



29 July 2022

Ref : Chans advice/252

To: Transport Industry Operators

HKD 386 million theft (II)

We refer to our Chans advice/251 last month reporting the Hong Kong High Court's decision to sentence Mr Ma (Hyundai Hong Kong's former deputy general manager) to 15 years' imprisonment. The High Court issued another Judgment on 27 April 2022 holding Mr Ma liable to compensate HK\$387,655,303.70 to Hyundai Hong Kong. [HCA 619/2016] [2022 HKCFI 1153]

Introduction

Hyundai Hong Kong is a subsidiary of Hyundai Korea. Hyundai Korea is a public listed company in Korea, carrying on the business of cargo and logistics services worldwide.

Mr Ma was an employee of Hyundai Hong Kong from 1992 to 2016. He joined as an accounts clerk. In April 2011, he became the Deputy General Manager of the Account Department. He remained in that post until he was summarily dismissed on 4 March 2016. At that time, his monthly salary was \$37,900.

It was Hyundai Hong Kong's case that between 2009 and 2016, Mr Ma had transferred a total sum of \$387,655,303.70 ("the Sum") from Hyundai Hong Kong's bank accounts to his own bank accounts. This involved 262 transactions. The transfers were made without Hyundai Hong Kong's authority. Mr Ma made use of the transferred money for his own use and benefit.

Hyundai Hong Kong claimed against Mr Ma for the restitution of the Sum on the basis of unjust enrichment. Alternatively, it claimed damages and/or equitable compensation for conversion, breach of confidence, breach of implied duty of fidelity, and breach of fiduciary duties. Hyundai Hong Kong also sought equitable compensation from Mr Ma with compound interest.

Separately, after a 36-day trial, Mr Ma was convicted of four counts of theft in HCCC 20/2018 in December 2020 (reported in our Chans advice/251 last month). He was sentenced to a total term of 15 years' imprisonment.

In the action in question, Mr Ma was initially legally represented. Since 29 December 2020, he acted in person. He was brought up to court on the first day of trial. He confirmed that he did not wish to participate in the trial. He was then taken back into custody. The trial therefore proceeded in his absence.

Procedural history

Hyundai Hong Kong commenced the action on 10 March 2016. On the same day, it obtained a *mareva* injunction against Mr Ma on an *ex parte* basis. The injunction included an ancillary order compelling him to disclose his assets. The injunction continued until the trial in question.

Contempt proceedings were brought against Mr Ma in May 2017 for breach of the injunction. After trial, in February 2018, he was found to have dissipated his assets in breach of the injunction. He

was found to have made use of his credit cards and spent substantial sums on personal services like massage parlours and night club to maintain his extraordinary lavish lifestyle. He also made purchases of consumer goods and services for himself to maintain the high standard of living.

At the conclusion of the trial in question, Hyundai Hong Kong applied for the continuation of the mareva injunction for 12 months in the event that judgment was entered against Mr Ma.

Hyundai Hong Kong's case

Mr Ma was one of three "system administrators" responsible for applying for and setting up online banking tokens for Hyundai Hong Kong. The other two "system administrators" would be the General Manager and the Managing Director. Any two "system administrators" together would be able to alter and reduce the levels of authorisations required to effect transfers via the online platform.

Mr Ma took advantage of Hyundai Hong Kong's practice that not all invoices would be settled on time. Many of the service providers were willing to indulge Hyundai Hong Kong by giving long grace periods for outstanding invoices because of the volume of its orders.

From time to time, Mr Ma would give instructions to the staff in the Accounts Payable section to request remittances from Hyundai Korea for a selection of the outstanding invoices. However, when the funds were received, only part of them would actually be used to settle some of the selected invoices. Mr Ma would direct the remainder of the funds to be transferred to his personal bank accounts.

Mr Ma had made use of online banking tokens of the General Managers and the Managing Directors to authorise the payments to himself. He had no authority to do so. He had also at times abused his right as "system administrator" to re-configure the standard three-tier authorisation adopted by Hyundai Hong Kong and alter it to require only one level of authorisation to approve the payment instructions.

Mr Ma applied for and controlled multiple online tokens belonging to the General Managers and the Managing Directors and used them to authorise payments to himself. This was done without the authority of Hyundai Hong Kong.

- (1) The authorisation records showed that Mr Jung (the General Manager from March 2007 to May 2011) had authorised payments to Mr Ma on dates when Mr Jung was absent from the office. Before Mr Jung took leave, he had given his token to Mr Ma. Upon Mr Jung's return, he retrieved the token from Mr Ma but did not cross-check whether any transactions had been approved using his token in his absence.
- (2) Mr JT Kim was the Managing Director from February 2009 to December 2011. The authorisation records showed that he had given authorisation for payments in 2012, after he had already left. The 2012 payments could not have been authorised by him. When a search was conducted in March 2016, a banking token bearing Mr JT Kim's name was found inside Mr Ma's drawer.
- (3) Mr Sohn was the Managing Director from January 2012 to January 2013. However, according to the authorisation records, Mr Sohn approved payments to Mr Ma between January 2013 and March 2015. These payments could not have been authorised by Mr Sohn.
- (4) A large number of transfers were authorised by Mr KH Kim (the Managing Director from October 2014 to March 2017) according to the authorisation records. During the subsequent meeting when Hyundai Hong Kong confronted Mr Ma about the transfers, he handed up two banking tokens bearing Mr KH Kim's name.
- (5) Lastly, according to the authorisation records, there were three transfers which were authorised by Mr Moon (the General Manager from June 2011 to February 2015) in February 2015. A banking token bearing Mr Moon's name was later found in Mr Ma's drawer during a search

conducted in March 2016.

After Mr Park became the General Manager in March 2015, he started to review the ledgers and accounting records of Hyundai Hong Kong and Hyundai Korea. In around October 2015, he discovered that there were huge discrepancies in the ledger between Hong Kong International Terminals and Hyundai Korea. He started to make enquiries with Hong Kong International Terminals and conducted an investigation.

Eventually, the misappropriations by Mr Ma were uncovered. Some meetings were held with Mr Ma in which he made confessions about the misappropriations.

- (1) On 29 February 2016, Mr Park questioned Mr Ma. Mr Ma confessed that he had embezzled money from Hyundai Hong Kong. He said he would be able to repay the money on the condition that Hyundai Hong Kong would not report the incident to the police. He would need one to two years to fully repay the money as he needed time to dispose of his properties in mainland China and Australia. Mr Ma revealed that he had been embezzling money from Hyundai Hong Kong since around 2010 or 2011 and he had used the funds to purchase real properties in Hong Kong, mainland China and Australia.
- (2) On 2 March 2016, Mr Park met with Mr Ma. Mr Ma confessed that he had been using the online banking tokens belonging to the General Manager and the Managing Director to authorise the payments online. He also admitted that he had re-configured the authorisation level so that only one level of authorisation using the General Manager or the Managing Director's token would be required to effect the transfer, after the payment instruction was created online. He said that he had applied for and was managing multiple online banking tokens. He made various offers to compensate Hyundai Hong Kong for the misappropriated funds. He also handed over three online banking tokens, two of which were labelled "KH Kim".

Mr Ma was summarily dismissed on 4 March 2016. The matter was reported to the police on the same day.

In the action in question, Hyundai Hong Kong further relied on Mr Ma's conviction in the criminal proceedings in support of its case. The evidence in the criminal case showed the *modus operandi* of Mr Ma, ie he had dishonestly made use of the online banking tokens issued to others to bypass the normal three-tier authorisation adopted by Hyundai Hong Kong. The evidence also showed that once the funds were transferred to Mr Ma, he dealt with them as if he were the owner and spent them for his and others' benefit.

Evaluation of the evidence

In the action in question, the burden was on Hyundai Hong Kong to make out the case that Mr Ma had misappropriated the Sum belonging to Hyundai Hong Kong in the 262 transactions without the authority or consent of Hyundai Hong Kong.

It was indisputable that the 262 transactions took place between 2009 and 2016, and sums of money amounting in total to the Sum were transferred from Hyundai Hong Kong's bank accounts to Mr Ma's personal bank accounts.

It was Hyundai Hong Kong's case that the funds should have been used to settle outstanding invoices of the service providers. Instead, Mr Ma misappropriated the funds for his own use.

Hyundai Hong Kong's witnesses testified to how Mr Ma had abused his access to, and administrative rights, in respect of Hyundai Hong Kong's online banking platform, retained and misused the online banking tokens belonging to other officers of Hyundai Hong Kong to authorise the transfers of Hyundai Hong Kong's funds to his personal bank accounts.

Hyundai Hong Kong's case against Mr Ma was inherently plausible, fully supported by the extensive contemporaneous documents, and hence credible. Mr Ma made no attempt in the proceedings in question to adduce evidence to contradict its case. Furthermore, the court should accept the criminal conviction of Mr Ma in HCCC 20/2018 as proof that he had stolen the money from Hyundai Hong Kong in those transactions.

For the above reasons, the High Court accepted Hyundai Hong Kong's factual case in full.

Rulings

While an employment relationship does not automatically import fiduciary relations, a senior employee or manager, depending on his role and function, can be held to owe fiduciary duties to the employer when carrying out those duties. Where an employee is entrusted with the company's money and diverts it for his own benefit, he would likely be in breach of the fiduciary relations.

On the facts as found, Mr Ma was entrusted with the task of settling the vendors' invoices and had a significant role to play in the operation of Hyundai Hong Kong's bank accounts. The High Court held that he owed fiduciary duties to Hyundai Hong Kong in the authorisation process and he was in breach of such fiduciary duties.

Mr Ma was also in breach of his implied duty of fidelity by misappropriating the assets of Hyundai Hong Kong.

Furthermore, Mr Ma had converted the online banking tokens to his own use in breach of confidence. By making use of the tokens to effect the 262 transactions and transfer the Sum to himself, he committed the tort of conversion.

Hyundai Hong Kong sought equitable compensation equal to the Sum from Mr Ma for his breach of fiduciary duties. It also sought compound interest at the rate of 1% above prime rate, with monthly resets, accruing from the date of transfer in respect of each of the 262 transactions.

Compound interest may be appropriate where (1) the breaches of fiduciary duties are by way of fraud or misconduct, (2) the breaches benefit the defaulting fiduciary personally, or (3) the fiduciary has misappropriated funds. The court assumes that the misappropriated funds would have been used by the fiduciary to earn profits and, instead of ordering an account of those profits, orders him to pay compound interest on the sums extracted.

In the case in question, Mr Ma acted dishonestly and misappropriated a colossal sum of money from Hyundai Hong Kong over a long period of time, when Hyundai Hong Kong at all times placed complete trust in him in handling its bank accounts. The High Court was satisfied that it was an appropriate case to award compound interest.

Post-judgment injunction

The High Court was also satisfied that the *mareva* injunction which was in place should be extended for a period of 12 months, as sought by Hyundai Hong Kong.

It was plain that Mr Ma acted dishonestly in misappropriating Hyundai Hong Kong's funds in the 262 transactions. Worse still, while the injunction was in place, he was in breach of it by dissipating his assets, as found in the contempt proceedings. All these showed that there continued to be a real risk of dissipation if Mr Ma was not restrained from dealing with his assets up to the value of the Sum.

The High Court accepted that the 12-month period asked for by Hyundai Hong Kong was reasonable. Mr Ma's properties included real properties. It was reasonably expected that the

execution process would take some time.

Conclusion

For the above reasons, the High Court ordered that judgment be entered in favour of Hyundai Hong Kong against Mr Ma for the Sum. There be compound interest at the rate of 1% above prime rate, with monthly resets, accruing, in respect of each transaction, on the transferred sum from the date of the transaction and up to the date of judgment. After that, simple interest accrues on the Sum at judgment rate until payment.

The High Court further ordered that the mareva injunction be continued for 12 months from the date of the handing down of the judgment or further order of the Court.

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

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