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Wire Fraud and Email Scams – Think Fast and Act Smart

There has been a dramatic increase in wire fraud globally. Here is a simple, practical guide on how to recover lost funds diverted to HK and some tips on how to prevent wire fraud.

3 key steps for victims

1. Contact the bank to cancel or revert the wire transfer and request them to notify the recipient bank immediately to recall the remittance.
2. Report the matter to the local police and to the HK police at (www.erc.police.gov.hk/cmisercc/CCC/PolicePublicPage?language=en). The HK police have a discretion to issue a 'Letter of No Consent' ("**LNC**") over the concerned bank account which serves as a temporary freeze (normally for no more than 6 months), but keep in mind that the police retain the discretion to unfreeze the account anytime. The High Court has recently expressed concerns over the LNC regime and held that it disproportionately interferes with the right to the use of one's own property.
3. Engage solicitors to assist with the process of recovery. Reporting to the police is not enough. It is also necessary to simultaneously commence civil proceedings to recover the lost funds provided the funds still remain in the bank account.

Time is of the essence when it comes to tracing and recovering funds and the slightest delay on the victim's part can risk dissipation of the funds.

Civil proceedings for recovery

Civil proceedings: The proceedings are commenced by issuing a Writ of Summons setting out the basis and the relief sought of the claim and serving it on the HK account holder.

The defendant has a short period of time to indicate whether it intends to contest the proceedings. Fraudsters often remain silent, which enables the victim to apply for a default judgment.

Upon obtaining default judgment, garnishee proceedings can be commenced to enforce the judgment against the funds in the bank account. The bank normally does not contest the proceedings. Once the order is obtained, the bank is able to release the funds to the victim's designated bank account.

If the proceedings are uncontested, the recovery process takes approximately 6 to 8 months in straightforward cases subject to the Court's capacity.

Injunction: Where substantial funds are involved which have been frozen by the HK police, it is also advisable to seek an injunctive relief to freeze the HK bank account. An injunction application is required to be made promptly. It is costly to obtain but offers additional protection as the police may withdraw the LNC at any time.

Suing the recipient bank is not recommended as it does not owe the victim any duty of care. Likewise, pursuing the individuals behind a corporate account holder is challenging as it is difficult to establish personal liability and they are likely to be in foreign jurisdictions with no identifiable assets, making both service of documents and enforcement difficult.

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Tracing

- The standard form of the injunction order includes a term ordering the defendant to disclose its assets, including their value, location, etc.
- Ancillary disclosure orders can also be sought against the bank as part of the injunction application.
- A Norwich Pharmacal application can be made against a bank if the victim does not know the identity and address of the wrongdoer but only the relevant account number, or if the victim wants to obtain details of the status of the funds before deciding the steps for recovery. The application can be made without commencing any proceedings against the account holder. Pursuant to this application, banks can be directed to disclose bank records such as bank account opening forms, which can help identify and locate the wrongdoer, bank statements, remittance advices, etc. If it transpires that the funds have been transferred out, the victim may need to apply for separate disclosure orders against the next layer of recipient(s) in order to ascertain the status of those funds. The whole process can be quite expensive. Generally, a gagging order is sought against the relevant bank at the outset so that the bank is prohibited from notifying the account holder (i.e., its client) about the intended proceedings.
- An application under section 21 of the Evidence Ordinance can be made against a bank to obtain bank records in ongoing civil proceedings.

Defence

It is possible that the recipient may have been innocently caught up in the fraud in which case it would seek to mount a defence to show that it did not participate in the fraud and/or the proceeds are not related to the proceeds of fraud but pertain to genuine transactions. The recipient may also seek to argue that it has already remitted out the monies while acting in good faith and without notice of the victim's interests.

If the defendant has no defence or puts forward a shadowy defence, the victim can consider applying for a summary judgment which can be obtained at an early stage in the proceedings without a full trial and can help minimise the time and costs of pursuing recovery. Historically, summary judgment was not available in cases involving an allegation of fraud but recent amendments to the High Court rules have removed the fraud exception.

Security for costs

An important thing to bear in mind for overseas victims is that HK courts have the power to order a foreign plaintiff to give security for the defendant's costs of defending the action in certain circumstances. This is to protect the defendant from chasing after the plaintiff in a foreign jurisdiction for its costs in the event that it is successful in defending the proceedings. The amount of security is in the discretion of the Court.

If the defendant seeks to defend the proceedings and applies for security for costs, it can have a significant impact on the legal fees of the victims. Continuing to pursue the action in these circumstances can be very expensive and sometimes even disproportionate to the amount of the claim involved.

Practical tips to prevent wire fraud

- Regular training sessions on scams and best practices.
- Never rely on a single source of instructions for payment requests or changes to payment methods. Double check email addresses, spelling mistakes, and verify instructions by phone.
- Research before investing. Verify licenses and beware of promises of high rates of return. If the offer seems too good to be true, it probably is too good to be true.

Contact



Kenix Yuen
Partner
+852 3405 7608
kenixyuen@gallhk.com



Ashima Sood
Senior Associate
+852 3405 7628
ashimasood@gallhk.com