

C L I F F O R D
C H A N C E



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Accumulated win

Bank wins decade-long mis-selling case

The Court of First Instance has handed a decisive win to the defendant bank in the latest mis-selling case to come before the courts. In *Shine Grace Investment Ltd v Citibank, N.A.* [2018] HKEC 2123, the Court found overwhelmingly in favour of the bank, rejecting all of the plaintiff's claims. Clifford Chance acted for the bank.

The dispute concerned six equity accumulator contracts entered into by the plaintiff, Shine Grace, an investment vehicle used by the late Mrs. Anita Chan Lai Ling with the first defendant bank in October 2007. The second defendant was the relationship manager of Shine Grace and for Mrs. Chan. Despite repeated margin calls being made, Shine Grace refused to deposit additional margin security, asserting the contracts were invalid and unenforceable. On 22 January 2008, the disputed contracts were closed out and unwound at a cost exceeding HK\$427 million, following which Shine Grace commenced proceedings.

The Court held the mere giving of "advice" does not necessarily mean that the bank had assumed legal responsibility for it. The Court noted that Mrs. Chan, being a "very strong-minded person and an enthusiastic, confident and prolific investor" would have entered into the contracts in any event.

The efficacy of non-reliance clauses has become somewhat academic in light of reforms to the Professional Investor Regime introduced by the Securities and Futures Commission which came into effect on 9 June 2017 and effectively negate the operation of such clauses. The case does, however, serve as a useful reminder of the importance for banks to maintain clear contemporaneous records showing their efforts in ascertaining suitability and explaining the associated risks.



Reversal of fortune

Does carrying on in a job provide consideration for employment changes?

The Court of Appeal in *胡潔敏 v 龍威集團控股有限公司* [2018] 2 HKLRD 117 granted leave to appeal to a former employee from a decision of Madam Justice Queeny Au-Yeung concerning the validity of an addendum added to an employment contract.

The employee was employed by the company as a senior compliance manager specifically to help the company with its Initial Public Offering (IPO). The addendum to her employment contract was added on 19 October 2015, five months after the employee started work. The addendum provided that the employee would be given a cash bonus of HK\$350,000 under two conditions: (i) if the IPO plan ceased or (ii) she resigned before 31 December 2016. The employee left the company two months after the addendum was added and started a claim in the Labour Tribunal for payment of the bonus. The Tribunal allowed the claim, but Queeny Au-Yeung J, on appeal from the Tribunal, had reversed the decision of the President Officer on the basis that the addendum was not supported by legal consideration.

The Court of Appeal considered the argument that the non-exercise by an employee of the right to terminate the contract of employment (in other words, the employee simply agreeing to carry on with the job), can potentially be considered good legal consideration for a variation of the terms of employment, notwithstanding that the employee would only be performing the same tasks as before. Consideration should be given to the overall circumstances to assess whether the employer did gain a real benefit by the employee continuing in the job. If so, this can provide legal consideration for the contract variation. As the state of affairs between the employee



and the employer clearly required close examination, the Court of Appeal decided to remit the case back to the Labour Tribunal for retrial on the question of legal consideration.

The moral of the story is that even if changes to an employment contract seem to lack commercial sense at first sight, this would not be sufficient to defeat a claim if the employer did gain a real benefit by the employee continuing in the job.

Competitive streak

Court gives leave to defend to defendant alleging collusion

The plaintiff in *Taching Petroleum Co Ltd v Meyer Aluminium Ltd* [2018] 2 HKLRD 1284 applied for summary judgment in its claim for the cost of industrial diesel oil it had sold and delivered to the defendant between April and June 2017. The sole defence raised was that of alleged price collusion with the defendant's other supplier of diesel to move their prices together in breach of section 6(1) Competition Ordinance (Cap. 619), the "first conduct rule". As such, the defendant argued that the contracts for which the plaintiff sought to recover the price were illegal and unenforceable. The defendant contended that it should be given leave to defend, that its defence should be transferred to the Competition Tribunal and that the proceedings should be stayed pending investigation by the Competition Commission.

Godfrey Lam J reviewed the relevant sections 113(1) to (3) of the Ordinance, that where a breach of a conduct rule is alleged as a defence, "the Court must, in respect of the allegation, transfer to the Tribunal so much of those proceedings that are

within the jurisdiction of the Tribunal". Although the use of the word "must" would suggest that a transfer was mandatory, Lam J thought there may be scope for suggesting that the Court "can examine the quality of the defence so that if it can be summarily seen to be of no substance", then there was no defence remaining that would call for a transfer. Even if a transfer were mandatory, the power under section 114(3) to transfer the matter back from the Tribunal to the Court, could be exercised immediately, without the need for the case to be adjourned.

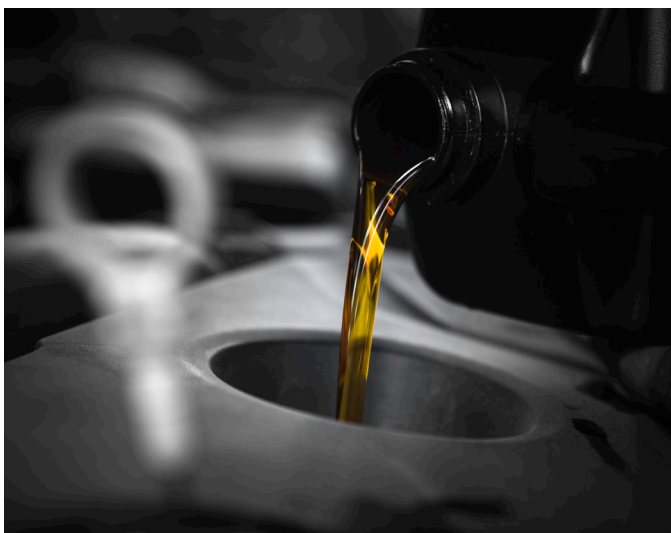
As with a usual summary judgment application, the question was "not whether the defendant's assertions are to be believed but whether they are believable". The plaintiff had failed to provide relevant evidence to show that the defendant's assertions were "beyond belief". Godfrey Lam J gave leave for the defendant to defend the action on condition of payment of HK\$4.43 million into court within 28 days. The allegation of contravention of the first conduct rule would be transferred to the Tribunal with the remainder of the action listed in the Court of First Instance for directions with the hearing before the same judge who would sit as the Tribunal on the same day.

Change of mind

Court allows plaintiff to benefit from sanctioned payment

Since the advent of civil justice reform, one of the more hotly debated topics in the courts has been what constitutes a valid sanctioned offer or sanctioned payment under Order 22 of the High Court rules. *Lam Wai Ling Mayme v Hutchison Telecommunications (Hong Kong) Ltd* [2018] HKEC 76, involved a personal injuries claim. In March 2016, the plaintiff obtained a doctor's certificate testifying that she was permanently unfit for work, which she used to apply for a long service payment.

On 3 November 2016, the defendant filed a notice of sanctioned payment of HK\$63,000 which was rejected by the plaintiff who made a counter-offer of HK\$380,000 by way of sanctioned offer. On 16 November 2016, the Labour Department wrote to the defendant that, having considered available medical reports, it had concluded the plaintiff was not entitled to a long service payment because she was not considered to be permanently unfit for the role for which she was engaged. On 21 November 2016, the defendant took out a summons to withdraw the sanctioned payment. The plaintiff initially indicated she would consent to the withdrawal, before changing her mind and several days later purporting to accept the sanctioned payment.





In allowing an appeal from the first instance decision granting leave to the defendant to withdraw the sanctioned payment, Bharwaney J said the question before the Court was whether the Labour Department's "ruling" on 16 November 2016 amounted to such a change of circumstances as would render it unjust to benefit from the sanctioned payment. The Court had little hesitation in allowing the appeal.

The advice of the medical experts relied upon by the Labour Department was "of no probative value" to the issues raised in the action. Had the action proceeded to trial, the issues would have been determined by the trial judge after a thorough consideration of all the admissible expert evidence.

While noting that RHC O.22, r10(2) and 3 did not cater for the situation where an application to withdraw a sanctioned payment is followed by a notice of acceptance, Bharwaney J found previous English authority of assistance. The Court consequently made an order granting leave to the plaintiff to accept the sanctioned payment and ordering the defendant to pay the plaintiff's costs of the action.

Strong medicine

Court of Appeal affirms Court's discretion in winding-up foreign companies

The Hong Kong courts continue to develop the law in the area of cross-border insolvency in the continuing absence of any statutory scheme for corporate rescue. In *China Medical Technologies, Inc v Samson Tsang Tak Yung* [2018] HKEC 392 and [2018] HKEC 393, the Court of Appeal handed down its reasons for two decisions in the long-running China Medical saga.



Mr Justice Harris had made a winding-up order against China Medical on 1 September 2014. Samson Tsang, a former director and chief financial officer of the company and an alleged contributory, appealed against the winding-up order. The provisional liquidators in turn applied to have Mr Tsang's notice of appeal struck out, arguing that he had no tangible interest in the company's liquidation and therefore could not be joined as a party to the winding-up proceedings. They also said he should be prevented from making the application whilst in contempt of court for failing to attend section 221 examination hearings.

The Court of Appeal found that, whilst Mr Tsang did not stand to benefit from the winding-up, this did not mean he did not have standing to oppose it, despite the court's previous settled practice in the area. The Court of Appeal did not consider the interests of justice would be served by preventing Mr Tsang from appealing against the winding-up, despite his being in contempt.

Mr Tsang was ultimately unsuccessful in his appeal however, with the Court of Appeal deciding that Harris J had been correct in exercising the Court's jurisdiction and discretion to wind-up a foreign company, notwithstanding that the third of the three "core requirements" had not been satisfied in this instance. These are: (i) there must be a sufficient connection with Hong Kong which may, but does not necessarily have to consist of assets within the jurisdiction; (ii) there must be a reasonable possibility if a winding-up order is made, that it benefits those applying for it; and (iii) one or more persons involved in the distribution of the assets of the company must be persons over whom the Court can exercise jurisdiction.

The Court of Appeal confirmed that the three requirements went to the Court's discretion (rather than jurisdiction), noting that the third limb would not always be required where, as in this case, the connection to the jurisdiction was sufficiently strong and the potential benefit was sufficiently significant.

In a third decision [2018] 2 HKLRD 1202, the Court of Appeal allowed an appeal by liquidators against the judgment of Harris J in February 2015 dismissing their application for production of documents by Mr Tsang under section 221(3) of the Companies (Winding up and Miscellaneous Provisions) Ordinance (Cap.32) (CWUMPO). The Court of Appeal said the language of the section called for a wide interpretation of the court's powers under it, which is in line with the recent amendments to liquidators' powers of examination in the CWUMPO.

What a legend

High Court clarifies circumstances in which provisional liquidators may exercise restructuring powers in Hong Kong

In *Re China Solar Energy Holdings Limited* [2018] 2 HKLRD 338, Mr Justice Harris dismissed an application to, *inter alia*, discharge provisional liquidators (PLs) where the only purpose of the PLs ongoing appointment was to complete the company's restructuring.

By way of reminder, the decision of the Court of Appeal in *Re Legend International Resorts Ltd* [2006] 3 HKC 565 has been widely interpreted to prevent the appointment of PLs in Hong Kong solely for the purpose of effecting a restructuring. Generally speaking, PLs may only be appointed where it can be shown that there is jeopardy to the assets of the company.



Re Legend has long been a thorn in the side of Hong Kong pressing its case to be an Asian restructuring hub (not least in the absence of a proper corporate rescue regime being implemented by the legislature). This decision goes some way (perhaps as far as presently possible) to limit the effect of *Re Legend*.

PLs were appointed to China Solar Energy Holdings Limited (the Company) on traditional asset preservation grounds and were, at the time of appointment, also given restructuring powers by the Court. The plaintiffs (Ankang Ltd) argued that (i) the decision in *Re Legend* meant that provisional liquidation is not permitted where the sole or primary function of the PLs is to carry out a business or debt restructuring, (ii) the PLs cannot be said to be protecting an asset of the company as the only asset to protect is the listing status of the Company and this does not qualify as an asset, and (iii) a restructuring that will avoid a winding-up is contrary to *Re Legend*, which held that a provisional liquidation must be for the purpose of a winding-up.

Harris J dismissed the first and third arguments on what could be seen as a stretched (though largely welcome) interpretation of the decision of *Re Legend*. In essence, Harris J found that the Court of Appeal cannot have intended to prevent PLs properly armed with restructuring powers from completing a restructuring where they had already performed their asset preservation role. It was not in dispute that PLs could be granted such restructuring powers. Harris J described the potential outcome of PLs being forced to abandon a restructuring that would result in better returns for creditors in favour of a winding-up (as would have been the case here) as both "*counter intuitive*" and "*bizarre*". To do so would also be inconsistent with the statutory regime and post-*Re Legend* case law.

Harris J rejected the plaintiff's second argument on two grounds, holding that a company's listing can be considered an asset of the company and second, that it was incorrect to say that the only jeopardy to the listing status came from the risk that it would be lost in a winding-up. There were existing reasons (including accounting and management irregularities) as to why the Company could have lost its listing status prior to the appointment of the PLs.

Harris J expressed his frustration at Hong Kong's lack of a statutory cross-border insolvency regime in *CW Advanced Technologies Ltd* [2018] HKEC 1983. Warning of the urgent need for reform, Harris J advised practitioners of the "*need for careful cross-border planning before insolvency proceedings are commenced*". Harris J relied on his own decision in *Re China*

Solar Energy Holdings Limited (above) to appoint provisional liquidators in Hong Kong at the application of a lender to the CW group. In doing so, he side-stepped the question of whether the Hong Kong Court could recognise a Singapore moratorium.

In decisions such as these, Harris J continues to do his utmost to assist the restructuring and insolvency practitioner community in Hong Kong. Only time will tell whether his efforts will eventually be supported by the legislature.

The real thing

Non-party ordered to bear the costs in company action

The parties due to receive costs from the plaintiff in *Big Island Construction (HK) Ltd v Wu Yi Development Co Ltd* [2018] 2 HKLRD 1145 asked the Court to order that a non-party, a Mr Lee, bear the costs personally on the ground that he was “the real party” to the litigation. It was argued that Mr Lee owned and controlled the plaintiff and had funded the actions and stood to benefit from them. Mr Lee argued he should not have to bear the costs as there had been gross delay on the part of the receiving parties in issuing the application and he was therefore prejudiced and that previous applications to hold him personally liable had failed.

Queeney Au-Yeung J noted that section 52A High Court Ordinance (Cap. 4) confers a wide discretion on the court to determine “by whom and to what extent” costs of and incidental to the proceedings before the court are to be paid. The court only has to be satisfied that it is “in the interests of justice” to award costs against a non-party. Where the non-party not merely funds the proceedings but substantially also controls them, justice would ordinarily require that the non-party should

pay the successful party’s costs if the litigation failed. A non-party’s conduct in giving dishonest evidence or running a claim which they know to be false is also a relevant factor.

The Court found that Mr Lee did own and control the plaintiff and that he had played a prominent and indispensable role in the litigation. He would also have benefitted substantially had the claim succeeded. In addition, the judgment of the Court of First Instance was “replete with examples where Poon J found instances of impropriety, all connected to Mr Lee”, with Mr Lee making up his story as he went along, lying to the Court and forging documents.

The plaintiff “was found to have invented the claim and had gone to the extent of fabricating evidence to pursue it”. “A person like Mr Lee who causes litigation to be pursued for the purpose of advancing a claim which he knows to be false has no reason to feel affronted or aggrieved if, when the falsity is exposed, he should be required to meet the cost of that litigation.” Whilst the Court found there had been gross delay in taking out the applications, the Court could find no prejudice to Mr Lee in the circumstances of the actions and the appeals involved. Mr Lee was ordered to be the costs of the actions personally, with costs in one of the actions on an indemnity basis.

Lack of service

Can account inspection be ordered where account holder hasn’t been served?

The plaintiff in *Tiger Resort Asia Ltd v Kazuo Okada* [2018] HKEC 680 applied for discovery and inspection against two banks pursuant to section 21 of the Evidence Ordinance, Cap 9. Neither bank was a party to the action and did not seek to be heard. The main cause of action against the first defendant was breach of fiduciary duties towards the plaintiff company as sole director, in relation to a large transfer made to the accounts of the other defendants. The primary cause of action against the other defendants was knowing receipt or assistance.

Despite the plaintiff’s efforts, the summons was not served upon the fourth defendant or Skyrise, an entity controlled by the first defendant. Would that prevent an order pursuant to section 21 of the Evidence Ordinance from being granted? The view of Deputy Judge Keith Yeung SC was no.

It was clear from the wording of the section there was no statutory prerequisite or requirement for the application to be served on the account holder. Indeed, an order under the section could be made “without summoning ... any other party”. Citing English authority from 1887, the Judge found that such





an order could be made *ex parte*, “though under ordinary circumstances” it was better that the person whose account was to be looked at should be served.

It was not always possible to give notice to the person whose account was to be inspected. An insistence that service or notice should be a prerequisite would impose unjustified fetters upon the Court’s discretion that could be exercised under that section.

The Court was satisfied that the present circumstances were not ordinary and that there was a clear *prima facie* case of breach of fiduciary duties on the part of the first defendant and knowing receipt or assistance by the other defendants, including Skyrise. The total amount involved was substantial and the records sought by the plaintiff were highly relevant. The scope of the order the plaintiff was seeking had been narrowed. As such, the Court would make the order requested.

Extracurricular activities

District Court ruling sounds alarm bells for senior employees

The plaintiffs in *South China Media Ltd v Kwok Yee Ning* [2018] HKEC 336, claimed against one of its former employees, who had been responsible for a magazine called “*Whiz-Kids Express Weekly*”, targeting kindergarten and primary school children and their parents and providing event planning services for educational and extra-curricular activities. The plaintiffs alleged this former employee was in breach of contractual and fiduciary duties owed to the plaintiffs, by allowing unauthorised use of the magazine’s logo and name, diverting business opportunities away to a company controlled by her husband and by the unlawful solicitation of business opportunities in breach of a



restrictive covenant. The plaintiffs claimed the other defendants, the husband and his companies, had unlawfully procured the defendant’s breaches, and were liable for dishonest assistance and knowing receipt of tainted funds.

Judge Andrew Li accepted that the defendant had not been formally appointed as a director of Whiz Kids, a subsidiary of the plaintiff, but by reason of her role and the functions she performed, was a *de facto* director up until she resigned. She had the title “*advertising director*” and had the authority to negotiate and enter into contracts. The defendant was therefore a fiduciary of Whiz Kids and owed it fiduciary duties.

The Court accepted the proposition that those who assume to act as directors and who thereby exercise the powers and discharge the functions of a director, whether validly appointed or not, must accept the responsibilities of the office. It was necessary to look at what the person actually did to see whether they assumed those responsibilities in relation to the company.

In light of the overwhelming evidence against her and the other defendants, the Court had no hesitation in finding the defendant had breached the fiduciary duties owed to the plaintiffs. The Court also found the non-solicitation clause in the defendant’s contract to be reasonable and enforceable.

As for the other defendants, the Court was satisfied the evidence supported the plaintiffs’ proposition that the requirements for dishonest assistance had been met. The Court found the defendant’s husband “*to be a dishonest individual who had acted in collusion with his wife Kwok to cheat her former employer and the associated companies, i.e. the*

plaintiffs.” The Court awarded equitable compensation to the plaintiffs for lost corporate opportunities and loss of profits.

The ruling is likely to sound alarm bells for senior employees who exercise the powers and discharge the functions of a director but who may be less aware of the obligations of undivided loyalty owed to the company in the capacity of a fiduciary.

A lenient approach

Tribunal considers scope of disclosure in competition battle

In the latest decision in *Competition Commission v Nutanix Hong Kong Ltd* [2018] HKEC 596, Godfrey Lam J presiding in the Competition Tribunal determined a respondent’s application for orders for discovery of a range of documents from the Competition Commission. The documents requested, among others, without prejudice correspondence between the Commission in relation to its leniency policy. The case concerns an allegation of bid-rigging against five companies which in 2016 tendered for the supply and installation of an IT server system for the Hong Kong Young Women’s Christian Association (YWCA).

Leniency programmes typically reward cooperation by cartel members in helping to expose the cartel of which they are members. Their value was described as creating “a general climate of uncertainty among potential cartel members which may inhibit the actual formation of cartels.” The chairperson of the Commission filed a certificate with the Tribunal in support of its claim for public interest immunity to apply over the documents sought in relation to the leniency policy, arguing that “a requirement that the Commission disclose and produce without prejudice correspondence and records between the Commission and an unsuccessful leniency applicant would

unduly dissuade potential leniency applicants in the future because of their knowledge that the contents of such communications may become disclosable if their leniency application is unsuccessful.” The Commission claimed that the effectiveness of the tool in the detection, investigation and prosecution of cartel activities could be severely undermined and the functioning of the Commission inhibited if the application were to succeed.

Lam J said there was no reason why common law “*informer privilege*” – protecting an informer’s identity from disclosure in criminal or civil proceedings – should not apply. The Tribunal considered international practice, noting that the approach of UK and EU regulators was similar to that of the Commission. Lam J said there was a strong public interest in encouraging eligible parties to apply for leniency and in facilitating free and frank communication during the process. On balance, Lam J said thought that the public interest in non-disclosure should outweigh any contrary interest in disclosure, and that the application of without prejudice privilege should allow the Commission to resist disclosure of the documents.

Given the approach taken in other jurisdictions, the outcome is not surprising. Had the decision gone the other way, it may have discouraged leniency applicants from coming forward, particularly those who might have been vulnerable to being sued for damages in other jurisdictions. The decision will also serve as an important precedent should the restrictions against standalone private antitrust actions be relaxed in Hong Kong.

Wood for the trees

Contempt order left in place against Sino Forest defendants

In *Cosimo Borrelli (Trustee of SFC Litigation Trust) v Allen Tak Yuen Chan* [2018] 2 HKLRD 496, the Court of Appeal considered the appeal by the 2nd to 4th defendants against the judge’s refusal to set aside leave granted to the plaintiff to commit the first to fourth defendants for contempt. The defendants argued that the plaintiff’s statement in support of the contempt application was defective because of false statements that the 2nd to 4th defendants breached the Hong Kong Mareva Order, when they had not been party to it.

The 1st defendant was the former chief executive officer of Sino Forest Corporation. The plaintiff, as trustee of the SFC Litigation Trust, brought proceedings against him in Canada (where it was listed) for breaches of fiduciary, equitable and statutory duties. The 2nd defendant was the 1st defendant’s companion and the 3rd and 4th defendants his daughters. On 28 August 2014, the Canadian Court granted a worldwide Mareva injunction against





the 1st defendant. The 1st defendant disclosed that a company under his control had transferred three sums of money totalling US\$6.5 million to the 2nd, 3rd and 4th defendants. The Hong Kong Court extended the freezing order to the bank accounts of the 2nd, 3rd and 4th defendants who admitted they had transferred substantial sums from their bank accounts to various entities.

Kwan JA and Lam J sitting in the Court of Appeal said the judge was correct in regarding the mis-characterisation about the legal basis of the complaint as a technical error which could not have caused prejudice to the 2nd to 4th defendants. The statement was nonetheless defective in that it failed to mention that the defendants knew that the funds had come from the 1st defendant, a key factual element necessary to establish that the 2nd to 4th defendants had knowingly aided or abetted the 1st defendant's breach.

The Court of Appeal did not accept counsel's submission that as a matter of principle the Court should simply set aside leave once the statement was found to be defective. The Court had a real discretion to exercise whether to set aside leave. The 2nd to 4th defendants would have suffered no prejudice, as it was clear the sums paid into their bank accounts came from the 1st defendant. In the *"very special circumstances of this case"*, the Court of Appeal considered the proper exercise of its discretion was to refuse to set aside the leave order.

Stop right now

Court restrains PRC civil proceedings due to breach of arbitration agreement

In a robust judgment in *Argowiggins HKK2 Ltd v Shandong Chenming Paper Holdings Ltd* [2018] HKEC 85, Madam Justice Mimmie Chan restrained the respondent from continuing PRC proceedings against the claimant. In 2015, the claimant

obtained an HKIAC arbitral award (Award) against the respondent pursuant to an arbitration agreement in a joint venture contract. The claimant's anti-suit injunction application before the Hong Kong court sought to restrain the respondent's PRC court proceedings. According to the claimant, the PRC proceedings breached the arbitration agreement and relitigated issues already decided in the Award and by the Hong Kong Courts (in an unsuccessful application by the respondent to set aside that Award).

In granting the anti-suit injunction, Mimmie Chan J considered that (i) the respondent's claims in the PRC proceedings fell within the scope of the arbitration agreement; and (ii) the parties' conduct is a relevant factor in exercising the Court's discretionary powers to grant an injunction. In assessing the respondent's conduct, she noted that Harris J had previously found that the respondent's refusal to enforce the Award had been *"in no uncertain terms ... unethical, reproachable and unacceptable"*. She added that the respondent *"has at the same time displayed complete disrespect for the arbitration agreement ... by totalling refusing to accept its liability under the Award when it is not in its favour"* and that the respondent's *"intentional and deliberate disregard of the order of this Court and of the Award cannot be countenanced"*. Moreover, Mimmie Chan J extended the anti-suit injunction to restrain the respondent from pursuing the PRC proceedings against Mr Tong, who was not a party to the arbitration agreement but who was alleged by the respondent to be the representative and agent of the claimant.



The Court also dismissed the respondent's application to adduce further expert evidence on procedures for derivative actions under PRC law, noting that the respondent had waited until five days before the hearing to apply for leave. The respondent was ordered to pay the applicant's costs on an indemnity basis.

Currency clarification

Court of Appeal revisits the basis for calculation of pre-judgment interest

The Court of Appeal in *Chow How Yeen Margaret v Wex Pharmaceuticals* [2018] HKEC 1540, considered the defendants' appeal from the first instance decision, which had found them liable for losses suffered by the plaintiffs in connection with a share sale. The defendants (a Canadian company and its listed Hong Kong subsidiary) represented to the plaintiffs through their President and CEO (a Mr Shum), that they owned a patent to manufacture a drug, inducing them to buy shares. The share price dropped once it became known that the defendants had previously lost ownership of the patent. The plaintiffs were successful at first instance in their claim for loss of value in the shares based on the defendants' fraudulent misrepresentation.

Lam V-P, Poon JA and Chan J rejected the defendants' appeal against the main judgment, describing it as "wholly unmeritorious". They did however consider two points of note: an appeal against the interest rate awarded in respect of pre-judgment interest and the applicable currency to be adopted, noting the defendants' submission that the applicable interest rate should be that of Canada rather than Hong Kong, as the shares were priced in Canadian dollars.

The judge had awarded pre-judgment interest to the plaintiffs at judgment rate (8%), above what the Court of Appeal noted was

the "norm in Hong Kong", prime rate plus 1%. The Court of Appeal said an award of interest was designed to compensate the winning party for being deprived of funds and should be calculated using a rate they generally would have had to pay to borrow money during the period. The Court of Appeal found there to be no sound basis for departing from the conventional rate and that the appeal on this point should be upheld.

The Court of Appeal went on to highlight that the plaintiffs paid for their investment by way of Hong Kong and US dollars into the defendants' bank accounts in Hong Kong. The first plaintiff was a Hong Kong resident and the second and third plaintiffs were Hong Kong companies. It was unlikely the plaintiffs would be able to borrow Canadian dollars in Hong Kong at rates published in Canada. The relevant interest rate, therefore should be Hong Kong dollar borrowing rates, at prime rate plus 1%.

Barred

Court of Appeal rejects appearance application by overseas counsel

Overseas counsel often find their applications to appear in Hong Kong courts challenged given opposition from the local bar association and the Secretary for Justice. Barma JA, giving the Court of Appeal's judgment in *Re Shân Warnock Smith QC* [2018] 2 HKLRD 377 considered an application for admission for the purpose of advising, preparing and appearing on behalf of the defendants in the conduct of proceedings between Mr Zhang Hong Li and others as plaintiffs and DBS Bank (Hong Kong) and others as defendants. The underlying proceedings involved a dispute in respect of private banking, investment management and trust services provided by the bank in the lead up to the 2008 global financial crisis. Bharwaney J had delivered a 379 page judgment following a 24-day trial involving more than 18,000 documents, finding negligence on the part of two of the defendants.



Barma JA summarised the principles applicable to the admission of overseas counsel. In coming to a decision, the Court is concerned to do what is in the public interest, in all the circumstances of the case. The need to maintain a strong and independent local bar is often said to militate against the admission of overseas counsel, however specialist overseas counsel may be admitted in cases involving the development of legal principles that may substantially impact on the development of local jurisprudence, or in cases of unusual difficulty or complexity.

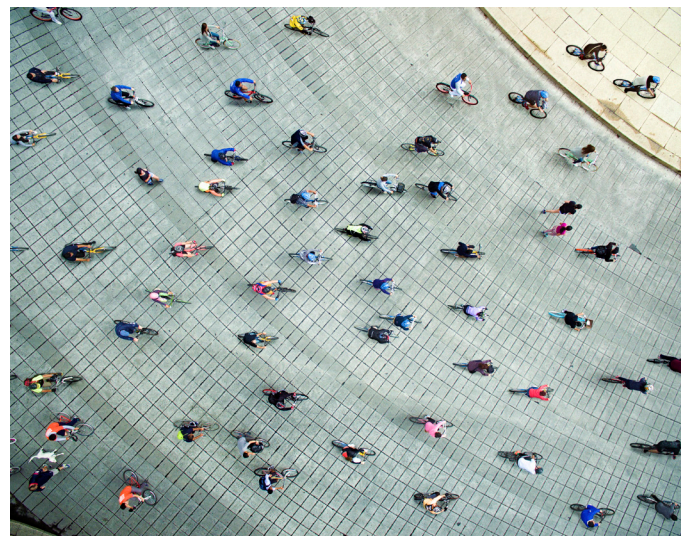
Whilst the Court found the applicant to be very well qualified and highly experienced in the areas of law which would arise for consideration on the appeal, the Court of Appeal found it inherently unlikely that the determination of the case would make any, let alone any substantial, impact on Hong Kong jurisprudence, given that Hong Kong law applied neither to the duties of the trustee or director. It was very likely that the issues would be determined by the application of well-established legal principles. Should the case eventually proceed to the Court of Final Appeal it would be open to the parties to seek the admission of overseas counsel at that stage. Neither was Barma JJA persuaded that the case was one which was so unusually heavy, difficult or complex as to justify the admission of overseas counsel. The Court of Appeal dismissed the application.

Mistaken identity

Court considers whether to allow claim where writ was issued against the wrong company

The BVI-incorporated defendant in *Benchmark Electronics (Thailand) PCL v Cargo Container Line Ltd* [2018] 2 HKLRD 617 applied to discharge the Order granting leave for the service of the Concurrent Amended Writ out of jurisdiction and to dismiss the action. The plaintiffs had issued the writ on the last day before the expiration of the limitation period.

Unfortunately, the writ had been issued against a company with the same name as the defendant but which was incorporated in



Malta, being a separate legal entity with different directors and shareholders. The defendant argued the claims were time barred, and that the proposed amendment of the writ amounted to the substitution of a new party.

Mr Justice Anthony Chan said it could not be seriously doubted that the plaintiffs had all along intended to sue the carrier under the relevant bills of lading. Neither counsel had managed to find any authority on whether the amendment of the address of the defendant would result in the substitution of a new party. RHC O.20, r5(3) allowed such an amendment after the expiry of a limitation period, if certain conditions were met. Where the plaintiff *“gets the right description but the wrong name, there is unlikely to be any doubt as to the identity of the person intended to be sued.”*

There could be no doubt that the party intended to be sued was CCL BVI. Dismissing the application, Chan J said he did *“not believe that the law should depend on a matter of accident”*.

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