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CONTENTIOUS COMMENTARY – HONG KONG

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Court of Final Appeal quashes TVB star's bribery conviction

The Court of Final Appeal in *Secretary for Justice v Chan Chi Wan Stephen* [2017] HKEC 505 has found the television presenter Stephen Chan and his assistant Tseng Pei Kun innocent of bribery charges brought by the Department of Justice under section 9 of the Prevention of Bribery Ordinance.

The CFA unanimously reversed the Court of Appeal's decision, with the majority ruling that Chan, the general manager of TVB, was not acting "in relation to his principal's affairs or business" when he appeared for a special edition of the "*Be My Guest*" TVB show at Olympian City alongside the main New Year's Eve countdown show in 2009 and was paid HK$112,000 for his appearance by Tseng. Whilst TVB did not give express consent to Chan's participation, they televised the show and so must have known about it. The CFA held that the appearance was not intended to injure the bond of trust and loyalty between the principal and agent. In the words of Ribeiro PJ, "*it is not the legislative intent to stigmatize as criminal, conduct of an agent which is beneficial to and congruent with the interests of the principal (as in the present case)*."

For an offence to be committed, there would need to be conduct adverse to the principal's interests, which was not the case. On the contrary, the appearance made the main New Year's Eve show even more popular with viewers.

Patently untrue

Listed company responsible for fraudulent misrepresentation

In *Chow How Yeen Margaret v Wex Pharmaceuticals Inc* [2017] HKEC 45, Madam Justice Queeny Au-Yeung in the Court of First Instance considered whether the defendants (a Canadian company and its listed Hong Kong subsidiary) were responsible for losses suffered by the plaintiffs in connection with a share sale.

The defendants – through their President and CEO, a Mr Shum – represented to the plaintiffs they owned a patent to manufacture a drug. In fact, the defendants had lost the ownership of the patent in legal proceedings in the PRC before the first plaintiff entered into a distribution agreement (which was never performed) and before the plaintiffs started purchasing shares in the defendant. The share price dropped when the loss of ownership of the patent was announced.

The plaintiffs sued for the loss in value of the shares, basing their claim on the defendants' fraudulent misrepresentation. The defendants denied the claim and said it was time-barred. The plaintiffs argued that the limitation period had been extended because of the defendants' deliberate concealment of the fraud from the plaintiffs.

The Court considered the representation was false. As to whether it was fraudulent, the Court rejected Mr Shum's defence of honest belief on seven grounds, one of which related to the nature of announcements made by the parent company over several years, in discharge of its duty of disclosure as a listed company, which the Court described as misleading.

The Court rejected the defendants argument that the plaintiffs could have discovered the truth earlier, partly due to the fact that mainland judgments are not "public" in the way it is understood in Hong Kong. The court awarded the plaintiffs damages of CAD$1.3 million (HK$7.5 million) together with interest from the date of purchase of the shares and costs.

Patently expensive

No hard and fast rule about costs in interlocutory injunctions

The plaintiffs in another patent dispute *Xcelom Ltd v BGI-Hongkong Co Ltd* (No 2) [2016] HKEC 2061 unsuccessfully sought an injunction to restrain the defendants from using or offering for use in Hong Kong a pre-natal test for screening chromosome abnormalities. The Court found the length of time it had taken the plaintiffs to issue proceedings (11 months) made them guilty of inordinate delay and that this was clear evidence of lack of irreparable damage.

Deputy Judge Kenneth Kwok SC made an order nisi for the defendants' costs to be taxed if not agreed. The plaintiffs applied for a variation of the order seeking *"the costs of the application be costs in the cause to be taxed in not agreed…"* (emphasis added). The defendants argued their costs "*be paid by Ps forthwith to be taxed if not agreed."*

DJ Kwok dismissed the plaintiffs' application holding (in [2017] 1 HKLRD 436) that – in very special circumstances – an unsuccessful party to an interlocutory application could be penalised in costs. There was no necessary correlation between the success of an interlocutory application and success at trial, and no invariable reason why the costs of an interlocutory application should be made to follow the event at

trial or wait until after trial. The plaintiffs had wasted the time of the defendants as well as the Court and were ordered to pay costs immediately to the defendants.

Wood for the trees

No reasons necessary for costs order

In *Cheung Hing v Wah Fung Forest Resources Ltd* [2017] 1 HKLRD 493, the intervener sought leave to appeal against a summary assessment of costs in favour of the plaintiff, on the basis that the Court had provided no reasons nor breakdown of the sum ordered to be paid. The intervener referred to RHC O.42 r.5B(1) which says that *"a court shall give the reasons for any decision either at the time the judgment or order is pronounced or, where it is at that time announced that the reasons will be given at a later date, at such later date as may be fixed."*

Godfrey Lam J said that while there was no general duty on the Court to give reasons in relation to costs orders, there was also no law or rule of practice which precluded the Court from indicating subsequently how a global sum had been calculated. In an appropriate case, the Court had an inherent jurisdiction to provide additional reasons for its judgment after the judgment itself. The Court was not proposing to revisit the order, which had already been sealed, but rather to make clear the breakdown of the sum assessed, which it proceeded to do.

Burden of proof

Court of Appeal considers the proper test for committal in contempt proceedings

The Court of Appeal in *Ip Pui Lam Arthur v Alan Chung Wah Tang* [2017] HKEC 353 considered an appeal by the defendants – the minority partners of a failed accounting firm – against a committal order for contempt because of a failure to provide documents pursuant to a court order.

The Court held that, when arguing for committal, the plaintiffs needed to show, on the criminal standard of *beyond reasonable doubt*, that the documents in question existed and that they were within the custody or power of the defendants to produce them. The first instance judge was wrong to find that there was a reverse evidential burden on the defendants to show that the documents did *not* exist. The burden remained with the prosecution throughout. The Court of Appeal also refused the plaintiffs' application to adduce new evidence at the appeal stage. Bearing in mind the penal consequences of contempt proceedings, the party pressing for contempt had to adduce all the evidence at the time of the application so as to allow the party cited for contempt the opportunity to respond.

Even taking into account the defendants' conduct – which here *"demonstrated a determined and obstinate refusal to comply"* – the Court of Appeal found that committal would be too harsh a punishment and set aside the order.

Frozen

CFA sets out the test for Mareva injunctions in aid of foreign proceedings

In *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd* [2016] HKEC 2463, the Court of Final Appeal provided clarification regarding the general principles surrounding the grant of Mareva injunctions in aid of foreign proceedings pursuant to section 21M High Court Ordinance (Cap. 4).

The plaintiff, a Chilean ship-owing company, brought proceedings in the PRC against the defendant, a Hong Kong-incorporated freight forwarder, in respect of numerous bills of lading for goods shipped from the PRC and destined for Venezuela. The proceedings were brought in breach of an exclusive English jurisdiction clause within the bills of lading. The plaintiff obtained anti-suit injunctions and eventually a judgment before the English courts for substantial damages by reason of the breach. The plaintiff sought and initially obtained a Mareva injunction in Hong Kong to assist in enforcement of the English judgment. The interim relief was subsequently discharged before a judge, whose decision was upheld by the Court of Appeal.

The CFA unanimously allowed the plaintiff's appeal and reinstated the Mareva relief. In section 21M proceedings, the court has first to consider whether the overseas court proceedings can give rise to a judgment that is enforceable in Hong Kong. If the answer is yes, the court has to form a view based on all the available material whether the plaintiff has a good arguable case *before the foreign court* (not the Hong Kong court). The court then has to consider whether it is unjust or inconvenient to grant the Mareva sought. It would weigh heavily, probably conclusively, against the grant of interim relief if such grant would give rise to conflicting, inconsistent or overlapping orders in other courts.

Late to the party

Adding new party to a claim runs into limitation time bar

When you add a new party to a claim, does that count as a *"new claim"* for the purposes of the Limitation Ordinance (Cap. 347), such that the whole claim falls away? That was the problem posed to the Court of Final Appeal in *Beijing Tong Gang Da Sheng Trade Co Ltd v Allen & Overy* [2016] HKEC 2713.

In September 2011, a company, C, issued a writ against the defendants for professional negligence as solicitor and barrister. In January 2012, C's causes of action were assigned to the plaintiff. The defendants applied to strike out the claim on the basis it was champertous. The plaintiff made an application for leave to add the original company as a plaintiff which was allowed by the Court of Appeal. It held that since the joinder application did not involve a new cause of action, there was no issue of limitation.

The CFA disagreed. On appeal by the defendants, the CFA held that an application to add or substitute a party would result in a "*new claim*" as defined in section 35(2) of the Limitation Ordinance and would therefore not be permitted once the limitation period had expired, as it had in this case. The fact that C had originally been a party to the action made no difference. C had ceased to be a party altogether as a result of the amendment of the writ in 2012.

Not so appealing

Solicitors criticised for continuing appeal without proper instructions

The Court of Appeal in *China Metal Recycling (Holdings) Ltd v Chun Chi Wai* [2017] HKEC 150 had some harsh words for solicitors who kept an appeal on foot notwithstanding a lack of instructions. Hearing of the appeals was fixed for 15 and 16 February 2017. On 29 November 2016, Notices of Change of Solicitors were filed on behalf of the 1st and 13th defendants by which new solicitors, Lau Kwong & Hung (LKH) came on the record.

The plaintiff's solicitors wrote to LKH several times regarding preparation of the appeal bundles. On 6 January 2017, LHK replied that they had not received the papers from the previous solicitors and were unable to contact their client. LKH said that if necessary, they would apply to the Court for a time extension for filing of the bundles which were due by 11 January 2017.

The Court said the reply *"demonstrated a remarkable failure on its part to observe the duty owed by a solicitor acting for a litigant prescribed under Order 1A, Rule 3."* Before a firm of solicitors takes on a case, the handling solicitor should familiarise himself or herself with the case and assess whether it was within his or her ability to comply with case management directions. LKH should not have gone on the record to act when it had neither the case papers nor the necessary instructions.

The appeals were dismissed for want of prosecution and the 1st and 13th defendants ordered to pay the plaintiff's costs on an indemnity basis. The Court also ordered LKH to pay HK$50,000 to the plaintiffs by way of wasted costs. LKH's delay amounted to a "*serious dereliction of duty on the part of LKH".* In the ruling, the Court highlighted the importance of the new Practice Direction 4.1 regarding appeals which came into force on 1 March 2017.

End of an era

Two long-running cases come to an end

The Court of Final Appeal refused to grant the defendant leave to appeal in *Waddington Ltd v Chan Chun Hoo Thomas* [2017] HKEC 339. The plaintiff complained that the first defendant was in breach of fiduciary duty in disposing of shares on the open market while he was also in negotiations with a listed company to sell the shares for a much higher price. In the Court of First Instance, the plaintiff succeeded in the multiple derivative action it brought against the first defendant.

The finding was upheld on appeal, the Court of Appeal holding that the fact that the first defendant was in a fiduciary relationship with more than one principal did not prevent a duty being imposed on the first defendant not to place himself in a conflict of interest position. The Court of Appeal also held that, as far as liability for breach of fiduciary duty was concerned, even where a relevant opportunity would not have been available to the principal, this did not prevent a fiduciary duty from arising.

After hearing counsel for the first defendant, the CFA dismissed the application for leave to appeal with costs, finding that no questions of great general public importance were involved. Arguments continue over costs. In a related decision, Anderson Chow J sitting in the Court of First Instance ordered solicitors acting for the fifth defendant, Reed Smith Richards Butler, to disclose information relating to the identity of the fifth defendant's funder.

The long-running *Lehman* saga was also brought to a close with the first instance decision in *Lehman Brothers Futures Asia Ltd* [2017] HKEC 250. Mr Justice Harris gave his reasons for

sanctioning three schemes of arrangement involving three *Lehman* entities and their unsecured creditors. The joint liquidators had realised sufficient assets and released substantial sums to preferential and general unsecured creditors such that each of the entities now had a surplus. There remained uncertainties regarding entitlement to the surpluses within each of the entities.

The Court noted that similar uncertainties in the Lehman liquidations in England had led to substantial litigation known as the *"Waterfall"* litigation. Although the English litigation was advanced, the determination of issues in the Waterfall litigation would not necessarily determine the uncertainties arising in Hong Kong, given the inherent differences in the respective insolvency regimes. If the uncertainties were to be litigated in Hong Kong, *"apart from the inevitable expense, there might well be significant delays before creditors receive the balance of their entitlements."* Class members were being asked to *"give up a right of uncertain value in return for the certainty, cost effectiveness and expedition provided by the Schemes."*

Pushing back the boundaries

Cross-border assistance in insolvency proceedings

Harris J also continued his theme of assisting foreign liquidators to obtain documents and information concerning Hong Kong companies. *Joint and Several Liquidators of Pacific Andes Enterprises (BVI) Ltd* [2017] HKEC 146 concerned the winding-up of four companies incorporated in the British Virgin Islands, themselves part of or otherwise connected to a large corporate group, *Pacific Andes International Holdings Limited*, listed on the Main Board of the Hong Kong Stock Exchange. Clifford Chance acted for the applicants. Investigations by the liquidators had identified a number of parties in Hong Kong which they believed might hold assets and records and information that would be useful to the liquidators and Letters of Request had been issued by the overseas court.

In a series of decisions (see *"Pushing the Boundaries"*, Contentious Commentary December 2016, page four), Harris J had already explained the Hong Kong Companies Court's power to provide assistance and recognition to a liquidator of a foreign incorporated company if the insolvency laws of the place of incorporation grant similar powers to a liquidator to those available under Hong Kong insolvency legislation.

The form of order the Court was asked to approve here sought to give the liquidators powers *"to obtain from third parties such documents and information as concern the Company, including its promotion, formation, business dealings, accounts, assets,*

liabilities or affairs…". Whilst Harris J agreed that expressly providing a power to that effect would assist the liquidators, *"the proposed wording might be read as giving them a right to obtain from third parties documents that the Liquidators are not entitled to without an order of the Court…".*

As the law in Hong Kong currently stood, a liquidator only has the right to obtain documents *"relating to the company"* not documents which cannot properly and fairly be described as relating to the company. The language of the order also needed to *"avoid giving the impression that it places a third party under a compulsion to provide documents or information"*, something that would need a further court order. Under the amended form of order granted, the liquidators were given power to *"request and receive from third parties documents and information…."*, rather than the power to *"obtain"* the same.

No wish to be famous

The law of confidence comes up against freedom of the press

Unlike the situation in England, where the landmark Supreme Court ruling last summer in *PJS v News Group Newspapers* [2016] UKSC 26 established that individuals may obtain injunctions against intrusions into their privacy (even where the information they are seeking to injunct is already widely known), the courts in Hong Kong have not as yet recognised the tort of invasion of privacy. Such claims are therefore necessarily grounded on the law of confidence.

The courts engage in a balancing exercise weighing the right to freedom of expression on the one hand with a plaintiff's claims that a particular confidence has been breached on the other. Just such a question came before Deputy Judge Kent Yee in *Wong Wing Yue Rosaline v Next Media Interactive Ltd* [2017] HKEC 326.

The action concerned two photographs published by the first defendant in a video together with an article on its website, the electronic version of *Next Magazine.* The photos were edited copies of photographs taken by the plaintiff's domestic helper on a mobile phone provided to her for use in the course of her employment. The plaintiff claimed that publication of the photos and article constituted a breach of confidence. She also claimed that her copyright in the photos, which she described as private and confidential in nature, had been breached.

The plaintiff sought disclosure from the defendant of the names and addresses of the person or persons who supplied it with the photos, engaging the court's *Norwich Pharmacal* jurisdiction to order disclosure. The first and second defendants opposed disclosure of their source on the basis that the source was insistent on its confidentiality.

The Court noted earlier English Court of Appeal authority that described the *"chilling effect"* of court orders requiring the disclosure of press sources, which was *"in no way lessened, and certainly not abrogated, simply because the case is one in which the information actually published is of no legitimate, public interest."* In Hong Kong, freedom of expression, freedom of the press and freedom of publication were enshrined in Article 27 of the Basic Law. The Court agreed that protection of press sources *"is of paramount importance to the freedom of the press, which can only be removed in view of cogent reasons."*

Whilst publication in this case served little public interest, it was in the public interest for the court to protect the non-disclosure of press sources. The Court refused to make the disclosure order requested.

Not so fabulous

Defaulting director ordered to resign

Deputy Judge Nicholas Hunsworth in the Court of First Instance considered a dispute concerning misplaced trust arising out of a failed romantic relationship. The plaintiff in *Karla Otto Ltd v Bulent Eren Bayram* [2017] HKEC 378 was an English company that formed part of the *Karla Otto Group* of companies named after their founder and active in the fashion and public relations business.

Ms Otto became romantically involved with the defendant in July 2007 until the relationship ended in July 2010. The defendant, whilst never formally appointed as a director of the plaintiff company, actively participated in its management, holding himself out as a director and assuming control of the company's bank account from which substantial sums were withdrawn and transferred to a Hong Kong company set up by the defendant.

The plaintiff had to show the defendant owed it fiduciary duties and was in breach of such duties. The authorities on *de facto* directors concerned *"whether a particular individual had been sufficiently cloaked with ostensible authority such that his acts or representations are binding on the company."*

The Court considered the defendant was clearly acting as a *de facto* director of the plaintiff company and thus owed the plaintiff the same fiduciary duties as if he were an actual director. By assuming control of the bank account, he had entered into a fiduciary relationship with the plaintiff. The Court granted equitable relief such that everything belonging to the Hong Kong company was held on trust for the plaintiff.

The Court also considered whether it had jurisdiction to require the defendant to resign as director of the Hong Kong company. Section 729 Companies Ordinance (Cap 622) vested in the Court a wide power to make orders against a defaulting director who had been found to be in breach of fiduciary duty. This included a power to order the director to perform a positive act. The Court therefore ordered the defendant to resign as a director of the Hong Kong company.

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