

Vesting orders: back in vogue? Let's hope so

Hong Kong court says it does have the power to assist cyber fraud victims under the Trustee Ordinance.

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Cyber fraud scams, typically involving fraudsters using spoofing / phishing tactics to bring about unlawful receipt of monies, have, unfortunately, been a mainstay in Hong Kong in recent years.

As the fraudsters' nefarious schemes have become more sophisticated and difficult to detect until it is too late, those defrauded have sought the most straightforward and cost-efficient way to recover their funds.

The law should at least strive to match the sophistication and creativity of these schemes, in order to ensure that victims are not left having to incur unnecessary further delay and cost in recovering their funds.

Against this backdrop, a common practice has developed in Hong Kong whereby victims apply for default judgment and a declaration that the recipient of the stolen monies (often a shell company holding the monies in an intermediate bank account) is holding the funds as a constructive trustee on behalf of the victim.

The victim would, in parallel, in circumstances where they could trace or identify their funds, seek a vesting order directing the party holding the stolen monies (most often a bank) to pay the money back to the victim.

It is a straightforward remedy available under section 52(1)(e) of the Trustee Ordinance (Cap.29), which provides that:

"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:..."

The courts had previously granted vesting orders without much fanfare, but recently, the jurisdiction to do so has come into question, with a legal debate involving a number of conflicting

first instance decisions centring around what the court is and is not allowed to do under the section 52(1)(e).

However, in a recently reported decision, *Case v Profitling International Ltd* [2021] 2 HKLRD 16, Deputy Judge Queenie Ng was in no doubt that the court did have the jurisdiction to make such an order despite other recent authorities suggesting otherwise.

Background to the fraud

The plaintiff was a 74 year old Australian national living in Melbourne. In May 2018, he received an unsolicited telephone call from a person who called himself Mr. Daniel J Fox, Senior Chief Analyst and Retirement Department Director of Cryptotag Financial.

According to Mr. Fox, Cryptotag was an international company that operated an online bitcoin trading platform. As instructed by Mr. Fox, the plaintiff transferred a sum of AU\$400,000 to the defendant's bank account in Hong Kong.

The plaintiff never received any bitcoin and contacted the bank asking for the funds to be recalled. His son helped him make a report to the Hong Kong police and on 11 August 2020 started proceedings for a declaration that the defendant was liable to account to the plaintiff as a constructive trustee and an order that the equivalent of AU\$400,000 be vested in the plaintiff and returned to him forthwith.

The court was satisfied that the plaintiff was entitled to trace his money into the account of the first defendant and that the defendant was liable to account to the plaintiff for the full sum of AU\$400,000 as constructive trustee. But could the court grant the vesting order?

The court's analysis

The court referred to the judgment of Deputy High Court Judge Paul Lam SC in *Wismettac Asian Foods Inc v United Top Properties Ltd* [2020] 3 HKLRD 732, and concluded, adopting the Deputy Judge's analysis of the relevant wording in section 52(1) of the Trustee Ordinance, that the court did have jurisdiction to make the vesting order sought. The court noted that the analysis in *Wismettac* was preferred in several recent cases, including *Jensonn Power Systems PTE Ltd v Lishan Zhi Trading Co Ltd* [2020] HKDC 629 and *Concrete Waterproofing Manufacturing Pty Ltd v Changxuan Co Ltd* [2020] 4 HKLRD 166.

The court also considered another competing line of authorities, commencing with Recorder Eugene Fung's decision in *800 Columbia Project Co LLC v Chengfang Trade Ltd* [2020] 3 HKLRD 674, which held the court's jurisdiction was not engaged, taking the view that where a person becomes a constructive trustee pursuant to a declaration made by the court, the person cannot be said to have been "appointed" by the court to be a trustee for the purposes of section 52 of the Ordinance.

In *800 Columbia*, it was contended that before the declarations were granted, the defendants were the absolute owners of the right to call upon the beneficiary to repay. After granting the declarations, they continued to hold the legal title in the right, but the equitable title would at that point have been divested from the defendants.

In declining to follow *800 Columbia*, Deputy Judge Queenie Ng took the view that the word "trustee" in section 52(1)(3) would extend to a constructive trustee unless the context required otherwise. The section set out the method of vesting as "...by way of mortgage or otherwise" (emphasis added). Deputy Judge Ng considered that "otherwise," meaning "any other way," was capable of including vesting by way of operation of law.

"There is no reason why, in this context, the word 'otherwise' should not be given its natural and ordinary meaning. In particular, it seems to me that 'otherwise,' meaning 'any other way,' is capable of including vesting by way of operation of law. In a constructive trust arising in this sort of case, 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."

In the circumstances (and on the facts of this case), the balance in the defendant's bank account could be considered as representing the victim's money or its traceable proceeds, and was vested in the defendant as a constructive trustee by operation of law.

Setting out the principles, the court concluded:

- A constructive trust comes into operation at the moment the fraudster or the subsequent recipient receives the victim's money or its traceable proceeds by operation of law. When the court grants a declaration in this respect, it is merely affirming the legal position but is not creating any trust.
- The phrase "or otherwise" in section 52(1)(e) of the Ordinance is wide enough to include this type of vesting in a constructive trustee by operation of law.

The court was satisfied that the two conditions were met and ordered that the sum equivalent to AU\$400,000 in the defendant's account be released by the bank to the plaintiff.

(Unsatisfactory) alternatives

As noted in *Wismettac*, a vesting order can only be made if the plaintiff can prove the balances in the recipient bank account are demonstrably the victim's monies or traceable proceeds. If the victim is unable to prove this, the victim will most often have to pursue garnishee proceedings under Order 49 of the Rules of the High Court in order to enforce its debt claim.

A garnishee order enables a victim to take enforcement action against any third party including a bank holding the defrauded monies. However, this path has its pitfalls as it involves separate proceedings and, inevitably, further costs, and delay.

A further potential remedy was outlined in *Tokić* (above). The court directed the plaintiff to apply for an order under section 25A of the High Court Ordinance (HCO) that if the defendant (who, as is typically the case, could not be found) failed to instruct the bank to make the transfer within the specified period the court may nominate another person to make that direction – i.e. the plaintiff's solicitor.

Section 25A HCO provides that:

"Where the Court of First Instance has given or made a judgment or order directing a person to execute any conveyance, contract or other document, ... , then, if that person... (b) cannot after reasonable inquiry be found, the Court of First Instance may, ... , order that the conveyance, contract or other document shall be executed, ... , by such person as the Court may nominate for that purpose."

Section 25A could be a feasible option where the court declines for whatever reason to grant a vesting order and it is another useful tool in the armoury of victims of fraud. However, it has a similar drawback of creating potential delay as the victim has to wait for the defendant to fail to make the transfer (which inevitably it will in most cases).

Whilst the decision in *Case* is a District Court decision, it can only be good news for victims of scams who can have hope of recovering their monies from defendants making it their business to evade the law.

This is a very welcome decision and whilst this area of law remains in a state of flux because of conflicting decisions in the High Court, the Deputy Judge's well-reasoned analysis and conclusion has achieved what on any basis appears to be the right result.

Contacts



Chris Dobby
Partner, Hong Kong
T +852 2840 5629
chris.dobby@hoganlovells.com



Antonia Croke
Partner, Hong Kong
T +852 2840 5092
antonia.croke@hoganlovells.com



Mark Lin
Partner, Hong Kong
T +852 2840 5091
mark.lin@hoganlovells.com



Byron Phillips
Counsel, Hong Kong
T +852 2840 5960
byron.phillips@hoganlovells.com



Nigel Sharman
Senior Knowledge Lawyer, Hong Kong
T +852 2840 5637
nigel.sharman@hoganlovells.com

www.hoganlovells.com

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