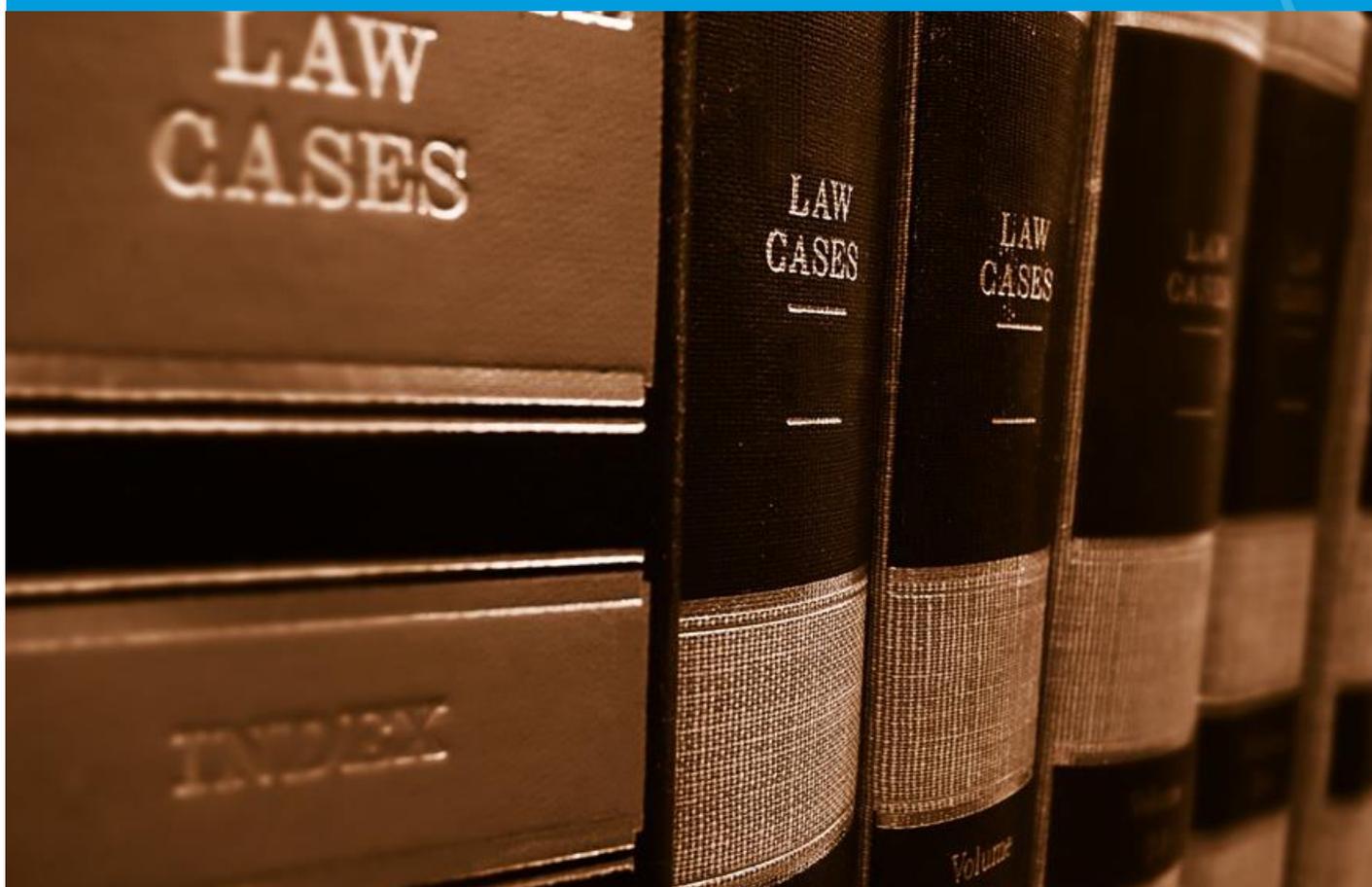


Commercial litigation newsletter – October 2022



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Update on Statutory Demands

Statutory Demands are often considered a powerful means for debt collection, in that if the debtor does not repay the debt claimed within 21 days after the Statutory Demand is served, the creditor shall be entitled to commence winding up/bankruptcy proceedings (as the case may be) against the debtor. This creates huge pressure on the debtor.



However, creditors always face challenge raised by debtors on the Statutory Demands. One of the often raised challenge is that the Statutory Demand has overstated the debt rendering it invalid. In a recent judgment given by the Court of Appeal in ***Chan WS and another v CC Bank*** [2022] HKCA 1037, the Court of Appeal clarified this area of the law.

- The judge in the first instance ordered that the statutory demands in question be set aside as it has substantially over-stated the debt, and no attempt had been made by the creditor to amend or correct them.
- It is well established that an over-statement of the indebtedness in the Statutory Demand will not automatically entitle the debtor to have the demand set aside. The judge in the first instance did not dispute the correctness of this principle but sought to distinguish it as applying only when the Court considers whether a bankruptcy order should be made at the hearing of the petition, in circumstances where the debtor has not applied to set aside the demand.
- The Court of Appeal disagree with the first instance judge and consider that there is no proper basis for such distinction to be drawn. The Court of Appeal found that the principle was in fact derived from a decision of the English Court of Appeal in a case which

specifically concerned an application to set aside a statutory demand.

- Further, the Court of Appeal found that the principle is consistent with s. 124(1) of the Bankruptcy Ordinance, which provides that "*no proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity unless the court is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the court*".
- The Court of Appeal considered that the judge in the first instance did not exercise her discretion correctly in setting aside the statutory demands, for the judge had failed to consider whether injustice would be caused to the debtors if the statutory demands were allowed to stand. The Court of Appeal considered that the judge should have considered, amongst other things, whether there was any evidence that the debtors could and would have repaid the indebtedness even if it were correctly stated in the statutory demands.
- The Court of Appeal ruled that the judge was wrong to set aside the statutory demands solely on the basis that the debt was overstated, as no injustice was caused to the debtors by the over-statement considering that: (1) the amount of indebtedness was subsequently clarified; (2) the over-statement was due to clerical mistake which was also subsequently clarified; (3) despite the clarifications, there was no evidence suggesting that the debtors were prepared to settle the correct amount of the debt.



Cutting off kinship legally?

One may have heard about people declaring on newspaper to cut off their relationship with their family members. Does such declaration has any legal effect under Hong Kong Law?

It appears that current Hong Kong law only expressly provides for a few circumstances where it is possible to "terminate the parent-child relationship" if the child is



under 18 years old. The logic behind is that where the child is under 18, the Hong Kong law does not recognize that the "parent-child relationship" has any formal and legal status – all that the parents have over the child are "rights and authorities" (See Public Consultation for The Proposed Legislation to Implement the Recommendations of The Law Reform Commission Report on Child Custody and Access), which are transferrable under Hong Kong law. See for example, *Mok Hing Chung (莫慶聰) v Wong Kwong Yiu* which is a case concerning transfer of parental rights and authorities in the case of adoption. Once such rights and authorities are transferred, the "previous" parents cease to have any rights and authorities over the child. However, generally speaking, there can be no agreement to give up the parents' parental rights and authorities (See section 4, Guardianship of Minors Ordinance). Things would obviously turn more complicated if surrogacy is involved (See our earlier article relating to surrogacy [here](#)).

Nevertheless, it seems that the position is less clear where the child reaches adulthood. There also does not appear to have any express provisions governing other kinds of family relationship, e.g. between father and daughter in law, siblings and/or grandparents and grandkids. In these circumstances, one may have to escalate the matter before the court by relying on its inherent jurisdiction to make a declaration to such effect (i.e. termination of relationship with a child over 18 years old or other family relationships). We are unable to locate reported authorities regarding the

same, and so it would be interesting to see the Court's opinion on the same.

On a side note, it would also be interesting to know if a child's entitlement under the Intestate' Estate Ordinance (Cap. 73) may extinguish upon his/her parents transferring away their parental rights to another person. Again, this appears to be a grey area under Hong Kong law, despite section 2 of the said Ordinance states that an adoptee through an adoption made in Hong Kong (under the Adoption Ordinance or in accordance with Chinese law and custom before 1 January 1973) would be considered as a child for the purpose of the Ordinance.



Victims of Email Fraud – how to get your money back

Introduction

The Covid-19 outbreak has made working from home or hybrid working new ways of working for millions of people around the globe. The increased reliance on email and other means of electronic communication have left businesses and their employees more vulnerable to cybercrime such as email fraud.

This short briefing aims to provide an overview of the steps/actions that businesses can take in order to maximise their chances of recovery in email fraud cases.



How does email fraud work?

Typically, fraudsters will hack into the email systems of companies or individuals to monitor their business dealings or correspondences. Subsequently, they will impersonate the senior employees, business partners, professional advisers, relatives or friends of the victims and send fraudulent emails to the victims requesting for payments to be made to the fraudsters' designated bank accounts. Fraudsters will encourage victims to act quickly without verification. Some common tricks adopted by fraudsters include:

- creating email addresses using domains with similar spelling to the legitimate domains
- using urgent tones: "The transfer needs to be done ASAP."
- stating that the funds are needed urgently but CEO is in a meeting or on leave and cannot be disturbed

Once the transfer has been made, fraudsters will then attempt to dissipate the funds as soon as possible to prevent effective recovery by the victims.

When an email fraud is discovered, it's vital to act quickly to prevent the onward transfer of funds.

Actions to be taken by victims

Contact the bank immediately

The victim should contact the transferring bank immediately to request cancellation of the suspicious transaction and freeze the bank account, if possible. Time is of the essence. In practice, banks may not freeze the account without a letter of "no consent" ("**LNC**") from the Police or a court order. The notification would at least put the bank on notice of the email fraud.

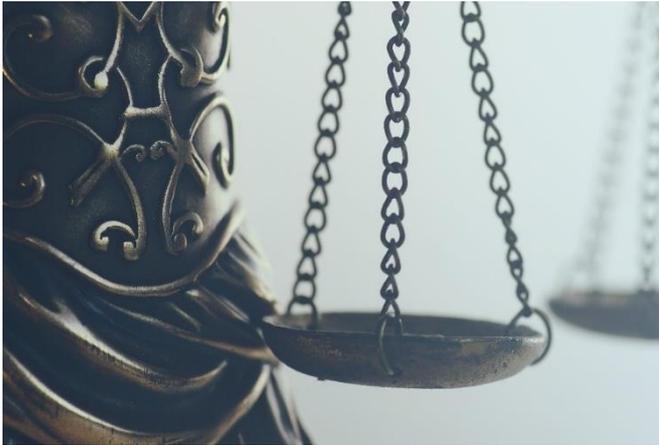


Report to the Police

A police report should be filed as soon as possible. Where a business does not have a presence in Hong Kong, an e-report may be filed to the Hong Kong Police via its online platform.

Upon receiving the victim's report, the Joint Financial Intelligence Unit (JFIU) may issue a LNC to the relevant bank stating that the JFIU does not consent the bank to deal with the bank account. The LNC practically freezes the bank account temporarily and give time to the victim to seek a formal court order.

However, the LNC is merely a stopgap measure, and the Police will not be in a position to seek a return of the defrauded sums. To recover the monies stolen, the victim has to commence civil actions against the fraudster in the Hong Kong Court.



Commence civil actions

There are a number of cause of actions available to victims which enable them to prevent dissipation of assets and recover the funds lost in email fraud cases:

Disclosure - Norwich Pharmacal Orders

Norwich Pharmacal Orders ("**NPOs**") are court orders which enable the victims to obtain information or documents from an innocent third party that has been "mixed up" in the wrongdoing, such as a bank or an accountant. NPOs are often sought in fraud cases, where the identity of the wrongdoer or the location of the misappropriated assets is unknown but the victim can point to a third party (usually banks) who has this information.

NPOs are discretionary remedy which will not be granted lightly. The Court will only exercise its discretion if:

- 1) there are cogent and compelling evidence to demonstrate that serious tortious or wrongful activities have taken place;
- 2) the NPO will very likely reap substantial and worthwhile benefits for the plaintiff;
- 3) the discovery sought must not be unduly wide; and
- 4) the plaintiff has exhausted other proper and reasonable avenues for obtaining the information sought.

In order to avoid the fraudsters from being forewarned of the plaintiffs' actions, applications for NPOs are usually coupled with a "gagging order" to prevent the banks tipping the fraudsters off. If necessary, the victims may also apply for an "anonymity order" prohibiting publication of the name of the victims or any information which will enable the public to identify the victims.

Freeze the assets - Injunction Orders

Once the whereabouts of the funds are identified, the victim may consider applying for injunction to freeze the bank account(s) to which the stolen funds have been wired. There are two primary forms of injunctions sought in cases of fraud:

Proprietary Injunction

A proprietary injunction is for preserving assets to which the plaintiff has a proprietary claim. Where properties are obtained by fraud, equity imposes a constructive trust on the fraudulent recipient, so that the monies are recoverable and traceable. Comparing to a Mareva injunction, a proprietary injunction is easier to obtain and there is no need to prove risk of dissipation. The plaintiff has to show that:

- 1) there is a serious issue to be tried on the merits of the claim;
- 2) damages are not an adequate remedy; and
- 3) on the balance of convenience, it is just and convenient to grant the injunction.

Mareva Injunction

A Mareva injunction restrains the defendant from dissipating his assets with the intention to frustrate a judgment subsequently made against him.

Unlike an application for proprietary injunction, the plaintiff is not required to show any proprietary interest in the transferred funds. Instead, the plaintiff has to satisfy the Court that:

- 1) there is a good arguable case on a substantive claim against the defendant;
- 2) the defendant has assets within Hong Kong;
- 3) the balance of convenience lies in favor of granting the injunction; and
- 4) there is a real risk of dissipating or secretion of assets by the defendant before the Court can make a final judgment at trial.

Injunctions are powerful legal remedies but highly technical. The victim should always seek legal advice to ensure that an application is prepared carefully, accurately and on a timely manner.

Recovery and enforcement

Default Judgment

In order to recover the monies lost in email fraud, the victim has to commence civil proceedings against the fraudster (or the subsequent recipients of funds) by filing a Writ of Summons. Upon being served the Writ of Summons, the fraudster must file an Acknowledgement of Service with the Court within 14 days. In reality, fraudsters rarely appear in the proceedings or take steps to defend the claim.

If the fraudster fails to acknowledge service within the prescribed time, the plaintiff may apply for a default judgment against the defendant.

Garnishee Order

Once a judgment is entered and the fraudster fails to satisfy the judgment, the victim can then apply for a garnishee order against the bank in which the funds are located pursuant to Order 49 of the Rules of the High Court (Cap. 4A). The garnishee order compels the bank to directly pay the attached sum in the fraudster's bank account back to the victim.

Vesting Order

As an alternative to the traditional garnishee procedure, one of the reliefs often sought by victims is a vesting order under Section 52 of the Trustee Ordinance. By the granting of a vesting order, the bank will be compelled to pay over the scammed funds to the victim without the victim applying to enforce the judgment.

Whilst there is conflicting case law as to the applicability of Section 52 of the Trustee Ordinance for situations pertaining to email scams, there have been numerous recent cases¹ which suggest that the Court has taken a stance that Section 52 of the Trustee Ordinance is applicable, and that a vesting order is a valid tool to be used for the recovery of funds for victims of email fraud.

With this being said, this area of law is not fully settled, and remains to be clarified by the more senior Courts.



Conclusion

Email fraud has unfortunately become increasingly common in Hong Kong. As the old saying goes, prevention is better than cure. It is paramount for companies to put in place adequate safeguards to prevent, detect and mitigate the risk of email fraud. Employees should remain alert and report any suspicious incidents. Failure to do so may lead to substantial monetary and reputational losses.

If you become a victim of email fraud, make sure that you keep calm and act promptly to enhance the chance of successful recovery. Legal advice should be sought as soon as possible to formulate the best course of actions to freeze and recover the funds stolen on a timely basis.

¹*Star Therapeutics Inc v. Leabon Technology (HK) Ltd* [2021] HKCFI 1715 and *Hypertec Systems Inc. v Yifim Limited* [2022] HKCFI 482

News update

Webinar

We will be hosting our next commercial litigation webinar on 22 November 2022, with details to follow. Stay tuned and please feel free to contact us if you wish to receive an invitation of the webinar.

Please also contact us if you would like to view our recent commercial litigation webinars:

Date	Speakers	Topic
18 August 2022	Alexander Tang (Restructuring & Insolvency Partner) and Henry Zhu (Partner, Wei Tu Law Firm*)	Commercial litigation Greater Bay Area series - part 2
6 July 2022	Ivan Ng (Litigation Partner) and Emily Li (Litigation Partner)	Cross-border Injunctions – the Shanshui case as an example
12 May 2022	Emily Li (Litigation Partner) and Henry Zhu (Partner, Wei Tu Law Firm*)	Commercial litigation Greater Bay Area series – part 1
28 January 2022	KT Fung (Banking Partner) and Emily Li (Litigation Partner)	Practical advice on debt recovery and credit risk mitigation [^]
16 December 2021	Stephanie Poon (Managing associate) and Karies Lam (Associate)	Legal regime for mental incapacitated person and enduring power of attorney
20 October 2021	Karis Yip (Managing associate, Stephenson Harwood) and Sanjay A. Sakhrani (Barrister-at-law and accredited mediator)	Current employment issues and trends

[^]This is an exclusive webinar for a particular client. If you also wish to receive any tailor-made webinar, please feel free to contact our Ms Emily Li at emily.li@shlegal.com.

Recent articles

Date	Author	Title
29 July 2022	Emily Li, Karis Yip and Stephanie Poon	Commercial litigation newsletter - July 2022
26 April 2022	Emily Li, Karis Yip and Stephanie Poon	Commercial litigation newsletter - April 2022
17 January 2022	Emily Li, Karis Yip and Stephanie Poon	Commercial litigation newsletter - January 2022
9 Nov 2021	Ian Childs	Hong Kong to end its 'fraud exception rule'
29 October 2021	Emily Li, Karis Yip and Stephanie Poon	Commercial litigation newsletter – October 2021

Publications



Ivan Ng and Emily Li have authored the Hong Kong chapter in the latest edition of The Legal 500's Litigation Country Comparative Guide. Ivan and Emily answered a set of country-specific questions to provide an overview of litigation laws and regulations applicable in Hong Kong. Click [here](#) to read the chapter.

Corporate and Commercial Disputes Hub

Please visit the [Stephenson Harwood Corporate and Commercial Disputes Hub](#) to see latest updates from our team.

Office news

Hong Kong-based partner Emily Li has passed the Guangdong-Hong Kong-Macao Greater Bay Area (GBA) Legal Professional Examination.

On 22 October 2020, the State Council General Office released the details regarding the pilot scheme that allows legal professionals who pass the special qualifying examination to deal with civil and commercial legal matters, including litigation and non-litigation matters, in the nine mainland cities of the Greater Bay Area. This a big step forward for allowing Hong Kong legal practitioners to practise law in the Greater Bay Area.

*Wei Tu (a PRC law firm registered in Guangzhou) and Stephenson Harwood (a law firm registered in Hong Kong) are in a CEPA association under the name "Stephenson Harwood - Wei Tu (China) Association". CEPA (Closer Economic Partnership Arrangement) is a free trade agreement concluded between Mainland China and Hong Kong. Under CEPA, Hong Kong based law firms are permitted to operate in association with Mainland Chinese law firms to provide comprehensive legal services in Mainland China governed by Chinese and non-Chinese laws.

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