

**IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE  
HIGH COURT ACTION NO. 1870 OF 2012**

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BETWEEN

CHOR KI KWONG DAVID

Plaintiff

and

LOREA SOLABARRIETA CHEUNG

Defendant

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Before: Deputy High Court Judge Leung in Chambers (open to public)

Date of Hearing and Decision: 6 February 2013

Date of Handing Down Reasons for Decision: 19 February 2013

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**REASONS FOR DECISION**

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1. In 2010, the defendant (“**Solabarrieta**”) interviewed the plaintiff (“**Chor**”) and his wife, their son and domestic helper on camera. Solabarrieta later caused parts of the video footage, information and photographs obtained during the interviews to be incorporated into a video and a written article, which were subsequently uploaded onto the internet. On 9 October 2012, Chor commenced the present action seeking injunctive relief against Solabarrieta for alleged misuse of the information and materials obtained during those interviews.

**BACKGROUND**

2. Chor is a businessman. Solabarrieta is the daughter of his old school mate. Solabarrieta has worked as a television presenter and journalist. At the material time, she was studying for the degree of Master of Journalism at the University of Hong Kong. It was then when the Chor couple agreed to be interviewed on camera by Solabarrieta. The interviews were filmed inside and outside Chor’s residence as well as during the couple’s social gatherings in other establishments. By now, it has been clarified that all those happened in 2010 instead of 2009 as previously suggested.

3. As particularised in the pleading, Solabarrieta was said to have obtained from those interviews information about the details of Chor’s family life, family relationship including Chor’s relationship with his wife and son, Chor’s family finance and lifestyle as well as personal photographs of Chor and his family (collectively “**the Information**”).

4. The Information was subsequently incorporated into a video titled “*The life of a Hong Kong Tai Tai*” (“**the Video**”). The Video was screened at the university as Solabarrieta’s graduation project in May 2010. In the same month, part of the Information, including a family photograph of the Chor couple, was incorporated into an article titled “*12 of the best golf courses according to Hong Kong’s pros and avid fanatics*” (“**the Article**”).

5. In May and August of 2010, the Article was published on www.cnngo.com and the Video uploaded onto the popular video sharing website www.youtube.com (“**YouTube**”) respectively. The Video and the

Article were uploaded by “FreedomLab TV”, a web and video production company founded by Solabarrieta.

6. In late August 2012, Chor’s wife complained to Solabarrieta and her mother that they agreed to the interviews merely to help Solabarrieta with her university project; and never permitted the publication of the Information on the internet.

7. On 9 October 2012, Chor commenced the present action for injunctive relief. By summons filed a week later, Chor applies for interlocutory injunction against Solabarrieta until the determination of this action or further order of the court.

8. On 19 October 2012, Mimmie Chan J adjourned Chor’s summons for substantive argument; and granted an injunction in terms as sought to last until the return date (“**the Interim Order**”). The learned judge also gave directions for the filing of affidavits. Solabarrieta filed her defence early this year.

9. This was the return day hearing of Chor’s summons. After hearing, I granted the interlocutory injunction in following terms:

“(1) The defendant be restrained, whether by herself, her servants or agents or otherwise disclosing, through the print media, the internet or otherwise, the information, and photographs of the plaintiff and his family which were provided to or obtained by the defendant in relation to and during a series of interviews conducted by the defendant with the plaintiff and his family in March to May 2010 or any part thereof unless with the plaintiff’s express prior consent, until judgment in these proceedings or further order of the court;

(2) The defendant do, within 24 hours of the making of this order:-

(a) cause to be removed from the website [www.youtube.com](http://www.youtube.com) a video titled “*The Life of a Hong Kong Tai Tai*”; and

(b) cause to be removed from the website www.cnngo.com a photograph of and caption referring to the plaintiff and his wife contained in an article titled “*12 of the best golf courses according to Hong Kong’s pros and avid fanatics*”,

such state of removal do continue until judgment in these proceedings or further order of the court.”

10. As requested, I reserved the question of the costs of the application; and gave directions for speedy trial. Chor was directed to take out a summons for case management conference (before a judge) within 21 days.

11. As indicated, I now give my reasons.

***HEARING CLOSED TO THE PUBLIC***

12. Prior to the hearing, Chor applied for direction that this hearing be closed to the public. Solabarieta opposed. For the following reasons, I refused the application.

13. Practice Direction 25.1 provides that at any stage of any proceedings (other than certain specified types), where the court is of the view that one or more of the reasons in Article 10 of the Hong Kong Bill of Rights Ordinance, Cap 383 are satisfied, it has the discretion to order a chambers hearing open to the public be closed to the public for the whole or part of the hearing.

14. Article 10 of Cap 383 provides for the right to a fair and public hearing. The press and the public may be excluded from all or part of a trial (i) for reasons of morals, public order or national security in a democratic society, or (ii) when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the

A court in special circumstances where publicity would prejudice the interests of justice.

15. Chor's application was based on ground (ii) above. The major concern expressed was that the public has been and would still be induced by the press reports of this case to attempt to gain access to the Video on the internet; and therefore the private lives of Chor and his family would be exposed to the public. Experience from the last hearing before Mimmie Chan J was cited. It was argued that the very purpose of the injunction, even if granted, would be rendered pointless, if the publicity of this hearing continued.

16. I do not agree. The private lives of Chor's family were exposed because of the Video and the caption in the Article placed on the internet, not the commencement of this action or court hearings or the press reports of them. Otherwise, but by no means suggesting that it would have been allowed (if made), an application should have been made for an anonymity order when Chor intended to commence the present action (like what the torture claimant sought in *Re Bu* [2012] 4 HKLRD 417, a case cited by both parties).

17. That the public has been induced to gain access to the Video by now cannot be undone. So long as this action remains, the public may still be induced to attempt to do so. No difference would be made, unless the Video and the caption in the Article are no longer available for general public access on the internet. Their availability pending the determination of this action was exactly what Chor's summons was about.

18. This is also not the kind of case where special circumstances exist that may cause the court to consider whether it is strictly necessary to prevent publicity so as not to prejudice the interests of justice.

***SERIOUS QUESTION TO BE TRIED***

19. The applicable principles since *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 are trite. As the applying party, Chor has to establish that the claim raises a serious question to be tried; and that damages would not be adequate remedy if he succeeds at the end. The balance of convenience between the parties ought to favour the granting the interlocutory injunction: see *Hong Kong Civil Procedure 2013* at §§29/1/8-29/1/17.

***The cause of action***

20. Both parties referred to the elements of an action for breach of confidence set out in *Coco v A H Clark (Engineers)* [1969] RPC 41, which was applied in *Li Yau Wai Eric v Genesis Films Ltd* [1987] HKLR 711, namely:

- (1) the information in respect of which relief is sought was confidential in nature;
- (2) the information was imparted by the plaintiff to the defendant in circumstances importing an obligation of confidence; and
- (3) the use and publication of the information by the defendant was unauthorised.

21. Ms Tam SC, with Mr Chain, for Chor submitted that family and personal matters are capable of being confidential in nature: see *Halsbury's Laws of Hong Kong* (2<sup>nd</sup> ed) Vol.47 at §380.523 (referring to *Michael Barrymore v News Group Newspapers Ltd* [1997] FSR 600 at 602). I agree. In my view, the context in which and the purpose for which information was elicited and provided are also relevant. In these respects, the evidences of the parties are conflicting.

22. The content of the Video and the caption referring to the Chor couple together with their photograph in the Article speak for themselves. They consist of matters personal and private to the Chor couple and family. There were also moments of expression of feelings and emotion about the family relationship. Arguably they would not be known without being revealed; and would not be revealed without being asked about. I agree with Ms Tam SC that to dissect the Information piece by piece is not profitable for the present purpose of determining whether the same is confidential in nature.

23. Mr Hughes submitted that the Chor couple gave the Information freely. But that did not necessarily take away the confidential nature of the information or the duty of confidence in respect of that. All depend on whether the Information was provided in circumstances where one would expect confidentiality to be respected; and where the Information was only supposed to be used for specific purposes as understood at the time when the Information was provided: see *Li Yau Wai Eric v Genesis Films Ltd* [1987] HKLR 711 at 719C and G.

24. In *Li Yau Wai Eric*, an exception was suggested, namely that it was the plaintiff who sought publicity. Indeed Mr Hughes for Solabarrieta

A went so far as suggesting that the Chor couple sought publicity. He cited  
B *Woodward v Hutchins* [1977] 1 WLR 760 (at 763H) in support.

C 25. It is common ground that the parties had not known each other  
D personally prior to the episode. The idea of the interview did not originate  
E from the Chor couple. The Chor couple was approached and agreed to be  
F interviewed because of the friendship between Chor and Solabarrieta's  
G mother. The context was Solabarrieta's graduation project at the university.  
H On behalf of Solabarrieta, no evidence was adduced to suggest that the  
I Chor couple or their family had any form of publicity experience prior to  
J those interviews. The evidence also includes the email from Chor to  
K Solabarrieta whereby he specifically requested her not to quote him or his  
L wife in the Article (about golfing courses). The reason given was that they  
M were not qualified to give their comments as professionals. In the  
N circumstances, I do not see how the present case can compare to what  
O happened in *Woodward* (above at 763H-764A).

L 26. No doubt a view would still have to be formed as to whether  
M the plaintiff indeed sought publicity as suggested. However, I would be  
N slow in forming that as the preliminary view of the matter for the present  
O purpose.

P 27. As to whether Solabarrieta's intention to make use of the  
Q Information for the development of her business plan had been made  
R known and consented to by the Chor couple or whether Solabarrieta had  
S repeatedly assured the Chor couple that the Information would be used for  
T the purpose of her graduation project rather than any other purpose or  
U publication, the evidence of the parties are again in direct conflict.

A 28. There was apparently never formal or written consent of any  
B sort. There was however the evidence of Sylvia Tai ("**Tai**"), a teammate of  
C Solabarrieta in the filming of the interviews and the compilation of the  
D Video. The filming schedule that Tai disclosed and her electronic message  
E in late October 2012 suggested that it was at all material times a university  
F project; and that the team never endorsed the use of the Information,  
specifically the Video, by Solabarrieta for her own purpose or publication  
on the internet.

G 29. In the email correspondence with the Chor couple in May  
H 2010, Solabarrieta asked for permission to incorporate a picture of the  
I couple in the Article. Whist Chor did not specifically replied to that in his  
J subsequent email, he, as mentioned, did request Solabarrieta not to quote  
K him or his wife for their comments as they were not professionals.  
Nevertheless the Article published days later not only quoted them but also  
contained their family photograph.

L 30. As mentioned, Chor's wife complained to Solabarrieta and her  
M mother towards the end of August 2012. Chor's wife complained that she  
N only expected to help Solabarrieta with her university project but never  
O gave her permission to publish the Video on the internet to the public. She  
P demanded the removal of the Video from the internet or legal action would  
Q be taken. Letter of demand was also sent electronically by the solicitors for  
R the Chor couple to Solabarrieta in early September 2012. Solabarrieta's  
S mother was apologetic to the complaint. As to Solabarrieta, one would  
T have expected denial of the complaint. Yet what she did was to express her  
understanding of the concern of the Chor couple; and suggested nothing  
U could be done until the web controller of her company returned to a  
V fortnight later.

31. Considering the materials before me, I found that it is seriously arguable whether the Information obtained during the interviews are capable of being and, in fact, confidential in nature. So are the questions of whether the duty of confidence existed as well as whether the consent to the publication of the Information was limited to the purpose of the graduation project of Solabarrieta or extended to effectively the world at large through the internet.

***Proper plaintiff***

32. Mr Hughes argued that the proper plaintiff should not be Chor but his wife. The essence of the argument was that Solabarrieta liaised with Chor's wife with a view to her being the star of the interview, namely, the "tai tai". It was Chor's own suggestion that he be interviewed as well. He was featured in the interviews to a limited extent. In the circumstances, Mr Hughes argued that the duty of confidence, if any, was owed not to Chor.

33. There is conflict of evidence as to whether it was Chor's initiative that he also be interviewed. In any event, the nature of the Information was such that interest in it is not peculiar to the individual providing it, be that Chor or his wife, during the interviews. The Information concerns Chor's wife as much as it concerns Chor. The permission or even invitation to film the social gathering of the Chor couple was one from Chor's wife as much as that from Chor.

34. It is in my view seriously arguable that the duty of confidence does not arise merely between the parties in actual liaison as if it were a

A matter of contract. In the premises, whether Chor's wife should also be  
B made a plaintiff does not affect Chor's capacity to sue.

C ***Higher standard of proof***

D 35. Mr Hughes submitted that demonstrating that the above  
E constitute serious questions to be tried would not suffice. As far as the  
F mandatory part of the injunction was concerned, Chor had to satisfy the  
G court that it has a real prospect of success at the trial. This would be a  
higher standard of proof.

H 36. That the injunction being sought is mandatory in nature does  
I not *per se* entail the application of a different test in the consideration of  
J the merits of the claim. It is the finality effect of the grant or refusal of the  
K interlocutory relief that matters. An interlocutory order would have such  
L effect if its grant or refusal would effectively dispose of the action: see *TKI*  
M *Ltd v New Happy Ltd* [1995] 1 HKC 551 at 554B-C. As such, the finality  
N effect may well exist in the case of a prohibitory injunction. An instance  
would be an interlocutory injunction in an action to enforce a contractual  
restraint of trade or anti-competition clause that would expire before the  
trial of the action.

O 37. After all, it is the consideration of the risk of injustice in  
P withholding and granting the interlocutory injunction in the circumstances  
Q of the particular case: see *Music Advance Ltd v The Incorporated Owners*  
R *of Argyle Centre Phase I* [2010] 2 HKLRD 1041 at §12. In the present  
S case, the interlocutory injunction sought, both the mandatory and the  
T prohibitory part of it, does not have the finality character of effectively  
U disposing of the case. If the injunction is granted, the availability of the  
V Video and the caption in the Article would effectively been suspended from

A the relevant websites. The kind of irreversible consequence of an  
B interlocutory injunction that would have caused the court concern about  
C finality is not apparent, if ever existing, in the circumstances.

D ***DELAY***

E 38. Application for interlocutory injunction should be made  
F promptly. It was argued that there was substantial delay since the  
G publication of the Video and the Article on the internet before the present  
H application.

I 39. Mr Hughes referred to *Chinaplus Wines Limited v Berry Bros*  
J *& Rudd Limited*, HCA 1818/2012 (13 December 2012) for the purpose of  
K demonstrating that ‘promptly’ would mean not more than 6 weeks of  
L unexplained delay or alternatively 3 months of explained delay. I found  
M that to be unhelpful, as each case must be considered on its own facts.

N 40. In the present case, indeed 2 years had elapsed since the  
O publication of the Video and the Article on the internet before the Chor  
P couple complained about them. It was suggested that the Chor couple  
Q ought to have learned about the content of the Article, the link to which  
R was forwarded by Solabarrieta to them at one time. As to the Video on  
S YouTube, there was no suggestion that the link to that had been forwarded  
T to the couple.

U 41. The Chor couple explained that they never opened the link to  
V the Article. As to the Video, even Solabarrieta suggested that the average  
hits on the Video on YouTube by mid-August 2010 had been very modest.  
The Chor couple claimed that they came to discover the publication of the

A Video on the internet indirectly during the last quarter of 2012. Upon that,  
B Chor's wife sent a telephone message complaining to Solabarrieta's mother  
C on 29 August 2012. 12 minutes later on the same day, Chor's wife sent an  
D electronic message to Solabarrieta making the same complaint and demand.

E 42. Whether the Chor couple were ignorant about the publication  
F on the internet until late August 2012 is a factual dispute. At the moment,  
G it was not abundantly clear that their explanation is liable to be rejected as  
H being inherently improbable.

I 43. As to what happened since the above complaint in late August  
J 2012, Solabarrieta suggested in her response that all parties had to wait  
K until after mid-September 2012 before anything could be done about that.  
L From then to the commencement of action in early October 2012 and then  
M the taking out of the present application a week later, I did not see the kind  
N of unexplained substantial delay that would have impaired an application  
O for the interlocutory injunctive relief.

P ***SERVICE OF THE PROCEEDINGS***

Q 44. Solabarrieta complained that the Interim Order was given in  
R her absence and when she was unaware of the commencement of these  
S proceedings.

T 45. There was conflicting evidence from the representatives of  
U Chor's solicitors and Solabarrieta in respect of what happened on 16  
V October 2012 when the former attempted to serve the court documents,  
including the writ and the summons, on the latter. But the solicitors'  
representatives deposed that upon the refusal of Solabarrieta to accept  
service on that occasion, the court documents were inserted into the

A letterbox of her residence in the presence of the security guard of the  
B building where she resides. Similar episode recurred when the solicitors'  
C representatives attempted to serve the Interim Order on Solabarrieta on 20  
D October 2012.

E 46. Solabarrieta admitted finding the documents in the letterbox  
F but only on or about 23 October 2012. It was how and when she became  
G aware of these proceedings. But amongst the news reports on the internet  
H on this case since its commencement, there was one dated 21 October 2012  
I in which Solabarrieta reportedly responded to the press that she would  
J consult her lawyers. That, if true and accurate, would contradict her  
K suggestion that she was not aware of these proceedings until 23 October  
L 2012.

M 47. In any event, I agree with Ms Tam SC that the dispute in this  
N respect was not material to my consideration of whether an interlocutory  
O injunction should be granted now.

P ***NEED FOR SPECIFICITY***

Q 48. It was argued that the injunction lacks specificity in the  
R confidential information and hence too wide and vague. Mr Hughes  
S referred to *Sim Kon Fah v JBPB & Co* [2011] 4 HKLRD 45; and submitted  
T that if an injunction to restrain the defendant from disclosing confidential  
U information was not fully particularised, it would be difficult for anyone to  
V know what was prohibited and what was not.

49. What Mr Hughes submitted came from similar submission  
made by counsel in *Sim Kon Fah* (above at §§50). Counsel there cited the

A principles in *PCCW-HKT Telephone Ltd v Aitken*, HCA 1089/2008 (at  
B §§51-53). The learned Recorder in *Sim Kon Fah* made clear (at §§53-56)  
C that in applying the principles in *HKT Telephone Ltd* in any particular case,  
D one needs to apply a degree of common sense.

E 50. It will be too vague and general for the plaintiff to seek to  
F restrain the defendants from disclosing or using documents which are  
G “private or confidential to the plaintiff” without any further specifications  
H or particulars of the documents in question. But the learned Recorder in  
I *Sim Kon Fah* found that the particulars of the documents stored in the  
laptop computer in that case as set out by the plaintiff sufficed for the  
purpose of identifying the documents in respect of which relief was sought.

J 51. In the present case, I saw no real vagueness in the ambit of the  
K information and materials in respect of which the injunction was sought.  
L As slightly refined during the hearing, they were identified as those  
M provided by and obtained from the Chor family in relation to and during the  
N series of interviews conducted by Solabarrieta with Chor and his family  
O during a specified period. As far as the mandatory part of the injunction is  
P concerned, the Video and the photograph and caption in the Article are  
Q precisely identified. Solabarrieta never actually expressed difficulty in  
identifying the information and materials subject to the order. Any  
suggestion to further dissect the information and materials especially those  
now forming integral parts of the Video, in my view, would lack the  
necessary degree of common sense.

R ***BALANCING CONVENIENCE AND RISK OF INJUSTICE***

S 52. Much of the factual dispute between the parties needs to be  
T argued and resolved. The balance of convenience and risk of injustice  
U  
V

between the parties became all the more important in my deliberation as to whether to give the interlocutory injunction pending the trial of this action.

53. Evidence of comment, some seemingly judgmental, on the lifestyle of Chor's wife as portrayed in the Video on the internet was produced. But it matters not what opinion any given person may form about Chor and his family upon viewing the Video and reading the caption in the Article. The damage that the publication of the Information may bring about to Chor (and his family) would take the form of embarrassment, anxiety and annoyance; and this would be because of their private and family affairs being exposed to an extent substantially beyond what was agreed upon or expected. That this kind of damage is difficult to quantify and to adequately compensate, in my view, should be clear. As a matter of fact, there is no claim for damages apart from the injunctive relief.

54. The fact that the Information has been published on the websites since 2010 would not render an injunction academic. The scale of publication, if not restrained, would be such that the Information continued to be available to all those who have or would have access to the relevant websites directly or by linkage. Every hit, be it fresh or repetitive, counts: see *Douglas v Hello! Ltd (No 3)* [2006] QB 125 at 162D-F (per Lord Phillips MR).

55. Solabarrieta suggested that the interlocutory injunction has tarnished her reputation; and its discharge was vital in that it would vindicate her as an honest and innocent producer of the Video and the author of the Article. I did not see how. As she also suggested, much publicity has been generated as a consequence of the commencement of this action. The discharge of the interlocutory injunction would not have the effect she suggested, unless and until she is cleared of the allegations

A against her in this action. This would not happen until after trial. For the  
B present purpose, the relevant damage to Solabarrieta being considered  
C should be that caused by the interlocutory injunction, if granted, and not the  
D action which would in any event have to continue until judgment.

E 56. Whilst it was suggested that the Video should be instrumental  
F to the development of Solabarrieta's business, the materials before me did  
G not show that this was the only or most significant element of her portfolio.  
H It took her 8 paragraphs in 2 pages of affirmation in order to set out her  
I academic and professional background even without the Video. Whilst the  
J idea was said to be utilising the Video to pitch for the production of a  
K television series, 2 years have elapsed since the production of the Video  
L without any suggestion that such idea has actually materialised into any  
M result. Further any such damage would take the form of loss of business or  
N business opportunity to Solabarrieta; and could be quantified and  
O compensated by way of damages. There was no suggestion to doubt  
P Chor's ability to fulfil his undertaking to pay damages in the event that the  
Q interlocutory injunction is eventually proven to be wrongly granted.

R 57. The balance of convenience and injustice, I conclude, tilted in  
S favour of granting the interlocutory injunction.

(Simon Leung)  
Deputy High Court Judge

T Ms Winnie TAM, SC and Mr Christopher CHAIN, instructed by Messrs  
U Maurice WM Lee Solicitors for the plaintiff  
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Mr Sebastian HUGHES, instructed by Messrs CWL Partners for the  
defendant

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