



31 January 2023
Ref : Chans advice/257

To: Transport Industry Operators

HKD 386 million theft (III)

We reported in our Chans advice/252 that the Hong Kong High Court held Hyundai Hong Kong's ex-Deputy General Manager (Mr Ma) liable to compensate HK\$387,655,303.70 to Hyundai Hong Kong in the case of his theft of his employer's money. On 23 December 2022, the Hong Kong High Court issued a decision ordering a sum of HK\$500,000 (which was deposited by Mr Ma as bail money) to be released to Hyundai Hong Kong in partial satisfaction of Mr Ma's judgment debt. [HCA 619/2016] [2022 HKCFI 3798]

INTRODUCTION

On 27 April 2022, the High Court handed down judgment in favour of Hyundai Hong Kong (the "Judgment"). The High Court found that Mr Ma had acted dishonestly and had misappropriated a "colossal sum of money" over 262 transactions carried out between 2009 and 2016. Mr Ma was found liable for breach of fiduciary duties, breach of the implied duty of fidelity, breach of confidence and conversion. He was ordered to pay damages to Hyundai Hong Kong in the amount of HK\$387,655,303.70 with interest and costs (the "Judgment Sum"). The Judgment Sum remained largely unpaid. Hyundai Hong Kong so far recovered only about HK\$2 million.

Mr Ma was also prosecuted in HCCC 20/2018 for four counts of theft based on the 260 of those 262 transactions (the "Criminal Proceedings"). As part of Mr Ma's bail conditions in the Criminal Proceedings, he had paid HK\$500,000 into the High Court (the "Bail Money").

On 18 January 2021, following Mr Ma's conviction in the criminal proceedings and pursuant to the direction of the High Court, Hyundai Hong Kong served the Re-re-re-Amended Injunction Order (the "Injunction Order") on the High Court Accounts Office, with the result that the Bail Money was not released to Mr Ma or anyone else.

Hyundai Hong Kong issued a summons dated 21 June 2022 (the "Summons") for payment out of the sum of HK\$500,000, which was deposited by Mr Ma as bail money in the Criminal Proceedings.

APPLICABLE LEGAL PRINCIPLES

Hyundai Hong Kong applied for the release of the Bail Money pursuant to Order 49, rule 9(1) of the Rules of High Court, Cap 4A. This is a manner of equitable execution, with the Court making the type of order that the old Courts of Chancery would to lend assistance to a judgment creditor so that he may obtain the fruits of his judgment. Order 49 rule 9(4) of the Rules of High Court, Cap 4A provides that upon such an application, the Court "may make such order with respect to the money in court as it thinks just".

The Court of Appeal held in *YBL v LWC (No 2)* [2017] 2 HKLRD 783, that bail money that is due to be returned to a judgment debtor constitutes "money ... standing to the credit of [the judgment

debtor in court]” for the purposes of Order 49 rule 9(1) of the Rules of High Court, Cap 4A. A judgment creditor is therefore entitled to apply for an order under Order 49 rule 9(1) of the Rules of High Court for release of such bail money in satisfaction or partial satisfaction of what is owed to him. In relation to the exercise of this power on an application under Order 49 rule 9(1) of the Rules of High Court, the Court of Appeal further held in *YBL v LWC* that,

“... the disposal of bail money is not to be fettered by constraints imposed by whatever arrangement between the person putting forward the cash bail and his financier (except perhaps in the context of a dispute between these two persons). The court does not hold the money on trust for any person and the person on bail only has a chose in action to seek the return of the bail money.”

Specifically, the aforesaid chose in action is subject to the Court’s legitimate power to dispose of the bail money otherwise than by returning it to the same person who answered bail. Such power was expressly held to include the Court’s power to order payment to judgment creditors pursuant to Order 49 rule 9(1) of the Rules of High Court (See *YBL v LWC*.)

ANALYSIS

The High Court was of the view an order should be made in terms of the Summons in view of (i) the substantial time and costs incurred by Hyundai Hong Kong in prosecuting its claims and in trying to enforce the Judgment; (ii) the added difficulties posed by Mr Ma’s dishonesty and contempt of court in continuing to dissipate his ill-gotten gains whilst an injunction was in place; and that (iii) the Judgment Sum remained substantially unsatisfied.

Mr Ma advanced 4 grounds of opposition. The High Court was of the view that all of them were unmeritorious.

First, Mr Ma submitted that he was entitled to the return of the Bail Money, as the purpose of putting up cash bail had been spent. However, Mr Ma only had a chose in action to seek the return of the Bail Money, which was subject to the Court exercising its power, *inter alia*, to make any payment out pursuant to Order 49 rule 9(1) of the Rules of High Court, Cap.4A. Mr Ma’s entitlement did not prevent the High Court from exercising its powers to make a payment out to Hyundai Hong Kong pursuant to Order 49 rule 9(1) of the Rules of High Court.

Secondly, Mr Ma asserted that he had put together the Bail Money from loans that he obtained from unspecified friends and relatives. Hence he claimed that the Bail Money did not belong to him. That was incorrect. Once he borrowed the money, the money belonged to him. He owed a debt vis-à-vis his friends and relatives. Courts have consistently explained that arrangements between the judgment debtor who put up the cash bail and his creditors who put him in funds to do so, will not fetter the Court’s power to dispose of the bail money.

Thirdly, Mr Ma submitted that the Bail Money should not be released pending his appeal against his conviction. It was to be noted that the Bail Money was part of Mr Ma’s conditions of bail, which bail was revoked subsequently. The purpose of the Bail Money being spent, it was open to Mr Ma to collect it. Indeed, Mr Ma’s representative did try to collect it on 12 January 2021 and would have succeeded had it not been for the service of the Injunction Order on the High Court Accounts Office on 18 January 2021. Hyundai Hong Kong, as judgment creditor, was entitled to enforce the Judgment Sum against any money or assets which were to be released or made available to Mr Ma.

Fourthly, Mr Ma argued that Hyundai Hong Kong was sufficiently protected by the Injunction Order. This was a bad point. The Injunction Order preserved the status quo. The Judgment being entered in Hyundai Hong Kong’s favour, Hyundai Hong Kong was entitled to execution, and not just a preservation of sufficient and/or relevant funds out of which the Judgment might be satisfied in the future. Mr Ma’s fourth contention also ignored the purpose of Order 49 rule

9(1) of the High Court, Cap 4A which is a manifestation of the Court's equitable jurisdiction to aid execution so that a judgment creditor may obtain the fruits of his judgment.

DISPOSITION

For all the reasons stated above, the High Court made an order in terms of the Summons.

Please feel free to contact us if you have any questions or you would like to have a copy of the decision.

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