

IN THE DISTRICT COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
CIVIL ACTION No. 3557 OF 2013

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BETWEEN

PENG RUXIANG (彭如祥)

Plaintiff

and

WAI CHONG GOLD COMPANY LIMITED

(惠昶金號有限公司)

1<sup>st</sup> Defendant

IWC BULLION LIMITED

(惠昶金業有限公司)

2<sup>nd</sup> Defendant

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Before: His Honour Judge Kent Yee in Chambers (open to public)

Date of Hearing: 2 October 2013

Date of Decision: 3 October 2013

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DECISION

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*Introduction*

1. Mr Peng Ruxiang (“**Peng**”) commenced these proceedings by a Writ of Summons endorsed with a general indorsement of claim dated 13 September 2013. On the same day, Peng took out an inter-partes summons (“**the Summons**”) for an application expressly

A for a Mareva injunction against Wai Chong Gold Company Limited  
B (“**Wai Chong**”) and IWC Bullion Limited (“**IWC**”).

C 2. The subject matter of the injunction sought by Peng is a  
D sum of US\$83,394.33 (“**the Sum**”) being the amount presently  
E standing in the account registered in the name of Peng with IWC for  
F his trading of London gold.

G 3. In support of his application, Peng has filed two  
H affirmations. Subsequent to his affirmations, Siu Kwun Luen (“**Siu**”)  
I filed an affirmation in opposition on behalf of Wai Chong on 30  
J September 2013. Lastly, on the very day of the hearing of the  
K Summons, IWC filed three affirmations to oppose the application.

L 4. Being the applicant, Peng is entitled to put in evidence in  
M reply. At the outset of the hearing, I made enquiries with Mr Chung,  
N counsel for Peng, whether Peng would wish to file evidence in reply  
O and Mr Chung indicated that he preferred to have the application  
P disposed of on the present state of evidence to avoid further delay. He  
Q was quite right. Normally these applications are made on an ex-parte  
R basis to avoid tipping off intended defendants having demonstrated a  
S tendency to dissipate assets. Further delay would only defeat the  
T purpose of this application.

U  
V  
*Background facts*

5. I would first state the indisputable background facts for the  
understanding of this Decision.

A 6. Peng is a resident in the Mainland. He is an investor having  
B experience in spot gold trading through members of the Chinese Gold  
C & Silver Exchange Society (“**the CGSES**”) in Hong Kong.

D 7. Wai Chong is a locally incorporated company and is a  
E member of the CGSES. At the material times, it held an AA licence  
F meaning that it is licensed to trade CGSE’s 99 gold, HKD kilo gold,  
G Loco London gold and silver and Renminbi Kilobar gold. It now  
H holds a B licence with its trade limited to 99 gold and HKD kilo gold  
I only.

J 8. Siu was the sole shareholder and registered manager of Wai  
K Chong. In the website of the CGSES, a recognized E-trading member  
L list (“**the List**”) is found and Wai Chong is included in the List. There,  
M Wai Chong made use of the website of IWC.

N 9. IWC is also a company incorporated in Hong Kong. It  
O shared the same registered address in Central with Wai Chong. Siu  
P was one of its two shareholders and directors. He ceased to be a  
Q director of IWC on 2 July 2013. The Companies Registry only  
R received belated notification about this change of directorship of  
S IWC.

T 10. Through the assistance of one Mr Kenneth Chun, Peng  
U applied to open an E-trading account with IWC (“**the Account**”). The  
V only documentary evidence adduced by Peng relating to the Account  
includes an undated 2-page document for acceptance of Peng’s  
application (“**the Document**”) and a transaction record in respect of  
the Account from 7 June 2013 to 15 September 2013 (“**the Record**”).

A 11. The Document was printed on the letter paper of IWC with  
B its letterhead. By the Document, Peng was confirmed to be a  
C customer of IWC. He was given a trade username and login password  
D for e-trade purpose. Handling charges payable to IWC were stipulated  
E in the Document.

F 12. From the Record, it can be seen that Peng first deposited  
G US\$200,000 into the Account to trade in London gold. Throughout  
H the three months, Peng won and lost at different times. Peng made  
I three online requests for withdrawal of his funds in the Account in the  
J respective sums of US\$600,000, US\$100,000 and US\$100,000 on or  
K about 21 June 2013, 15 July 2013 and 19 July 2013. His requests  
L were all accepted and Peng got payments of such sums and he has no  
M complaint about these transactions.

N 13. The triggering event leading to this action and hence this  
O application is the fourth request made by Peng on or about 28 August  
P 2013 (“**the Request**”). This time, Peng wanted to withdraw a sum of  
Q US\$109,101.27 being the entire sum then standing in the Account.

R 14. On the following day, IWC turned down the Request and  
S explained to Peng through Kenneth Chun that the Account was frozen  
T for investigation by reason of their suspicion of irregular trading  
U undergone in the Account.

V 15. On 29 August 2013, IWC reported this matter to the police  
and the case report number is CRN 13040628. This piece of  
information is not included in any of the three affirmations filed on  
behalf of IWC and Mr Paul Leung, counsel for IWC, agrees that those

A instructing him would undertake to file an affirmation to include this  
B piece of information on an urgent basis.

C 16. On or about 4 September 2013, Kenneth Chun informed  
D Peng that part of the funds in the sum of HK\$200,000 under the  
E Request had been cleared and it could be transferred to Peng. Indeed  
F the transfer of HK\$199,988 (with HK\$12 bank charge deducted  
therefrom) to Peng was effected on that day.

G 17. The remaining balance of Peng in the Account stands at  
H US\$83,394.33 and at the hearing Mr Paul Leung confirms that the  
I Sum still remain intact in the Account. Up till now, IWC refuses to  
J return the Sum to Peng pending the conclusion of the police  
investigation.

K 18. Further, Peng discovered an unauthorized transfer of  
L US\$70,540.86 out of the Account on 15 September 2013. This  
M apparently confirms his fear of IWC's dissipation of his fund in the  
Account.

N 19. In his affirmation, Mr Wong On Chak, Managing Director  
O of IWC, explained that the said transfer was merely a book-keeping  
P mistake and the innocent mistake was rectified on 27 September 2013  
Q by way of a correction entry in the Record. The Sum as such still  
R remains in the Account.

S *Peng v IWC*

T 20. In the Indorsement of Claim, the causes of action relied on  
U are breach of contract, negligent (*sic*), fraudulent misrepresentation,  
V

A trust and/or fiduciary duties and money had and received. There is little elaboration of the legal basis of Peng's claim in the skeleton submissions of Mr Chung.

21. Mr Paul Leung duly challenges the legal basis of Peng's claim in his submission. I invited Mr Chung to give elaboration on each of the causes of action at the hearing and I just need to say I am not convinced in the end.

22. Be that as it may, this action is still in its infancy. Peng has yet to file his Statement of Claim. There is no reason why Peng's case should now be tied down by Mr Chung's oral submission.

23. On the evidence, without being over-zealous to formulate the claim for Peng, I would accept that Peng has a viable claim in trust against IWC at the very least. Mr Paul Leung confirms that there is no written agreement signed between IWC and Peng and there is no written definition of "irregular trading". Absent any prior agreement and cogent challenge to Peng's ownership of the Sum, I fail to see how IWC has the legal authority to withhold the Sum from Peng, even if irregular trading, whatever it means, has been detected.

24. Mr Paul Leung, after taking instructions, sensibly accepts this court's suggestion that IWC should pay into court the Sum on or before 7 October 2013 pending conclusion of these proceedings or further order. Mr Chung indicates that Peng is happy with this course. I would make an order to such an effect. I should also make an order *nisi* that costs of this application be in the cause with certificate for counsel.

A 25. I should point out that when Peng is making a propriety  
B claim to the Sum in the Account, this injunction sought by Peng to  
C freeze the Account to protect trust property is not really a Mareva  
D injunction. It is a propriety injunction. The difference between a  
E Mareva injunction and a propriety injunction was explained by Scott  
L.J. in *Polly Peck International plc v Nadir (No.2)* [1992] 4 All E.R.  
769 at 776E:

F  
G “Equitable tracing leads to a claim of a proprietary character. A fund  
H is identified that, in equity, is regarded as a fund belonging to the  
I applicant. The constructive trust claim, in this action, at least, is not a  
J claim to any fund in specie. It is a claim for monetary compensation.  
K The only relevant interlocutory protection that can be sought in aid of  
a money claim is a Mareva injunction, restraining the defendant from  
dissipating or secreting away his assets in order to make himself  
judgment proof. But if identifiable assets are being claimed, the  
interlocutory relief sought will not be a Mareva injunction but relief  
for the purpose of preserving intact the assets in question until their  
true ownership can be determined. Quite different considerations  
arise from those which apply to Mareva injunctions.”

L 26. Scott L.J. did not further explain what those different  
M considerations were. It would be however obvious that the disclosure  
N orders would be different in cases of proprietary injunctions.  
O Moreover, those usual provisions for the business/daily expenses of  
the defendants may not be applicable to such proprietary injunctions.

P 27. This difference identified by Scott L.J. was agreed by  
Q DHCJ Saunders (as he then was) in *Promail International (HK)  
R Limited (in Liquidation) v Shee Yip Shing*, unreported, HCA  
S 1774/2005, 6 September 2006 and Cheung JA in *Wu Wei v Liu Yi  
T Ping*, unreported, CACV 47/2005, 29.9.2005 at §43.

A 28. I shall bear in mind the true nature of the injunction sought  
B when considering the remaining controversy between Peng and Wai  
C Chong.

D *Peng v Wai Chong*

E 29. Mr Chung submits that on the evidence, Wai Chong is the  
F principal of IWC and IWC is its agent in respect of the Account and  
G further or in the alternative, IWC is the alter ego of Wai Chong. I note  
H that the latter plea does not feature in his skeleton submissions and is  
now raised for the first time.

I 30. On the agency issue, Mr Chung relies on the fact that the  
J website of IWC was used by Wai Chong in the List. In my view, this  
K at most shows that Wai Chong's clients are to do e-trade by the use of  
L the website of IWC. It is however no evidence that IWC's clients are  
M in fact the clients of Wai Chong and IWC is a mere agent of Wai  
Chong.

N 31. I further note that there is not an iota of documentary  
O evidence indicating the involvement of Wai Chong in the trading  
P activities of Peng through the Account with IWC. The Document  
Q made no mention about Wai Chong. In the previous three requests for  
R return of the fund in the Account, IWC duly complied with the  
requests and there is no evidence of the Wai Chong's involvement at  
all.

S 32. Mr Chung lastly relies on the allegation of Peng that  
T Kenneth Chun all along orally represented to him that he was the  
U  
V



A representative of both Wai Chong and IWC. Kenneth Chun in his  
B affirmation denies that he is ever an agent or employee of Wai Chong  
C and he ever told Peng that he also represented Wai Chong. I note that  
D it is even not the allegation of Peng that IWC was the agent of Wai  
Chong in respect of the Account.

E 33. I further make it clear that I do not accept the fact that Wai  
F Chong and IWC shared the common registered address in Central  
G before September 2013 and the common shareholder to be any  
H evidence of agency.

I 34. The case of agency is therefore not substantiated by  
J evidence and is a non-starter. In my judgment, no interlocutory relief  
K can be granted on the basis that IWC is arguably the agent of Wai  
Chong.

L 35. Next, Mr Chung argues that IWC is the alter ego of Wai  
M Chong. As rightly pointed out by Mr Adrian Leung, counsel for Wai  
N Chong, this is effectively an attempt to lift the corporate veil. It is  
O well-established that the court will only lift the corporate veil under  
limited circumstances.

P 36. In *Winland Enterprises Group Inc. v Wex Pharmaceuticals*  
Q *Inc. and Anor.* [2012] 2 HKLRD 757, To J, in his judgment for the  
R Court of Appeal, (from §43 to 54) reviewed a number of British and  
S Hong Kong authorities relating to lifting of corporate veil and it  
T suffices for me to set out here the conclusion of To J.:

“In summary, the court will the corporate veil of a company if it is a façade or a puppet of the parent company used to perpetrate fraud or evade legal obligation and liability. Fraud and concealment which may have such effect are valid grounds for lifting the corporate veil. That a company is a façade or a puppet of its parent company by itself is neither here nor there. It is just some evidence from which the inference of illegitimate purpose may be drawn or on which to support a finding of the illegitimate purpose behind the façade. Unless the use of a façade or that a company is a puppet of its parent company without more does not justify lifting of the corporate veil.”

37. Though Mr Chung makes submission on fraud allegedly perpetrated by IWC, I am not satisfied on the evidence that the operation of IWC is to perpetrate fraud or evade legal obligation and liability. First, IWC has reported to the police in respect of the Account and it can be seen that IWC is, rightly or wrongly, ready to settle its difference with Peng, through the police and it was willing to return HK\$200,000 of its own volition to Peng after finding out that this sum could be cleared. IWC does not seem to me to be a fraudster.

38. Further, the unchallenged evidence is that Peng managed to use the Account to do actual e-trade for a few months and could withdraw the fund in the Account on three occasions. Coupled with the fact that IWC has about 9,700 customers and has traded since 2010, I am far from satisfied that the use of IWC is for any illegitimate purposes such as evading legal obligation and liability. Indeed Mr Chung fails to identify any such purposes save the refusal of IWC to accede to the Request and return the Sum to Peng.

39. In the premises, I refuse to lift the corporate veil on the evidence before me. Wai Chong and IWC remain very much two separate legal entities. I cannot see how Peng can have any valid claim against Wai Chong in respect of the Account.

40. In the result, the application against Wai Chong falls to be dismissed with costs, to be taxed if not agreed with certificate for counsel. Again, this is an order *nisi*.

41. Lastly, I thank all three counsel for the clarity and succinctness of their submissions.

(Kent Yee)  
District Judge

Mr Hylas Chung, instructed by Messrs Huen & Partners for the plaintiff

Mr Adrian Leung, instructed by Messrs To, Lam & Co. for the 1<sup>st</sup> defendant

Mr Paul H. M. Leung instructed by Messrs Alvan Liu & Partners for the 2<sup>nd</sup> defendant