

DCCJ 3359/2023

[2024] HKDC 776

IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CIVIL ACTION NO 3359 OF 2023

BETWEEN

STEVE JAY SHIRE 1st Plaintiff
SHIRE COMMERCIAL INC. 2nd Plaintiff
and
ZHAO YANLING (赵燕玲) Defendant

Before: Her Honour Judge G. Chow in Chambers (open to public)

Date of Hearing: 16 May 2024

Date of Judgment: 16 May 2024

JUDGMENT

Introduction

1. This is the hearing of an application by the 1st Plaintiff (“P1”) and the 2nd Plaintiff (“P2”) (collectively, “Ps”) pursuant to O 19, r 7 of the

Rules of the District Court, Cap 336H (“RDC”) by *Inter Partes* Summons dated 15 February 2024 (“the Summons”) seeking:

(1) An order that the Defendant (“D”) do pay Ps the sum of US\$80,990.00 (or its HKD equivalent at the time of payment) (“the Sum”) plus the sum of HK\$107,232.67;

(2) A declaration that D holds the Sum received from P2’s account on or about 10 February 2023 and/or all such traceable proceeds or any part thereof on constructive trust for Ps;

(3) An order that D do transfer the Sum or such assets derived from the Sum or any part thereof to Ps;

(4) An order that the injunction granted by DCJ Leong on 4 September 2023 and continued by DDJ David Chan on 11 September 2023 be continued on the same terms beyond judgment for a period of 12 months (with liberty to apply), save that the injunction as continued does not prohibit HSBC from paying funds to Ps’ solicitors pursuant to any garnishee order absolute granted in favour of Ps;

(5) An order *nisi* that D do pay interest on the Sum from 10 February 2023 to the date of judgment at the rate of

prime plus 1% and thereafter at judgment rate until payment;

(6) An order *nisi* that D do pay Ps' costs of this action including the costs of this application to be taxed if not agreed; and

(7) P's Summons dated 14 December 2023 be withdrawn with no order as to costs.

Background Facts and Procedural History

2. The following background facts are taken from what has been pleaded in the Statement of Claim ("SOC").

3. P1, is an individual, resident in the US and is the sole director and shareholder of P2.

4. P2 is a company incorporated in the US.

5. D is an individual resident in the PRC. D is the holder of an account maintained with HSBC with account number 174-817072-888 ("D's Bank Account").

6. P1 holds:

(1) account number 10465100 ("Personal Account"); and

(2) on behalf of P2, an account number 10473868 (“the Business Account”) with Horizon Bank in Austin, Texas (“HB”).

7. On 9 February 2023, P1 received an email purportedly from PayPal which stated that there is a charge for US\$1,499.99 for the purchase of an iPhone. P1 suspected that this was a fake email because he did not purchase any iPhones.

8. When P1 logged into his PayPal account, he did find a charge of US\$1,499.99. He then called to enquire with the customer service hotline number stated on the website. A person answered, claiming to be one David Hay (“David”) from PayPal giving his employee number. David instructed P1 to check if his bank account was debited US\$1,499.99. Following his instructions, when P1 checked the Business Account, P1 found there was a charge for that amount. David then told P1 that his computer was hacked and assured P1 that the amount could be retrieved.

9. Following David’s instructions, P1 installed a software called “RFL”, inputted his name and the amount of US\$1,499.99 on the software and checked the Business Account for the incoming deposit of US\$1,499.99.

10. However, when P1 checked the Business Account, he discovered US\$149,999.00 was deposited into the Business Account. Believing that there was a mistake, he agreed to return the excess.

11. On 9 February 2023, David instructed P1 to return the excess by 2 transfers: one of US\$80,940.00 and another of US\$67,509.01 to D's Bank Account.

12. On the same day, P1 made the first transfer and instructed HB to make the second transfer the next day.

13. On 10 February 2023, P1 received a voicemail from David that his PayPal account had been blocked. When P1 called back David, David claimed that the first transfer did not go through and instructed P1 to conduct 2 more transfers. However, P1 called HB and was informed that the first transfer was completed. It was then that P1 became suspicious and instructed HB to recall the first transfer and cancel the second transfer.

14. P1 then contacted PayPal to verify David's identity but was informed there was no record of such employee. P1 then realized he was a victim of fraud. It later transpired that the US\$149,999.00 was actually transferred from the Personal Account to the Business Account.

15. P1 subsequently made a police report in the US through FBI and the Hong Kong Police.

16. On 9 August 2023, Ps issued the writ in this action.

17. By an Order dated 4 September 2023 ("the Order"), His Honour Judge Harold Leong granted a proprietary injunction in respect of the Sum and a "top up" Mareva (restraining D from removing assets from

Hong Kong up to the value of the Sum) against D. Also, in the Order, it provided that Ps may serve the writ, the Order and an *inter-parte* summons to be heard on the return date together with a copy of the affirmation and exhibits and skeleton argument used at the application for the Order by sending those documents by email to D.

18. The Order has been ordered to continue until trial or further order of the court by Deputy District Judge David Chan on 11 September 2023.

19. By a Summons dated 14 December 2023 (“the Previous Summons”), Ps applied for default judgment against D pursuant to O.19, r.7 of RDC.

20. The Previous Summons was heard by me on 7 February 2024. At that time, it was not clear if the Previous Summons and SOC were covered by the substituted service order in the Order. For that reason, Mr Brown, counsel who appeared on behalf of Ps (who also appears before me today) sought, and I granted, an adjournment of the Previous Summons *sine die* with costs reserved.

21. Only after the hearing, Mr Brown confirmed that at the hearing before His Honour Judge Leong, additional orders were made for substituted service of all court documents that are required to be served on D in this action by email.

Applicable principles

22. The applicable principles to an application under O 19, r 7 have been discussed in several cases brought by victims of fraud. The power to grant judgment under the provision is discretionary. The court is required to scrutinize whether the matters pleaded in the Statement of Claim entitle the plaintiff to the judgment sought. The court's decision is made on the basis of the pleaded facts, rather than on the evidence. See eg : *Sultana Distribution Services Inc v Hong Kong Fuheng Technology Co Limited* [2018] HKCFI 1480, §7; *Wells Fargo Securities LLC v Tian Ruida Industrial Co Ltd* [2018] HKCFI 2495, §1; *Peter Shoikhet and Gale Shoikhet v Chen Guoqiang* [2022] HKDC 369, §8 and *Minebea Cambodia Co Ltd v Zhao Jin Fang trading as Anzhan Industrial & Commercial Company* [2022] HKCFI 3325, §28.

23. As to declaratory relief, the rule of the court that a declaration will not be granted when giving judgment by consent or in default without a trial is a rule of practice and not of law and will give way to the paramount duty of the court to do the fullest justice to the plaintiff to which he is entitled. In exercising its discretion, the court will consider whether any useful purpose would be served by granting declaratory relief. In email fraud cases where a proprietary claim was asserted, the court has granted declaratory relief in the default judgment context in order to secure the plaintiff's proprietary claim as opposed to merely personal claim, particularly given that the defendant may have other creditors. See *Hong Kong Civil Procedure 2024*, Vol. 1, §19/7/20; *Mesirow Financial Administrative Corporation v Best Link Industrial Company Limited*

(Unrep) HCMP 1846/2015, 25 January 2016, §§35-38; *Peter Shoikhet and Gale Shoikhet*, §22 and *Minebea Cambodia Co Ltd*, §29.

24. In so far as post-judgment injunction is concerned, Keith Yeung SC DHCJ (as he then was) held in *China Citic Bank Corp Ltd (Quanzhou Branch) v Li Kwai Chun & Ors* [2018] HKCFI 1800 at §32:

“...The mere fact that a judgment has been obtained does not by itself justify [a *Mareva* injunction]. But if a *Mareva* injunction is otherwise justified (applying the established considerations and with the fact that it is a post-judgment application factored in), a *Mareva* judgment may be granted (subject to the rider that it should normally be of limited and specific duration.). It acts *in personam* on the defendant and works in tandem with the usual execution mechanism. No additional ‘special circumstances’ are required to be established.”

Analysis

25. I am satisfied from the affirmations of service filed on behalf of Ps that D was duly served by substituted service (amongst other things) the writ, SOC and the Summons together with the supporting affirmations.

26. D has not filed any acknowledgment of service or Defence within the time limited for doing so or at all.

27. D is absent from today’s hearing. This court is empowered by O 32, r 5(1) of RDC, to proceed with a summons at its first or any resumed hearing in the absence of a party thereto, if having regard to the nature of the application, it thinks it expedient to do so.

28. Under O 32, r 5(2) of RDC, the court may be required to be satisfied that the summons, or as the case may be, notice of the time appointed for the resumed hearing was duly served on that party. As mentioned above, the Summons was served on D by substituted service.

29. Since the commencement of these proceedings, D has not appeared to participate or contest these proceedings. It seems to me that there is no point in adjourning the hearing of the Summons. In the circumstances, I consider it expedient to proceed with today's hearing in the absence of D.

30. Ps' account of the events leading up to the transfer of the Sum to D's Bank Account as pleaded has not been contested due to D's non-appearance. I see no reason not to accept Ps' case of fraud. D have not acknowledged service of the writ or filed any defence.

31. On the averments in SOC, I am satisfied that Ps are entitled to enter judgment against D for the Sum. A case of unjust enrichment has been pleaded.

32. There are 4 elements to a claim in unjust enrichment:

(1) enrichment of the defendant;

(2) at the expense of the plaintiff;

(3) enrichment being unjust; and

(4) no defence applicable.

See *Shanghai Tongji Science & Technology Industrial Co Ltd v Casil Clearing Ltd* (2004) 7 HKCFAR 79 at §67.

33. D, having no entitlement to the Sum, plainly have been enriched at the expense of Ps. But for the fraud, Ps would not have transferred the Sum and D would not have received the Sum from Ps, with whom she had no business dealing nor paid any consideration. D has filed no defence so there is no applicable defence.

34. Ps further seek interest on the Sum at the rate of prime plus 1% from 10 February 2023 to the date of judgment and thereafter at judgment rate until full payment. Mr Brown relied on the decision of DHCJ Jonathan Chang SC in *Kuo Benjamin Yung-Hsiang v Xu Meiyi* [2022] HKCFI 3007, §20(5) where a similar award of interest was ordered.

35. However, I note that in *Peter Shoikhet and Gale Shoikhet*, His Honour Judge KC Chan refused to award such interest. The learned judge noted that in that case there was no allegation that the sum transferred to the defendant's bank account had been earning interest at prime rate plus 1% and thereby the defendant was enriched in the amount of such interest. I would also adopt the same approach in the present case. There being no allegation that the Sum in D's Bank Account had earned interest at prime rate plus 1%, I would refuse to order such interest.

36. As for Ps' proprietary claim, it is now well established that when property is obtained by fraud, equity imposes a constructive trust on

the fraudulent recipient so the property is recoverable and traceable in equity. See eg : *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 716C-D; *Minebea Cambodia Co Ltd*, §32 and *Peter Shoikhet and Gale Shoikhet*, §21.

37. Further, even if the recipient was not a party to the fraud, if his state of knowledge is such as to make it unconscionable for him to retain the property, the defrauded claimant has a tracing remedy. Moreover, knowledge does not have to be acquired at the time of receipt, and it can be acquired subsequently while the property is in the recipient's hands: *Minebea Cambodia Co Ltd*, §§33-34.

38. The pleaded facts establish that the Sum was transferred to D's Bank Account as a result of the fraud. At the very least, upon service of the writ, SOC and the Order, D must have known the Sum was transferred under a mistake of fact, without Ps ever intending D to have it and without any consideration given by D.

39. Furthermore, I am satisfied that the present case is one where justice requires the court to grant the declaration sought to enable Ps to pursue proprietary in addition to personal remedies against D. I would therefore exercise my discretion in favour of the declaration sought.

40. I would also continue the injunctive relief of the Order as an aid to enforcement. None of the circumstances which justified the grant and continuation of the Order have materially changed to date. I therefore order the Order be continued but only for a further period of 6 months from

the date of judgment as that was the period sought in SOC. I am of the view that this should be sufficient for Ps to issue the necessary enforcement proceedings. This is, however, without prejudice to any application in the future for further extension should the circumstances justify it.

41. As for Ps' claim for the sum of HK\$107,232.67, the pleaded basis in SOC is "damages to compensate the costs incurred in obtaining the Norwich Pharmacal Order dated 15 June 2023. The costs claimed were reasonably and necessarily incurred in the course of the Plaintiffs' efforts to obtain redress for the breach, and include, among other things, the costs for the application for the Norwich Pharmacal Order and the costs of complying with the order."

42. Mr Brown did not refer me to any decision where such costs were recoverable as damages. Neither was I satisfied that there was any pleaded cause of action to seek such sum as "damages".

43. In any event, insofar as the costs were incurred to obtain redress for the wrongful acts of D, this would be included as part of Ps' costs of this action, which are to be taxed if not agreed. As for the costs for complying with the *Norwich Pharmacal* order, I believe only the bank, against whom such order was made, incurred such costs and those costs should have already been provided for in the order made against it. I therefore will not make any order against D for the payment of the sum of HK\$107,232.67.

Disposition and orders

44. Accordingly, I will therefore grant judgment to Ps and order that:

(1) D do pay Ps the Sum (or its HKD equivalent at the time of payment);

(2) An order *nisi* that D do pay Ps the interest accrued on the Sum from 10 February 2023 to the date of judgment and thereafter at judgment rate until full payment;

(3) There be a declaration that D holds the Sum received from P2's account on or about 10 February 2023 and/or such traceable proceeds or any part thereof on constructive trust for Ps;

(4) D do transfer the Sum and/or its traceable proceeds to Ps;

(5) The injunction granted by His Honour Judge Harold Leong on 4 September 2023 and continued by Deputy District Judge David Chan on 11 September 2023 be continued on the same terms beyond judgment for a period of 6 months, with liberty to apply for further extension should the circumstances justify it, save that the injunction as continued does not prohibit HSBC

from paying any funds to Ps' solicitors pursuant to any garnishee order absolute granted in favour of Ps;

(6) A costs order *nisi* that D do pay Ps' costs of this action including the costs of this application and Ps' application for *Norwich Pharmacal* relief, to be taxed if not agreed, with certificate for counsel.

45. The above orders *nisi* shall become absolute if no application to vary is made within 14 days from the date hereof.

46. I would further make an order that the Previous Summons be withdrawn with no order as to costs.

47. I thank Mr Brown for his helpful assistance.

(G. Chow)
District Judge

Mr Toby Brown, instructed by Payne Velasco, for the 1st & 2nd plaintiffs

The defendant was not represented and did not appear