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HCA1945/2014
[2020] HKCFI 1312

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO 1945 OF 2014**

BETWEEN

MUSIC HOLDINGS PROPERTY HK LTD (formerly known as BECKTON INTERNATIONAL LIMITED)	1 st Plaintiff
COOLAUDIO INTERNATIONAL LIMITED	2 nd Plaintiff
and	
OOI LEAN CHOO (also known as ALSIE LAU)	Defendant

HCA 2304/2014

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO 2304 OF 2014**

BETWEEN

MUSIC HOLDINGS PROPERTY HK LTD (formerly known as BECKTON INTERNATIONAL LIMITED)	1 st Plaintiff
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COOLAUDIO INTERNATIONAL LIMITED	2 nd Plaintiff
and	
LARRY BRENDON MANAGEMENT LIMITED	1 st Defendant
LARRY BRENDON CPA LIMITED	2 nd Defendant (Discontinued)
KIAN HWA YUEN	3 rd Defendant (Discontinued)

(Heard together)

Before: Hon Ng J in Court

Dates of Hearing: 3-4, 8 & 19 July 2019

Date of Judgment: 23 June 2020

J U D G M E N T

INTRODUCTION

1. This is the trial of the 2 Actions (“**HCA1945**” and “**HCA2304**” respectively) ordered to be heard together and that the evidence adduced in each Action stands as evidence in the other.

2. The 1st Plaintiff, Music Holdings Property HK Limited (“**Music Holdings**”) was incorporated in the BVI in 1997. It is and at all material times was beneficially owned by Mr Ulrich Behringer (“**Mr Behringer**”). Mr Behringer set up Music Holdings primarily for the purpose of holding residential properties for him. In 1999, Music Holdings

purchased and at all material times thereafter owned a residential property situated at as Flat A, 34/F, Block 1, Clovelly Court, 12 May Road, Hong Kong (“**May Road Property**”). Until the relocation of his business management to the Philippines in 2004, Mr Behringer resided in the May Road Property. Since about 2004 when Mr Behringer moved out of it, Music Holdings has been renting it out to tenants more or less continuously.

3. The 2nd Plaintiff, Coolaudio International Limited (“**Coolaudio**”), was incorporated in the BVI in 2006.¹ Coolaudio is and at all material times was beneficially owned by Mr Behringer who was at all material times also the CEO of the Plaintiffs. Coolaudio ran an online business of selling semiconductors and providing integrated circuit design services for the audio industry and conducted all of its sales over the Internet. It is a member of a group of companies run by Mr Behringer known as the “Music Group”. The head office of the Music Group was situated in the Philippines while its manufacturing base was in Zhongshan, PRC. The Music Group did little business in Hong Kong and its customers were all over the world. At all material times, Coolaudio operated out of the Music Group’s head office in Manila. It ran an online business.

4. The Defendant in HCA1945 (“**Ms Lau**”) was born in Malaysia and relocated to Hong Kong in 1984. Ms Lau joined one of the Music Group companies in Hong Kong in 2001 as Mr Behringer’s secretary². According to Mr Behringer, Ms Lau quickly gained his trust and confidence such that she became an integral part of his business and

¹ In this Judgment, this court shall refer to Music Holdings and Coolaudio as “the Plaintiffs” collectively.

² Or, according to Ms Lau, assistant to director ie Mr Behringer.

he delegated more and more administrative functions to her. As a reward for her loyal service, Ms Lau was promoted, with increased salaries, from secretary to Office Manager to Vice President, Human Resources and Administration, of Music Group Macao Commercial Offshore Limited Philippines—ROHQ (“**Music Group Philippines**”). When Mr Behringer decided to relocate to the Philippines in 2004, Ms Lau also relocated from Hong Kong to the Philippines in 2004 where she currently lives. Ms Lau’s last written contract of employment was entered into with Music Group Philippines on or about 1 July 2012.

5. Apart from the administrative functions aforesaid, since 2004, Ms Lau had also acted as Music Holdings’ agent³ entrusted with the task of attending to all matters incidental to the leasing out of May Road Property eg dealing with estate agents, meeting with prospective tenants, negotiating the terms of the lease and so on. She even signed 2 leases on behalf of Music Holdings in 2004 and 2013. For the present purpose, the relevant lease was dated 1 June 2013 which stipulated a monthly rent of HK\$120,000. In about 2010, after Mr Behringer had closed all his bank accounts in Hong Kong, Ms Lau agreed to allow one of her bank accounts with HSBC to receive rent on behalf of Music Holdings.

6. The relationship between Ms Lau and Mr Behringer went sour in mid-August 2014, when a Music Group employee in Zhongshan viz Cecile Lee (“**Lee**”) provided to the head of the legal department in Zhongshan an audio recording of a recent meeting Lee had with Ms Lau. On being presented with the audio recording, details of which are not

³ This is denied by Ms Lau in her witness statement.

material for the present purpose, Ms Lau’s employment with the Music Group came to an end on 15 August 2014.

7. In this regard, there is a dispute as to whether Ms Lau resigned from Music Group Philippines, as Mr Behringer maintains, or whether her employment had been wrongfully terminated and was legally entitled to redundancy payment, as Ms Lau maintains. It is not necessary for this court to resolve this dispute—her employment contract was governed by Philippines laws and Ms Lau’s employer Music Group Philippines is not a party to these proceedings. Their dispute is currently before the Philippines’ Courts.

8. The 1st Defendant in HCA2304 (“**Larry Brendon**”) is a company incorporated in Hong Kong providing accountancy related services. Mr Lam Ying Bon Laurence (“**Mr Lam**”), presently a director of Larry Brendon was a consultant in its employ in 2014. Larry Brendon acted on behalf of Ms Lau in relation to the monetary dispute between Ms Lau and Music Group Philippines/Mr Behringer and Mr Lam was assigned to assist Ms Lau.

THE PARTIES’ RESPECTIVE CASES IN HCA1945

Music Holdings and Ms Lau

9. Music Holdings’ claims against Ms Lau are for *inter alia* (i) a declaration that Ms Lau holds the rental payments for the May Road Property on trust for it, (ii) an account to Music Holdings for the rental payments and (iii) further or alternatively, restitution of all sums held on

trust by Ms Lau for Music Holdings. The amount of the claim is HK\$360,000.

10. On Music Holdings' case, the circumstances under which Ms Lau agreed to allow Music Holdings to use her bank account to receive rent for the May Road Property were as follows.

11. Music Holdings did not have any bank accounts in Hong Kong ⁴ and until August 2009, rental payments were paid into Mr Behringer's personal Dah Sing Bank account which Ms Lau was responsible and authorized to manage it. The Dah Sing Bank account was also closed in September 2009. Thereafter, Ms Lau and Mr Behringer on behalf of Music Holdings agreed that her personal bank account no 809-500549-833 with HSBC ("**Lau's No 1 Account**") could be used to collect rents from tenants of the May Road Property. It is not in dispute from late 2010 onwards, rents were paid into Lau's No 1 Account. Indeed, by an email dated 12 November 2010, Ms Lau informed Mr Behringer that she had directed the tenant to pay the monthly rent to her No 1 Account. According to this arrangement, Ms Lau would from time to time remit the rent so collected in her No 1 Account in accordance with Mr Behringer's instructions to Music Holdings' Mauritius bank account or whatever account as directed by him.

12. The last remittance was made by Ms Lau on or about 26 May 2014 to Music Holdings' bank account in Mauritius as per Mr Behringer's instructions. Prior to that remittance, the funds held in Lau's No 1 Account

⁴ It had 1 bank account in Mauritius.

were about HK\$4.917 million. Afterwards, only a balance of HK\$522.37 was left in it. Thereafter, the tenant continued to pay rent for May, June and July 2014 at the rate of HK\$120,000 per month⁵ into Lau's No 1 Account. This practice ended in August 2014 as a result of the termination of Ms Lau's employment. Music Holdings therefore claims the sum of HK\$360,000 from Ms Lau.

13. In her witness statement, Ms Lau admits that she allowed Music Holdings to use her No 1 Account to receive rental payments for the May Road Property and since about 2010, that account was used *solely* for that purpose.⁶ Indeed, in her witness statement, Ms Lau said it was her intention to return those parts of the monies in her No 1 Account to Mr Behringer which rightly belong to him subject to verification of the amount. However, Ms Lau claims some of the monies in her No 1 Account belong to her beneficially, such as service fee ie the 1st Service Fee mentioned below or "some other monies", whatever that may be. The claim for service fee has been pleaded as her counterclaim but not "some other monies".

14. In so far as "some other monies" refer to the RMB200,000 mentioned in the letter dated 10 February 2017 from Kelvin Cheung & Co ("KC")⁷ to the Plaintiffs' solicitors ("**Payne Clermont**") as the amount Ms Lau claims to have expended on Mr Behringer's condominium in the

⁵ Initially Music Holdings believed that Ms Lau had collected 5 months' rent and hence its claim was for HK\$600,000. It now accepts Ms Lau had collected only 3 months' rent.

⁶ In the witness box, Ms Lau also admits that the source of the funds in Lau's No 1 Account was the rental payments for the May Road Property.

⁷ Former solicitors of Ms Lau.

PRC for *inter alia* renovation works (“**PRC Reimbursement claim**”), that has not been pleaded as part of her counterclaim. Further, on the evidence, that appears to be a claim against Mr Behringer personally—in his witness statement, he admits he owned condominiums in the PRC and is willing to pay for any expenses incurred by Ms Lau as long as there are valid receipts. For these 2 reasons, this court is unable to adjudicate on the merits of the PRC Reimbursement claim in this Action. If Ms Lau is serious about claiming the RMB200,000 from Mr Behringer, she should obtain legal advice as to what steps to take.

15. Ms Lau’s sole defence to Music Holdings’ monetary claim is that Mr Behringer on behalf of Music Holdings had orally agreed to pay her a monthly service fee of HK\$5,000 (“**1st Service Fee**”) for her agreement to provide her No 1 Account for Music Holdings’ use. On her pleaded case, the 1st Service Fee was payable from January 2010 up to 15 August 2014. Since Music Holdings never separately paid the fee to her, Ms Lau claims she is entitled to set off and counterclaim the 1st Service Fee from Music Holdings. While it was pleaded that this service fee was in the sum of HK\$282,500 ie 56.5 months x HK\$5,000, in the letter dated 10 February 2017 from KC to Payne Clermont, the amount was reduced to HK\$275,000 ie 55 months x HK\$5,000, on the basis that the service fee was payable from January 2010 to July 2014.

16. Music Holdings denies any oral agreement for service fee was reached with Ms Lau for the use of her No 1 Account. However, to simplify matters, Music Holdings accepts that, if the Court finds that such an oral agreement had been reached between Mr Behringer on behalf of

Music Holdings and Ms Lau, the quantum of her set off and counterclaim is HK\$275,000.

17. The question therefore is this: how did the trust, if any, in respect of the funds in Lau's No 1 Account arise, alternatively, whether Music Holdings has a restitutionary claim against Ms Lau for the funds and whether there was an agreement between Music Holdings and Ms Lau in respect of the 1st Service Fee.

Coolaudio and Ms Lau

18. Coolaudio's claims against Ms Lau and Ms Lau's defence and counterclaim follow a very similar pattern to those between Music Holdings and Ms Lau.

19. Coolaudio's claims against Ms Lau are for *inter alia* (i) a declaration that Ms Lau holds the funds in her HSBC savings account numbered 110-9-046746 ("**Lau's No 2 Account**") ie Coolaudio's online sales revenue on trust for it, (ii) an account to Coolaudio for the funds and (iii) further or alternatively, restitution of the funds so held on trust by Ms Lau. The amount of the claim is HK\$3,584,719.09.

20. On Coolaudio's case, the circumstances under which Ms Lau agreed to allow it to use her No 2 Account to collect its online sales revenue were as follows.

21. At the time when Coolaudio's online business was set up in about 2006, Mr Behringer said he was extremely busy and consequently

delegated a great deal of decision-making to Ms Lau, placed great weight on her judgment and advice, and said he trusted her completely. Ms Lau's primary responsibility was said to be the setting up of the administrative side of Coolaudio's business ⁸ so that customers would be directed to pay for their orders by bank transfer to Lau's No 2 Account. Ms Lau would then remit the same to Coolaudio via Music Holdings' bank account in Mauritius. While Mr Behringer cannot recall when Coolaudio's online customers began paying into Lau's No 2 Account, this practice was in place as early as 2008.

22. Ms Lau states in her witness statement that in late 2006, Mr Behringer requested and she agreed for her No 2 Account to be used to receive sales revenue from Coolaudio's online customers. Her role was limited to allowing customers to pay for their orders by bank transfer to Lau's No 2 Account and then remitting the sales revenue as per Mr Behringer's instructions.⁹

23. Indeed, in her witness statement, Ms Lau said it was her intention to return those parts of the monies in Lau's No 2 Account to Mr Behringer which rightly belong to him, subject to verification of the amount. However, Ms Lau claims some of the monies in her No 2 Account belong to her beneficially, such as service fee ie the 2nd Service Fee mentioned below or "some other monies". The irrelevance of "some other monies" has already been explained earlier in this Judgment.

⁸ This is denied by Ms Lau.

⁹ While in the witness box, Ms Lau similarly admitted that the source of the funds in Lau's No 2 Account was the online sales revenue of Coolaudio.

24. Ms Lau's sole defence to Coolaudio's monetary claim is that Mr Behringer on behalf of Coolaudio orally agreed to pay her a monthly service fee of HK\$10,000 ("**2nd Service Fee**") prior to her agreement to provide her No 2 Account for Coolaudio's use. Since Coolaudio never separately paid the fee to her, Ms Lau claims that she is entitled to set off and counterclaim the 2nd Service Fee from Coolaudio. In the letter dated 10 February 2017 from KC to Payne Clermont, the 2nd Service Fee was said to be payable from November 2006 to July 2014 in the sum of HK\$930,000 ie HK\$10,000 x 93 months.

25. Coolaudio denies any oral agreement for service fee was reached with Ms Lau for the use of Lau's No 2 Account. However, to simplify matters, Coolaudio accepts that, if the Court finds that such an oral agreement had been reached between Mr Behringer on behalf of Coolaudio and Ms Lau, the quantum of her set off and counterclaim is HK\$930,000

26. As far as quantum of Coolaudio's monetary claim is concerned, the last remittance made by Ms Lau from the No 2 Account was on or about 26 May 2014. Prior to that remittance, the amount held in Lau's No 2 Account as Coolaudio's online sales revenue was HK\$9,907,154.24, out of which HK\$8.9 million was remitted out as per Mr Behringer's instructions to Music Holdings' Mauritius bank account. A balance of HK\$1,007,154.24 was then left in Lau's No 2 Account. Thereafter, further sales revenue from Coolaudio's customers were remitted to Lau's No 2 Account until the use of it ended.

27. There was originally a dispute as to the amount collected in Lau's No 2 Account after 26 May 2014 and hence the ultimate quantum of Coolaudio's claim. That was resolved at trial with the benefit of the relevant bank statements for Lau's No 2 Account as follows:

- (1) Immediately after 26 May 2014, the balance was HK\$1,007,154.24.
- (2) As at around 13 August 2014, the balance held in Lau's No 2 Account had increased to HK\$3,272,232.34.
- (3) After 13 August 2014, some customers still continued to remit payments to Lau's no 2 Account. In light of the bank statements available, Ms Lau agreed that there were 8 remittance from customers into Lau's No 2 Account, totalling HK\$312,486.75.
- (4) Coolaudio's claim is therefore HK\$3,272,232.34 + HK\$312,486.75 = HK\$3,584,719.09.

28. The question therefore is this: how did the trust, if any, in respect of the funds in Lau's No 2 Account arise, alternatively, whether Coolaudio has a restitutionary claim against Ms Lau for the funds and whether there was an agreement between Coolaudio and Ms Lau in respect of the 2nd Service Fee.

THE PARTIES' RESPECTIVE CASES IN HCA2304

Music Holdings/Coolaudio and Larry Brendon

29. The Plaintiffs' claims against Larry Brendon arose from events subsequent to the termination of Ms Lau's employment on

15 August 2014. Specifically, they relate to Ms Lau's transfers of the monies in her No 1 Account and No 2 Account to Larry Brendon on 30 September 2014 and Larry Brendon's initial refusal to return the monies to the Plaintiffs.

30. In the Amended Statement of Claim, the Plaintiffs' claims against Larry Brendon are for *inter alia* (i) a declaration that Larry Brendon is liable to account to them for "the Plaintiffs' Trust Monies" ie rent from the May Road Property and Coolaudio's online sales revenue transferred from Ms Lau's 2 bank accounts to Larry Brendon, (ii) payment of "the Plaintiffs' Trust Monies" to them and (iii) a declaration that the Plaintiffs are entitled to trace "the Plaintiffs' Trust Monies" and claim proprietary title to them and that Larry Brendon held the "Plaintiffs' Trust Monies" on trust for them. In the course of his oral closing submissions, Mr Brown clarified with this court that, since the monies had been already been paid into Court, he would be content to seek a declaration in terms of (iii) only.

31. As noted above, an issue arose between Ms Lau and Music Group Philippines as to whether Ms Lau had resigned or whether her employment was wrongfully terminated and was entitled to redundancy payment. By email dated 28 August 2014, the Music Group sent to Ms Lau a draft settlement proposal involving the payment to Ms Lau of US\$186,184.09 as her redundancy pay and the RMB200,000 PRC Reimbursement. A number of correspondence followed between Music Group Philippines, Payne Clermont acting on behalf of the Plaintiffs and Larry Brendon acting on behalf of Ms Lau in which *inter alia* Larry Brendon demanded the payment to Ms Lau the sums of US\$186,184.09

and RMB200,000 while Payne Clermont demanded repayment of all monies held in Lau's No 1 Account and Lau's No 2 Account to the Plaintiffs.

32. Before any settlement could be reached, and unknown to the Plaintiffs, Ms Lau transferred the following sums to Larry Brendon on 30 September 2014:

- (1) HK\$294,629.25 from Lau's No 1 Account and HK\$1,989,360.65 from Lau's No 2 Account, totalling HK\$2,283,989.90.
 - (2) RMB235,245.24 from the RMB currency account within Lau's No 1 Account.
- (collectively "**Unauthorised Transfers**")

33. At the same time, Ms Lau transferred HK\$1,447,357.88 from her No 2 Account to another bank account of hers with HSBC no 002-0-251633 ("**Personal Account**"). In her witness statement, Ms Lau claims this sum was her service fees since June 2007 (calculated on the basis of HK\$180,000 per annum) plus provisions for reimbursements of advances previously made by her, pending verification of the receipt. This is her *ex post facto* explanation of why she made that transfer to her Personal Account on 30 September 2014 but there is no contemporaneous document which supports this was indeed her thinking at that time.

34. Ms Lau also concedes in her statement that she was mistaken as to the commencement date of her service fee "in respect of the No 2 Account, which should be January 2010". The reference to the No 2

Account is obviously mistaken since Ms Lau's case is that the service fee in respect of the No 1 Account should begin to accrue in January 2010.

35. Ms Lau and Larry Brendon did not comply with the demand for the repayment of monies held in Lau's No 1 Account and Lau's No 2 Account. On 3 October 2014, the Plaintiffs commenced HCA1945 against Ms Lau. On the same day, they obtained an *ex parte* mareva injunction up to HK\$3.9 million against her ("**Mareva Injunction**") which was subsequently continued but eventually discharged after Ms Lau had made 3 payments into Court in January 2015 totalling HK\$3,961,408.35 and a further payment into Court in July 2015 in the sum of HK\$148,016.26.

36. When the Plaintiffs were made aware of the Unauthorised Transfers, Payne Clermont sent a letter dated 15 October 2014 to Larry Brendon providing it with a copy of the Mareva Injunction and informed Larry Brendon that it was bound by its terms. By letter dated 17 October 2017, Larry Brendon replied to Payne Clermont in effect saying it did not accept the contents of their 15 October 2014 letter.

37. On 14 November 2014, the Plaintiffs commenced HCA2304 against Larry Brendon.

38. On 19 December 2014, upon the Plaintiffs undertaking to give consent for Larry Brendon to pay the sums held by it ie HK\$2,283,989.90 and RMB235,245.24 (or its HK dollar equivalent) to Ms Lau's solicitors for on-payment into Court, DHCJ Lok (as he then was) gave leave to Ms Lau to pay into Court the aforesaid 2 sums as well as a sum of HK\$1,385,375.00 from her Personal Account. On 16 June 2015,

Mr Justice Anthony Chan made an Order allowing Ms Lau to pay a further sum of HK\$148,016.26 into Court and on such payment, the Mareva Injunction would be discharged.

39. The end result is therefore the Mareva Injunction has been discharged and the sum of HK\$4,109,424.60 (with the RMB having been converted to HK\$) was in Court by 7 July 2015.

40. As for Larry Brendon, it is difficult to discern any positive defence in its Defence filed on 23 October 2017. With regard to the Unauthorised Transfers, Larry Brendon admits the transfers and the amounts but pleads:

(1) At paragraph 25 that the funds were transferred to Larry Brendon “as a middleman for the purpose of verification of the exact figures that Alsie Lau was at all material times owed to Mr Behringer.”

(2) At paragraph 31 that (i) on or about 1 September 2014, Ms Lau engaged Larry Brendon to liaise and negotiate with the Music Group regarding the monetary dispute arising from the termination of her employment contract, (ii) it did know whether the Plaintiffs were the beneficial owners of the monies in Lau’s No 1 Account and Lau’s No 2 Account and (iii) it was instructed by Ms Lau to hold the monies so transferred on trust for her.

41. Otherwise, Larry Brendon’s case is one of denials and non-admissions—in other words, putting the Plaintiffs to strict proof of their claims against it.

DELIBERATION

The issues and witnesses

42. In this court's view, the principal issues for adjudication are:

- (1) Whether Ms Lau held the funds in her No 1 Account on trust for Music Holdings, alternatively, whether Music Holdings has a restitutionary claim against Ms Lau. (“**Issue 1**”)
- (2) Whether Ms Lau held the funds in her No 2 Account on trust for Coolaudio, alternatively, whether Coolaudio has a restitutionary claim against Ms Lau (“**Issue 2**”).
- (3) Whether there were oral agreements between Ms Lau and Mr Behringer on behalf of the Plaintiffs in respect of the 1st Service Fee and the 2nd Service Fee. (“**Issue 3**”)
- (4) Whether the Plaintiffs can establish a cause of action against Larry Brendon on the basis of the Unauthorised Transfers and Larry Brendon's refusal to return the monies so transferred, but only paid them into Court after the Mareva Injunction had been granted. (“**Issue 4**”)

43. At trial, all parties called 1 witness to testify on their behalf:

- (1) Mr Behringer for the Plaintiffs.
- (2) Ms Lau for herself.
- (3) Mr Lam for Larry Brendon.

Issues 1 and 2

44. These 2 issues can conveniently be dealt with together.

45. As this court mentioned earlier, given Ms Lau's admission in her witness statement and in the witness box that the source of the funds in her No 1 Account was rent for the May Road Property and her No 2 Account was Coolaudio's online sales revenue, and that the funds in the 2 accounts had always been dealt with in accordance with Mr Behringer's instructions, it must follow that the funds in Lau's No 1 and No 2 Accounts were not simply debts owed by Ms Lau to the Plaintiffs—otherwise, Ms Lau would have been free to use them subject to her obligation to repay.

Trust

46. In determining whether the funds in Ms Lau's 2 accounts were held on trust for the Plaintiffs, one can conveniently start with a number of fundamental legal propositions.

47. In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 705 C-H, Lord Browne-Wilkinson set out a number of fundamental principles of trust law as follows:

“(i) Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust).

(ii) Since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience, i.e. until he is aware that he is intended to hold the property for the benefit of others in the case of an express or implied trust, or, in the case of a constructive trust, of the factors which are alleged to affect his conscience.

(iii) In order to establish a trust there must be identifiable trust property. ...

(iv) Once a trust is established, as from the date of its establishment the beneficiary has, in equity, a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property (whether the original property or substituted property into which it can be traced) other than a purchaser for value of the legal interest without notice.

These propositions are fundamental to the law of trusts and I would have thought uncontroversial. However, proposition (ii) may call for some expansion. There are cases where property has been put into the name of X without X's knowledge but in circumstances where no gift to X was intended. It has been held that such property is recoverable under a resulting trust: *Birch v. Blagrove* (1755) 1 Amb. 264; *Childers v. Childers* (1857) 1 De G. & J. 482; *In re Vinogradoff*; *Allen v. Jackson* [1935] W.N. 68; *In re Muller*; *Cassin v. Mutual Cash Order Co. Ltd.* [1953] N.Z.L.R. 879. These cases are explicable on the ground that, by the time action was brought, X or his successors in title have become aware of the facts which gave rise to a resulting trust; his conscience was affected as from the time of such discovery and thereafter he held on a resulting trust under which the property was recovered from him. ...” (emphasis added)

48. In *Angove's Pty Ltd v Bailey and Anor* [2016] UKSC 47 at [19], Lord Sumption JSC explained the circumstances under which money in an agent's hands will be regarded as being held on trust for his principal:

“19. An agent has a duty to account to his principal for money received on his behalf. It is, however, well established that the duty does not necessarily give rise to a trust of the money in the agent's hands. That depends on the intentions of the parties derived from the contract, or in some cases from their conduct. As a broad generalisation, the relations between principal and agent must be such that the agent was not at liberty to treat as part of his general assets money for which he was accountable to his principal. This will usually, but not invariably, involve segregating it from his own money. ...” (emphasis added)

49. In the present case, it seems reasonably clear to this court that Ms Lau was not simply “lending” her 2 bank accounts for use by the

Plaintiffs. As far as Music Holdings is concerned, this court finds on the evidence that she was Music Holdings' agent in attending to *all* matters incidental to the leasing of the May Road Property including in particular receiving rent on behalf of Music Holdings and deploying the rent so received in her No 1 Account in accordance with Mr Behringer's instructions on behalf of Music Holdings. As far as Coolaudio is concerned, this court finds on the evidence that she was its agent in receiving Coolaudio's online sales revenue in her No 2 Account and in dealing with it in accordance with Mr Behringer's instructions on behalf of Coolaudio.

50. As an agent, Ms Lau obviously had a duty to account to her principals ie the Plaintiffs for all monies received on their behalf. But on the evidence their relationship went further than that—she was not at liberty to treat and had not treated as part of her general assets monies so received in her 2 accounts for the Plaintiffs. Further, the 2 accounts were used solely for the purpose of receiving funds on behalf of the Plaintiffs and there is no question of Ms Lau mixing the Plaintiffs' money with her own. This fits well into the circumstances which would normally give rise to a trust of the money in an agent's hands, as explained by Lord Sumpton JSC above.

51. If one analyses the situation at a more general level in line with Lord Browne-Wilkinson's formulation in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, it seems to this court right from the time when Ms Lau agreed that her 2 bank accounts could be used by the Plaintiffs for the specified purpose and that funds in them would be dealt with in accordance with Mr Behringer's instructions on behalf of the Plaintiffs, she was aware that it was intended she should hold

the funds for the benefit of the Plaintiffs and no one else and that her conscience was so affected. If so, it must be correct to regard Ms Lau as a trustee of the funds in the 2 accounts right from the beginning of the arrangement between the Plaintiffs and her, according to proposition (ii). Further, if a resulting trust can arise in cases where property has been put into the name of X without X's knowledge but in circumstances where no gift to X was intended, *a fortiori* a resulting trust can arise when the rent and the online sales revenue were put into Lau's No 1 and No 2 Accounts with her knowledge and express consent in circumstances where no gift to her was intended.

52. All in all, however one analyses the arrangement between Ms Lau and the Plaintiffs in relation to the use of her 2 accounts, this court finds that the funds in the 2 accounts were at all times held by her on trust for the Plaintiffs. If so, the Plaintiffs should be entitled to the declarations sought and an account of the funds used to be in Ms Lau's 2 accounts which are now held in Court.

Restitution

53. In view of this court's conclusion above, it is strictly speaking not necessary to go into the question whether the Plaintiffs have an alternative restitutionary claim against Ms Lau. Suffice it to say that, after asking the 4 questions propounded by Ribeiro PJ in *Shanghai Tongji Science & Technology Industrial Co Ltd v Casil Clearing Ltd* (2004) 7 HKCFAR 79 at [67] ie (a) was the defendant enriched, (b) was the enrichment at the plaintiff's expense, (c) was the enrichment unjust, and (d) are any of the defences applicable, this court has no doubt that Ms Lau

would be unjustly enriched at the Plaintiffs' expense if she is allowed to keep the funds paid into her 2 accounts in full. In the premises, this court finds that the Plaintiffs also have a restitutionary claim against Ms Lau for the funds in Ms Lau's 2 accounts which are now standing in Court.

Issue 3

54. The resolution of this issue depends primarily on this court's assessment of the credibility of Mr Behringer and Ms Lau as there is a direct conflict of their testimony as to the existence or otherwise of the alleged oral agreements. In this regard, this court has carefully considered the testimony, as well as the demeanour, of the two and assessed it in light of the documentary evidence, the witnesses' conduct at the material time and the known and undisputed circumstances of this case. This court has in particular considered the inherent probabilities or otherwise of their testimony, whether their testimony is coherent or self-contradictory and assessed their credibility accordingly: *The World Food Fair Ltd v Hong Kong Island Development Ltd* (2006) 9 HKCFAR 735, Ribeiro PJ at [37].

55. Since it is Ms Lau who puts forward the alleged oral agreements in support of her defence and counterclaim, she bears the burden of proving those oral agreements on balance of probabilities—it is not for the Plaintiffs to convince this court of the truth of their alternative account.

56. For reasons set out below, this court rejects the testimony of Ms Lau and accepts Mr Behringer's testimony.

57. First, as Mr Brown rightly points out in his closing submissions, there is a complete lack of contemporaneous documents which record or in any way acknowledge the existence and terms of the alleged oral agreement about service fees. This was accepted by Ms Lau during cross-examination on Day 2 of trial.

58. This is so despite the fact that the alleged agreement for the 2nd Service Fee had been in place since 2006 while that for the 1st Service Fee had been in place since 2010. In this day and age where the use of emails, text messages and other forms of electronic communication is prevalent, it is rare that an oral agreement would leave no electronic footprint in the parties' contemporaneous communications: cf *Blue v Ashley* [2017] EWHC 1928 at [65]. This is particularly the case here where Ms Lau and Mr Behringer were in the habit of communicating by email.

59. Second, there were several occasions when one would reasonably expect Ms Lau to mention the service fees in her communications with Mr Behringer but yet the opportunity was not taken up by her.¹⁰

60. For instance, on 12 November 2010, Ms Lau sent an email to Mr Behringer informing him that she had already instructed the tenant to pay rent to her No 1 Account. There was no mention of any service fee in this email whatsoever.

¹⁰ Or Larry Brendon on behalf of Ms Lau.

61. On 16 August 2014 after the termination of Ms Lau's employment, Mr Behringer sent an email to Ms Lau under the subject "Closure". At the end of that email were these words:

"P.S. ... Finally please propose how we can sort out the Coolaudio matter and the China apartment. Thank you."

62. On the evidence, at that time, the only outstanding matter between Ms Lau and Coolaudio was the money in Lau's No 2 Account, one can safely expect the "Coolaudio matter" was a reference to that. In reply, by an email dated 17 August 2014, Ms Lau stated:

"Below is what i need to handover back to you:

1. Your money at my HSBC a/c which held your coolaudio and Clovely rental income, and use to make payment of HK government rates and maintenance of Clovely. Pleas let me know where you want me to send them out, I would like to close the a/c.

...

I cannot think of more for now but I will let you know when i remember more...you can rest assure not a single penny was stolen, you can audit it.

Below are what I expect to receive from the company:

...

4. I have spent around RMB200k to renovate and equipped the Kai Yin apartment, since you didnt give it to me, i should be paid for all money I spent..."

63. Ms Lau not only failed to mention about the services fees accumulated over the years—her counterclaim is over HK\$1 million—she actually indicated that all the funds in the 2 accounts would be returned as she would like to close them. In the same email, Ms Lau mentioned she had spent around RMB200,000 to renovate and equipped an apartment in

the PRC and asked Mr Behringer for repayment. If Ms Lau remembered to ask for reimbursement of RMB200,000, it is highly unlikely that she would have forgotten about the over HK\$1 million service fees due to her, if it was indeed agreed that she was entitled to them.

64. On 30 September 2014 Payne Clermont wrote to Larry Brendon demanding the return of the funds in the 2 accounts immediately. In the letter, Payne Clermont specifically mentioned that:

“As trustee, your client is legally bound to ensure that the funds are not used for her own personal benefit without the express consent of [the Plaintiffs], which has not been, and is not, given”.

65. Yet, in Larry Brendon’s reply to Payne Clermont dated 6 October 2014, there was no mention of the service fees or Ms Lau’s alleged entitlement to retain them and return only the balance to the Plaintiffs.

66. Third, as Mr Brown points out, Ms Lau’s present case on the amount of the service fees allegedly agreed with Mr Behringer is inconsistent with her original pleaded case.

67. In her Defence dated 25 November 2015, Ms Lau’s plea at paragraph 28 was as follows:

“Further, the Defendant avers that in consideration for letting Mr Behringer and his companies, namely P1 and P2, utilize D1’s No. 1 Account and D2’s [sic] No. 2 Account, Mr Behringer had agreed orally to pay the Defendant a service fee at around HK\$10,000 per month.”

68. Mr Brown submits and this court agrees that this plea can only be read to mean the fee of “around HK\$10,000 per month” was payable for the use of Ms Lau’s 2 bank accounts. There was no plea that there were 2 oral agreements reached separately in different years with 2 different amounts of service fees for the use of her No 1 and No 2 Accounts.

69. This can be contrasted with Ms Lau’s Defence and Counterclaim dated 20 October 2017 at paragraphs 16-17 and 29 where it was pleaded that the fee of HK\$10,000 was agreed for the use of her No 2 Account while the fee of HK\$5,000 was agreed separately for the use of her No 1 Account, which remains her present case. Normally, one’s memory fades instead of improves with the passage of time. In Ms Lau’s case, she seems to be able to remember things more clearly in 2017 than in 2015.

70. Fourth, Ms Lau’s memory of the years (never mind the exact date) in which the alleged oral agreements were reached was also confused and has changed with the passage of time.

71. On 30 September 2014, Ms Lau made a transfer of the sum of HK\$1,447,357.88 from her No 2 Account to her Personal Account purportedly as *inter alia* her service fees since June 2007, calculated on the basis of HK\$180,000 per annum (ie HK\$5,000 and HK\$10,000 per month x 12). Thus, on 30 September 2014, Ms Lau appeared to believe that *both* oral agreements must have been reached in 2007.¹¹ This is because her case

¹¹ At para 31 of her witness statement, Ms Lau accepted that she was mistaken as to the commencement date of her entitlement to the 1st Service Fee which should be January 2010.

was and is that she had never been paid the agreed service fees so that she had to take it upon herself to transfer what she believed to be her entitlement to her Personal Account.

72. Next, in Ms Lau's Defence dated 25 November 2015, it was pleaded that:

“... pursuant to Mr. Behringer's verbal request in or about the end of 2004 or in the beginning of 2005, the Defendant allowed her personal HSBC accounts to be used for the purpose of collecting the Rental Monies.”

73. This plea suggests that on 25 November 2015, Ms Lau thought the alleged oral agreement regarding the use of her No 1 Account was reached in 2004 or 2005. This is wholly inconsistent with her email dated 12 November 2010 to Mr Behringer which stated that “Since you have closed Dah Sing Bank account, I have instructed the tenant to pay her rent to my (yours) HSBC account.” On Ms Lau's own evidence, Mr Behringer informed her that he had closed all his bank accounts in Hong Kong only in 2008 or 2009.

74. Lastly, in Ms Lau's Defence and Counterclaim dated 20 October 2017 which sets out her present case, at paragraphs 16-18, it was no longer pleaded the year in which the alleged oral agreement regarding the 1st Service Fee was entered into. Rather, it was pleaded that the 1st Service Fee for the use of her No 1 Account began to accrue in January 2010. At paragraph 29, it was pleaded that it was in 2006 that Mr Behringer requested the use of her No 2 Account and that the 2nd Service Fee began to accrue in November 2006, thereby suggesting that the agreement on the 2nd Service Fee was agreed in that year.

75. So again, Ms Lau seems to be able to remember things more clearly in 2017 than in 2014 and 2015.

76. Fifth, throughout the years from which, on Ms Lau's case, the service fees have accumulated in her No 2 Account since 2006 and in her No 1 Account since 2010, she had only accessed the funds in the accounts once ie to make a transfer from her No 1 Account in the sum of A\$2,000 to her son who was studying in Australia¹². Other than that, Ms Lau accepted that she had not taken money out of either account for her own use. Her explanation is that she had sufficient income to maintain her living and that the No 1 Account belongs to her any way.

77. Ms Lau also accepted in the witness box that she had informed Mr Behringer about this transfer. When asked why it was necessary to inform Mr Behringer of this withdrawal for her personal use if part of the funds in her No 1 Account were in fact hers, Ms Lau's answer was that it was out of respect for him. Mr Brown submits and this court agrees that this makes little sense, since on her case, she was entitled to much more than A\$2,000 as service fee in her No 1 Account.

78. As mentioned earlier, other than her No 1 and No 2 Accounts, Ms Lau also had the Personal Account with HSBC. If the alleged oral agreements for the monthly services fees of HK\$10,000 and HK\$5,000 did exist, there is no reason why she did not transfer them into the Personal Account monthly, yearly or as and when she decided to spend some of the service fees which, after all, were hers.

¹² In her written closing submissions, Ms Lau said that took place in November 2010.

79. For these reasons, this court holds that Ms Lau has not made out her case that there were oral agreements between her and the Plaintiffs in respect of the 1st Service Fee or the 2nd Service Fee. If so, Ms Lau's defence of set off fails and her counterclaim must be dismissed.

Issue 4

80. Given this court's ruling that the funds in Ms Lau's 2 bank accounts were at all times held on trust for the Plaintiffs, this issue can be dealt with rather briefly.

81. First, it is clear from Mr Lam's witness statement that Larry Brendon disclaims any entitlement to the monies transferred by Ms Lau to it on 30 September 2014.

82. Second, Mr Lam also accepts in his witness statement that Larry Brendon held the monies so transferred for Ms Lau.

83. Third, as explained by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council supra* as proposition (iv), once a trust is established, as from the date of its establishment, the beneficiary has, in equity, a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property (whether the original property or substituted property into which it can be traced) other than a purchaser for value of the legal interest without notice.

84. Similarly, in *Foskett v McKeown & Ors* [2001] 1 AC 102, 127F-G, Lord Millett observed that:

“ A beneficiary of a trust is entitled to a continuing beneficial interest not merely in the trust property but in its traceable proceeds also, and his interest binds everyone who takes the property or its traceable proceeds except a bona fide purchaser for value without notice. In the present case the plaintiffs’ beneficial interest plainly bound Mr Murphy, a trustee who wrongfully mixed the trust money with his own and whose every dealing with the money (including the payment of the premiums) was in breach of trust. It similarly binds his successors, the trustees of the children’s settlement, who claim no beneficial interest of their own, and Mr Murphy’s children, who are volunteers. They gave no value for what they received and derive their interest from Mr Murphy by way of gift.” (emphasis added)

85. Larry Brendon is not a purchaser for value of the legal interest in the funds in Ms Lau’s 2 bank accounts—it is a mere volunteer who held the funds for Ms Lau. Since Ms Lau has no entitlement to any part of the funds in her 2 bank accounts and thus all the monies transferred by her to Larry Brendon belonged beneficially to the Plaintiffs, the Plaintiffs would be entitled to trace the funds to Larry Brendon and this court shall so hold.

86. That is sufficient to dispose of Issue 4.

DISPOSITION AND COSTS ORDER NISI

87. There shall be Judgment in favour of the Plaintiffs for the declarations sought in paragraphs (i) and (ii) of the prayer for relief in the Re-Re-Amended Statement of Claim in HCA1945.

88. There shall be Judgment in favour of Music Holdings against Ms Lau for the sum of HK\$360,000 together with interest at the rate of

prime plus 1% from the date of the Writ to Judgment and thereafter at Judgment rate until payment.

89. There shall be Judgment in favour of Coolaudio against Ms Lau for the sum of HK\$3,584,719.09 together with interest at the rate of prime plus 1% from the date of the Writ to Judgment and thereafter at Judgment rate until payment.

90. Ms Lau's counterclaim against the Plaintiffs be dismissed.

91. The sum standing to the credit of Ms Lau in Court be paid out to the Plaintiffs in full satisfaction of the aforesaid Judgment sums and partial satisfaction of interest, upon the expiry of 28 days after the handing down of this Judgment.

92. There shall be Judgment in favour of the Plaintiffs for the declaration sought in paragraph (iii) of the prayer for relief in the Amended Statement of Claim in HCA2304.

93. There shall be an Order *nisi* that costs of HCA1945 be to the Plaintiffs, to be taxed if not agreed, and paid by Ms Lau forthwith, certificate for counsel.

94. There shall be an Order *nisi* that costs of HCA2304 be to the Plaintiffs, to be taxed if not agreed, and paid by Larry Brendon forthwith, certificate for counsel.

95. Liberty to apply.

(Peter Ng)
Judge of the Court of First Instance
High Court

Mr Toby Brown, instructed by Payne Clermont Velasco, for the Plaintiffs
in HCA 1945/2014 and HCA 2304/2014

The Defendant in HCA 1945/2014 appeared in person

The 1st Defendant in HCA 2304/2014 appeared in person and was
represented by Mr Lam Laurence Ying Bon