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CHAMBERS GLOBAL PRACTICE GUIDES

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# International Fraud & Asset Tracing 2023

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**Hong Kong: Law & Practice**

George Lamplough, Lee Landale and Vanessa Cheng  
Holman Fenwick Willan



# HONG KONG



## Law and Practice

### Contributed by:

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**Holman Fenwick Willan (HFW)** is recognised internationally as an industry leader advising on all aspects of fraud in the aviation, commodities, construction, energy and resources, insurance and reinsurance, and shipping industries. The Hong Kong office has a stellar record in representing clients in all forms of disputes, both regionally and internationally. The fraud and insolvency practice provides a full-service on-shore capability in Hong Kong. It has a long tradition of success acting for the victims of fraud, banks, local and international businesses and

directors. The practice has particular expertise in dealing with trust matters and shareholder disputes in offshore financial jurisdictions. The type of fraud work undertaken includes multi-jurisdictional fraud claims; locating, securing and recovering the proceeds of fraud; obtaining Norwich Pharmacal orders and injunction orders of all kinds, including Mareva, proprietary, mandatory and anti-suit injunctions, stop orders and committal orders; and negotiating settlements with fraudsters (an art in itself).

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## 1. Fraud Claims

### 1.1 General Characteristics of Fraud Claims

It has been said that the many forms of fraud are as diverse as man's infinite capacity to invent them (Grossman, 1993). Perhaps that is why in Hong Kong there is no overarching definition of "fraud".

The High Court of Hong Kong recently described fraud as "a concept rather than a specific cause of action", adding, "that is why one finds the word used in many and diverse cases, albeit as a shorthand expression, to refer to the different types of behaviour which are under scrutiny in each case" (Polyline v Ching Lin Chuen [2021] HKCFI 483).

The law has responded to the many types of behaviour with myriad causes of action and a diverse range of remedies.

Fraudulent activity may include deception, though it is not essential. There is usually financial loss to the victim, but not always. The elements of fraud are set out (though not specifically defined) in the Theft Ordinance (Cap 210), which makes it a criminal offence to induce another person by deception and "with intent to defraud" to do anything that results in either a benefit or a prejudice to another person.

In the criminal jurisdiction, the legal concept of dishonesty is itself highly complex, as it is both a subjective and objective standard: *R v Ghosh* [1982] QB 1053. It is subjective in terms of whether the defendant realised they were being dishonest, and objective in terms of whether their behaviour was dishonest according to the ordinary standards of reasonable behaviour. However, in the civil jurisdiction, the test is

largely objective – see *Royal Brunei Airlines v Tan* [1995] 2 AC 378; *Barlow Clowes International Ltd (in Liquidation) & Ors v Eurotrust International Ltd* [2005] UKPC 37; and *Ivey v Genting Casinos (UK) Ltd* [2018] AC 391.

### Fraud in Hong Kong

In Hong Kong, fraud commonly involves the fabrication or falsification of financial statements, which are either misrepresented or edited to omit key information. The goal is often to make a business appear more profitable than it is.

To be convincing, the fraudster usually implements a fake paper trail of underlying contracts, invoices and payment receipts. This may involve setting up a series of supposedly unrelated companies who act as the "suppliers" and "customers" of the company, giving the impression that funds are flowing through the business. Funds can even be recycled in a "round-robin" scheme, enabling fraudsters to funnel the same cash through the business over and over again, falsely driving up revenue figures and enhancing the apparent value of the company.

### Misappropriation of funds

Fraudsters look for ways to extract funds from businesses that pass casual scrutiny. A company might purchase fixed assets or acquire a business at an inflated price from a connected company, or acquire a property in an obscure location making it difficult to verify independently.

### Fraud Through Hong Kong

Hong Kong banks are often unwitting participants in the money-laundering process, partly due to the ease and relative anonymity with which an individual can set up a company and open a bank account.

Victims fall foul of all sorts of deceptions, including email and phone scams, investment and wire frauds, even impostor scams. Common ploys include persuading the victim to think they are transferring funds to the “police” for safekeeping or tricking a bank into thinking it is following instructions from its customer, when in fact it is complying with instructions from an impostor. There is a constant stream of “CEO” frauds, in which unknown hackers clone company email addresses, study the written language of senior management officers and then instruct accounts executives to remit funds to bank accounts controlled by fraudsters. Cryptocurrency fraudsters trick victims into purchasing cryptocurrencies on fake crypto-trading platforms. While the victims may “see” growth of their portfolios on the fake platforms, the fraudsters have in fact stolen their property.

## General Characteristics of Fraud Claims

The individual heads of claim that apply depend on the underlying facts. Common causes of action that victims rely on include:

- (a) fraudulent misrepresentation;
- (b) deceit and fraudulent inducement;
- (c) dishonest assistance (accessory liability);
- (d) knowing receipt;
- (e) constructive trust – arises when the recipient holds funds that they know have been paid to them by mistake;
- (f) restitution on the grounds of unjust enrichment – where the unjust enrichment consists of a pecuniary benefit, the claim is known as an action for money had and received.

Claims (a) to (e) all involve some manner of knowledge or dishonesty on the part of the defendant. Claim (f) does not necessarily require the plaintiff to prove dishonesty or knowledge of the fraud on the part of the recipient. If plaintiffs

can prove they have a proprietary claim (that is, applying common law and equitable rules of tracing, they can locate their funds in defendants’ accounts) then, subject to any equitable defences the defendants might have, their claim may succeed without having to prove that the defendant had knowledge of the original fraud.

Defendants regularly argue by way of defence that:

- they have changed their position in reliance on receipt of the plaintiff’s funds; and/or
- they are bona fide purchasers for value (ie, they paid fair value for an asset acquired with the funds) without notice of the fraud.

Other claims include breach of fiduciary duty and breach of the duties of good faith and fidelity, which may apply if the wrongdoer owes a duty to the victim but fails to act in the victim’s best interests. Conspiracy claims can be brought against those who make agreements with fraudsters with intent to injure the plaintiff. Conspiracy claims encompass all the overt acts carried out pursuant to the conspiracy, together with the damage done to the victim (see *Tempura Virginia Pido v Compass Technology Company Limited & Anor* [2010] 2 HKLRD 537).

The most common relief sought for fraud is damages or restitution. Other remedies may also be sought, including injunctive or declaratory relief or an account of profits, which enables a plaintiff to recover any profits made by the defendant with the proceeds of the fraud.

## 1.2 Causes of Action After Receipt of a Bribe

A claimant whose agent has received a bribe may be able to avail themselves of the causes of action set out below.

In this context, an “agent” includes any person employed by or acting for another. The “principal” is the person who has granted an agent power to act on their behalf. There is not necessarily a requirement for a pre-existing legal, contractual or fiduciary obligation.

## Against the Corrupt Agent – Breach of Fiduciary Duty

In *Attorney General of Hong Kong v Reid* [1994] 1 AC 324, the defendant abused his public office by receiving bribes in exchange for preventing criminal prosecutions. The Privy Council (on appeal from Hong Kong) held that where fiduciaries receive bribes in breach of their fiduciary duties, the law regards the fiduciaries as constructive trustees who hold the bribe on trust for the benefit of their principals. The principal can therefore recover the bribe, as well as any property acquired with it, or any profits made through its use.

The Hong Kong courts followed *Reid* in *Secretary for Justice v Hon Kam Wing & Others* [2003] 1 HKLRD 524, in which the courts framed the same principle a different way, holding that equity regards the bribe as a legitimate payment intended for the principal. The payment must be paid over to the principal immediately upon receipt, and equity imposes a constructive trust over the funds or property paid as a bribe for the benefit of the principal. In *FHR European Ventures LLP & Ors v Cedar Capital Partners LLC* [2014] UKSC 45 the UK Supreme Court confirmed the principle in *Reid* and *FHR European* was subsequently endorsed by the Hong Kong courts in *Tang Ying Li v Tang Ying Ip alias Tang Ying Yip and Others* [2015] 1 HKLRD 712.

In addition to suing for breach of fiduciary duty, a principal or employer can also sue corrupt

agents or employees for breach of their employment or service contracts.

## Criminal Sanctions

The primary anti-corruption legislation in Hong Kong is the Prevention of Bribery Ordinance (Cap 201) (POBO), which is enforced by the Independent Commission Against Corruption (ICAC). The POBO prohibits the offer and acceptance of bribes in both the public and private sectors and establishes a series of offences for corrupt conduct.

In the private sector, it is an offence under the POBO to offer an agent, or for an agent to solicit or accept, any reward to perform any action without permission from their principal when conducting the principal’s business. There is a defence available for agents acting with “lawful authority or reasonable excuse”. On summary conviction, the maximum sentence for the private sector offence is three years’ imprisonment and a fine of HKD100,000. Sentences for public sector offences are significantly higher, the maximum being ten years’ imprisonment and a fine of HKD1 million.

In addition, a person found guilty of accepting a bribe will be ordered to repay the bribe (Section 12(1), POBO) and the Hong Kong courts can order the return of property from the convicted person to the victim directly under Section 84, Criminal Procedure Ordinance (Cap 221).

It is technically possible to find a company liable for soliciting or accepting a bribe, but in practice most prosecutions target individuals.

## 1.3 Claims Against Parties Who Assist or Facilitate Fraudulent Acts

Criminal and civil claims can be brought against parties who assist or facilitate fraudulent acts.

In some cases, claims (in particular, claims for restitution) are available even where the assisting party has no knowledge of the fraud. Some of the key parties who assist or facilitate fraudulent acts include:

- banks (inadvertently);
- account holders who receive the proceeds of fraud directly from the fraudster (often with knowledge of the fraud);
- second-level recipients (sometimes inadvertently); and
- professional service providers, such as auditors and accountants.

## **Banks**

Nowadays, banks are acutely aware of the problem of money laundering and of their commercial and social responsibility to prevent illegal transactions taking place through their customers' accounts.

When a bank is put on notice of a fraud and that its customer holds funds on constructive trust, the bank can be liable in damages for breach of that constructive trust if it subsequently moves the funds. It is therefore important to put the bank on notice of the victim's equitable proprietary interest in the funds as soon as a fraud is discovered.

In *PT Asuransi Tugu Pratama Indonesia Tbk (formerly known as PT Tugu Pratama Indonesia) v Citibank NA* [2023] HKCFA 3 (in which HFW acted for the successful account holder), the Court of Final Appeal held that the defendant bank was liable for monies paid out of the plaintiff's bank account on the dishonest instructions of the plaintiff's authorised signatories. The Court held that the plaintiff's debt claim, for the balance of the account before it was fraudulently emptied and the account closed, was good in

law, the fraudulent transfers were nullities, and the debt claim was not statute-barred (as the bank argued). The Court held that, in the context of such banking claims, the six-year limitation period starts to run when the bank's customer demands payment of the debt, not on the unauthorised closure of the account (as the bank argued), which has important implications because victims of fraud may not be aware of the fraud for many years. This decision also discusses another remedy which may be used by victims of fraud, a claim for breach of the bank's so-called Quincecare duty (ie the duty of care owed by banks to their customers).

The Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap 615) (AMLO) empowers the police to launch criminal proceedings against banks for ignoring or assisting in money laundering.

## **Account Holders**

The architect of the fraud rarely holds the bank account into which the victim remits their funds. Rather, criminal rings will recruit "money mules" to set up and manage Hong Kong bank accounts to launder the proceeds of fraud. These account holders frequently live in Mainland China, beyond the jurisdiction of the Hong Kong courts and police.

Such bank accounts are usually corporate accounts held by shell companies, with nominal share capital and a single director and shareholder. The signatories are usually individuals residing in Mainland China and the account-opening documents will usually state low monthly salaries. The purpose of the business is usually random and innocuous – eg, the sale of frozen meat or trading air purifiers. Such people are the pawns in the money-laundering process, not the kings and queens. Tracking them down for arrest



is not just difficult, because they are outside the jurisdiction, but of limited utility when found.

Civil claims against the account holder company are limited to proprietary claims against the company (or individual bank account holder, if the account is not a corporate account) such as money had and received and unjust enrichment, to recover any remaining funds. Where the account holder is a Hong Kong resident, the police will investigate and, if possible, press charges.

Those who knowingly assist in money-laundering operations risk being charged with several criminal offences, such as conspiracy under Section 159A Crimes Ordinance (Cap 200) or the common law offence of conspiracy to defraud. Civil causes of action commonly pleaded against accessories to wrongdoing include knowing receipt and dishonest assistance.

The Organised and Serious Crimes Ordinance (Cap 455) (OSCO) empowers the police to charge individuals who deal with property they know, or have reasonable grounds to believe, are the proceeds of an indictable offence. The offender is liable on conviction on indictment to a fine of HKD5 million and imprisonment for 14 years, or on summary conviction to a fine of HKD500,000 and imprisonment for three years.

The prosecution may also apply for a restraint order to prohibit a person from dealing with their property (Section 15, OSCO). Restraint orders can effectively freeze bank accounts holding the proceeds of fraud.

### **Second-, Third- and Higher-Level Recipients**

There are usually several rounds of dissipation. First-level recipients (who are often acutely aware that the funds they have received are the

proceeds of fraud), usually quickly transfer the funds on to second-level recipients, who often then transfer the funds onwards. These higher-level recipients tend to have less knowledge of the underlying fraud than those from whom they received the funds.

Victims must therefore decide whether to apply for an injunction or seek other interim relief against the second- and third-level recipients to secure and recover their funds, or whether to apply for a disclosure order to find out where the funds went next. Cost considerations are paramount.

Victims may be entitled to bring a proprietary claim in equity over the funds found in the hands of the second- or third-level recipients. Whether or not such claims succeed will depend on whether the recipients have a legitimate reason for receiving the funds. Recipients often argue that they received the funds pursuant to a legitimate business transaction or, as is often the case in Hong Kong, during an underground currency exchange. Recipients often seek to rely on the equitable defences mentioned above (change of position or bona fide purchaser for value) to defeat a proprietary claim.

The Hong Kong courts have ruled that defendant recipients may not invoke these defences where they use underground banking to circumvent the foreign exchange laws of Mainland China (see the decisions of the Court of First Instance in *DBS Bank (Hong Kong) Ltd v Pan Jing* [2020] HKCFI 268 (in which HFW acted for the successful bank); *TTI Global Resources Hong Kong Ltd v Hongkong Myphone Technology Co Ltd* [2021] HKCFI 306; and *She Ching Yan v Cai Yunxiang and Others* [2023] HKCFI 592).

However, there is a line of authority which appears to allow a more flexible approach than that seen in *Pan Jing*, *TTI Global* and *She Ching Yan* and suggests that the use of underground banking does not automatically render the transaction unenforceable. Rather, the courts may consider the severity of the illegality on a case-by-case basis, having regard to questions such as proportionality and public policy. The April 2022 decision of the Court of First Instance in *Lesnina H D.O.O v Wave Shipping Trade Co Ltd and Others* [2022] HKCFI 1070 discusses the authorities in some detail. However, this decision concerned the claimant's unsuccessful application for summary judgment and the court held that the illegality argument was not suitable for summary disposal and ought to be fully ventilated before the court at trial, with expert evidence on PRC law. The question therefore remains open, for now. Summary judgment is discussed in more detail in **2.6 Judgment Without Trial**.

It is not uncommon for a victim to encounter an evidential lacuna which prevents them from directly linking payments received by first-level recipients to funds received by second- or third-level recipients. In appropriate circumstances, the courts may draw adverse inferences from the failure by defendants to produce documents and/or witnesses, which they can reasonably be expected to produce, in relation to the victim's tracing exercise (see *ANZ Commodity Trading Pty Ltd v Excellence Raise Overseas Limited and Others* [2023] HKCFI 179 – in which HFW acted for the successful bank).

### Professional Service Providers

Professionals engaged to carry out services such as maintaining accounts, conducting audits or calculating tax liabilities may unwittingly facilitate a fraud. They may find themselves exposed

to tortious claims such as negligence and breach of professional standards.

### 1.4 Limitation Periods

In general, the limitation period in Hong Kong for causes of action in both tort and contract (except contracts under seal) is six years from the date on which the cause of action accrued (Section 4 Limitation Ordinance (Cap 347) (LO)).

Where fraud, mistake or concealment has occurred, the limitation period does not begin until the fraud, mistake or concealment is discovered, or could have been discovered with reasonable diligence (Section 26(1) LO).

However, it is still important to act quickly when fraud is discovered: the extension of limitation to allow for actual or constructive knowledge must be balanced against the rights of innocent third parties who purchased for valuable consideration property acquired by the seller via fraud or using fraudulently acquired funds. Hong Kong law therefore prevents a victim of fraud from recovering property, enforcing a charge or setting aside a transaction affecting such property where an innocent third party purchased the property for valuable consideration (Section 26(4) LO).

At the opposite end of the spectrum, there is no limitation period for a beneficiary to bring an action in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy, or to recover trust property or proceeds from the trustee (Section 20 LO). However, the equitable doctrine of laches (lack of diligence in making a legal claim) may apply and bar such claims.

## 1.5 Proprietary Claims Against Property

To recover property that has passed from hand to hand, victims must first identify and locate the property and prove that it belongs to them.

Victims may be able to trace their funds into the property and thus claim a proprietary interest.

The tracing rules developed by the English courts and applied in Hong Kong will determine whether the victims can claim a proprietary interest in the property. Proprietary claims are powerful because they take priority over the claims of other creditors.

### Following and Tracing

Following is the process of identifying the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as a substitute for the old. Tracing is not a remedy. It is a process which, if properly followed, enables victims to identify, locate and ultimately recover their property.

Property can be traced both at common law and in equity. At common law, the right to trace ceases once the property of the victim is mixed with the property of the wrongdoer – for example, when the proceeds of fraud are deposited into a bank account with an existing credit balance. However, equity allows tracing into mixed funds.

### Tracing in Equity: The Subordination Principle

Where the proceeds of fraud are mixed with other funds, victims must use the tracing rules and the principles of subordination to identify their property. Broadly speaking, the subordination principle holds that, as between the victim and the wrongdoer, the equities are unequal and favour the victim. This means that where an asset is exchanged for another, the victim can choose whether to follow the original asset into

the hands of the new owner, or to trace its value in the hands of the previous owner (*Foskett v McKeown* [2000] UKHL 29). The courts have established the following general rules to assist identifying and tracing in equity.

- If the funds of two innocent parties are mixed, the “first-in, first-out” rule applies (*Clayton’s Case*, *Devaynes v Nobel* (1816) 35 ER 781). This rule presumes that the funds first paid into the account are the funds first paid out.
- If the wrongdoer mixes HKD10 of their own money with HKD10 received from a victim, and then dissipates HKD10 from the mixed funds, the victim is entitled to presume that the wrongdoer has spent their own money first and kept the victim’s money intact (*Re Hallett’s Estate* (1880) 13 Ch D 696).
- When the wrongdoer mixes HKD10 of their own money with HKD10 of a victim’s money, then uses HKD10 to buy a painting and dissipates the remaining HKD10, equity deems the wrongdoer to have used the victim’s money to buy the painting, so that the painting becomes the traceable proceeds of the victim’s money (*Re Oatway* [1903] 2 Ch 356, 360).
- More recently, equity allows backwards tracing (*The Federal Republic of Brazil v Durant International Corp* [2015] UKPC 35). Backwards tracing allows victims to claim funds that have left the bank account of the wrongdoer before their funds were deposited, so long as they can prove that the payment out was in anticipation of their funds being paid in.

Using these principles, victims of fraud can preserve their proprietary claim over the proceeds of fraud even when mixed with other assets. The subordination principle can work against both

the wrongdoer and recipients of transfers from the wrongdoer's account.

## Trust Claims

Where a victim can establish that they are the beneficiary under a trust, they can trace the trust property into substitute assets, to expand their claim in terms of both people and property. Trust claims and tracing claims are therefore important both procedurally and substantively.

## Gains Made on the Proceeds of Fraud

Where the wrongdoer invests the proceeds of fraud successfully, the victim may be entitled to recover profits in addition to the original sum. This is particularly the case where the fraudster owes the victim a fiduciary duty.

The victim can recover the funds by applying to court for a disgorgement order, an order that forces the defendant to repay the profit gained from the fraud. The Securities and Futures Commission (SFC) has obtained numerous disgorgement orders to recover profits in cases of insider trading or securities fraud. Alternatively, the court can order an account of profits, which can then be claimed by the victim.

## Vesting Orders

In recent years, victims of fraud have successfully obtained vesting orders under Section 52(1)(e) of the Trustee Ordinance (Cap 29) (TO).

Vesting orders work as follows:

- a defendant who receives property obtained by fraud holds the property as constructive trustee for the victim;
- a credit balance in the defendant's bank account represents a debt owed by the bank to the defendant;

- the victim applies under Section 52(1)(e) TO for an order that the defendant's right to sue for and recover the sums against the bank be vested in the victim, and that the bank should transfer the sums directly to the victim; and
- before making the application, the bank must be joined to the proceedings so that any vesting order binds the bank.

Although there are conflicting decisions on whether the recipients of funds obtained by fraud are "true" trustees for the purpose of Section 52 TO, the authors consider it is a logical interpretation of the TO. The Hong Kong Court of First Instance recently reaffirmed jurisdiction to grant vesting orders under Section 52 TO in order to assist victims of fraud (*Hypertec Systems Inc v Yifim Ltd* [2022] HKCFI 482).

However, in view of the differing approaches taken by Hong Kong judges, many victims of fraud opt for the conventional approach, which is to apply for garnishee orders against the defendant's bank under Order 49 of the Rules of High Court (Cap 4A) (RHC).

## 1.6 Rules of Pre-action Conduct

Although there is no standard pre-action protocol for fraud cases in Hong Kong, a number of pre-action steps are available to victims, which enable them to obtain and preserve evidence and prevent wrongdoers from dissipating their assets.

### Damage Control: Preservation of Assets

As soon as fraud is discovered, victims should act quickly to stop the funds from being dissipated. There is little point in taking recovery action if some or all of the lost funds have not been located and frozen. Victims should follow these general guidelines:

- tell the bank – immediately inform the bank and ask the bank to reverse the transfer(s);
- tell the police – file a Suspicious Transaction Report with the Joint Financial Intelligence Unit (JFIU), the anti-money laundering, anti-terrorist financing arm and the E-Crime Processing and Analysis Hub of the Hong Kong Police;
- consider obtaining interim injunctive relief; and/or
- consider obtaining disclosure orders, in particular Norwich Pharmacal orders.

As discussed in **1.7 Prevention of Defendants Dissipating or Secreting Assets**, victims can apply for injunctive relief to freeze property over which the victim has a proprietary claim and restrict alleged wrongdoers from dealing with their assets. These are important steps in any fraud action. Injunctions can be granted in respect of assets within Hong Kong or worldwide and can restrain wrongdoers from removing or disposing of assets.

Where victims of fraud successfully freeze assets, civil proceedings should be commenced to recover the funds.

### **Pre-action Disclosure**

As discussed in **2. Procedures and Trials**, pre-action disclosure against third parties (such as Norwich Pharmacal orders) can be sought to obtain information about potential defendants, which the third party has in its possession.

Pre-action disclosure is also available against potential defendants under RHC Order 24 rule 7A RHC and Section 42 of the High Court Ordinance (Cap 4). Such orders can assist an applicant who is aware of the identity of potential suspects but does not have sufficient details to advance a claim.

Private investigators can also be engaged to identify potential defendants and available assets.

### **1.7 Prevention of Defendants Dissipating or Secreting Assets**

There are several weapons in the legal arsenal to prevent wrongdoers from dissipating or secret-ing assets before a judgment is obtained against them.

#### **Mareva Injunction**

Mareva injunctions restrain defendants from disposing of their assets with the intention of frustrating a judgment later made against them. Mareva injunctions operate in personam.

Mareva injunction applications are usually made ex parte – that is, without notice to the defendant. When an application for a Mareva injunction is made ex parte, the plaintiff is obliged to make full and frank disclosure to the court (ie, telling the court everything, even the weak points of their application). Shortly after the court grants a Mareva injunction, the defendant will have an opportunity to challenge and set aside the order.

An applicant can apply for a Mareva injunction at any time before or during the litigation process, so long as the court is satisfied that:

- there is a good arguable case on a substantive claim against the defendant;
- the defendant has assets within Hong Kong;
- the balance of convenience is in favour of granting the injunction; and
- there is a real risk of dissipation or secretion of assets.

If defendants fail to comply with the terms of a Mareva injunction, they may be liable for con-

tempt of court and ordered to pay a fine or sent to prison.

## Proprietary Injunction

If the victim wants to preserve specific assets or money over which they claim ownership, then they should seek a proprietary injunction. The threshold for obtaining a proprietary injunction is lower than obtaining a Mareva injunction as the plaintiff only has to show that there is a serious issue to be tried in relation to the assets that are in dispute. There is no need to prove that there is a real risk of dissipation of assets (*Pacific Rainbow International Inc v Shenzhen Wolverine Tech Ltd* [2017] HKEC 869, paragraphs 37–39).

## Court Fees

Court fees are inexpensive in Hong Kong. The cost of issuing a writ is HKD1,045 and a further fee of HKD1,045 is payable for each injunction or Norwich Pharmacal application that is made.

## Cross-Undertakings in Damages

A plaintiff who seeks injunctive relief must give an undertaking to pay the defendant any damages the defendant might suffer if it later transpires that the injunction should not have been granted. This is known as a cross-undertaking in damages. Cross-undertakings are given to mitigate the risk of loss that may be suffered by the defendant due to the injunction.

As a condition of granting an injunction, the courts may ask that the plaintiff “fortify” the cross-undertaking (ie, provide a bank guarantee or make a payment into court).

Where there is a strong prima facie arguable case of fraud, the courts do not always order the plaintiff to fortify its undertaking as to damages until after the defendant appears before the court and requests fortification.

Plaintiffs should carefully consider the significance of offering a cross-undertaking in damages, and the risk that they will be ordered to fortify it, before embarking on an application for injunctive relief.

## The Effect on Third Parties

It is a contempt of court for any person notified of an injunction knowingly to assist in or permit a breach of the order. Any person doing so may be imprisoned, fined or have their assets seized.

Generally, the terms of an injunction will not affect or concern anyone outside Hong Kong until it is enforced or declared enforceable outside Hong Kong.

## Prohibition Against Debtors Leaving Hong Kong

RHC Order 44A enables a plaintiff or a judgment creditor (a party with a judgment in its favour), to apply to courts, ex parte, seeking an order prohibiting a debtor from leaving Hong Kong for a “judgment-proof” jurisdiction.

The courts are empowered to grant prohibition orders to “... facilitate the enforcement, securing or pursuance of...” judgments and civil claims involving money (or damages), property or performance of an act.

The test differs pre- and post-judgment, with the latter being less onerous given that the applicant is holding a judgment in their favour. In both cases the applicant must show that there is reason to believe that the debtor is about to leave Hong Kong and the debtor’s departure will likely obstruct or delay judgment or satisfaction thereof.

## 2. Procedures and Trials

### 2.1 Disclosure of Defendants' Assets

#### Mareva Injunctions

Ancillary to the order restricting the defendant from dealing with their assets, a Mareva injunction may also require the defendant to disclose what has become of the plaintiff's property, and also to disclose details of all assets owned or controlled by them, whether in their own name or not.

The Hong Kong courts have the power to grant Mareva injunctions on a worldwide basis and require the defendant to disclose the nature and value of their worldwide assets.

#### Ancillary Disclosure Orders

The court has inherent jurisdiction to order the defendant to:

- provide a statement of their assets; and
- give discovery of documents or answer interrogatories for the purpose of ascertaining the existence, nature and location of those assets.

The standard form Mareva injunction contained in Practice Direction 11.2 refers to assets "whether in his [the defendant's] own name or not, and whether solely or jointly owned". As such, the disclosure order would include assets held in the name of the defendant, assets held jointly with other person(s), as well as those held by nominees on the defendant's behalf.

Disclosure of assets under a Mareva injunction will normally be by affidavit. If the disclosure is unsatisfactory, the court may order a further and better affidavit and, ultimately, cross-examination on affidavit before a judge or examiner.

If a defendant fails to comply with a disclosure order, they may be liable for contempt of court and ordered to pay a fine or sentenced to imprisonment.

As discussed, a plaintiff seeking a Mareva injunction is required to give a cross-undertaking in damages.

### 2.2 Preserving Evidence

#### Anton Piller Orders

Where it is feared that important evidence may be destroyed or suppressed, a plaintiff may obtain a search and seizure order (known as an Anton Piller order) requiring the defendant to permit the plaintiff to enter the defendant's premises and inspect, seize and remove documents relating to the underlying matter into safe custody.

Although an Anton Piller order permits a physical search of the documents at the defendant's premises, it does not amount to a search warrant and therefore no forcible entry to the premises can be made.

The application for an Anton Piller order is made *ex parte* (hence there is a duty to give full and frank disclosure) and is executed without notice to the defendant.

The pre-conditions for making an Anton Piller order are:

- there must be an extremely strong *prima facie* case;
- the potential or actual damage must be very serious;
- there must be clear evidence that the defendant has in their possession relevant materials or documents, and that there is a real possibility that they may destroy such material

- before any inter partes application can be made; and
- the harm to be caused by the execution of the order to the defendant must not be excessive or out of proportion to the legitimate object of the order.

Even if these conditions are satisfied, the court has residual discretion to consider whether to grant an Anton Piller order. Due to their draconian effect, Anton Piller orders are only granted in “rare and extreme cases” where it is necessary in the interests of justice and in terms no wider than is necessary to achieve the legitimate objective of the order.

The plaintiff will be required to give a cross-undertaking in damages as part of the Anton Piller order.

### 2.3 Obtaining Disclosure of Documents and Evidence from Third Parties

For victims who fall prey to fraudsters, the disclosure of details of the wrongdoer is crucial to identify the wrongdoer, trace and secure the lost property and make a recovery. Such disclosure orders are called Norwich Pharmacal orders and are an important tool in combating fraud.

#### Norwich Pharmacal Orders (NPOs)

NPOs are usually sought against banks, who inadvertently handle the stolen funds, and have visibility over when and where they went next, as well as the identity of the account holder. An NPO can also be made against cryptocurrency exchanges.

The information sought by the plaintiff can range from remittance advice and bank statements to bank account-opening documents disclosing the identity of the bank account holder and signatories.

NPOs do not traditionally operate extraterritorially. The Hong Kong courts will not usually require the Hong Kong branch of a foreign bank to disclose information held by the foreign branch. Questions of comity arise because the rights and duties of the foreign branch of the bank will be subject to the laws of the foreign jurisdiction, not the laws of Hong Kong.

However, the recent decision in *A1 and A2 v R1, R2 and R3* [2021] HKCFI 650, expanded the scope of NPOs in this area. This case involved a cross-border fraud running into hundreds of millions of US dollars. The applicants successfully persuaded the Hong Kong court to grant disclosure orders over the Macau branches of two Hong Kong banks. The logic was that both Hong Kong banks were regulated by the Hong Kong Monetary Authority, which requires them to ensure that their overseas branches in Macau comply with extensive record-keeping requirements, including keeping various records for at least five years for the purposes of (among other things) tracing criminal property. On that basis, it was reasonable to assume that the banks would have in their possession documents and information relating to the relevant accounts.

Under Hong Kong law, it is possible to seek an NPO in support of proceedings initiated in other jurisdictions. In *Manufacturer’s Life Insurance Co of Canada v Harvest International Ltd* [2002] 1 HKLRD 828, the Court of Appeal held that the court’s ability to make NPOs is not limited by the Evidence Ordinance (Cap 8) and RHC Order 70, which set out the court’s statutory powers to order discovery in support of foreign proceedings.

#### *The two-step process*

In *Asiya Asset Management (Cayman) Ltd v Dipper Trading Co Ltd* [2019] HKCFI 1090,



the High Court of Hong Kong directed that in non-urgent cases a plaintiff who seeks an NPO against a bank should put the bank on notice of the impending NPO application rather than proceeding *ex parte*.

To prevent the bank from tipping off the wrongdoer in relation to the legal proceedings, the plaintiff should separately apply *ex parte* for a gagging order against the bank, pending the hearing of the application for the NPO.

In *A1 and A2 v R1, R2 and R3*, the court confirmed that the two-step approach should be followed in “all save the most exceptional of cases”. The process of putting the bank on notice and simultaneously obtaining a gagging order to protect the applicant and avoid the bank being put in an otherwise difficult situation of breaching the duty of confidentiality owed to its customer, provides, “the proper balancing of interest between (a) the party seeking the information [...] and (b) the bank’s customer”. The learned judge added that “those safeguards cannot be avoided in the name of convenience or to save costs and are not overridden by the understandable wish to obtain information as quickly and cheaply as possible”.

### *When to apply*

A NPO can be obtained before or after the commencement of proceedings.

Where there are proceedings in progress and an NPO is required to identify further wrongdoers, the order should not be sought in the existing proceedings and a separate originating summons should be issued.

### *Form of NPO application*

The application is made pursuant to the inherent jurisdiction of the court by way of an originating

summons, which should set out the full terms of the orders sought.

The application must also be supported by affidavit evidence setting out:

- the factual background;
- if an application is made without notice, the reason for the without-notice application and the urgency or secrecy of the application;
- evidence to show that the mere witness rule will not be breached (ie, that without the information an action cannot be brought);
- evidence that the respondent has been involved with or mixed up in the wrongdoing;
- the documents or information sought;
- the reason the respondent is believed to be in possession of the documents or information sought;
- the purpose for which the documents and information are required;
- that disclosure is necessary in the interests of justice;
- any other factors relevant to the exercise of the court’s discretion; and
- the cross-undertaking in damages, attaching any evidence in support of the undertaking.

A draft NPO should also be prepared.

### **Pre-action Discovery**

A party may apply for pre-action discovery against any party under RHC Order 24 rule 7A(1).

The documents sought must be shown to be “directly relevant” to an issue arising in the proceedings and necessary for disposing fairly of the cause or matter or for saving costs. A document is “directly relevant” if it is likely to be relied on in evidence by any party in the proceedings or the document supports or adversely affects any

party's case. This would exclude background and "chain of enquiry" documents.

The application is made by an originating summons in expedited form (Form 10 of Appendix A to RHC) with supporting affidavit. The person against whom the order is sought must be made the defendant and served in the usual way.

### Discovery Against Third Parties

A party to an existing action may apply for an order for disclosure of documents held by a person who is not a party to the proceedings (a third party). The application is made pursuant to RHC Order 24 rule 7A(2). The application is made by way of summons in the action, together with a supporting affidavit.

The summons and supporting affidavit must be served on the third party personally, as if it were an originating process, and on all the parties to the action.

The supporting affidavit must:

- specify or describe the documents sought; and
- show that the person against whom the order is sought is likely to have or have had such documents in their possession, custody or power.

The test for relevance in third-party disclosure applications is the same as for other types of discovery, which includes background documents and "chain of enquiry" documents in the Peruvian Guano sense.

## 2.4 Procedural Orders

Ex parte applications are appropriate in cases of urgency or where there are grounds for believing that defendants will take steps to frustrate the

proceedings if they become aware of the application.

A number of procedural orders can be obtained on an ex parte basis, including:

- Mareva injunctions and (where appropriate) ancillary disclosure orders (see **1.7 Prevention of Defendants Dissipating or Secreting Assets** and **2.1 Disclosure of Defendants' Assets**);
- Anton Piller orders (see **2.2 Preserving Evidence**).

The court has jurisdiction to make ex parte orders against, for example, banks for Norwich Pharmacal discovery, but the courts have said that "it would however be hard to think of any appropriate case where it should exercise its discretion to do so on that basis" (*Asiya Asset Management (Cayman) Ltd v Dipper Trading Co Ltd* [2019] HKCFI 1090). The plaintiff must therefore put the bank on notice. This delay, however necessary in the interests of justice to the bank, is frustrating in the context of fraud where time is of the essence.

It should be noted that orders given ex parte will generally operate for a limited time and a substantive, inter partes hearing will be fixed to give the defendant an opportunity to set aside the injunction or amend the orders granted.

In all ex parte applications, there is a duty to give full and frank disclosure of all material matters. If there is any material non-disclosure on the part of the applicant, the order is at risk of being set aside.

## 2.5 Criminal Redress

Law enforcement and civil lawyers frequently work together to recover funds for victims of

fraud. In cases of bank wire fraud, where a victim has been tricked into transferring funds into another bank account as a result of fraud, the victim usually files a report with the Hong Kong police. The report will contain details of the incident such as the time and date of the transfer, brief facts of the incident, name of suspect(s) and financial loss. The report can be filed at any police station or via the E-Report Centre.

The police will usually contact the recipient bank to see if the funds are still in that account. If the matter has been reported promptly, the fraudster may not have had the opportunity to move the funds elsewhere and they may still be in the account. If the funds have been transferred out of the account of the first level recipient, or there is only a nominal amount left, the police usually obtain a warrant ordering the recipient bank to disclose the relevant bank records to identify the second-level recipients.

A practice evolved whereby the police would ask recipient banks to make a suspicious transaction report to the JFIU and then issue a letter of no consent (LNC) to “freeze” the funds in the fraudster’s account. In December 2023, the High Court held that such informal freezing of accounts by the authorities was unconstitutional. However, the Court of Appeal later overturned that decision and restored the LNC regime (see *Tam Sze Leung & Ors v Commissioner of Police* [2023] HKCA 537).

In the meantime, the efficient use of Mareva injunctions is now paramount and victims of fraud would be wise to obtain urgent Mareva relief.

Where a criminal prosecution is in progress, the defendant would usually seek to stay the civil proceedings pending the outcome of the crimi-

nal process. A certificate of conviction is admissible as evidence in a civil action, so a successful prosecution will assist the plaintiff in establishing liability before the civil courts. Whether the plaintiff can, as a practical matter, secure the return of their assets or otherwise successfully enforce any judgment granted by the courts will, as previously discussed, depend on successful tracing and following, freezing of assets and other protective, pre-action steps.

## 2.6 Judgment Without Trial Default Judgment

A plaintiff may obtain judgment without a trial (“default judgment”) where a defendant has failed to give notice of intention to defend and the claim falls within one of the classes of claim under RHC Order 13 rules 1–4 (ie, a claim for a liquidated sum, unliquidated damages, detention of goods or possession of land).

Where the writ is endorsed with multiple heads of claim (eg, a proprietary claim and a claim for monies had and received), it is possible for the plaintiff to abandon the proprietary claim in order to come within the scope of RHC Order 13 rules 1–4.

The requirements for entering judgment by default are:

- that the writ has been duly served;
- that the defendant has not filed an acknowledgment of service within the time required, or an acknowledgement has been returned but contains a statement that the defendant does not intend to defend;
- proof of service of the writ by way of an affidavit of service; and
- that in a claim for the recovery of land, no relief is claimed of the nature specified in

RHC Order 88 relating to mortgage transactions.

The above requirements must be complied with strictly; otherwise the judgment is irregular and may be set aside.

Where the plaintiff is seeking declaratory relief or other relief, which does not fall within RHC Order 13 rules 1–4, and the defendant fails to serve its defence, the plaintiff can apply for default judgment under RHC Order 19 rule 7.

Where the default judgment sought involves a declaration, the courts retain discretion to decide whether to grant such relief, and will only grant declaratory relief where there is a genuine need and justice might not be done if such relief was denied. In cases concerning email frauds where the plaintiff asserts a proprietary claim, the courts have granted declaratory relief in default judgments to secure the plaintiff’s proprietary claim.

Where an acknowledgement of service is filed, the plaintiff must serve a notice in writing of their intention to enter judgment in default of the filing of a defence not less than two clear days before entering judgment (RHC Order 19 rule 8A).

## Summary Judgment

Summary judgment refers to a judgment granted without a trial on the grounds that the defendant has no defence to the claim. The procedures for applying for summary judgment are provided in RHC Order 14. Summary judgment is available to most actions begun by writ and, since 1 December 2021, claims alleging fraud.

The application for summary judgment should be made as soon as possible after notice of intention to defend has been given and after a

statement of claim has been served. The application is made by affidavit, which must:

- verify the facts upon which the claim is made; and
- state that the deponent believes that there is no defence to the claim.

Where a defence has been served, the affidavit should address the allegations made in the defence and explain why the plaintiff believes that there is no valid defence to the claim.

The application must be made promptly, as delay may be a reason for refusing summary judgment.

## 2.7 Rules for Pleading Fraud

It is well established that fraud or dishonesty must be distinctly alleged and sufficiently particularised in pleadings. This does not mean that the words “fraud” or “dishonesty” must necessarily be used. However, the pleadings must set out the primary facts that are relied upon to justify any alleged inference of fraud or dishonesty. It is not open to the courts to infer dishonesty from facts that have not been pleaded.

The courts have inherent jurisdiction to strike out allegations of fraud made without proper evidence. Lawyers also have a professional duty to ensure that there is clear and sufficient evidence to support a pleading of fraud or dishonesty.

## 2.8 Claims Against “Unknown” Fraudsters

Rapidly developing technology is leading to increasingly sophisticated cyber-attacks and new forms of fraud, often conducted in foreign jurisdictions and behind a veil of anonymity or online (further discussed in 7.3 Crypto-assets).

The English courts are innovating in line with these developments and, in 2018, granted the first worldwide freezing order against “persons unknown”. In addition, the English courts have permitted service of freezing orders by way of Facebook and WhatsApp messenger.

The Hong Kong courts have granted injunctive relief against persons unknown, albeit not yet in the context of fraud. In 2016, the Hong Kong courts made an order restraining the disclosure of two audio recordings made by “persons unknown” of a meeting of the Council of the University of Hong Kong. In 2018, an interim injunction was awarded to restrain “persons unknown” from busking and carrying out other outdoor performance activities in a shopping arcade in Hong Kong.

A case has not yet come before the Hong Kong courts against unknown fraudsters, but the courts have already shown that they are committed to adapting to new circumstances and taking an innovative approach in order to assist victims of fraud. When an application is made against “fraudsters unknown”, the relevant English authorities will be highly persuasive and provide a basis for the Hong Kong courts to provide similar relief to victims of online and cyber fraud.

## 2.9 Compelling Witnesses to Give Evidence

A witness in Hong Kong can be compelled to attend court to give evidence by a writ of subpoena. A subpoena can be issued either to obtain oral evidence at trial (subpoena ad testificandum) or to obtain documents (subpoena duces tecum).

The writ of subpoena must be in prescribed form (No 28 or 29 in Appendix A of RHC). Before a subpoena can be issued, a praecipe must be

filed in the High Court Registry together with a note from a judge or master authorising the issue of the subpoena.

Since a subpoena is an order of the court, deliberate failure to obey the order by non-attendance or non-production of documents may amount to contempt, and the intended witness may be liable to a fine or imprisonment.

## 3. Corporate Entities, Ultimate Beneficial Owners and Shareholders

### 3.1 Imposing Liability for Fraud on to a Corporate Entity

An important feature of any fraud claim is the extent to which the knowledge of directors and officers of a company can be attributed to the company.

The starting points are the “primary rule” and the general rules of agency. The “primary rule” looks at the company’s articles of association or company law statutes and identifies whose decisions bind the company. For example, the articles of the company may state that the decision of the board of directors or a majority of shareholders is treated as the decision of the company for a specified purpose. In such a case, the knowledge of the board or a majority of shareholders will be attributed to the company.

These starting points are subject to any special rules of attribution that the court may fashion based on the context (eg, where a particular statutory provision requires such rules so that it is not frustrated) and, importantly in fraud cases, to the “fraud exception”.

The special rules of attribution will depend on the facts of the case and the language and legislative purpose of the relevant statutory provisions (*Moulin Global Eyecare Trading Limited (in liquidation) v The Commissioner of Inland Revenue* (2014) 17 HKCFAR 218).

In deciding whether the “fraud exception” applies, the Hong Kong Court of Final Appeal in *Moulin Global* distinguished the following situations:

- where a company commences legal action against its directors and officers for wrongdoing, which caused loss to the company, the knowledge of the director or officer is not attributable to the company because it would be “absurd and unjust to permit a fraudulent director or employee to be able to use his own serious breach of duty to his corporate employer as a defence”; and
- where a third party takes legal action against the company for the fraudulent conduct of a director or employee, the knowledge of the director or officer is attributable to the company, because the company must take responsibility for such fraudulent conduct, even if the company may be a victim in a way.

## 3.2 Claims Against Ultimate Beneficial Owners

### Common Law

It is well established that a company is a separate entity from its beneficial owners. Beneficial owners are often said to exist behind a “corporate veil” and are protected from liability for the actions of the company.

However, in certain circumstances, the corporate veil can be pierced so that the actions of a company are treated as the actions of its shareholders. When the company has been used as

a vehicle for fraud, it is possible to pierce the corporate veil and bring claims against the beneficial owners and directors of the company. The plaintiff has to establish the following in order to pierce the corporate veil (see *VTB Capital plc v Nutritek International Corp* [2012] EWCA Civ 808):

- the company is involved in some impropriety linked to use of the company structure to avoid or conceal liability; and
- the wrongdoer controls the company at the time of the relevant transaction.

Normally, the court will pierce the corporate veil only when there is clear evidence of fraud. It is legitimate to use a limited liability company as a vehicle of business in order to minimise the risk of business (*Bakri Bunker Trading Co Ltd v Owners and Persons Interested in Ship Neptune* [1986] HKLR 345; *China Ocean Shipping Co v Mitrans Shipping Co Ltd* [1995] 3 HKC 123).

### Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) (CWUMPO)

If, in the course of the winding up of a company:

- any person carries on the business of the company with an intent to defraud creditors, or for any fraudulent purpose, the court may find such a person personally responsible for all or any of the debts or other liabilities of the company (Section 275, CWUMPO); and
- any person misapplies or retains any money or property of the company, they may be compelled to repay or restore the money or property (Section 276, CWUMPO).

For example, if the directors transferred the assets of the company to themselves in the course of the company’s winding up, the direc-

tors may be liable under Section 276 of CWUM-PO.

### 3.3 Shareholders' Claims Against Fraudulent Directors

Shareholders can bring claims against fraudulent directors under both common law and statute.

#### General Principles

Where directors have breached duties owed to the company, or where any person has infringed any rights of the company, the general rule is that the proper plaintiff is the company itself (*Foss v Harbottle* (1843) 67 ER 189).

Where both the company and a shareholder have a cause of action arising from the same conduct, but the shareholder's loss is not a separate and distinct loss and is reflective of the company's loss, the shareholder is not entitled to bring a personal action to recover that reflective loss (*Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204). However, the UK Supreme Court has held that this rule is limited to claims by shareholders where, as a result of actionable loss suffered by the company, the value of their shares or of the distributions they receive as shareholders has been diminished (*Marex Financial Ltd v Sevilleja* [2020] 3 WLR 255 (UKSC)). *Marex* has been applied by the Hong Kong courts (*Xie Li Xin v Law Ka Yan, Thompson and Others* [2022] HKCFI 1591).

#### Common Law Derivative Action

Under common law, a shareholder can commence a derivative action in relation to a fraud on the company (*Edwards v Halliwell* [1950] 2 All ER 1064, 1067). The shareholder has to establish that:

- the wrongdoers have committed fraud on the company; and

- the wrongdoers are in control of the company – the element of control is often stated to be control of voting power in the general meeting (*Burland v Earle* [1902] AC 83, 93-94).

#### Statutory Derivative Action (Pt 14, Division 4, Companies Ordinance)

With the permission of the court, a shareholder can commence a statutory derivative action on behalf of the company in respect of misconduct committed against the company (Section 732, Companies Ordinance). "Misconduct" means "fraud, negligence, breach of duty, or default in compliance with any Ordinance or rule of law" (Section 731, Companies Ordinance).

The court may permit the shareholder to commence a derivative action if it is satisfied that:

- on the face of the application, it appears to be in the company's interests that leave be granted;
- there is a serious question to be tried;
- the company has not itself brought the proceedings; and
- the shareholder has served a written notice on the company in accordance with Sections 733(3) to 733(4) of the Companies Ordinance (unless the requirement has been dispensed with by the court pursuant to Section 733(5)).

#### Statutory Injunction (Pt 14, Division 3, Companies Ordinance)

Sections 728–730 of the Companies Ordinance allow certain individuals, including shareholders, the right to seek an injunction to restrain breaches of the Companies Ordinance or breaches of fiduciary duties by directors.

Shareholders and creditors of the company whose interests have been, are or would be

affected by the conduct can seek an injunction under Section 729 of the Companies Ordinance.

## 4. Overseas Parties in Fraud Claims

### 4.1 Joining Overseas Parties to Fraud Claims

#### Joinder of Parties

Under RHC Order 15 rule 6, the courts can add any of the following persons as a party to an action:

- any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute can be completely determined; or
- any person with whom there may exist a question connected to any relief or remedy claimed by a party to the action, which the court considers it just and convenient to determine as between the person and that party as well as between the parties to the cause or matter.

#### Extraterritorial Jurisdiction

There are generally three distinct ways for a civil plaintiff to establish the jurisdiction of the Hong Kong courts:

- submission to jurisdiction – jurisdiction of the Hong Kong courts may be established by demonstrating that the defendant has, or is deemed to have, voluntarily submitted to it;
- service of process on the defendant within Hong Kong; and
- service of process on the defendant outside Hong Kong – in most cases, leave from the court must be obtained by making an ex parte application supported by affidavit evidence.

The power of the Hong Kong courts to exercise extraterritorial jurisdiction is subject to RHC Order 11, which sets out the requirements for service of process out of the jurisdiction.

#### Service of Writ out of the Jurisdiction

If a foreign party is added as a defendant to a claim, the plaintiff has to seek leave from the court under RHC Order 11 to serve the writ out of the jurisdiction. An application for leave is typically made ex parte with an affidavit in support. The plaintiff must satisfy the court that:

- the claim falls within one or more of the “gateways” under RHC Order 11 rule 1(1) (or at least a good arguable case that it does); and
- there is a serious issue to be tried on the merits of the underlying claim.

The court will also consider whether Hong Kong is the appropriate forum to hear the claim.

#### Necessary person gateway

The gateway in RHC Order 11 rule 1(1)(c) is helpful in fraud claims and permits servicing out in actions begun by writ where:

- one of the defendants, the so-called anchor defendant, has been duly served (whether within or out of the jurisdiction);
- the person out of the jurisdiction is a “necessary or proper party” to the claim;
- genuine, properly commenced proceedings are pending before the Hong Kong courts which involve a real issue, which the plaintiff may reasonably ask the court to try; and
- the Hong Kong court is the appropriate forum to hear the case, but bearing in mind the action already pending here.



## *Constructive trust gateway*

Another important gateway is RHC Order 11 rule 1(1)(p), which provides that service of a writ out of the jurisdiction is permissible where: “the claim is brought for money had and received or for an account or for other relief against the defendant as a constructive trustee, and the defendant’s alleged liability arises out of acts committed whether by him or otherwise, within the jurisdiction.”

Separately, RHC Order 69 sets out the requirements for service of process within Hong Kong from a country or place outside Hong Kong.

## 5. Enforcement

### 5.1 Methods of Enforcement Enforcement of Criminal Offences

The principal authorities that investigate criminal offending in Hong Kong are:

- the Hong Kong Police Force;
- the Commercial Crime Bureau;
- the Cyber Security and Technology Crime Bureau;
- the Organised Crime and Triad Bureau;
- the JFIU, which is a joint operation of the Police and the Hong Kong Customs & Excise Department focusing on anti-money laundering and terrorist financing; and
- the Securities and Futures Commission (SFC) which deals with insider dealing offences and market abuse.

These authorities, in conjunction with the Department of Justice, prosecute individuals and corporate entities suspected of committing an offence, and the Hong Kong courts decide the question of guilt. The burden of proving the commission of an offence by the defendant is

on the prosecuting authority and the standard of proof is “beyond reasonable doubt”.

### Enforcement of a Judgment or Order *Garnishee order*

Where a plaintiff has obtained a judgment in their favour for a specified sum (usually the amount received by the defendant in the course of the fraud), the defendant becomes a judgment debtor, and the plaintiff can apply to court for a garnishee order. A garnishee order requires a person who owes the judgment debtor a debt to repay that debt directly to the judgment creditor. A typical garnishee order requires the judgment debtor’s bank to pay the judgment debtor’s debt directly to the judgment creditor.

The garnishee order is obtained in two stages. The first is an *ex parte* paper application. The judgment creditor files a draft garnishee order to show cause, supported by an affidavit explaining why the order should be granted. Once granted, a sealed copy must be served on the garnishee bank and, thereafter, on the judgment debtor. The funds in the judgment debtor’s account will be frozen as soon as the bank is aware of the garnishee order to show cause. Following a specified period of time (which gives the judgment debtor a final chance to object and apply to have the order set aside), there will be a short hearing at which, all going well, the court will make the garnishee order absolute. Once the garnishee order absolute is served on the bank (or other paying party), the bank should release the funds to the judgment creditor.

### *Charging order*

A charging order is a charge on an interest in land or over securities. If the judgment debtor does not satisfy the judgment following the making of a charging order, the judgment creditor

can enforce the charging order by selling the charged land or securities.

In deciding whether to make a charging order, the court considers the circumstances of the case as well as the personal circumstances of the debtor, and whether the creditor or the debtor would be unduly prejudiced by the making of the order.

The Hong Kong courts have regard to proportionality and would not make a charging order on an asset of considerable value in respect of a relatively small debt.

A charging order will not be made where the court is aware that the debtor is, or is likely to be, insolvent. In those circumstances the making of a charging order would give one creditor an advantage over others in the debtor's liquidation or bankruptcy.

### *Writ of execution*

A writ of execution directs a bailiff to seize the judgment debtor's goods, chattels and other property to satisfy the judgment debt. The judgment creditor has to issue a writ of execution of the type it requires, eg:

- a writ of fieri facias, to obtain a levy on the debtor's goods;
- a writ of possession, to obtain repossession of land; or
- a writ of delivery, for the delivery of goods.

### *Examination order*

An examination order is an order for cross-examination of the judgment debtor on oath in open court. Usually, the Registrar (or their appointee) will carry out the cross-examination.

The judgment creditor can apply ex parte for an examination order, which, if obtained, should be served personally on the judgment debtor.

### *Winding-up petition/bankruptcy*

If the judgment debtor can be shown to be insolvent, the judgment creditor can present a winding up petition against a debtor company or instigate bankruptcy proceedings against an individual debtor.

Where a judgment debtor fails to wholly satisfy a judgment following execution that is prima facie evidence that the debtor is unable to pay their debts as they fall due.

However, the insolvency process is usually instigated by issuing a statutory demand. A statutory demand requires payment of the debt within 21 days of service and, if the judgment debtor fails to pay or dispute the debt timeously, a petition can be presented.

If the court grants the petition, a liquidator or trustee in bankruptcy will be appointed (as the case may be) to gather in the judgment debtor's assets and pay their debts.

Winding up and bankruptcy are class remedies, which benefit the whole body of creditors. If there are sufficient assets, the creditors will be paid a dividend from the assets of the debtor. The judgment creditor who petitioned for appointment of the liquidator/trustee has no special priority (unlike, for instance, secured creditors) and will rank pari passu with all other creditors of the same class.

## 6. Privileges

### 6.1 Invoking the Privilege Against Self-incrimination

Protection against self-incrimination is a fundamental tenet of the common law. In Hong Kong, the right is enshrined in the Hong Kong Bill of Rights Ordinance (Cap 383). When invoked, no adverse inference can be drawn from remaining silent. This is because it is unfair for a person to have the right to remain silent only for their silence to be put against them at trial.

However, the right not to self-incriminate is abrogated in some specific circumstances.

In 2012, the Hong Kong Court of Final Appeal held that a person who was not a suspect was not allowed to invoke their right to silence during a POBO investigation. Subject to a limited use order, the witness was required to provide the information and documentation requested.

In 2019, the courts clarified the position on self-incrimination in relation to Section 181 notices issued by the SFC (being a preliminary notice for obtaining trading information), confirming that claiming privilege against self-incrimination can be a reasonable excuse for non-compliance. This is significant because the SFC issues a significant number of Section 181 notices annually.

That said, the privilege will not usually apply where the documents requested by the SFC are “pre-existing materials [that] have existence independent of the will” of the person claiming the privilege. The privilege may only extend to “materials created in response to the investigation”.

### 6.2 Undermining the Privilege Over Communications Exempt From Discovery or Disclosure

Privilege will not protect anything said or done to further a crime.

If communications that would otherwise be protected by legal professional privilege are made to further fraud and if the party seeking the disclosure can establish a strong prima facie case of fraud, then the disclosing party cannot assert legal professional privilege. To trigger the exception, there must be a definite charge of fraud or illegality. Fraud here is used in a relatively wide sense, encompassing general iniquity and civil fraud.

Therefore, legal professional privilege does not extend where, for example, a solicitor is consulted on how to carry out an illegal act. In an English action against ex-employees for conspiracy to injure, breach of the duty of fidelity and breach of confidence, discovery of documents relating to the incorporation of the corporate structure used to effect the alleged fraud was ordered. The defendants argued that legal professional privilege applied. The court disagreed, holding that a client loses legal professional privilege in cases of fraud and it was irrelevant whether the solicitor was aware of the fraud or illegality (*Gamlen Chemical Co (UK) Ltd v Rochem Ltd (No 1)* 1983 RPC 1).

The courts are entitled to look at the document in question to determine whether privilege should be upheld.

However, the courts are very reluctant to deprive a party of legal professional privilege on an interlocutory application. Each case is judged on its facts. The courts will strike a balance between

legal professional privilege considerations and the gravity of the fraud charge.

It is also worth noting that privilege is not lost if the purpose of the document was to ask, or warn against, the results of contemplated acts (Butler v Board of Trade [1971] Ch 680).

## 7. Special Rules and Laws

### 7.1 Rules for Claiming Punitive or Exemplary Damages

The general objective of punitive or exemplary damages is to punish, deter and denunciate (Allan v Ng & Co (a firm) [2012] 2 HKLRD 160). It is not therefore possible to claim punitive or exemplary damages as a form of compensation.

There are three situations where punitive or exemplary damages may be awarded (Rookes v Barnard [1964] UKHL 1):

- (a) in cases of oppressive, arbitrary or unconstitutional actions by the servants of government;
- (b) where the defendant's conduct was "calculated" to make a profit for themselves; and
- (c) where expressly authorised by statute.

A case of fraud may fall within category (b) above, and therefore punitive or exemplary damages may be awarded.

It is important to note that exemplary damages are a remedy of last resort. Exemplary damages will only be awarded if the remedies available to the court are inadequate to punish and deter the defendant (Allan v Ng & Co).

Awards of exemplary damages should, in general, be moderate (Allan v Ng & Co).

As a matter of procedure, the plaintiff must specifically plead their claim for exemplary damages, together with the facts on which they rely (RHC Order 18 rule 8(3)).

### 7.2 Laws to Protect "Banking Secrecy" Banking Secrecy

In Hong Kong, a bank owes a qualified duty of secrecy to its customer.

#### *Common law duty*

The leading case on banks' duty of secrecy is *Tournier v National Provincial and Union Bank of England* (1924) 1 KB 461, where Atkin LJ defined the extent of the duty as going beyond the balance in the account, extending at least to all transactions that go through the account, and any securities. He added that the duty extends to information obtained from other sources than the customer's account if the information was obtained as a result of the relationship between banker and customer. The duty persists after the closure of the account.

However, the duty of confidence that a bank owes to its customer is not absolute and is qualified where:

- disclosure is required by law;
- there is a duty to the public to disclose;
- the interests of the bank require disclosure; and
- disclosure is made further to express or implied customer consent.

#### *Official secrecy – Banking Ordinance (Cap 155)*

Section 120 of the Banking Ordinance sets out banks' statutory duty to preserve the secrecy of customer affairs and circumstances where banks may share customer information with regulators.

Section 120(5) provides that the duty of secrecy does not apply in certain circumstances, such as:

- disclosure of information during criminal proceedings;
- disclosure to the ICAC and SFC; and
- disclosure for anti-money laundering and counter-terrorist financing purposes.

### *Code of Banking Practice*

The Code of Banking Practice (the “Code”) is issued jointly by the Hong Kong Association of Banks (HKAB) and the Deposit Taking Companies Association (DTCA), and is endorsed by the Hong Kong Monetary Authority (HKMA). Authorised institutions must observe the Code when dealing with their customers. Failure to observe the Code could lead to disciplinary action by the HKMA.

The Code sets out certain requirements in relation to security of customer information. For example, the Code provides guidance on keeping customers’ affairs private, and on confidential and electronic banking services.

### *Personal Data (Privacy) Ordinance (Cap 486)*

Additionally, a bank is required to keep certain customer information private under the Personal Data (Privacy) Ordinance (Cap 486).

### *Seeking Evidence in Fraud Claims*

#### *Banker’s record – Evidence Ordinance (Cap 8)*

If the bank is not a party to the proceedings, a court order is required to compel production of a banker’s record as evidence in court (Section 20(2), Evidence Ordinance).

On the application of any party to any proceedings, the court may order that the party has the

right to inspect and take copies of any entries in a banker’s record for any of the purposes of such proceedings (Section 21, Evidence Ordinance).

“Banker’s record” includes:

- any document or record used in the ordinary business of a bank; and
- any record so used that is capable of being reproduced in a legible form (Section 2, Evidence Ordinance).

### *Bankers Trust orders*

A Bankers Trust order directs a bank to disclose certain information. The information disclosed is wide-ranging and the court may order disclosure of correspondence, cheques and banking records. A Bankers Trust order is usually made against banks or professional advisers who either hold the misappropriated funds or through whom those funds have passed.

The courts have also made Bankers Trust orders against cryptocurrency exchanges (see, for example, *Fetch.ai Ltd & Anor v Persons Unknown Category A & Ors* [2021] EWHC 2254 (Comm)).

Following the two-step process set out in *Asiya Asset Management* (see **2.3 Obtaining Disclosure of Documents and Evidence From Third Parties**), applications for Bankers Trust orders should be made on an inter partes basis whenever possible.

Bankers Trust orders can be sought in aid of an interlocutory application for a Mareva or Anton Piller order. Similarly, Bankers Trust orders are sometimes granted where a plaintiff claims a proprietary interest in assets held by the defendant.

As a condition of a Bankers Trust order being granted, the applicant may be required to:

- give an undertaking in damages;
- pay the bank's expenses; and
- agree to use the documents disclosed for the purpose of tracing only.

### *Indictable offences*

A bank can be compelled to disclose customer information by virtue of a disclosure notice under the Police Force Ordinance (Cap 232) (PFO). Section 67(1) of the PFO gives the Commissioner of the Police the power to order the disclosure, provided that the Commissioner has good reason to suspect that an indictable offence has been committed, and it is useful for the purpose of investigating such an offence or apprehending the offender.

### *Organised and Serious Crimes Ordinance (OSCO), anti-money laundering and anti-terrorism*

A bank can also be compelled to disclose customer information under the OSCO.

Under Section 25A(1) of the OSCO, if a person (including, therefore, a banker) knows or suspects that property represents the proceeds of an indictable offence, they must disclose the evidence of that knowledge or suspicion, to an authorised officer.

In addition, the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap 615) imposes statutory customer due diligence and record-keeping obligations on financial institutions, including banks. For example, banks are required to scrutinise transactions and consider whether they are in keeping with the customer's business and risk profile, to identify transactions that are "com-

plex, unusually large in amount or of an unusual pattern" and "have no apparent economic or lawful purpose", and record their findings in writing (Section 7 of Schedule 2). The Ordinance sets out the framework for investigations into money laundering and terrorist financing and there are various aspects (ie, the investigator's power to require production of customer records and other relevant documents) which qualify the bank's duty of confidentiality.

### **7.3 Crypto-assets**

Hong Kong law treats crypto-assets as property: see *Re Gatecoin* [2023] HKCFI 914. The position is the same under English law (*AA v Persons Unknown* [2019] EWHC 3556 (Comm)).

### **Injunctions**

It is possible to obtain both proprietary and Mareva injunction relief in Hong Kong in relation to crypto-assets. In *Yan Yu Ying v Leung Wing Hei* [2023] HKCFI 3160, the plaintiff obtained a proprietary injunction to restrain the defendant from dealing with Bitcoin and assets up to the value of HKD328,363,760. The court granted the proprietary injunction, but having regard to the balance of fairness, refused to grant an interim Mareva injunction. However, the court did not rule out the possibility of granting a Mareva injunction in relation to crypto-assets in a suitable case in future and this was the outcome in *Nico Constantijn Antonius Samara v Stive Jean-Paul Dan* [2019] HKCFI 2718, [2021] HKCFI 1078, [2022] HKCFI 1254.

Tracing cryptocurrencies can be straightforward because:

- blockchain identifies cryptocurrency transactions with a transaction hash, which is a unique string of characters given to every

transaction verified by and added to the blockchain; and

- the senders and recipients of cryptocurrencies are identified by their wallet addresses.

However, cryptocurrencies can be difficult to trace when fraudsters mix multiple sources of funds for lengthy and random periods of time, and then redirect the currencies to their destination addresses. In these circumstances claims may be met by a change of position defence or the defendant may claim that they are a bona fide purchaser for value without notice of the fraud.

## **Norwich Pharmacal Orders**

It is possible to obtain NPOs against cryptocurrency exchanges based in Hong Kong. A cryptocurrency exchange served with an NPO can be compelled to provide information, including the source and destination of the cryptocurrencies, and customer information and the wallet operators' IP addresses. This information will assist a plaintiff to bring both personal and proprietary claims. Applying *Fetch.ai Ltd & Anor v Persons Unknown Category A & Ors* [2021] EWHC 2254 (Comm), the authors have obtained Bankers Trust orders and NPOs against cryptocurrency exchanges operating in Hong Kong which were registered abroad.

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