

**Insights**

## **LOVE'S LABOUR'S LOST?: ONLINE LOVE SCAM: UNJUST ENRICHMENT AND THE DEFENCE OF BONA FIDE CHANGE OF POSITION**

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### **SUMMARY**

In a recent decision *Luk Mei Suet Michelle v Afsafari Services Co Ltd and Others* ([2022] HKDC 191, DCCJ 5593/2018, 23 February 2022), the Hong Kong District Court considered the applicability of the defence of bona fide change of position to an unjust enrichment claim brought by a victim of an online romance scam.

### **BRIEF FACTS**

This was a civil claim relating to a catfishing scam – a fraudster sets up a fake online profile to extract money out of people who are looking for love.

The Plaintiff (“**P**”) was defrauded by a person purporting to be her lover (the “**Fraudster**”). The Fraudster told P that he wanted to send P a “surprise gift” by courier. Subsequently, a person who alleged to be a representative of a courier company contacted P and requested her to pay various charges in relation to the delivery of the Fraudster’s “surprise gift”. All in all, P was swindled out of more than USD850,000. Unsurprisingly, the “surprise gift” never reached P.

One of the transactions was P’s transfer of US\$41,550 (the “**Sum**”) to the bank account of the 3<sup>rd</sup> Defendant (“**D3**”) on 14 March 2018. The judgment dated 23 February 2022 was about P’s claim against D3 on a restitutionary basis.

D3 was a company incorporated in the Republic of Seychelles. D3 operated a trading business in the supplying of bicycle parts to customers worldwide. D3 denied any knowledge of P and the Fraudster, and denied having any connection with the Fraudster. D3 relied on its bona fide change of its position to defeat P’s restitutionary claim. D3 claimed the Sum represented a payment by its customer, Malaika Investment Limited (“**Malaika**”), due under an agreement to supply bicycle repair

kits in the ordinary course of D3's business. D3 further claimed that, upon receipt of the Sum, D3 arranged shipment of bicycle repair kits to Malaika on 2 April 2018.

It was common ground that P did not have any prior knowledge of, let alone any personal or business relationship with D3 at all. Further, D3 had no specific prior knowledge of any fraud or scam being perpetrated upon P by the Fraudster, but as noted below the court held on the available evidence that D3's actions were questionable.

### Issues

There were three issues in dispute concerning P's claim for the Sum:-

1. Whether D3 was unjustly enriched by the deposit of the Sum into D3's bank account?
2. Whether D3 could establish the defence of bona fide change of position in respect of the Sum, in particular:-
  - a. Whether there existed a legitimate commercial transaction in early 2018 between D3 and Malaika in relation to the deposit of the Sum?
  - b. Whether D3 had grounds for believing that the deposit of the Sum might have been made unjustly, and if so whether D3 acted in good faith by making reasonable inquiries of the payer of the deposit of the Sum (i.e. P)?
  - c. Whether D3 acted in a commercially acceptable way in the circumstances, including taking reasonable precautions to in respect of the transaction.
  - d. Whether D3's position was changed in a way that that D3 would suffer an injustice if called upon to repay the Sum to P, such that the injustice of requiring D3 to repay would outweigh the injustice of denying P restitution?
3. Whether P would be entitled to claim restitution of the Sum or any part thereof?

### LEGAL PRINCIPLES

The Court set out the following legal principles relevant to the determination of a claim in unjust enrichment and the defence of bona fide change of position:-

1. The four questions for the determination of a claim in unjust enrichment are:-
  - a. Was the defendant enriched?
  - b. Was the enrichment at the plaintiff's expense?
  - c. Was the enrichment unjust?

d. Are any of the available defences applicable?

*(Shanghai Tongji Science & Technology Industrial Co Ltd v Casil Clearing Ltd* (2004) 7 HKCFAR 79)

2. For the purpose of determining whether a benefit would constitute enrichment, the credit of one's bank account is treated as an incontrovertible benefit because it is similar to a receipt of money. *(Credit One Finance Limited v Yeung Kwok Chi and Ors.* [2020] HKCFI 2450)
3. The defendant's enrichment is unjust if it is caused by a mistake of fact or law made by the plaintiff. It is prima facie unjust for a recipient of money to retain the payment when, if the payer had known the true state of affairs, the payer would not have paid. *(Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349)
4. Change of position is recognised as a general defence to all restitutionary claims. Change of position refers to the circumstances where an innocent defendant's position is so changed that it will suffer an injustice if called upon to repay, and that the injustice of requiring the defendant so to repay outweighs the injustice of denying the plaintiff restitution. The mere fact that the defendant has spent the money, in whole or in part, does not of itself render it inequitable that it should be called upon to repay, because the expenditure might in any event have been incurred by them in the ordinary course of things. *(Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548)
5. A fair balance has to be struck between the plaintiff's interest in restitution and the defendant's interest in making spending decisions freely without fear that a claim in unjust enrichment might later invalidate the assumptions that it makes about the means at its disposal. *(Goff & Jones: the Law of Unjust Enrichment, 9<sup>th</sup>, §1-09)*
6. Change of position in good faith is capable of embracing a failure to act in a commercially acceptable way, sharp practice of a kind that falls short of outright dishonesty, as well as dishonesty itself. The factors which will determine whether it is inequitable to allow the claimant to obtain restitution in a case of mistaken payment will vary from case to case, but where the payee voluntarily has parted with the money, it is likely that much will depend on the circumstances in which the payee did so and the extent of its knowledge about how the payment came to be made. Where the payee knows that the payment it has received was made by mistake, the position is quite straightforward: it must return the payment. Greater difficulty is likely to arise, however, in cases where the payee has grounds for believing that the payment may have been made by mistake, but cannot be sure. In such cases, good faith may well dictate that an inquiry be made of the payer. The nature and extent of the inquiry called for will, of course, depend on the circumstances of each case. However, a payee who has, or thinks it has, good reason to believe that the payment was made by mistake often will be found to have acted in good faith if it pays the money away without first making inquiries of the person from whom he received it. *(Niru Battery Manufacturing Co and Anor. v Milestone Trading Ltd and Others* [2004] QB 985)

7. A defendant who parts with goods must prove their value in order to make out the defence. (Goff & Jones §27-26, and National Westminster Bank Plc v Somer International (UK) Ltd [2002] Q.B. 1286)

### **Issue (1): Unjust enrichment**

The Court accepted P's evidence in full, and believed that P was deceived into transferring the Sum to D3. The Court held that P clearly would not have transferred the Sum to D3 if she had known that she would never receive the "secret gift" from the courier. As a result of P's mistake of fact, D3 received the Sum in its bank account. The Court had no hesitation in holding that D3 was unjustly enriched at P's expense.

### **Issue (2): Defence of bona fide change of position**

The remaining issue was whether D3 could establish its defence of bona fide change of position.

#### *Witness*

D3's only witness was Madam Chen, who claimed to be D3's consultant.

As shown by the documentary evidence, Madam Chen was not personally involved in the alleged transaction between D3 and Malaika. The Court was dubious about Madam Chen's role in this matter. D3 provided no explanation for the failure of D3's staff in charge of the alleged transaction to testify for D3.

#### *Existence of prior commercial relationship between D3 and Malaika*

D3 claimed that it had been trading with Malaika since 2013 and that this continued even after the commencement of these proceedings. However, D3 adduced no evidence to show the details of these prior dealings between D3 and Malaika. The Court said that, if the business relationship between D3 and Malaika was genuine, there was no reason why D3 did not produce a single commercial document to substantiate its assertions. Madam Chen's explanation for the failure to adduce such evidence was that she forgot to do so. The Court said this was "wholly unacceptable" especially because D3 was legally represented.

#### *Absence of Malaika's involvement in the proceedings*

The Court found no reason why D3 did not ask Malaika to do anything to support D3's defence. Malaika purportedly paid D3 the Sum to settle the balance of the purchase price. In light of the risk of paying back the Sum to P, D3 should ask Malaika for a full account of how Malaika caused P to pay the Sum purportedly on Malaika's behalf. However, D3 did not put in any evidence that D3 had ever required or demanded Malaika to do so.

Further, the Court considered that, despite the proceedings, the continuation of D3's business dealings with Malaika and acceptance of Malaika's payments through third parties was "surreal and incredible".

*Issue (2)(a): Existence of legitimate commercial relationship between D3 and Malaika*

The Court examined three documents that had been adduced by D3 to support the asserted genuineness of the transaction between D3 and Malaika, namely (a) a document entitled "Funds Transfer Request Authorization" issued by the Bank of America in New York (the "**TT Document**"), (b) Form M issued by the Central Bank of Nigeria, which allegedly was required for the production of a certificate requisite for good to be imported into Nigeria and (c) the bill of lading (the "**BL**").

The TT Document allegedly evidenced Malaika's deposit of US\$20,000 into D3's bank account as an upfront payment. The TT Documents recorded that the transferor was Arlene Brown in the US and the specified purpose of payment was for family support. The Court said the usual specific purpose of payment cried out for an explanation. However, D3 did not make any enquiries with the transferor to confirm their consent to the transfer.

The information appearing in the Form M significantly differed from the agreement between D3 and Malaika for the alleged transaction. However, D3 did not provide any proper explanation for these differences. The Court said D3's "failure to proffer any explanation speaks volume[s]".

The BL cross-referred to the Form M for the details of the products shipped. Due to the differences between Form M and the agreement for the alleged transaction between D3 and Malaika, the Court was not convinced that the BL was for the shipment of D3's products pursuant to the agreement between D3 and Malaika.

On the evidence, the Court was not satisfied that it was a genuine transaction between D3 and Malaika. The Court was of the view that, if the alleged transaction was bona fide, D3 should have had no difficulties in disclosing all the correspondences exchanged with Malaika and the commercial documents to prove its existence, and D3 should be ready to explain these documents in an unequivocal manner.

The Court held that the above findings were sufficient to reject D3's purported defence of change of position, on the ground that D3's change of position, if any, could not have been bona fide. The Court also said it was not required to find any knowing involvement or participation of D3 in the fraud, nor indeed any dishonesty on the part of D3. Lack of good faith, on its own, was a sufficient basis to forfeit the defence of change of position.

*Issue (2)(c): D3's belief and acts*

Nonetheless, the Court proceeded to consider, if the Court was wrong to find against the genuineness of the alleged underlying transaction, whether the defence of bona fide change of

position would be available to D3.

D3 claimed that more than 40% of its business involved African customers. There were foreign currency control policies in many countries in Africa, including Nigeria. In D3's experience, its African customers normally would make payments to D3 via third parties, and D3 never had been concerned about the identity of such third parties as long as the money could reach D3's pocket. The Court said D3 obviously knew very well that this kind of payment method often was used to circumvent the foreign currency control policies in those African countries.

Further, D3 accepted that there could be risks that those third party payees might not be the intermediaries of its African customers and might not voluntarily make payments to D3 for its African customers. However, D3 opined that it was D3's usual practice in dealing with African customers, and there was nothing wrong for D3 to turn a blind eye to such a risk since it had never met with any problems before.

The Court refused to accept that this alleged usual practice was commercially acceptable, because (a) it defeated what were said to be the foreign currency control policies in Nigeria, and (b) the risk of money laundering and cyber fraud arising from payment out of a totally unknown bank account would be obvious and one could not simply ignore such a risk.

To conclude, the Court was of the view that D3:-

1. had valid grounds to believe that the deposit of the Sum might have been made unjustly;
2. did not act in good faith by failing to make any inquiry of P;
3. did not act in a commercially acceptable, when it voluntarily took these obvious risks of receiving the Sum from an unknown source, before it purportedly changed its position and shipped its products to Malaika.

#### *Issue (2)(d): Injustice to P and D3*

The Court's view was that P undoubtedly suffered injustice if she would be denied restitution. On the contrary, the Court could see no injustice to compel D3 to repay the Sum to P, given that D3 must have recourse against Malaika for the recovery of the Sum.

Therefore, the Court held that the injustice of requiring D3 to repay the Sum would not outweigh the injustice of denying P's restitution.

#### THE COURT'S DECISION

For the reasons given, the Court held that D3 was unjustly enriched at P's expense, and D3's defence of bona fide change of position in good faith could not be made out. The Court allowed P's claim in restitution against D3 in full.

## BCLP COMMENTS

Although the judgment in *Luk Mei Suet Michelle* did not establish new principles on either unjust enrichment or the defence of bona fide change of position. However, it is an interesting illustration of how the Court applied the well-established legal principles to the facts of the case. It also demonstrated the level of evidence required for the recipient of the defrauded money in order for the defence of bona fide change of position to stand.

## RELATED PRACTICE AREAS

- Litigation & Dispute Resolution
- Investigations
- Private Client

## MEET THE TEAM



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