

# To trace or not to trace? Hong Kong Court reiterates applicable tracing principles for obtaining a proprietary relief in email fraud cases

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In a recent High Court decision, the court rejected the plaintiff's application for a declaration that the defendant (a first layer recipient) held the total amount of three transfers that were mistakenly made by the plaintiff to the defendant on constructive trust for the plaintiff.

The decision reiterates the applicable tracing principles for obtaining proprietary relief and has practical implications as to how proprietary claims may be formulated in cyber fraud cases.

## **The facts**

In *Milestone Electric Inc v. Meihoukang Trading Co Limited* [2020] HKCFI 2542, the plaintiff, a victim of an email fraud, remitted a total of US\$850,000 in three payments on three separate days to the defendant's account.

The plaintiff issued court proceedings requesting:

1. A declaration that the defendant held the US\$850,000 (or its Hong Kong dollar equivalent) or all such assets derived from the sum or any part thereof which rightfully belong to the plaintiff on constructive or resulting trust for the plaintiff.
2. Upon the defendant's failure to participate in the proceedings, the plaintiff applied for a default judgment for, amongst other things, a declaration that the defendant held the US\$850,000 on constructive trust for the plaintiff.

## **Declaration for constructive trust – the applicable test**

While it is not the normal practice of the court to make a declaration without a trial, this is only a rule of practice. We have seen in many recent judgments in similar cases that the court is prepared to depart from this rule of practice if the plaintiff has a genuine need for the declaratory relief and justice would not be done if such relief was denied.

The court has been particularly willing to exercise its discretion in this regard in email fraud cases where there are multiple victims and competing claims over monies in the defendant's account.

A declaration that the defendant holds the monies in his account on constructive trust for the plaintiff is a form of proprietary relief which ranks ahead of any simple judgment for damages against the defendant. Accordingly, depending on the amount at stake and whether there are competing claims, there can be a significant advantage to obtaining a declaration as opposed to a mere judgment for damages against the defendant.

In the present case, in determining the plaintiff's application for a declaration for constructive trust, Recorder Eugene Fung SC reiterated the need for a plaintiff to successfully establish that assets being claimed can be identified through tracing. In particular, citing *Federal Republic of Brazil v. Durant International Corporation* [2016] AC 297, he noted:

To obtain proprietary relief in relation to the US\$850,000 transferred to the defendant, or assets derived from it, the plaintiff must establish the assets claimed can be identified by the tracing process as representing the original trust property.

### **The court's finding**

As over half of the US\$850,000 had already been withdrawn from the defendant's account, the court considered it no longer possible for the plaintiff to assert a proprietary right in respect of the entire US\$850,000. Further, the court considered that it was not able to determine whether the plaintiff could assert its rights in the remaining credit balance in the defendant's account based on the available evidence before it (presumably because the plaintiff had not applied for a disclosure order for provision of the defendant's bank statements).

In particular, the court noted that a number of considerations will be relevant to any tracing exercise, such as whether there has been any mixing of money in the defendant's account and whether the intermediate balance has fallen to or below zero since the deposits of the sums of money transferred from the plaintiff.

### **Implications**

The judgment has practical implications as to how proprietary claims may be formulated in certain email fraud cases.

The implications are twofold:

1. Rather than lumping different payments together and making a claim over the total amount of the transfers, it may be preferable to claim that the victim has a proprietary interest in relation to the amount of each separate transfer or any remaining traceable part of it.
2. When applying for proprietary relief, one must be prepared and be able to demonstrate by documentary evidence that the remaining balance in the relevant bank account is traceable from the original monies sent by the victim and/or an identifiable part of it.

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