JUDICIAL DISCRETION IN DISPENSING WITH THE SERVICE OF PROCESS REQUIREMENT IN HONG KONG UNDER ORDER 45, RULE 7(7): MOVING TOWARDS A DOCTRINE?

Simon Teng

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Subscription is US $35.00 per year for 4 issues (regardless of the price of individual issues) in the United States and $40.00 for Canada or overseas. Checks should be addressed to MSCAS.

Tel.: (410) 706-3870
Fax: (410) 706-1516

Price for single copy of this issue: US $7.00

ISSN 0730-0107
ISBN 1-932330-08-9

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is especially grateful to Jason Pope, law school colleague and close friend, for his
insightful comments and honest criticism.
OVERVIEW

In Hong Kong, under Order 45, a director or officer of a company must be personally served with an order and penal notice before legal action can be taken to deprive him of his personal property for the company's failure to comply with that order. However, under Order 45, Rule 7(7), the judges of the Hong Kong Court in their discretion can dispense with the service requirement based upon whether it is "just to do so." The author examines whether the judges of the Hong Kong courts have developed a judicial doctrine or set legal parameters to define circumstances under which it is appropriate and "just" to dispense with the prerequisite requirement of personal service.

By way of background, Hong Kong is a common-law system.1 When Hong Kong reverted to mainland China in 1997, the Hong Kong courts were:

"...required by Art 84 to adjudicate in accordance with Arts 8 and 18, which bring in the common law; and it is expressly provided that they 'may refer to precedents of other common law jurisdictions.'...the emphasis is undoubtedly on the common law, and not to the common law as declared in England only."2

That being said, the cases that follow are primarily from the Hong Kong courts.

I. INTRODUCTION

"Procedural fairness and regularity are of the indispensable essence of liberty."3

The above quote recognizes that in all legal systems, a core value in the administration of justice is the concept of procedural

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2. Robin Cooke. The Judge in an Evolving Society, 28 HONG KONG L.J. 145, 148 (1998). See Patrick Bourke, A Privileged Class...HONG KONG LAWYER, Jan. 2005, at 77 (stating "following the resumption of Chinese sovereignty over Hong Kong from 1 July 1997 decisions of the English courts (including the House of Lords) have lost some of their previous binding effect but remain highly persuasive.").

fairness. At a minimum, and under most circumstances, procedural fairness includes "the right to know a charge, to be confronted with the accuser, to cross-examine informers and to produce evidence in one's behalf." To put it simply, before an individual can be deprived of life, liberty, or property, it is essential that they be given not only an opportunity for a hearing but also "adequate" notice. The English Courts have also attached importance to such a concept. They have said, "a person whose liberty is in jeopardy is entitled to know the precise charges made against him."

What is "adequate" notice? Chief Justice Marshall succinctly writes that for notice to comport with fundamental notions of procedural fairness,

the "notice must 'clarify what the charges are' in a manner adequate to apprise the individual of the basis for the government's proposed action. Notice must be provided sufficiently in advance of the hearing to 'give the charged party a chance to marshal the facts in his defense.'"

As I will discuss later in more detail, under Order 45, Rule 7(7), the judges of the Hong Kong Court in their discretion can dispense with the service requirement based upon whether it is "just to do so" so that "an order against [a] company by committal of its directors" can be executed.

The statutory language of Rule 7(7), which allows judges to dispense with the requirement of serving the director of a company with a judgment and penal notice before legal action can be taken

4. Procedural fairness is of paramount importance. In his written dissent, American Supreme Court Justice Jackson stated, "Indeed, if put to the choice, one might well prefer to live under Soviet substantive law applied in good faith by our common-law procedures than under our substantive law enforced by Soviet procedural practices." Id.

5. Id. at 225 (Jackson, J., dissenting).

6. Parker and another v. Rasalingham and others, [April 2000] Chancery Division


8. For more information on Hong Kong Civil Procedure see HONG KONG CIVIL PROCEDURE, (Sweet & Maxwell Asia, Mar. 2004); and Camille Cameron and Elsa Kelly, PRINCIPLES AND PRACTICE OF CIVIL PROCEDURE IN HONG KONG, (Sweet & Maxwell, Sept. 2001).

9. See generally Peter Wesley-Smith, AN INTRODUCTION TO THE HONG KONG LEGAL SYSTEM, (Oxford University Press, Feb. 1999).

10. O.45, r. 7(7).

to deprive him of his personal property, does seem very alarming from a procedural due process analysis standpoint. As previously stated, a fundamental aspect of procedural fairness is that an individual have adequate notice of the charges and legal responsibilities that he is obligated to perform.

Rule 7(7) essentially permits a judge to waive the notice requirement and possibly violate an individual’s basic right to be aware of his or her legal obligations under a court order. It could be argued that an individual is at the mercy of the court since no legal standards are explicitly laid out in Rule 7(7). The discretion and deference given to the court are great based on the fact that the only limitation (if it can be considered a limitation at all) to waiving the service requirement is whether or not the court’s opinion is “just”. The term “it is just to do so” on its face does not seem like a rational and workable legal standard. No legal elements are used. There is no weighing of explicit legal factors. In a sense, Rule 7(7) legal analysis may be merely an ad-hoc factual inquiry with no set legal standard.13

The absence of legal elements, factors, and more concrete principles of what is considered “just” under Rule 7(7) could lead to numerous inconsistent decisions by judges. Abuse of judicial discretion is certainly foreseeable. Predictability is one of the many essential characteristics for a legal system to function properly. On the other hand, the absence of concrete legal standards can provide judges with the opportunity to be sensitive to the individual facts of a particular case. Ultimately, a balance must be struck between hard, fast, bright-line legal rules and abstract principles of justice. Depending on the type of legal dispute and interests involved, some circumstances are more susceptible to bright-line legal rules while others require the application of more abstract legal principles.14


13. The only explicit standard in the language of Rule 7(7) is whether it is just to dispense with the personal service requirement. The rule does not prescribe what factors to take into consideration or what legal elements are required to waive personal service.

14. The author recognizes that the development of legal rules is an extremely complex topic. Numerous factors are taken into consideration when developing rules to administer justice. Bright-line rules, although efficient and predictable, may be extremely harsh and produce unjust results in certain circumstances. At the other end of the spectrum, factor tests and constitutional principles may seem to be unpredictable
My article will primarily address whether the Hong Kong courts under Rule 7(7) have attempted to set more explicit parameters in connection with the discretion that they are given in dispensing with the service requirements of Order 45, Rule 5. More specifically, I will look at those cases (both in Hong Kong and the United Kingdom)\(^{15}\) where the courts have dispensed with the service of process and those cases where the courts have refused to dispense with the service of process. In reviewing the cases that follow, the reader should attempt to discern whether a coherent legal standard exists or the dispensation issue is an amoeba which constantly changes shape and adapts to its climate.

II. OVERVIEW OF THE STATUTORY FRAMEWORK OF ORDER 45, RULE 5(1), AS IT RELATES TO OFFICERS AND DIRECTORS

In Hong Kong, there are two legal means by which the director of a company may be found in contempt.\(^{16}\) One is for a director to be charged with “aiding and abetting.” The other, which falls under Order 45\(^{17}\) (entitled “Enforcement of Judgments and Orders”), imposes a duty on a director once he is fully aware of the terms of the order. In sum, the ordinance “deal[s] with the various ways in which the successful party can employ the machinery of the High Court towards obtaining satisfaction of his judgment or order.”\(^ {18}\)

To be more precise, Order 45, Rule 5(1), allows the enforcement of judgments or orders to be made against the personal property of a director or officer of a body corporate by a writ of sequestration or by an order of committal even though the judg-

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\(^{15}\) The reason I have decided to use cases from the United Kingdom with regard to a Hong Kong civil procedure rule is because I am in agreement with Judge Rogers that there is no difference between the “approach[es] adopted by the Courts [of] Appeal in England and in Hong Kong,” Excel Nobel Development Ltd. & Others v. Wah Nam Group Ltd. & Others, [2001] H.K.E.C. 612.

\(^{16}\) See Abu Dhabi National Tanker Co. v. South View Holdings Ltd., [1999] H.K.E.C. 1193

\(^{17}\) The ordinance is a series of civil procedure rules for Hong Kong courts to administer the enforcement of judgments and orders.

\(^{18}\) Supra note 8, at para. 45/0/2.
ments or orders only name the corporation as the charged party. 19
"No moral blame" need be shown. 20

The basic idea is to "prevent the court order from being frustrated by the principle of corporate identity" by placing the director in the hot seat. 21 The underlying rationale is self-interest. When the director's personal property is at stake, it is more likely that he will use his position to ensure that the corporation will comply with the court order in order to avoid the sanction. One judge analogized this rationale to the human body. He said:

“A body corporate must operate through the minds and hands of natural persons, the most influential of which are its directors who have the conduct and responsibility for the corporate affairs...[The director] is part of that corporate brain and must bear overall, not vicarious, responsibility for what is done as a result of the corporate will. Service of the order on a director is to ensure that he will exert pressure to bear on co-directors who are directly responsible for the company's compliance with the order.” 22

However, not all directors are created equal. Some have more power and influence than others. It may not be feasible based on the structure of the organization and the position of the director to ensure that the court order will not be breached. A second problem may be from a cost-benefit analysis. Some directors may not feel compelled to exert their influence even if their personal property is up for grabs since they may be rewarded in monetary or non-monetary terms for not using their best efforts to ensure that the corporation is following the terms of the order. A third problem is group dynamics and loyalty issues. A director's loyalty to his coworkers, peers, and the corporation may outweigh the costs of losing his personal property.

19. It should be noted that the corporation is still a party to the legal action and not the officer or director. In other words, the judgment or order is only against the company.


22. Id.
The general duty imposed on a company by a court order or judgment is described by Judge Megaw in *Re Galvanized Tank Manufacturers’ Association’s Agreement*:23

"a company which has given an undertaking to the court must be treated as having failed lamentably and inexcusably in its elementary duty if it fails to take adequate and continuing steps to ensure, through its responsible officers, that those officers themselves, and anyone to whom they may delegate the handling of matters which fall within the scope of the undertaking, do not forget or misunderstand or overlook the obligations imposed by such undertakings."

If an officer “takes adequate and continuing steps” to comply with a court order and the company is still found to be in contempt, the officer will not be liable. There is no absolute and automatic liability imputed to an officer.24

The history of the rule can be traced back to section 33 of the Common Law Procedure Act of 1860.25 The central function of the rule was to provide an effective method of enforcing the law against persons and other entities for contempt of court. The English Courts recognized that the power to enforce their own orders and punish those who failed to comply with those orders fell within their inherent jurisdiction.26

Judge Lincoln, when considering the history of Order 45, wrote that the “fundamental purpose of such proceedings is to uphold the supremacy of the rule of law and the court’s authority to administer it.”27 The rule of law and the concept of justice require that legally valid judgments and orders be enforced. It was in the public’s interest that the party who had won the case on its legal merits be able to secure the fruits of the judgment or order.28

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23. [1965] 2 All ER 1003
25. Id.
28. *Parker and another v. Rasalingham and others*, [April 2000] Chancery Division (recognizing “the public was entitled to expect the courts would not allow their orders to be deliberately flouted with impunity.”)
Judge Coleman in *Z Bank v. D1 and Others*\(^{29}\) recognized that Order 45 was "punitive or quasi-criminal [in] nature because the court *sua sponte* or by the motion of a party could punish an individual for disobeying a court order.

The language of Order 45, Rule 5(1) states:

"Where –

(a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or; . ..

(b) a person disobeys a judgment or order requiring him to abstain from doing an act,

then, subject to the provisions of these rules, the judgment or order may be enforced by one or more of the following means, that is to say-

(ii) where that person is a body corporate, with the leave of the Court, a writ of sequestration against the property of any director or other officer of the body;

(iii) an order of committal against that person or, where that person is a body corporate, against any such officer."

However Order 45, Rule 5(1) is subject to a number of statutory requirements. Rule 7(3) states:

"An order requiring a body corporate to do or abstain from doing an act shall not be enforced as mentioned in Rule 5(1)(ii) or (iii) unless:

(a) a copy of the order has also been served personally on the officer against whose property leave is sought to issue a writ of sequestration or against whom an order of committal is sought; and

(b) in the case of an order requiring the body corporate to do an act, the copy has been so served before the expiration of the time within which the body was required to do the act."

In other words, to enforce an order against a director it is essential that the party relying on the rule serve a “copy of the order at the appropriate time...with the appropriate penal notice.”

III. WHY HAVE THE SERVICE REQUIREMENT?

Judge Huggins explains in his opinion in Cartier International B.V. and Others v. Kaybee International Ltd. why the service requirement under Order 45, Rule 5(1) is so important. He says:

“However, it must be remembered that O.45 could prima facie be prayed in aid even against a director who has been innocent of any contempt, and that is why this order insists that he shall have been personally served with the order against the company before he can be committed: it would be unjust to commit him for the company’s disobedience to an order of which he had no knowledge. No such injustice could result where he has been directly and knowingly responsible for the company’s disobedience.”

(emphasis added).

The above quote makes perfect legal sense: since the legal effect of Order 45, Rule 5(1), which is based on the law of contempt, is “punitive rather than remedial”, a showing of the required “mens rea” or “an intention on the part of the person proceeded against” to disobey the Court order must be established. No one should be punished for charges about which they know nothing.

By personally receiving a copy of the judgment with the penal notice, the officer is made fully aware of the terms of the order and thus is on notice to use his position as an officer of the company to carry out the order.

32. Director General of Fair Trading v. Smith Concrete Ltd., [1992] 1 QB 213; Aqua-Leisure Industries Inc. & Another v. Aqua Splash Ltd. (No. 2), CFI No. 18928 of 1998, at 246 (establishing that “it is not necessary to prove willful disobedience. It is sufficient to prove that the alleged contemnor knew of the facts which are said to make his act or omission a contempt and that such omission was not causal, or accidental and unintentional.”) (citing Director General of Fair Trading v. Pioneer Concrete Ltd., [1995] 1 AC 456 at pp. 478-481).
Failure to carry out an order followed by personal punishment of the individual by depriving him of his personal property seems more justifiable when a person has knowledge of the order and fails to carry it out. In sum, individuals who have personally received documents charging them to do something and failed to carry them out are more culpable morally and in the eyes of the law than individuals who have not received anything and subsequently failed to carry out an outstanding order. In support of the above policy preference of placing the burden on the moving party to prove that the charged party had "knowledge" of the order, Justice Huggins eloquently says:

"...I confess that I find it offends my sense of justice. It is one thing to punish a director for the company's failure to do something where it lies within the power of the director to ascertain whether the order has been obeyed and to ensure compliance if it has not: it is another to punish him if he had no reasonable opportunity to ensure compliance."34

In a sense, the formal requirement of personally serving the officer can also be seen as a "legal fiction" in which the court will assume and feel comfortable that the charged party has adequate notice and knowledge of the order. The general assumption is that when an individual is served with legal documents, he or she will not only read them but will also take appropriate legal action. One court characterized the service of the order requirement as "a convenient mode of giving notice, but that is all."35

In even fewer words, Judge Rogers states that the requirement of effecting personal service upon the charged directors is to serve as a warning. He says, "[T]he effect of the penal notice is to warn the person so served that...if the body corporate disobeys the order, he is liable to process of execution to compel the body to obey it."36

Generally speaking, "the responsibility for obeying [an] order is clearly thrown on [an] individual" if the order is personally directed against him.37 However, in the corporate context of the relationship between directors/officers and their employees, the above

rule does not apply well. Enforcing orders or judgments directed at corporations against the directors or officers personally is like attempting to put a square peg into a circular hole. Judge Lincoln explains:

With regard to corporate bodies it seems established that liability is dependent upon the vicarious principle so that where an order has been made against the corporation, that body is liable for acts of its servants. Hence, it has been held that if, contrary to an order made against the corporate body: "the act is in fact done, it is no answer to say that, done, as it must be, by an officer or servant of the council, the council is not liable for it, even though it may have been done by the servant through carelessness, neglect, or even in dereliction of his duty." (citations omitted)

Extending principles of vicarious liability to encompass the personal assets of an officer or director when they have not been formally served with an order or are unaware of the terms of the order, as recognized by the Judges previously quoted, is fundamentally unfair. Because of these reasons, the Hong Kong courts have established certain procedural safeguards to protect against the possibility of inequitable results occurring. As I will discuss in the next section, the main protection for officers and directors under Order 45, Rule 5(1) is the service and "knowledge" requirement created by the Hong Kong Courts.

IV. THE POWER TO DISPENSE WITH THE SERVICE REQUIREMENT

The requirement of serving a copy of the order is exempted under Order 45, Rule 7(7). The rule states:

"...the Court may dispense with service of a copy of an order under this rule, if it thinks it just to do so."

38. Z Ltd. v. A-Z and AA-LL, [1982] 1 Lloyd's Rep. 240 (stating "in the great majority of cases the fact that a person does an act which is contrary to the injunction after having notice of its terms will almost inevitably mean that he is knowingly acting contrary to those terms. However, where a corporation is concerned, it may be a difficult matter to determine when a corporation can be said to be acting knowingly.)

From reading the explicit language of the rule, the Hong Kong courts have determined Order 45, Rule 7(7) "confers an unfettered discretionary power and can be exercised whenever it is just to do so."\textsuperscript{40} The question then arises: what judicially created limitations if any are placed upon judges to avoid unjust outcomes and prevent abuses of judicial discretion?

V. DEFINING WHEN A COURT MAY DISPENSE WITH SERVICE

From examining the cases in Hong Kong, the central inquiry undertaken in an Order 45, Rule 7(7) analysis hinges on the degree of "knowledge" that the officer or director has with regard to the court order. Underlying this inquiry, the Hong Kong courts "agree...that the power to dispense with service is one that 'should not be exercised too readily, lest what should be a dispensing power for use in exceptional cases' swallow up the general rule requiring personal service.

A. Knowledge of the Order

1. Different Types of Knowledge

The question that needs to be asked is: what types of knowledge are relevant for the purpose of dispensing with the service requirement? As in many causes of action that find their source either in the common law or in statute, the required degree of knowledge for the charged party to become liable can range from no knowledge to actual knowledge. In legal terms this would be from strict liability to scienter. Sometimes courts find it suitable to impute the knowledge to certain actors from other actors, while at other times they deem such imputation unjust. Absent actual knowledge, sometimes courts develop the concept of constructive knowledge. Constructive knowledge inquiries as to whether the actor "should have known" about the activities that gave rise to his or her liability.

The English Court in Lipkin Gorman v. Karpnale Ltd and Lloyds Bank\textsuperscript{41} recognized five mental states which exist in common law. They are the following:

(1) Actual knowledge;


\textsuperscript{41} [1987] 1 WLR 987.
(2) "Willfully shutting one's eyes to the obvious",42
(3) "Willfully and recklessly failing to make such inquiries as an honest and reasonable man would make",43
(4) "Knowledge of circumstances which would indicate the facts to an honest and reasonable man",44
(5) "Knowledge of circumstances which would put an honest and reasonable man on inquiry."45

Which of the five categories of knowledge should be used to test whether the defendant has the requisite knowledge for dispensing with the service requirement? In other words, what is the mental state required of a defendant for the judge to deem it "just" to dispense with the service of judgment and penal notice? All five categories? Just the first three? Or only the first one?

Judge Huggins in his Cartier opinion felt compelled to dispense with the service requirement of Rule 7(3) only if the party charged with the court order "was fully aware of the terms" of the order and their "knowledge" could be proved "with the necessary degree of certainty."46 This degree of certainty must be proved "beyond [a] reasonable doubt."47

Such a requirement is a heavy, but reasonable, burden on the party requesting service of process to be dispensed with since the Court must be confident in its decision that the charged party had adequate notice of its obligation under the court order. It would be manifestly unjust to deprive an officer of a corporate body of personal property if, under the circumstances, and through no fault of his own, he had no knowledge of the order. As previously discussed, the heavy burden placed on the party relying on Rule 7(7) is perfectly logically based upon the fact that most societies and legal systems believe no one should be deprived of their personal property unless they are given some sort of notice.

In Excel Noble Development Ltd. v. Wah Nam Group48, Judge Rogers expands on Judge Huggin's definition of the requisite knowledge for dispensing with the service requirement. Three conditions are required: (1) the officer must be fully aware of the terms of the order; (2) the officer must have that knowledge at a time

42. [1987] 1 WLR 987.
43. [1987] 1 WLR 987.
44. [1987] 1 WLR 987.
when he can use his position as an officer to secure compliance; and (3) the officer should be aware that, if he does not so use his position, he may be personally liable.\textsuperscript{49}

To put it simply, plaintiff has the burden to prove to a necessary degree of certainty that the defendant was fully aware of the terms of the order, had a reasonable opportunity to execute the order, and knew of the legal consequences of failing to carry out the order. It should be noted that the number of hoops that the plaintiffs must jump through corresponds with the liberty interest involved.\textsuperscript{50} In general, the "standard of proof ultimately 'reflects the value society places' on the interest at stake.'"\textsuperscript{51} In the legal context of O.45 proceedings, the personal property of an officer is in jeopardy and the charges of failing to obey a court order are serious. Therefore, the Court must be certain that the defendant is actually at fault.

Due to the heightened evidentiary burden placed on the plaintiff in proving that the officer had the requisite "knowledge" of the order, it seems that the standard of knowledge that will be applied to judge a defendant is obviously the first category: actual knowledge. With possibly of the exception of a defendant who willfully shuts his eyes to the obvious, the other three mental states would not be sufficient for a court to dispense with the service requirement. This is because it is still quite possible to prove that a director was fully aware of the terms of the order despite the fact that he willfully closed his eyes and placed his hands over his ears. An example would be a small company operated by only a married couple. The husband and wife share the same office and the same responsibilities. Suppose the husband is personally served with the order. Consequently he makes an announcement to the company about the order. Further, he seeks legal counsel and develops poli-

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\textsuperscript{49} Excel Noble Development Ltd. & Others v. Wah Nam Group Ltd. & Others, [2001] H.K.E.C. 612. The problem with Judge Huggin's method is its defendant-centered approach. There may be circumstances where failure to comply with an order causes more harm to the plaintiff than the personal liability that is imposed upon the director. In other words, it could be argued that the stringent requirements for knowledge should be relaxed if the severity of the harm to the plaintiff is great while the punishment imposed on the director is small.

\textsuperscript{50} The most obvious example is in the case of criminal proceedings in which execution is a possibility. The interest involved is the freedom of the criminal defendant and his life. Since nothing is greater than one's life, in most countries the standard of proof is "beyond a reasonable doubt."

cies to implement the court order. Although not personally served, the wife assists their legal counsel in complying with the order. Under these circumstances, it would be difficult for a court to find that the wife was not fully aware of the terms of the order even though she was not personally served.

The last three categories would surely be rejected by the Hong Kong courts since all impute knowledge to the director based on the circumstances. The underlying policy of providing notice that drives the personal service requirement clearly rejects any mental state which is based upon constructive knowledge. There needs to be clear and convincing evidence that the director knew the terms of the order. Since constructive knowledge is based largely on circumstantial evidence, the court would rather err on the side of caution and not dispense with the service requirement because the personal property of the director is subject to removal.

The following section will discuss cases where Hong Kong courts have tackled the issue of whether a corporate officer or director was fully aware of the terms of an order.

2. Actual Knowledge versus Constructive Knowledge


In Cartier Intl. B.V. and Others v. Kaybee Intl., the appellants, two directors of a company, were being committed for contempt for violating two orders. The first was an injunctive order enjoining the company from manufacturing watches of a design registered by the plaintiffs. The second was an Anton Pillar Order ordering the company to disclose watches of that design which were in their possession.

Plaintiff’s solicitors visited the defendant’s factory and found evidence that watches of the plaintiffs’ design were being infringed. Following this, an Anton Pillar Order was obtained and the plaintiffs revisited defendants’ factory. The first director was shown the Anton Pillar Order, while the second director arrived while the factory was being searched. After the search, 29 infringing watches were discovered. In response to the breach of the order, the court concluded that plaintiffs pursuant to Order 45, Rule 5 were requesting that the court make the directors personally liable for an order against the corporation. Unfortunately, plaintiffs’ failed to effect personal service of the order upon the two directors. The plaintiff’s lawyers argued that under the circumstances, the court
should in its authority under Order 45, Rule 7(7) dispense with the personal service requirement.

In upholding the civil contempt charges brought by plaintiffs, the lower court reasoned that, "[both directors] are clearly the alter ego of the defendant company. Their knowledge is clearly also the defendant company's knowledge." A possible justification for the lower court's reasoning may be something similar to the "captain of the ship" doctrine which has been adopted in some parts of the United States. The doctrine holds the attending physician liable, "irrespective of any personal negligence, solely because he is the attending physician." The legal conclusion that the mere presence of the physician will result in liability from the conduct of secondary actors (e.g. nurses) derives its reasoning by analogy to the captain of a ship. This antiquated idea postulates that the captain of a ship is responsible for everything since he is responsible for guiding the crew and directing the ship to its ultimate destination.

Judge Huggins criticized the lower court's decision in its "unexceptionable" reasoning. Basically, the lower court's analysis was a tautology. Judge Huggins summarized the reasoning as saying "because the company was guilty of contempt, the appellants must also be guilty." Further, in today's age, the analogy of the captain of a ship to the director or executive officer of a company is a tenuous one. The first problem with this analogy is the inherent organization differences between a ship and a company.

Both directors were not personally served with the Anton Pillar Order as required by Order 45, Rule 7(3). However, one of the directors was served on behalf of the company. It was concluded that the second director did not have the "knowledge to the necessary degree of certainty." Judge Huggins implied that there was a weak inference that the second director was "aware of the full terms of the order" when he returned to the factory during the search. But such an inference was not sufficient to prove his knowledge to the degree of necessary certainty.

Since there was evidence that the second director was served on behalf of the company, Judge Huggins on appeal excused the personal service requirement. As for the second director, plaintiffs'

55. Id.
56. Id. at 132.
57. Id.
attorney argued that the court should dispense with the service requirement because since someone in the director's company knew the existence of the infringing watches, the first director could be punished regardless of the fact that he was not personally aware. Judge Huggins rejected this argument. As previously discussed, Judge Huggins felt it would shock the conscience of the court to punish an individual if he had no knowledge and reasonable opportunity to comply with an outstanding court order.

A bright-line rule that imputes knowledge of a court order from anyone in the company to the directors would not only be contrary to fundamental notions of procedural fairness, but would also fail to reflect how knowledge is diffused through an organization. Judge Huggins was correct to dismiss the argument raised by the plaintiffs that since the directors were the alter ego of the company and since "someone" in the company knew of the order, knowledge of the order should be imputed to them.

As with all organizations, the flow and diffusion of information does not reach the top in all circumstances. It would be impractical for the director of a company to be aware of all the day-to-day activities of the janitor, the secretaries, lower-level management, assembly line workers, store clerks, etc. Further, it is difficult to conclude that in all circumstances directors are the alter ego of a company. The reasoning may be based upon the analogy to the captain of a ship. Even in that case, a captain does not have total control and knowledge of what is happening on his vessel. Take for example a cruise ship with over 1,000 employees and numerous facilities. One cannot expect the captain to be aware of the day-to-day activities and problems of the bartender on the second deck. 58

Especially in large organizations, information is filtered. Only relevant and significant information is sent to the directors of a company. The delegation of authority is one component that makes companies successful. It is a major misconception to believe that the directors of a company are the "all seeing eyes" of the company. In reality, information is summarized and condensed for

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58. A counter argument, which misses the point, pins the responsibility onto the director since they are in charge at the end of the day. Like President Harry Truman said, "The buck stops here." The driving force behind this argument is that there needs to be accountability at the highest level. Sanctioning a director who lacks notice when a company fails to comply with a court order does not further the very purpose of punishing those who are accountable. Ethically speaking, someone is accountable only if they are at fault. As previously discussed, it is inherently unjust to find fault in an individual who is unaware of the court order.
them. Much of their work is seeing the "broader strategy and direction" in which a company should proceed. Thus, it was wise for Judge Huggins to reject the plaintiff's argument that what the company knows the director also knows.

b. Proving Knowledge through Circumstantial Evidence

*Chou Yi Feng v. Chou Yi Chen & Others – Insufficient Circumstantial Evidence*

In *Chou Yi Feng v. Chou Yi Chen & Others*59, the plaintiff alleged that her shares in a Hong Kong registered company were being fraudulently transferred to the defendants. Further, plaintiff claimed she was removed as director by the fraudulent acts of the defendants. The plaintiff sought and was granted a Mareva injunction. Defendants were restrained from: (1) disposing of their shares; (2) withdrawing or transferring the deposits of the company; and (3) removing plaintiff as the president of the company. In complying with the order, defendants’ were required to inform and provide certain documents to plaintiff’s solicitors. Subsequently, plaintiff alleged that the defendant’s failed to comply with the order and thus sought a motion to commit the defendants for contempt of court.

It was admitted by the plaintiff that the injunctive orders had not been personally served on the defendants. The central issue of the case was whether under the circumstances service should be dispensed with.

The plaintiff in this case had an uphill battle. Defendants’ were not personally served. They were not present in court when the injunction was made. There was no direct evidence that they were notified and made aware of the terms of the injunction. Plus the standard of proof was beyond a reasonable doubt. All that was left was for plaintiff’s lawyer to prove that there was enough circumstantial evidence to indicate that the defendants’ were fully aware of the terms of the injunction. The presiding judge determined that the plaintiff's did not meet their burden.

The gist of plaintiff’s argument was that in addition to filing affidavits, defendants were represented by their lawyers (who filed defenses and counterclaims) in the various legal proceedings. Thus, they should have been fully aware of the terms of the injunction. It was assumed by plaintiffs that by providing documents to counsel in

59. [2002] H.K.E.C. 1437
connection with the injunction order they would have known the terms of the injunction. Some sort of communication between the defendants and their legal representatives must have occurred.

Judge Chung, who presided over the case, concluded that it was wrong to assume that the defendants' legal representatives would explain the terms of the injunction order to defendants when they requested documents or asked defendants' to perform certain activities in compliance with the injunctive order.60 From reading Chou Yi Feng, establishing through circumstantial evidence the requisite state of mind of a defendant for a court to dispense with the service requirement is extremely difficult. Mere participation or having agents participate on behalf of the defendant is not enough to give rise to a presumption that they were fully aware of the terms of the order. The central problem with circumstantial evidence based upon the interactions between the party and their legal representative is that the party can cooperate with his attorney without fully understanding the terms of the order. Pointing to legal documents such as affidavits may show that they were aware of the order, but not that they were aware of the specific terms of the order.

Excel Noble Development Ltd. v. Wah Nam Group – Sufficient Circumstantial Evidence

Very briefly, in Excel Noble, the plaintiffs sought to commit the second contemnor for contempt in connection with a Mareva injunction directed against the company, which was the first contemnor.61 The order restricted the disposal of various assets, both in monetary terms and specific assets. Further, there was to be disclosure to the plaintiffs, in writing, of certain assets. The second contemnor filed the written affirmation three weeks late and omitted certain things. It was argued on appeal that the lower court should not have dispensed with the personal service requirement because the second contemnor had not been personally served with the order and the penal notice.

The High Court of Hong Kong firmly rejected the lower court judge's basis for dispensing with the personal service requirement for the second contemnor. The lower court judge relied on public

60. It is interesting to note that the attorney-client privilege poses a significant barrier to plaintiffs who want to prove through circumstantial evidence that the defendants were fully aware of the terms of the injunction through the advice of counsel.

61. The first contemnor (the company) went into liquidation.
announcements made by the first contemnor that referred to the order restricting the disposal of assets, the second contemnor's approval for making the announcements, and the second contemnor's affirmation that he knew the terms of the disclosure order. The combination of these facts, according to the judge, supported a strong inference that the second contemnor knew the terms of the disclosure order.

The appeals court concluded that the above three reasons did not support the inference that the second contemnor was fully aware of the terms of the disclosure order. Firstly, the public announcements did not refer to the disclosure order. Secondly, although the second contemnor was responsible for supervising and approving the public announcements, it was more likely than not that the public announcements were "drafted by professional advisers and perhaps the company secretary."62 Thirdly, since the affirmation was made after the time for compliance with the order had elapsed, it could not be presumed that the second contemnor was fully aware of the terms of the order before it expired.

What is particularly interesting about the High Court's reasoning is not that each reason standing alone would be insufficient to prove that the second contemnor had knowledge of the order, but that they rejected the cumulative effect of the above facts. The reasons proffered by the lower court judge only demonstrated that there was a possibility that the second contemnor was fully aware of the terms of the order.

The court affirmed the lower court's decision to dispense with the personal service requirement, but on different grounds. Judge Rogers focused on how the second contemnor was responsible "for the day to day administration" of the first contemnor. However, the court conceded that this was still not sufficient to compel the court to dispense with the service requirement. The straw that broke the camel's back was the delivery of the copy of the order with the penal notice to the "letter box of the 2nd contemnor's residence."63 Under the circumstances of the case, the above two points, although individually inadequate, had sufficient persuasive force in combination to permit an inference that the defendant was fully aware of the terms of the order, thereby justifying dispensing with the personal service requirement.

63. Id. at 20.
Distinguishing the evidence in *Chou Yi Feng* and *Excel Noble*

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As it can be seen from the above chart, from a quantitative perspective, the plaintiffs in *Excel Noble* had substantially more evidence to prove that the contemnor was fully aware of the terms of the order than the plaintiff in *Chou Yi Feng*. It is unclear whether the weak evidence combined with the strong evidence in *Excel Noble* played a significant role in allowing the court to exercise its discretion to dispense with the personal service requirement.

An interesting inquiry would be whether substituted service and the position of the contemnor alone would be sufficient to compel a court to dispense with the personal service requirement. Would the situation have been any different if the plaintiffs in *Chou Yi Feng* had delivered the order to the defendants’ residence and the defendants’ had also been responsible for the day to day activities of the company? At the very least, I would argue, the court in *Excel Noble* took judicial notice and was sensitive to the “weak” evidence presented to them by the Plaintiffs.

c. Direct Evidence through Previous Personal Service

*AXA China Region Insurance Co. & Anor v. Li Yu Ping Ellen*

The plaintiffs, who were in the insurance business, sought the services of the defendant as an insurance agent. The defendant later was terminated for cause by her company and subsequently began working as an agent for another insurance company. Soon afterwards, the plaintiffs claimed that the defendant was targeting their policy holders by using documents wrongfully obtained from
them in an attempt to induce their policy holders to switch insurance policies. An injunction was issued and the defendant was ordered not to use or disclose documents belonging to the plaintiffs. Further, those documents were to be delivered to the plaintiffs’ attorney. The order was personally served upon the defendant.

When the deadline had passed for the delivery of the documents, it was concluded by the court that the defendant had failed to deliver all the documents required by the order. The following day, attorneys for both sides consented to a second order in which there was a new timetable for defendant to submit plaintiffs’ documents. Essentially, defendant was asking for more time. The order was not personally served upon the defendant, but upon her attorneys. Despite a second order having been issued for her benefit, defendant failed to comply.

In filing a motion for failure to comply with the order, the plaintiffs recognized two procedural defects in their cause of action. Firstly, the second order was not personally served upon defendant. Secondly, the second order was not endorsed with a penal notice.

Plaintiff’s attorney argued that the court should exercise its power under Order 45, Rule 7(7) for three reasons: (1) the second order was relevant only “to extend time”\(^{64}\) and it did not go to the substance of the order; (2) defendant was fully aware of the terms of the injunction based upon her affirmation that she had complied with the first order; and (3) defendant was personally served with the first order and an attached penal notice.

The lower court entered an order finding the defendant in contempt of court for failing to comply with the first and second orders. On appeal, defendants argued that since the second order superseded the first order, plaintiffs were required to satisfy the personal service and penal notice requirement. They could no longer rely on the first order, which had satisfied the procedural requirements.

At the outset, Judge Stock first recognized that regardless of the new obligations in subsequent orders, whether they are more or less harsh, “personal service of the variation is required in both instances.”\(^{65}\) In support of his conclusion he said, “...[while] it could hardly be suggested that committal proceedings could hold good absent proof that the alleged contemnor had notice of the more onerous provision, there is no logical basis for contending that ser-


\(^{65}\) Id. at 352.
vice on that party is not similarly required where a material change to the order effects a lighter obligation." The court stood by its long standing policy that defendants had a fundamental right to be notified of their legal obligations under a court order no matter whether the terms of the order were harsh, fair, or in their favor.

Although the court rejected plaintiffs’ argument that personal service was not required, Judge Stock felt compelled to use his authority under Order 45, Rule 7(7) to dispense with the service requirement for the second order.

Judge Stock recognized that it was appropriate to waive the personal service and penal notice requirement because they were of no “significance” since defendant had been personally served with the first order. The only difference between the first order and the second order was the time frame in which the defendant was to deliver the documents. In fact, the time frame was extended for the defendant’s benefit. All the other terms remained the same. To put it simply, defendant would have been fully aware of the terms of the order and the legal consequences of non-compliance regardless of whether the second order was served personally because she had already been informed by the previous order.

The defendant’s knowledge of the terms of the second order was also proven by her filed affirmations. In the affirmations, defendant made references to the first and second orders. Furthermore, she acknowledged that she had complied with the first order and was well aware through her legal advisers that failure to obey the order would result in “serious consequences.”

In conclusion, the procedural defects in the second order were harmless. In the words of Judge Stock, to rule otherwise would be to “permit the triumph of pure form and technicality over the clear interests of justice, devoid of any prejudice to the defendant.”

d. Direct Evidence other than Personal Service

“‘If it were proved, for instance, that the person was actually in court at the time the order was made, service would be unnecessary in order to obtain process for contempt.’” (emphasis added). In other words, if the person was in court, heard the order read by the

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66. Id at 352.
67. Id at 360.
68. Id. at 359.
judge, and understood it, service of the order would be a mere formality. The primary function of serving the order would be redundant and serve no purpose since the individual would have the requisite knowledge of the court order. It would be grossly unfair to require a party to comply with the service requirement in the above circumstance since no one should be shielded from personal liability when they have full knowledge of the court order.

The defendant’s presence in the court, however, will not be dispositive in determining whether the Judge will dispense with the service of documents.70

In *Chou Yi Feng v. Chou Yi Chen & Others*,71 Judge Chung citing with approval *In re Tuck*72 and Arlidge, Eady & Smith on Contempt (1999) 2nd Ed., accepted defendants’ argument that “the mere fact that [defendant] was present when the order was made is not sufficient to dispense with service.”73 The presence of the defendant in court should be one of the factors taken into account to determine whether that individual has knowledge of the terms of the order. An examination of the person’s involvement in the court proceedings, how long he was there, and whether the order was read out aloud to the defendant in his presence may be determinative on how much weight should be given to this factor.

**B. Putting It All Together: Defining “Just to Do So” in the Context of Order 45, Rule 7(7)**

In a nutshell, the following factors, though not exhaustive, are what the Hong Kong courts have taken into consideration in deciding whether to dispense with the personal service requirement:

a) Service-related factors

(1) Was the defendant previously personally served with the order?
(2) Was there substitute service? (e.g. residence)
(3) Did the defendant evade service?
(4) Was the order delivered by other means (e.g. Director’s residence, telephone, telegram, publication, etc.)?

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71. [2002] H.K.E.C. 1437
72. [1906] 1 Ch 692
73. Arlidge, Eady & Smith on Contempt (1999) 2nd Ed.
b) Conduct-related factors
   (5) How involved was the defendant in the legal proceedings?
   (6) Was there any communication between legal counsel and the defendant that would indicate that his counsel made him fully aware of the terms of the order?
   (7) Did defendant affirm that he knew of the terms of the order?
   (8) Was defendant present in court to hear the order?

c) Situational factors
   (9) What is the relationship between the defendant and the other contemnors?
   (10) Did defendant's conduct during the time when the order was outstanding support a strong inference that he was fully aware of the terms of the order?

d) Other factors
   (11) Was any subsequent order materially different from the first order, which was personally served?

It can be seen that the approach adopted by the Hong Kong courts is a defendant-centered approach rather than a more balanced “totality of the circumstances” approach. Although the scale of justice is tilted more heavily towards the defendant, judges are still sensitive to the interests of the ‘victim’ of the violation of the order and the authority of the court. Judge Stone wrote the following to describe the competing interests in these types of proceedings:

“...There is always in matters of this nature a delicate balance to be maintained between the strong public interest in ensuring that the orders of the Hong Kong courts are not flouted and the evaluation of the individual circumstances of each case.”

The greatest weight is given to whether the defendant exhibited any conduct that would indicate that he was fully aware of the terms of the order. It is interesting to note that the court, at least explicitly, does not take into account the harm inflicted on the

plaintiff, the general public interest, the characteristics of the defendant’s corporate body, the schedule of the defendant, custom of the industry, the use of in-house counsel or outside counsel (or both), previous contempt charges against defendant, defendant’s demeanor and interaction in court-related proceedings, or defendant’s knowledge of the law. This is not an exhaustive list of factors. As you can see, there is an endless list of relevant factors that the court could consider that have a bearing on the defendant’s awareness of the order. A broader and holistic factor test may produce a more “just” result than an approach that places the inquiry largely on the defendant’s mental state. It seems that most of these factors, however, will either not be considered at all or will be given very little weight. This is because the courts have determined that a defendant’s procedural right to receive adequate notice trumps the majority of other interests that could be affected by the denial of dispensing with the service requirement.

VI. CAN WE DO BETTER THAN JUST SAYING IT IS “JUST TO DO SO”?

How easy would it be if judges could apply an algebraic equation to resolve circumstances in which the service requirement should be dispensed with? For example, K (knowledge of defendant) + S (whether service requirement has been fulfilled) = J (it is “just to do so.”). Unfortunately, this simple solution to a complex problem cannot be reduced to numbers. The actors involved, the circumstances of the orders, the sequence of events, and other relevant facts that are intertwined in each O.45 dispute make it impossible for any mathematical equation to take into consideration the factual nuances of each case. Nevertheless, we do the best we can in hopes of achieving the “fairest” result.

76. One would assume that the flow of information in a large multinational corporation would not be as efficient and wide-spread as that of a smaller corporate body that has two people. In a smaller organization, it may be more likely that the directors would have knowledge of the terms of the order.

77. If the director spends the majority of his time traveling outside the country, it may reasonable for him not to be aware of the terms of the order.

78. Depending on the type of industry, some officers or directors are more involved in legal matters.

79. A corporate body that has an in-house legal department or an in-house lawyer will probably disseminate information on the terms of the order more widely and frequently. The use of outside counsel may provide an inference that the corporation and the director are taking a “hands-off” approach, with their knowledge of the terms of the order probably being minimal.
Eliminating the court’s discretion to dispense with the service requirement and only allowing committal proceedings against directors who have been personally served to proceed would be to sacrifice the interests of the parties, the rights of the defendant, and the administration of justice for administrative convenience. A bright-line rule would be both over-inclusive and under-inclusive in serving the purpose of ensuring that defendants were fully aware of the terms of the order. It would be over-inclusive in cases where defendants who have been personally served do not personally read those documents. In many instances, persons who have received court documents will transfer them to their legal representative. The bright-line rule would be under-inclusive in instances where the defendant was fully aware of the terms of the order even though he was not personally served. A perfect example is found in AXA China Region Insurance Co., where the first order was personally served upon the defendant but the second order was not. The only substantial difference between the two orders was that the second order gave the defendant more time to submit certain documents. Allowing technical procedural defects to be dispositive would certainly produce a fair number of unjust results.

Although not limited to committal proceedings, the court and the plaintiffs face the problem of discerning the defendant’s state of mind and his degree of knowledge of the terms of the order. How can we ever be sure that the defendant was fully aware of the terms of the order absent personal service or a personal statement from the defendant admitting to knowing the terms of the order? Rarely will plaintiffs find a smoking gun. This burden, as the Hong Kong courts see it, is acceptable. The interests of the court and the plaintiffs are put aside in favor of a more deeply held value rooted in a legal system based on justice. This value is a defendant’s right to have adequate notice before being deprived of personal property.
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