

Commercial Litigation Alert



The rise of 'email fraud' and recovery litigation in Hong Kong

Introduction

In view of the rapid change in the technological landscape, 'email fraud' is becoming more and more prevalent. Upon discovery of the fraud, time is of the essence to identify the bank account to which money had been transferred to and freeze the same. Tracing exercises should also be done in cases where there are many layers of recipients. If the relevant bank account has been frozen, then victims can apply for default judgments against the fraudster and subsequent recipients (if any).

Two recent case authorities in Hong Kong have diverged in juridical views of whether victims should seek default judgment together with a vesting order or commence garnishee proceedings to enforce default judgments to recoup their stolen funds. This article seeks to discuss the differences between the two options.

Recovery litigation in Hong Kong

It is not uncommon for the unknown fraudsters and subsequent recipients of the victim's money to not appear in the proceedings. As a result, the victim usually resorts to one of the following recovery litigation options:

1. Vesting order

The victim can seek an order for default judgment together with a vesting order pursuant to section 52 of the Trustee Ordinance (Cap. 29) ("**TO**"). In order for a vesting order to be made, the Court should first be satisfied that the stolen funds are funds belonging to the victim. If so, the Court will then make a vesting order against the bank in whose account the stolen funds are held. The effect of the vesting order is to compel the bank to pay the stolen funds directly back to the victim. This is a cost-efficient method to allow victims recoup stolen funds as the Hong Kong courts process their applications for default judgment and vesting order in one hearing. In the past, vesting orders are commonly granted by the Court.

S. 52(1)(e) of TO provides that where a thing in action is vested in a trustee and it appears to the Court to be expedient, the Court may grant an order vesting the right to transfer the thing in action in any person appointed by the Court.

In the recent case of **800 Columbia Project Company LLC v Chengfang Trade Ltd and others** [2020] HKCFI 1293, Recorder Eugene Fung SC considered that the Court can only grant a vesting order in favour of trustees appointed by the Court. The learned Recorder was not satisfied that the Court's jurisdiction under s. 52(1)(e) of TO was engaged upon making of a declaration that a defendant holds certain sums of money in a bank account on constructive trust for a plaintiff, in that the defendant becoming a constructive trustee pursuant to a declaration made by the Court cannot be said to have been "appointed" by the Court to be a trustee for the purpose of s. 52.

In a subsequent case of **Wismettac Asian Foods, Inc. v United Top Properties Limited and Others** [2020] HKCFI 1504, Deputy High Court Judge Paul Lam SC came to a different conclusion than that of Recorder Eugene Fung SC. The learned Deputy Judge recognised that a constructive trust came into existence the moment the fraudster or subsequent recipient receives the victim's money or its traceable proceeds in their bank accounts. Accordingly, the Hong Kong courts can grant a vesting order upon the victim's application for default judgment.

Then, in the most recent case of ***TOKIĆ, D.O.O.v Hong Kong Shui Fat Trading Limited & Others*** (HCA 381/2020, 4 August 2020), DHCJ Douglas Lam SC dismissed a vesting order application and considered that the correct decision should be the one made in ***800 Columbia***.

In view of the conflicting authorities set out above, the position of the Hong Kong court's power to grant a vesting order in email fraud cases remain unsettled until the issue is clarified by the Court of Appeal. Victims may be at risk of the Hong Kong courts dismissing their applications for vesting order and instead be ordered to commence garnishee proceedings to enforce their default judgments.

2. Garnishee proceedings

Alternatively, it is open for the victim to seek a garnishee order pursuant to Order 49 of the Rules of High Court (Cap. 4A) to enforce a default judgment against the victim or subsequent recipients. The main difference between the seeking of a vesting order and a garnishee order is that, in seeking the latter order, the victim does so in its capacity as a judgment creditor.

In order to obtain a garnishee order, the victim should first obtain a default judgment against the fraudster for the fraudster to pay a sum equivalent to the stolen sum to the victim. If the fraudster fails to satisfy the default judgment, the victim can enforce the judgment by commencing garnishee proceedings. The effect of the garnishee proceedings is that the garnishee, i.e. the relevant bank holding the stolen funds, cannot pay the debt under the default judgment to any person other than the victim.

Unlike a vesting order, the garnishee proceedings may be more time-consuming. However, in view of the unsettled legal position regarding a vesting order, garnishee proceedings may be a more straight forward option.

Conclusion

This area of law remains to be clarified by the higher courts. In the meantime, given the conflicting decisions, it seems that vesting order may no longer be a shortcut for victims to recoup their stolen funds. Ultimately, victims should consider whether they are risk adverse and time sensitive when deciding which recovery option to pursue.

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