HCMP 2016/2014

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO2016 OF 2014

IN THE MATTER of an Application by the Applicant against the Respondent for an Order of Committal

and

IN THE MATTER of the High Court Miscellaneous Proceedings No 1780 of 2013

and

IN THE MATTER of a World-wide *Mareva* Injunction application

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BETWEEN

SUZANNE RUTH HENDERSON Applicant

and

SCOTT HENDERSON Respondent

Before: Hon Au-Yeung J in Court

Date of Hearing: 18 March 2015

Closing Date for Further Submission: 13 May 2015

Date of Judgment: 14 July 2015

JUDGMENT

An overview

1. This is an application to commit the respondent for contempt of court in breaching the terms of *Mareva* injunction orders, namely,

(1) Failing to disclose the existence of 2 bank accounts ("**the 2 accounts**"); and

(2) Siphoning off funds subject to those orders using the 2 accounts.

2. The *Mareva* injunction orders allegedly breached were made in HCMP 1780/2013 ("**the underlying action**"):

(a) An *ex parte* world-wide *Mareva* injunction dated 22 July 2013 whereby Mr Justice L Chan restrained the respondent from disposing of his assets up to the value of CAD803,610; and required the respondent to disclose all his assets of an individual value of HK$20,000 or more. This order was amended (*inter partes*) on 5 August 2013 to allow the respondent to spend a one off sum of HK$50,000 (instead of HK$50,000 per week) on legal advice and representation ("**the Chan (1st) Order**");

(b) An order dated 4 October 2013 made by Deputy Judge Hartmann to vary the Chan (1st) Order so that after paying arrears of monthly maintenance o CAD9,774 ("**the support payments**"), the respondent was permitted to use the balance of his monthly salary for his legal and living expenses ("**the Hartmann (2nd) Order**").

(c) An order dated 27 November 2013 made by Deputy Judge Sakhrani that continued the Chan (1st) Order as varied by the Hartmann (2nd) Order and dismissed the respondent's application for discharge ("**the Sakhrani (3rd) Order**").

3. The defences are spread over 5 affidavits of the respondent, but counsel for the applicant has hardly dealt with them in his skeleton submission. I have classified the defences into the following categories:

A. That the underlying maintenance orders which gave rise to the support payments have been obtained by improper means;

B. That the applicant misled the court when seeking the *Mareva* injunction

orders;

C. That the applicant had been forum shopping in 3 jurisdictions seeking to register foreign maintenance orders;

D. That the respondent had no intention to knowingly breach the *Mareva* injunction orders;

E. That the respondent withdrew the money to pay off debts as permitted by the *Mareva* injunction orders;

F. Miscellaneous defences.

Undisputed facts

4. The parties were divorced. The applicant lives in Canada and the respondent (a pilot) lives in Arizona.

5. Between 2001 and 2009, the applicant obtained 10 maintenance orders in Ontario ("**the Ontario AR orders**"). The final order dated 15 January 2009 ("**the 10th order**") was made in the absence of the respondent. It purported to be a "consolidation" of the arrears due under the first 9 orders plus an order for him to pay support payments of CAD9,774 per month "based upon his income being CAD402,000".

6. There has been and still is a warrant of arrest and committal against the respondent in Ontario. Till the date of this hearing, the 10th order has not been varied or overturned on appeal. All of the respondent's pleadings had been struck in Ontario.

7. Between 2009 and 2012, the applicant had sought, through the Family Responsibility Office ("**FRO**"), registration of the 10th order in California, Arizona and Hong Kong but did not achieve much success in recovery. The application in Hong Kong for registration under the Maintenance Orders (Reciprocal Enforcement) Ordinance ("**the Cap 188 application**") was rejected in 2009.

8. On 22 July 2013, the applicant commenced the underlying action, seeking an injunction pursuant to section 21M of the High Court Ordinance. It was to support yet another Cap 188 application. She obtained and served on the respondent the *Mareva* injunction orders in paragraph 2 above. Only the Chan (1st) Order was endorsed with a penal notice. There is no question that the respondent understood the effect of the orders.

9. A Cap 188 application for registration of the Ontario AR orders was made by the FRO again in October 2013. The District Court Registrar rejected it on 24 June 2014 on the

ground that the respondent was not residing in Hong Kong.

10. On 11 July 2014, Deputy Judge B Chu (as she then was) ordered the *Mareva* injunction orders to continue pending determination of the leave application for judicial review of the District Court Registrar's decision.

11. Meanwhile, subsequent to the Sakhrani (3rd) Order, the respondent opened the 2 accounts on around 9 December 2013 to receive salary and withdraw therefrom. Between January and July 2014, a total of US$210,446.64 was withdrawn, of which US$161,400 went to account of his wife ("**M**").

12. The applicant seeks an order to commit the respondent for contempt of court. She asks that he be sentenced to imprisonment or fined and that he do repatriate the sum dissipated.

The legal principles

13. Orders of the court should be obeyed until they are set aside. Where a defendant is of the view that an *ex parte* order has been made on a false premise and that it is therefore impossible for him to comply with it, he should immediately apply to have it set aside: *Guccio Gucci S.P.A. Severin and anr v NP Ping Tin*, CACV 71/1993, 10 June 1994, §19.

14. An applicant for committal has to prove that (a) the alleged contemnor knew the facts which are said to make his act or omission a contempt; and (b) such act or omission was not accidental: *Citybase Property Management Ltd v Kam Kyun Tak (No.1)* [2003] 2 HKC 98 at para 17(2), *per* Ma J (as he then was).

15. The standard of proof is beyond reasonable doubt.

16. Absence of contumacious intent to disobey the order does not affect liability but is relevant to penalty. Only conduct constituting disobedience that is casual or accidental and unintentional would be excluded from civil contempt: *Kao Lee & Yip v Koo Hoi Yan* (2009) 12 HKCFAR 830, at §§45-46.

17. Mistaken belief as to the legitimacy of the action in compliance with the order (even on legal advice) is no defence to a charge of contempt: *Kao Lee & Yip v Koo Hoi Yan*, at §63.

Opening of the 2 accounts

18. The respondent did file an affidavit within time to disclose his assets, at which time the 2 accounts were not yet opened. Therefore opening of the 2 accounts cannot be regarded as a breach of the disclosure order under the Chan (1st) Order.

19. At the hearing before Deputy Judge Hartmann (when the respondent was legally represented), the learned judge was told of the respondent's payroll account at HSBC. At this hearing, the respondent disclosed that he had subsequently requested HSBC to release money for him to pay his debts in the US for his mortgage, car loan and car lease. HSBC advised that it was not permitted to do so as those debts were outside Hong Kong. The respondent admitted working with his employer to set up the 2 accounts without disclosing the Hartmann (2nd) Order. He hid the fact of opening of the 2 accounts from his solicitors (HWG) too.

20. I find that the opening of the 2 accounts was to facilitate siphoning off of assets and to circumvent the Hartmann (2nd) Order.

Respondent's explanations as to the withdrawals

21. The respondent explains that (a) 2 payments were made to the Hong Kong Inland Revenue Department ("**IRD**") and US tax authority respectively; (b) 8 were made to M to pay for various expenses; and (c) one was to HWG.

22. With regard to (a), there was no documentary proof of the tax demand but the bank statement clearly showed the payment to IRD, which I accept. I also accept from the tax demands produced that the respondent did owe US federal and state income tax and that the tax authority had threatened to seize his assets.

23. No policy existed in Hong Kong for IRD to withdraw tax from a payor's account direct. On the other hand, there was no documentary proof of the alleged US tax policy, or the amount that the respondent's employer was required by law to withhold. I am not satisfied that any part of his income was withheld as a result of US tax policy. The withdrawals were made by the respondent.

24. Accordingly, even if the withdrawals were in payment of taxes, they were deliberate acts in violation of the *Mareva* injunction orders, especially the Hartmann (2nd) Order. They were no defence to a charge of contempt.

25. With regard to (b), the respondent says he was facing a legal bill of over HK$2.8 million, foreclosure by the mortgagee, possible repossession of the cars, and forced bankruptcy by the tax authority, in which case he would lose his career. The money given to M was to pay for those items and living expenses, which were necessary for survival.

26. I accept that the respondent might have spent the withdrawn money for those purposes although computation of the exact amount spent was unclear due to the limited

disclosure. Despite that, without fulfilling the conditions under the Hartmann (2nd) Order, the withdrawals in themselves were still in contempt of court.

27. With regard to (c), the payment of US$6,481.64 (converted to HK$50,000) to HWG was authorized by the Chan (1st) Order and could not be said to be in contempt of court.

28. In summary, 10 out of 11 withdrawals were in breach of the *Mareva* injunction orders and had caused the respondent's assets to reduce by US$205,446.64 (ie US$210,446.64 – US$5,000).

29. It remains to see if any of the defences set out in paragraph 3 above could be substantiated.

Defence A: that the Ontario AR orders have been obtained by improper means

30. The respondent alleges that the applicant and her attorney (Mr Fanjoy) had misled the Ontario Court when seeking the Ontario AR orders. Allegedly, they overstated his income as CAD402,000, when his true income was about CAD200,000. Allegedly, the laws of the FRO provide that the amount of support cannot exceed 50% of an individual's net salary after all taxes and deductions for mandatory retirement funds are taken into account ("the FRO laws"). The amount claimed by the applicant exceeded the lawful limits.

31. In the 10th order, Madame Justice ven Rensburg had expressly reserved a right for the respondent to vary it upon his "purging all existing contempts, providing all answers to his undertakings, providing complete income disclosure and reopening his pleadings". The respondent knew it and had applied for extension of time to raise money to comply with an Ontario court order so as to pursue the variation/appeal. Till now, none of the 10 orders have been overturned and the time for appeal had expired (according to the legal opinion of Mr Fanjoy).

32. In my view, it is not open to the respondent to make collateral attacks on the Ontario AR orders in another jurisdiction. As a matter of judicial comity, the Hong Kong court would not re-examine the validity of the Ontario AR orders. For example, having expressed doubts as to the CAD402,000 figure and noting that the evidence of the respondent's income before him was in the region of US$213,000, Deputy Judge Hartmann declined to depart from the 10th order. Instead, he gave an "escape route" for the respondent to use part of his income as per the terms of the Hartmann (2nd) order.

33. The respondent relies on a recent ruling on 12 December 2014 whereby the Arizona

Superior Court found that the information regarding the respondent's income provided to the Ontario Court was material but false information. The Ontario Court was unaware of the falsity and relied on the information to the injury of the respondent. However, the Arizona Court did not find that the applicant was aware of the falsity or that there was fraud; she had in good faith relied upon the estimates made by experts in the matter. The Arizona Court also held that the respondent should receive credit for US$92,772.47 for support payments made by him.

34. The Arizona ruling does not assist the respondent. Despite being satisfied that the income of the respondent had been overstated, the Arizona Court confirmed registration of the 10th order, giving credit to payments made by the respondent.

35. Moreover, it has never been the respondent's case that in the honest belief that with an income much less than CAD402,000, he had made only part of the support payments ordered using the money withdrawn.

36. As regards the FRO laws, there was no proof.

37. Defence A is not substantiated.

Defence B: that the applicant has misled the Hong Kong court when obtaining the Mareva injunction orders

38. The respondent alleges that the applicant had misled the Hong Kong court or otherwise was guilty of material non-disclosure as follows when she sought the *Mareva* injunction:

(a) She lied that the Ontario AR orders were pending registration when no Cap 188 application had been made until 4 months after the Chan (1st) Order;

(b) The applicant and Mr Fanjoy denied on oath that they knew about the attempted registration of the Ontario AR orders in 2009 and the cancellation of the registration;

(c) The applicant did not disclose a letter of 30 July 2013 from her Hong Kong lawyers to the Chief Executive's Office stating her intention to apply for enforcement under Cap 188;

(d) The applicant stated that the respondent had an address in Hong Kong when she knew it was not true, since she had testified being aware of his Arizona address.

(e) On 27 October 2013, after the hearing before Deputy Judge Sakhrani, Mr

Fanjoy wrote to FRO, "fraudulently" stating the respondent's address to be in Hong Kong and that the respondent had been residing there with M since 1 January 2011. That was quite improbable as the respondent and M were not married until December 2011.

(f) Mr Fanjoy swore on affidavit stating that the respondent had said in open court in Arizona that he was resident in Hong Kong when the transcript of those proceedings showed that the respondent never said so;

(g) The applicant accused the respondent of disposing of family assets when it was the applicant who actually did so;

(h) The applicant had overstated the support payments due.

39. There may be cases where an order was made wrongly in the sense that the court in question had no power to make it, or even acted contrary to express provisions of law in purporting to make it. However, the fundamental principle is that any order of the court should be obeyed unless and until it is stayed or set aside.

> "It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. 'A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it…It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null and void—whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question: that the course of a party knowing of an order, which was null and irregular and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed.'" (*Isaacs v Robertson* [1985] 1 AC 97, Lord Diplock, citing Romer LJ in *Hadkinson v Hadkinson* [1952] P. 285, 288 with approval)

40. Therefore, even if the allegations in paragraph 39 are all established, the respondent would still have to comply with the *Mareva* injunction orders until they are set aside. The respondent has had the opportunity to raise those allegations before Deputy Judge Sakhrani in October 2013 in seeking a discharge. It is too late now for him to mount a collateral attack on the validity of the *Mareva* injunction orders.

41. In particular, with regard to items (a) and (c), it was Deputy Judge Sakhrani who discovered the non-registration of the Ontario AR orders, found it to be material non-disclosure, discharged the *Mareva* injunction but continued it (§§99-100, 108-110, 112 of the decision dated 22 November 2013).

42. With regard to item (b), I have rejected it before (§§45-48 of the judgment in HCAL 82 of 2014).

43. With regard to item (d), whether the respondent had an address in Hong Kong was a matter of fact. Deputy Judge Sakhrani has found there to be a serious issue to be tried on it.

44. With regard to item (e), it was probable that Mr Fanjoy was mistaken as to the date when the respondent first resided at a Hong Kong address, but the evidence was far from showing fraud.

45. With regard to item (f), I have read the relevant transcripts of the Arizona court (obtained after the Sakhrani (3rd) Order was made) and confirm that Mr Fanjoy was wrong.

46. With regard to item (g), that the applicant had disposed of family assets did not mean that the respondent had not done the same. This item is irrelevant.

47. With regard to (h), the respondent claims that the applicant had failed to credit US$77,000 paid by him as support payments. She attempted to mislead the HK court that over CAD100,000 of costs were outstanding when Mr Fanjoy had confirmed that the respondent had already paid the applicant CAD111,960.69 (Exhibit O to the respondent's 1st affidavit). She also lied in saying that interest was not included in the calculation of arrears of maintenance when the transcript of the Ontario proceedings showed that she was aware that interest was included.

48. Item (h) is no defence to a charge of contempt. At best, it should be brought to the attention of the District Court Registrar when it comes to the extent of enforcement of the Ontario AR orders, similar to what had happened in the Arizona Superior Court.

49. Separately, I have had queries as to whether (i) too much assets of the respondent had been frozen as the applicant wrongly included legal costs granted under the Ontario AR Orders in her Cap 188 application; and (b) whether there had been material non-disclosure of the distinction between the provisional and final nature of the Ontario AR orders; both of which could have affected exercise of the powers to grant the *Mareva* injunction orders.

50. Mr Ng, counsel for the applicant, has shown that under section 2(1) of Cap 188 and section 1(1)(g) of the Family Responsibility and Support Arrears Enforcement Act 1996, S.O. 1996 c31, legal costs can arguably form part of the maintenance order registrable under Cap 188. Moreover, at the time of the *ex parte* application before Chan J, the applicant only relied on the 10th order and not the rest. The distinction between provisional and final orders was irrelevant.

51. This part of Mr Ng's submission should best be left to the District Court Registrar to decide under Cap 188. Suffice to say that I am not satisfied that there were factors calling into question the validity of the *Mareva* injunction orders. In any case, the overriding principle in paragraph 39 applies. Defence B is not substantiated.

Defence C: The applicant has been forum shopping in seeking registration

52. The respondent claims that the applicant has been forum shopping in 3 jurisdictions (California, Arizona and Hong Kong) to see where she would get the biggest reward, when the proper jurisdiction should be Arizona which had registered the Ontario AR orders.

53. Cap 188 does not prevent a person from seeking registration of a maintenance order in more than one jurisdiction. In any case, even if the applicant has been forum shopping, that did not undermine the conduct of the respondent as contemnor. Defence C is irrelevant.

Defence D: That the respondent had no intention to knowingly breach the Mareva injunction

54. The respondent claims that he would not have deposited non-resident tax refund of HK$101,490 into his frozen HSBC account if he had wanted to breach the *Mareva* injunction. However, paragraph 16 above shows that this might be relevant to penalty but not liability. Defence D is unsubstantiated.

Defence E: That the Respondent withdrew the money to pay off debts as permitted by the Mareva injunction orders

55. The respondent asserts that he should not be denied his pay so long as the total unencumbered value of his assets, including his pension (about US$855,550.12), was over CAD803,610.50.

56. In §§20-26 of my decision dated 27 August 2014 declining to correct the Hartmann (2nd) order under the slip-rule ("**the slip-rule decision**"), I have rejected this argument. If the respondent had honestly believed in the aforesaid assertion, he would have withdrawn from the frozen accounts instead of opening the 2 accounts.

57. Separately, in her slip-rule application, the applicant's senior counsel gave advice that the Hartmann (2nd) order was written "in a way that presented ambiguity". I have found that there was no ambiguity in the material part of the Hartmann (2nd) Order (§28 of the slip-rule decision). The respondent's application for leave to appeal had been dismissed by the Court of Appeal (HCMP 2796/2014). I do not think my view will change when

the standard of proof beyond reasonable doubt is applied.

58. Just as acting on wrong legal advice from one's own lawyer was no defence to a charge of contempt (paragraph 17 above), a defendant cannot rely on the opponent's wrong legal advice to justify his contempt, especially since there was no evidence that that piece of wrong legal advice came to his knowledge before the contempt was committed.

59. The respondent further claims that the monies withdrawn were to set-off pre-existing debts due to third parties, as permitted in clause (3) of the Chan order.

60. I have rejected the argument of set-off in §30 of the slip-rule decision. Clause (3) would permit, eg HSBC to apply the respondent's funds in its hands to reduce pre-existing debts owed to HSBC but not debts of any other entity. On the respondent's evidence, HSBC had (correctly) advised him on the effect of clause (3) before he opened the 2 accounts. Defence E is not substantiated.

Defence F: Miscellaneous defences

61. The respondent has raised other matters in his affidavits. For example, he says that he was not responsible for the breakdown in the marriage; that he was denied access to the children; that the applicant was a former pilot who falsely claimed to be on disability and received income from her employer to lead a lavish lifestyle, etc; and that his house was bought upon inheritance under a trust. On the other hand, the applicant queried where he kept the rest of the trust money and why he had not paid the maintenance instead. These matters are entirely irrelevant to the issue before me. I disregard them.

Findings

62. The terms of the *Mareva* injunction orders were clear and the orders have been validly served on the respondent. Knowing the effect of the orders, he deliberately opened the 2 accounts and withdrew monies therefrom. None of the defences were substantiated save in respect of HK$50,000 for legal costs which was permitted by clause (3) of the Chan (1st) order. The breach has caused siphoning off of US$205,446.64 in total. I find it proved beyond reasonable doubt that the respondent had acted in contempt of court as alleged in paragraph 1 above.

63. I adjourn this matter to a date to be fixed for deciding the penalty. The respondent has to attend the hearing personally. The question of costs will be adjourned till then.

(Queeny Au-Yeung)
Judge of the Court of First Instance
High Court

Mr Felix Ng, instructed by Deannie Yew and Associates, for the applicant

The respondent appeared in person