

J-Land Korea Co Ltd v Choi Fung Trade Ltd

Date of Decision: 4 November 2020

District Court

DC

Civil Action No 374 of 2020

DCCJ 374/2020

Citations: [2020] HKDC 1009  
[2020] HKEC 3441

Presiding Judges: Judge Kent Yee in Chambers

Phrases: Civil procedure - injunctions - ex parte proprietary injunction - discharge - whether applicant for injunction guilty of material non-disclosure - if discharged, whether re-grant of injunction warranted

Counsel in the Case: Mr. Lavesh Kirpalani and Mr Edward Chin, instructed by T C Wong & Co, for the plaintiff  
Ms Sabrina Leung, instructed by William K.W. Leung & Co., for the defendant

Cases cited in the judgment: [Brink's Mat Ltd v Elcombe \[1988\] 1 WLR 1350](#)  
New Asia Energy Ltd v Concord Oil (Hong Kong) Ltd [2000] 2 HKC 681

DECISION:

Judge Kent Yee in Chambers

1. In this all too common email fraud case, the plaintiff obtained a proprietary injunction ("the ex parte Injunction") before HHJ Clement Lee on 21 February 2020 by way of an ex parte application ("the Application") in respect of the sum of US\$135,666.82 ("the Sum") transferred to the defendant's account held with Standard Chartered Bank ("the Account") on 29 November 2019.

2. Pursuant to the ex parte order, the plaintiff took out a summons dated 21 February 2020 ("the Summons") for the continuation of the ex parte Injunction. The defendant does not seriously contest this application but it seeks a discharge of the ex parte Injunction on the ground of material non-disclosure.

3. Ms Leung, for the defendant, has made a helpful summary of the background facts and the parties' respective cases in her written submissions. Mr Kirpalani, together with Mr Chin, for the plaintiff (not in the Application), indicates his agreement with the summary save those references to the plaintiff's affidavit evidence. For the purpose of this Decision, it suffices for me to adopt the following summary of Ms Leung with slight alterations in light of Mr Kirpalani's observations:

The plaintiff's case

3.1 The plaintiff is a wholly-owned private holding company incorporated in South Korea that is engaged in the import, export and sale of manufactured clothing goods worldwide.

3.2 On or about 12 November 2019, the plaintiff received an email from their Mainland Chinese business partner Wujiang Quanjin Textile ("Wujiang"). The sender of that email

was from an "Eddie" who informed the plaintiff that Wujiang's bank account had been frozen due to tax auditing purposes and that further payment should be made to their factory bank account, i.e. the Account. The bank details of the Account were as follows:-

Registered Name: CHOI FUNG TRADE LIMITED

Bank: Standard Chartered Bank (Hong Kong) Limited

Account No: 415 00XX XXXX

SWIFT: SCBLHKHHXXX

3.3 On 29 November 2019, Ms Sohyun Lee (" Ms Lee ") of the plaintiff transferred the Sum from the plaintiff's account to the Account which was intended for the purchase of fabrics.

3.4 On 16 December 2019, Ms Lee and her superior suspected that the plaintiff had been defrauded and the real Eddie of Wujiang (along with his manager Denier) confirmed that their email was hacked by a fraudster and that Wujiang never requested a change of bank details.

3.5 On 17 December 2019, the plaintiff reported the aforesaid matter to the Korean police.

3.6 On 26 December 2019, the plaintiff filed a preliminary report to the Hong Kong Police.

3.7 Around January 2020, the plaintiff engaged Messrs. T C Wong & Co., Solicitors to file a suspicious transaction report with the Joint Financial Intelligence Unit of the Hong Kong Police.

3.8 On 15 January 2020, the Hong Kong Police informed Ms Lee that they have frozen around US\$135,000 in the Account.

The plaintiff's evidence/submissions in the Application

3.9 The fraudster(s) are connected with and/or are the controlling mind of the defendant and therefore can easily control the movement of the funds in the Account. The defendant's conduct in engaging and/or assisting in the fraud perpetrated upon the plaintiff justifies an inference that the defendant is likely to transfer away the cash balance in the Account if it is not prevented from doing so by injunction; and

3.10 The defendant has conspired to defraud the plaintiff, or knowingly assisted the fraudster(s) to defraud the plaintiff or at the very least, had reason to believe that the source of the Sum was dubious.

The defendant's pleaded case and its evidence

3.11 The defendant filed its defence on 14 July 2020 and an affirmation of Zhuang Yi Shen ("Mr Zhuang" ) dated 14 May 2020. They contain the following allegations.

3.12 The defendant is a company incorporated in Hong Kong that works in association with Gotai Holdings Limited 國泰找換錢有限公司 (" Gotai ") (formerly known as China International Exchange Limited 中國國際找換有限公司 ) which holds a valid money service operator license (No.18-10-02582) pursuant to Section 30 of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance, Cap. 615.

3.13 Mr Zhuang is the founder of Gotai and the general manager of the defendant.

3.14 On 25 October 2019, Mr Sheung, a personal friend of Mr Zhuang, referred an acquaintance named 劉梓彤 (" Ms Lau ") to him stating that a business client of hers, a person named 劉剛毅 (" Mr Lau "), would like to engage Mr Zhuang for money exchange services so to convert USD into Renminbi. Instructions and particulars of the Account were provided to Ms Lau so to relay it back to Mr Lau. Mr Lau did not deposit any money into the Account that day.

3.15 On 29 November 2019, unbeknown to the defendant, a deposit of US\$135,641.82 was found in the Account and enquiries were made with Mr Sheung to see whether it was one of his referrals who made the deposit.

3.16 On 30 November 2019, Mr Sheung informed Mr Zhuang that Ms Lau and/or Mr Lau just notified him that the deposit was from a Korean company called J-Land Korea Co., Ltd (" J-Land ") in favour of Mr Lau.

3.17 Though originally uncomfortable with dealing with overseas transfers, Mr Zhuang decided to carry through with the said transaction on an "one-off" basis and requested the following documents for verification purposes before it would exchange US\$135,641.82 into Renminbi as requested. The requested documents were: (a) Mr Lau's proof of identity, (b) the business registration of J-Land and (c) an authorisation letter (in the defendant's usual template form) signed by a director of J-Land permitting such payment.

3.18 When Mr Lau (through Mr Sheung) asked whether the production of documents could be dispensed with, it was explained to Mr Sheung that these documents were necessary pursuant to the due diligence guidelines given by the Customs and Excise Department for money service operators and must adhere to the rules so if Mr Lau was unwilling / unable to provide these documents then Gotai and/or the defendant would have no choice but to

transfer the US\$135,641.82 back to J-Land the following Monday (i.e. 2 December 2019).

3.19 On 3 December 2019, the defendant received all necessary documents from Mr Lau for verification purposes.

3.20 On 4 December 2019, the defendant remitted a total sum of RMB914,789 into Mr Lau's bank account maintained with the Bank of China.

3.21 The defendant was later notified that the Hong Kong Police has frozen the Account alleging that the money therein are illegal proceeds and related to money laundering.

3.22 On 6 February 2020, Mr Zhuang sent an email to the plaintiff to introduce himself and to ask whether the parties were able to exchange any information in relation to the deposit of the Sum.

3.23 On 12 February 2020, Ms Lee replied to Mr Zhuang's email (which appears to recap the contents of their earlier telephone conversation) and further appealed to him that he should not make any payment to the alleged fraudster(s).

3.24 Mr Zhuang promptly replied to Ms Lee's email on the same day to provide her with his personal phone number and frankly stated that he had made payments out already. He further indicated that he was empathetic to the plaintiff's situation.

4. There is no dispute about the onerous duty on an applicant in an ex parte application to make full and frank disclosure and the consequences of the failure to discharge such a duty. I do not think I need to repeat the well-established principles expounded by Gibson LJ in [Brink's Mat Ltd. v Elcombe \[1988\] 1 WLR 1350](#) here.

5. Ms Leung relies on the following three matters which were not disclosed to the judge in the Application:

a. There were communications by way of emails and telephone conversations between Ms Lee and Mr Zhuang between 6 February 2020 to 12 February 2020 (" MND 1 ");

b. The Hong Kong police has already frozen the Account on 15 January 2020 (" MND 2 "); and

c. There were correspondences between the plaintiff and the alleged fraudster by the name "Eddie" between 5 December 2019 to 13 December 2019 requesting the plaintiff to recall the deposit (" MND 3 ").

6. It cannot be seriously argued that these matters were disclosed in the Application. I shall assess the materiality of each of these matters in turn.

#### MND 1

7. I have read the three emails exchanged between Mr Zhuang and one Steve and Ms Lee of the plaintiff. First, on 6 February 2020, Mr Zhuang emailed Steve and thanked him for taking his call. Then he gave an introduction of himself as the founder of the defendant. He told Steve that the defendant was engaged in the trade of foreign exchange in Hong Kong. He indicated that the defendant had receive the Sum from the plaintiff and a few days later the Account was frozen by the police. The defendant was informed by the police that the money was illegal and related to money laundering. To the understanding of the defendant, the money was related to its currency exchange business from US dollars to Renminbi. Mr Zhuang went on to ask for further information. Apparently, he also attached to this email some documents which the defendant had received from its client.

8. The next email is the reply email from Ms Lee to Mr Zhuang dated 12 February 2020. She first referred to their phone conversation in which she mentioned the fact that the plaintiff's email system was hacked. She then indicated that a report had been made to the police and they froze the Account as a result. She referred to her earlier indication that the plaintiff did not know "the people" and the plaintiff did not create "the documents". She asked Mr Zhuang not to arrange any payment to "him". I gather that "the people" and "him" referred to Mr Lau or the fraudster.

9. Lastly, Ms Lee asked Mr Zhuang for his telephone number so that the lawyer of the plaintiff could contact him in Hong Kong.

10. Mr Zhuang replied three minutes later and gave his phone number. He indicated that he had made the payment to the related party and said he was sorry to know what had happened to the plaintiff. Alarmingly, a copy of this email was also sent to Mr Kevin Lee, former counsel of the plaintiff who made the Application for the plaintiff 9 days later, to both his personal and business email accounts.

11. Mr Kirpalani submits that these emails do not state that Mr Zhuang had attempted to provide the plaintiff with any information, that the defendant was a victim to the email fraud or that the defendant had made a payment to Mr Lau as alleged by Mr Zhuang in his affirmation. He further submits that these emails merely confirmed that the defendant had indeed received the Sum from the plaintiff and that they were aware that the Account had been frozen by the police. Thus, these emails are immaterial.

12. I cannot accept his submission. In the first place, brushing aside the descriptions of these emails by Mr Zhuang, it is clear from these emails that Mr Zhuang maintained the innocence of the defendant by explaining that the Sum was received in the course of the ordinary business of the defendant as a money changer.

13. I have little doubt that these emails are material and there is utterly no reason why the plaintiff did not produce them including the attachments thereto in the Application. They plainly suggest that the defendant is an innocent recipient of the Sum and has altered its position by transferring the equivalent amount of the Sum in Renminbi to Mr Lau.

14. I do not understand why Mr Lee in his skeleton submission used at the ex parte hearing, given the fact that he was one of the recipients of the email of Mr Zhuang, could make the following submission under the title of "Full and Frank Disclosure":

"Plaintiff is not aware of any points that might be taken on behalf of the Defendant, other than the facts which have already been fully laid out in the affidavits herein."

15. I do not for a moment suggest that the explanation of Mr Zhuang should be taken at face value and hence the defendant has a strong defence. The duty is on the plaintiff to bring court's attention that could have been made by the defendant, even if not yet made, at the time of the ex parte application, provided that (a) the point is one that the defendant would expect to raise in due course and (b) the point is not one that can be dismissed as without substance or importance: *New Asia Energy Ltd v Concord Oil (Hong Kong) Ltd* [2000] 2 H.K.C. 681 per Keith JA citing with approval *Gee, "Mareva Injunctions and Anton Piller Relief"*, 4th. ed., pp.128 and 131.

16. In the present case, unlike other elusive defendants who received monies from victims in the vast majority of email fraud cases, the defendant here was actually forthcoming and got in touch with the plaintiff by email and over the phone. By the emails, the defendant proffered an explanation. The plaintiff must know that the defendant will give the explanation once it is given a chance to do so. Even if the plaintiff does not believe the explanation, which the plaintiff has not said so, the plaintiff should have disclosed the same to the court in the Application.

17. Regrettably, in the affidavit of Ms Lee and the skeleton submission of Mr Lee consisting of 5 pages only, an incomplete and unfair picture without any mention about the aforesaid exchanges was presented to the judge. In the former, it was asserted that the defendant was engaged in or assisted the fraud perpetrated upon the plaintiff. In the latter, it was submitted that it is impossible to conclude that the defendant appears to have a substantial presence in Hong Kong.

18. The plaintiff had taken all the time it needed to prepare the Application. It is unacceptable that such significant omissions were made. I conclude that MND 1 is made out.

## MND 2

19. Ms Leung complains that the fact that the police had frozen the Account was not disclosed in the Application. She submits that this has a bearing on whether there was a risk of dissipation of the Sum in the Account.

20. I disagree. It is common knowledge that the police are not obliged to give the plaintiff any notice if it withdraws their letter of no consent and hence unfreezes the Account. In other words, the police's freezing of the Account is no substitute for an injunction and it is only a temporary relief which can be taken away anytime. A plaintiff is still in an urgent need for an injunction. This court usually expects, if not expressly informed, that the victims would normally first seeks help from the police and the accounts sought to be frozen by way of an ex parte injunction are normally being frozen by the police.

My view is that the fact that the Account is being frozen by the police is not really a matter relevant to the weighing operation of an ex parte judge.

21. Therefore, I do not think that MND 2 can be established.

### MND 3

22. I cannot see the relevance of the emails exchanged between the plaintiff and "Eddie", the fraudster from 5 December 2019 to 13 December 2019. Ms Leung submits that it is curious that a fraudster would actively urge its victim to recall the same tranche of monies from the remitting bank at the risk of alerting the victim.

23. I am unable to accept her submission. As submitted by Mr Kirpalani, the attempt made by the fraudster might have served the purpose of buying some time for the Sum to be dissipated.

24. In any event, the court hearing an ex parte application relating to an email fraud does not really concern itself with the minute details of the acts of the fraudster. It has only to be satisfied that the plaintiff has a genuine and reasonable case of fraud. Here, Ms Leung did not submit that the plaintiff was not defrauded by "Eddie". Whether or not and why "Eddie" made a curious step in the process has little relevance in the Application.

25. On the other hand, the fact that the plaintiff gave a brief mention about these messages in the table annexed to its report to the police does not necessarily suggest the materiality of these emails. The plaintiff expected the police to carry out a thorough investigation into the fraud. The court hearing the Application was not required to do so.

26. I am of the view that MND 3 is not made out.

### Conclusion and dispositions

27. By reason of the foregoing analysis, despite the excellent effort of Mr Kirpalani, the ex parte Injunction is indefensible and I conclude that there was material non-disclosure in the Application. The ex parte Injunction must be discharged.

28. Ms Leung accepts that a re-grant is appropriate in all the circumstances of this matter. I allow a re-grant of an injunction in terms of the ex parte Injunction and the plaintiff is further granted leave to make an amendment to the number of the Account.

29. There is no reason why costs should not follow the event in respect of the discharge application. Costs of the discharge application should be paid by the plaintiff to the defendant forthwith, to be taxed if not agreed, with certificate for counsel.

30. As regards the costs of the Application and the Summons, costs should be in the cause with certificate for counsel.

31. Lastly, I thank Mr Kirpalani and Ms Leung for their able submissions.