HCA 2640/2014
[2018] HKCFI 1930

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO 2640 OF 2014

BETWEEN

GRUPO PACIFICA INCORPORADA	Plaintiff
and	
WORLDWIDE MARINE PRODUCT LIMITED	1st Defendant
EMINENT VANTAGE LIMITED	2nd Defendant (Discontinued)
THE HONGKONG AND SHANGHAI BANKING CORPORATION LIMITED	3rd Defendant (Discontinued)
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED	4th Defendant (Discontinued)
FULL HONOUR INTERNATIONAL TRADE LIMITED	5th Defendant

Before: Mr Recorder Houghton SC in Court

Dates of Hearing: 25, 26, 28 June 2018

Date of Judgment: 24 September 2018

J U D G M E N T

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1. The plaintiff in this matter was the victim of a fraud perpetrated in 2014, as a result of which sums of money to which the plaintiff was entitled were said to have been diverted to bank accounts held by the defendants.

2. The plaintiff only became aware of the fraud in late October 2014 and, on 23 December 2014 the plaintiff was granted *Mareva* injunctions against the 1st defendant and the 2nd defendant. At one stage of the proceedings the injunction against the 1st defendant was discharged, but the plaintiff appealed against that decision, and the injunction order was restored by the Court of Appeal on 28 January 2016.

3. The proceedings against the 2nd to 5th defendants were concluded by the time the action came on for hearing. Judgment was entered by the plaintiff against the 5th defendant on 15 February 2017. The action was withdrawn against the 2nd, 3rd and 4th defendants on 16 November 2017, 28 October 2015 and 13 May 2015 respectively. Accordingly the trial concerned only the plaintiff's claims against the 1st defendant.

The fraud

4. The plaintiff agreed to purchase a ship ("the *Golden*") from a Korean Company, Hae Ju Shipping Co Ltd ("Hae Ju"). Both parties acted through others, the plaintiff acting through its agent, Apex Machinery Co Ltd and Hae Ju acting through another Korean company, Blue Marine Co Ltd ("Blue Marine"). It later emerged that the company president of Blue Marine, Mr Park Dong Ok, was a director of the 2nd defendant, and a person having control over the 2nd defendant's bank account with ANZ in Hong Kong.

5. The agreement for the sale of the *Golden* set the price for the vessel at US$1,000,000, and this had been paid in full by the plaintiff to Blue Marine by 8 August 2014. However Hae Ju and Blue Marine failed to deliver the vessel to the plaintiff, and by a letter dated 3 September 2014 the plaintiff sought the repayment of US$900,000 from Blue Marine. US$100,000 was to be retained by Blue Marine against the possibility that the transaction could be reinstated.

6. On 26 September 2014 the plaintiff wrote to Blue Marine, cancelling the agreement and again demanding the refund of US$900,000. No payment was forthcoming, and the plaintiff wrote once more to Blue Marine seeking the repayment on 10 October 2014.

7. There was no direct response to that correspondence from Blue Marine, but the plaintiff received from Blue Marine a bundle of documents on 22 October 2014 which included a "notice" that purported to be from the plaintiff to Blue Marine. This "notice" purportedly instructed Blue Marine to make the refund which the plaintiff sought to the 1st defendant and the 2nd defendant at their respective accounts with the 3rd and 4th defendants. One moiety was paid to the account of the 1st defendant.

8. The notice appeared to be signed by the General Manager of the plaintiff, Mr Alan Go on behalf of the plaintiff. The plaintiff's (unchallenged) evidence is that the notice was not sent by the plaintiff, and the signature of Mr Go was forged.

9. The bank records which have been obtained show that the payments were effected by Blue Marine such that a sum of US$449,963.60 was paid into the 1st defendant's account with HSBC on 28 August 2014. The 1st defendant accepts that such a transfer was made.

The pleaded cases

10. The plaintiff pleaded its claim against the 1st defendant based on four causes of action, alleging, first, the unjust enrichment of the 1st defendant, alleging rights in respect of a constructive or a resulting trust, and finally alleging a proprietary estoppel against the 1st defendant. At the trial however the plaintiff restricted itself to its unjust enrichment and constructive trust claims.

11. For its part the 1st defendant contends that it was no more than an innocent recipient of the relevant funds, having, at the material time, no knowledge of either the plaintiff or the alleged fraud.

12. The 1st defendant proffers an explanation as to why and how the money came to be transferred to its account. It says, in the Amended Defence dated 27 July 2015, that it is in the business of running a seafood wholesale trading business for a PRC company known as Shenzhen City Luohu District Tairan Marine Products Shop ("Tairan"). The 1st defendant, it contends, "serves as a trading point between companies in the mainland and other countries from the accounts receivables and payables of Tairan".

13. The 1st defendant pleads that Tairan receives funds and settles payments with customers and suppliers in foreign currency, and the 1st defendant facilitates with such transactions. It is contended that this business has an average monthly turnover in excess of HK$10,000,000.

14. Tairan, it is said, began a business relationship trading seafood, with a company called Weihai Tongjin Trade Co Ltd ("Weihai"), represented by one Park Mingxue, in April/May 2014. Trading seafood started in around June 2014, and was an active business, with Tairan purchasing over RMB 2,000,000 (about US$330,000) of seafood from Weihai during the first couple of months.

15. In early August 2014 Mr Park Mingxue contacted Tairan to ask if it could assist him by receiving, on his behalf a sum in US currency, to be paid to him in China, in RMB. If Tairan agreed, the USD sum was to be remitted to the 1st defendant's account in Hong Kong. The evidence was that Tairan considered this to involve no risk because, if the money had not been received by it, no payment would be made either. Therefore, Tairan agreed. On 28 August 2014 a sum of US$449,963.60 was received by the 1st defendant, from Blue Marine ("the Blue Marine Money"), and on the next day three payments were made, in China, in RMB, and one payment was made in Hong Kong, in disbursement of the sums received. These disbursements will be described in more detail below, but there was no money transferred from the 1st defendant to Tairan in China. It is the 1st defendant's case that the US funds it received in Hong Kong were set off against Tairan in their course of business.

16. Against that background the 1st defendant says that it was an innocent recipient of the relevant funds, acting throughout in ignorance of the fraud. The 1st defendant contends that it has 'changed its position' by disbursing the Blue Marine Money, such that it would be inequitable for it to be required to repay the monies received to the plaintiff. The 1st defendant denies that any constructive trust has arisen in the circumstances. Further the 1st defendant relies on the defence of ministerial receipt.

The evidence

17. The plaintiff called two witnesses, Ms Lesley Go who is the plaintiff's corporate secretary, and Mr Dennis Ning, the General Manager of Apex. Their evidence was straightforward, explaining the circumstances in which money was paid out, the refund demanded, and in due course, how the deception perpetrated against the plaintiff was discovered. The chain of events they described was substantially evidenced in the documents, and their evidence was not seriously challenged.

18. The 1st defendant called three witnesses, only one of whom was cross examined at any length. All were employees of Tairan. Evidence was given by Ms Ye Liujuan, a finance officer of Tairan as to the way in which Tairan and the 1st defendant conducted their business. She spoke to the bank account records which were put in evidence by the 1st defendant, and she was the officer who had made the arrangements for payments to be made in China in respect of the Blue Marine Money.

19. Business between Tairan and Weihai (indeed, it appears between Tairan and all of its customers) was conducted in a non-traditional manner by instant messenger. Ms Li Bixuan also gave evidence, principally to exhibit mobile telephone messages exchanged between Tairan and Weihai representatives and others, through which their seafood business was conducted.

20. The primary witness on behalf of the 1st defendant was Mr Zheng Binglong, the General Manager of Tairan. His evidence largely corroborated, but also elaborated on, the matters contained in the pleaded Defence. He explained that the 1st defendant had been incorporated in Hong Kong for the purpose of holding foreign currency bank accounts for Tairan. He described the HSBC account as being an active account, with some substantial transactions.

21. The 'core' component of his evidence was an explanation as to why it was that the Blue Marine Money came to be paid to the 1st defendant's account. Mr Zheng came to know Mr Park Mingxue in early 2014, and a business co-operation agreement involving Tairan and Weihai was signed in April or May of that year. Trading began in June, and a further business co-operation agreement was signed in August. It was also in early August that Park Mingxue asked Mr Zheng if Tairan could help him to receive a sum of money in US dollars for subsequent payment to him in China. Mr Zheng agreed. In due course a sum of US$449,963.60 was transferred into the bank account of the 1st defendant. On the following day Mr Zheng received 'instructions' from Park Mingxue as to the payments to be made in the PRC. In addition Park Mingxiue told Mr Zheng that there had been an 'overpayment' made by the remitter (Blue Marine) and that US$50,000 should be remitted back. Mr Zheng's evidence is that the transactions requested by Park Mingxue were made.

22. The instructions said to have been given by Park Mingxue were in unusual form, being for payment to one Lee Sau Fuk ("with a limit not more that RMB 500,000"); Park Ming Sing ("with a limit not more than RMB 1,000,000); and to Kam Fa Suk (also "with a limit not more than RMB 1,000,000").

23. Transfers of RMB 500,000, RMB 985,600 and RMB 974,000 were made to Lee Sau Fuk, Park Ming Sing, and Kam Fa Suk respectively, all on 29 August 2014. A transfer of US$50,000 was also made on 29 August, to Blue Marine in respect of the supposed overpayment. Finally, in accounting fully for the money received by the 1st defendant, a balance of US$195.73 remained, in respect of which a further transfer of RMB 1,204.48 was made to Park Ming Sing.

24. Thus, as a matter of book-keeping, the sums received (in Hong Kong), and the sums paid (in China), balance.

25. There is a complication however which is as to the receiving and paying parties. Mr Zheng Binglong described in his witness statement that Tairan "held two bank accounts in the PRC" but neither was in its own name. These accounts are in the names of two members of staff, Yang Zhihang and Zheng Jiarong. Thus the four payments made in the PRC to Mr Lee, Mr Park and Mr Kam were made from these accounts. No relevant transaction involved payment into or out of an account in the name of Tairan.

The submissions

26. The plaintiff sets out its case on the unjust enrichment of the 1st defendant and/or the existence of a constructive trust based on the premise that the 1st defendant has indeed been enriched at the expense of the plaintiff. The issue, so far as the plaintiff is concerned, is as to whether the 1st defendant is able to avoid liability for that enrichment in reliance on either the defence of change of position, or the defence of ministerial receipt. The burden lies on the 1st defendant to show unconscionability in any return of the funds received: *JS Microelectronics v Achhada* [2013] 1 HKLRD 334.

27. The 1st defendant agrees that those two defences are central to its liability, or otherwise, and does not accept that it has been "enriched", having (it contends) disbursed the money received in the way described above.

28. The 1st defendant's position is that it accepts having received the Blue Marine Money but has a defence because it did not use the plaintiff's money, and nor did it retain any of it. As such, it is submitted, there has been no enrichment, unjust or otherwise. Furthermore, it is submitted, the

position of the 1st defendant has changed since it was in receipt of the funds in question by virtue of the disbursements such that it would be inequitable to require the 1st defendant to make repayment to the plaintiff.

29. The 1st defendant points to the fact that the payments made by the two employees of Tairan, taken together with the repayment to Blue Marine, exactly match the sum received by the 1st defendant. The payments are said to be causally linked to the receipt of the Blue Marine Money in that the accounts of the 1st defendant, and those of the employees of Tairan, are all beneficially owned by Tairan.

Discussion

30. Without doubt the 1st defendant has received money to which it had (and claims) no entitlement by reason of the fraudulent conduct of other persons. The 1st defendant was, in that sense at least, enriched, but the key question is whether the subsequent actions of the 1st defendant have changed its position in a way that would make it unjust to require restitution to the plaintiff of the money received.

31. Allied to that 'conduct' question is the other defence relied on, namely 'ministerial receipt'. Did the 1st defendant receive the plaintiff's funds in a purely administrative way, much as a bank might have done, and deal with those funds in that capacity?

32. There is no dispute that the plaintiff must establish that the 1st defendant has been enriched at the plaintiff's expense, and, moreover, that the enrichment of the 1st defendant in that way was unjust. Thereafter, an onus lies on the 1st defendant to establish its defence, once receipt by it of money to which it had no entitlement is established.

Change of position

33. There is no dispute between these parties in regard to the principles. A change of position defence will not be available to a defendant which has not acted in good faith. (*Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548) Moreover, the change of position by the defendant must have a causal connection to the enrichment.

34. In the present case the stance taken by the 1st defendant is that these requirements are met, by, firstly, "merging" the different corporate and non-corporate persons involved. Secondly, the 1st defendant submits that it was under no notice of dishonest conduct and, as such, acted in good faith in the relevant transactions.

35. In my judgment, it is not legitimate for the 1st defendant to simply 'adopt' transactions made by Tairan in China. It is trite that the 1st defendant, Tairan, and the bank account holders in China are, or are to be treated as, separate legal entities. Common beneficial ownership does not entitle the beneficial owner to disregard the corporate personality of the company when circumstances suit it to do so.

36. It is, therefore, incumbent on the 1st defendant to show, in the context of its defence that the 1st defendant itself has changed its position in a relevant way. There is no evidence as to this, although the defence is premised on some accounting process as between the 1st defendant and Tairan. There is no clear 'inter-company' accounting mechanism in place. The accounts documents of the 1st defendant were not disclosed on discovery, although application was made by the 1st defendant during the trial for leave to discover these documents. This seems an unnecessary application; relevant documents must be disclosed, and parties do not need leave for this.

Leave would have been needed to adduce and rely on such documents, but no such application was made, perhaps because, according to Mr Zheng, these documents had been retained by the 1st defendant's accountants, pending an audit process that was itself awaiting the conclusion of the trial. In other words, no such documents were available.

37. In any event, the beneficial ownership of money in the 1st defendant's bank account is open to doubt. Mr Zheng Binglong says that it is beneficially owned by Tairan, but the document that was used to open the account shows the beneficial owner to be "Zheng Yang". There was no satisfactory explanation for this discrepancy forthcoming from Mr Zheng. His evidence that the assets of the 1st defendant are beneficially owned by Tairan is in flat contradiction to the account opening documents. I prefer the documentary evidence.

38. Although the defence of the 1st defendant amounts, in effect, to a contention that Tairan has changed its position since receipt of the funds, the evidence as to Tairan's accounting and business arrangements is minimal. To say the least, Tairan appears to do business very informally, and without the burden of accounts, so far as the evidence goes.

39. The bank documents showing payments made by Yang Zhihang and Zheng Jiarong in the PRC establish that payments were made by those individuals corresponding to the (general) instructions said to have been given by Park Mingxue, and the value of the money received by the 1st defendant. Mr Zheng's evidence is that these payments were made by those individuals in their capacity as employees of Tairan, but no documents support this. No explanation was offered for this bizarre business arrangement, and no explanation as to how this might have been accounted for in the accounts of

Tairan, much less the 1st defendant. The 1st defendant's stance is that this does not matter because, it says, all of the funds in question are under the same beneficial ownership.

40. It is relevant to consider, in any investigation as to whether it would be inequitable to require money to be repaid to a plaintiff, whether a transaction by which money has been disbursed by a recipient of funds can be reversed. Counsel for the 1st defendant points out that the payments out of the individuals' accounts in China were made only a matter of a day or so after the money was paid in to the 1st defendant's account in Hong Kong. On that basis he submits that "nothing could be done" to reverse the transaction once payment out was made.

41. Plainly that is not correct. Whether the 1st defendant is treated as acting at arm's length with Tairan, or as part of an unincorporated 'group', the notional set-off between the 1st defendant and Tairan could be readily reversed. So also could the 'transaction' between Tairan and Weihai. Mr Zheng's evidence was that business with Weihai continued until late 2016, and so a set-off could have taken place at any time if Tairan so wished. Even if, as counsel for the 1st defendant submitted, this business relationship concluded at the end of 2014, that came after the 1st defendant was notified that a fraud had been committed, by the grant of the injunction order on 23 December 2014. I have no doubt that this transaction could and should have been reversed by Tairan, and certainly by the 1st defendant.

42. I do not accept that the 1st defendant is entitled to avail itself of a change of position defence when, as here, the relevant 'change of position' (if any) was by others. But if that were wrong then, in my judgment, the fact that this transaction could have been reversed would negate any such defence.

Lack of good faith

43. The 1st defendant does not dispute that a lack of good faith on its part would preclude it from relying on a change of position defence. It submits however that the plaintiff seeks to show a lack of good faith by advancing an argument that the business operated by the 1st defendant is an illegal (unlicensed) money service, a contention which is not pleaded. Tairan has used the 1st defendant, on the basis of Mr Zheng's evidence, as a vehicle by which foreign currency has been accepted and disbursed in China in RMB.

44. In fact, insofar as the change of position' defence is concerned the plaintiff relies simply on the 1st defendant having failed to act in a commercially acceptable way. Reliance is placed on the decision of the Court of Appeal in England in *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2003] EWCA Civ 1446; [2004] QB 985.

45. As is spelled out in that judgment, a defence of change of position does not require a plaintiff to show dishonesty on the part of the defendant in order to defeat the defence. Rather the question as to whether a defendant has acted in good faith is part and parcel of the overall enquiry as to whether it would be inequitable to call on the defendant to make restitution to the plaintiff. As described by Clarke LJ at paragraph 147, the question includes consideration as to whether "the injustice of requiring him to repay outweighs the injustice of denying the claimant restitution."

46. Accepting that the 1st defendant's knowledge of the factual background is the same as that of Mr Zheng, then the 1st defendant was told that this was part of a 'normal' commercial transaction for Weihai. Receiving money on behalf of other companies, Weihai included, other than in the course of seafood trading, was not part of the 1st defendant's business,

it says. As a one-off currency transfer, of a relatively substantial amount of money, some form of due diligence investigation on the part of the 1st defendant might have been expected. The evidence shows no such investigation or enquiry.

47. The 1st defendant has therefore chosen to act as a money exchange service for Weihai with no consideration as to why it has been asked to do so, and with no enquiry as to the source of funds or the basis of the underlying transaction. None of this establishes dishonesty or complicity in the fraud on the part of the 1st defendant. This failure to act in a commercially acceptable way is sufficient, in my judgment, to defeat the 1st defendant's defence of having acted in good faith however.

Ministerial receipt

48. On the facts as I have found them above, there was no actual change of position on the part of the 1st defendant. No payment out was made by the 1st defendant of the Blue Marine Money received. A defence of ministerial receipt may nevertheless be established in circumstances in which a party, such as the 1st defendant, acts as an agent to whom he is obliged to account: see generally Goff & Jones, *The Law of Unjust Enrichment* (8th Ed) at 28-02.

49. I do not think such a defence, which was only faintly argued, is available to the 1st defendant however. There is no pleading (or evidence) that the 1st defendant acted as agent for Weihai, much less was under any obligation to account. The pleadings implicitly place the 1st defendant as an agent of Tairan, but, as referred to above, the evidence falls short of demonstrating even that relationship, much less any accounting arrangement.

50. But even were the evidence otherwise, I would be unprepared to accept a ministerial receipt defence in circumstances in which an illegitimate transaction such as that in the present case which could, on the 1st defendant's evidence, have been reversed, and the supposed obligation to account avoided.

51. I do not accept that the 1st defendant has made out its status as agent to another, and nor has it established the necessary obligation to account, therefore. This defence fails.

Conclusion

52. For the above reasons I accept that the 1st defendant has been enriched at the expense of the plaintiff in circumstances in which it would not be inequitable (but rather the reverse) to require the 1st defendant to repay the relevant amounts to the plaintiff. I do not accept that the 1st defendant has established either limb of its defence. There will be judgment for the plaintiff in the sum of US$449,963.60 to which will be added interest at a commercial rate of prime +1% from the date of the writ to judgment.

53. Costs of the action are to be to the plaintiff, to be taxed if not agreed this order being made on an order *nisi* basis.

(Anthony Houghton SC)
Recorder of the High Court

Ms Athena Wong, instructed by Payne Clermont Velasco, for the plaintiff

Mr Kenneth Y F Wong, instructed by CC Partners, for the 1st defendant