

Insights

REVISITING VESTING ORDERS IN INTERNET SCAM CASES

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SUMMARY

In our previous article titled [Fraud Cases: Hong Kong Court's Jurisdiction on the Grant of Vesting Orders](#), our team discussed the remedy of vesting orders in providing relief to victims of internet fraud in recovering their assets that have been siphoned away by fraudsters.

The case that was discussed in that article, *Hypertec Systems Inc v Yifim Ltd* (HCA 1308/2021, HCMP 1829/2021, 18 February 2022) was in favour of a more proactive judicial approach – that the court does have jurisdiction to grant a vesting order in favour of the victim in recovering their assets. In *Hypertec*, the court did grant a vesting order in favour of the victim.

However, decisions since the case of *Hypertec* have taken a different view on whether the court does have jurisdiction to grant a vesting order. The latest one in this continuing line of undulation is [Orion Engineered Carbons GmbH v Universall All Limited and ors](#) (HCA 1625/2024, HCMP 210/2025, 30 May 2025). In *Orion*, the judge decided to adopt the approach that a vesting order should not be granted in favour of the victim, and instead the victim of internet fraud has recourse only to the conventional remedy of a garnishee order in recovering their siphoned assets.

In this article, we revisit the state of the law in Hong Kong on vesting orders and the implications in practice to remedies available to victims of fraud in recovery of their assets.

WHY VESTING ORDERS?

In a typical internet fraud scenario, victims of frauds are likely to find that their money has been siphoned to second or even third layer recipients, who might not themselves have been directly involved in the underlying fraud. While victims of fraud may potentially have in *personam* causes of action against the fraudsters in deceit, conspiracy to defraud, and/or knowing receipt and unjust enrichment, the sad reality is that the fraudsters may have disappeared and/or have insufficient assets for the purposes of enforcement. Therefore, usually a victim of internet fraud may need to find recourse in proprietary claims over amounts that have been frozen by virtue of a Mareva injunction or by virtue of police action. In this scenario, equity steps in to allow a victim to identify

their beneficial interest in a fund held by a second or third layer recipient, through obtaining declaratory relief that such recipients hold assets on constructive trust for the plaintiff. The effect of the declaratory relief is to allow for a tracing enquiry to follow monies into these second or third layer accounts, and absolutely entitle the plaintiff to call for return of their misapplied funds by virtue of a garnishee order. Further, it gives priority to the plaintiffs ahead of other unsecured judgment creditors.

However, the primary perpetrators of such internet scams are unlikely to honour plaintiffs' requests to return stolen monies, since they often do not appear in the proceedings and usually could not be contacted. Further, the banks which maintain defendants' accounts are bound by their customer contract owed to the defendants and not necessarily bound by the terms of a declaration of trust. Therefore, in addition to the traditional application for a garnishee order, the recent practice has been for plaintiffs also to make a separate application for a vesting order in respect of the monies in the relevant bank account. If a vesting order is granted under section 52 of the TO, the remaining moneys in the bank account held by the second or third layer recipient are immediately and fully vested in the plaintiff. In other words, the victim of internet fraud can enforce the chose in action immediately once it is vested in it. This reduces the time and cost required for victims to retrieve their stolen assets, in comparison with a traditional garnishee order application.

BRIEF FACTS OF *ORION*

The plaintiff, a German company listed on the New York Stock Exchange ("P"), became the victim of an identity fraud. Fraudsters impersonated its Chief Financial Officer and deceived it into remitting a total of EUR21,374,900 and USD31,035,683 in multiple tranches to various bank accounts held separately by the 1st to 16th and 18th defendants named in HCA 1625 (the case against the 17th Defendant was subsequently discontinued). When the fraud came to P's attention, reports were made to law enforcement agencies, including the police in Hong Kong.

P issued a statement of claim against the 1st to 16th Defendants and the 18th Defendant ("Remaining Defendants"), claiming for restitution/damages of the sums that the Remaining Defendants' accounts received, a declaration that the sums remitted to the Remaining Defendants belonged to P at the time of receipt, and for an account and tracing enquiry, together with related directions. No acknowledgements of service were filed by any of the Remaining Defendants. The court had no difficulty in granting the declarations sought and default judgment against the Remaining Defendants.

P also initiated miscellaneous proceedings by way of originating summons against 16 of the Remaining Defendants, as well as the seven banks with which the Remaining Defendants kept accounts, to be heard immediately after the default judgment summons. Specifically, P sought vesting orders against each of these 23 defendants (16 of the Remaining Defendants plus the

seven banks) in respect of the sums which P in HCA 1625 had obtained default judgment, as well as applications for garnishee orders *nisi*.

CURRENT STATE OF THE LAW IN HK REGARDING VESTING ORDERS

The question of whether the court has jurisdiction to grant a vesting order under section 52(1)(e) of the TO in enforcement applications arising from internet fraud scenarios has been tested before the court numerous times. Needless to say, *Orion* is yet another opportunity to gauge the court's attitude towards this issue. The court has on different occasions adopted different attitudes. The full provision of section 52(1)(e) of the TO is provided below for better reference:

"(1) In any of the following cases, namely—

...

(e) where stock or a thing in action is vested in a trustee whether by way of mortgage or otherwise and it appears to the court to be expedient,

the court may make an order vesting the right to transfer or call for a transfer of stock, or to receive the dividends or income thereof, or to sue for or recover the thing in action, in any such person as the court may appoint...

(5) The court may make declarations and give directions concerning the manner in which the right to transfer any stock or thing in action vested under the provisions of this Ordinance is to be exercised."

The more traditional judicial approach has been that section 52 of the TO does not apply to assist victims in cases in email fraud, while proponents of the other end of the spectrum argues that it does. The gist of the question surrounds whether "trustee" under the meaning of section 52(1)(e) extends to constructive trustees. We set out below some representative first instance decisions that deal with the issue of whether vesting orders should be granted in favour of internet scam victims:

1. Recently in *Amidas Hong Kong Limited v Che Si Limited* [2025] HKCFI 1128, Queeny Au-Yeung J reviewed the recent representative decisions in this respect. Her ladyship noted the division between "institutional" and "remedial" constructive trusts, also known as category 1 and category 2 constructive trusts. Ultimately, she found that section 52(1)(e) of the TO is not engaged in fraud cases like the one before her which involved remedial or "category 2" constructive trusts.
2. *Tokic DOO v Hongkong Shui Fat Trading Ltd* [2020] 5 HKLRD 189, DHCJ Douglas Lam SC observed that equity imposes on recipients of fraud proceeds an obligation to account for the funds they received *as if* they were trustees, although they are not. He reviewed the intention of the Trustee Act 1925, upon which the TO was based, and expressed the view that the TO was never intended to apply to persons in this category. He considered that the TO is concerned with

the administration of “true trusts”, and not constructive trusts imposed by equity on strangers in the exercise of its remedial jurisdiction.

3. Contrary to *Amidas* and *Tokic* discussed above, in the case of *Wismettac Asian Foods Inc v United Top Properties Ltd* [2020] 3 HKLRD 732, DHCJ Paul Lam SC considered that, based on section 2 of the TO, unless the context otherwise provides, the expressions “trust” and “trustee” extend to implied and constructive trusts. His view was that it was clear to him that the word “trustee” as provided within section 52(1)(e) extended to include constructive trustees. Further, he considered that the word “otherwise” as provided within section 52(1)(e) should be interpreted to mean “in any other way”. Therefore, section 52(1)(e) of the TO should be interpreted also to include trusts that arose by the operation of law as a result of which the legal title of the victim’s money is vested in the fraudster or subsequent recipient but the victim retained equitable interest therein. Pursuant to his view, DHCJ Lam granted a vesting order in favour of the claimant in *Wismettac*.
- It should be noted, however, that in *Wismettac* DHCJ Paul Lam SC also emphasized that a plaintiff, in applying for a vesting order, will need to adduce evidence in proving that the **current balance** in the bank account represents the plaintiff’s money or its traceable proceeds, and that it has been held on constructive trust. Indeed, the judge clarified his view when considering alternative remedies for a victim to internet fraud: “*I should point out that a garnishee order will be particularly useful, and indeed the only viable means, if the plaintiff is unable to show that the remaining balance of the bank account in question indeed represents its money or its traceable proceeds.*” In light of this, if fraud proceeds are transferred into a bank account which contains moneys that belonged to the account holder, there will then be substantial difficulty for a victim to satisfy the court to grant a vesting order.

DECISION IN *ORION*

In *Orion*, the court reviewed the authorities put before it and concluded the latest decision of *Amidas*, amongst others such as *Tokic*, to be more compelling.

The court cited, additionally, the case of *Hui Chun Ping v Hui Kau Mo* (both before the Court of Appeal [2024] 2 HKLRD 178 and the Court of Final Appeal (2024) 27 HKCFAR 634), where the Court of Appeal (“CA”), when considering a separate issue regarding the applicability of the statutory limitation period for constructive trustees, adopted a literal approach to statutory interpretation of the TO. Since section 2(1) of the Limitation Ordinance provides that the words “trust” and “trustee” have “the same meanings respectively as in the Trustee Ordinance”, the CA was also required to consider the issue of whether “trust” and “trustee” as provided under the TO can be extended to include remedial constructive trusts and trustees. In deciding this, the CA considered that the TO’s provisions only apply to the administration of “*true trusts*” and trustees, instead of constructive trustees which arose in the exercise of equity’s remedial jurisdiction, “*whose sole obligation of any*

practice significance is to restore the assets immediately". Such constructive trustees' possession of the assets are "*at all times wrongful and adverse to the rights of the claimant, nor does he have the powers and duties of a trustee with regard to investment and management.*" Therefore "*the meaning and language of 'trustee' in the Trustee Ordinance do not extend to constructive trustees whose liability to account arose from the misapplication itself.*" The CA's decision on this matter was endorsed by the Court of Final Appeal ("CFA").

Adopting the CA's interpretation of the TO in *Hui Chun Ping*, the court in *Orion* came to the conclusion that section 52(1)(e) of the TO therefore does not extend to constructive trusts (and their trustees) where the constructive trust arises from the misapplication of funds by fraudsters, and therefore, refused P's application for the grant of vesting orders.

CONCLUSION

Plaintiffs in internet scam cases understandably want to recover their assets as quickly (and as economically) as possible. Further, usually these cases are undefended, and rarely are acknowledgements of service filed by the defendants. As a result, it is unlikely that such cases will advance further in the judicial system to be considered before the CFA. Therefore, the CA decision (endorsed by the CFA) in *Hui Chun Ping* on the interpretation of "trustee" under the TO, while the case itself was not an internet scam case, is highly compelling and will likely make it very difficult for victims in internet fraud to persuade the court to grant a vesting order in aid of recovery. Victims therefore are likely to concentrate their efforts on the conventional route of applying for a garnishee order to recover their stolen assets.

RELATED CAPABILITIES

- Litigation & Dispute Resolution

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