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CACV 217/2015

**IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF APPEAL**  
CIVIL APPEAL NO. 217 OF 2015  
(ON APPEAL FROM HCA NO. 2640 OF 2014)

BETWEEN

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

Before : Hon Cheung and Barma JJA in Court  
Date of Hearing : 19 January 2016  
Date of Judgment : 19 January 2016  
Date of Reasons for Judgment : 28 January 2016

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## REASONS FOR JUDGMENT

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Hon Cheung JA :

### I. The appeal

1.1 The plaintiff obtained an *ex-parte* Mareva injunction against the 1<sup>st</sup> and 2<sup>nd</sup> defendants. On the *inter partes* hearing for the continuation of the injunction, Chung J refused to continue the injunction against the 1<sup>st</sup> defendant although he allowed the injunction to be continued against the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant did not appear at the hearing below and on appeal. The 3<sup>rd</sup> and 4<sup>th</sup> defendants are two banks which were given notice of the injunction. The 5<sup>th</sup> defendant was added as an additional defendant after the judgment of Chung J.

1.2 The plaintiff appealed against the judgment. At the conclusion of the appeal, we allowed the appeal, set aside the judgment below and restored the Mareva injunction against the 1<sup>st</sup> defendant. This is the reason for our judgment.

## **II. The pleaded case of the plaintiff**

2.1 The pleaded case of the plaintiff is that it has been the victim of a fraud. The plaintiff, acting by its broker Apex Machinery Company Limited ('Apex'), had entered into an agreement for the purchase of a ship 'Golden' from Hae Ju Shipping Co., Ltd ('Hae Ju'). Blue Marine Co., Ltd. ('Blue Marine'), was acting on behalf of Hae Ju.

2.2 The agreement required the plaintiff to pay Blue Marine US\$1,000,000 and, in exchange, Blue Marine would deliver to and transfer ownership of the Golden to the plaintiff. The plaintiff paid Blue Marine US\$1,000,000 by a number of telegraphic transfers. The last payment was made on 8 August 2014.

2.3 Blue Marine failed to deliver the ship to the plaintiff. By a letter dated 3 September 2014, the plaintiff requested Blue Marine to refund US\$900,000 to its bank account due to the failure of Blue Marine to deliver the ship. The plaintiff stated that it did not seek the return of the remaining US\$100,000 as it wanted to keep the funds on deposit in case the transaction could be completed at a later date. By another letter dated 26 September 2014, the plaintiff informed Blue Marine that it was cancelling its agreement to purchase the ship and demanded the refund of US\$900,000. On 10

October 2014, the plaintiff requested Blue Marine to refund US\$900,000. Blue Marine did not respond.

2.4 On 22 October 2014, the plaintiff received a bundle of documents from Blue Marine which, among other things, included a notice purportedly from the plaintiff to Blue Marine dated 18 August 2014 instructing Blue Marine to refund US\$900,000 to the 1<sup>st</sup> defendant's account with the 3<sup>rd</sup> defendant ('the HSBC Account') and the 2<sup>nd</sup> defendant's account with the 4<sup>th</sup> defendant ('the ANZ Bank Account'). The plaintiff denied that it had given the notice to the Blue Marine and stated that the signature of its officer, Mr Alan C. Go appearing on the notice is a forgery.

2.5 Included in the bundle of documents were the following :

1) A Remittance Details from the Industrial Bank of Korea which indicated that on 28 August 2014 Blue Marine transferred the sum of US\$450,000 from its account at the Industrial Bank of Korea to the 1<sup>st</sup> defendant's HSBC Account.

2) Another Remittance Details from the same bank indicated that on 2 September 2014 Blue Marine transferred the sum of US\$450,000 from its account at the Industrial Bank of Korea to the 2<sup>nd</sup> defendant's ANZ Bank Account.

2.6 Records obtained from HSBC indicated that a deposit in the amount of US\$449,963.60 was made in the

1<sup>st</sup> defendant's HSBC Account on 28 August 2014. The plaintiff believed that these funds were received from Blue Marine.

2.7 Records obtained from ANZ Bank indicated that a deposit was made by Blue Marine into the 2<sup>nd</sup> defendant's ANZ Bank Account in the amount of US\$449,970.50 on 2 September 2014.

2.8 The plaintiff has no connection with the 1<sup>st</sup> and 2<sup>nd</sup> defendants and did not (or has any reason to) request that any funds rightfully belonging to it be deposited into the 1<sup>st</sup> defendant's HSBC Account or the 2<sup>nd</sup> defendant's ANZ Bank Account.

2.9 Records obtained from the ANZ Bank indicated that the 2<sup>nd</sup> defendant's ANZ Bank Account was opened by Mr Park Dongok, Director of the 2<sup>nd</sup> defendant, and the 2<sup>nd</sup> defendant was incorporated in Samoa. Mr Park Dongok was the President of Blue Marine.

2.10 The plaintiff pleaded that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were unjustly enriched as a result of the deposits of these two sums into their respective accounts and they are holding these two sums of money on constructive, alternatively resulting trust for the plaintiff. The plaintiff seeks, among other things, for the return of the two sums of money.

### III. The 1<sup>st</sup> defendant's defence

3.1 The 1<sup>st</sup> defendant's defence is that it is running a seafood wholesale trading business in Hong Kong for a company known as 「深圳市羅湖區泰然海產品店」 [transliteration: Shenzhen City Lowu District Tairan Seafood Product Shops] ('Tairan'), a company incorporated in Mainland China. Ms Ye Liujuan, the finance officer of Tairan has been the person handling all the accounting transactions and records of the business dealings with the 1<sup>st</sup> defendant.

3.2 The majority of Tairan's customers are suppliers and buyers from the Asia region and the Mainland. The 1<sup>st</sup> defendant mainly serves as a trading point between companies in the Mainland and other countries for the accounts receivables and payables of Tairan. The average monthly turnover of the 1<sup>st</sup> defendant exceeds HK\$10,000,000.

3.3 The 1<sup>st</sup> defendant holds the HSBC Account.

3.4 From time to time, Tairan would receive and settle funds with its customers and suppliers in foreign currencies including US dollars and Australian dollars and it would request the 1<sup>st</sup> defendant to help with the currency exchange. As a result, the 1<sup>st</sup> defendant also maintains foreign accounts with the HSBC Account for Tairan.

3.5 The 1<sup>st</sup> defendant has been in active business with frequent transactions between the period of August and December 2014. During that period, the balance in the HSBC Account has always been ranging from a few million dollars to over HK\$27,000,000. As at 8 August 2014, there was a total of US\$1,641,734.95 in the HSBC Account.

3.6 In or about early 2014, Tairan came to know a customer in the Mainland named 朴明學 [transliteration: Park Ming Hok] who is of ethnic Korean origin (朝鮮族). Mr Park Ming Hok and his brothers could communicate fluently in Putonghua, and they expressed an interest in supplying seafood products to Tairan. After some further discussions, Tairan began placing orders with the Park brothers. The total orders placed up to about end July 2014 were in the sum exceeding two million Renminbi dollars ('RMB'), and the business with the Park brothers seemed to be growing.

3.7 Towards the end of July to early August 2014, Mr Park Ming Hok contacted Tairan and enquired if it could help to receive certain sum of US dollars and pay him back in RMB in the Mainland because he had no US dollars bank account.

3.8 Tairan agreed to help and gave the 1<sup>st</sup> defendant's HSBC Account to Mr Park Ming Hok.

3.9 On 28 August 2014, a total sum of US\$449,963.60 was transferred into the HSBC Account. It was subsequently learned that it was Blue Marine that remitted the money into the HSBC Account.

3.10 On 29 August 2014, Mr Park Ming Hok informed Tairan that there was an overpayment of US\$50,000 and requested a remittance, he also requested to transfer the remaining sum by three tranches to 李壽福 [transliteration: Li Sau Fook] (with a limit not more than RMB500,000), one of the Park brothers 朴明星 [transliteration: Park Ming Sing] (with a limit not more than RMB1,000,000) and 金花淑 [transliteration: Kam Fa Suk] (with a limit not more than RMB1,000,000), whose accounts were all in the Mainland.

3.11 Acting on that instruction, Tairan arranged to transfer RMB500,000 to Li Sau Fook, RMB985,600 to Park Ming Sing and RMB974,400 to Kam Fa Suk, all on 29 August 2014. These sums were converted to RMB based on the then existing USD:RMB exchange rate. Tairan also instructed the 1<sup>st</sup> defendant to remit back US\$50,000 to Blue Marine on 1 September 2014, which the 1<sup>st</sup> defendant duly complied.

3.12 The balance of US\$399,963.60 in the HSBC Account was subsequently offset between the 1<sup>st</sup> defendant and Tairan in their course of business. In the circumstances, the entire sum of US\$449,963.60 had been applied under Tairan's instruction (of which the then equivalent of US\$399,963.60 was paid out in RMB in the Mainland and the US\$50,000 had been remitted back to Blue Marine).

3.13 The 1<sup>st</sup> defendant claimed that it and Tairan had no knowledge of

1) the existence of the plaintiff, the 2<sup>nd</sup> defendant or Blue Marine;

2) the sale and purchase of the vessel as alleged by the plaintiff; and

3) the fraud, perpetrated against the plaintiff until the present proceedings.

3.14 The 1<sup>st</sup> defendant claimed that it had acted *bona fide* in handling the sum of US\$449,963.60 and it acted as an agent for Tairan in respect of the sum of US\$449,963.60.

3.15 The 1<sup>st</sup> defendant further claimed that if it is accountable for US\$449,963.60 as money had and received, then it has changed its position by reason of the transfer out of this sum and it would be inequitable for the

1<sup>st</sup> defendant now to repay the sum of US\$449,963.60 or any to the plaintiff.

#### **IV. The Judge's view**

4.1 The Judge commented that the case is unusual in that Mr Park Dongok, the President of the Blue Marine who allegedly was the fraudster and perpetrated the fraud, was the source of the evidence on which the plaintiff's claim is now based. The Judge said that it is unusual for a fraudster not to simply vanish but instead to provide the victim of the fraud with materials on which the victim can build a case.

4.2 Further, the case is unusual in respect of the reason given for the amount of the plaintiff's claim. Rather than claiming the whole of US\$1,000,000 that the plaintiff had paid over earlier, it chose to claim only US\$900,000. This is unusual because as the victim of fraud, the plaintiff at least arguably could have the right to avoid the sale and purchase agreement, alternatively, the plaintiff should have the right to accept any repudiatory breach on the part of the owner of its ship.

4.3 In respect of the defence of change of position, the Judge was of the view that the position of the 1<sup>st</sup> defendant was not much different from that of a licensed bank :

‘ 24. ....which innocently received money which may be the fruits of theft (and/or other cases where the depositors have no title to the money) can avail themselves of the defence of change of position when

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they pay out the same to the depositors or as directed by the latter.'

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4.4 As to the plaintiff's contention that the transaction was aimed to avoid the foreign exchange regulatory regime of the Mainland, the Judge stated that the parties had not adduced evidence on the Mainland law concerning foreign exchange control. The Judge held that :

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' 28. Because of the conclusion reached, I do not consider the plaintiff to be able to establish a good arguable case against Worldwide Marine Product; alternatively, the strength of the plaintiff's case is such that the balance of convenience is in favour of not continuing the said injunction.

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29. Finally, again because of the conclusion reached, it is unnecessary to consider the real risk of dissipation. I will only state for the record that, if it were necessary to do so, I would have concluded that there is such risk (bearing in mind the matters set out in para 14 and 15 above).'

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## V. My View

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### 1) Good arguable case

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5.1 An injunctive relief is, of course, a discretionary remedy. In this case, I consider that this Court has proper grounds to interfere in that the Judge had erred on principle when he held the plaintiff was unable to establish a good arguable case. In order to show a 'good arguable case' for the purpose of a Mareva injunction, the Courts have held that 'the plaintiff need not go so far as to persuade the judge that he is likely to win'. The plaintiff must show that his case 'is one

that is “more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success” ’ (*Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft mbH & Co. KG* [1984] 1 All E.R. 398, applied in *Akai Holdings Ltd v. Ho Wing On* (unrep., HCCL 37/40 of 2005; [2009] H.K.E.C. 191)): see paragraph 29/1/66 of the *Hong Kong Civil Procedure* 2016.

5.2 In this case, the plaintiff’s claim is a simple one. It did not receive the ship it had purchased and paid for. Instead, it discovered that the money which it had paid to Blue Marine had been transferred to two persons that it did not know at all. It did not claim for the whole of the US\$1,000,000 paid for the purchase of the ship because the money transferred to the 1<sup>st</sup> and 2<sup>nd</sup> defendants only amounted to US\$900,000. The plaintiff’s claim against the 1<sup>st</sup> and 2<sup>nd</sup> defendants was not in the nature of a contractual claim by the plaintiff against the seller of the vessel or Blue Marine. It was targeted against the 1<sup>st</sup> and 2<sup>nd</sup> defendants who wrongly received the US\$900,000.

5.3 As to the Judge’s comment that it was unusual for a fraudster, namely, Mr Park Dongok who committed the fraud on the plaintiff to supply it with information so as to enable the plaintiff to build a case against it, the plaintiff’s response was that the package from Blue Marine was not sent by Mr Park Dongok but by another individual. Further, since Mr Park Dongok had later asked for the return of the documents, this

suggested that the documents were inadvertently disclosed to the plaintiff.

5.4 It is not necessary at this stage to go into the question of who actually sent the documents to the plaintiff. The important thing is that the documents supported the plaintiff's case that money had been transferred to the 1<sup>st</sup> and 2<sup>nd</sup> defendants' accounts. Certainly, the 1<sup>st</sup> defendant has not disputed that.

5.5 In an unjust enrichment claim, the defence of change of position in good faith would be available to a person whose position had so changed that it would be inequitable in all the circumstances to make restitution: *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 546, per Lord Goff of Chieveley at 580F.

5.6 Unlike previous transactions which involved the 1<sup>st</sup> defendant receiving and settling funds with Tairan's customers and suppliers in foreign currencies, this particular transaction was not related to the business of Tairan. It was simply based on the request from Mr Park Ming Hok to help him to receive US dollars and to pay him back in RMB in the Mainland. This is an extremely unusual transaction because according to the 1<sup>st</sup> defendant's own evidence, Tairan took the liberty to lend the 1<sup>st</sup> defendant's bank account to a third party. The 1<sup>st</sup> defendant then accepted an unknown sum of money (a very sizable sum of about US\$450,000) into its HSBC Account from an unknown source with no underlying business

transaction and with no knowledge of the nature of the remittance.

5.7 Further, the payments out were not made from the 1<sup>st</sup> defendant's HSBC Account in Hong Kong. The 1<sup>st</sup> defendant never explained how the money was transferred. The transferors were not the 1<sup>st</sup> defendant and the payments out were made to three individuals in Mainland China whose identities and connection with the 1<sup>st</sup> defendant or Tairan are unknown.

5.8 Further, the payment instructions were most unusual in that, as Ms Athena Wong counsel for the plaintiff, pointed out, the payment instruction concerning Park Ming Sing and Kam Fa Suk did not specify the exact amount to be transferred but left it as ambiguous and as wide as 'Not over 1 million RMB'. The 1<sup>st</sup> defendant never explained why it was left to decide and how it came to decide the amount to be transferred to Park Ming Sing was RMB985,600 and the amount to be transferred to Kam Fa Suk was RMB974,400.

5.9 The plaintiff had carried out an investigation and discovered that in respect of the fish market address it had given, it was only a post box address and the 1<sup>st</sup> defendant did not have any stall there.

5.10 This being the state of the 1<sup>st</sup> defendant's defence, my view is that the Judge should have allowed the injunction to continue until trial instead of making a determination as if it was a trial before him.

2) **Material non disclosure**

5.11 The 1<sup>st</sup> defendant now complains of material non-disclosure by the plaintiff in applying for the *ex parte* injunction. This is in respect of Korean proceedings instituted by the plaintiff against Blue Marine in Korea. This claim was briefly mentioned in the judgment below as follows :

‘ 33. In the course of the parties' submissions (and as a result of a challenge by Worldwide Marine Product), it was disclosed (without evidence) that a claim has been commenced against Blue Marine / Mr Park in Korea. This disclosure regrettably was brief, and no details are known as to, for instance, the nature of the claim, its progress and the response of Blue Marine/Mr Park thereto.’

5.12 However, despite this issue being discussed at the *inter partes* hearing on 10 June 2015, the 1<sup>st</sup> defendant did not at that hearing or before the Judge delivered his judgment on 18 June 2015 take any issue on material non disclosure. The plaintiff had sought leave to appeal the judgment from both the Judge below and from this Court and again the issue of material

non disclosure was not raised by the 1<sup>st</sup> defendant. This matter was only raised in this appeal.

5.13 Mr Kenneth Wong for the 1<sup>st</sup> defendant submitted that it was only on 11 January 2016 that the plaintiff finally provided the 1<sup>st</sup> defendant with documents in relation to the Korean proceedings. He submitted that there are a number of important points concerning the proceedings :

1) The Korean proceedings were commenced on 4 December 2014 which was earlier than the Hong Kong proceedings;

2) In the Korean proceedings, the cause of action of the plaintiff was specific performance and/or return of US\$1,000,000 plus interest;

3) The plaintiff had applied for an injunction regarding prohibition on disposition of the ship;

4) The plaintiff did not disclose the defence documents and other documents of the Korean proceedings; and

5) The Korean proceedings are ongoing and the plaintiff's witness, Ms Lesley Mae Go, is part way through her evidence.

5.14 Mr Wong submitted that these are material facts which the plaintiff was obliged to disclose in the *ex parte*

application for the injunction and has the continuing obligation to do so. In failing to do this, there was material non disclosure on the part of the plaintiff and it was not entitled to the Mareva injunction.

5.15 It is plain that the 1<sup>st</sup> defendant had not taken steps to apply to discharge the *ex parte* injunction for material non disclosure despite knowledge of it at the time of the hearing below. In my view, it is clearly too late to take this point now. Evidence is required to address this point, for example, whether the non disclosure was innocent or deliberate, the excuse or reason for the non disclosure and the importance of the omission to the issues which were to be decided by the Judge, in particular whether the non disclosure would have resulted in the original order not being made in the first place. These are issues that this Court cannot properly address without evidence and without determination from the Judge below.

## VI. Conclusion

6. Accordingly, the appeal is allowed and the Mareva injunction is restored. We further order that the costs of the appeal and the costs of the leave application before the Judge be to the plaintiff.

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Hon Barma JA :

7. I agree with the Reasons for Judgment of Cheung JA.

(Peter Cheung)	(Aarif Barma)
Justice of Appeal	Justice of Appeal

Ms Athena Wong, instructed by Payne Clermont, for the plaintiff
Mr Kenneth Y. F. Wong, instructed by CC Partners, for the 1 <sup>st</sup> defendant