

Partially relieved – Hong Kong court judgment highlights difficulties facing cyber fraud victims in seeking recovery

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The Hong Kong Court of First Instance in *Edison Norge As v. BZZ Ltd* [2021] HKCFI 135 has granted default judgment against email fraudsters whilst granting the declaratory relief applied for only in part. This decision provides further clarification and guidance as to best practice in formulating a claim for proprietary relief.

The facts and legal principles

The plaintiff was the victim of email fraud and sought, in addition to default judgment against the first and second defendants (first-level recipients) and fifth and ninth defendants (second-level recipients), declarations that:

- He had a proprietary interest over the sums that were paid into the defendants' accounts.
- The defendants each held the minimum balance in their account on constructive trust for the plaintiff.
- He was entitled to trace the sums that were paid into the defendants' accounts into all funds and assets acquired by or representing the amounts so paid.

Recorder Manzoni SC said he concurred with the decision of Mr. Recorder Eugene Fung, SC in *Milestone Electric, Inc v. Meihoukang Trading Co. Ltd.* [2020] HKCFI 2542 as to the principles. (see Hogan Lovells [client alert](#), *To trace or not to trace? Hong Kong court reiterates applicable principles for obtaining proprietary relief in email fraud cases*).

Where the plaintiff is a victim of fraud, he may be entitled (subject to proving the same) to a constructive trust over any identifiable stolen property. The court would apply the doctrine of tracing to determine the nature of the original property interest and study what had become of it.

The declarations

Having reviewed the bank statements, Recorder Manzoni SC was satisfied that the plaintiff could assert a proprietary interest over the amounts that were paid into each of the four accounts, and granted the first type of declaration sought against all four defendants.

With respect to the second-level recipients, citing the rule in *Re Hallett's Estate* [1880] 13 Ch 696 (that the first sum paid into a mixed fund will be held to have been first drawn out), he found that the bank statements showed the same monies leaving the second defendant's account were paid into the fifth and ninth defendants' accounts.

However, Recorder Manzoni SC was not prepared to grant the second and third type of declaration sought against all four defendants. For all four defendants' accounts, he was provided with the bank statements from the date of receipt of the fraudulent payment to a certain date (Date A) showing a remaining balance, and also a letter from the bank confirming the same remaining balance as of a later date (Date B).

Whilst he considered on "the balance of probability" that it was likely there had been no movement between Date A and Date B, he was not prepared to make that assumption for the purposes of granting declaratory relief. The court noted this was something that would have to be proved at a later time with evidence and explained:

The reason is not because the plaintiff is not necessarily entitled to trace, but the reason is that I am not prepared to make a declaration which may be used subsequently by the Plaintiff in any way to support propositions that have not been put before me or so as to bind other people or entitles.

Interest

On interest to be awarded to the plaintiff, unlike in many other fraud cases, the court thought it more appropriate to grant the usual interest rate at HSBC prime rate plus one percent from the date on which each defendant received the relevant sums, rather than the rate payable on the judgment that was claimed by the plaintiff.

Implications

The judgment illustrates the difficulties facing plaintiffs when trying to recover monies by asserting a proprietary right over monies in a defendant's account. Plaintiffs should not expect the court to simply rubber stamp an uncontested application where declaratory relief is sought. In cases where documentary evidence of tracing is incomplete, the court will not be prepared to make any assumptions in the plaintiff's favour.

As ever, prompt and decisive action is advised in the battle with the fraudsters and the most appropriate type of relief may differ in each case depending on the facts and the availability of evidence before the court.

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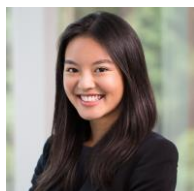
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