



28 February 2023
Ref : Chans advice/258

To: Transport Industry Operators

HKD 386 million theft (IV)

Following the issue of Chans advice last month, we would like to report the latest decision issued by the court over this theft case. On 17 January 2023, the Hong Kong High Court dismissed Mr Ma's application to withdraw HK\$1.5 million out of his frozen assets for paying the legal costs for his appeal against conviction in theft. [HCA 619/2016] [2023 HKCFI 197]

Introduction

Mr Ma took out a summons on 9 August 2022 to vary a post-judgment injunction order so as to release funds for his appeal to the Court of Appeal against a conviction in theft. The injunction order was first made against him on 10 March 2016, with 6 subsequent variations until 26 August 2022 ("**Injunction Order**"). The amount frozen was HK\$654,223,293.24. Specifically, on 27 April 2022 when final judgment (reported in Chans advice/252) in this case was handed down, the High Court ordered that the Injunction Order continue for 12 months post-judgment.

Mr Ma was applying for a withdrawal of HK\$1.5 million out of the frozen assets in order to pay his contribution to the Director of Legal Aid towards the legal costs for his appeal against conviction in theft.

The application was opposed by Hyundai Hong Kong on the ground that Mr Ma had not shown himself to be in lack of other available assets to justify the variation.

Background

Mr Ma used to be employed by Hyundai Hong Kong as an accounts clerk and was promoted to Deputy General Manager of the Account Department before his employment was terminated. His last salary was HK\$37,900. During his employment between 2009 and 2016, he transferred a total of HK\$387,655,303.70 from Hyundai Hong Kong's bank accounts to his own. He used the money for his own purposes and to lead a lavish life style. Hyundai Hong Kong discovered the dishonest acts of Mr Ma and confronted him on 29 February 2016, to which he confessed the embezzlement. Mr Ma was summarily dismissed on 4 March 2016. On 10 March 2016, Hyundai Hong Kong applied for and obtained the Injunction Order.

Pending trial of this action, Mr Ma had been found to be in breach of the Injunction Order in respect of 6 items of expenses amounting to more than HK\$3 million. He was sentenced to 4 months' imprisonment (reported in Chans advice/206).

In criminal proceedings (reported in Chans advice/251), which arose out of the same acts of misappropriation, Mr Ma was convicted on 16 December 2020 of 4 counts of theft and was sentenced to 15 years' imprisonment. He is currently serving his sentence at the Stanley Prison. In delivering the sentence, the trial judge, Remedios J, described Mr Ma as "a dishonest man" and his behaviour as "a wholly premeditated and calculating theft" and "an egregious example of selfishness and greed".

The present action was tried before the High Court in August 2021. Mr Ma told the High Court on the first day of trial that he did not wish to participate in the trial. After trial in his absence, the High Court held that Mr Ma had acted dishonestly and misappropriated a “colossal sum of money” over 260 transactions carried out between 2009 and 2016. Mr Ma was found liable for breach of fiduciary duties, breach of implied duty of fidelity, breach of confidence and conversion (reported in Chans advice/252). He was ordered to pay damages of HK\$387,655,303.70, plus compound interest of P + 1%, which rolled to HK\$657,282,052.90 by September 2022.

It was estimated that the value of Mr Ma’s assets was about HK\$55.85 million. Hyundai Hong Kong only recovered about HK\$2 million of the judgment debt from garnishee orders absolute and another HK\$500,000 from Mr Ma’s bail money pursuant to the High Court’s order (reported in Chans advice/257). There were also charging orders over properties in the name of Mr Ma, but the properties were yet to be sold.

Legal Principles for Variation of Injunction

Where a post-judgment injunction has been granted, the burden is on the party seeking variation to justify it. Since the creditor has already obtained judgment, the creditor’s interest is one of the factors for the Court to consider.

The court will apply the same principle when considering whether or not to grant a *Mareva* injunction, and ask whether it is just and convenient to allow the variation. As the purpose of *Mareva* relief is to prevent unjustifiable disposal, the court would bear in mind that the assets belong to the defendant and that the injunction is not intended to provide the plaintiff with security for his claim or to create an untouchable pot which will be available to satisfy an eventual judgment: *Alltogether Land Co Ltd v China Create Capital Limited* [2022] HKCFI 2726.

Generally, the applicant for variation should make full and frank disclosure, by sufficient evidence, that (a) he does not have other assets available to meet those expenses; and (b) the purpose of the application is not an attempt to dissipate the assets to frustrate the plaintiff’s enforcement of a judgment. In considering (a), the Court is not limited to the funds to which the defendant has a strict legal right if there are reasonable grounds for believing that the defendant can obtain money elsewhere. The court must seek to balance the risk of deliberate dissipation of frozen assets by the defendant against the abuse of the freezing order to pressure the defendant illegitimately. See *Hong Kong Civil Procedure 2023*, Volume 1, §29/1/79.

Application of the legal principles

Mr Ma produced the Offer of a Legal Aid Certificate that determined a maximum contribution fee of \$15,882,685 as costs of the criminal appeal proceedings. The contribution that Mr Ma had to pay upon acceptance of the offer was \$1,472,550. There was a valid purpose for his application to vary the injunction.

However, Mr Ma did not make full and frank disclosure as to whether he had other assets available to meet the legal fees.

Firstly, he claimed that he had not used or diminished the value of the frozen assets and that the assets appreciated in value by 2022. However, he had not adduced evidence to contradict the estimated value of HK\$55.85 million put forth by Hyundai Hong Kong.

Secondly, Mr Ma claimed that all his assets had been frozen by the *Mareva* injunction and, being in jail, he had no other available assets.

As the past comments in various judgments showed, Mr Ma had been found to be a dishonest person in the context of criminal and civil proceedings. The High Court was entitled to hold a healthy skepticism towards Mr Ma's assertions.

The High Court agreed with Hyundai Hong Kong that it was impossible for Hyundai Hong Kong to know if Mr Ma had disclosed all his assets. Full and frank disclosure of Mr Ma was thus of utmost importance in the present application.

Thirdly, Mr Ma claimed that Hyundai Hong Kong unreasonably dismissed him and owed him retirement fund or long service pay of about HK\$2 million. Mr Ma reserved his right to claim against Hyundai Hong Kong.

In the High Court's view, given the conviction and the final judgment of the High Court, Mr Ma's claim was simply shameless. Even if Hyundai Hong Kong still owed him \$2 million, it was still far short of the judgment sum that he had to pay.

In the premises the High Court was not satisfied that Mr Ma had made full and frank disclosure that he did not have other assets available to meet his legal costs for the appeal.

In any case, the assets owned by Mr Ma were far below the judgment sum due to Hyundai Hong Kong. Balancing the potential prejudice to each party if a variation was not granted, the High Court was of the view that it was not just and convenient for Mr Ma to obtain release of funds for his appeal, which would deprive Hyundai Hong Kong of the fruits of its judgment. For the foregoing reasons, the High Court dismissed Mr Ma's summons.

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

Simon Chan
Director
E-mail: simonchan@smicsl.com

Richard Chan
Director
E-mail: richardchan@smicsl.com

23/F, Excel Centre, 483A Castle Peak Road, Lai Chi Kok, Kowloon, Hong Kong
香港九龍荔枝角青山道 483A 卓匯中心 23 樓 Tel: 2299 5566 Fax: 2866 7096

E-mail: gm@smicsl.com Website: www.sun-mobility.com

CTB A MEMBER OF THE HONG KONG CONFEDERATION OF INSURANCE BROKERS

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