(2018) 20 *Flinders Law Journal*

INTERIM RELIEF: NATIONAL REPORT FOR HONG KONG (CHINA)

PETER CHAN & UBAID-UR REHMAN[†]

I INTRODUCTION

The *Rules of the High Court* (Hong Kong) cap 4A ('*RHC*') are the main procedural rules that govern civil litigation in Hong Kong for all civil and commercial actions commenced at the High Court. This report focuses primarily on the following interim relief measures in Hong Kong: (a) interim payments, (b) interlocutory injunctions, (c) Mareva injunctions and Anton Piller orders, and (d) security for costs.

II INTERIM PAYMENT UNDER HONG KONG CIVIL PROCEDURE

A *The Nature of Interim Payment*

Interim payment is designed to alleviate the hardship of the plaintiff from commencement to trial[1] either when the question of liability has already been decided, or, if the question of liability has not been decided, the court is satisfied that if the action proceeded to trial the

† Peter Chan, Assistant Professor, School of Law, City University of Hong Kong. Ubaid-Ur Rehman, Barrister-at-Law, Hong Kong Special Administrative Region; Teaching Consultant, School of Law, City University of Hong Kong.

1 P J Chan and Martin Rogers (eds), *Hong Kong Civil Procedure 2014* (Sweet & Maxwell, 2014) vol 1, [29/11/1] ('*White Book 2014*').

plaintiff is likely to obtain judgment for substantial damages.

B *Criteria for Grant of Interim Payment*

RHC Order 29, rule 9 provides the definition of 'interim payment':

> 'interim payment', in relation to a defendant, means a payment on account of any damages, debt or other sum (excluding costs) which he may be held liable to pay to or for the benefit of the plaintiff; and any reference to the plaintiff or defendant includes a reference to any person who, for the purpose of the proceedings, acts as next friend of the plaintiff or guardian of the defendant.

RHC Order 29, rule 11 states the test for the court to grant interim payment in respect of damages:

> (1) If, on the hearing of an application under rule 10 in an action for damages, the Court is satisfied —
>
> (a) that the defendant against whom the order is sought (in this paragraph referred to as 'the respondent') has admitted liability for the plaintiff's damages; or
>
> (b) that the plaintiff has obtained judgment against the respondent for damages to be assessed; or
>
> (c) that, if the action proceeded to trial, the plaintiff would obtain judgment for substantial damages against the respondent or, where there are two or more defendants, against any of them,
>
> the Court may, if it thinks fit and subject to paragraph (2), order the respondent to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the Court are likely to be recovered by the plaintiff after taking into account any relevant contributory negligence and any set-off, cross-claim or counterclaim on which the respondent may be entitled to rely.

Interim payment in situations where the defendant has admitted liability for the plaintiff's damages and where the plaintiff has obtained judgment against the respondent for damages to be assessed

need little explanation given the question of liability has already been determined.

The focus of the discussion is the situation under *RHC* Order 29, rule 11(1)(c). The case law adds very little to what the rule has already detailed. Essentially, the court goes through a two-stage enquiry (*the two-stage test*): (a) 'the court must be satisfied, whatever the defence relied on in opposition, that the plaintiff would obtain judgment for a substantial amount at trial',[2] that is, mere likelihood of obtaining judgment for a substantial amount at trial is insufficient; and (b) '[t]he court must be satisfied that the defendant has no arguable defence or that there are sufficient doubts regarding the genuineness of the defence, that the court would not grant the defendant unconditional leave to defend in a summary judgment application under O 14'.[3]

For an example of the application of this test, see *Great City Holdings Ltd v To Chun Hung*.[4]

C *What Constitutes 'Substantial Damages'?*

The plaintiff seeking interim relief under *RHC* Order 29, rule 11(c) must prove to the court that 'if the claim were to go to trial then, on the material before the judge at the time of the application for interim payment, the plaintiff would succeed in his [or her] claim and would obtain a *substantial amount* of damages'.[5]

What constitutes a 'substantial amount' depends on the circumstances of the case. Generally speaking, '[relevant] factors in assessing whether an amount is substantial include the plaintiff's

---

[2] Ibid.
[3] Ibid.
[4] [2009] HKCFI 576 (20 July 2009).
[5] *White Book 2014*, above n 1, [29/11/1] (emphasis added).

total claim for damages and the plaintiff's need'.[6] It appears that the case law does not provide a clear guideline in assessing what constitutes a 'substantial amount'. However, Andrews commented, '[i]t might be suggested that the courts approach this in terms of 75 per cent threshold of conviction that the claimant is likely to succeed: somewhat between certainty and a bare "more likely than not" sense of success.'[7]

D Exercise of Court Discretion

Even where the two-stage test is satisfied, the court has discretion whether or not to grant interim payment. A factor that the court would usually take into account includes the timing of the trial (that is, if the trial is taking place soon, the court is less likely to order interim payment).[8]

E Application for Interim Payment: Procedural Summary

An application for interim payments must comply with the following procedures under *RHC* Order 29, rule 10:

> (1) The plaintiff may, at any time after the writ has been served on a defendant and the time limited for him to acknowledge service has expired, apply to the Court for an order requiring that defendant to make an interim payment.
>
> (2) An application under this rule shall be made by summons but may be included in a summons for summary judgment under Order 14 or Order 86.
>
> (3) An application under this rule shall be supported by an affidavit which shall —

---

[6] Ibid.

[7] Neil Andrews, *The Modern Civil Process: Judicial and Alternative Forms of Dispute Resolution in England* (Mohr Siebeck, 2008) 78 [5.05].

[8] Dave Lau, *Civil Procedure in Hong Kong: A Guide to The Main Principles* (Sweet & Maxwell, 3rd ed, 2014) 201.

(a) verify the amount of the damages, debt or other sum to which the application relates and the grounds of the application;

(b) exhibit any documentary evidence relied on by the plaintiff in support of the application; and

(c) if the plaintiff's claim is made under the Fatal Accidents Ordinance (Cap 22), contain the particulars mentioned in section 5(4) that Ordinance.

(4) The summons and a copy of the affidavit in support and any documents exhibited thereto shall be served on the defendant against whom the order is sought not less than 10 clear days before the return day.

(5) Notwithstanding the making or refusal of an order for an interim payment, a second or subsequent application may be made upon cause shown.

F *Effectiveness of Interim Payment*

Interim payment is generally very effective, as it allows a plaintiff to recover a proportionate amount of the damages before the actual trial where the liability has already been determined or when the merits of the plaintiff's case is such that the court is of the view that 'substantial damages' would be awarded if the matter goes to trial. It is fair in the sense that the plaintiff should not be left to wait when the liability issue is relatively clear at the point when an application for interim judgment is made. A delicate balance needs to be struck. On the one hand, the rules need to ensure that a plaintiff should get its entitlement in the form of interim payment when liability is clear, but on the other hand, sufficient safeguards must be in place to protect the defendant. On the latter point, Andrews provided a succinct overview of the measures available in England for protecting the defendant.[9] The absence of any controversies with respect to interim measures could be seen as indicative of their effectiveness.

---

[9] Andrews, above n 7, 79 [5.07].

G Future Developments in the Area of Interim Relief

Some of the major changes made to the *RHC* were effected through the Civil Justice Reform ('CJR') which was implemented on 2 April 2009. In 2004, the Working Party of the Chief Justice on Civil Justice Reform (Working Party) published the *Final Report on Civil Justice Reform*. The Final Report became the blueprint for amending the procedural rules.

The Working Party examined the proposal to consolidate various rules relating to interim relief (including interim payment) along the lines of Part 25 of the *Civil Procedure Rules 1998* (UK) ('*CPR*') and rejected the proposal on the following grounds:

> (a) While CPR 25 may be appropriate in the context of an entirely new procedural code using new nomenclature and language, such considerations are inapplicable here.
>
> (b) The changes effected by CPR 25 are minor. The legal principles governing applications for and the grant of such interim orders are to be found in the case-law and to some extent in statutes which are generally unaffected by the changes. Most of the procedural provisions mirror those already found in the RHC. Forms in use in Hong Kong for Mareva injunctions and Anton Piller orders can already be found in a published practice direction.
>
> (c) In the circumstances, the benefit to be derived from adopting CPR 25 would be slight and does not appear to justify the effort which adoption of CPR 25 would require of users of the civil justice system. However, certain specific measures discussed below may be useful additions to the RHC.[10]

---

[10] Chief Justice's Working Party on Civil Justice Reform (Hong Kong), *The Final Report of the Chief Justice's Working Party on Civil Justice Reform* (2004) 162 [326].

III INTERLOCUTORY INJUNCTIONS UNDER HONG KONG CIVIL PROCEDURE

A *The Object of Interlocutory Injunctions*

Perhaps no other description of the object of interlocutory injunctions is as clear as the one provided in the leading case, *American Cyanamid Co v Ethicon Ltd (No 1)* (‘*American Cyanamid*’):

> The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where 'the balance of convenience' lies.[11]

Section 21L of the *High Court Ordinance* (Hong Kong) cap 4 provides: ‘(1) The Court of First Instance may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the Court of First Instance to be just or convenient to do so.’

Unlike the District Court,[12] the High Court has unlimited jurisdiction to grant injunctions. It is said that this jurisdiction ‘is very wide’ and ‘imposes no fetter on the discretion of a judge to do what is just and equitable in all the circumstances, subject to established principles which have grown up by precedent’.[13]

---

11 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, 406 (Lord Diplock).

12 Limitations on the District Court’s ability to grant injunctions are set out in s 52(1) of the *District Court Ordinance* (Hong Kong) cap 336.

13 *White Book 2014*, above n 1, [29/1/3].

If urgency can be shown, an interlocutory injunction may be granted before the issuance of the writ.[14] The *White Book 2014* notes, 'Order 29, r. 1(3) recognises that the court's jurisdiction is invoked and acquired by the issue and service of originating process on a defendant, but further stipulates that the court may, if it thinks fit, permit such applications in situations of urgency by putting the plaintiff on suitable terms as to the issue of the writ or summons'.[15]

B *Criteria for Granting Interlocutory Injunctions*

In *American Cyanamid Co v Ethicon Ltd*,[16] the test laid down for granting interlocutory injunctions is a complex one:

(1) *Is there a serious question to be tried?* This is a 'limited enquiry' into the prospect of the plaintiff's success, and '[odds] against success do not defeat him, unless they are so long that the plaintiff can have no expectation of success, but only a hope'.[17] So long as there is a real prospect of success, the court would be satisfied that there is a serious question to be tried. The court would not consider 'the merits of the case once it had been shown there was a serious issue to be tried'.[18] This is lower than the threshold of a 'prima facie case', which was a requirement pre-*American Cyanamid*.[19]

(2) *Would the damages awarded at trial be sufficient as a remedy?* The court needs to consider this question in two separate stages:

---

[14] *RHC* O 29, r 1(3).
[15] *White Book 2014*, above n 1, [29/1/1].
[16] [1975] AC 396.
[17] *White Book 2014*, above n 1, [29/1/10].
[18] *Poon Ying Hon v CCT Telecom Holdings Ltd* [2001] HKCFI 735 (17 August 2001) [27].
[19] Lau, above n 8, 253.

(a) *First stage*: if the court refuses to grant an injunction, would the plaintiff be adequately compensated in damages at trial (assuming the plaintiff wins) for any loss and damage caused by the refusal? If the answer is yes, then no interlocutory injunction would be granted. If the answer is no, then the court proceeds to the second stage.[20]

(b) *Second stage*: if the court grants an injunction, would the plaintiff's undertaking as to damages be adequate to cover any loss and damage suffered by the defendant as a result of the granting of the injunction? If the answer is yes (and the plaintiff is financially capable to pay the undertaking), then the court would grant an interlocutory injunction. If the answer is no, the court would proceed to the next limb of the test, which is the balance of convenience.[21]

(3) *Balance of convenience:*

(a) There is no hard and fast rule to ascertain where the balance of convenience lies. Case law suggests that each case needs to be considered on its facts. A leading author suggests that '[in] essence, the "balance of convenience" is the relative hardship between the parties, ie who will suffer more as a result of the Court granting or not the injunction?'[22]

(b) Factors that the court may take into consideration could vary with the case. Lord Diplock provided guidance in relation to what constitutes such factors in *American Cyanamid*:

> The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of

---

[20] *White Book 2014*, above n 1, [29/1/12]. Non-financial losses are incapable of being adequately compensated by way of damages: see Lau, above n 8, 254.

[21] As clearly summarised in *White Book 2014*, above n 1, [29/1/11]: 'It is where there is doubt as to the adequacy of the respective remedies in damages that the question of balance of convenience arises'.

[22] Lau, above n 8, 255.

> convenience lies, and if the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however, should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case. I would reiterate that, in addition to those to which I have referred, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases.[23]

C *How Effective are Interlocutory Injunctions and are they Controversial?*

Interlocutory injunctions are very effective in securing the rights of applicants who may suffer damage that cannot be compensated adequately if no injunction is granted. A fair balance is usually struck by the court having considered all the circumstances of the case.

The only real controversy is the debate in relation to the test for granting interlocutory injunction. The principle underlying the *American Cyanamid* test is ultimately one that concerns balancing the hardship of the parties. Unlike some other interlocutory measures (eg summary judgment), the *American Cyanamid* test does not make a provisional assessment of the substantive merits of the case when considering whether or not to grant an injunction.[24] Andrews observed:

---

[23] *American Cyanamid Co v Ethicon Ltd (No 1)* [1975] AC 396, 409.

[24] *White Book 2014*, above n 1, [29/1/16] clearly stated that a consideration of the 'relative strength of each party's case' must be 'disregarded except as a last resort when the balance of convenience is otherwise even in the circumstances stated in guidelines (6) and even then it should not be taken into account unless it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party'.

> It is submitted that the court should avoid considering a case's substantive merits when deciding whether to grant an interim injunction only if such provisional adjudication of the facts would be perilous in that particular case. This danger arises only if reliable assessment of the facts will require scrutiny of oral witness evidence, a process confined to trial (factual evidence during pre-trial hearings is presented instead in written form and there is no opportunity for cross-examination). Otherwise, the courts should cut the Gordian knot and make an interim assessment on the basis of both documentary materials (provided it is not too voluminous) and counsel's submissions.[25]

IV Mareva Injunctions and Anton Piller Orders

A *A Note*

Mareva injunctions (called 'freezing injunctions' in England) and Anton Piller orders (called 'search orders' in England) are different from interlocutory injunctions described above in that Mareva and Anton Piller 'do not concern the substantive dispute but instead operate in a "protective" fashion to maintain the monetary or evidential viability of pursuing or enforcing the main claim'.[26]

B *What is a Mareva Injunction?*

Any claimant seeking a monetary remedy in a civil dispute will no doubt find little solace in obtaining a judgement against the opposing party if there are no assets against which the winning judgement can eventually be enforced. The purpose of a Mareva injunction is to prevent that outcome by restraining the defendant from dissipating its assets or even dealing with assets that are located within the jurisdiction.[27] In some cases, the court may even restrain the

---

25 Andrews, above n 7, 84-5 [5.16].

26 Ibid 80 [5.08].

27 P J Chan and Martin Rogers (eds), *Hong Kong Civil Procedure 2015* (Sweet &

defendant from dissipating or dealing with assets that are outside the jurisdiction.[28]

A Mareva injunction is an *ad personam* order, which means that the injunction has no effect over the proprietary rights of the assets in question. Preservation of the assets in question is the primary concern. An applicant applying for a Mareva injunction does not seek to make a proprietary claim over the assets in question, ie 'the right to the injunction and the ultimate right to damages or whatever else is claimed in the action are wholly disconnected'.[29] As Lord Mustill put it:

> The courts administering the remedy always distinguish sharply between tracing and other remedies available where the plaintiff asserts that the assets in question belong to him and that the dealings with them should be enjoined in order to protect his proprietary rights, and Mareva injunctions granted where the plaintiff does not claim any interest in the assets and seeks an inhibition of dealings with them simply in order to keep them available for a possible future execution to satisfy an unconnected claim.[30]

C *Criteria for Granting Mareva Injunctions*

In order to successfully obtain a domestic Mareva injunction, the plaintiff must show:

(1) *A good arguable case*. Echoing the approach adopted in *American Cyanamid*, the courts have held that they will not decide complex issues of law on affidavit evidence alone and all that the plaintiff needs to show in order to succeed is 'one that is "more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of

---

Maxwell, 2015) vol 1, [29/1/58] ('*White Book 2015*').

28 *Ashtiani v Kashi* [1987] QB 888 (CA).

29 *Mercedes-Benz AG v Leiduck* [1996] AC 284, 303.

30 Ibid 300. See also *Creaven v Director of the Assets Recovery Agency* [2005] EWHC 2726 (QB Admin).

success'".[31]

(2) The defendant has assets within the jurisdiction. The assets are not restricted to money and can include any property that is owned by the defendant. In addition, the assets do not necessarily have to be within the control of the defendant as even property such as money in a bank account can be frozen. In that case, the defendant and the third party such a bank would be restrained from dealing with the assets.[32]

(3) There is a real risk of dissipation or removal of the assets from the jurisdiction. It is insufficient for the plaintiff to prove to the court that he is fearful the defendant will remove the assets from the jurisdiction. In order to succeed, the plaintiff must produce compelling evidence which points to objective facts that the defendant will remove or dissipate the assets from the jurisdiction. Whilst it is very unlikely that a defendant's reluctance to divulge information about its financial position will satisfy the threshold of the solid evidence of dissipation that is normally required,[33] the courts have been willing to grant the application when the plaintiff has been able to prove dishonesty or 'an unacceptably low standard of commercial morality' in the defendant's dealing with the plaintiff.[34]

D *How Effective are Mareva Injunctions?*

Given the forceful effect that a Mareva injunction can have on a defendant against whom it has been ordered, these injunctions have been described as the nuclear weapons of civil litigation. The successful grant of a Mareva injunction ensures that a calculating

---

31 *Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft mbH & Co. KG* [1984] 1 All ER 398.

32 *White Book 2015*, above n 27, [29/1/68].

33 *Laemthong International v. ARTIS* [2005] Lloyd's Rep 100.

34 *Honsaico Trading Ltd v Hong Yiah Seng Co Ltd* [1990] 1 HKLR 235, 240.

defendant will not be easily able to hamper the successful enforcement of an eventual award and it allows the plaintiff to progress through the preparation of the case with some degree of equanimity.

In spite of the obvious benefits that a Mareva injunction can provide to a plaintiff, some limitations remain. Since the grant of the injunction does not give the plaintiff any proprietary interest in the property of the defendant, in the event that the defendant becomes bankrupt, the plaintiff's position is no more advantageous than that of an unsecured creditor. In addition, the standard form of Order for a Mareva Injunction allows a defendant to withdraw a certain amount of money per week towards his ordinary personal and business expenses and on legal advice and representation.[35] Though this is often a reasonable and necessary concession to the practical needs of a defendant, it can represent a substantial amount of money if the defendant is an affluent person with an equally comfortable lifestyle.

E *Have there been any Developments in this Area?*

Prior to the implementation of the CJR, a plaintiff in foreign proceedings who did not have an underlying claim in Hong Kong was not able to obtain interim relief by way of a Mareva injunction in respect of any of the defendant's assets that may have been located in Hong Kong. In the Final Report, the Working Party addressed this issue and recommended that such relief 'by way of Mareva injunctions should be available in relation to proceedings which are taking place, or will take place, outside the jurisdiction (and where no such substantive proceedings are contemplated in Hong Kong)'.[36] Shortly after the CJR, the issue was scrutinised by the Court of Appeal in a case in which the Hong Kong action had been stayed in favour of foreign proceedings.[37] The Court of Appeal held that it had

---

35 *Practice Direction 11.2* (Hong Kong).

36 Chief Justice's Working Party on Civil Justice Reform (Hong Kong), above n 10, 163 (Proposal 17).

37 See *Hornor Resources (International) Co Ltd v Savvy Resources* [2010]

the jurisdiction to order the grant of a Mareva injunction in such instances. Though this case should make it easier for an intended plaintiff to decide whether to commence litigation outside the jurisdiction against a defendant with assets in Hong Kong, it must be borne in mind that in deciding whether to grant a Mareva injunction in such cases, the courts will continue to apply the general principles governing the grant of the same.

F *What is an Anton Piller Order?*

An Anton Piller order is a form of an interlocutory injunction that compels the occupier of premises to allow the applicant and his or her solicitor to enter the premises and search for documents or other property and if necessary, to remove these articles and retain them.[38] Unlike a search order, which allows an applicant to use force when necessary to enter the premises, an Anton Piller order requires the assent of the defendant. A standard form Anton Piller order as set out in Practice Direction 11.2 is endorsed with a penal notice and if the defendant refuses to give permission to the plaintiff to enter the premises when he or she is presented with such an Order, the defendant is guilty of a contempt of court.

The most fundamentally valuable feature of an Anton Piller order is that it allows a plaintiff to make an ex parte application to the court to allow it to enter the premises of the opposing party and search for and preserve property. Long before the jurisdiction of the Anton Piller order arose in a number of intellectual property cases in the mid 1970s, parties were able to apply to the court for an order with similar consequences.[39] However, the effectiveness of such orders was curtailed by the fact that the applications had to made *inter-partes*. In cases involving intellectual property matters, such *inter-partes* orders were often impractical because prior notice of the search order would allow the incriminating party to destroy the

HKCFI 260 (23 March 2010); [2010] HKEC 445.

38 See *Anton Piller KG v Manufacturing Processes* [1976] 1 Ch 55.

39 *RHC* O 29, r 2.

evidence in question. The success of the Anton Piller since its inception in the 1970s is largely due to the secrecy and confidentiality with which it allows the applicant to carry out the purposes of the order. Nowadays, apart from intellectual property cases, Anton Piller orders are also commonly sought in matrimonial proceedings and anti-competition cases brought by employers.[40]

G *Criteria for Granting Anton Piller Orders*

An applicant must satisfy the following four conditions:

(1) An extremely strong prima facie case. Unlike the 'good arguable case' test that is applied in applications for Mareva injunctions, this test requires the court to closely examine the merits of the applicant's case and satisfy itself that the plaintiff is likely to succeed in their action.

(2) The danger to the plaintiff must be serious. The applicant must show the court that the refusal of the grant of the order will have a severely detrimental effect on his or her interests.

(3) Clear evidence of incriminating evidence and a real risk of destruction. This two fold test requires the plaintiff to show that the defendant is in possession of the documents or articles in question and that there is more than a mere possibility that he or she will destroy the said documents or articles before any *inter-partes* application can be made. Applicants can occasionally find it difficult to present convincing evidence in relation to the second limb of this test and though courts are willing to draw the requisite inference if some evidence of the defendant's dishonesty is shown, it does not necessarily mean that the condition will always be satisfied. The applicant has to persuade the court that the defendant will refuse to comply with an injunction for the preservation of the evidence.

---

[40] *White Book 2015*, above n 27, [29/8/20].

(4) Proportionality. Given the discretionary nature of the remedy, the court has to be satisfied that the granting of the order will not result in any harm to the respondent that is excessive or out of proportion of the aims of the order. In considering this issue, the court essentially gives credence to the principles of justice and tries to ensure that the rights of the defendant are considered even though it has not had the opportunity to address the court.

H *How Effective are Anton Piller Orders?*

One of the most fundamentally valuable features of an Anton Piller order is that it allows a plaintiff to make an ex parte application to the court to allow it to enter the premises of the opposing party and search for and preserve property. Long before the jurisdiction of the Anton Piller order arose in a number of intellectual property cases in the mid 1970s, parties were able to apply to the court for an order with similar consequences.[41] However, the effectiveness of such orders was curtailed by the fact that the applications had to made *inter-partes*. In cases involving intellectual property matters, such *inter-partes* orders were often impractical because prior notice of the search order would allow the incriminating party to destroy the evidence in question.

V SECURITY FOR COSTS

A *Why do we need Security for Costs?*

Andrews succinctly described the purpose of security for costs orders: '[the] purpose of such a security for costs order is to protect the defendant against the risk that the claimant might not pay the

[41] *RHC* O 29, r 2.

defendant's costs if the claimant eventually becomes liable, or agrees as a term of settlement, to pay the defendant's costs.'[42]

There is solid basis for the existence of such an order because whereas a plaintiff almost always has the luxury to meticulously investigate the financial standing of an intended defendant before any action is commenced, the same opportunity is not available to a defendant. There is very little recourse in terms of the recovery of costs for a victorious defendant against an impecunious plaintiff. To prevent such outcomes, a security for costs order requires the plaintiff to provide security in case he or she eventually loses the action.

B *Criteria for Granting the Order*

The court derives its discretionary power to order security against a party through either the *RHC* or the *Companies Ordinance* (Hong Kong) cap 622.

Under *RHC* Order 23, rule 1:

> Where, on the application of a defendant to an action or other proceeding in the Court of First Instance, it appears to the Court —
>
> (a) that the plaintiff is ordinarily resident out of the jurisdiction, or
>
> (b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so, or
>
> (c) subject to paragraph (2) that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein, or
>
> (d) that the plaintiff has changed his address during the course of the proceedings with a view to evading the consequences of the litigation,

[42] Andrews, above n 7, 71 [4.36].

> then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant 's costs of the action or other proceeding as it thinks just.

In addition, if a plaintiff is a limited company and the defendant can successfully argue that the plaintiff will be unable to pay the costs of the defendant in the event that the plaintiff loses the action, the court may also grant the order.[43]

It must be borne in mind that the discretionary nature of the order gives the court a very wide discretion in applying the rules. The court will have regard to all the circumstances of the case and only order security in cases in which it thinks it would be just to do so. It would be erroneous for a locally domiciled defendant to presume that an order will automatically be granted against a plaintiff who is ordinarily resident out of the jurisdiction. Although in the past the courts have more often than not made such orders against non-resident plaintiffs in order to safeguard the interests of the defendants,[44] it is by no means an inflexible rule that always results in the grant of the order.[45] The court will always endeavour to balance the interests of the parties and avoid outcomes that would sacrifice the rights of the plaintiff for the sake of providing some degree of security for the defendant.

In most cases, if the non-resident plaintiff or the party against whom the application has been made can show the court that it has a good prospect of success, the court will not grant the order.[46] Conversely, if the plaintiff cannot show a high degree of probability of success, it is likely that an order would be granted.[47] Other factors

---

43 *Companies Ordinance* (Hong Kong) cap 622, s 905.

44 See *Charter View Holdings (BVI) Ltd v Corona Investments Ltd* [1998] 1 HKLRD 469.

45 See *Henrik Andersen and Michael Serring (suing as receiver of the Estate of Huang Kuang Yuan) v Hunag Kuang Yuan* [1997] HKLRD 1360.

46 *Wong Kwok Mei Sanrita v Eversonic Inc* [1992] 2 HKC 62.

47 *China Smart Properties Ltd v Mansion Holdings Ltd* [2002] HKCFI 1236 (12

that the court may consider when exercising its discretion include the defendant's prospects of success,[48] whether the order will stifle a claim,[49] whether the impecuniosity of the plaintiff is directly attributable to the actions or omissions of the defendant[50] and the ease with which a judgment could be enforced in the jurisdiction in which the non-resident plaintiff is domiciled. This is not an exhaustive list but the last of these factors can be particularly valuable in swaying the discretion of the court in favour of the plaintiff if a non-resident plaintiff can convincingly demonstrate the existence of sizeable assets within the jurisdiction.[51]

C *Effectiveness of the Orders*

Such orders are generally very effective because they require the plaintiff to pay a sum of money into court barring which all proceedings in the action would be stayed. Administratively, the requirement for the payment into court ensures that the enforcement of the order is carried out in an efficient and uncomplicated manner. Additionally, the prospect of an almost immediate halt in the proceedings also serves as a great incentive for the affected parties to pay the security in a timely manner. For the defendants, depending on the sum of security granted, it provides a measure of assurance that their victory will not be a hollow or symbolic triumph.

Although the exercise is entirely at the discretion of the court and there is no fixed formula as the court considers each case on its own facts, the usual approach when ordering the amount of security is to fix the amount at about two thirds of the estimated party and party costs.[52]

March 2002); [2002] HKEC 449.

48 *Wai Shun Construction Co Ltd v Fitzroya Finance Co Ltd* [2007] HKCFI 725 (13 July 2007); [2007] HKEC 1302.

49 *Chian Ker Chi Paul v. Super Zone Investment Ltd* [1994] 2 HKC 679.

50 *Sunchase International Group (China) Ltd v Vincor Group of Companies (Investment) Ltd* [2004] 1 HKLRD 731.

51 *A-G v Vianini Lavori SpA* [1991] 1 HKC 423.

52 *Sujanani v Middle East Finance International Ltd (No 1)* [1985] 2 HKC 226.

CONCLUDING REMARKS

One of the most undesirable aspects of civil litigation in Hong Kong and most other common law jurisdictions is the protracted period of time that it takes to resolve these disputes. During lengthy proceedings, interim remedies often serve a useful and practical purpose in addressing the issues facing the parties. In Hong Kong, there have been relatively few recent controversies or developments in terms of interim remedies but it is hoped that with the implementation of the CJR, the courts will take a more pro-active and innovative approach in enhancing the effectiveness of these measures to make litigation more cost effective, efficient and expeditious.