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Ref : Chans advice/206

To: Transport Industry Operators

**Fraud vis-à-vis summary judgment (II)**

Our Chans advice/191 reported a Hong Kong High Court's case concerning a shipping company's restitution claim against its former deputy general manager (Mr Ma) for HK\$387,655,303.70. The latest development of this case is: the Hong Kong High Court issued a Judgment on 1/2/2018 and a Decision on 9/2/2018 holding that Mr Ma was in contempt of Court as a result of his breach of a Mareva Injunction Order and that he be committed to prison for 4 months. [HCMP1115/2017] [2018 HKCFI176] [2018 HKCFI328]

Background

Mr Ma used to work for the shipping company. He first joined the shipping company in 1992 as an Accounts Clerk. He was promoted gradually and became its Deputy General Manager (Accounting). That was Mr Ma's post when he was summarily dismissed on 4 March 2016. At that time, he was earning a monthly salary of HK\$37,900.

It was the case of the shipping company that, between 2009 and 2016, Mr Ma caused a total sum equivalent to HK\$387,655,303.70 (Sum), which involved 262 transactions, to be wrongfully transferred from his employer's accounts to his own accounts. The shipping company asserted, inter alia, a proprietary claim over the Sum.

In Mr Ma's Amended Defence, the money which made up the Sum was transferred with the knowledge, consent and authorization of the shipping company pursuant to an Agreed Arrangement devised to overcome foreign exchange control of the Mainland. Such Arrangement was required due to the need of the shipping company to make payments to service providers in the Mainland.

The shipping company said that the Agreed Arrangement was entirely a fiction created by Mr Ma.

The matter was reported to the police by the shipping company. There was an Indictment against Mr Ma containing 2 counts of theft. He was on bail pending the trial of his case in the High Court.

The Order

On 10 March 2016, upon the shipping company's ex parte application, the court granted the Order against Mr Ma in the Main Action. The Order, inter alia, enjoined Mr Ma from dealing with his assets up to the value of HK\$322,345,743 (Restriction on Disposal of Assets); included the usual ancillary disclosure order; and made provisions for monetary exceptions in respect of Mr Ma's ordinary and proper expenses (HK\$9,000 per week) and legal costs (HK\$100,000). The Order was endorsed with a Penal Notice and was served personally on Mr Ma on 11 March 2016. The Order was subsequently varied on 18 March 2016, 14 April 2016, 26 August 2016 and 3 February 2017. The amendments included revising the limit of the Order to the Sum.

### The subject matters of complaint

Subsequent to the granting of the Order, on 25 May 2016, Mr Ma opened 5 accounts with Citibank (Hong Kong) Limited (May Accounts). At the material times, Mr Ma had 2 American Express credit cards (Credit Cards), respectively a Platinum Card and a Centurion Card.

According to Mr Ma's evidence, the following sums were deposited into the May Accounts. Firstly, a total sum of HK\$2,988,082.44 which was realized from the termination of 6 insurance policies (Insurance Policies). Secondly, a total sum (by way of 26 deposits from 2 June to 2 September 2016) of HK\$916,950 was deposited by Mr Ma's friends pursuant to a Reimbursement Arrangement (see below). These payments added up to HK\$3,905,032.44 (Deposited Sum).

According to Mr Ma's explanation, the Deposited Sum was transferred out of the May Accounts for the following purposes. These transfers added up to precisely the Deposited Sum :

- (1) Mortgage payments in the total sum of HK\$275,728;
- (2) Payments for the Credit Cards in the total sum of HK\$1,539,916.08;
- (3) Expenses permitted under the monetary exceptions of the Order in the total sum of HK\$543,000;
- (4) Other personal and property expenses in the total sum of HK\$1,546,388.36.

In the committal proceedings, the court was invited by the shipping company to focus on the complaints relating to the breaches of the Restriction on Disposal of Assets which arose from the transactions carried out with the May Accounts and the Credit Cards. By an Originating Summons filed on 16 May 2017 (OS), the shipping company sought a committal order against Mr Ma for breaches of the Mareva Injunction Order (Order) made in HCA 619 of 2016 (Main Action). Leave to commence these proceedings was granted on 4 May 2017 pursuant to an O.52, r.2(2) Statement filed on 14 March 2017. The breaches of the Order concerned undisclosed assets of Mr Ma and the dissipation of the same.

### Law

The applicable principles are settled and not in dispute. The proper approach of the court involves a three-stage test :

"There was no dispute that the proper approach in committal for civil contempt by reason of breach of a court order is essentially a three-stage test, namely: (1) first, the relevant court order must be construed to ascertain its meaning and operation; (2) secondly, it must be determined whether the defendant has in fact complied with the order as so construed; and (3) thirdly, it must be determined whether any failure to comply was accompanied by the state of mind necessary to establish punishable contempt."

*Efficient Ltd v Edward Eugene Lehman* [2013] 3 HKC 300, §14 per Fok JA

No order will be enforced unless it can be shown that the terms are clear and unambiguous. The burden is on the plaintiff to prove the defendant's contempt beyond reasonable doubt: *Hao Xiaoying v Wong Yiu Lam William & Ors*, HCMP 1968/2014, 2 March 2015, §34.

In establishing the requisite state of mind, it is enough to show that the conduct itself was intentional without being contumacious. A mistaken believe as to the legitimacy of the act is not a defence: *Suzanne Ruth Henderson v Scott Henderson*, HCMP 2016/2014, 14 July 2015, §§16-17.

### Issues

The issues for the court were as follows :

- (1) Whether on the proper construction of the terms of the Order, the shipping company could prove beyond a reasonable doubt that Mr Ma was in breach of the terms (Issue 1);

- (2) For each alleged breach, whether the shipping company could prove beyond a reasonable doubt that the failure of Mr Ma to comply was accompanied by a state of mind necessary to establish punishable contempt. In other words, whether Mr Ma acted in wilful disobedience of the terms of the Order (Issue 2); and
- (3) Whether the court should exercise its discretion to order any alternative directions or conditions in lieu of committal.

The requisite state of mind to establish contempt is that (a) the contemnor knew the facts which are said to make his act or omission a contempt and (b) such act or omission was not accidental (see *Hong Kong Civil Procedure 2018*, vol 1, rubric 52/1/17). This is meant by “wilful disobedient”.

#### Credit Card Payments

During a period of about 5 months from March to July 2016, Mr Ma had incurred expenditures with the Centurion Card in the total sum of HK\$3,882,688.44 and HK\$634,090.10 in respect of the Platinum Card. These Cards were terminated by the issuer in July 2016.

#### Platinum Card

The lion share of the Platinum Card expenses HK\$550,306 was paid to CSL for the upkeep and/or termination of Mr Ma’s mobile phone plans. Mr Ma’s evidence was that he had acquired a large number of auspicious mobile phone numbers from CSL. The substantial amount paid to CSL was the result of the pre-mature termination of over 100 service contracts required to keep these mobile phone numbers. With the Order in place, Mr Ma was unable to continue to pay the monthly fees under the contracts. To avoid the accumulation of outstanding monthly fees, he terminated the contracts before their expiration. It was contended that such step was reasonable and necessary.

#### Centurion Card

A Reimbursement Arrangement alleged by Mr Ma was highly relevant to much of the expenditures incurred with the Centurion Card. Mr Ma explained the Reimbursement Arrangement as follows. As a Centurion cardholder and VIP member of various establishments, Mr Ma was entitled to various benefits and privileges. It was his practice “for several years” to help his friends to purchase various goods and services by using his Centurion Card so as to enjoy the benefits and privileges associated with it and/or his VIP memberships. Such friends would subsequently reimburse Mr Ma for the expenses that he had incurred on their behalf. A total of HK\$3,597,031.79 was said to have been incurred under the Reimbursement Arrangement.

In respect of the nature of the Centurion expenses, the Judge agreed with the shipping company that they demonstrated an extraordinary lavish lifestyle. Very substantial sums were spent on personal services like massage parlours and night clubs. One particular night club bill was in the sum of HK\$500,000. On a number of occasions, huge amounts were spent on Chanel boutique.

#### Payments made to the Card issuer

The total payment made for the Credit Cards to their issuer amounted to about HK\$1.54 million. The statements showed that the total payment made for the Centurion Card and the Platinum Card was respectively HK\$1,242,417.80 and HK\$357,498.28. Hence, there were unpaid outstanding balances in respect of which legal proceedings had been issued against Mr Ma by the Card issuer.

It is important to distinguish between making a “payment” to a shop with a credit card and payment made to the card issuer for having made purchases with the credit card. The former cannot be regarded as dissipation of assets.

The legal nature of credit card transactions was explained *In re Charge Card Services Ltd* [1989] 1 Ch 497, 509C-F, per Browne-Wilkinson VC (as he then was). It was held that a credit card transaction comprises two separate contracts, one between the card company and the seller to accept the card in

payment, and the second contract between the card company and the cardholder which enables the latter to use the card for payment in consideration of his agreement to pay the card company in full. It follows that each payment by credit card merely represents the increase of an existing debt to the card company.

Mr Ma's case was that the entirety of the HK\$1.54 million was attributable to the Reimbursement Arrangement. Given that his friends had repaid him HK\$916,950, there was an outstanding balance of HK\$622,966.08 which his friends were willing to repay after the Chinese New Year.

#### Other spending

Mr Ma's evidence was that these transactions involved purchases of consumer goods and services for himself to maintain the high standard of living which he was accustomed to.

#### Analysis

As regards the purchases of consumer goods and services, Mr Ma accepted that these expenditures constituted breaches of the Restriction on Disposal of Assets. Mr Ma had expressed remorse and he was apologetic for such conduct. In short, the liability for breach of the Order was admitted. The remaining issue was the appropriate punishment.

In respect of the credit cards' payments, it was contended by Mr Ma that the sum of HK\$916,950 (which came from his friends under the Reimbursement Arrangement) was not his asset or subject to the Restriction on Disposal of Assets, and that payment of the HK\$916,950 out of the May Accounts did not amount to dissipation of his assets or any breach of the Order.

On the other hand, there was no dispute that the sum of HK\$622,966.08 was Mr Ma's asset and the payment of that sum to settle the debts owed under the Credit Cards constituted breaches of the Restriction on Disposal of Assets. The remaining issue was the appropriate penalty.

#### The Reimbursement Arrangement

The dispute over the Credit Card payments was therefore confined to the amount of HK\$916,950 (HK\$1,539,916.09 - HK\$622,966.08). Whether the payment of HK\$916,950 was in breach of the Restriction on Disposal of Assets depended on whether it was part of Mr Ma's assets and the credibility of the evidence on the Reimbursement Arrangement.

The Judge was unable to accept the Reimbursement Arrangement as true. The evidence was nothing but a bare assertion. No particulars whatsoever had been provided. There was no information even on the number of "friends" involved. Further, the Reimbursement Arrangement did not stand up to simple scrutiny. First, it made no sense that all the Card payments (the entirety of the HK\$1.54 million) were made under the Arrangement because Mr Ma had to be present to sign the bills for his friends. It was inconceivable that none of the expenses was attributable to him, eg, the night club expenses and those incurred for food and beverage. There was no suggestion that under the Arrangement Mr Ma's friends would absorb his share of the expenses. Secondly, over HK\$350,000 of the payments, which went to the Platinum Card account, were mainly for the CSL expenditures. The Judge failed to see why Mr Ma's friends had anything to do with such expenses. Furthermore, despite the committal proceedings, there was no suggestion that Mr Ma had attempted to press his friends for the outstanding payment (HK\$622,966.08) or to produce any evidence from any of them to support the Reimbursement Arrangement.

Having rejected the Reimbursement Arrangement story, the court was left in no doubt that the HK\$916,950 was Mr Ma's asset. Firstly, the money was in his bank account. Normally, such funds belonged to the account holder, and there was no credible evidence to the contrary. Secondly, Mr Ma was free to use the money as he pleased. Therefore, the only reasonable inference was that the money belonged to him. In the premises, there was no doubt that Mr Ma had breached the

Restriction on Disposal of Assets in respect of the payment of HK\$916,950, and Issues 1 and 2 were both satisfied.

### Conclusions

The Judge found that Mr Ma was in breach of the Restriction on Disposal of Assets imposed in the Mareva Injunction Order (Order) granted against him on 10 March 2016. He was therefore in contempt of court.

### Committal

The shipping company referred the court to the authority of *AO Smith Holdings (Barbados) SRL v Zhang Dacheng*, HCMP 1132/2011, 1 June 2012, §§58 to 62, where the court agreed with the English Court of Appeal that deliberate and substantial breach of a Mareva injunction should be met with an immediate custodial sentence measured in months, unless the contempt has been purged and the assets recovered. The court was also referred to a number of similar or comparable cases where immediate custodial sentences ranging from 3 to 6 months were imposed: *Banca Popolare Di Vicenza Soc Coop v Alutech (Far East) Co Ltd*, HCA 1973/2007, 11 September 2008, §§9-10 (6 months); *A O Smith Holdings*, §70 (3 months); *GE Transportation (Shenyang) Co Ltd v Lu Jinxiang*, HCMP 1792/2013, 22 January 2014, §§55-56 (3 months); *Suzanne Ruth Henderson v Scott Henderson*, HCMP 2016/2014, 14 April 2016, §23 (3 months).

There was little which could be said in mitigation for Mr Ma. The breaches of the Order could not be regarded as anything but serious and deliberate infringements which took place over a long period of time. There was no good or acceptable explanation for the infringements. The only substantive matter in Mr Ma's favour was his apology. On the other hand, it was of no comfort to the shipping company and did not mitigate the effect of the breaches.

The court was informed that Mr Ma was 44 years old. He had a son aged 6 years and was of clear criminal record.

Taking the most lenient view for Mr Ma's benefit, the Judge ordered that Mr Ma be committed to prison for 4 months.

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

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