

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE**

ACTION NO 17 OF 2019

BETWEEN

TERENCE JOHN STOTT

Plaintiff

and

LARKS TRADING LIMITED

1st Defendant

SOMERSET ASIA LIMITED

2nd Defendant

YOWIN TRADING CO, LIMITED

3rd Defendant

Before: Deputy High Court Judge Allan Leung in Chambers

Date of Hearing: 2 May 2019

Date of Decision: 2 May 2019

DECISION

1. This is the plaintiff's application for judgment against the defendants in default of notice of intention to defend and defence pursuant to Order 19, rule 7 of the Rules of the High Court.

2. The plaintiff seeks an order in terms of the summons issued on 28 March 2019 ("the Summons") which include declarations that the 1st, 2nd and 3rd defendants hold US\$300,475, US\$820,625 and US\$227,618.75 respectively or all such assets derived from such sums or any parts thereof on constructive or resulting trust for the plaintiff.

3. The plaintiff is a victim of a fraudulent investment scam over a period of eight months from March to November 2016. He was deceived into transferring funds to the defendants believing that he was acquiring shares pursuant to an investment opportunity. He was sent numerous remittance instructions to transfer funds to the accounts of the defendants on numerous occasions under different pretext. He was led to believe that all the transfers were for the acquisition of shares and the cashing out of the same.

4. The plaintiff issued a writ on 4 February 2019 and amended on the same day. He also obtained a *Mareva* injunction from Deputy High Court Judge Ismail SC on the same day restraining the defendants from dealing with their assets up to the above respective amounts.

5. No notice of intention to defend or defence has been filed. The present Summons was issued on 28 March 2019.

6. I have read the affirmations of service confirming the service of the amended Writs of Summons and statement of claim on 4 February 2019 and the Summons on 2 April on the defendants at their registered addresses. I have not seen any affirmation of service on the *Mareva* injunction. However, the plaintiff's counsel Mr Brown confirmed that the *Mareva* injunction had been duly served on the defendants and the plaintiff's solicitors undertake to file the affirmation of service today.

7. As the claims in the statement of claim are not provided for in Order 13, rules 1 to 4 and Order 19, rules 2 to 5, the present application is governed by Order 19, rule 7(1) which I do not need to recite. Suffice it to say that despite the words "*the Court shall*" are used, "*the rule is not mandatory but discretionary, and the court retains its discretionary power*

whether to give judgment” (see *Hong Kong Civil Procedure 2019* Volume 1, paragraph 19/7/13).

8. Further, Mr Brown reminded this court that it must give judgment according to the pleadings alone and it is not necessary on the hearing of the application for default judgment for the plaintiff to prove his case by evidence.

9. As mentioned earlier, one of the relief sought by the plaintiff in the default judgment is a declaration in respect of constructive or resulting trusts. Given that declaratory relief is sought, the following passages from *Hong Kong Civil Procedure 2019* are relevant. Paragraph 15/16/2 provides that:

“ The power to make binding declaration of right is a discretionary power A declaration can only be made after proper argument and cannot be made merely on admissions by the parties whether in pleadings or otherwise ... nor in default of compliance with rules of the court.”

10. Further, paragraph 19/7/20 provides that:

“ It is not the normal practice of the court to make a declaration without a trial, particularly where the declaration is that the defendant in default of defence has acted fraudulently ...”

which is, of course, the case here.

11. However, paragraph 15/16/2 of *Hong Kong Civil Procedure 2019* Volume 1 says this:

“ ... the rule of the court that a declaration will not be granted when giving judgment by consent or in default without a trial is a rule of practice and not of law and will give way to the paramount duty of a court to do the fullest justice to the plaintiff to which he is entitled;”

12. Hence, such relief has been granted by the courts in a number of cases, including, for example, by Lam J (as he then was) in *Lai Wai Kuen v Wong Shau Kwong* [2004] 4 HKC 528. See also paragraph 19/7/20 of *Hong Kong Civil Procedure 2019* Volume 1.

13. Mr Brown also helpfully referred to a number of cases on the practice of granting declaratory relief without a trial in his submissions, which I will not repeat here.

14. It appears that in the light of the events as pleaded in the statement of claim, the plaintiff is a victim of fraud. It is quite clear that it has suffered loss in the amounts of over US\$11 million and is entitled to the relief sought on the basis of its proprietary claim for the money defrauded.

15. The declaration sought will assist the plaintiff in his proprietary claim for the money defrauded and will do fullest justice to the plaintiff to which he is entitled not least because this will prevent other creditors from competing with the plaintiff for the money claimed against the defendants.

16. Given the above reasons and the practice rules in *Hong Kong Civil Procedure*, I am satisfied that I should exercise my discretion and grant the declaration sought by the plaintiff.

17. So far as continuation of the *Mareva* injunction is concerned, Mr Brown referred me to Deputy High Court Judge Alexander Stock SC's decision in *Sultana Distribution Services Inc v Hong Kong Fucheng Technology Co Ltd* [2018] HKCFI 1480 (unreported, HCA 661/2018, 29 June 2018), paragraph 13(3).

18. I referred Mr Brown to paragraph 32 of Deputy High Court Judge Keith Yeung SC's decision in *China CITIC Bank Corporation Limited (Quanzhou Branch) v Li Kwai Chun & Ors* [2018] HKCFI 1800 where he said:

"... The mere fact that a judgment has been obtained does not by itself justify [a *Mareva* injunction]. But if a *Mareva* injunction is otherwise justified (applying the established considerations and with the fact that it is a post-judgment application factored in), a *Mareva* injunction may be granted (subject to the rider that it should normally be of limited and specific duration). It acts *in personam* on the defendant and works in tandem with the usual execution mechanism."

See also his decision in *Spruce Australia Pty Ltd v New Senjia Trade Ltd* [2019] HKCFI 101 (unreported), paragraph 18.

19. Having considered all the circumstances, the *modus operandi* of the fraud, the number of fraudsters and defendants involved, and the clear risk of dissipation in the absence of any *Mareva* relief, I consider that the continuation of the *Mareva* injunction post-judgment is justified.

20. However, as the learned Deputy Judge Keith Yeung SC said in *China CITIC Bank*, the continuation of the *Mareva* injunction should not be left open-ended as sought in the draft order, or rather, the revised draft order. I am inclined to impose a time limit of 31 August 2019 after which the *Mareva* injunction will lapse. That should give the plaintiff sufficient time to issue the necessary enforcement proceedings. This is, however, without prejudice to any application in the future for further extension should the circumstances justify it.

21. I have gone through the revised draft order with Mr Brown in which he changed certain provisions in relation of cost against the 2nd and 3rd defendants because a sanction offer has been made. I agree with the new orders sought.

22. In conclusion, I make an order in terms of the Summons and the final draft order as amended.

(Allan Leung)
Deputy High Court Judge

Mr Toby Brown, instructed by Payne Clermont Velasco, for the plaintiff
The 1st to 3rd defendants were not represented and did not appear