

Defending Unjust Enrichment Claims by Original Owners of Funds in Fraud Cases

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Introduction

It is increasingly prevalent to see individuals or businesses who inadvertently received proceeds of fraudulent transactions (the “**Innocent Recipient**”) face legal challenges from the original owner of the funds (the “**Original Owner**”) that seek restitution through unjust enrichment claims. This situation typically arises when a fraudster deceives the Original Owner, misappropriates its money, and transfers it or a part thereof to the Innocent Recipient who is unaware of the fraud. The Innocent Recipient may then be sued by the Original Owner in respect of the funds on the ground that the Innocent Recipient has been unjustly enriched at the Original Owner’s expense.

In our previous blog posts [To Freeze or Not To Freeze](#) and [Proactive Measures and Legal Remedies Against Corporate Document Forgery](#), we have provided some practical and immediate tips to victims of fraud (whom we also frequently represent). Now in this blog post, we will look at the problem from another angle and explore how the Innocent Recipient can defend such unjust enrichment claims and protect its position.

The Legal Framework for Unjust Enrichment

Unjust enrichment offers a restitutionary claim where a party seeks to recover money that has been unjustly transferred to another party. In Hong Kong, the Courts apply a four-step test to establish an unjust enrichment claims, as outlined in *Shanghai Tongji Science & Technology Industrial Co Ltd v Casil Clearing Ltd* [2004] 2 HKLRD 548:-

- (1) Was the defendant enriched (i.e. Did the defendant obtain a benefit)?
- (2) Was the enrichment at the plaintiff’s expense?
- (3) Was the enrichment unjust (e.g. due to fraud, mistake or failure of consideration)?
- (4) Are any of the defences applicable?



In the context of fraud, the Original Owner may argue that the Innocent Recipient has been unjustly enriched at the Original Owner's expense and has no basis to retain such funds. However, there are several defences available to the Innocent Recipient to such claims, and we will focus on the most common two of them here.

Defences Available to the Innocent Recipient

1. Bona Fide Purchaser for Value Without Notice

To establish the 'bona fide purchaser' defence, a defendant needs to prove the following elements as quoted in *BCPE Diamond Holdco SRL v Sunwe Plastic HK Ltd & Ors* [2024] HKCFI 3370:

- (1) he has the legal title in the property in question;
- (2) he has acted in good faith;
- (3) he has given valuable consideration for the property; and
- (4) he had no notice of the prior equity.

This defence protects the Innocent Recipient if it engaged in a legitimate transaction for value with the fraudster and is unaware of the funds' illicit origins.

What is 'good faith' is determined on a case-by-case basis. For example, one may be found to have acted in good faith if what was done in the relevant transaction did not deviate from its standard business practices or similar previous dealings.

By way of illustration, the bona fide purchaser defence may apply when the Innocent Recipient receives the funds from the fraudster in good faith in its ordinary course of business, provides valuable consideration (e.g., goods, services, or payments) for the said funds, and has no notice / knowledge of the Original Owner's entitlement to the funds.

2. Change of Position

To establish the 'change of position' defence, the defendant must prove the following elements set out in *Zhang Kan v SPH (Hong Kong) International Trading Co Ltd* [2023] 4 HKLRD 544 at [28]:-

- (1) that there was a causative link between the receipt of the benefit and its change of position, so that but for the receipt of the benefit, its position would not have changed; and



(2) its position has changed in circumstances which make it inequitable for it to be required to make restitution to the plaintiff.

While the ‘change of position’ defence is often linked with the ‘bona fide purchaser’ defence, ‘change of position’ is different in that it focuses on the inequitable consequences of ordering the defendant to make restitution. The defendant does not necessarily have had engaged in any transaction for value in respect of the funds.

For example, if the Innocent Recipient has spent, transferred, or otherwise dissipated the funds in good faith believing them to be legitimately received, the ‘change of position’ defence may be relevant.

However, one should note that where the alleged transaction or change of position involves unlawful acts under domestic or foreign laws or contravenes public policies, Hong Kong Courts may reject such defences and allow the restitutionary claim of the plaintiff: *Wong Chi Hung v Lo Wing Pun and Another* [2025] HKCA 370.

A Successful Example

AXHT Company Limited v Wing Wo Lung Company Limited and Another [2024] HKCFI 3678 is an example where a defendant successfully defended the plaintiff’s claim in (among other grounds) unjust enrichment, based on the doctrines of **(1) bona fide purchaser for value without notice** and **(2) change of position**.

In this case, the plaintiff alleged that it had been defrauded by a Mr. Soe (the 2nd Defendant; the “**Fraudster**”) to make payments to the Fraudster’s bank account. A sum of HK\$945,000 (the “**Sum**”), being part of the said payments, was subsequently transferred to the accounts of, among other persons, the 10th Defendant (“**D10**”).

It was D10’s case that he had entered into a provisional sale and purchase agreement with the Fraudster (the “**Agreement**”), under which D10 agreed to sell and the Fraudster agreed to purchase certain landed properties and interests in development projects owned by D10. The Sum was the partial settlement of the further deposit under the Agreement, which was subsequently forfeited by D10 due to the Fraudster’s default in proceeding with the Agreement as required.

The Court found that D10 was indeed a bona fide purchaser for valuable consideration without notice of the Fraudster’s alleged fraud or wrongdoing, as the Sum was received by D10 with a legitimate commercial purpose and no evidence showed that D10 had known the fraud or any facts which should have led him to



make enquiries which would have revealed the probable existence of the plaintiff's rights. D10 was found to have provided valid and sufficient consideration for the Sum by (1) the discharge of part of the further deposit under the Agreement and (2) the contractual arrangement that D10 would make the relevant properties for sale to the Fraudster upon completion. D10 was entitled to forfeit and retain the Sum by reason of the Fraudster's failure to complete the Agreement.

Turning to the defence of change of position, the Court ruled that, by committing to the Agreement and putting the relevant properties off the market between contract and completion, D10 had forgone an economic opportunity which could constitute a sufficient detriment for this defence. This constitutes anticipatory change of position on the part of D10, who had acted in good faith without notice of the Fraudster's fraud or wrongdoings.

Application to the Innocent Recipient

As such, the Innocent Recipient may have a defence where it has acted in good faith without notice / knowledge of the fraud or prior equity, for instance:-

- The Innocent Recipient received the relevant funds from the fraudster or a third party in exchange for goods or services supplied to the fraudster or that party; or
- The Innocent Recipient has spent or transferred the funds received (e.g. to pay suppliers, settle debts or make investments) in good faith.

Practical Strategies for the Innocent Recipient

To avoid liability and/or strengthen their defence against potential unjust enrichment claims, the following strategies could be adopted:

- 1. Conducting Due Diligence:** Businesses should implement anti-money laundering (AML) and know-your-customer (KYC) procedures to verify the source of funds before entering into transactions in order to avoid becoming a recipient of crime proceeds. This could also support the contention that the business was acting in good faith and had carried out the reasonable level of due diligence required when entering into the relevant transaction(s). (For more tips on AML measures, please see our previous blog post [here](#).)
- 2. Documenting Transactions:** It is crucial for both individuals and businesses to maintain good records of their transactions with third parties, including the



relevant contracts, invoices, payment records and correspondence. These documents could be important evidence in establishing the relevant defences.

3. **Reporting the Matter to the Police:** Pursuant to s.25A of the Organized and Serious Crimes Ordinance (Cap. 455), a person who knows or suspects that any property (a) represents any person's proceeds of, (b) was used in connection with or (c) is intended to be used in connection with an indictable offence shall as soon as it is reasonable for him to do so disclose that knowledge or suspicion, together with the basis thereof, to an authorized officer. The Innocent Recipient may therefore have a duty to report the matter to the Police once it comes to have knowledge or reasonable suspicion regarding the funds.
4. **Complying with Letters of No Consent (LNCs):** As explained in our previous blog post [To Freeze or Not To Freeze](#), LNCs are often issued by law enforcement agencies to freeze bank accounts suspected of holding illicit funds. It is not unusual to see the bank accounts of Innocent Recipients being subject to LNCs, which could have a real impact on their businesses. One must comply with these LNCs and refrain from dealing with the frozen funds in any manner.
5. **Seeking Timely Legal Advice:** The facts of each case vary. It is important to seek legal advice at the earliest possible occasion when one encounters a situation as aforementioned.

Our Expertise

Our firm has experience in acting for innocent recipients, defending and handling unjust enrichment claims, leading to successful and cost-effective resolution of the dispute for clients. For innocent recipients whose accounts have been subject to LNCs, we could also assist in negotiating with the authorities for the conditional lifting of the LNC and unfreezing of the relevant account.

If you have any questions or require legal assistance on the subject matter, please do not hesitate to contact us.




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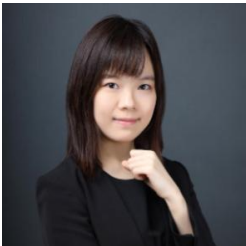


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