HCCT 34/2019
[2020] HKCFI 902

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO 34 OF 2019

BETWEEN

DAELIM CORPORATION Plaintiff

and

BONITA CO. LTD Defendant

Before: Hon K Yeung J in Chambers
Date of Hearing: 17 December 2019
Date of Decision: 28 May 2020

D E C I S I O N

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1. On 19 July 2019, the plaintiff ("**P**") sought and obtained from Deputy Judge Leung on an *ex parte* basis (the "**HK *Ex Parte* Application**") an injunction (the "**HK Injunction**") restraining the defendant ("**D**") from dealing with its assets up to the sum of US$1,292,616.64 (the "**Restrained Amount**"). The HK Injunction was obtained in aid of an arbitration commenced in and conducted before a tribunal seated in the UK (the "**UK Arbitration**" and the "**UK Tribunal**"). The *inter partes* summons (the "**Continuation Summons**") first came

before Wilson Chan J on 2 August 2019. Continuation of the HK Injunction was opposed by D, and the Continuation Summons was adjourned with directions on the filing of evidence having been given. The HK Injunction was continued in the meantime. The Continuation Summons now comes before this Court for substantive hearing.

2. The issues are whether P has demonstrated a good arguable case, whether there was sufficient urgency in the matter for P to have gone *ex parte*, and whether there has been any material non-disclosure on P's part.

Three preliminary matters

3. Before dealing with the Continuation Summons, I record 3 matters:

(a) on 4 December 2019 D took out a summons for leave to file certain additional evidence. On the morning of the hearing, Mr Wong, leading counsel appearing for D, informed the Court that he would no longer pursue the application. I granted him leave to withdraw that summons, with costs to P;

(b) on 12 December 2019, P took out a summons for an order that "*[D] do file and serve an affirmation by an officer of [D] rather than by any legal representative of [D] ... providing further and better particulars of [D's] assets ...*". It was supported by the 3rd Affirmation of Joo Hyun Park (the Deputy General Manager of P, "**Park**", and "**Park/#3**"). On the morning of the hearing, Mr Wong informed the Court that D was prepared to ask an officer of D to within 7 days make

an affirmation on the matters under §§3(a) and (b) of the HK Injunction. In the light of that, Mr Brown, counsel for P, informed me that he would not take his application further. I made an order accordingly, with costs to P. I will also, for the purpose of the adjudication of the Continuation Summons, ignore Park/#3; and

(c) on the morning of the hearing, Mr Brown produced before this court the "Partial Final Award" dated 16 December 2019 of the UK Tribunal (the "**Partial Final Award**"). Mr Wong had no objection to that document being placed before this court for the purpose of the Continuation Summons.

The affirmatory evidence

4. Before me there are the following affirmations:

(a) For P:

(i) the affirmation of Park of 19 July 2019 ("**Park/#1**") filed in support of the HK *Ex Parte* Application;

(ii) Park's 2nd affirmation of 24 October 2019 filed in reply of Leung #2 (see below); and

(b) For D:

(i) the 1st affirmation of Leung King Wai William ("**Leung**") of 16 August 2019 ("**Leung #1**"). Leung is the principal of Messrs William K.W. Leung & Co., solicitors for D ("**WLC**"). Leung #1 was filed in purported compliance by D of the asset disclosure requirement imposed upon it by the HK Injunction;

(ii) Leung's 2nd affirmation of 27 September 2019 ("**Leung #2**") in opposition of P's Continuation Summons.

Factual Background

5. The underlying dispute relates to the hire of motor vessel "LDL Carnation" (the "**Vessel**").

6. In its capacity as owners of the Vessel, P entered into a bareboat charterparty of 23 December 2010 with D (the "**Master C/P**").

7. Under the terms of the Master C/P:

(a) D was to pay hire at US$15,400 per day, payable monthly and in advance;

(b) the Master C/P period was 5 years subject to certain options to extend;

(c) Any dispute arising out of the Master C/P was to be submitted to arbitration in London in accordance with the London Maritime Arbitrators Association ("**LMAA**") terms (Clause 30).

8. On the same date when the Master C/P was entered into, D entered into what was in effect a downstream back-to-back (save the hire) charterparty (the "**BB C/P**") with Easter Media International Corporation ("**EMIC**") and Far Eastern Silo & Shipping (Panama) S.A ("**FESS**") (together the "**Sub-charterers**"). Under the BB C/P, the Sub-charterers were to pay D daily hire of US$16,500, payable monthly in

advance. The BB C/P period was also 5 years, which was again subject to certain options to extend.

9. It is P's case that also on 23 December 2010, D, pursuant to the terms of the Master C/P, assigned to P absolutely all interest and rights D had under, in or in connection with the BB C/P. It is further P's case that notice of the assignment had been given to the Sub-charterers who acknowledged the same by a Form of Sub-Charterer's Acknowledgement dated 23 December 2010. The effect of the assignment was disputed by D.

10. Pursuant to the Master C/P, P on 5 September 2014 delivered the Vessel to D. At the same time, D delivered the Vessel to EMIC pursuant to the BB C/P.

11. Both the Master C/P and BB C/P had subsequently been extended to 5 August 2020 (the "**Extended Expiry Date**").

12. The 56th hire under the Master C/P related to the hire for the month of April 2019 payable by D. It was in the sum of US$462,000[1]. D has failed to settle the same.

13. The 57th hire under the Master C/P related to the hire for the month of May 2019 payable by D. It was in the sum of US$477,400[2]. D has also failed to settle the same.

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1 See invoice at [B3/447].

2 See invoice at [B3/451]. The 56th hire and the 57th hire will collectively be referred to as the "**Unpaid Hire**").

14. Correspondence ensued between P and D as a result of the non-payment of the Unpaid Hire. In particular, between 9 April 2019 and 17 June 2019, Ms Jenny Tsai representing D in 5 emails claimed to P that D had in fact paid the Unpaid Hire to its bank (namely HSBC), but that the onward payment by its bank to P had somehow been delayed. There had been no denial that the Unpaid Hire had become payable. As late as 8 July 2019 (by which time, as we shall see, the TSA (as defined below) had been signed), Park on P's behalf was still issuing emails chasing for the Unpaid Hire. She in an email of that date (the "**8 July 19 Email**"[3]) said that:

> "We have requested full payment of the hire and/or substantiating document to prove that your bank, HSBC, is holding the payment as per your allegation. However, we have not received any constructive response or evidence to date and we cannot but consider Bonita's allegation for payment of hire appears to be no more than a fraud. Unless Bonita provide genuine evidence as payment of hire by tomorrow, 9th JUN 2019, we have no other option but to proceed with all necessary actions, including filing criminal charges against Bonita without further notice."

As things turned out, D failed to pay P the Unpaid Hire.

15. In the meantime, there were negotiations between the parties for early re-delivery of the Vessel by EMIC before the expiry of the Extended Expiry Date. Those negotiations were primarily between P and EMIC. The extent of D's involvement therein is in dispute.

16. Consequential upon those negotiations, P, D and EMIC entered into a Termination Settlement Agreement dated 4 June 2019 (the "**TSA**"). In respect of the TSA and pursuant to its terms:

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[3] [B3/458].

(a) Early re-delivery of the Vessel was agreed to be effected on 10 June 2019 (the "**Re-delivery Date**");

(b) Clause 1, that:

> " …EMIC agrees and shall pay, for indemnifying the loss and damages which [P] and [D] may and would suffer respectively under the Master C/P and/or [BB C/P] as a result of such earlier redelivery of the Vessel and closing the accounts thereof,
>
> a) to [P] directly a sum of … [US$5,950,000] … for a total of 422 days as from the [Re-delivery Date] upto the [Extended Expiry Date]…
>
> b) to [D] directly a sum of … [US$464,200] at a daily rate of US$1,100 and on the same base of a) above …"

(c) Clause 6, that:

> " Once the payments hereunder are paid in full by EMIC to [P] and [D], it reflects and shall be a full and final indemnity and settlement to any and all claims of loss, damage and/or incidental expenses with regard to the charter hire payable at the rate specified in the respective charter party and for the charter period not performed by EMIC and [D]…"

(d) Clause 7, that:

> " In consideration of and against the payments mentioned above, [P] and [D] both agree to and shall:
>
> a) Subject to [Ps'] and [D's] receipt of the payment hereunder, the charter parties shall be terminated promptly with the Parties' mutual agreement upon the date and time of signing [protocol of redelivery and acceptance] according to terms of this Agreement.
>
> …"

(e) Clause 11 thereof that:

> " Disputes and Claims if any the parties may have which are arising out of and/or in connection with performance and enforcement of this Agreement shall be submitted to and settled by a single arbitrator appointed by the Hong Kong International Arbitration Centre ('HKIAC'), to that English law and the rules and practice of HKIAC shall be adopted and apply."

17. On 17 June 2019, P applied *ex parte* in London (with notice to EMIC) for an order requiring EMIC to pay the sum of US$474,100 (the "**Settlement Sum**") into either a controlled account or into Court and to prevent D from taking steps to demand and/or recover that sum from EMIC. An Order to that effect was granted by Jacobs J on the same day (the "**UK Injunction**").

18. On 25 June 2019, P pursuant to Clause 30 of the Master C/P commenced arbitration proceedings against D in London (ie the UK Arbitration).

19. The UK Injunction was returnable before Jacobs J on 28 June 2019 (the "**UK Injunction Return Date**"). Amongst others, directions were given on that day which required D to make any challenge in respect of the UK Injunction by 19 July 2019.

20. On 19 July 2019, P made the HK *Ex Parte* Application before Deputy Judge Leung and obtained the HK Injunction.

The grounds of opposition

21. Originally, the only express ground of oppositions taken by Leung in Leung #2 on behalf of D was one of alleged material non-disclosure[4]. 9 specific alleged non-disclosures were identified, which Leung called Non-disclosure (1) to Non-disclosure (9)[5]. In the course of the hearing, Mr Wong informed the Court that some of those alleged non-disclosures would no longer be pursued. For those which

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4 §4 of Leung #2 at [A/76].

5 §6 of Leung #2.

are still being pursued, Mr Wong has re-grouped and reclassified them into 4 grounds of various natures[6] (which I will for convenience call respectively the "**No Good Arguable Case Ground**", the "**No Jurisdiction Ground**", the "**No Urgency/Secrecy Ground**", and the "**Material Non-disclosure Ground**"):

> " 3. First, P does not have a good arguable case in respect of its underlying claim against D because any outstanding liability owed by D to P was already settled by [the TSA] …
>
> 4. Second, P does not have a good arguable case that the UK Arbitration is capable of giving rise to an enforceable award in Hong Kong. As the TSA expressly provides for disputes between P and D to be submitted to arbitration in Hong Kong (not UK), the UK Tribunal has no jurisdiction to determine the issue of whether D's outstanding liability to P was already settled by the TSA …
>
> 5. Third, the [HK Injunction] was obtained irregularly in the absence of any genuine need for urgency or secrecy. As the case law shows, the [HK Injunction] must be discharged without any investigation of its merits …
>
> 6. Fourth, the [HK Injunction] was obtained by non-disclosure of the material facts. In the circumstances, it is only right for the [HK Injunction] to be discharged …"

The No Good Arguable Case Ground

22. Mr Wong submits that the language of the TSA shows that the parties clearly intended to settle both past and future hire of the Vessel under the Master C/P and the BB C/P, that the purpose of the TSA and the context in which it was concluded support the construction that the Unpaid Hire had been settled, that that conclusion makes commercial sense, and that the correspondence between the parties relating to the Unpaid Hire are either of "extremely limited value" or inadmissible for construing the terms and legal effects of the TSA.

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[6] See §§3 to 6 of his written submissions.

23. The issue is whether P has a good arguable case that the TSA only covers prospective loss which would arise as a result of the early re-delivery of the Vessel, but does not cover the Unpaid Hire.

24. For the reasons set out below, I am of the view that P has.

25. The Unpaid Hire was for the hire of the Vessel for April and May 2019. The TSA was dated 4 June 2019, when the issue relating to the non-payment of the Unpaid Hire was fresh. If the TSA were meant and intended to cover also the Unpaid Hire, specific terms to that effect could have been included. There has been none.

26. Clause 1 of the TSA talks about "*the loss and damages which [P] and [D] may and would suffer respectively under the Master C/P and/or [BB C/P] as a result of such earlier redelivery of the Vessel*" (emphasis added), but not any previous loss like the Unpaid Hire.

27. The sums payable by EMIC to P and D referred to in Clauses 1(a) and 1(b) of the TSA were calculated with reference to the number of dates yet to run between the Extended Expiry Date and the Re-delivery Date.

28. I break down the wording of Clause 6 of the TSA in the following parts ("**Parts a, b, and c**") for ease of analysis:

> " a. Once the payments hereunder are paid in full by EMIC to [P] and [D], it reflects and shall be a full and final indemnity and settlement to any and all claims of loss, damage and/or incidental expenses with regard to the charter hire

b. payable at the rate specified in the respective charter party

c. and for the charter period not performed by EMIC and [D]"

29. Mr Wong seeks to read Part b and Part c disjunctively so that Part b covers the Unpaid Hire and Part c covers the future loss.

30. I am not satisfied that Parts b and c should necessarily be so disjunctively read. In my view, reading the TSA as a whole and in context, P has a good arguable case that Part b is in fact qualified by Part c, so that Part b and Part c, when read as a whole, cover only future and prospective loss in relation to the charter period not performed by EMIC.

31. I have been referred to various contemporaneous conduct of the parties. In particular, it is noted that in the email correspondence between 9 April 2019 and 17 June 2019, D had never claimed that the Unpaid Hire had been settled.

32. As mentioned above, Mr Wong submits that the correspondence between the parties relating to the Unpaid Hire are either of "extremely limited value" or inadmissible for construing the terms and legal effects of the TSA

33. In my view, I do not need to go into those conduct or correspondence. I am of the view that simply on a plain reading of the TSA as a whole, P has demonstrated a good arguable case that the TSA only covers future and prospective loss in relation to the charter period not performed by EMIC.

34. In my view, the No Good Arguable Case Ground is not made out.

35. I will come back to this ground to consider whether it adds anything to the Material Non-disclosure Ground.

The No Jurisdiction Ground

36. The gist of Mr Wong's submission in this regard is that the dispute resolution clause contained in the Master C/P (which provides for arbitration in London in accordance with LMAA terms) has been superseded by the dispute resolution clause in the TSA (which provides for arbitration adopting the HKIAC rules), so that the UK Arbitration has no jurisdiction in the mater, with the result that those proceedings would not be capable of giving rise to an award that may be enforced in Hong Kong.

37. In developing this Ground, Mr Wong relies upon the so-called presumption in favour of one-stop adjudication explained by Lord Hoffmann in *Fiona Trust & Holdings Corpn v Privalov* [2007] Bus LR 1719, at §13 that:

> " … the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction …"

He further refers to *Monde Petroleum SA v Westernzagros Limited* [2015] EWHC 2126 (Comm) where Popplewell J observed at §38 that:

> " The presumption in favour of one-stop adjudication may have particular potency where there is an agreement which is entered into for the purpose of terminating an earlier agreement between the same parties or settling disputes which have arisen under such an agreement."

38. However, despite that presumption, the scope of an arbitration clause remains a question of construction. I have explained above why I am of the view that P has demonstrated a good arguable case that the TSA only covers future loss in relation to the charter period not performed by EMIC. I note further that the Master C/P and the TSA are not between the same parties.

39. Mr Wong's submissions on this ground also faces one legal difficulty, which he has properly brought to my attention. In *Top Gains Minerals Macao Commercial Offshore Ltd v TL Resources Ptd Ltd* [2016] 3 HKC 44, the plaintiff obtained a *Mareva* injunction in aid of a foreign arbitration commenced before the International Chamber of Commerce ("**ICC**"). The relevant arbitration clause however provided that any dispute was to be submitted for determination by the Singapore International Arbitration Centre ("**SIAC**"). On that basis (together with others), the defendant sought to have the injunction discharged. In rejecting that ground, Mimmie Chan J observed at §§43 and 44 that:

> " 43. … the test in *Her Majesty's Revenue & Customs v Shahdadpuri* is applicable to s 45, and that an applicant for interim relief in aid of arbitral proceedings, which have been or are to be commenced outside Hong Kong, is only required to show that there is a good arguable case that the arbitral proceedings outside Hong Kong are capable of giving rise to an award that may be enforced in Hong Kong.

> 44. At first blush, it may seem clear that the plaintiff has departed from the arbitration clause by initiating arbitration in Singapore by referring the dispute to the ICC, instead of SIAC. However, this is a question of or challenge to the jurisdiction of the arbitral tribunal, which should be determined by the tribunal itself. Neither the Hong Kong court nor the Singapore court should interfere by deciding the jurisdiction of the tribunal at this stage. Even if the tribunal constituted by ICC should decide that it has jurisdiction over the Arbitration, and makes an award in the arbitral proceedings, it is still possible for the award to be recognised and enforced by the Hong Kong court at the enforcement and recognition stage, either by exercise of its discretion on the facts of the case (as in *China Nanhai Joint Service Corporation Shenzhen Branch v Gee Tai Holdings* [1994] 3 HKC 375 ; [1995] 2 HKLR 215), or because the award has not been set aside by the Singapore court as the supervisory court (on jurisdiction, or any other ground)."

40. Mr Wong submits that the analysis in *Top Gains* is wrong and should not be followed. He submits, relying on *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 (AC) *per* Lord Collins at §84 and *S Co v B Co* [2014] 6 HKC 421 *per* Mimmie Chan J at §32, that this Court is required under s 45 of the Arbitration Ordinance to make an assessment as to whether, at the enforcement stage, the UK Tribunal's award may be enforced in Hong Kong. He submits that making this assessment would not constitute any unjustified interference with the power of the UK Tribunal to determine its own jurisdiction.

41. I do not believe it is necessary for this court to express any view on the correctness of *Top Gains.* Suffice for me to say that:

(a) *Top Gains* is directly on point. Its correctness on the issue in question has never been expressly doubted (at least no authority to that effect has been cited to me). P's case is supported thereby. Mr Wong's submissions to the contrary

does not in my view have the effect of watering P's case down to the extent that it ceases to be a good arguable one;

(b) In any event, given my view on the scope of the TSA, even if I were to make the assessment as to whether P has a *good arguable case* that the UK Arbitration is *capable of* giving rise to an award that *may be* enforced in Hong Kong, which Mr Wong submits I should, my answer would have been an affirmative one.

42. I reject the No Jurisdiction Ground.

43. I will also come back to this ground to consider whether it adds anything to the Material Non-disclosure Ground.

The No Urgency/Secrecy Ground and the Material Non-disclosure Ground

44. I deal with these 2 grounds together because Mr Wong, when making his oral submissions, dealt with one limb of the Material Non-disclosure Ground together with the No Urgency/Secrecy Ground. That limb concerns certain previous communications between D and P's solicitors in respect of these matters (the "**Previous Communications Limb**"). I will therefore consider those specific aspects together.

45. Before doing that, I first of all come back to the No Good Arguable Case Ground and the No Jurisdiction Ground in the context of the Material Non-disclosure Ground (the "**No Good Arguable Case and No Jurisdiction Limb of the Material Non-disclosure Ground**"). Mr Wong's complaints under this limb are that there have been non-disclosures "*of TSA being capable of settling the [Unpaid] Hire*" and

"*of the award being potentially unenforceable by reason of the UK Tribunal lacking in jurisdiction*".

46. I have explained above why I reject the No Good Arguable Case Ground and the No Jurisdiction Ground. For those reasons, I am of the view that P is not to be faulted for not having revealed them at the *ex parte* stage.

47. I note further the correspondence that had ensued between P and D as a result of the non-payment of the Unpaid Hire. As Mr Brown has submitted[7], that:

> " … the 'settlement by the TSA' defence was first raised in the witness statement of [Leung] dated 19 July 2019 filed in the English Proceedings … (i.e. on the same day as the [HK *Ex Parte* Application] but served on P's after the *exparte* application had been heard.)"

At the time when the HK *Ex Parte* Application was made, those points were not ones which could reasonably be expected to be raised in due course by D.

48. I reject the No Good Arguable Case and No Jurisdiction Limb of the Material Non-disclosure Ground.

49. I return now to the No Urgency/Secrecy Ground and the Previous Communications Limb of the Material Non-disclosure Ground. Mr Wong's principal submissions may be summarized as follows:

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[7] At §73 of his written submissions.

(a) By the time when P made the HK *Ex Parte* Application, P had obtained the UK Injunction for one month, and that the UK Arbitration had been commenced for close to one month. There was no need for the application to have been proceeded with on a confidential basis;

(b) The learned judge in the course of the HK *Ex Parte* Application expressed reservations about those same points (though he ultimately allowed the application);

(c) On the authority of *China Medical Technologies, Inc. (in liquidation) v Wu Xiaodong* (unrep, HCA 3391/2016, 22 May 2019), the HK Injunction should be set aside on this point alone;

(d) Mr Wong submits further, specifically in respect of the Previous Communications Limb, that:

> " 79. In the present case, it is undisputed that on 18 June 2019, D's representative and P's solicitor[8] had two telephone conversations ('**18 June 2019 Calls**'):-
>
> (1) D intended to obtain preliminary advice about the dispute it had with P and D.
>
> (2) [P's solicitor] stated that it cannot confirm whether it was free to act for D, as it has already been approached by P …
>
> (3) Nevertheless P's solicitor volunteered certain advice to D, including advice about D's commencing arbitration in Hong Kong …
>
> (4) P's solicitor later informed D that she cannot act for D.

[8] Referred to in this Decision as "**P's solicitor**", who was the same solicitor who appeared for P during the *ex parte* application for the HK Injunction.

> 80. It is D's case that during the 18 June 2019 Calls, D imparted P's solicitor with information which are *prima facie* confidential in nature and may be relevant to P's interest ('Confidential Information'), including:
>
> (1) Details about the dispute between P and D;
>
> (2) D's concern that P may obtain a *Mareva* injunction in Hong Kong to freeze the Settlement Sum; and
>
> (3) D's intention to recover the Settlement Sum by way of arbitration in Hong Kong.
>
> 81. The response from P's solicitor is that no Confidential Information had ever come to her knowledge during the 18 June 2019 Calls …
>
> 82. Although the contents of the 18 June 2019 Calls are in dispute, the failure to disclose the existence of such calls is a serious material non-disclosure. Had such matter been disclosed, it might lead the *ex parte* judge to consider whether P's solicitor was in a position to make the *ex parte* application without unfairly prejudice the rights and interests of D, and the *ex parte* judge might choose not to hear the *ex parte* application."

(e) In the course of his oral submissions, Mr Wong further submitted that those previous communications would have been relevant to the reservations expressed Deputy Judge Leung during the HK *Ex Parte* Application about the appropriateness of P proceeding on an urgent and *ex parte* basis.

50. I have been cited a number of authorities on the relevant principles and considerations on the issue of material non-disclosure. I have considered them.

51. I first consider the No Urgency/Secrecy Ground independent of the Previous Communications Limb.

52. I accept Mr Brown's submissions in this regard that at the stage of the HK *Ex Parte* Application, the UK Injunction was against EMIC, and that the main activities had been taking place only in the UK. While D would have had knowledge about those proceedings and P's possible claim against it, it remained possible for D to have believed that the battle was still far from Hong Kong, so that there remained risk of dissipation had D been warned about the application. So viewed, keeping the HK *Ex Parte* Application secret was still important.

53. In the context of that ground, Mr Wong, at one stage during his oral submissions, and with reference to the hearing transcript of the HK *Ex Parte* Application, criticized P's solicitor for having submitted to Deputy Judge Leung that while there had been some demand letters issued by P to D, the "*threats*" made were not that explicit. Mr Wong pointed to the 8 July 19 Email and submitted that the threat made by P to D to take action was in fact explicit.

54. The criticism made was in my view not a fair one. According to the transcript, what P's solicitor was recorded to have submitted was that "*it was not explicit as such that 'We will go to the court to apply for a Mareva injunction as such…'* ". It was the specific threat of seeking a *Mareva* injunction which P's solicitor submitted was not explicit. Ultimately, Mr Wong accepted that in that sense, the threat was indeed not explicit.

55. Does it make any difference if the No Urgency/Secrecy Ground and the Previous Communications Limb are considered together? In my view, it does not.

56. Whether P's solicitor has breached any duty of confidence between her and D is a matter between her and D. For that D has started HCA 1380 of 2019 against her. D has not joined P as a party to those proceedings. What were discussed during the 18 June 2019 Calls are also in dispute.

57. Whatever that were discussed between P's solicitor and D during the 18 June 2019 Calls do not affect the merits of P's case in the UK Arbitration. They do not go to any defence which D might have. Nor do they, as submitted by Mr Brown which I agree, relate to any issue that goes to the merits of the HK Injunction.

58. The highest which Mr Wong can put D's case in this regard is that the alleged non-disclosure is relevant to the manner in which the application for the HK Injunction was made (ie the appropriateness of P having gone for an urgent *ex parte* application), and "*might lead the ex parte judge to consider whether P's solicitor was in a position to make the ex parte application without unfairly prejudice the rights and interests of D, and the ex parte judge might choose not to hear the ex parte application*".

59. Mr Wong acknowledges that the contents of the 18 June 2019 Calls are in dispute. His complaint is hence further narrowed down to this, that "*the failure to disclose the existence of such calls is a serious material non-disclosure*" (emphasis added).

60. I do not accept that the mere existence of those calls is a material fact. The mere fact that D had on 18 June 2019 called P's

Solicitors is hardly a fact which are relevant to the "weighing operation"[9] which Deputy Judge Leung had to make.

61. Further, even if the existence of those calls were somehow marginally material and P ought to have disclosed their existence:

(a) the Court has the jurisdiction and discretion not to discharge the HK Injunction or to re-grant the same[10];

(b) given the nature of the facts which are said not to have disclosed, P (itself, as opposed to its solicitors) would not have appreciated their significance. P (again itself, as opposed to its solicitors) has little to be blamed for the non-disclosure;

(c) Mr Wong submits[11] that "*It is no answer for P to say ... that it had no actual knowledge of the 18 June 2019 Calls. Irrespectively of whether P knew of the 18 June 2019 Calls, P's solicitor had the duty to bring it to the attention of the ex parte judge*";

(d) But given the marginal materiality of those facts, it would have been totally out of all proportionality between the punishment and the offence[12] if I were to lay the blame on P's doorstep and to discharge the HK Injunction;

(e) I would hence have in necessary exercised my discretion and continued the HK Injunction.

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9 See *Citibank NA v Express Ship Management Services Ltd & Anor* [1987] HKLR 1184, *per* Fuad JA 1190.

10 See *Yau Chiu Wah v Gold Chief Investment Ltd* (unrep, HCA 807/2001, 15 May 2001), *per* Recorder Ma (as the Chief Justice then was) at §32, and *Excel Courage Holdings Ltd v Wong Sin Lai* [2014] 3 HKLRD 642, *per* Kwan JA at §58.

11 At §85 of his written submissions.

12 See *Excel Courage Holdings*, *per* Kwan JA at §58(8).

Disposition

62. For the above reasons, I continue the HK Injunction in terms of §1 of the Continuation Summons.

Costs

63. I make a costs order *nisi* that the costs of the Continuation Summons, including the costs of the HK *Ex Parte* Application, and the costs of the hearing of the Continuation Summons on 2 August 2019 be to P, to be taxed if not agreed. Any party who seeks any variation of the same shall file its submissions within 14 days from the date hereof, response within 14 days of receipt, and reply within 7 days thereafter.

(Keith Yeung)
Judge of the Court of First Instance
High Court

Mr Toby Brown, instructed by Brenda Chark & Co, for the Plaintiff

Mr Anson Wong SC, leading Mr Lai Chun Ho,
instructed by William K W Leung & Co, for the Defendant