

MALAYSIA'S FIRST LEGAL REMEDIES AGAINST "PERSONS UNKNOWN"

INTRODUCTION

Zschimmer & Schwarz GmbH & Co KG Chemische Fabriken v Persons Unknown & Anor [2021] 7 MLJ 178 is Malaysia's first legal action against "Persons Unknown" in light of a push payment fraud. The judgment has provided important clarification on the remedies against "Persons Unknown". The Malaysian High Court granted a Mareva Injunction and a Proprietary Injunction against the fraudsters including the "Persons Unknown".

Push payment fraud has become one of the fastest-growing cybercrimes. It happens when fraudsters deceive individuals by impersonating a business and lead them to make payments to a bank account controlled by the fraudsters. Whilst fraud cases of this nature are often being reported, the identity of the fraudster is not always known. This leaves victims with great uncertainty as they may not know how to seek redress against "Persons Unknown".

BRIEF FACTS OF THE CASE

The Plaintiff, Zschimmer & Schwarz, a German company, was exchanging emails with its business counterpart in South Korea, Real KoWorks. The fraudster, also known as the 1st Defendant, being "Persons Unknown", infiltrated the email communications between the Plaintiff and Real KoWorks using multiple fake email addresses and executed the fraud to deceive the Plaintiff into mistakenly paying the commission into the 2nd Defendant's bank account in Malaysia. The Plaintiff made a payment of approximately €123,014.65. The 2nd Defendant is a sole proprietor of a company, who owns the bank account in which the Plaintiff's monies were paid. His identity was known.

The Plaintiff eventually discovered the fraud when Real KoWorks informed the Plaintiff that it did not receive any payment. Based on the above-mentioned facts, the Plaintiff applied for a proprietary injunction and a Mareva injunction (on an urgent ex parte basis) against the 1st Defendant and the 2nd Defendant.

ANALYSIS

I. Court Can Grant Orders Against “Persons Unknown”

The Court granted interlocutory orders against the “Persons Unknown”. This decision of the court is consistent with English case law which has allowed for similar injunctive orders against “Persons Unknown”. The Court adopted the test set out by the UK Supreme Court in ***Cameron v Liverpool Victoria Insurance Co Ltd [2019] 3 All ER 1 (SC)***, where it stipulates that the Defendant must be described in a way that makes it possible in principle to locate or communicate with him. Likewise, the ***CMOC Sales & Marketing Limited v Persons Unknown and 30 others [2018] EWHC 2230*** was also applied, where it states that the description of the “Persons Unknown” must be sufficiently certain to identify both those who are included and those who are not.

Further, the court emphasised that the Rules of Court 2012 does not prevent the making of an order against “Persons Unknown”. In fact, Order 89 of the Rules of Court 2012 for summary proceedings for possession of land allows for a defendant reference to “Persons Unknown”.

The Plaintiff merely needs to establish a good arguable case for the Court to apply the “Persons Unknown” jurisdiction which is established in ***CMOC v Persons Unknown [2017] EWHC 3599 (Comm)***. An important point to note is, in such cases, the identity of Defendants will be amended and the number of defendants will also be expanded following further investigation of the recipients of those monies.

II. Servicing Claims by Way of Email and Advertisement Against “Persons Unknown”

It is impracticable to effect personal service on the Persons Unknown as his/their whereabouts are unknown. In such circumstances, the Court may make an order for substituted service of a document requiring personal service, as per Order 62 Rule 5(1) of the Rules of Court 2012. The proposed methods of substituted service should be those that would most likely bring the proceedings to the notice of the defendant.

As such, the Court in this case allowed for the substituted service to be effected by emails which was the only known communication method with the 1st Defendant. The Court also permitted the Plaintiff to effect service by inserting an advertisement in a local newspaper. These are the two most practicable methods that would most likely bring the proceedings to the notice of the “Persons Unknown”.

III. Court Can Grant Parallel Proprietary Injunction and Mareva Freezing Injunction

The Court in this case granted parallel remedies of a proprietary injunction and a Mareva freezing injunction, which is often done in fraud cases. It highlighted the difference between the two remedies. A proprietary injunction is to preserve assets in which a plaintiff has a proprietary claim, whereas a Mareva injunction is designed to protect a plaintiff against dissipation of assets against which he might execute judgment. In granting the injunctions, the court based its judgement on the following principles:

Propriety Injunction

The English Court decision of **AA v Persons Unknown [2020] 4 WLR 35** was followed in respect of the three requirements of granting a proprietary injunction. First, the Plaintiff must show that there is a serious issue to be tried on the merits. Secondly, the balance of convenience must be in favour of granting an injunction. Lastly, the Court must decide whether it is just and convenient to grant the injunction. In the case, the Court agreed that the requirements are met and averred that the Plaintiff is entitled to seek an account of profits which was obtained from the use of the Plaintiff's monies as constructive trust arises from such profits.

Mareva Injunction

The principles set out in **Aspatra Sdn Bhd & 21 Others v Bank Bumiputra Malaysia Bhd & Anor [1988] 1 MLJ 97** were adopted when granting the Mareva Injunction. The Plaintiff had to show that it has a good arguable case. Subsequently, the Defendants must have assets within the jurisdiction. Thirdly, the Plaintiff had to show a risk of dissipation of assets. In this case, the Court was of the view that such risk exists because there was an actual dissipation of asset by the 2nd Defendant. Interestingly, the Court stipulated that even a lack of probity and honesty i.e. the use of fake email addresses can be determinative in concluding that there is such a risk of dissipation.

In short, both types of injunctions can help the plaintiff to preserve and assert his proprietary interest in the assets until the full determination of the legal action.

CONCLUSION

This ground-breaking court decision has put to rest any doubt or uncertainty on whether interlocutory orders could be granted against "Persons Unknown" and the court's ability to grant a proprietary injunction. Furthermore, substituted service has now been further elaborated to include servicing through email and advertisement in situations where personal service is impracticable.

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