

Commercial litigation alert – Actions against unknown persons



Since the anti-Extradition Bill protests in Hong Kong from March 2019, we have seen an increasing number of legal actions commenced against unknown persons. Indeed, in light of the advancement of cyber technology nowadays, it has become more and more common that wrongful or unlawful conducts are being committed by persons whom we do not know.

In light of the increasing trend in actions against unknown persons, this article seeks to discuss the key issues which one should be aware.

Beginning the action

Identify the defendants

Normally, defendants must be named in the Writ of Summons. It is, however, impossible to do so if you are suing unknown persons.

In *Billion Star Development Ltd v Wong Tak Chuen* [2013] 2 HKLRD 714, the Hong Kong Court said that it is permissible for the defendants to be identified by description and not by name, provided that the description is sufficiently certain so as to identify those who are included and those who are not.

We have seen the cases relating to the anti-Extradition Bill protests in Hong Kong, where the defendants are described by reference to their alleged unlawful acts. For instance, in the actions commenced by the Hong Kong Airport Authority and MTR, the defendants were described as respectively “*persons unlawfully and willfully obstructing or interfering with the proper use of the Hong Kong International Airport*” and “*persons unlawfully and willfully damaging any property at any station of the Railway*”.

Service

One of the major purposes of service is to bring the proceedings to the attention of the defendants. In the normal course of events, the Writ of Summons must be served on the defendants in person, by registered post or by inserting through the letter box. In actions against unknown persons, it is impossible to do so and very often, the Writ of Summons is served by way of substituted service. The same applies to service of the interim injunction where the action comes with an urgent application for an interim injunction to stop the alleged unlawful conduct (which is usual).

For instance, in the actions commenced by the Airport Authority and MTR, the Court allowed the MTR and the Airport Authority to serve the injunction order by:

1. affixing it in conspicuous places at all MTR stations/the Hong Kong International Airport;
2. posting it on the websites of MTR/the Hong Kong International Airport; and
3. publishing it in one English and one Chinese newspapers in Hong Kong for 1 day.

What may prevent the Court from granting the injunction

It is very common for actions against unknown persons to come with an urgent injunction application to restrain the defendants’ actions. In considering whether or not to grant the injunction, the following usual test applies:

1. the plaintiff has demonstrated serious issues to be tried;
2. whether damages would be an adequate remedy for either side;
3. where the balance of convenience lies in terms of whether or not to grant an interim injunction pending trial.

In considering where the balance of convenience lies, the following are common factors which the Court will take into account:

1. **Service:** The injunction must be served on the defendants in order to bring the same to their attention. In the cases of *Airport Authority* and *MTR*, the Court was satisfied that service of the injunction by the means explained above would bring the injunction to the attention of the defendants. This, however, has to be contrasted with the Court's ruling in *TVB v Persons unlawfully and willfully damaging any property and injuring any employee of the Plaintiff* [2019] HKCFI 2723.

In the *TVB* case, TVB sought an interim injunction against protestors who damage TVB's news equipment and injure its news crew; and applied to serve, *inter alia*, the Writ of Summons and the injunction order (if granted) by way of substituted service by (a) announcing the same at all news programmes broadcasted by TVB, (b) posting the same on TVB's website, and (c) advertising the same on one English and one Chinese newspapers in Hong Kong.

Although the means of service proposed by TVB was similar to those in *Airport Authority* and *MTR*, the Court was not satisfied that such means of service were sufficient. In particular, the Court was of the view that TVB's news crew may be at different locations at different times, and that its news equipment may not be easily identifiable. This makes it difficult to give penal notice of the terms of the injunction to the defendants.

2. **Injunctions which cannot be enforced:** In *Co A v Co D* [2019] HKCFI 397, the Court held that "*if an injunction order cannot be enforced, a court may exercise its discretion not to grant such an order ... whether an order can be effectively enforced is highly relevant in the court's exercise of discretion in deciding whether or not an injunction should be granted*".

In actions against unknown persons, enforcement of the injunction may not be straightforward, given the difficulty in identifying the persons acting in breach. In the *TVB* case, the Court said that "*the Court does not act in futile, so it will refrain from making an order which cannot be policed and enforced, either because it is uncertain in scope and terms, or if it is otherwise impossible to identify the party who is in breach of the order*".

Nonetheless, this was not an issue in *Airport Authority* and *MTR*, although the Airport Authority and MTR were faced with the same types of protestors (who were masked to hide their identities).

3. **Protection by general criminal law:** In the *MTR* case, the Court considered there was arguable basis for MTR to say that special circumstances exist and a court order should be granted in aid of the criminal law. In doing so, the Court expressly said that "*...the invocation of the civil law and in particular the power to grant an injunction, in aid of the criminal law, is an exceptional course not lightly acceded to by the court, because it may result in far more onerous sanctions than the penalty imposed for the offence*".

By contrast, the Court in *TVB* refused to grant the injunction restraining the defendants from damaging TVB's properties and injuring its staff in aid of the criminal law, as the Court was of the view that there was a lack of imminent risk of damage and injury.

4. **Human rights consideration:** In *MTR*, the Court considered the potential impact of the injunction on freedom of expression and freedom of assembly, and ruled that "*the question of proportionality has to be assessed having regard to the nature and form of exercise of such rights, in particular where any demonstration is being 'conducted in a manner or taking the form which is much more intrusive, affecting the rights of others or posing risks to public order, ordre public, or public health and morals'*". The Court concluded that a restriction to prevent the kind of confrontations and defacing of property within the precincts of the railway stations is likely to be proportionate.

Key takeaway points

In cases against unknown persons, it is important that the defendants are described by reference to their unlawful conducts clearly so that the defendants can be identified with sufficient certainty.

As compared to actions against named defendants, the factors affecting the balance of convenience in actions against unknown persons are more complicated, particularly when it comes to questions as to whether or not the injunction can be brought to the attention of the defendants and whether or not it can be effectively enforced. Parties should therefore come up with more innovative solutions to these questions.

Get in touch



Emily Li

Senior associate

T: +852 2533 2841

Email: [Emily](#)

Emily is a dispute resolution lawyer with extensive experience in commercial and international trade disputes, as well as regulatory matters. Emily has handled various high profile cases including the litigation concerning China Shanshui Cement Group Company Limited and TVB v Persons unlawfully damaging any property of the plaintiff and another.