

HONG KONG COURT OF APPEAL CLARIFIES WHEN TO ASSIST FOREIGN COURTS IN OBTAINING EVIDENCE

Under the Evidence Ordinance (Cap 8) (**Ordinance**), the Hong Kong Courts may make orders to facilitate a request by a foreign court to obtain evidence for use in foreign proceedings. In *Re a civil matter now pending in United States District Court for the Western District of Washington at Seattle*,¹ the Hong Kong Court of Appeal (CA) upheld the Hong Kong Court of First Instance (CFI)'s decision to set aside an examination order made pursuant to the United States District Court, Western District of Washington at Seattle (**Federal Court**)'s request on the ground that the purpose of the proposed examination of witnesses was not to obtain evidence for the purposes of civil proceedings before the Federal Court and constituted a fishing exercise, which is impermissible under Hong Kong laws. This case illustrates the Hong Kong Courts' approach when deciding whether to accede to a foreign court's request under the Ordinance and highlights the differences in the permissible scope of discovery between the US and Hong Kong in relation to pre-action discovery, especially against non-party witnesses.

Background

The Applicants obtained judgment in the sum of US\$100 million in substantive proceedings in the Federal Court. They were then appointed by the King County Superior Court, State of Washington (**State Court**) as collection agent to collect the receivables of one of the judgment debtors owed by some third parties, including the receivables allegedly owed by two overseas companies, SSG Capital Partners I, LP (**SSG Capital**) and Value Team Corporation (**VTC**) (**Receivables**), over which neither the Federal Court nor the State Court is likely to have jurisdiction.

Under the US Federal Rules of Civil Procedure, judgment creditors are entitled to obtain information which may enable them to collect monies which can be utilised to satisfy the judgment debt. Pursuant to this rule, the Federal Court subsequently issued

letters of request to the CFI requesting a court order to compel certain individuals (**Respondents**) to appear to provide deposition testimony regarding the Receivables. The Respondents are directors of SSG Capital and VTC. According to the Applicants, they reside and/or transact business in Hong Kong and have personal knowledge regarding the Receivables.

Under section 75 of the Ordinance, where an application is made to the CFI for an order for evidence to be obtained in Hong Kong, it shall have the powers conferred on it under Part VIII of the Ordinance, including the power to make an order under section 76 that witnesses be examined,² provided that the following criteria are satisfied:

- (a) the application is made pursuant to a request issued by a foreign court or tribunal; and
- (b) the evidence to which the application relates is to be obtained for the purposes of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated.

Having said that, section 76(3) provides that an order under section 76 shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the court making the order (whether or not proceedings of the same description as those to which the application for the order relates).

A Master of the High Court of Hong Kong initially granted the examination order, which was then set aside by the CFI. The CFI was not satisfied that there were 'civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated' within the meaning of section 75(b) of the Ordinance.

property; taking of samples of any property and carrying out of any experiments on any property; and medical examination of any person.

¹ [2020] HKCA 766.

² The CFI may also order production of documents; inspection, photographing, preservation, custody or detention of any

Further, the evidence being sought via the proposed examination was not for the purpose of assisting the Federal Court to determine live allegations in the proceedings before it and was in fact pre-trial discovery, which is prohibited under section 76(3) of the Ordinance.

Judgment

The CA upheld the CFI's decision to set aside the examination order on the basis of section 76(3) of the Ordinance. The CA explained that, for the purposes of section 76(3) of the Ordinance, the Courts would differentiate between the obtaining of evidence for use at trial in the foreign proceedings and the procurement of information which might lead to a train of enquiry which might produce evidence. To this end, the Courts would consider the nature and purpose of a foreign court's request by reference to all relevant underlying materials and the circumstances leading to the request. The test is not a matter of form (for example, whether there are extant civil proceedings) but a matter of substance (whether the evidence is to be obtained for use in the requesting court to facilitate the determination of certain issues by that court). In the context of oral examination of a non-party witness, it is impermissible fishing if the evidence is not obtained for use of the requesting court to resolve any live issues before it.

On the facts and circumstances of the case, the CA held that they were precluded by section 76(3) of the Ordinance from acceding to the letters of request as the purpose of the proposed examination was investigatory, as opposed to the obtaining of evidence for use in the Federal Court. The CA noted that:

- (a) There was no suggestion of the use of evidence in any pending or contemplative adjudicative process in the Federal Court. The collection order merely authorised the Applicants to step into the shoes of the debtor. Collection on the strength of the collection order would not engage any process of determination by the Federal Court.
- (b) While the evidence could be relevant in garnishee proceedings against SSG Capital and VTC, the Applicants had yet to determine if they could issue such proceedings and if so in which jurisdiction (neither the Federal Court nor the State Court seemed to have jurisdiction over SSG Capital or VTC). As such, the discovery was for the purpose of 'plotting the course' of unspecified, possible, future proceedings.

The CA held that whether a foreign court's request falls foul of section 76(3) of the Ordinance is a substantive issue to be tested by the Hong Kong Courts by reference to Hong Kong laws. Therefore, the fact that the Federal Court judge made the

request is not determinative of the issue whether the evidence sought is relevant to the determination of live issues in civil proceedings.

Indeed, the CA acknowledged that the course adopted by the Applicants is permissible in the US, where a judgment creditor may obtain discovery from any person in aid of execution of a judgment. However, this is not a permissible procedure under Hong Kong laws. In Hong Kong, where a judgment creditor has sufficient grounds to apply for a garnishee order over a debt due to a judgment debtor, the judgment creditor must issue garnishee proceedings before obtaining any directions for discovery as necessary.

Whilst not being a major issue to be considered by the CA, the Applicants also attempted to argue that the seeking of information by way of discovery in aid of execution amounts to the obtaining of evidence for the purposes of 'civil proceedings' under section 75 of the Ordinance. However, the CA decided that jurisdiction to obtain evidence would only be established if the relevant proceedings are proceedings in a civil or commercial matter in both the requested jurisdiction and the requesting jurisdiction. In Hong Kong, there is no collection procedure. The mere facilitation of the Applicants to act as a collection agent does not qualify as civil proceedings in Hong Kong. As such, even if the post-judgment discovery application in aid of execution constituted civil proceedings under US laws, it does not qualify as 'civil proceedings' for the purposes of section 75 of the Ordinance.

Comments

This case illustrates the Courts' decision making process under section 76(3) of the Ordinance, which effectively prohibits the making of an order that serves the purpose of pre-trial discovery, particularly against a non-party witness. The Courts will take into account the circumstances as a whole when considering whether a foreign court's request amounts to fishing. The test is whether the evidence can be said to be relevant and/or necessary to the determination of any live issues before the requesting court.

This case also highlights significant differences between the US and Hong Kong in terms of the permissible scope of discovery. Whereas the US allows interrogation of even non-parties to the suit for the purpose of seeking information which might lead to the discovery of evidence, Hong Kong has no such wide power of pre-trial discovery save in limited circumstances where a third party becomes involved in unlawful conduct, in which case a *Norwich Pharmacal* order compelling the third party to disclose the identity of the wrongdoer may be granted.

Parties seeking for discovery in Hong Kong in aid of foreign proceedings in the US or elsewhere should therefore bear in mind these differences and plan their course of action carefully. For example, in the present case, the CA has suggested that if the Applicants wish to rely on the use of evidence in

garnishee proceedings in the future, they should at least make reference to such possibility when applying for a letter of request so that the Federal Court has an opportunity to address the relevant issues such as jurisdiction.



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