Contentious Commentary Hong Kong

December 2016

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contents

Family feud

Successful claim in long running property dispute

Yang Foo Oi v Wai Wai Chen [2016] HKEC 2583 concerned the distribution of significant family properties by the late founder of Nan Fung Group, a major Hong Kong property developer, back in 2004. The plaintiff's daughter entered into agreements with the plaintiff whereby the plaintiff would receive cash in lieu of properties.

The plaintiff asked for these agreements to be set aside, on the grounds of misrepresentation, breach of fiduciary duty and duty of full disclosure under family arrangements, as well as undue influence, primarily because the defendant (daughter) failed to disclose to the plaintiff (mother) the true value of the assets and the extent of their appreciation. The case involved prime properties in Hong Kong and London valued at over HK$ 20 billion (over US$ 2.5 billion).

The Court granted the plaintiff equitable compensation of more than HK$ 8 billion (over US$ 1 billion) or an account of profits. Clifford Chance acted for the successful plaintiff in a trial which became a hotly contested battle involving several complicated legal issues, as highlighted by the judge, Anthony Chan J.

Delay can be costly

Court of Appeal upholds need for speedy finality in arbitral enforcement

The Court of Appeal in *Astro Nusantara International BV v PT Ayunda Prima Mitra* [2016] HKEC 2633 upheld the importance of speedy finality in the context of enforcement of arbitration awards, and dismissed the appellant's appeal against the lower court's decision handed down in February 2015. Clifford Chance acted for the successful respondents in the appeal.

The Court declined to extend time for the appellant to apply for setting aside certain Hong Kong judgments and orders enforcing Singapore arbitration awards in favour of the respondents. The Court said a more disciplined approach was called for in the arbitration context, with its emphasis on rapidity and short statutory time limits. The time allowed for a party to apply to set aside an order to enforce an award was 14 days. The 14-month delay – coupled with the deliberate calculated inaction on the part of the appellant – was unacceptable. No English or Hong Kong cases had been cited in which this sort of delay had been excused in the enforcement of a Convention award.

The Court of Appeal also considered whether the appellant was precluded by the principle of *"good faith"* from relying on section 44(2) of the Arbitration Ordinance

(Cap 341) (as it was then), to resist enforcement of the Singapore arbitration awards. The section sets out circumstances in which enforcement of a Convention award may be refused, including where the arbitration agreement is not valid or deals with a difference not falling with the scope of the arbitration itself. Holding in favour of the appellant, the Court emphasised the importance of the decision of the supervisory court of the seat of arbitration when considering the conduct of the arbitration. The Court accepted the appellant's arguments that as a matter of Singapore law, the law of the seat of arbitration, the appellant was entitled to act in the way it did.

The Court also noted that where a party had concealed its objection before the arbitral tribunal and carried on with the arbitration, it would be likely that a breach of *"good faith"* could be invoked. However the Court also cautioned against applying the principle too rigorously whenever there is a failure to take positive steps to invalidate an arbitral award at the seat of the arbitration.

A constitutional question

Court of Appeal rejects oath takers' bid to re-take the pledge

The Court of Appeal in *HKSAR v President of Legislative Council* [2016] HKEC 2587 dismissed the appeals of Sixtus Leung Chung Hang and Yau Wai Ching, upholding the decision of the court below that their

refusal to take the oaths as prospective members of the Legislative Council (LegCo) in accordance with the requirements of the Oaths and Declarations Ordinance Cap.11 and Article 104 of the Basic Law, meant they should be disqualified from taking their seats in LegCo. The Court of Appeal ruled that it was plain from their actions that neither Leung nor Yau intended to uphold the Basic Law of the HKSAR or bear allegiance to the HKSAR – both elements being mandatory parts of the LegCo oath.

Much of the Appeal Court's analysis was founded on the constitutional supremacy of the Basic Law. It ruled that the question of whether key constitutional requirements had been complied with were matters over which the Hong Kong courts had the power and the responsibility to decide. That said, the Court of Appeal did consider the interpretation by the Standing Committee of the National People's Congress (the Standing Committee) of the true meaning of Article 104, given earlier in November (the NPC Interpretation). The Court noted that the NPC Interpretation *"sets out the true and proper meaning of Article 104 from day one."*

Notwithstanding the Standing Committee's readiness to involve itself in a politically sensitive issue, the Hong Kong courts have confirmed their own powers and duties to rule on this matter under Hong Kong's *"one country, two systems"* Basic Law regime, whilst also coming to a similar conclusion as did the Standing Committee. Leung and Yau have said they will appeal to the Court of Final Appeal.

Show me the money

Bank allowed to debit client account after email fraud

The plaintiff in *Fast Track Holdings Ltd v BOCI Securities Ltd [2016]* HKEC 2212 applied for continuation of an ex parte injunction restraining the defendant from debiting the plaintiff's account for an amount equivalent to the price of shares that had been fraudulently purchased by hackers who had gained access to the plaintiff's securities account. Whilst the plaintiff had immediately sought and won an injunction preventing the defendant from making settlement for the shares, the action came too late to prevent CCASS from making settlement of the share transaction with some 76 intermediaries. As a result, the defendant had to use its own house funds to settle the transactions with CCASS.

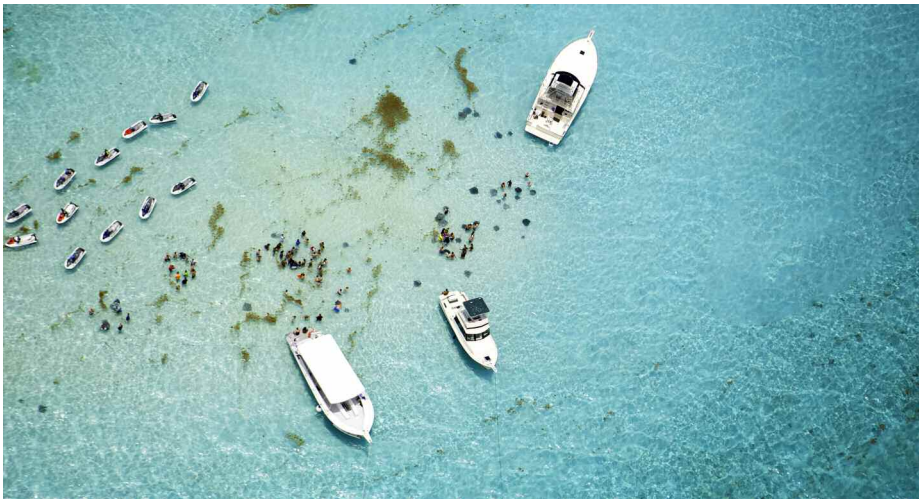
The defendant pointed to clauses within its customer agreement that would allow it to act on "*instructions given by you…or any other person purporting to be you*". Anderson Chow J sitting in the CFI ruled that the plaintiff would suffer no prejudice if the defendant were allowed to debit the account and contrasted that with the detriment caused to the plaintiff by the enforced decrease in its liquidity ratio. The Court ruled that damages would be an adequate remedy for the plaintiff and that the balance of convenience strongly favoured the non-continuation of the ex parte order against the defendant.

Pushing the boundaries

Two significant decisions in cross-border insolvency

In the continued absence of any statutory regime for cross-border insolvency recognition in Hong Kong, two recent decisions of Mr Justice Harris in the Court of First Instance have provided guidance to liquidators in this developing area.

In *Joint Provisional Liquidators of BJB Career Education Company Limited (in provisional liquidation) v Xu Zhendong* [2016] HKEC 2516, Harris J confirmed that the powers of the Hong Kong court to assist foreign regulators of companies incorporated overseas extend to ordering the oral examination of an officer of a foreign company or other persons in possession of information which the foreign liquidator requires to conduct properly his investigations into the company's affairs. This would be the sort of order that in the domestic context would be made pursuant to section 221 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap 32.



A few days earlier, Harris J had given a judgment in *Bay Capital Asia LP v DBS Bank (Hong Kong) Ltd* [2016] HKEC 2377, in which the liquidators of a Cayman Islands-incorporated company applied amongst other things for an order recognising their appointment. Harris J said if a bank receives a request for information from liquidators of a company which has an account with them – and the bank is satisfied that the liquidators have been properly appointed – they should hand over documents to which the directors of the company would have been entitled without requiring a Hong Kong court order.

In practice, given their duty of confidentiality to their clients, banks will need to feel comfortable that the liquidators have been properly appointed, particularly if the liquidator in question has not been appointed by the court but rather voluntarily. Banks may therefore find themselves, when presented with requests for assistance from foreign liquidators, facing tricky practical issues, despite the Court's guidance in *Bay Capital*.

Bye bye baby

Court rules no common intention in loan agreement

The plaintiff life insurance company in *FTlife Insurance Co Ltd v Choy Hou Yan Jacqueline* [2016] HKEC 2348 sought repayment of what it claimed was a HK$3 million loan it had given to an eighteen-year old school girl who had been appointed a self-employed agent of the plaintiff to sell long term insurance. The defendant, Jacqueline, was the daughter of a Madam Choy, who ran a successful business arranging for wealthy pregnant women from the

PRC to come to Hong Kong to give birth. The business dried up in 2014 following a change in the law.

In evidence, it became clear the insurer's real interest was to access Madam Choy's business connections as potential purchasers of life assurance. Deputy Judge Field sitting in the CFI accepted Jacqueline's evidence that she signed the loan agreement, an agency agreement and one other in order to help her mother earn commission. The Court found the three agreements were mere window dressing to give the appearance of satisfying the plaintiff's regulatory and internal requirements. There was no intention to create legal relations. *"Jacqueline was just a piece on the chess board to be moved into a position by her mother, with the connivance of the plaintiff, that would allow (their) mutual ambitions to be realised without Madam Choy having to enter into an Agent's Contract".* The Court found the agreement was unenforceable against the defendant and dismissed the claim.

No show is no defence

PRC defendant loses contract case in his absence

At the opening of the trial (which concerned monies payable under an alleged joint venture) the second defendant, Mr Chen, asked his counsel to apply for an adjournment of three months as he did not have permission to come to Hong Kong from the PRC to attend the trial. The parties in *Noble Field Overseas Ltd v United Best Developments Ltd* [2016] HKEC 2394 had had notice of the date of the trial for ten months.

Deputy Judge Field sitting in the CFI refused the application, following which counsel for Chen told the Court that there was to be no cross-examination of the plaintiff's witnesses, none of Mr Chen's own witnesses were to be called; there would be no submissions as to the facts or the law advanced by Mr Chen; and the written opening submissions that had been served by Mr Chen pre-trial were withdrawn. The Court gave judgment to the plaintiff.

The Court found that Mr Chen's non-appearance at the trial was entirely of his own doing and that he had deliberately brought about a situation that made it impossible for him to attend the trial. Deputy Judge Field suspected that Chen's instructions "not to challenge the plaintiff's case evidentially or legally (was an) endeavour to render the inevitable judgment in the plaintiff's favour unenforceable outside Hong Kong in a jurisdiction where Mr Chen has assets susceptible to execution". If this was indeed Mr Chen's plan, it ought to fail. The Court's judgment was "as deserving to be enforced outside Hong Kong as it would be if Mr Chen had fully participated in the trial."

Advertising adversaries

Hong Kong company law overrides jurisdictional concerns

Joseph Ghossoub v Team Y&R Holdings Hong Kong Ltd [2016] HKEC 2332

The respondents (*Team Y&R Holdings, Cavendish Square Holding BV, Young & Rubicam International Group BV* and *WPP PLC*) applied for stay of a petition presented in April 2015 on the grounds that the allegations in the petition give rise to issues which the petitioner supposedly agreed should be referred to the exclusive jurisdiction of England & Wales. The petitioner held 20% of the shares in a joint venture company, with the other shareholders being *Cavendish, Young & Rubicam* and *Talal Elias Makdessi*. In 2008, the parties entered into agreements restructuring the interests in the company. The parties then became embroiled in proceedings in England.

Meanwhile, the petitioner brought proceedings in Hong Kong pursuant to section 724 Companies Ordinance, Cap 622, claiming unfairly prejudicial conduct of the company by *WPP, Cavendish* and *Young & Rubicam* and seeking a buyout of his shareholding. The respondents and WPP filed anti-suit proceedings in England and sought to restrain the petitioner from pursuing the Hong Kong proceedings.

Deputy Judge Le Pichon in the Court of First Instance ruled that the fact that all the shareholders decided to incorporate the company in Hong Kong meant that the company and its operations would be subject to the provisions of Hong Kong company law. Whilst it was undesirable to have multiple proceedings on the same or similar issues in different fora, situations could arise where this could not be avoided. The petitioner would not be able to obtain substantial justice in the English court if he were to have his complaints aired in the substantive English proceedings. The Court refused the application for a stay.

Guaranteed win

No obligation for bank to pursue debtors before guarantor

The defendant in *Standard Chartered Bank (Hong Kong) Ltd v Pak Kwan Ho* [2016] HKEC 1848 appealed against a June 2016 order granting summary judgment to the bank for HK$16 million in respect of his liability as a guarantor under three guarantees for the payment of debts due to the bank by four principal borrowers. The defendant was a director of the borrowers. The guarantee contained a provision that the guarantor expressly waived any right he might have to require the creditor to first proceed against the principal borrowers. The Court said that such a clause is a perfectly normal provision in a guarantee and rejected a defence that the bank should first obtain judgment against the principal borrowers before pursuing the defendant.

The defendant was required to give particulars if it were to suggest that any part of the plaintiff's claim was not owed by the defendant. The defendant's response did not even amount to a general denial. The fact the defendant was not legally represented at the hearing before the Master was no defence at all. The Court found the defendant had failed to show (i) any arguable defence; (ii) any other issue, question in dispute which ought to be tried; or (iii) any other reason for there to be a trial, and dismissed the appeal.

In the public interest

Creditor's petition can be re-amended to include subsequent debts

The Court of Appeal in *Hin-Pro International Logistics Ltd* [2016] 5 HKLRD 282 considered the position of a petitioner who commenced winding-up proceedings against the company, Hin-Pro, based on an unsatisfied costs order which was subsequently discharged. The petitioner sought leave to re-amend the petition by substituting, in place of the original debt, a number of outstanding debts arising from judgments and orders which accrued after the date of the petition. The Court was asked whether the *Eshelby* rule, under which a court may not amend a writ without the consent of the parties, applied to a creditor's petition.

The Court said that the rule, which was a matter of practice not of law, did not apply to a creditor's winding up petition as it asserted a class remedy on behalf of all the company's creditors. It was in the public interest that an insolvent company not be allowed to continue to trade. There was nothing in the relevant provision of the Companies (Winding-up) Rules or RHC O.20 which precluded the court's discretion to allow a creditor's winding-up petition to be amended to include post-petition debts. A rigid insistence on requiring a fresh petition for each subsequent debt as and when it arose would result in multiplicity of proceedings, unnecessary waste of costs, time and the Court's resources.

The situation involving a creditor's position was distinct from a petition under s.168A and a winding-up petition presented by a shareholder on the just and equitable ground, where the public interest element was seldom present.

Fax and figures

Court of Appeal lays down the law for litigants in person

The defendant in *AXA China Region Insurance Co Ltd v Leong Fong Cheng* [2016] HKEC 2327 relocated to Thailand but failed to provide a Hong Kong address for service when lodging an appeal against a May 2016 civil judgment, providing only an unspecified postal address in Thailand and a Hong Kong fax number. On 11 August 2016, the Court made an order directing her to provide a Hong Kong address for service.

Whilst sending documents to the other side by fax does not normally constitute good service, the Court of Appeal in this instance made an order for substituted service upon the defendant by fax, given the difficulties inherent in serving process in Thailand. The Court also noted its view that the time had come for the court to *"reinstate firmly the proper procedural discipline"* in cases involving litigants in person. All litigants had to abide by the rules and procedures that are in place, and not bother the Court with lengthy and time consuming correspondence.

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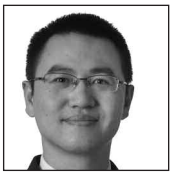

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