

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM NO. BVIHC (COM) 44 of 2019

BETWEEN:

CHEN MEI-HUAN

Claimant and Respondent

and

(1) VICTORY SUCCESS HOLDINGS LTD

Applicant

(2) ALAN ZHAN

(3) PECKSON LTD

(4) MACAU HOTEL DEVELOPERS LTD

(5) MACAU TOURISM AND AMUSEMENT CO LTD

Defendants

Appearances:

Mr. John McDonnell QC and Ms. Dancia Penn OBE QC of Dancia Penn & Co for the Claimant and Respondent

Mr. Stephen Rubin QC and Mr. Andrew Willins with Fraser Mitchell of Appleby (BVI) Ltd for the First Defendant and Applicant

Mr. Grant Carroll for the Third and Fourth Defendants

The Second and Fifth Defendants did not appear

2020 November 3, 4 and 5,
November 30

JUDGMENT

[1] **JACK, J [Ag.]**: On 10th April 2019 Adderley J granted the claimant (“Madame Chen”) an injunction *ex parte* restraining the first defendant (“Victory Success”), a BVI company,

(a) from disposing or attempting to dispose of the New Century Hotel (“the Hotel”) in Macau, a special administrative region of the People’s Republic of China;

(b) from creating or granting or attempting to create or grant any interest or right whether real or personal in or over the Hotel;

(c) from carrying out any demolition works or construction works on the Hotel; or

(d) from denying or preventing access to the Hotel by the third defendant (“Peckson”), the fourth defendant (“Empresa”)¹, the fifth defendant (“STDM”) or the receivers appointed over Peckson by the Judicial Committee of Her Majesty’s Privy Council by order of 29th November 2017 (“the receivers”).

There was a short return date on the injunction of 8th May 2019, at which the question of continuing the injunction was stood over to a substantive return day. The injunction meanwhile continued.

[2] The adjourned return date was argued before me over 3rd, 4th and 5th November 2020. I shall come back to discuss this extraordinary delay. In addition, there were live applications from Victory Success seeking a stay of the action on grounds of *forum non conveniens* and a discharge of the injunction.

[3] It is common ground that the Hotel, when it was still open, was an up-market five-star establishment with the valuable concession of a casino in it, known as the Greek Mythology Casino. The Government of Macau closed the Hotel on 21st July 2016 on the grounds of administrative irregularities and breach of fire safety requirements. The licence to operate the casino was surrendered in 2017.

The background

[4] The background to the current action is a piece of epic litigation between Madame Chen and her erstwhile life partner, Ng Man Sun (also known as Ng Wei) (“Mr. Ng”), which commenced in 2012.² It first came to trial before Bannister J over six days in October 2013. He delivered judgment on 14th November 2013. He explained the facts as follows:

“[1] In November 1996 [Mr. Ng] acquired the entire issued share capital of [Peckson], comprising 50,000 shares. Mr. Ng acquired these shares as beneficial owner. Shortly thereafter, he sold 10,000 of the Peckson shares to Dr. Stanley Ho, who at that time was *de facto* regulator of all casino business carried on in Macau, for HK\$100 million. The purpose of the sale to Dr. Ho was two-fold: (1) to produce capital for Peckson’s

¹ This, as with STDM, is the translation from the Portuguese.

² In re Peckson Ltd; Ng v Peckson Ltd and Chen BVIHC (COM) 88 of 2012.

anticipated acquisition of a Macau registered company called Empresa... and (2) to have Dr. Ho on side.

[2] The purchase price for Empresa was some HK\$900 million. Of that, an initial deposit of HK\$100 million was borrowed by Peckson from Liu Chong Hing Bank. Unusually, that loan was guaranteed by Mr. Ng's solicitors, Lu Lai & Li. The loan was further guaranteed by Mr. Ng and an associate of his and was secured by a mortgage of the Peckson shares which described Mr. Ng as their beneficial owner... The funds to pay a further deposit of HK\$100 million, on 27 November 1996, were raised from the sale of shares to Dr Ho. The balance of the purchase price was raised by way of a syndicated loan of some HK\$800 million from a number of banks, guaranteed by Mr. Ng and secured against his earnings from STDM, Dr. Ho's casino management company.

[3] On 4 October 2011 Mr. Ng transferred his 40,000 Peckson shares to [Madame Chen]. Mr. Ng and Madame Chen had formed a relationship sometime around the beginning of 1996 and moved into the Hotel together on its purchase. On 22 November 2011 a notary purports to have witnessed Mr. Ng's signature to a declaration in which he stated that the transferred shares were his and that as a result of transfer to Madame Chen he retained no rights in them. On the face of it, therefore, he had divested himself of legal and beneficial ownership in the shares. Indeed, Mr. Ng does not deny in his amended statement of claim that that was so. What he pleads is that Madame Chen paid no consideration or the transfer as it was not intended that she should keep the shares permanently. In his witness statement the matter is put differently: Mr. Ng says that Madame Chen did not pay any consideration because it was not intended that should keep the shares beneficially, it being understood between them that it was temporary transfer of the bare legal title, not the beneficial interest.

[5] On 18 January 2012 Madame Chen made a will in favour of Mr. Ng whose sole subject matter was the Peckson shares. Shortly thereafter, Mr. Ng and Madame Chen split up for good. She retains the shares and is registered in Peckson's register of members as their holder."

- [5] Bannister J concluded that Mr. Ng had failed to establish either an agreement between himself and Madame Chen that she would transfer the shares in Peckson back to him or that she held the shares on resulting trust for Mr. Ng. Accordingly, he dismissed Mr. Ng's claim and allowed Madame Chen's claim for a declaration of beneficial ownership of the shares. He made various negative findings about Madame Chen's evidence and I shall come back to these.

- [6] Mr. Ng appealed. The Court of Appeal³ allowed the appeal on two bases: firstly, that Mr. Ng was entitled to the benefit of a resulting trust and secondly that various matters on which the judge relied had not been put to Mr. Ng when he was cross-examined.
- [7] From this judgment, Madame Chen appealed. The Privy Council⁴ allowed the appeal and ordered a retrial to determine whether there was an agreement for the transfer of the shares back to him or a resulting trust. In the meantime, the Judicial Committee ordered that receivers be appointed of the shares in Peckson and Empresa to preserve the shares pending the retrial.
- [8] The retrial took place over fifteen days before Adderley J in January and February 2019. Since the date of Bannister J's judgment there had been further litigation in Macau, which meant the issues before Adderley J were significantly different to those before Bannister J. He found against Mr. Ng on both points referred back by the Privy Council, but did not find that he needed to make detailed determination of many of the disputed facts.⁵
- [9] Mr. Ng appealed, but the Court of Appeal upheld the judgment of Adderley J.⁶ A further appeal to the Privy Council was settled on terms that Mr. Ng transferred the nominee minority shareholding in Empresa to Madame Chen. Thus after eight years, the litigation between Madame Chen and Mr. Ng settled with Madame Chen the winner.
- [10] Control of Peckson (and therefore Empresa) was initially with Madame Chen, until the first Court of Appeal judgment on 23rd September 2015, when control shifted to Mr. Ng. After the Privy Council decision in 2017 control vested in the receivers until the receivership order was discharged on 8th October 2020. Control then reverted to Madame Chen.
- [11] In the meantime, Empresa experienced financial difficulties. On 16th December 2013, Peckson and Empresa entered a joint venture agreement with Victory Success and another company, Golden Prosperous Ltd (which plays no further rôle in the case). Victory Success was to finance the Hotel with HK\$1.5 billion. On 5th January 2014 Victory Success, Empresa and

³ BVIHCMAP 2013/0026 (determined 22nd May 2015).

⁴ *Sub nom* Chen v Ng [2017] UKPC 27, [2018] 1 P&CR DG2.

⁵ Determined 28th February 2019.

⁶ BVIHCMAP 2018/0011 (determined 8th April 2020).

Peckson entered a loan and pledge agreement (“the loan agreement”). By this, Victory Success was to advance a total of HK\$1.5 billion with the first tranche to be paid to Empresa’s creditors and the balance to be advanced to Empresa directly. Peckson pledged its shares in Empresa as security for the loan. Subsequently, on 25th January 2014 Empresa granted Victory Success a mortgage over the Hotel to secure the borrowings of HK\$1.5 billion (1.545 billion Macau patacas). The mortgage was registered at the Macau Land Registry on 27th January 2014. Registration ensures good title. (Registration in Macau may be of deeds, rather than registration of title itself as under a Torrens system of land registration, but nothing turns on this.)

- [12] Paulo Ramalho Gonçalves (“Advocate Gonçalves”), a Macau lawyer who has acted since February 2018 in Macau on behalf of Victory Success, gives details of the payments said to have been made to Empresa. These started with a cashier order from the Macau branch of the Bank of China in the sum of HK\$150 million on 11th December 2013, then two cashier orders of 6th January 2014 for just under HK\$4 million and just over HK\$3 million. There are a large number of cash payments between 8th January 2014 and 31st January 2014 for sums between HK\$32.2 million and HK\$49 million. (These are astonishingly large cash payments, but it has to be remembered that all parties were involved in the casino industry.) The cashier orders and the cash payments are all receipted by Mr. Xu Zhao-Ji (“Mr. Xu”), the Hotel’s general manager. On 27th January 2014 there was a bank transfer to the Chong Hing Bank Ltd of HK\$248,891.282.06 which paid off all monies owed by Empresa to Chong Hing Bank. On 30th January 2014 and 27th February 2014 there were HSBC cashier orders issued for HK\$50 million and 73 million respectively. These payments total the HK\$1.5 billion due to be lent under the loan agreement.
- [13] Madame Chen disputes that the whole of this sum was paid. She accepts HK\$618 million odd was paid by Victory Success. I shall come back to this issue.
- [14] After Victory Success advanced monies to Empresa, Empresa fell into further financial difficulties. In addition Madame Chen suffered financial strain.

The issues

- [15] What then occurred is at the heart of the current applications. Victory Success's case is this. It says that in order to resolve Empresa's financial misère, a compromise was reached whereby Empresa transferred the Hotel to Victory Success and Victory Success wrote off the HK\$1.5 billion lent together with all the accrued interest. To formalise this, on 4th September 2015 Mr. Xu issued a written notice calling on Mr. Ng (who held a small minority shareholding in Empresa) to attend a special shareholders' meeting of Empresa, the purpose of which was to approve the transfer of the Hotel to Victory Success. On 22nd October 2015 Empresa and Victory Success entered a deed of compromise, known in Macau law as a *datio in solutum*. By this Victory Success waived its claim to HK\$1.5 billion and interest and Empresa transferred legal title to the Hotel to Victory Success. On this basis, Victory Success argues that the injunction of 10th April 2019 (as extended) is completely ill-founded and stands to be discharged.
- [16] Madame Chen's case on the facts is very different. Her case is that Mr. Xu, who had signing rights on behalf of Empresa, was kidnapped by associates of Victory Success and Alvin Chau Cheok-wa ("Mr Chau"), who is said to stand behind Victory Success. As a result of these threats, Mr. Xu executed a power of attorney in favour of the second defendant ("Mr. Zhan"), so that Mr. Zhan could sign the *datio in solutum* on behalf of Empresa and various other documents. The *datio in solutum* is accordingly void, or in the alternative, voidable. It is thus ineffective to transfer title to the Hotel to Victory Success. Madame Chen is entitled to an injunction to give her the fruits of her victory in the 2012 action. Alternatively, if technically the cause of action against Victory Success is vested in Empresa or Peckson, it is easy to substitute those companies for her as claimant in this action.
- [17] Mr. Carroll of counsel, who appeared for Empresa and Peckson, supported Madame Chen's stance and indicated that those companies would be willing to be substituted as claimants, if that was appropriate.
- [18] Mr. McDonnell QC, who appeared for Madame Chen said there were three issues:
- (A) Does Madame Chen have a good arguable case for the relief which she is seeking in this Action?

(B) Is Madame Chen entitled to have the Injunction against [Victory Success], which was originally granted by Adderley J on 10 April 2019, continued until trial?

(C) Should the Court stay this action on the ground that the BVI is *forum non conveniens* — or in other words that there is another forum in which this case could more suitably be tried for the interests of all the parties and for the ends of justice? (To this can conveniently be added the question whether a stay should be on terms, so that Victory Success may not plead any limitation issue in Macau.)

[19] To these, Mr. Rubin QC, who appeared for Victory Success, added three issues: first whether the injunction was barred by the **Mozambique** principle established by the House of Lords in **British South Africa Co v Companhia de Mocambique**,⁷ second whether the injunction should be discharged for material non-disclosure and third whether the injunction should be discharged for delay.

Does Madame Chen have a good arguable case?

[20] I shall begin with Mr. McDonnell QC's issue (A). The first step in considering whether to grant an interim injunction is whether the claimant has shown a "serious question to be tried": **American Cyanamid Co v Ethicon Ltd.**⁸ Although it would perhaps be logical to start with the issue of Madame Chen's standing, it is better to start with the substantive factual question. Any failure of standing can be potentially cured; failure to show a serious case on the facts cannot be. If Madame Chen succeeds in establishing a sufficiently arguable case on the facts and overcomes the standing point, the question of balance of convenience needs to be determined.

[21] I turn then to the facts. The earliest documentary evidence of the kidnapping is a report made to the Shenzhen police by Wang He ("Madame Wang"). The police described her as Mr. Xu's girlfriend. She recorded Mr. Xu being seized outside her home on Saturday 17th October 2015. (In another version of Madame Wang's account, given by Madame Chen in the **Ng** litigation, he was seized outside a shop.)

[22] Mr. Xu says that that was inaccurate. In his first witness statement he says:

⁷ [1893] AC 602.

⁸ [1975] AC 396 at p 407.

“33... In the first place the kidnapping took place on Friday 16 October and not 17 October. In the second place Wang He is not and never has been my ‘girlfriend’: that must have been a mistaken inference by the Police and Madame Chen [who repeated this in her witness statement in the other proceedings] (who did not know her). She is the wife of my friend Wang Bin in whose apartment I was staying. In the third place, I did not telephone Wang He and tell her not to report the incident to the Police nor did I tell her that I was with friends and would be home the next day: that must have been done by the kidnappers themselves. Since I have been unable to find Wang Bin or Wang He since the kidnapping, I suspect that Wang He was intimidated by the kidnappers into saying those things.

34. What actually happened was that I had been out shopping on my own in my car. When I got back, Wang He came out and opened the car door for me and then two men grabbed me and dragged me into another car and drove off. Other men in other cars were surrounding us, including Alan Zhan. I am not a weakling, but I had no chance to escape...

35. I was blindfolded by the captors, one of whom had a gun, and taken to a vacant office in Zhuhai where I was kept for a week under the guard of 6 men. They told me that they were acting for Mr. Meng [Henry Meng, who had been a potential investor in the Hotel in late 2013]. They told me that they had my two children under surveillance and they would both be killed immediately if I refused to sign the documents. My son was living in China and my daughter in the USA. They described them both to me and gave me accurate details of their daily lives. I had no choice but to sign the documents.

36. On Monday 19 October they took me to a Zhuhai notary and had the documents notarised... That is the Power of Attorney in favour of Alan Zhan authorising him to sign various other documents on my behalf including a Transfer of Empresa’s Hotel to Victory Success by way of repayment of a loan of HK\$1.5 billion.

37... I signed the Power of Attorney before the Zhuhai notary because I believed that the kidnappers’ threats would be carried out and my children would be killed if I did not sign the documents.

38. I did not study the other documents which I was forced to sign and I do not remember clearly what they were, apart from the 21 receipts for cash, the receipt for HK\$1.5 billion witnessed by Alan Zhan, and the Empresa EGM Notice and Minutes... I do remember that some were in a language which I did not understand. I did not ask what they were because it would have made no difference. All I was concerned about was the threat to kill my children.”

[23] A different account of the kidnapping was given by one Yang Hong Jin (“Mr. Yang”) to a Macau judge in proceedings issued there under case number CV3-15-0017-CPV3. Mr. Yang was an employee at the Hotel. The transcript goes as follows:

“Q from advocate: ...Do you remember accompanying Mr. Xu in October on 17 October on a trip you had made in Shenzhen, China.

A: He took me there that day.

Q: You went with him, so tell the court what happened that day. Is that the day you left Macau? On any previous date? Tell the Court what happened in this trip and what happened that day?

A: We left Macau for Shenzhen that day, the Boss took me out that day, and then he went inside the restaurant. I waited for him outside, and then when he came out, a car appeared. 7-8 people came down, and there was another car behind, they kidnapped my Boss.

Judge: I can't hear you clearly. What did those 7-8 people do?

A: 7-8 people tied up my Boss. 7-8 people caught my Boss.

Judge: What do you mean? Forced him to leave?

A: Forced to go, dragged, caught in the car and drove away.

...

Q from advocate: ...Was Mr. Xu with anyone else?

A: There's another colleague, waiting outside.

Q: That person's name, what was it?

A: Named Zhu Kaozong.

Q: I didn't get the answer. Wasn't there a lady? Wasn't your patron accompanied by a lady?

A: If our Boss picks up someone who he says is private, we won't bother, because the Boss's affairs are not allowed to talk too much. If the Boss told us to wait, we just wait and that's it.

Q: So you've been sitting here waiting and you don't know if your patron was accompanied by anyone, and that?

A: Yes.

Q: And when he left the restaurant, he was alone?

A: Yes, I'm was playing outside with my phone. I don't know when he was coming out. I was playing on the phone and look up and see the Boss being driven away.”

- [24] These two accounts clearly relate to completely different incidents. First, there is the difference of date. Second, on Mr. Xu's account, the kidnapping occurred outside Wang Bin's apartment, where Mr. Xu had been staying, whereas Mr. Yang says it was outside a restaurant where Mr. Xu had been eating. Third, Mr. Xu says that Madame Wang opened his car door on his return from shopping, whereas Mr. Yang says there was no woman present at all when Mr. Xu emerged from the restaurant. No attempt has been made to account for these discrepancies. Mr. Yang has not given evidence in these proceedings, but no explanation for his failure to do so is advanced.

- [25] Madame Wang has given no evidence in these proceedings. Mr. Xu says that is because she and her husband are in fear of those behind Victory Success, but there is no independent evidence of this.
- [26] There are surprising features of Mr. Xu's account of his kidnapping. He has never, either in mainland China or in Macau, reported the matter to the police. He says that he was in terror of the threats made against his children, but then he overcame his fear to give a full account of what occurred. No explanation is given as to why or when he ceased to be fearful or why the threats to his children had ceased to have coercive effect on him.
- [27] Another problem with his evidence is that no Chinese version of his witness statements exists. In both his witness statements he says "I have had translated to me" and lists various documents. He does not say who translated them. Nor does he say who took his evidence or who produced the English-language witness statements which he signed. These deficiencies are of particular weight, because very shortly before the hearing before me, a second witness statement of Mr. Xu made 3rd November 2020 was served which repeats these failings of the first witness statement. It does not address any of these issues, despite their obvious importance.
- [28] Further, some parts of Mr. Xu's first witness statement are clearly not in his words. One of Madame Chen's BVI lawyers, Astra Penn, made a witness statement on 31st August 2020. Paras [21] and [23] of that witness statement were copied almost word-for-word in paras [17] and [19] of Mr. Xu's witness statement of 24th September 2020. No explanation, even if only on instructions, was forthcoming for this congruence of wording. Further the signing page of each of the witness statements is clearly a separate document from the body of the witness statements, so there is no evidence that Mr. Xu even saw the body of the statement when he signed the signing page. Still less is there evidence that the body of the statement had been translated to him.
- [29] Now it is true that the Court is sometimes less than rigorous in insisting that non-English speakers make their witness statements and affidavits in their native tongue and that a certified translation is then provided. However, in the current case there is a very real doubt as to whether Mr. Xu had anything to do at all with the witness statements supposedly in his name.

It often happens that the *contents* of a witness statement or affidavit are attacked, however, I cannot recall a case where it was suggested that a witness statement or affidavit is not made by the person who purports to make it. Witness statements and affidavits are effectively self-proving. The mere production of the document is taken as evidence that it was signed or sworn by the deponent. (The form of the oath on making an affidavit commences: “I swear that that is my name and handwriting...” referring to the name and signature of the deponent on the engrossed affidavit. The commissioner for oaths or notary certifies the swearing.)

- [30] In the current case, I need to have regard to Bannister J's conclusions as to Madame Chen's veracity. In the trial before him, Madame Chen put forward a case that she was the beneficial owner of the Hotel, because in November 1996 she had advanced HK\$100 million to Mr. Ng as the initial deposit on the purchase of the Hotel. She was, she said, at the time an immensely wealthy woman, who owned five hotels in mainland China. The judge found that the evidence that she owned five hotels was “risible”. The judge “found Madame Chen an unreliable witness. Argumentative and evasive, she failed to inspire any confidence that it would be wise to rely upon anything that she said unless it was against her interest or corroborated.” So far as a receipt for the money, supposedly signed by Mr. Ng, was concerned, the judge found, after hearing evidence from handwriting experts, that the receipt had been forged. It must have been forged by or at the behest of Madame Chen.
- [31] The fact that a witness lies on one occasion does not mean that she always lies. However, on this application I am entitled to have regard to the fact that her testimony has been doubted in the past and that she has been found to have forged documents. Normally, an allegation would be treated as fanciful that a witness statement is not made by the purported author and that it is a pure invention of a party. In the current case this easy dismissal of the allegation is not in my judgment possible. There is a real possibility that Mr. Xu's witness statements are complete inventions which have never been seen by Mr. Xu at all, still less approved by him.
- [32] Victory Success asserts that Mr. Xu is in fact in prison, although the evidence for this is hearsay: Advocate Gonçalves' first affidavit para 63. It also asserts that the signatures on Mr. Xu's witness statements are not authentic. The Court is in no position to determine this and there is no expert evidence. Nonetheless, I do note that it is extremely easy for Madame Chen to disprove the allegation that Mr. Xu's witness statements are not his. All Mr. Xu need to do is

go to a notary in China, prove his identity and confirm the truth of the witness statements. Given that China has been very successful in suppressing the coronavirus, there would be no difficulty in his attending a notary.

- [33] Mr. Xu's second witness statement was in response to an affidavit of Rui Sousa ("Advocate Sousa") sworn on 28th October 2020. He is a lawyer and notary public in Macau, practising with the firm of JNV. He acted for Victory Success in a number of cases involving travel agents, but had no involvement with the litigation with Madame Chen. He says:

"7... Mr. Xu fails to mention the fact that a meeting was held at the offices of JNV on 21 April 2016 which he himself attended. The purpose of that meeting was to discuss the ongoing litigation in Macau concerning case CV2-16-008-CAO. In those proceedings it was, at that time, claimed by Mr. Ng that Victory Success and Empresa had colluded together to transfer the [Hotel].

...

9. At the time of submission of the collusion claim, Mr. Ng... was the sole Director of Empresa, appointed by... minutes of the General Meeting of Shareholders, held on 15 January 2016, replacing Mr. Xu... who was previously appointed as director...

10. Mr. Ng... claimed that during the time in which Empresa was controlled by Mr. Xu..., the business associate of Madame Chen, the company has entered into collusion with Victory Success to simulate a loan agreement, in the total amount of HK\$1.5 billion granted by Victory Success to Empresa, executed on the 25th January 2014, and to simulate a transfer of property in lieu of payment of debt agreement (the '*datio in solutum*'), executed on the 22nd October 2015.

11. Mr. Ng... claimed that Empresa had not received any amounts in respect of the said loan from Victory Success and therefore the loan and mortgage agreement and the transfer of the property agreement in lieu of payment of debt agreement should be declared null and void.

12. I was in attendance at that meeting with various members of our firm...

13. Victory Success was represented by Mr. Alvin Chau and Gina Lei who was a member of Mr. Chau's staff; and Isabel Azedo who was a contractor at that time appointed to carry out the redevelopment of the [Hotel].

14. At the invitation of Mr. Chau, Mr. Xu attended this meeting for the purposes of clarifying his authority to act on behalf of Empresa and to discuss his role in the claim CV2-16-0008-CAO. During that meeting the various loans made by Victory Success to Empresa were discussed. Mr. Xu acknowledge the receipt of the HK\$1.5 billion loan from Victory Success and stated that it had been paid to individual creditors of Empresa. He then produced some 21 receipts evidencing this, signed by him together with a receipt for the total loan amount of HK\$1.5 billion also signed by him. We asked

Mr. Xu to collect the details of all individual creditors who had received payments. At no stage during that meeting did Mr. Xu claim to have been kidnapped or that he had been coerced into signing any documents.”

[34] Mr. Xu in his second witness statement says:

“3. I do not question the truthfulness of Mr. Sousa’s account of that meeting except that the person who was introduced to him and his colleagues by Mr. Chau as being me was not in fact me and must have been an impostor.

4. As appears from the Chinese Border Control Records of my departures from China of which I have included an extract for the relevant period in Tab 16 of the Electronic Bundle to which I shall refer in this Witness Statement, I did not leave China after my kidnapping until I travelled to London for the Privy Council Hearing at the end of October 2017.”

[35] Mr. Xu exhibits one page of the border control records. Apart from some Arabic numbers (some of which are dates), it is all in Chinese and was not translated. I was told in argument that the page does not in fact mention Mr. Xu’s name at all. No information is given as to how Mr. Xu came to be in possession of the document.

[36] Be that as it may, there is a critical problem with the information. The first date at the top of the document is 3rd November 2017, which he says is the date of his return from London, where he attended the Privy Council hearing on 30th October. The second entry is 27th October 2017, when he says he left for London. The third date is 14th December 2014, which must be a date of entry into China (otherwise how could he leave the country on 27th October 2017?). So far so good: Mr. Xu did not leave China between December 2014 and October 2017. However, he does not say what is meant by “China”. Macau is part of China. Mr. Xu says⁹ that shortly before 16th July 2015 he “consulted Advocate Leitão in Macau.” The natural meaning of that is that there was a face-to-face meeting between the two men in Macau. However, any doubt as to that is dispelled by the fact that he then sent a registered letter to Victory Success here in the BVI. The receipt for the registered letter shows it was posted from Macau: see p 175 of 223 of the electronic copy of Mr. Xu’s exhibit to his first witness statement. It follows that trips between the mainland and Macau do not appear on these Border Control records. (Mr. Yang says he and Mr. Xu travelled from Macau to the mainland on the day of Mr. Xu’s alleged

⁹ 1st witness statement para 31.

kidnap, but it is not clear if Mr. Xu accepts that he travelled with Mr. Yang. If he did, then this trip was not shown on the Border Control records either.) Thus, even if the other problems with the document were overcome, the record would not show that Mr. Xu had an alibi for 21st April 2016.

Serious question to be tried

- [37] I stand back then and ask whether Madame Chen has shown a serious question to be tried. If Mr Xu's witness statements are not admissible, then she has no case at all. Even if she could rely on Mr. Yang's evidence as given in the Macau proceedings, this would not show that the power of attorney was obtained by duress. This is because Mr. Yang cannot speak to how long the duress lasted or to any threats made regarding Mr. Xu's children. There was no evidence from Mr. Yang that when Mr. Xu attended the notary to sign the power of attorney and the other documents, he was still under duress. Once Mr. Xu was released from captivity, the duress caused by being kidnapped ended. (Duress from the threats to kill could have continued, but Mr. Yang could not give evidence about that.) This was the basis on which the Macau judge refused an *ex parte* injunction.
- [38] Are Mr. Xu's witness statements admissible? I was referred to no authorities on the legal test to be applied in deciding whether a witness statement is inadmissible on the ground that it was not a witness statement of the purported deponent. This is no doubt because such allegations are so rare. I therefore go to first principles. As I have said, witness statements and affidavits are normally self-proving, in the sense that they are assumed to have been made by the person who purports to make them. It would put an unfair burden on a party challenging their genuineness to have to prove on balance of probabilities that the document was forged. This is particularly so, since it will normally be straightforward for the party challenged to prove that the person who purported to make the witness statement or affidavit was that person. Even in an international case like the present, it would be easy for Mr. Xu to go to a notary and prove his *bona fides*. In my judgment it suffices that the party challenging admissibility raises an arguable case. The burden then shifts to the party challenged to show the genuineness of the witness statement or affidavit.
- [39] Has Victory Success shown an arguable case that the witness statements are not in truth those of Mr. Xu? In my judgment they have. Firstly, there is some evidence the signatures of

Mr. Xu on the witness statements are not his. There is no expert evidence, but just as a lay person can say in plain cases that an English signature is not genuine, so too a lay person can say a Chinese ideogram is not that of the person purportedly signing. Secondly, the evidence (albeit weak evidence) that Mr. Xu is in prison has not been disproved, as it could easily have been. Thirdly, no explanation is given as to how Mr. Xu, who speaks no English, comes to give evidence solely in English.

[40] Although those considerations are enough in my judgment in themselves to raise an arguable case for Madame Chen to answer, I think I am entitled as well to have regard to the ease with which Madame Chen could disprove the allegation. Going to a notary in Shanghai, where Mr. Xu says he lives, would have been easy. (I think I can take judicial notice of the fact that China has been very effective in suppressing the coronavirus, so that notarial services would have been available. However, even if I am not entitled to take judicial notice of that fact, no evidence has been adduced that Mr. Xu could not visit a notary.) Even just exhibiting his passport and a household utility bill would have provided some evidence that he was making the witness statements. No attempt has been made, as it so easily could have been.

[41] Accordingly, Victory Success have shown an arguable case that the witness statements purportedly by Mr. Xu are not in fact his. Madame Chen has adduced no evidence to gainsay that. I therefore hold that Mr. Xu's witness statements are not admissible.

[42] It follows that Madame Chen has failed to show a serious question to be tried and her application for an injunction fails *in limine*.

[43] Since, however, the matter may go further, I shall consider the question on the assumption that the two witness statements from Mr. Xu are in fact his. My starting point is that Mr. Xu's claim that he was kidnapped is inherently unlikely. I do not accept that, even in the "wild Far East" of the Macau gaming industry, kidnapping is a regular feature of life. However, neither do I accept the submission on behalf of Victory Success that the idea of there being a kidnapping is simply preposterous and can be dismissed out of hand.

[44] It is well established that it is not appropriate to carry out a mini-trial when considering whether to grant or extend an interlocutory injunction.¹⁰ Thus, I am not determining whether Mr. Xu was kidnapped or not. All I am deciding is whether Madame Chen has shown a sufficient case that he was, so that there is a serious question to be tried. If she has, I need then (after deciding on her standing) to consider the next step of the balance of convenience. In determining whether she has shown a serious question to be tried, it is right to bear in mind the guidance in cases like **In re Dellow's Will Trusts**:¹¹

“The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.”

[45] That common-sense observation was approved by the House of Lords in **Re H (Minors) (Sexual Abuse: Standard of Proof)**¹² and in **Re B (Children) (Care Proceedings: Standard of Proof)**,¹³ albeit in the context of determinations at trial.

[46] It is not sufficient to establish a serious issue for Mr. Xu simply to assert that he was kidnapped and executed documents due to the fear that his children would be shot. The evidence of this has to meet a minimum standard of cogency.

[47] My starting point in considering this is the differing accounts of the kidnapping by Mr. Xu and Mr. Yang. There is no way to reconcile the accounts based on *bona fide* differences of recollection. As I discuss above in para [24], they are describing two completely different incidents. Madame Chen's case to me is that Mr. Xu's account is accurate. It necessarily follows in my judgment that Mr. Yang's account is simply an invented story. Yet no explanation is given as to how his account came to be given in the terms it was in the Macau *ex parte* injunction proceedings. The inference I draw is that Madame Chen suborned him.

[48] If that is an appropriate inference in regards to Mr. Yang, it would be an equally appropriate inference to draw in relation to Mr. Xu. Indeed, the inference may be stronger. Mr. Yang was a junior employee (the translation of his evidence suggests he might have been a bellboy at

¹⁰ *Gryspeerd v Clico Investment Bank Limited* SLUHCVP2017/0016 (determined 8th September 2017, unreported) at para. 11 (Pereira CJ).

¹¹ [1964] 1 WLR 451 (Ungoed-Thomas J).

¹² [1996] AC 563.

¹³ [2008] UKHL 35, [2009] 1 AC 11.

the Hotel). Mr. Xu was on any view a close associate of Madame Chen. As such he had a motive for lying to assist Madame Chen.

[49] There are other, quite separate, reasons to conclude that Mr. Xu is not a witness of truth. I have referred to the false alibi he sought to establish in respect of the meeting with Advocate Sousa. The truthfulness of what Advocate Sousa says is not challenged. The only point made by Mr. Xu is that there was an imposter at the meeting. That suggestion can in my judgment properly be dismissed as preposterous. It has to be remembered that in 2016 Empresa was under the control of Mr. Ng. Madame Chen and Victory Success were making a common cause against Mr. Ng. There is no reason why an imposter should have been sent along to this important meeting.

[50] If Mr. Xu did attend the meeting on 21st April 2016 (and the overwhelming evidence in my judgment is that he did), then a number of points arise. Firstly, it is not credible that he did not mention the kidnapping and the circumstances in which he came to give the power of attorney, if the kidnapping had indeed occurred. Secondly, the production of the twenty-one receipts undermines Madame Chen's case that only HK\$618 million was lent by Victory Success to Empresa. Madame Chen's case on the HK\$618 million was never very convincing in the light of the Macau legal documentation and the absence of any contemporary complaints of underpayment, but Advocate Sousa's evidence of the receipts is extremely strong evidence against Madame Chen's case on underpayment of the loan.

[51] A further important consideration in deciding whether Madame Chen has shown a serious question to be tried is what Victory Success's motive might have been to arrange Mr. Xu's kidnapping. Victory Success had good security for its lending to Empresa. By 2015, Empresa was in financial difficulties. Victory Success would have been able, with little difficulty, to enforce its mortgage over the Hotel. By the *datio in solutum* it gave up its rights to repayment of the HK\$1.5 billion and accrued interest in return for the Hotel. If Victory Success wanted possession of the Hotel it did not need to force Mr. Xu to give Mr. Chau a power of attorney. Indeed, even only HK\$618 million had been lent, Victory Success would still have had its right to foreclose.

[52] Standing back, I need to take a holistic view as to whether Mr. Xu's evidence reaches a minimum threshold of cogency, so that there is a serious issue to be tried. In my judgment, his evidence does not meet that threshold. Firstly, the discrepancies between Mr. Xu's account of the kidnapping and Mr. Yang's show that one or both of them are lying. Given that both were witnesses of Madame Chen, there is a more than realistic possibility that both were lying. Secondly, Mr. Xu has never complained to the police about his kidnapping. Thirdly, Mr. Xu lied about not attending the meeting with Advocate Sousa and sought to support his case with a false alibi. Fourthly, Advocate Sousa's evidence is strong that the full amount of the loan was advanced and that the *datio in solutum* was a properly executed compromise of the claims between Victory Success and Empresa. Fifthly, there was no reason for Victory Success to arrange Mr. Xu's kidnapping; it had adequate security and could foreclose if it wished to. Given my starting point that Mr. Xu's allegation of having been kidnapped is improbable, Madame Chen has not shown that his evidence is sufficiently cogent to overcome the inherent improbability of his account of events.

[53] It follows that Madame Chen has not shown a serious question to be tried on the facts. The injunction granted her accordingly falls to be discharged on this ground alone. I determine Issue (A) against Madame Chen.

Standing

[54] I turn then to the question of standing. This of course only arises if Madame Chen has established a serious case to be tried on the facts. I shall therefore proceed on the basis that I am wrong in my conclusion that she has failed to do so. Mr. McDonnell says that Mr. Xu was Madame Chen's agent. She therefore has a cause of action for unjust enrichment against Victory Success. As he put it in his skeleton argument for the *ex parte* hearing before Adderley J:

"29. If the Power of Attorney was void there can be no doubt that the Transfer executed by Alan Zhan was void for want of authority, particularly since the first express purpose of the Power of Attorney was the execution of the Transfer. Even if it was only voidable, the Transfer must also be regarded as procured by duress...

30. Viewed in terms of unjust enrichment, the purpose of the unlawful and unconscionable conduct on the part of Alan Zhan was the enrichment of Victory Success by the Transfer of the Hotel (and his own enrichment by what he received from Victory Success by way of remuneration)."

[55] The difficulty with the unjust enrichment claim is that the subject of supposed unjust enrichment was the Hotel. The Hotel was owned by Empresa, not by Madame Chen. Indeed, she only beneficially owned 80 per cent of Empresa through her 80 per cent shareholding in Peckson. There is in my judgment no arguable basis for saying that Madame Chen had herself a cause of action. The loss was suffered by Empresa. She is not entitled to claim as an indirect shareholder for any reflexive loss: see most recently **Sevilleja v Marex Financial Ltd.**¹⁴ This case had admittedly not reached the UK Supreme Court by the time of the hearing before Adderley J, but it followed earlier decisions going back to at least 1843.¹⁵

Balance of convenience

[56] If I am wrong about all the forgoing, I need to consider the balance of convenience. I can deal with this shortly. Madame Chen appears to be impecunious (I discuss this further below in relation to full and frank disclosure). Peckson and Empresa are equally impoverished. At present the Hotel is held in a stalemate. It is producing no revenue for anyone and its fabric is deteriorating. Even if Madame Chen were to succeed in the current action and was able to show the transfer of the Hotel was made under duress, the sole effect would be to restore the situation at the outset: Victory Success holding a valid mortgage for HK\$1.5 billion lent under the loan agreement with no repayments of the loan having been made for many years.

[57] If Madame Chen had a better claim on the merits, there may have been scope for considering whether Peckson or Empresa should give some form of cross-undertaking, possibly backed by some form of fortification. However, the fact is that restoring the *status quo ante*, which is the best Madame Chen could hope to achieve, would bring her no material benefit: Victory Success would be restored to its position of being a secured creditor for an amount which Empresa, Peckson and Madame Chen have no ability to service.

[58] In my judgment the balance of convenience is against continuing the injunction granted by Adderley J. Accordingly I rule against Madame Chen on Issue (B).

¹⁴ [2020] UKSC 31, [2020] 3 WLR 255.

¹⁵ *Foss v Harbottle* 2 Hare 461.

Forum non conveniens

[59] I turn then to Victory Success's application for a stay of the action based on this Territory being a *forum non conveniens*. The leading authority is **IPOC International Growth Fund Ltd v LV Finance Group Ltd and others**¹⁶ where Gordon JA held:

"This jurisdiction has frequently had to deal with the principles that a trial judge should apply in exercising a discretion whether to stay proceedings on the grounds of *forum non conveniens*. As always the starting point is **Spiliada Maritime Corporation v Cansulex Limited**,¹⁷ a decision of the House of Lords, the learning within which has on more than one occasion been accepted by this Court. In the lead judgment, Lord Goff of Chieveley summarised the law in the following way, and I take the liberty of paraphrasing the learned Law Lord:

(i) The starting point, or basic principle, is that a stay on the grounds of *forum non conveniens* will only be granted where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action. In this context, appropriate means more suitable for the interests of all of the parties and the ends of justice.

(ii) The burden of proof is on the defendant who seeks the stay to persuade the court to exercise its discretion in favour of a stay. Once the defendant has discharged that burden, the burden shifts to the claimant to show any special circumstances by reason of which justice requires that the trial should nevertheless take place in this jurisdiction. Lord Goff opined that there was no presumption, or extra weight in the balance, in favour of a claimant where the claimant has founded jurisdiction as of right in this jurisdiction, save that 'where there can be pointers to a number of different jurisdictions' there is no reason why a court of this jurisdiction should not refuse a stay. In other words, the burden on the defendant is two-fold: firstly, to show that there is an alternate available jurisdiction, and, secondly, to show that that alternate jurisdiction is clearly or distinctly more appropriate than this jurisdiction.

(iii) When considering whether to grant a stay or not, the court will look to what is the 'natural forum' as was described by Lord Keith of Kinkel in **The Abidin Daver**,¹⁸ 'that with which the action has the most real and substantial connection.' In this connection the court will be mindful of the availability of witnesses, the likely languages that they speak, the law governing the transactions or to which the fructification of the transactions might be subject, in the case of actions in tort where it is alleged that the tort took place and the places where the parties reside and carry on business. The list of factors is by no means meant to be exhaustive but rather indicative of the kinds of considerations a court should have in exercising its discretion.

¹⁶ Civil Appeal Nos 20 of 2003 and 1 of 2004 (determined 19th September 2005, unreported) at para [27].

¹⁷ [1987] 1 A.C. 460.

¹⁸ [1984] A.C. 398.

(iv) If the court determines that there is some other available and prima facie more appropriate forum then ordinarily a stay will be granted unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. Such a circumstance might be that the claimant will not obtain justice in the appropriate forum. Lord Diplock in the **Abidin Daver** made it very clear that the burden of proof to establish such a circumstance was on the claimant and that cogent and objective evidence is a requirement.”

[60] Step (i) is to consider where the most appropriate forum is. I have no hesitation in saying that the appropriate forum is Macau. The Hotel is there. Any issues of dilapidations at the Hotel are more conveniently dealt with there. All the witnesses are there or in mainland China. All the relevant documents are in Chinese or Portuguese, which the Courts of Macau are able to handle very much more conveniently than this Court. The relevant law of duress will be either Macau law or the law of the People’s Republic of China. Again, the Macau courts are much better placed to consider any issues of law which arise. Mr. McDonnell QC argues that this Court will apply the BVI law of duress, if the trial occurs here. I doubt that, but even if it is right, it is a matter of little weight in considering the appropriate forum. Not surprisingly all of the systems of law treat threats to kill as matters which vitiate consent. There is nothing to make this Territory an appropriate venue. The only connection the case has with this jurisdiction is that Victory Success is incorporated here.

[61] Accordingly, under step (ii) the burden shifts to Madame Chen to show some legitimate juridical advantage in suing here. The only matter put forward is an issue as to limitation or prescription. It is common ground that for at least some forms of duress there is a one-year period of prescription. If the one-year period of prescription elapses, then that creates a substantive bar to reliance on duress. As such it is different to the expiry of a period of limitation, which merely creates a procedural bar to any claim. At common law, being a procedural matter, a statute of limitations is treated as a matter for the *lex fori*, so we here in the Virgin Islands would apply our own **Limitation Act 1961**.¹⁹ It is otherwise with a prescription period, which bars the right as well as the remedy.

¹⁹ No 20 of 1961, Revised Laws of the Virgin Islands. In England and Wales the common law has been reversed by the Foreign Limitation Periods Act 1984 c 16, but this Territory is still subject to the common law rules.

[62] Both sides adduced expert evidence of Macau law. There were four views: firstly that there was a one year prescription period, which ran from the date of the execution of the document which was made under duress; secondly that there was a one year prescription period, which ran from the date on which the person who had been under duress ceased to be under duress; thirdly there was a one year prescription period which ran from the time Victory Success obtained legal possession of the Hotel; and fourthly that there was no limitation or prescription period at all. The fullest expert report was given by Prof Paula Costa e Silva, who was instructed on Madame Chen's behalf. She explained that there was a difference between "moral coercion" and "physical coercion". The former made the transaction entered in consequence of the coercion voidable and was subject to the one-year prescription period. The latter rendered the transaction void; there was no limitation or prescription period on this. She considered the threats to kill were a form of physical coercion, so there was no prescription period. Advocate Leitão says that Victory Success, as a result of a Macau injunction obtained by Empresa, does not have legal possession of the Hotel, so time has not started to run.

[63] In fact it makes no odds which expert view is right. The claim form in the current action was issued on 1st April 2019. That is more than year after the making of the power of attorney and the transfer of the Hotel. It is also more than a year after Mr. Xu ceased to be in fear for the lives of his children. Thus if the claims based on duress were the subject of the one year prescription period from any of those starting points, they were already time-barred when the current proceedings were brought. If the claims are not subject to the one-year prescription period, then time has not yet run. If the prescription period, as Advocate Leitão contends, runs from the date of Victory Success obtaining legal possession of the Hotel, it has not started to run.

[64] Where a party issues proceedings in a *forum non conveniens* at a time when a limitation period has not expired in the *forum conveniens*, the Courts will sometimes refuse a stay of the action in the former venue unless the defendant agrees to waive any limitation point in the latter venue. In the current case, however, Madame Chen has no juridical advantage from suing here. Either her claim was statute barred when she issued proceedings here, or there is no period of limitation or prescription, or the time for prescribing has not started to run. This is the same position if she were now to issue proceedings in Macau.

- [65] Accordingly under step (ii), I find Madame Chen has no legitimate juridical advantage from suing here.
- [66] Under step (iii), for the reasons I gave under step (i) the “natural forum” for the action is Macau.
- [67] As to step (iv), there is no evidence that Macau could not do substantial justice between the parties. Quite the contrary in fact. There have already been no less than six different actions brought in Macau in relation to issues between the parties.
- [68] Accordingly, I will order a stay of the current proceedings on the ground that this Territory is *forum non conveniens*. I will not attach any terms to the stay of the proceedings. Issue (C) is thus determined against Madame Chen as well.

The Mocambique point

- [69] I shall deal very briefly with Mr. Rubin QC’s **Mocambique** point, because it is no longer material. The House of Lords in that case established a principle that the English courts would not entertain an action to establish title to land abroad or to claim damages for trespass to land abroad. There are obvious difficulties with this Court issuing a writ addressed to the sheriff of Macau (or whoever the equivalent official might be) ordering him or her to deliver the Hotel up to Madame Chen. That would be impinging on the sovereignty of a foreign state. Likewise, for the same reason this Court would have no jurisdiction to issue an order directed to the Registrar of the Registry of Deeds of Macau to give effect to this Court’s determination of title to the Hotel.
- [70] The Court does, however, have a power to act *in personam*. Victory Success is subject to this Court’s jurisdiction. This Court has the power to make injunctions against Victory Success. Indeed this Court by, for example, appointing receivers has the actual power to enforce its orders against Victory Success. Thus, the English courts will enforce a contract to grant a mortgage over foreign lands where it has personal jurisdiction over the defendant: **British South Africa Co v De Beers Consolidated Mines Ltd.**²⁰

²⁰ [1910] 2 Ch 502.

[71] It is arguable that — in theory at least — it would be open to this Court, after a trial, to declare that the transfer of the Hotel to Victory Success was void and order Victory Success to transfer the Hotel back to Empresa. However, as my discussion of *forum non conveniens* shows, it would not be appropriate for the Court to exercise such a jurisdiction (assuming it has it at all).

Material non-disclosure

[72] I turn then to the complaint that there was material non-disclosure on the *ex parte* application to Adderley J. A party's duty making an *ex parte* application is well-established. Ralph Gibson LJ said in **Brink's Mat Ltd v Elcombe**:²¹

“(1) The duty of the applicant is to make ‘a full and fair disclosure of all the material facts.’

(2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers.

(3) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(4) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J²² of the possible effect of an **Anton Piller** order; and (c) the degree of legitimate urgency and the time available for the making of inquiries.

(5) If material non-disclosure is established the court will be ‘astute to ensure that a plaintiff who obtains [an *ex parte* injunction] without full disclosure... is deprived of any advantage he may have derived by that breach of duty.’

(6) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

²¹ [1988] 1 WLR 1350 at p 1356, citations omitted.

²² *Columbia Picture Industries Inc. v Robinson* [1987] Ch 38.

(7) Finally, it 'is not for every omission that the injunction will be automatically discharged. A *locus poenitentiae* may sometimes be afforded.' The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the *ex parte* order, nevertheless to continue the order, or to make a new order on terms

'when the whole of the facts, including that of the original non-disclosure, are before [the court, it] may well grant... a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.'"

[73] This was approved by our Court of Appeal in **Enzo Addari v Edy Gay Addari**,²³ In **Paraskevaides and another v Citco Trust Corp and others**,²⁴ Carrington JA said:

"[31] ...The onus is on an applicant for *ex parte* relief to comply with the obligation to make full and frank disclosure as *ex parte* applications are, generally speaking, inconsistent with the adversarial nature of court proceedings under our system of law which usually permits a respondent to be heard before an order is made against them. The key elements are that the duty is not only to disclose what the party or their legal advisers considers to be material but what one reasonably should expect a court to consider to be material in the exercise of its discretion whether to grant the order being sought. This requires not only objective consideration of the matters that the party puts before the court, but also an active duty to make proper inquiries so as to determine whether there is other material that may available for him to place before the court on the application. This is because even an innocent non-disclosure on account of a party not being aware of the fact or not realizing its materiality may be a factor against him whereas a deliberate non-disclosure will always be a factor against him.

[32] A distinction may perhaps be made here between material that is known and material that ought to have been known by an applicant. The extent of the obligation differs between the two categories of material. With respect to the former, the duty appears understandably to be more absolute. Whereas for the latter, the duty is to make proper inquiries as to the existence of further material facts. The extent of this obligation to make such inquiries is dependent on all the circumstances including the nature of the case being advanced, the order being sought, the effects of such an order, if granted, on both the applicant and potential respondent and the interplay between the degree of urgency of the application and the time available for making such inquiries.

[33] Once it has been established that there has been non-disclosure of a material fact, and the duty is in relation to facts, the Court must ensure that the party who failed

²³ Civil Appeal No 2 of 2005 (determined 27th June 2005).

²⁴ BVIHCMAP 2018/0046 (determined 30th March 2020). The citation given for Addari in Paraskevaides is to a later appeal in the same case, but the judgment detailed in the previous footnote is the one intended.

to disclose is stripped of any advantage that he gained from that breach of his duty. This may not always result in the discharge of the ex parte order but, even if it does, the Court may nevertheless grant a fresh order if the non-disclosure was innocent only and the balance of convenience in light of all the material facts of which the court is aware demands that a new injunction should be granted. However, the consequences of non-disclosure are not necessarily as severe if the court finds that the non-disclosure relates to a fact that is of lesser importance to the issues to be determined in order to grant the relief being sought.”

[74] Para 100 of Victory Success’s skeleton identifies the following heads of non-disclosure:

“(1) The Judge was not told that Macau was the more convenient forum. None of the factors relevant to the appropriate forum... was identified to the court or addressed. Neither was the Court told that the Privy Council had been told that Macau was the forum within which Madame Chen would propose to litigate her claims against Victory Success.

(2) The Court was left with a confused picture of the corporate structure. It was told that the Receivers appointed by the Privy Council had been appointed over the assets of Peckson (see page 6 at lines 23-25 of the transcript). However, the submissions then conflated Peckson with Empresa (see the submissions made at page 14 of the transcript).

(3) Although the Court was told that there were issues with Madame Chen’s standing to bring proceedings, the Receivers (to be remembered, officers of this Court) assured the Court that they would take steps to substitute themselves as Claimants in the event that a standing point was taken. As a result, the Court was led to think that the standing issues were not of concern and that injunctive relief was appropriately given. Having given those assurances, the Receivers (and Madam Chen) have acted in persistent breach of them ever since.

(4) The Court’s attention was not drawn to the plethora of factors... which suggested that the kidnapping story was highly improbable.

(5) It was not told of the dismissal by the Macau Courts of Empresa’s 2016 attempt in Macau to obtain injunctive relief on the basis of the kidnapping story, which had been dismissed.

(6) The Judge was led to believe that BVI law which was more favourable to Madam Chen than Macau law could apply to the duress claim. Yet plainly Macau law was the only arguable applicable law in relation to the title and possession of the Hotel. By doing so Madame Chen side-stepped disclosure of the weakness of her claim under Macau law and a time bar obstacle under Macau law which she says she has now found a way around. But she had not done so at the time, hence no doubt why the issue was avoided.

(7) The fact that on her own case Victory Success had advanced at least HK \$619 million was not disclosed and that the security would operate in its favour in even if the claim succeeded.

(8) The Judge was not informed of Madam Chen's poor financial position and that she could not honour her cross-undertaking in damages.

(9) The court was encouraged to think that restraining the proposed works at the Hotel was needed without being told that the injunction would have the effect of preventing urgent work needed to ensure public safety and save the Hotel from further serious decline. This would have serious consequences for owner whoever it turned out to be. It was vital to explain this and the effect it might have on Victory Success.

(10) The four-year delay in bringing the claim was not identified to the Judge or explained."

[75] The transcript of the *ex parte* application on 10th April 2019 runs to some 81 pages. Mr. McDonnell QC starts by explaining to Adderley J that there are two matters before him. First, there was an application in the 2012 action to bring contempt proceedings against Mr. Ng and Victory Success (who were to be the subject of a new ancillary claim in that action) for interfering with the receivers appointed by this Court. Second, there was the application in the current action for the *ex parte* injunction against Victory Success. Mr. McDonnell explained²⁵ that "the reasons why [this] action is brought now in this jurisdiction can only be explained on the basis of the subject matter of [the other] application which is based on contempt of court."

[76] Counsel does not then come back to discuss any points which Victory Success might have made on the bringing of the current action in this Territory. Now it is true that (because Victory Success is a BVI company) there was no need, and therefore no application, to serve outside the jurisdiction, so the duty to argue that the Court should assume jurisdiction as a *forum conveniens* did not arise. However, this does not mean the claimant could just ignore *forum* issues. On the contrary, in my judgment the claimant was obliged to bring the arguments I have set out under the heading "*Forum non conveniens*" to the judge's attention, because these were matters on which Victory Success would be able to rely (and now have relied) to stay the proceedings.

[77] In addition, the claimant should have brought the **Mocambique** point to the judge's attention. Now I have not ruled that this was quite the knock-out point Mr. Rubin QC sought to make it,

²⁵ Transcript p 3.

but (a) it is fairly arguable and (b) it was very relevant to the appropriate forum question. Instead the judge was only referred to **De Beers**, thus giving an unbalanced submission.

[78] Further, the change of tactics between the October hearing before the Privy Council, who were told proceedings would be brought in Macau and the application to Adderley J was not brought to the judge's attention. If it had been, no doubt he would have focussed a lot more on the reasons and their adequacy as justification for the change in the choice of venue.

[79] Accordingly complaint (1) of non-disclosure is in my judgment made out.

[80] I do not accept complaint (2). Adderley J had just heard a very long trial involving these issues. Even if there were inexactitudes in the way Mr. McDonnell QC presented the corporate structure to the judge, the judge would have been well aware of the true facts.

[81] Complaint (3) is a serious matter and in my judgment is made out. The reason the receivers were reluctant to have Peckson and Empresa as claimants in the current litigation was because of the dire financial circumstances of those companies. (This is why they did not make themselves directors.) Having Madame Chen as the claimant is not a mere technical matter capable of easy rectification, as was submitted to the judge. On the contrary, the claimant's having a cause of action vested in her is precondition for her being entitled to any relief whatsoever. Further, there are grave doubts as to whether there was any real willingness on the part of the receivers to be substituted as claimants. When Appleby asked that the substitution be made, no steps were taken either by Madame Chen or by the receivers to achieve that.

[82] Complaints (4) and (5) I can take together. A judge of a court of competent jurisdiction in Macau had rejected Madame Chen's claim of duress. It is true that Madame Chen mentions the *ex parte* application in her first affirmation at para [16]. However, she downplayed the point. It was not drawn to the judge's attention in either the skeleton or the oral submissions, as it should have been in my judgment. Now it is true that the Macau judge only had the evidence of Mr. Yang and was able to reject the application for an *ex parte* injunction on the narrow basis that there was no evidence that Mr. Xu, when he went to the notary, was under duress. However, any judicial determination adverse to Madame Chen on the issue of duress

must be treated as of substantial weight. At the very least it would have caused Adderley J to examine in detail why he should differ from the determination of the Macau judge.

[83] Further, the judge's attention was not drawn to the potential weaknesses in the case of kidnapping. As a general rule, practitioners on an *ex parte* application have a section (usually at the end) entitled "Full and Frank Disclosure". Mr. McDonnell QC's skeleton for the 10th April 2019 did not. Nor is there any separate section in his oral submissions to Adderley J in which he, as a discrete matter, address full and frank disclosure. Mr. McDonnell submits that full and frank disclosure was spread throughout the oral submissions. I do not agree that this was done in respect of the matters where I have accepted Victory Success's points on non-disclosure. Even it were not so, a judge needs to know what the defendant would say if it were present at the *ex parte*. A fair presentation of the other side's case requires some structure. In particular, even if there was a fair presentation of discrete points (and there was not), a party like Victory Success is entitled to have put to the judge the cumulative effect of the points it would have wished to make. This is why it is important to have all the points on which Victory Success might rely pulled together in one section.

[84] As to complaint (6), it is doubtful that the BVI law of duress was very relevant, but I can see no relevant difference between it and Macau's law of duress. Both have very similar features, down even to the question whether a transaction made under duress is void or voidable. I do not consider this head constitutes non-disclosure.

[85] Complaint (7) shows serious non-disclosure. The whole basis of Madame Chen's case was undermined if the judge had been told that success on the duress argument would merely mean to a restoration of the *status quo ante*. Not only is this a point which deleteriously affects the case on the facts (since there would have been no need for Victory Success to exercise duress by kidnapping Mr. Xu), it is also very material to the balance of convenience.

[86] Complaint (8) also constitutes serious non-disclosure. Madame Chen was in serious financial difficulties. Indeed, she had left Walkers, her former solicitors, owed over a million dollars in outstanding fees. She had also left Walkers liable for the cost of her staying at the Sugar Mill Hotel during the trial before Adderley J. There were numerous other debts. Mr. McDonnell QC's answer to this was that there was no likelihood of her having to meet her cross-

undertaking in damages. That in my judgment is not a proper justification for non-disclosure. He says that Victory Success would never suffer any loss, because there is currently an injunction issued in Macau preventing Victory Success taking legal possession of the Hotel. The precise effect of the Macau injunction may need to be considered in due course, but even just the injunction of this Court preventing Victory Success doing any works of repair to the Hotel is liable to cause damage which might stand to be met under the cross-undertaking. Moreover, even if his submissions were right, Madame Chen's impecuniosity would still be a matter for the judge to be invited to consider.

[87] Complaint (9) is made out. The judge should have been told about the practical effect of preventing any works being done at the Hotel.

[88] Complaint (10) is not made out. The judge, having done the trial of the 2012 action, would have been well aware of the background.

[89] Thus seven out of the ten complaints of material non-disclosure are in my judgment made out. When such serious non-disclosure occurs, most of which I find to be deliberate, the starting point is that the injunction should be discharged. There are no circumstances in my judgment which would make that unjust on the facts of this case. Given my conclusions on the merits of the application of the injunction application, no question of reimposing the injunction can arise.

Delay

[90] I turn then to the question of delay. When the Court grants an *ex parte* injunction, the Court always lists a return date within twenty-eight days. This is usually a short half hour appointment. If there is a dispute of substance as to continuation of the injunction (as there was here), the matter must generally be adjourned for a longer listing. It behooves a claimant who has obtained an injunction *ex parte* to proceed with diligence in getting the substantive hearing listed. In this case, the claimant has not done so.

[91] Innocent J in **Peterson Connor v Desmond Paul**²⁶ was dealing with a claimant who had sat on an interim injunction for one year and seven months without seeking to obtain judgment.

²⁶ AXAHCV 2020/0039 (determined 28th August 2020) at para 45.

He approved a passage of my judgment in **VB Bank (Public Joint Stock Company) v Miccos Group Ltd. and Another**²⁷ where I said:

“There seems to be developing a culture in this Territory of parties obtaining interim relief and then doing nothing to obtain final substantive relief. That is not the purpose of granting interim remedies. If parties do nothing once they have obtained interim relief, they can expect the Court to discharge the interim relief on that ground alone. In the current case, VTB have done nothing to enforce the BVI judgment debt: they have simply sat on their protective equitable receivership for eighteen months from its grant *ex parte* in May 2018...”

[92] What should have happened in the current case is this. After the short return date was adjourned, both sides should have liaised to get a listing of the substantive return date through the usual channels. If that had not resulted in a date being fixed within one month, the claimant should have issued an application for a fifteen minute hearing for the Court to give listing directions. If the claimant had not done that within a month, the defendant itself should have issued an application for a fifteen minute hearing seeking discharge of the injunction on the grounds of the claimant’s sloth. Whether or not the Court granted that application for a discharge, the defendant would have strong grounds for being given the costs of the application in any event. Unless a defendant is encouraged to make such applications, this form of chronic delay is liable to fester.

[93] Since I have determined to discharge the injunction on substantive grounds, it is not necessary for me to consider the precise reasons for the eighteen-month delay in obtaining the hearing before me. It suffices to say that it is unacceptable.

Post-script

[94] I had the draft judgment in this matter distributed to the parties on Thursday 19th November and asked for typographical errors to be identified by close of business on Thursday 26th November with a view to the judgment being handed down on Monday 30th November. I received suggested corrections in the usual way. I then had counsel asked whether they had agreed an order or whether I should hand the judgment down on the Monday and adjourn consideration of the form of the final order to a date convenient for counsel.

²⁷ BVIHC (COM) 2018/0067 (determined 20th January 2020) at para 9.

- [95] On Sunday 29th November 2020, for the first time, Ms Penn QC indicated that Madame Chen would seek a stay of execution of my discharge of the injunction. No formal application for a stay had been made, notwithstanding that the parties had had the draft judgment since 17th November. Despite the extreme lateness of this indication, Mr. Willins was able to respond later on Sunday. Victory Success's position was that they were due to start urgent works at the Hotel on 1st December 2020, that any extension of the injunction would prejudice Victory Success and that if any extension were ordered it should be on terms that, in the light of her impecuniosity, Madame Chen fortify her cross-undertaking in damages.
- [96] Ms Penn replied the same day and indicated that Madame Chen was not so concerned by the commencement of the works, but rather by the risk that Victory Success might sell the Hotel to a purchaser for value without notice. None of these matters had been raised with the Court, or apparently with Appleby, in the period from 17th November to 28th November. Appleby have offered a contractual undertaking not to sell the Hotel until the consequential orders have been dealt with, so there is no urgency in granting a temporary stay so that Madame Chen can, if so advised, seek a longer stay from the Court of Appeal.
- [97] As regards a longer stay, the principles on which a stay of execution should be granted were stated by the Court of Appeal in **C-Mobile Services Limited v Huawei Technologies Co Ltd**²⁸ to comprise five principles:
- “(i) The court must take into account all of the circumstances of the case.
 - (ii) A stay is the exception rather than the general rule.
 - (iii) A party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted.
 - (iv) In exercising its discretion, the court applies, what is in effect, a balance of harm test in which the likely prejudice to the successful party must be carefully considered.
 - (v) The court should take into account the prospects of the appeal succeeding but only where strong grounds of appeal or a strong likelihood the appeal will succeed is shown (which will usually enable a stay to be granted).

²⁸ BVIHCMAP2014/0017 (delivered 2nd October 2014, unreported) at para [30] (Blenman JA) as summarized by Webster JA in *Novel Blaze Ltd (in liquidation) v Chance Talent Management Ltd* BVIHC VAP 2020/0006 (delivered 9th July 2020) at para [10].

These elements are self-explanatory and apply in virtually all applications in varying degrees. The Court carries out a balancing exercise in considering the elements and no one element is decisive. The degree of importance attached to each element will vary according to the facts of each case.”

- [98] I shall start with consideration (iii). Ms Penn QC says that Madame Chen’s concern is not the works which Victory Success wish to commence on 1st December, because those, she says, are prohibited by the Macau injunction which denies Victory Success legal possession of the Hotel. Rather the concern is that Victory Success might sell the Hotel to a purchaser for value without notice. There is no evidence that Victory Success can as a matter of Macau law sell the Hotel currently, so that the purchaser obtains title good against Madame Chen (or Empresa). On the contrary the existence of the Macau injunction would surely put any purchaser for value on notice of an issue about title. Madame Chen has had over a week to obtain cogent evidence of Macau law, but has failed to do so. (iii) is accordingly not made out.
- [99] As to (iv), a sale to a *bona fide* purchaser for value without notice will be at the best market price. If any appeal by Madame Chen succeeds, then the proceeds of sale will be available. Insofar as they exceed the amount owed to Victory Success by Empresa, they will be available to pay Empresa. Mr. McDonnell QC submits that any proceeds of sale would be liable to be dissipated (he said the Hotel might be worth HK\$3.5 billion). However, if there were evidence of that, no doubt a freezing order could be obtained. There is therefore little prejudice to Madame Chen. By contrast the physical structure of the Hotel is deteriorating. Any delay will prejudice Victory Success. Madame Chen appears to be in no position to offer any security to underpin her cross-undertaking in damages. (iv) also tells against Madame Chen.
- [100] As to (v), I have been shown no draft grounds of appeal. However, Madame Chen will have a mountain to climb to succeed on any appeal, given the numerous points on which I have found against her. In my judgment the prospects of an appeal succeeding are poor.
- [101] I turn then to (i) and (ii). Standing back the balance of factors is strongly against Madame Chen. Given that a stay is the exception rather than the rule, she has not in my judgment established a case for the grant of a stay.

Conclusion

[102] I shall adjourn consideration of the terms of the consequential order which I should make. However, in due course the order will include provision:

- (a) that the injunction granted by Adderley J on 10th April 2019 as extended on 8th May 2019 be discharged with effect from 30th November 2020;
- (b) that the action be stayed; and
- (c) that the oral application made on 30th November 2020 for a stay of execution be refused.

[103] I shall also hear counsel on costs.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar