

DCCJ 4266/2018

[2018] HKDC 1612

**IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CIVIL ACTION NO 4266 OF 2018**

BETWEEN

GRAMIX LLC

Plaintiff

and

PACIFIC BOND (GROUP) LIMITED

Defendant

Before: His Honour Judge MK Liu in Chambers (Open to Public)

Date of Hearing: 28 December 2018

Date of Decision: 28 December 2018

DECISION

1. By an inter partes summons filed on 29 November 2018 (“the summons”), the plaintiff seeks a Mareva injunction against the defendant, freezing the money in a bank account in Hong Kong (“the Subject Account”) held by the defendant. The summons is supported by an affidavit made by Mr Alexander Ivlev on 14 November 2018 (“the

supporting affidavit”). Mr Ivlev is the manager and the authorized member of the plaintiff.

2. The defendant is a US company incorporated in Delaware. On 16 November 2018, the plaintiff obtained leave to issue and serve the concurrent writ of summons issued on 21 November 2018, and any summons, notice, order, affidavit, or any other documents relating to or arising out of these proceedings on the defendant out of the jurisdiction (“the order”). On 12 December 2018, the concurrent writ of summons, the summons and the supporting affidavit were served on the defendant in accordance with the order.

The facts

3. The plaintiff’s case as set out in the supporting affidavit is that the plaintiff is the victim of a fraud. The plaintiff is a company with limited liability in Florida. It is a trading company buying and selling electronic goods. In or about late March 2016, it placed a purchase order (“the purchase order”) with a manufacturer in China (“the manufacturer”). The plaintiff made some payments to the manufacturer, and the balance remained to be paid under the Purchase Order was US\$91,140. On or about 23 June 2016, being misled by a fraudulent email, the plaintiff transferred US\$91,140 (“the transfer”) to a bank account in Hong Kong (“Account A”) held by “HK Huahe International Technology Limited” for the purpose of paying the balance under the purchase order. On or about 30 June 2016, the manufacturer through an agent informed the plaintiff that the manufacturer had not yet received the balance of the purchase price. The plaintiff then realized that they had been deceived by a fraudulent scheme.

4. On or about 1 July 2016, the plaintiff made a report to the Federal Bureau of Investigation Internet Crime Complaint Centre in the US. On or about 8 July 2016, the plaintiff made a report to the Hong Kong Police.

5. On or about 20 May 2017, the Hong Kong Police notified the plaintiff by an email and informed the plaintiff that:

(1) the report made by the plaintiff was under investigation;

(2) the transfer “was further dispersed to a second layer account [“Account B”] under beneficiary Apex Energy International limited and further transferred to the third layer account [ie the Subject Account]”;

(3) the Hong Kong Police had frozen “the material balance in [the Subject Account]. However, there was only around US\$21,000 balance left in the account”.

6. On or about 31 January 2018, the plaintiff was informed by the Hong Kong Police that the holder of the Subject Account was the defendant.

7. On or about 18 April 2018, the Hong Kong Police sent a letter to the plaintiff and told the plaintiff that:-

(1) on 27 June 2016, the sum of US\$91,060 was transferred from the Account A to Account B;

(2) on the same day, the sum of US\$91,000 was then transferred from Account B to the Subject Account.

8. Although the Subject Account has been frozen by the Hong Kong Police, the Hong Kong Police has not guaranteed the plaintiff that they would freeze the account indefinitely.

Analysis

9. In my view, there has been delay in taking out this application for a Mareva injunction. Based upon the evidence produced by the plaintiff, by mid-April 2018, the plaintiff has obtained all the necessary information enabling the plaintiff to make an application for a Mareva injunction against the defendant. However, the plaintiff did not do so until late November 2018. I appreciate that the plaintiff is a company in the US and they would certainly need some time to engage Hong Kong lawyers to take care of the matter. However, even bearing this in mind, there is a time gap of more than 6 months between mid-April 2018 and late November 2018. I am of the view that there is no satisfactory explanation for the inaction in this period which is more than half a year.

10. Delay is a factor affecting whether a Mareva injunction should be granted. Depending upon the circumstances, delay itself may show that there is no irreparable damage in the absence of an injunction. Delay may also cause prejudice to the defendant if it has changed its position in the

intervening period. However, mere delay, without more, is not fatal to an injunction application. There must be evidence showing that because of the delay, it would be unreasonable or practically unjust to grant the injunction¹.

11. In this case, while there is unreasonable delay on the plaintiff's part in taking out the application for a Mareva injunction, there is no evidence showing that because of the delay, it would be unreasonable or practically unjust to grant the injunction. Further, there is no evidence showing that there would be no irreparable damage to the plaintiff in the absence of an injunction. The Hong Kong Police may cease freezing the Subject Account at any time. If the Hong Kong Police ceases to freeze the Subject Account and there is no injunction, the defendant may immediately withdraw the remaining sum in the Subject Account. In that case, even if the plaintiff succeeds in these proceedings at the end, the plaintiff may only obtain an empty judgment.

12. I come to the conclusion that the delay itself would not defeat the plaintiff's application for the injunction.

13. I turn to consider whether the plaintiff has produced evidence to show the requisite elements for a Mareva injunction, which are as follows²:-

- (1) that they have a good arguable case on a substantive claim over which the court has jurisdiction;

¹ *Abbot GmbH & Co KG v Pharmareg Consulting Co Ltd* [2009] 3 HKLRD 524 [80] – [95]

² *Hong Kong Civil Procedure 2019*, Volume 1, §29/1/65

(2) there are assets within the jurisdiction;

(3) the balance of convenience is in favour of granting the injunction; and

(4) there is a real risk of dissipation of assets, or removal of assets from the jurisdiction, which would render the plaintiff's judgment of no effect.

14. Based upon the evidence before the court, I am satisfied that the plaintiff has shown a good arguable case against the defendant on the ground of unjust enrichment. The defendant has been enriched by the transfer of US\$91,000 from Account B to the Subject Account. The defendant has provided no consideration in exchange for this transfer. The Hong Kong Police's investigation and intervention (ie freezing the Subject Account) is evidence showing that the balance now left in the Subject Account might have been obtained by some unlawful activities. All these are evidence in support of the unjust element.

15. There is money in the Subject Account. Obviously there are assets in Hong Kong³ which can be frozen by an injunction granted by this court.

16. The Hong Kong Police's investigation and intervention is evidence showing that the money now left in the Subject Account may well be procured by some unlawful activities, and the defendant may have taken

³ The sum of around US\$21,000 left in the Subject Account.

part in these activities. In these circumstances, if no injunction is granted, there would be a real risk that the judgment obtained by the plaintiff would go unsatisfied by reason of the disposal by the defendant of their assets.

17. In my view, there is a real risk of dissipation of assets if the injunction sought is not granted. At the same time, there is no evidence showing that the defendant would suffer any irreparable damage if the injunction is granted. The balance of convenience is in favour of granting the injunction.

Disposition

18. I allow the plaintiff's application. I make an order in terms of the draft order produced in the supporting affidavit and marked as exhibit AI-1 ("the draft order"), with the amendments and additions indicated in this decision.

19. Since the writ of summons has already been served on the defendant and this is an inter-partes hearing of the plaintiff's application for a Mareva injunction, undertaking (3) in schedule 2 to the draft order would not be necessary. In undertaking (2), the words "*the writ of summons together with*" should be deleted, as the writ has already been served on the defendant. Further, the injunction granted would remain in force until the conclusion of the trial unless it is varied or discharged by a further order of the court.

20. The plaintiff is also seeking an order requiring the defendant to disclose all their assets of an individual value of HK\$10,000 or more in

Hong Kong at once. I am prepared to give this disclosure order, but would allow the defendant to have some time to make the disclosure. Since the defendant is in the US, they may need time to consult Hong Kong lawyers after being served with the order. I would allow the defendant to make the disclosure within 28 days after the order has been served on them.

21. Costs of the summons be the plaintiff's costs in the cause.

(MK Liu)
District Judge

Ms Cynthia Mak of Payne Clermont Velasco, for the plaintiff

The defendant was not represented and did not appear