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Newsletter

Litigation & Dispute Resolution

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What's inside?

Can you get a Vesting Order for cyber fraud cases?

Peter So and Michelle Wan

Cyber frauds, in particular email scams, have become a common trend of crime in Hong Kong in recent years. Fraudsters use various means to deceive the victims into transferring money to unauthorised bank accounts. Upon discovery of the fraud and based on information obtained from the bank, the victim may apply for an injunction from the court to freeze the recipients' bank accounts and if the victim is lucky enough, there will be some credit balance left to recover.

In most if not all of the cases, the fraudsters and the subsequent recipients, understandably, would not appear in the proceedings, and the victim would apply for a default judgment. One type of relief often sought is a vesting order under s.52 of the Trustee Ordinance (Cap. 29), compelling the bank to pay the money in the recipients' accounts back to the victim. In the past, courts have commonly granted the vesting order sought.

The relevant statutory provision that requires construction by the court is s.52(1)(e) of the Trustee Ordinance (Cap. 29) which provides as follows:

"*(1) In any of the following cases, namely – (e) where stock or a thing in action is vested in a trustee whether by way of mortgage or otherwise and it appears to the court to be expedient, the court may make an order vesting the right to transfer or call for a transfer of stock, or to receive the dividends or income thereof, or to sue for or recover the thing in action, in any such person as the court may appoint:*"

Recorder Fung SC's Decision

In a recent case, *800 Columbia Project Company LLC v Chengfang Trade Ltd and others* [2020] HKCFI 1293, Recorder Eugene Fung SC came to the conclusion that section 52 is not engaged in the context of email scam cases.

In gist, Mr. Recorder Fung SC considered that section 52 envisages a vesting order to be made upon a change in trusteeship and the statutory provisions envisage certain circumstances where the legal estate or interest should be conveyed or transferred by the outgoing trustee to the incoming trustee but the outgoing trustee who should convey or transfer is not in a position to do so, e.g., he may be of unsound mind, or he may refuse to convey. In cases of this kind, the court makes an order whereby the property is vested in the incoming trustee without any conveyance, transfer or assignment (para. 16(4) & (5) of the Decision).

Mr. Recorder Fung SC examined the concluding paragraph of s.52(1) which provides as follows:

"*[1(a) – (e)] … the court may make an order vesting the right to transfer or call for a transfer of stock, or to receive the dividends or income thereof, or to sue for or recover the thing in action, in any such person as the court may appoint:*" The learned Recorder took the view that the phrase "*in any such person as the court may appoint*" contemplates an appointment of trustee(s) by the court and thus places restrictions on persons in whose favour the vesting order may be made (para. 16(6) of the Decision). In other words, he considered that a vesting order may only be made in favour of trustee(s) to be appointed by the court.

The learned Recorder took the view that before he gave the default judgments, the various sums of money were held by the defendants and the defendants were the absolute owner of the money. After the giving of default judgments, the legal title in the right to call for repayment would continue to be held by the defendants, but the equitable title in such right would be divested from the defendants who would hold the same on trust for the victim. The learned Recorder did not agree that the right to call for repayment from the bank was vested in the defendants by virtue of the giving of the default judgments, hence declined to make the vesting order.

DHCJ Paul Lam SC's Decision

In a subsequent case *Wismettac Asian Foods Inc. v. United Top Properties Ltd and others* [2020] HKCFI 1504, Deputy High Court Judge Paul Lam SC came to a different conclusion from that of Mr. Recorder Fung SC.

The Deputy Judge considered Recorder Fung SC's Decision and took the view that the phrase "*a thing in action is vested in a trustee whether by way of mortgage or otherwise*", in particular the word "*otherwise*" in s.52(1)(e) is wide enough to cover the vesting by way of operation of law in a constructive trust scenario. He took the view that in a constructive trust scenario, the trust is imposed by the operation of law as a result of which the legal title of the victim's money or its traceable proceeds is vested in the fraudster or the subsequent recipient but the victim retains or holds the equitable or beneficial interest therein (para. 43 of the Decision).

The Deputy Judge considered that the constructive trust came into existence at the moment the fraudster or subsequent recipient receives the victim's money or its traceable proceeds in their bank accounts by operation of law and when the court grants a declaration, it is merely affirming the legal position but is not creating any trust by such order (para. 43 of the Decision).

The Deputy Judge considered that the phrase "*in any such person as the court may appoint*" is wide enough to include the beneficiary of a constructive trust. If the court vests the thing in action in the beneficiary, since no new trustee is appointed, the proviso in s.52(1) ("*Provided that (i)…; and (ii)*") is not engaged or applicable.

Commentary

In view of these two recent conflicting authorities, it is clear that the debate about the court's power to make a vesting order remains unsettled and it seems unlikely that there will be an appellate authority to decide the issue authoritatively.

While it is probably right for the Deputy Judge in *Wismettac* to take the view that the phrase "*where stock or a thing in action is vested in a trustee whether by way of mortgage or otherwise*" in s.52(1)(e) of the Trustee Ordinance (Cap. 29) is wide enough to capture the constructive trust scenario, i.e., the declaration of the prior existence of a constructive trust has the effect of making the fraudster defendant a constructive trustee for the plaintiff beneficiary in respect of the money in the bank account, however it is not apt to describe the plaintiff beneficiary in whose favour a vesting order is made as a person "appointed" by the court.

By using the words "*the court may appoint*" in the concluding paragraph and in particular the word "*appoint*" in s. 52(1), it appears that the section itself contemplates that the recipient in whose favour the vesting order is made would *perform some sort of duties / functions for another person*, hence the section uses the word "appoint". Reading s.52(1) as a whole, the duties / functions that are envisaged to be performed by the incoming person "appointed" by the court are duties / functions normally performed by a trustee for a beneficiary.

It would be straining the language of s.52(1) to say that "*in any such person as the court may appoint*" would include the victim, being the beneficiary. By vesting the right to call for the transfer of the money to the beneficiary, the court is unwinding the "constructive trust" but not appointing someone to perform the trustee duties / functions, and this interpretation renders the word "appoint" in the concluding paragraph of s.52(1) otiose.

If the beneficiary is absolutely entitled to the property (as in the case of a constructive trust), the beneficiary should invoke the rule in *Saunders v Vautier* to terminate the trust and obtain from the court an order directing the trustee to transfer the property to him, failing which, such transfer may be carried out by another person in place of the trustee.

The recent cases may make it confusing as to whether a vesting order should be sought. However, the Judges in both cases remarked that the victim may seek relief by commencing garnishee proceedings under Order 49 of the Rules of the High Court. Until the matter is clarified, it is more sensible for the victim to achieve the same objective by applying for a garnishee order, which is clearly uncontroversial.

Court permits and encourages banks to comply with disclosure orders by uploading documents to online data room

Leo Wong

In Hwang Joon Sang & Anor v. Golden Electronics Inc. & Ors (HCA 1529/2019; [2020] HKCFI 1233), the Court made an order requiring various banks to supply documents by way of disclosure to the Plaintiffs and permitting (indeed, encouraging) the banks to do so by use of electronic or digital versions of those documents being uploaded to a data room. The Plaintiffs were to create an online data room for each of the banks, so that only the particular bank would have access to the materials in, or be able to upload materials to, that data room.

Brief facts

The Plaintiffs, purportedly defrauded of significant sums, asserted proprietary claims over the funds in bank accounts held by the Defendants. The Plaintiffs obtained disclosure orders against the various banks where the accounts were held. The issue was how the banks may and should comply with the disclosure orders.

Disclosure by access to a data room was suggested in particular, because of the heavy costs, including photocopying charges, levied by some banks in producing documents as ordered. Those orders, necessary for the intended tracing exercises, had already put a significant financial burden on the Plaintiffs. For instance, one bank had quoted HK$157,100 as photocopying charges for 1,571 pages of documents, i.e. HK$100 per page.

Court's reasoning

In light of the underlying objectives of the Rules of High Court, in particular, the objectives of increasing the cost-effectiveness of any practice and procedure, promoting a sense of proportion and procedural economy in the conduct of proceedings and ensuring fairness between the parties, the Court agreed with the Plaintiffs' submissions that the Court should actively approve and adopt a practice and procedure which may help reduce costs, so long as it was possible, fair, just and reasonable to do so.

The Court remarked that the banks probably held the relevant materials in electronic or digital form and unnecessary time and costs would therefore be involved if the banks had to print out hard copies of documents so as to provide them to the Plaintiffs. This was particularly so, where the Plaintiffs would likely have to scan those documents to create their own electronic or digital versions to pass on to (for example) forensic accountants or others involved in the tracing exercise. Turning paper documents back into electronic documents would also incur unnecessary time and costs. The use of paper, at least much more paper than was likely to be required for any focused exercise, was also environmentally unattractive.

The Court said that with the use of a data room for document disclosure banks' photocopying charges could be lowered, if not eliminated altogether (presumably also lowering administrative charges generally), which meant savings not only in costs, time and paper, but also that information could be provided faster, which was a significant benefit in cases such as this, where earlier attempts to trace assets may lead to greater recovery, without further dissipation and greater difficulty in tracing and recovery.

It would also go some way, the Court said, to ensure that disclosure orders obtained against banks in cases like this do not become impracticable to all but the most well off victims of fraud.

The Court added that where the purposes of ordering disclosure from the banks are (a) to facilitate the provision of information which may lead to the location and preservation of assets to which a party makes a proprietary claim, and (b) where the order is intended to reap substantial and worthwhile benefits for the plaintiff, then the form of the order should permit and encourage compliance using a method which actually furthers those purposes, rather than risk frustrating them.

Comment

We anticipate that more and more cases will follow this method of disclosure. When it comes to prevention of dissipation of assets in suspected fraud cases, how fast the victims can trace the assets will have a huge bearing on recovery. By permitting and encouraging banks to provide disclosure by uploading the requested documents to an online data room, administrative and photocopying time and costs can be saved and victims would be able to receive information helpful to asset tracing more quickly. It would also save the time and costs of delivery/post/courier.

To cater for the possibility of banks not wishing to upload documents to an online data room, perhaps as a fall-back mechanism, the Court could allow banks to provide softcopies of the requested documents. Either way, the banks would not need to print out hardcopies of the requested documents which they already have in electronic or digital form.

CFA confirms no pre-existing legal relationship required for one to be an "agent" of another for bribery offences

Peter So and Mandy Pang

Section 9 of the Prevention of Bribery Ordinance (Cap. 201) (POBO) criminalizes corrupt transactions with agents in both public and private sectors. The first question which would come to one's mind is, who is an "agent"? Under section 2 of the POBO, an "agent" includes "*a public servant and any person employed by or acting for another*".

In recent years, there have been cases before the Courts concerning whether a pre-existing legal relationship is required for one to be an "agent" of another under section 9 of the POBO. Recently, the Court of Final Appeal (CFA) confirmed in *HKSAR v Chu Ang* (FACC 6/2019, 30 June 2020) that a person is an "agent" by having "acted for another" where that person has agreed or chosen so to act in circumstances giving rise to a reasonable expectation, and therefore a duty, to act honestly and in the interests of that other person to the exclusion of his or her own interests. A pre-existing legal relationship is not required for one to be an "agent" of another.

Background

The Defendant was a private violin teacher. A parent of a student asked the Defendant to help source a new Italian violin. The Defendant recommended a shop, Chairman Instruments Trading Ltd (CITL), to the parent, and accompanied the parent and student to the shop. The parent chose a violin for purchase after the Defendant indicated that it was preferable and the Defendant helped the parent negotiate the price of the violin from HK$99,000 to HK$80,000. About two weeks later, the Defendant received an undisclosed HK$20,000 commission from CITL for the purchase of the violin by the parent.

The Defendant was charged with accepting an advantage as an agent contrary to section 9(1)(a) of the POBO. The section materially provides that "*any agent who, without lawful authority or reasonable excuse, ... accepts any advantage as an inducement to or reward for or otherwise on account of his ... having done ... any act in relation to his principal's affairs or business; ... shall be guilty of an offence*."

At trial, the thrust of the Defendant's defence was that a pre-existing legal relationship must be proved for someone to be an "agent" under section 9(1)(a) of the POBO. The Magistrate ruled that the Defendant had no case to answer and held that an agent-principal relationship had to be in existence at the time when an offence was committed under section 9(1)(a) of the POBO. Given that the purchase of the violin was beyond the Defendant's contractual relationship with the parent as the student's violin teacher, the Defendant was not an "agent".

On the Prosecution's appeal by way of case stated, DHCJ Gary Lam upheld the Magistrate's ruling and found that the Defendant was an independent contractor for teaching violin, who had offered help on a voluntary and non-commercial basis outside teaching.

On the Prosecution's application for leave to appeal from the Appeal Committee of the CFA (Appeal Committee), the Appeal Committee accepted that guidance would be helpful in connection with the establishment of the status of "agent" for the purposes of section 9 of the POBO and granted leave on the basis that it is reasonably arguable that there has been substantial and grave injustice in that the law had been misapplied in the decisions below.
At the hearing before the CFA, the CFA unanimously allowed the appeal.

"Agent" for the Purposes of Section 9 of the POBO

The CFA revisited two CFA cases, namely *HKSAR v Luk Kin Peter Joseph* (2016) 19 HKCFAR 619 (*Peter Luk*) and *Secretary for Justice v Chan Chi Wan Stephen* (2017) 20 HKCFAR 98 (*Stephen Chan*).

In *Peter Luk*, it had been held that no pre-existing duty is required for one to be an agent under section 9(1) and (2) of the POBO. Whilst acceptance of a request to act may itself create a duty to do so honestly and in good faith, it is not necessary that there should have been a request to act. A person who is in a position to act on behalf of another and voluntarily does so may also thereby assume fiduciary duties.

In *Stephen Chan*, the CFA had held that section 9(1)(a) of the POBO does not require the agent to have been acting in his capacity as an agent within a pre-existing relationship but that the relevant act done or not done must be "in relation to his principal's affairs or business". It also held that economic loss is not an element of the offence.

Applying *Peter Luk* and *Stephen Chan*, the CFA held that:

1. The Magistrate and DHCJ Gary Lam wrongly held that the Defendant was not an "agent" in relation to the purchase of the violin because that transaction fell outside the scope of the pre-existing contractual relationship.

2. For the purposes of section 9(1)(a) of the POBO, a person is an "agent" by having "acted for another" where that person has agreed or chosen so to act in circumstances giving rise to a reasonable expectation, and therefore a duty, to act honestly and in the interests of that other person to the exclusion of his or her own interests. A pre-existing legal relationship is not required for one to be an "agent" of another.

3. Given that the Defendant agreed to assist the parent to source an Italian violin, accompanied the parent and her student to the shop, helped them choose a violin and then participated in negotiating the price eventually paid, the Defendant was acting for, and thus the agent of, the parent in purchasing the violin from CITL. The Defendant's conduct created a reasonable expectation that she would act honestly and in good faith in the interests of the parent to the exclusion of her own interests in connection with the purchase of the violin. The Defendant's acceptance of the secret commission of HK$20,000 while acting for the parent in the purchase of the violin placed the Defendant in a conflict of interest situation which subverted the integrity of the agency relationship between her and the parent.

4. Section 9 of the POBO does not criminalize helpful assistance given to another person honestly and in good faith. In this case, the Defendant had placed herself in a conflict of interest situation and made a secret profit out of acting for another. A person acting honestly and in good faith can easily avoid liability under section 9 of the POBO by disclosing the commission arrangement rather than keeping it secret from the person for whom he or she is acting.

Commentary

It is now settled that a pre-existing legal relationship is not required for one to be an "agent" of another under section 9 of the POBO. It need not even be proved that that other person had requested the agent to act.

The CFA ruling has wide implications, as a person might be caught by section 9 of the POBO even if there was no pre-existing legal relationship between the "principal" and the "agent".

Honesty and transparency will be the key to avoiding POBO liability when one receives benefits or advantages while acting for another person.

Court Proceedings (Electronic Technology) Bill passed

Karen Menon

In our previous article, we reported on the Court Proceedings (Electronic Technology) Bill, the objective of which is to enable the use of electronic technology (e-technology) in proceedings in courts (and specified tribunals) and for court-related services, as an alternative to traditional paper-based methods. The Bill was passed on 17 July 2020 and will come into force on a date to later be announced.

Court allows service of court documents by access to online data room

Leo Wong

In the recent case of Hwang Joon Sang & Anor v. Golden Electronics Inc. & Ors (HCA 1529/2019; [2020] HKCFI 1084), Hong Kong's Court of First Instance allowed a novel mode of ordinary service of court documents, using an online data room, to which the persons so served were given access by being sent a previously Court-approved letter providing a link to the data room with clear pictorial instructions, and by separate communication an access code to the data room. In principle, any court documents may be served in this way with the Court's permission, except for documents which are an originating process (such as writs) or those that are required to be served personally.

The Facts

The Plaintiffs, purportedly defrauded of significant sums, asserted proprietary claims over the funds in bank accounts held by the Defendants. A firm of attorneys-at-law was engaged by the Plaintiffs, through their Hong Kong solicitors, to effect service of documents on some of the Defendants in Taiwan. Some of the documents served on some of those Defendants were returned, but the Court was satisfied that those Defendants were aware of the proceedings and that their decision not to participate in them was both voluntary and informed and they were attempting to refuse or evade service of the documents.

Service via online data room

The Court decided to allow service by online data room for the following reasons:

1. There were numerous Defendants in the action and further Defendants were likely to be added as a result of the Plaintiffs' tracing of assets;

2. There was a substantial body of material in the form of affidavits, exhibits and previous court orders and there would likely be more added;

3. There was clearly significant expense, as well as the use of time and paper, in continued service of significant volumes of hardcopy materials, not least if that also involved employment of agents/lawyers overseas to effect that service;

4. The Defendants were aware of the proceedings and their decision not to participate in them was both voluntary and informed;

5. The Court is mandated to give effect to and further the underlying objectives of the Rules of High Court by active case management including making use of technology;

6. This seemed to be precisely the sort of case, and precisely the sort of circumstances, in which the underlying objectives of case management strongly pointed towards the use of available technology;

7. In the modern era of communications, it has become relatively common for Courts to permit service to be affected by use of email. The Court had also previously, in a small number of other cases, permitted service using Facebook Messenger or WhatsApp Messenger, which are both private service channels which might be used either to send documents or to send a link to documents; and

8. The Court considered the English decision in *CMOC Sales & Marketing Ltd v Persons Unknown and 30 others* [2018] EWHC 2230 (Comm) (which allowed service of documents by use of an online data room) and was satisfied that in an appropriate case, such as this one, a similar mode of service can clearly be justified in Hong Kong.

One size does not fit all

The Court made it clear that, there is no "one size fits all" mode of service and that this is fully catered for by the need for parties and the Court to proactively consider the appropriate mode of service in a particular case. As the Court remarked, service by access to an online data room might not be suitable for some individuals, in particular when technology would be a bar or hurdle rather than an aid to those individuals. In this case, there was also a distinction between those defendants for whom the Plaintiffs had an email address and those for whom they did not. The method of providing the link and the access code, so as to facilitate access to the data room, may therefore vary from party to party.

It is not entirely clear whether the Court's decision would have been the same had it not been satisfied that the Plaintiffs had brought the proceedings to the Defendants' attention. This may be why the Court highlighted the importance that any first occasion of service on any defendant or third party should be effected by a Court approved method before an alternative is mooted.

Recent publications

Data protection authorities set out expectations in open letter to VTC companies

Pilot Scheme on Facilitation for Persons Participating in Arbitral Proceedings in Hong Kong

"Relaxing penalties"? Sounds like an oxymoron

Greater Bay Area introduces new Individual Income Tax incentives to attract foreign talent

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