DCCJ 1238/2023

[2023] HKDC 957

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

CIVIL ACTION NO. 1238 OF 2023

BETWEEN

STEPHEN ANTHONY SOYKA Plaintiff

and

HANG XU TRADING CO., LIMITED Defendant

Before: Deputy District Judge David Chan in Chambers (Open to Public)

Date of Hearing: 7 July 2023

Date of Decision: 7 July 2023

DECISION

Introduction

1. This is an application of the plaintiff seeking post-judgment *Mareva* injunction against the defendant. By the injunction, the defendant will be restrained from removing any of its assets within Hong Kong up to

the value of USD375,621 (or its Hong Kong dollar equivalent), and the defendant will be required to disclose all its assets of an individual value of HK$25,000.00 or more in Hong Kong.

2. The application came before me on 7 July 2023. At the hearing, the plaintiff was represented by Mr Adam Clermont ("Mr Clermont") of Messrs Payne Clermont Velasco ("PCV"). The defendant was unrepresented and absent from the hearing.

3. Originally, the plaintiff also sought under the same application either a Banker Book Order under section 21 of the Evidence Ordinance (Cap. 8), or a garnishee order *nisi* against the DBS Bank (Hong Kong) Limited ("DBS"). As a garnishee order *nisi* has been granted by Master Stanley Ho on 5 July 2023, these orders are no longer pursued.

4. Apart from the garnishee order *nisi*, I am given to understand that the winding up process against the defendant is now underway, with a statutory demand being issued in June 2023.

5. Having read the affirmation of service of the summons and supporting affirmation on the defendant[1] filed by PCV on 4 July 2023, I am satisfied that the defendant is aware of the date and time of this hearing. Although the hearing bundle lodged for this hearing was not served on the defendant, the key documents contained therein were previously served on the defendant (save the submissions, list and copy of authorities). With Mr Clermont's undertaking to serve the hearing bundle to the defendant within 7 days from the date hereof, and in view of the injunction order to be made

[1] By leaving and by post on 28 and 29 June 2023 respectively.

contains a clause which allows the defendant to apply for discharge of the order and/or variation of the terms, not to mention the plaintiff's undertaking to compensate the defendant for any loss and damage suffered due to the order being granted, I ordered that the hearing should proceed in its absence.

Background

6. The plaintiff was the victim of a so-called "Pig Butchering Scam" investment fraud, whereby he was induced to make 4 transfers of money into the defendant's bank account with the DBS (the "DBS Account"), totalling USD375,621.00. As per the transaction records exhibited, the dates of the transfers and the sum transferred on each occasion are as follow: -

(1) USD80,000.00 on 1 November 2022.
(2) USD120,000.00 on 2 November 2022.
(3) USD115,658.00 on 4 November 2022.
(4) USD59,963.00 on 8 November 2022.

7. Upon learning that he was defrauded, the plaintiff reported the matter to the Hong Kong Police on 11 February 2023. After being informed on 18 March 2023 by the officer-in-charge that there were funds in the DBS Account, and that the funds were "frozen" by DBS after the police issued a 'letter of no consent', the plaintiff commenced the present action against the defendant.

8. The Writ of Summons was issued on 23 March 2023, and served on the defendant by leaving at its registered office on even day. As no Acknowledgment of Service was filed by the defendant, final judgment was entered against it on 24 April 2023 for the sum of USD375,621 with interest thereon, together with fixed costs at HK$7,130.00 (the "Judgment").

9. As said, a garnishee order *nisi* has been granted in aid of the execution of the Judgment.

10. That being so, the plaintiff continues to seek a post-judgment *Mareva* injunction against the defendant. First, he was informed by the officer-in-charge that there is a credit balance of about USD200,000 in the DBS Account, which is insufficient to cover the amount awarded under the Judgment. The injunction order will be wide enough to include assets of the defendant other than the money in the DBS Account. Second, there is concern that the defendant would dissipate its assets in Hong Kong, notwithstanding the 'letter of no consent' issued by the police to DBS. Third, although a garnishee order *nisi* has been granted, there is no guarantee that it would be made absolute, and if so, when.

Legal principles

11. The court is empowered to grant a post-judgment injunction in aid of execution. The court is more ready to grant it, for the plaintiff is entitled to enforce the judgment by executing the same on the defendant's

assets: *Erwiana Sulistyaningsih v Law Wan Tung*[2]. That being so, granting of such injunction is not automatic once judgment has been obtained. And if it was granted, it should normally be of limited and specific duration[3].

12. For this kind of application, the court is bound to consider 4 requirements, namely: (1) a good arguable case on a substantive claim; (2) there are assets within the jurisdiction; (3) balance of convenience is in favour of granting it; and (4) a real risk of dissipation of assets, or removal of assets from the jurisdiction[4].

13. Regarding the risks of dissipation of assets, despite that an applicant is required to adduce "solid evidence" in proving the same[5], it is said that one ought not lose sight of the reality, and the plaintiff's burden of showing this is very often discharged by means of "inferential evidence"[6]. On this point, the Courts have in previous cases accepted that, when a defendant has displayed a fairly low commercial standard or standard of morality in dealing with a plaintiff, that by itself is some evidence of a risk of dissipation of assets. This is not a proposition of law, but a proposition of common sense[7]. And in fraud cases, for example internet fraud, the real risk of dissipation may be said to be self-evident, as the fraudulent exercise is designed to deprive a plaintiff of his assets[8].

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[2] [2018] HKDC 1267, at §§16-22; HH Judge MK Liu adopted the principles set out in the cases of *Orwell Steel (Erection & Fabrication) Ltd v Asphalt & Tarmac (UK) Ltd* [1984] 1 WLR 1097 and *Menno Leendert Vos v Global Fair Industrial Ltd* (unreported, HCA 4200/1995, Hon To J, 25 March 2010).
[3] *China Citic Bank Corporation Limited (Quanzhou Branch) v Li Kwan Chun & Ors*, [2018] HKCFI 1800, §32.
[4] See *Hong Kong Civil Procedure 2023*, Vol. 1, §29/1/65, at p. 815.
[5] Supra, note 2, at §36.
[6] See *Pacific Concepts (HK) Limited v Michel Brennion & Ors* (unreported, HCA 2672/2008, Hon A. Cheung J, 13 March 2009), §24.
[7] Ibid., §25.
[8] See *Crete Maritime Corporation v Emirates Shipping Line DMCEST* (unreported, HCMP 1010/2017, Hon A. Chan J, 21 September 2017), §21.

Discussions

14. I am satisfied that the 4 requirements set out in §12 above are satisfied. By the Judgment, a good arguable case on a substantive claim has been established. The defendant does have assets within jurisdiction in light of the credit balance in the DBS Account. And being a Hong Kong company, the defendant could have other assets within the jurisdiction which have yet been uncovered.

15. Given the nature of this claim (internet fraud), and that only a balance of about USD200,000.00 remains in the DBS Account (when the plaintiff had transferred a total of USD375,621.00 into it, meaning USD175,621.00 had been removed), I am satisfied that there is real risk of dissipation of assets by the defendant to defeat execution of the Judgment. I am of the view that the balance of convenience is in favour of granting the post-judgment *Mareva* injunction.

16. Pausing here, one may argue that, with the 'letter of no consent' in place, the plaintiff's concern, in particular dissipation of the funds in the DBS Account, is unjustified. In this regard, I shall refer to the Court of Appeal cases of *Tam Sze Leung & Ors v Commissioner of Police*[9] and *Interush Limited & Anor v The Commissioner of Police & Ors*[10]. A 'letter of no consent' or 'a letter of consent'[11] under the consent regime,

[9] [2023] HKCA 537, §§57-58.
[10] [2019] HKCA 70, §3.7, citing the *Force Procedures Manual*, Chapter 27-19..
[11] A practice which stems from section 25A of the Organized and Serious Crimes Ordinance, Cap.455 ("OSCO"):
"(1) Where a person knows or suspects that any property—
(a) in whole or in part directly or indirectly represents any person's proceeds of;
(b) was used in connection with; or

unlike a *Mareva* injunction granted by a civil court which blocks the account, serves not as an enforceable order by the police to the bank. The account is "frozen" by the bank upon its own decision, in fear of the criminal liability[12] for dealing with property that represents proceeds of crime. The police have no power to require the bank to do anything. And after a 'letter of no consent' has been issued, it would last no more than 6 months from the date of issue, unless there are exceptional circumstances warranting its extension.

17. Simply, a 'letter of no consent' is not a cure to the anxiety of the plaintiff.

18. For the above reasons, I would grant the post-judgment *Mareva* injunction order. Such post-judgment *Mareva* injunction shall be of limited and specific duration. I think it is fair to have the injunction to remain in force for 9 months from the date of this order, by which time a garnishee order absolute could be granted, and/or the winding proceedings against the defendant could be completed.

(c) is intended to be used in connection with,
an indictable offence, he shall as soon as it is reasonable for him to do so disclose that knowledge or suspicion, together with any matter on which that knowledge or suspicion is based, to an authorized officer.
(2) If a person who has made a disclosure referred to in subsection (1) does any act in contravention of section 25(1) (whether before or after such disclosure), and the disclosure relates to that act, he does not commit an offence under that section if—
(a) that disclosure is made before he does that act and he does that act with the consent of an authorized officer; or
(b) that disclosure is made—
(i) after he does that act;
(ii) on his initiative; and
(iii) as soon as it is reasonable for him to make it."

[12] Under section 25(1) of OSCO:
"Subject to section 25A, a person commits an offence if, knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person's proceeds of an indictable offence, he deals with that property."

Order

19. I make an order in terms of the draft post-judgment *Mareva* injunction order with modifications[13], and amending the duration of the post-judgment *Mareva* injunction order to the effect as stated in §18 above. I also gave the plaintiff liberty to apply for the continuance of this injunction order beyond the said duration.

20. Costs should generally follow the event. Mr Clermont, however, suggested there should be no order as to costs in view of the unlikelihood that such costs could be recovered from the defendant. I accepted this suggestion and agreed to depart from the norm. I therefore order that there be no order as to costs of this application.

21. I thank Mr Clermont for his assistance.

(David Chan)
Deputy District Judge

Mr Adam Clermont of Payne Clermont Velasco, for the plaintiff

The defendant was not represented and did not appear

[13] A revised draft order provided by Mr Clermont has already deleted the part concerning Banker's Book Order.