DVC's second edition of A Word of Counsel picks up where our inaugural edition left off, teeming with substantive content, including Case Reports and new Announcements, as well as a carousel of collaborative Events which began in January this year.

In an issue that has seen a raft of company cases handed down in the first quarter of 2018, notably in the insolvency domain, read on to learn about how the panorama has changed and how to navigate the evolving landscape.

Headlining this edition, we feature an exciting new landmark judgment featuring a lineup of DVC members including John Scott SC, Clifford Smith SC, José-Antonio Maurellet SC and John Hui. Discover how The China Solar case has distinguished itself from the case of Re Legend International Resorts.

Next, Barrie Barlow SC and Pat Lun Chan break down the anatomy of Mr Justice Godfrey Lam’s judgment in The Liquidator of Wing Fai Construction (The Company) v. Yip Kwong Robert & Two Others to determine when directors are required to compensate a company for misfeasance.

We subsequently take you to a leading judgment that has moved Hong Kong closer in line with the UK and Singapore where the court concluded what happens when a winding up petition is issued despite the existence of an arbitration agreement. The issue of whether to give primacy to a party’s agreed dispute resolution method was conclusively resolved in the judgment of Lasmos Ltd v. Southwest Pacific Bauxite (HK) Limited [2018] HKCFI 426 in a case led by Christopher Chain.

In the context of winding up petitions, Anson Wong SC reflects upon whether sufficient connection is still the test to be applied before the court can exercise its jurisdiction to wind up a foreign company. For more on this, read his case report featuring a summary of the China Medical case.

Lawrence K F Ng spotlights three cases; read on to find out whether Google got the green light, Where the buck stops in the context of leave to appeal, and whether or not a defendant can rely on the defence of qualified privilege to defeat a defamation claim.

Yang-Wahn Hew, John Hui and Alvin Tsang consider whether there’s been a change of direction in favour of filial piety in Primecredit v. Yeung Chun Pang Barry.


Next, Michael Lok analyses the reason why a company might apply for its own winding-up.

Weighing in on land disputes and estoppel by standing by, Alan Kwong and Stephanie Wong outline the circumstances in which an estoppel by silence might arise in Cheung Lai Mui v. Cheung Wai Shing.

We are alerted to a recent decision by Mr Justice Harris, the current Company and Insolvency Judge, in a “March towards Modified Universalism” - a case note authored by John Marsden of Mayer Brown JSM and Ian Mann of Harneys.
Reflecting upon what happened in 2017 in a key case from the competition sphere, Johnny Mok SC and Catrina Lam clarify the scope of privilege against self-incrimination, what this might mean for you, and why it matters. Tim Ward QC, from London’s Monckton Chambers asks the question: do Hong Kong and the UK share the same rationale for the privilege?

José-Antonio Maurellet SC wraps up the Case Reports segment by considering whether the recent case of Re Seadrill Drilling sits comfortably with the case of Rubin v. Eurofinance and Singularis Holdings v. PricewaterhouseCoopers.

Announcements

There have been three notable appointments in the first quarter of 2018, read on to find out who landed these appointments and which sectors these cut across.

Events

Kicking off the events for Q1 of 2018, Chris Chain and Lai Chun Ho took the litigation team at Bird & Bird through a structured playbook which captured the crucial features of effective advocacy in a presentation entitled “Oral Advocacy- Practical Tips & Tricks”.

Bringing to the fore an incisive analysis of the most recent developments in Company Law, William M F Wong SC and Kerby Lau recapped the latest issues in cross-border insolvency at their book launch of “Company Law: Powers & Accountability - 2nd Edition” co-authored with Low Siew Chiang on 23 February. The Hon. Mr Justice Jonathan Harris was the keynote speaker, and William M F Wong SC followed with a review of the redress available when a Board of Directors is deadlocked – as highlighted in a new chapter on Fight over Board Control. The event was co-hosted with publishers, LexisNexis and concluded with a book signing by the two authors. Clifford Smith SC, José-Antonio Maurellet SC, Lawrence K F Ng, Teresa Wu, Eva Leung, Justin Lam and Stephanie Wong also attended.

On 13th, 14th and 15th March, Catrina Lam, Paul Harris QC of Monckton Chambers and David Chu of Proskauer Rose delivered a compelling series of sector driven Competition events. Each presentation was contoured for a different cross-section of the in-house community including those in the finance and construction industries. The first event on 13th March “Know your Competition risks and Protect your Goals” was held in collaboration with the HKCCA. The second event highlighted the red flags in the evolving competition panorama in Hong Kong, the EU and the UK and the final event identified the nuts and bolts of bid-rigging in Capstones of the Competition Ordinance within the Construction Industry in a co-hosted event with the Society of Construction Law HK. For a fly on the wall’s observation of what you missed, listen to Catrina’s podcast on page 40.

Winnie Tam SC, Ling Chun Wai and Stephanie Wong joined forces with keynote speaker Dr Dev Gangjee, Associate Professor and Visiting Oxford Scholar, along with other leading IP experts to deliver a robust workshop to a full house on how luxury brands could flourish in light of increasing IP challenges in “Evolving IP issues in Brand Protection in the Digital Marketing Era” as part of the DVC-Oxford HKU Visiting Fellowship Series.

We hope you enjoy this issue. Look out for more newsworthy case reports, event updates and announcement bulletins in our 3rd edition.
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### Juniors

| Liza Jane Cruden                  | Mairéad Rattigan              | Alfred Liang                      | Lawrence K F Ng            |
| Pat Lun Chan                      | David Tsang                   | Richard Leung                     | Ling Chun Wai              |
| Richard Zimmern                   | Patrick Chong                 | Frances Irving                    | Janine Cheung              |
| Catrina Lam                       | Johnny Ma                     | Teresa Wu                         | Jenkin Suen                |
| Yang-Wahn Hew                     | Rachel Lam                    | Calvin Cheuk                      | Frances Lok                |
| Gary Lam                          | Adrian Lai                   | John Hui                          | Benny Lo                   |
| Alvin Tsang                       | Alan Kwong                    | Christopher Chain                 | Sabrina Ho                 |
| Connie Lee                        | Patrick Siu                  | David Chen                        | Alexander Tang             |
| Ebony Ling                        | Jason Yu                      | Kerby Lau                         | Justin Lam                 |
| Martin Kok                        | Jacqueline Law                | Michael Lok                       | Eva Leung                  |
| Joseph Wong                       | Jonathan Chan                 | Kaiser Leung                      | Ross Li                    |
| Ellen Pang                        | Vincent Chiu                  | Tom Ng                            | Stephanie Wong             |
| Cherry Xu                         | Terrence Tai                  | Tommy Cheung                      | Lai Chun Ho                |
| Sharon Yuen                       | Kevin Lau                     |                                  |                            |

### Door Tenants

| John Griffiths SC, QC, CMG        | Jeffrey P. Elkinson           | Jonathan Shaw                     | Kelvin Kwok                |
Provisional Liquidators’ Restructuring Powers Clarified: China Solar

The Court of Appeal decision in Re Legend International Resorts [2006] 2 HKLRD 192 had caused many to doubt if provisional liquidators appointed in Hong Kong could play a restructuring role at all. Twelve years later, in Re China Solar Energy Holdings [2018] HKCFI 555, Harris J has clarified that provisional liquidators need to be appointed on such conventional grounds as asset preservation. But where the circumstances warrant it, the provisional liquidators may be given restructuring powers and may pursue the company’s restructuring exercise to fruition.

The China Solar facts and decision

China Solar Energy Holdings Limited (“Company”) was incorporated in Bermuda and listed on the Hong Kong Stock Exchange (“HKSE”), but trading in the Company’s shares had been suspended since August 2013.

Since January 2015 the Company had been in various stages of the delisting procedure because of the Company’s failure to comply with the listing requirements. In August 2015, on the Company’s application, provisional liquidators (“PLs”) were appointed to the Company on the basis that the PLs were needed to: (a) safeguard the Company’s assets (including the Company’s listing status) which were in jeopardy, and (b) investigate certain suspicious transactions entered into by the Company.

The PLs’ terms of appointment included a power to pursue the Company’s restructuring. Thus from the outset, the PLs intended to procure a restructuring with a view to the Company resuming the trading of its shares. Together with a potential investor, the PLs had been working on various re-listing proposals to be submitted to HKSE.

In February 2017, however, the petitioner (a shareholder of the Company), who in fact supported the Company’s application for provisional liquidation and intended to invest in the Company’s restructuring, applied to the court to remove the PLs. The petitioner argued that, because the PLs had finished their asset preservation tasks, the PLs’ primary remaining role would be to pursue the Company’s restructuring. That, according to the petitioner, would not be permissible under Legend because Legend held that provisional liquidation must be for the purpose of a winding-up, and not for the purpose of avoiding a winding-up. A successful restructuring of the Company would avoid a winding-up.

Harris J dismissed the petitioner’s application. His Lordship reasoned and explained the effect of Legend as follows. The court may appoint provisional liquidators only on conventional grounds, such as the need to preserve the company’s assets. In other words, provisional liquidators may not be appointed solely for the purpose of restructuring. Where the circumstances so warrant, however, the provisional liquidators may be given restructuring powers. The provisional liquidators will be permitted to complete the company’s restructuring, even if they have completed their other tasks, such as asset preservation. Terminating the provisional liquidators just because their remaining primary task concerns restructuring would be detrimental to the creditors’ collective interest. This would not be consistent with the statutory purpose underlying the appointment of provisional liquidators.
Comments

This decision is a much welcome clarification of *Legend*. For practitioners, the decision stands for the following propositions:

1. The Hong Kong court may appoint provisional liquidators only on conventional grounds, such as asset preservation and investigation.

2. In the right circumstances (such as the existence of strong creditor support), provisional liquidators may be given powers to restructure the company’s business and indebtedness.

3. Provisional liquidators with restructuring powers may focus on restructuring even if they have completed their other tasks for which they were appointed.

4. Thus the Hong Kong provisional liquidation regime may sometimes help a foreign company achieve a restructuring, as the facts in *China Solar* demonstrate.

DVC members involved in this case are:

José-Antonio Maurellet SC, John Hui and Jonathan Chan for the petitioner.

John Scott SC for the Company.

Clifford Smith SC and Alexander Tang for the provisional liquidators.

Patrick Chong for an investor.

William M F Wong SC and Look Chan Ho co-authored this Case Report.
Misfeasance Actions Against Directors or Officers of Insolvent Companies:


In his recent Judgment handed down on 24 November 2017, the Hon. Mr. Justice Godfrey Lam, provided valuable guidance to practitioners and liquidators alike and clarified the legal principles involving claims against directors of a company in liquidation for misfeasance whilst in office, pursuant to S.276 of the Companies Winding Up (Miscellaneous Proceedings) Ordinance, Cap. 32. The Judgment brought to an end long-drawn-out and protracted litigation, which spanned the course of over 13 years and involved various (well-known) related applications and appeals to the Court of Appeal, and Court of Final Appeal.

On 6 July 2002, a petition was presented to wind up Wing Fai Construction (the *Company*). On 9 December 2002, the *Company* was wound up and provisional liquidators were appointed. On 28 February 2003, they were appointed as the original liquidators of the *Company*.

In August 2004 the original liquidators of Wing Fai initiated a claim for misfeasance against the 3 directors, which was later continued by the liquidator acting alone. The liquidator alleged that the 3 directors had fraudulently authorised $33 million worth of payments on fictitious L/Cs for the benefit of 2 companies, that were alleged to be connected to them.

The learned Judge held:

1. S.276 actions were confined to actions against the limited class of persons to whom the section applies, and the respondents were not officers of the *Company* merely on the basis of their alleged trusteeship of corporate funds under their control but the 1st and 2nd Respondents were however de facto directors of the Company during the time the alleged misconduct took place [§97]: *cf Revenue and Customs Commissioners v. Holland* [2010] 1 WLR 279.

2. The purpose of S.276 actions was to compensate the company for actual losses incurred by reason of misfeasance and were not to be used as a means to punish directors for misfeasance [§273].

3. S.276 ends with the words “as the court thinks just”, which enables the Court to exercise its discretion do what it considers to be just in the circumstances of the case [§338].

4. S.276 actions did not apply to alleged losses arising merely out of accounting entries, and proof of actual loss was required before S.276 would be applied [§§156-163].

5. S.276 is a provision directed against individual persons, and duties of directors are owed personally and individually to the company, there is no basis to make all or some of the board of directors jointly liable for the misfeasance of other directors. Conceptually, the proceedings comprised 3 applications against the 3 respondents individually [§190].

6. In this case, the Liquidator had failed to prove his case that the *Company* had suffered any losses; and/or, in any event, the directors had made good any depletion of the Company’s funds such that the *Company* should have given credit for those returned funds and there was no loss to the *Company* and no liability on the directors to compensate the *Company* at all - *cf Re Derek Randall Enterprises Ltd.* [1990] BCC 79.

*Barrie Barlow SC* and *Chan Pat Lun* represented the 2nd Respondent in this case.
HK Landmark Judgment: Arbitration Trumps Winding-Up Petition


On 2 March 2018, Harris J handed down a landmark judgment holding that, where a creditor presents a winding-up petition based on a disputed debt which is covered by an arbitration agreement between the creditor and the company, the court would generally dismiss the petition.

In so holding, Harris J brought Hong Kong law in line with the position in England, Singapore and the Cayman Islands. The decision offers compelling reasons for developing Hong Kong law in this direction.

The position is to be contrasted to a situation where the petition debt is disputed and there is no arbitration provision. In such a case, the court’s general approach is to dismiss the petition only if the debt is subject to a bona fide dispute on substantial grounds.

Comments

The Lasmos case arose out of the petitioner’s unsatisfied claim for fees under a management services agreement, which contained an arbitration clause. The petitioner issued a statutory demand and then a winding-up petition against the Company. The Company’s position was that the fees had not been agreed.

Because the Company required the dispute to be resolved in accordance with the arbitration clause, the Court dismissed the petition. In any event, the Court also found that the petitioner’s claim was disputed on bona fide substantial grounds.

Prior to this decision, it was generally assumed that, once a winding-up petition was issued, the existence of an arbitration clause covering the petition debt would be irrelevant to the court’s exercise of its winding-up jurisdiction.

The decision to develop Hong Kong law here seems eminently sensible in principle because it gives primacy to the party’s agreed dispute resolution method. If a petition debt is subject to an arbitration clause, it is not appropriate for the Companies Court to try the dispute, even for the mere purpose of determining the existence of bona fide substantial dispute. Otherwise, a creditor could essentially repudiate the arbitration agreement by merely presenting a winding-up petition to collect a disputed debt.

Upholding the parties’ arbitration agreement, however, does not mean that the Companies Court’s insolvency jurisdiction is ousted. The Court emphasised that, where exceptional circumstances exist, the Court could still exercise its insolvency jurisdiction (such as appointing provisional liquidators), despite the presence of an arbitration clause covering the disputed petition debt.

Summary of the Companies Court’s practice

After this landmark decision, the Companies Court’s practice when dealing with a disputed petition debt may be summarised thus:

1. If there is no arbitration clause, the court will generally dismiss the winding-up petition only if there is a bona fide dispute on substantial grounds.
2. If there is an arbitration clause and the company wishes to refer the dispute to arbitration, the court would generally dismiss the winding-up petition.

3. The court retains the ultimate discretion to exercise its insolvency jurisdiction in exceptional circumstances, despite the presence of an arbitration clause.

Christopher Chain represented the Company in this case.

Look Chan Ho and Christopher Chain co-authored this Case Report.
HK Court’s Jurisdiction to Wind Up Foreign Companies: The Test is Sufficient Connection

*China Medical Technologies, Inc. v. Samson Tsang Tak Yung* [2018] HKCA 111

On 28 February 2018, the Court of Appeal reaffirmed that “sufficient connection” is the overarching criterion for the Hong Kong court’s exercise of its jurisdiction to wind up insolvent foreign companies.

Generally speaking, when considering whether to exercise its discretion to wind up a foreign company, the Hong Kong court has to be satisfied that three core requirements exist, namely:

1. there must be a sufficient connection with Hong Kong which may, but does not necessarily have to, consist of assets within the jurisdiction;
2. there must be a reasonable possibility if a winding-up order is made, of benefit to those applying for the winding-up order; and
3. one or more persons interested in the distribution of the assets of the company must be persons over whom the court can exercise a jurisdiction.

The Court of Appeal held that the ultimate overarching question is whether there is a sufficient connection between the company and Hong Kong that would justify the winding-up of the company in Hong Kong. Thus the three core requirements above may be best understood as aspects of the sufficient connection enquiry. It follows that in some circumstances the third core requirement may be dispensed with.

The facts in *China Medical* serve to illustrate this conclusion. *China Medical Technologies, Inc.*, incorporated in the Cayman Islands, was insolvent and wound up in the Cayman Islands. The Cayman liquidators then petitioned for the Company’s winding-up in Hong Kong. Their purpose of seeking a Hong Kong winding-up was to use the HK insolvency legislation to obtain information from various people, including the opposing contributory.

The Cayman liquidators could not satisfy the third core requirement because the available evidence suggested that there was only one Hong Kong creditor, with a debt of just over US$4,000. But the Court of Appeal agreed with the first instance judge (Harris J) that the strength of the first two core requirements alone was already sufficient to justify the making of a winding-up order.

**Key takeaways**

The Court of Appeal decision stands for the following propositions:

1. Before the Hong Kong court will exercise its jurisdiction to wind up a foreign company, the overarching criterion to satisfy is sufficient connection with Hong Kong.
2. The three core requirements developed by case law are to test the sufficiency of connection. Thus in most cases all three requirements need to be satisfied.
3. Because the ultimate issue is sufficiency of connection, in exceptional cases the third core requirement may be dispensed with.

Anson Wong SC acted for the opposing contributory.

Look Chan Ho authored this Case Report.
No go for Google as Oriental gets the green light to serve outside the jurisdiction


6 February 2018

These three recent appeals in the Court of Appeal concern three defamation claims against Google. The Plaintiffs sued Google as an Internet search engine, the owner/operator of a blog and the owner/operator of an Internet discussion forum. Google is a US corporation, and the Plaintiffs obtained leave to serve the writ on Google outside Hong Kong. In dismissing Google’s appeals against the Judge’s refusal to set aside service of the writ outside the jurisdiction, the Court of Appeal applied the test of whether “a real and substantial tort has been committed within the jurisdiction” (Jamee (Yousel) v. Dow Jones Inc [2005] QB 946). Based on that test, the Court of Appeal held that the Plaintiffs had provided evidence of substantial publication in the form of “Average Monthly Searches” of a key word, which was obtained from Google’s own search tool called “Google AdWords”, and that the court is entitled to draw an inference of substantial publication within the jurisdiction in the circumstances of the case.

The judgment of the Court of Appeal was given by Mr Justice Cheung JA, with whom Madam Justices Yuen and Kwan JJA agreed.

Lawrence K F Ng (led by Robert Whitehead SC) represented the Plaintiffs/Respondents in the Court of Appeal.
A change of direction by the Court in favour of filial piety?

1. The decision of the Court of Appeal in *Primecredit Ltd v. Yeung Chun Pang Barry* [2017] 4 HKLRD 327 concerned the beneficial ownership of a Home Ownership Scheme (“HOS”) flat.

2. It was not a dispute between the legal title holder and a person claiming to have a beneficial interest in the property. Rather, it was a dispute between a lender on the one side who sought to enforce a charging order on the flat based on the legal title, and on the other side the holder of the legal title and his mother, who both argued that the mother was the beneficial owner of the flat for the duration of her life. The question was: Given that there was no evidence of an express agreement that the mother was to have a beneficial interest in the flat- could such a common intention be inferred?

3. The Court of Appeal’s reasons for allowing the mother’s appeal against the CFI’s finding that she was not a beneficial owner of the flat are of interest for several reasons.

Navigating presumptions

4. Given that trusts is an area particularly fertile with presumptions, it was no surprise that the parties to this case deployed the presumptions of resulting trust and advancement both at trial and on appeal, and submissions were made about the presumptions being “weak”.

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5. Cheung JA’s judgment (with which Lam V-P agreed) noted that there were a line of cases expressly describing the presumption of advancement as a relatively weak presumption that can be rebutted on comparatively slight evidence (such as Pettit v. Pettit [1970] AC 777, Cheung Pui Yin v. Worldcup Investments Inc (2009) 12 HKCFAR 31), and the Vandervell v. IRC [1967] 2 AC 291 case which stated that the presumption of resulting trust is easily rebutted.

6. Having considered those cases, Cheung JA held at §2.15:

“I just wish to point out that as resulting trust operates in the absence of evidence of intention of the parties, it is not helpful to use adjectives like “weak” to describe it.”

7. This helpful clarification is in line with the existing approach of the Court of Final Appeal Leung Wing Yi Asther v. Kwok Yu Wah (2015) 18 HKCFAR 605, where Stock NPJ described the two presumptions as arising as a matter of default where there is insufficient evidence to displace them.

Reflecting on the rationales for different trusts

8. Cheung JA’s judgment also contains an interesting observation about the difference between a resulting trust based on the payment of the purchase price by a third party, and the second limb of the common intention constructive trust.

9. The second limb arises where there is no direct evidence of an agreement or arrangement about the beneficial ownership of the property, and the court must rely entirely on the parties’ conduct to infer a common intention constructive trust. Direct contributions to the purchase price by a party who is not the legal owner will readily justify an inference of a constructive trust.

10. Given that the foundation of both concepts are based on payment of the purchase price, Cheung JA rhetorically asked what the difference between the two was. His Lordship then noted that there are two schools of thought about the rationale for a resulting trust.

11. The first school of thought (supported by Lord Millet in Air Jamaica Ltd v. Charlton [1999] 1 WLR 1399) is that it is a response to the absence of any intention by the transferor to pass a beneficial interest to the receiving party, and it may arise whether or not the transferor intended to retain a beneficial interest.

12. The second school of thought (supported by Lord Browne-Wilkinson in Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] 2 All ER 961) is that a resulting trust is giving effect to the common intention of the parties.

13. His Lordship observed that there is still academic debate about which school of thought is to be preferred, but noted that it was unnecessary in the present appeal to choose between the two, or to resolve the difference between the second limb of common intention constructive trust and resulting trust.

14. This judgment leaves the debate open about the correct rationale(s) for resulting trusts, and it is hoped that the Court of Appeal or Court of Final Appeal will shed light on this far-reaching and controversial issue on an appropriate occasion.
The Hong Kong Chinese family’s “not uncommon” common intention?

15. Another interesting aspect of the Court of Appeal’s judgment is Cheung JA’s (with whom Lam VP agreed) rejection of the trial judge’s finding that the Mother’s suggestion that there was a common intention that she is to have a beneficial interest in the Property until such time as she passes away is “nebulous” (see §§1.6, 1.7 and §2.9 of the judgment).

16. In this regard, Lam VP, after referring to Stack v. Dowden [2007] 2 AC 432, Jones v. Kernott [2012] 1 AC 776 and Mo Ying v. Brillex Development Ltd [2015] 2 HKLRD 985, emphasised at §1.6 that a holistic approach has to be adopted to assess the common intention of the parties, and that:

“In a Chinese setting, especially for the older generations, where explicit discussions on property rights within the family are not that common, the court has to pay more regard to circumstantial matters.”

17. Further, Cheung JA said at §2.9 of the Judgment that:

“Specifically, the mother’s evidence is, as summarised by the Judge, that it was intended that the property would pass to the son as the only male descendent after she and her husband passed away. The proper inference to be drawn from this evidence is that the mother is the beneficial owner of the property during her lifetime. In my view there is nothing incredible or inherently improbable about such an intention particularly in the context of a Hong Kong Chinese family where it is not uncommon that parents would acquire a property in the name of their children and yet retain control and beneficial ownership of the property during their lifetime.” (emphasis added)

18. The comments above are reflective in that they are looking back for guidance whilst at the same time moving forward. The courts are providing a pivotal steer and enables parties and tribunals to be more sensitive to the assessment of evidence concerning lifetime equitable interest in properties claimed by parents.

19. The idea of a common intention for parents to have a lifetime equitable interest in properties may well be, if not unique to, then at least prevalent in Hong Kong society. Indeed, and quite apart from general Hong Kong Chinese traditions and customs of filial piety, there are also Hong Kong’s infamous sky-high property prices. According to the Census and Statistics Department, the Hong Kong 2016 median household income is about HK$15,500, while according to the Rating and Valuation Department, the average property price in the same year is about HK$13,100 per square foot. It is therefore virtually impossible for many young adults to purchase a flat in Hong Kong as they would not have had a chance to establish themselves in life. It remains difficult even for those who have made some progress in their careers. It is therefore not uncommon to see Hong Kong parents helping their children to acquire real properties. Where families do not have sufficient financial resources for more than one flat (as in the present case), parents would often see the need to take care of both their needs and the interest of their children. It may be that in such situations a common intention may be found to exist between the parents and the children that the parents are to retain an equitable interest in the property during their lifetime, even though the legal title is in the name of the children. The parents may of course have the choice of retaining full legal and beneficial

1 Lam VP in §1.7 agreed with Cheung JA’s observation. Kwan JA dissented on this issue, holding that there is no ground to challenge the trial judge’s finding of fact in the constructive trust analysis.
ownership in the property, and arrange for the children to inherit the property by way of a will. However, there are other matters which may discourage such practice, e.g. tax implications, the formalities involved and room for potential disputes between family members.

Singapore: The Board Supremacy

20. There are probably few (if any) other places in the world that share the same socio-economic and cultural context as Hong Kong on this particular issue. The closest comparable jurisdiction is probably Singapore. Like Hong Kong, it is a predominantly Chinese society, with a small and open economy, relatively limited landmass for building on, and high real estate/property prices. While there is much room for debate about the relative private property prices between Hong Kong and Singapore, the key difference between the two places most likely lies in the availability of public housing. Public housing in Hong Kong caters mainly to low-income groups, and there is a long wait even for those who are eligible. A considerable number of people fall within the gap between eligibility for public housing and ability to afford private property. In contrast, public housing in Singapore is managed by the Housing and Development Board (HDB). While HDB housing is also primarily built to provide affordable housing to the poor, the HDB also provides various types of flats and layouts to cater for different family sizes and budgets. There is also more up-scale HDB housing for those who are more financially able. According to the HDB Annual Report 2016, it is estimated that as much as 82% of the Singapore residential population lives in HDB housing. It is thus not difficult to see from these facts that obtaining housing is much less difficult in Singapore. As such, one can surmise that the idea of parents purchasing flats in their children’s name but retaining equitable interest during their lifetime is unlikely to be either as necessary or as common in Singapore.

21. The “not uncommon” common intention among family members that parents are to retain an equitable interest during their lifetime in a property acquired in the children’s name is arguably a special feature of Hong Kong Chinese society shaped by Hong Kong’s traditions, and given added force due to socio-economic conditions, and practical reality. This might reduce the jurisprudential effect of his Lordship’s judgment on this topic in other common law jurisdictions. However, his Lordship’s judgment is nonetheless to be welcomed in Hong Kong, as it highlights the importance of being receptive and sensitive to social and cultural considerations in similar cases on common intention constructive trusts, even though “each case will turn on its own facts” and is “highly fact-sensitive” (per Stack v. Dowden [2007] 2 AC 432).

22. Indeed, even Kwan JA differed from on this topic. She concluded that the Judge at first instance had been entitled to conclude that the “evidence on an arrangement or understanding reached among the three parties regarding common intention [was] so “nebulous and vague” that [the CFI could not] be satisfied on balance [that] there was such common intention” and therefore did not think that the CFI was clearly wrong to hold, on the evidence, that no common intention could be inferred. However, her Ladyship allowed the appeal of the mother on the basis (with which Lam V-P agreed) that the Judge had been plainly wrong to conclude on the facts that there was sufficient evidence to rebut the presumption of a resulting trust in favour of the mother.

What about illegality?

23. As the relevant property was an HOS Flat, one interesting issue which the CFI and the CA did not have to deal with in Primecredit was one of illegality. In Cheuk Shu Yin v. Yip So Wan (2012) 15 HKCFAR 344, the CFA had held in relation to HOS property that family arrangements (through contributions to the purchase price or by making mortgage loan repayments) through which family members would obtain a beneficial interest
in the property were not an impermissible “alienation” under s. 17B Housing Ordinance (CAP. 283). In doing so, their Lordships held inter alia that in view of the purpose of the restrictions, it was in the public interest that those eligible for HOS flats, but are unable to pay the deposit or keep up the mortgage payments, should be able to buy one with the assistance of family or friends on the basis that the latter would have beneficial interests which they could realise when the period of restriction on resale had expired.

24. However, it is likely that the Courts will need to grapple with the issue of illegality soon as a potential defence to claims based on constructive or resulting trusts, and possibly even proprietary estoppel, if the underlying property has been constructed pursuant to certain statutory declarations made in pursuit of the Small House Policy. Such declarations had previously required that the applicant state he was the “sole owner” (and hence the unqualified legal and beneficial owner) of the land on which the small house was built: see Chan Yau v Chan Calvin [2014] 5 HKLRD 304 (CFI) and [2016] 1 HKC 1 (CA). It will be of great interest to see how the Courts will approach and deal with such issues, given the UK Supreme Court’s recent decision in Mirza v. Patel [2017] A.C. 467 which moved away from the test in Tinsley v. Milligan [1994] 1 AC 340 and toward a line of inquiry focusing on whether it is in the “public interest” that the relief should be granted.

What to watch for

1. Practitioners should always strive to look for evidence that sheds light on the intentions of the parties about the beneficial interest, rather than relying only on presumptions to carry their client’s case.

2. The correct rationale(s) for resulting trusts is still open for debate until the Court of Appeal or Court of Final Appeal finally resolves the question.

3. Given the prominence accorded by the Court to Hong Kong Chinese family settings, practitioners advising clients on equitable interests in real properties should thoroughly investigate whether the parents intended to retain beneficial interest in the property for life.

4. Practitioners should also be mindful of the approach that the Courts will take toward allegations that resulting and constructive trusts are illegal, particularly where the property has been constructed pursuant to the Small House Policy.

Alvin Tsang was acted for the 1st Respondent in the appeal to the Court of Appeal.

Yang-Wahn Hew, John Hui and Alvin Tsang co-authored this Case Report.
Invoking S.12A of the Town Planning Ordinance for the first time... Not this master plan


The case concerned a challenge by way of judicial review of the Town Planning Board’s decision to refuse an application made under section 12A of the Town Planning Ordinance to amend the Sai Ying Pun and Sheung Wan OZP by re-zoning a privately owned site designated open space to residential use. It was the first section 12A case to come before the Court and the challenge was brought on multiple grounds.

Most of the grounds were dismissed but it did succeed on two of them, both specific to the facts of the case. The first related to certain comments made by a committee member in the private deliberation session which the Court (Au J) held was part of the TPB’s reasons and which the applicant as a matter of procedural fairness should have been given an opportunity to respond to but was not. The second successful ground was the TPB’s reliance, as a reason not to allow the application, on the concern that if the application was permitted it would set an undesirable precedent.

John Litton QC acted for the Town Planning Board.
The defence of qualified privilege in the context of building management

*Multi-Winner Investment Ltd v. Lau Ming Yee*

[2017] 1 HKLRD 328

The Defendant in this recent case successfully relied on the defence of qualified privilege to defeat the Plaintiff’s defamation claim. The defence was raised in respect of alleged defamatory statements published by the chairperson of the management committee of the incorporated owners of a building to all owners of the building. The Court observed that:

- The authorities show that there is a common interest among the owners of the building with regard to matters relating to the affairs of the building (§69); and
- A recognized occasion of qualified privilege is where the statement was made in reply to an attack (§70).

These observations are important in that they help understand the defence of qualified privilege in the context of building management.

Lawrence K F Ng (led by Jason Pow SC) represented the Defendant in this case.
Where the buck stops: S.63B of the District Court Ordinance


This recent Court of Final Appeal case concerns a constitutional challenge to s.63B of the District Court Ordinance which provides that “No appeal lies from a decision of the Court of Appeal as to whether or not leave to appeal to it should be granted”. The Appellant argued that s.63B is unconstitutional in that it deprives the Court of Final Appeal’s power of final adjudication vested upon it by Article 82 of the Basic Law. The Court of Final Appeal rejected the argument. Applying _Solicitor v. Law Society of Hong Kong_ (2003) 6 HKCFAR 570 and _Mok Charles v. Tam Wai Ho_ (2010) 13 HKCFAR 762, the Court of Final Appeal upheld the constitutionality of s.63B on the basis that it is proportionate and a constitutionally valid limitation on the Court’s power of final adjudication and does not go beyond what is reasonably necessary for the achievement of its legitimate aims. The Court further approved _Lane v. Esdaile_ [1891] AC 210, in which the House of Lords held that no appeal lay to the House of Lords from a decision of the Court of Appeal refusing leave to appeal to it, and the decision of the Appeal Committee in _HLF v. MTC_ (2004) 7 HKCFAR 167 which followed _Lane v Esdaile_.

_Lawrence K F Ng_ represented the Respondent in this case.
Re Le Corporation HCCW 398/2017 – When might a company itself apply for for its own winding-up?

In the recent unreported matter of Re Le Corporation (HCCW 398/2017), the company was wound up pursuant to Section 177 of the Companies (Winding-Up and Miscellaneous Provisions) Ordinance (Cap. 32).

Amongst the grounds relied upon was section 177(1)(a) which provides that a company may be wound up if “the company has by special resolution resolved that the company be wound up by the court”. Perhaps unsurprising given the generally unopposed nature of such petitions, there is limited discussion on section 177(1)(a) in the case law. In Hong Kong, the leading decision is that of Madam Justice Le Pichon (as she then was) in Re Comtowell Ltd [1998] 2 HKLRD 463. According to the learned judge, “there is very little case law on the operation of paragraph (a) and certainly there is no reported Hong Kong authority”. And the situation has not changed much since 1998.

When might section 177(1)(a) be invoked?

It is self-evident from the provision itself that the starting point must be the existence of a validly-passed shareholders’ resolution. In Comtowell, the learned judge, in applying Canadian authority, held that a company was prima facie entitled to the winding-up order unless there are “special circumstances militating against the making of such an order”.

It would appear, from the learned judge’s judgment as well as the Canadian decision of Re United Fuel Investments Ltd (1961) 31 DLR (2nd) 331, the “special circumstances” require some evidence that the majority shareholders “were acting fraudulently or in bad faith in adopting the resolution”.

This author submits therefore that section 177(1)(a) should find application where the shareholders come to a genuine and bona fide commercial decision that winding-up is the proper and appropriate course to take. In line with established principles, the court should be slow to interfere with a business or commercial judgment of such character.

As a matter of practice, to make clear that such considerations have been taken into account, a petitioner should identify such underlying commercial factors with particulars, backed with sufficient evidence where applicable.

In addition, it may be advisable to concurrently rely on more than one ground. For instance, in Re Comtowell Ltd itself, the petitioner also relied upon section 177(1)(d) (that the company is unable to pay its debts) and section 177(1)(f) (that it is just and equitable that the Company be wound up, on the main premise that the company’s affairs require investigation). First, this ensures that the Court is not limited to considering whether the pre-requisites under section 177(1)(a) are satisfied. Secondly, the circumstances relied upon under the other grounds may well complement and reinforce the commercial considerations. Thus, it will reinforce the analysis advanced under section 177(1)(a) as well.

Michael Lok acted for the Petitioner Company in Re Le Corporation.
Land disputes and estoppel by standing by:

Cheung Lai Mui v. Cheung Wai Shing (HCA 1652/2012, 10 April 2017)


The facts can be briefly summarized. The land in question was owned by three brothers as equal tenants-in-common. One of the brothers died and his shares passed to his 2 children, the 1st and 2nd Defendants. The 3rd Defendant, being the son of the 1st Defendant, claimed that he is the beneficial owner of the land.

It is the defendants’ case that there was all along a family consensus, agreement or understanding that the 3rd defendant (being the sole male descendant of the family) could use and own the land as his home, and he could build a small house there when he became an adult.

Wilson Chan J explained the doctrine of “estoppel by standing by”:

A) An estoppel by silence, inaction or acquiescence arises where a reasonable man would expect the person against whom the estoppel is raised, acting honestly and responsibly, to bring the true facts to the attention of the other party known to him to be under a mistake as to their respective rights and obligations.

B) A duty to speak, such as to found an estoppel on silence will arise in the following circumstances:

1. where a person, having a title or right to property of any kind, perceives that another person is innocently, and ignorantly, conducting himself with reference to the property in a manner inconsistent with such right or rights.

2. where an owner becomes aware that someone is attempting to dispose of his property, and in such circumstances he is bound to assert his rights and, if he fails to do so, he may be estopped against the disponee.

3. when anything in order to a purchase is publicly transacted, and a third person, knowing thereof, and of his own right to the lands intended to be purchased, do not give the purchaser notice of such right, he shall never afterwards be admitted to set up such right to avoid the purchase.

On the facts, the Plaintiff was fully aware of the works carried out by the 3rd defendant had on the land: in particular, the 3rd defendant has built houses on the land. There was an estoppel by standing by against the Plaintiff.

In addition, the 3rd Defendant is also entitled to rely on adverse possession and common intention constructive trust.

Alan Kwong and Stephanie Wong represented the Defendants.
Hong Kong’s March towards Modified Universalism – Lord Sumption’s “Private Arrangements” Distinguished

By John Marsden of Mayer Brown JSM and Ian Mann of Harneys

In the recent decision in Re the Joint Liquidators of Supreme Tycoon Limited (in Liquidation in the British Virgin Islands) [2018] HKCFI 277, Mr. Justice Harris granted recognition to liquidators of Supreme Tycoon Limited, a company incorporated in the British Virgin Islands (BVI). Supreme Tycoon was placed into liquidation in the BVI pursuant to a members’ resolution passed pursuant to section 159(2) of the BVI Insolvency Act, 2003 (the IA). Notwithstanding its voluntary nature, section 159(2) of the IA, is used to place insolvent companies into liquidation, and pursuant to section 184(1) of the IA, liquidators so appointed are officers of the BVI Court.

In the Privy Council decision of Singularis Holdings Limited v. PricewaterhouseCoopers [2014] UKPC 36, Lord Sumption had summarised that recognition of a foreign insolvency “would not, for example, be available to assist a voluntary winding up which is essentially a private arrangement”. Indeed, the decision in Singularis was itself rather curious since their Lordships cited with approval the case of In re African Farms [1906] TS 373, highlighting it as the genesis for common law assistance, but apparently forgetting that African Farms was itself a voluntary liquidation initiated by a resolution of creditors. It should be noted that Lords Neuberger and Mance did dissent in Singularis and Lord Neuberger, in particular, noted that limiting recognition only to those liquidations conducted for officers of the foreign court were “potentially arbitrary”.

By his decision, Mr. Justice Harris had found that the majority decision of the Privy Council in Singularis was incorrect to the extent that it limited recognition to foreign court appointed liquidators, taking the view that the key consideration should be whether the foreign proceeding is collective in nature, in the sense that it is “a process of collective enforcement of debts for the benefit of the general body of creditors.” In doing so, Mr. Justice Harris recognised that while there is, no doubt, a difference between compulsory and voluntary winding-up in terms of the level of Court supervision, “the difference is one of degree, not kind.” The result is that while the “private arrangement” contemplated by Lord Sumption in Singularis may still exist, it is limited in Hong Kong to solvent liquidations. Mr. Justice Harris was at pains to make that distinction as he specifically distinguished his decision from that of the Singapore Courts in Re Gulf Pacific Shipping Ltd [2016] SGHC 287 on the basis that that judgment appeared to rely on an Australian decision recognising a members’ voluntary liquidation.

Re Supreme Tycoon, in following the principle of modified universalism, has effectively taken Hong Kong a step further towards a more pragmatic and holistic view of insolvencies and common law recognition where the purpose of a liquidation is to facilitate judicial comity and cross-border cooperation in the collective interest of benefiting the general body of creditors of an insolvency company.

Mayer Brown JSM and Harneys had acted for the Joint Liquidators of Supreme Tycoon Limited as Hong Kong and BVI counsel respectively.
Case Reports

Competition Tribunal clarifies scope of the privilege against self-incrimination: Be(a)ware corporate clients

Introduction

On 3 October 2017, the Competition Tribunal (Tribunal) dismissed applications made by US software supplier Nutanix and British telecoms giant BT to strike out references to statements given by their employees during compulsory interviews and to debar the Competition Commission (Commission) from relying on such statements as evidence against the companies in the substantive trial due to commence in June 2018.

Background

The decision was given in Competition Commission v. Nutanix Hong Kong Limited & Ors [2017] 5 HKLRD 712, the first case brought before the Tribunal. The proceedings involved allegations of bid-rigging in a tender for the supply and installation of an IT server system for the Hong Kong Young Women’s Christian Association. The Commission is seeking pecuniary penalties against each of the respondents under section 93 of the Competition Ordinance Cap 619 (Ordinance).

During the course of its investigation, the Commission issued notices under section 42 of the Ordinance to employees of Nutanix and BT, requiring them to attend before the Commission to answer questions. Compliance is compulsory – a person who fails to comply with a section 42 notice without reasonable excuse commits an offence under section 52 of the Ordinance.

Section 45(1) of the Ordinance provides that a person is not excused from answering questions posed by the Commission in the exercise of its statutory powers of investigation on the grounds that to do so might expose the person to proceedings in which the Commission applies for an order for a pecuniary penalty under section 93 or a financial penalty under section 169 of the Ordinance, or to criminal proceedings (Specified Proceedings).

It was common ground that section 45(1) abrogated the privilege against self-incrimination. This privilege was replaced by a direct use prohibition conferred by section 45(2) which provides that “no statement made by a person (a) in giving any explanation or further particulars about a document; or (b) in answering any question... is admissible against that person” [emphasis added] in Specified Proceedings.

The Anatomies of the Arguments

Both Nutanix and BT contended that the direct use prohibition under section 45(2) covered not only the individual who attended the compulsory interview, but extended to the company which employed him at the time. In other words, statements made by an employee at a compulsory interview are inadmissible in substantive proceedings against his or her corporate employer.
In support, Nutanix advanced a two-pronged argument and submitted that the interview statements are inadmissible on the basis that (a) the interviewee’s conduct is sought to be attributed to Nutanix and (b) the interviewee attended the s.42 interview on behalf of Nutanix.

BT focused solely on attribution and contended that where the Commission seeks to attribute the conduct of an individual to an undertaking for the purposes of proceedings for pecuniary penalty, the answers given by that individual in a s.42 interview should be regarded as the undertaking’s answers. In particular, since an undertaking that is a company can only act through individuals employed by it, the acts of such an undertaking are inevitably performed by those individuals.

In response, the Commission contended that the statements were made by the individuals interviewed and are not to be regarded as statements made by Nutanix or BT. The direct use prohibition under section 45(2) rendered the statements inadmissible against the individuals themselves in Specified Proceedings but are admissible against their employers or indeed anyone else. Alternatively, the Commission submitted that even if Nutanix and BT were right about the effect of section 45(2), the statements are still admissible against all the respondents other than the particular interviewee’s employer, and references to them should therefore not be struck out.

The Crux of the Decision

The central issue raised was this: can the direct use prohibition under section 45(2) be extended to protect persons other than the person who attended the compulsory interview under section 42?

All arguments advanced by Nutanix and BT were rejected. The Tribunal observed that the direct use prohibition is clearly aimed at protecting the person being required to make the statement – it is compensatory protection for the “subject of the compulsion”. The identity of the person required by a section 42 notice to attend and answer questions depends on the construction of the section 42 notice itself, being the document invoking the Commission’s statutory power and imposing legal obligations on the addressee. The Tribunal considered there can be no doubt in the present case that the persons required by the section 42 notices to attend before the Commission and answer questions were the individuals themselves, not the corporate employer, and it was the individuals who would have committed an offence under section 52 had they failed to comply. Thus, the direct use prohibition in section 45(2) benefits the person to whom a section 42 notice is addressed but no other third party. An employee to whom a section 42 notice is addressed therefore cannot claim the benefit of the direct use prohibition on behalf of his or her employer, even where the employer is the subject of enforcement proceedings brought by the Commission.

The Tribunal rejected the attribution argument on the basis that the circumstances surrounding the section 42 interview could be very different from those surrounding the alleged infringing acts. There is no logical reason as to why an individual’s mouth should be accepted as the mouth of an undertaking where the employee could have since left the undertaking or might have even entered into a leniency agreement with the Commission in return for giving information. Furthermore, the employee may be asked questions in relation to which he was merely a “witness” rather than an “actor”. There is no logic in holding to be inadmissible against the employer what one employee said on other questions unrelated to the conduct sought to be attributed to the employer.

Key Takeaways

The direct use prohibition under section 45(2) operated automatically without any need for a claim to be made by the person prior to his answers or any stage (in contrast to the provisions in some other enactments such as section
865(3)(b) of the Companies Ordinance Cap 622 and section 187(2) of the Securities and Futures Ordinance Cap 571),
and is imposed on all statements made by the person regardless of whether they tend to incriminate him.

However, the scope of the direct use prohibition under section 45(2) is limited in several important aspects.

The Checklist to Navigate

1) The Tribunal clarified in this important decision that the scope of the protection against self-incrimination in the context of a compulsory interview extends only to the person compelled by the section 42 notice to attend before the Commission. While a corporate entity can claim the protection in its own right if it is served with a section 42 notice, an employee served with a section 42 notice cannot refuse to answer questions on the ground, not that it might incriminate himself, but that it might incriminate his employer or a company of which he was director. Nor can an employer or a company prevent an employee or a director from answering questions on the ground that it may incriminate the employer or company, unless the company is the alter ego of the individual served with a section 42 notice.

2) The direct use prohibition under section 45(2) only rendered the statements inadmissible against the individuals served with a section 42 notice. The statements remain admissible against other parties including their employers, fellow employees and other respondents in the proceedings.

3) The direct use prohibition terminates in relation to a statement if evidence relating to it is adduced, or a question relating to it is asked, by the person or on his behalf in the Specified Proceedings.

4) Lastly, derivative use of the statements is not restricted by the direct use prohibition under section 45(2). The Commission is in any event free to use the answers obtained from a section 42 interview to develop new lines of inquiry, identify sources of independent evidence, as well as assist in formulating applications for search warrants etc.

What does this mean and why does it matter?

This decision may well have an impact on the interpretation of other similar statutory abrogations of the privilege against self-incrimination which, as the Tribunal noted, is not uncommon in Hong Kong and other jurisdictions.

Whilst the clarity that this case has brought about is welcome, corporate clients would be well advised to continuously review the conflicts of interest and ensure that employees are independently advised and represented in any compulsory interviews, if and when necessary.

Johnny Mok SC and Catrina Lam appeared on behalf of the Commission. Please click here to read the full judgment.
The privilege against self-incrimination has long been recognised in English law, based “upon the common view that one person should so far as possible be entitled to tell another person to mind his own business”: *R v Director of the Serious Fraud Office, ex p Smith* [1993] AC 1 at 31, per Lord Mustill. It has also been given effect by the European Court of Human Rights (“ECtHR”), and the Court of Justice of the European Union.

If that privilege were unqualified, it would give rise to obvious practical difficulties in the effective enforcement of the law. As a result, it is subject to statutory carve-outs and qualifications derived from case law. The ECtHR has recognised that the right is not absolute, but rather an aspect of procedural fairness: *O’Halloran and Francis v. United Kingdom* (2008) 46 EHRR 21.

On the face of it, the privilege afforded by section 45 of the Competition Ordinance is a powerful one. Where a company under investigation provides material under compulsion, it may not be admitted in evidence in pecuniary penalty proceedings against it under section 93 (the “direct use prohibition”). In EU anti-trust law, the privilege against self-incrimination of the undertaking is more limited. Where the Commission uses compulsory powers to obtain information from the undertaking, it may decline to provide answers “which might involve an admission on its part of the existence of an infringement”: Case 374/87 *Orkem v. Commission* [1989] ECR 3283.

In *Nutanix* the Competition Tribunal concluded that the Commission could rely upon answers provided by individuals under compulsion that may incriminate the company under investigation, rejecting the argument that this undermined the protection afforded by the direct use prohibition. Mr Justice Lam observed that the scope of the privilege was a matter of “legislative choice”. In this regard, the EU has made a different choice: the European Commission may conduct interviews with individuals as part of an investigation, but has no power of compulsion: Art 19 of Regulation 1/2003. Thus, whilst the undertaking under investigation enjoys a more limited form of privilege, it cannot be eroded through the interview of individuals under compulsory powers.

In each case, the result is the recognition of a privilege which is subject to practical limits. Each system of law has balanced the need for effective enforcement and the protection of the interests of the natural and legal persons concerned, albeit in somewhat different ways.

English domestic competition law takes an approach which is more similar to that in Hong Kong. There is a power to interview individuals under compulsion, but there is a statutory prohibition on the use of that material in the prosecution of most offences against the individual, and “in evidence against an undertaking with which the individual who gave the statement has a connection on a prosecution for an offence”: Competition Act s 30A(5). That does not appear to preclude the use of such material for the imposition of competition penalties against an undertaking, although the point has not been tested. Thus in the situation contemplated by the Court in *Nutanix*, the result may well have been the same.
Recognition of Foreign Restructuring Plan: Bermuda Pushing the Common Law Envelope in Seadrill

17 April 2018

In *Re Seadrill Drilling* [2018] SC (Bda) 30 Com (5 April 2018), the Bermuda court recognised and enforced a US Chapter 11 reorganisation plan in relation to Bermuda-incorporated companies. The court’s reasoning appears to sit somewhat uncomfortably with the UK Supreme Court decision in *Rubin v. Eurofinance* [2012] UKSC 46; [2013] 1 AC 236 and the Privy Council decision in *Singularis Holdings v. PricewaterhouseCoopers* [2014] UKPC 36; [2015] AC 1675. It is doubtful if the Hong Kong court would follow the Bermuda court’s approach.

The facts and decision

On 12 September 2017, Seadrill Limited, North Atlantic Drilling Ltd, and Sevan Drilling Limited ("Companies"), together with other affiliates, commenced US Chapter 11 proceedings to pursue the group’s debt restructuring.

On 13 September 2017, the Companies applied for provisional liquidation in Bermuda in order to coordinate with the Chapter 11 proceedings. On the same day, the Bermuda court appointed provisional liquidators ("PLs") to the Companies.

In anticipation of the US Bankruptcy Court’s order ("Confirmation Order") confirming the Chapter 11 reorganisation plan, the PLs applied for an order from the Bermuda court recognising the Chapter 11 plan and permanently staying all creditors and shareholders’ claims against the Companies.

The minority shareholders of Sevan Drilling Limited ("Sevan") opposed the PLs’ application for a permanent stay in order to preserve their right to bring derivative proceedings in relation to Sevan in Bermuda.

The court ruled against the minority shareholders, and granted an order conditionally:

(a) recognising the Confirmation Order which the US Bankruptcy Court was expected to make later in the month; and

(b) permanently restraining creditors and shareholders from pursuing claims against the Companies in breach of their obligations under the proposed Chapter 11 plan.
As regards the court’s competence to conditionally recognise the Confirmation Order, the court relied on *Re Energy XXI* [2016] SC (Bda) 79 Com (18 August 2016) and reasoned as follows.

First, the minority shareholders (along with Sevan itself), having submitted to the jurisdiction of the US Bankruptcy Court, would be bound by the Confirmation Order.

Second, the minority shareholders could not argue that the Confirmation Order was an *in rem* order which had no effect under Bermudian law on their shares which were located in Bermuda. This is because the US Bankruptcy Court had jurisdiction over the minority shareholders’ shares in Sevan. This was the consequence of the minority shareholders having submitted personally to the US jurisdiction in connection with the Chapter 11 proceedings, the function of which was to determine (among other things) the extent of the shareholders’ rights.

**Comments**

The Bermuda court’s reasoning seems to be somewhat out of line with the common law as applied elsewhere. If the Confirmation Order was a judgment *in rem* in relation to the minority shareholders’ shares (being assets situated in Bermuda), it is hard to see why the minority shareholders could not argue that the Confirmation Order could not be recognised in Bermuda in relation to the shares.

It is well established that a foreign judgment *in rem* is enforceable at common law only if the asset in question was situate within the jurisdiction of the foreign court at the time of the foreign proceedings (*United States of America v. Abacha* [2014] EWCA Civ 1291; [2015] 1 WLR 1917). The fact that the minority shareholders were subject to the US Bankruptcy Court’s in personam jurisdiction does not seem relevant to the question of recognition of a US judgment *in rem* (see *Pattni v. Ali* [2006] UKPC 51; [2007] 2 AC 85). Nor is it relevant that the judgment *in rem* arose out of a US bankruptcy proceeding (see *Rubin and Singularis*). Therefore, it seems that Bermuda has developed its foreign judgment recognition regime.

Will the Hong Kong court follow Bermuda’s approach going forward? The position in Hong Kong is that “[f]or judgments *in rem*, a foreign court’s judgment will only be recognised where the subject matter of the said judgment is situated in that foreign country” (*Re Performance Investment Products Corp* [2014] HKEC 465 at [28]). It is thus improbable that the Hong Kong court could recognise a foreign restructuring order in respect of assets situated in Hong Kong.

José-Antonio Maurellet SC and Look Chan Ho co-authored this Case Report.
Teresa Cheng SC is appointed Secretary for Justice

Teresa Cheng Yeuk Wah GBS, SC, JP, who has been a member of Des Voeux Chambers since 1988, has been appointed as the Secretary for Justice with effect from 6 January 2018.

Des Voeux Chambers takes this opportunity to congratulate Ms. Cheng on her appointment and to wish her every success in her new position.
Winnie Tam SC to lead the Communications watchdog

Winnie Tam SC, has been appointed to chair the Communications Authority for a term of at least 1 year, ending 31 March 2019.

She will be responsible for licensing and regulating the broadcasting and telecommunications industries in HK.

She was formerly the head of the Bar Association and is a member of the Hong Kong Tourism Board, West Kowloon Cultural District Authority and the Advisory Committee on Corruption of the Independent Commission Against Corruption.
2 new Governmental Advisers appointed from DVC

*DVC’s* Catrina Lam and Kelvin Kwok have been appointed as Non-Governmental Advisers to the International Competition Network for a period of 2 years by the Hong Kong Competition Commission.

Catrina has considerable experience in handling competition law matters. She advised and appeared in *Competition Commission v. Nutanix Hong Kong Ltd & Ors*, the first case commenced before the Competition Tribunal after the Competition Ordinance came into effect in December 2015. She has advised major telecommunications companies on licensing and competition issues. She is also a member of the Hong Kong Bar Association’s Special Committee on Competition Law.

Kelvin has a civil and commercial practice with a strong emphasis on competition law matters. Immediately upon graduation from law school, he became an Assistant Professor of Law at HKU, where he continues to teach and conduct research on competition law. He serves on the Bar Association’s Special Committee on Competition Law, the Consumer Council’s Competition Policy Committee and the Hong Kong Competition Association’s Executive Committee.
In DVC’s first event of the year, **Christopher Chain** and **Lai Chun Ho** delivered a compelling presentation at Bird & Bird’s offices entitled “Oral Advocacy: Practical Tips & Tricks.”

They took the audience through key features of forceful oral advocacy, with practical tips from their frontline experiences on how to successfully establish and maintain dialogue with the Judge or tribunal.

Topics covered included methods to simplify and streamline submissions, the importance of proper prioritization and structuring of points, the interaction between the roles played by written advocacy and oral advocacy, and how to effectively answer questions from the bench.

To practically illustrate the methods and techniques discussed, Chris and Chun Ho took the audience though a skeleton argument, which they had amended from a sample provided to them beforehand.

The presentation was nuanced with humorous anecdotes and war stories, which made for an entertaining and engaging interaction with the audience.
What happens when a board of directors is deadlocked? What redress is available for warring camps of shareholders? Is an appointment of a receiver over the entire company the only solution? These were some of the questions asked and answered at the Book Launch of “Company Law: Powers & Accountability - Second Edition,” the newly published leading Hong Kong Company Law text co-authored by William M F Wong SC, Kerby Lau and Dato Loh Siew Cheang. The launch was held on 23 February in collaboration with publishers, LexisNexis.

To demonstrate when a company may or may not be in a state of paralysis to warrant receivership, William and Kerby discussed some of the unusual standout features in the recent case of Re Birmingham International Holdings Ltd, HCMP 395/2015. Kerby also took the audience through when injunctions may be granted to restrain substantial shareholders from acting upon certain resolutions in relation to the change of composition of the board of directors in the ongoing case of Aeso Holding Ltd, [2018] HKCFI 248.

The evening presentation was MC’d by Jen Lee of LexisNexis, and wrapped up with a book signing over cocktails.

The urbane setting at Eaton House lent itself to a casual atmosphere ideal for sharing at this well attended event, with Clifford Smith SC, José-Antonio Maurellet SC, Lawrence K F Ng, Teresa Wu, Justin Lam, Eva Leung and Stephanie Wong also attending.

23 February 2018
On 13 March 2018, Eva Leung was invited as one of the guest speakers at the Shanghai International Arbitration Week 2018 held in Shanghai from 9 to 14 March 2018, for the Forum on Resolution of Disputes in Real Estates and Finance co-hosted by Hangzhou Arbitration Commission (杭州仲裁委员会) and China Academy of Arbitration Law (中国仲裁法学研究会房地产仲裁研究专业委员会). Lawyers from all over China attended the Forum.

Eva delivered a speech on the relationship between Hong Kong and PRC arbitration and the potential cooperation opportunities. She reflected on the basis of enforcement of PRC awards in Hong Kong and illustrated the procedures by referencing the example of enforcing an arbitral award concerning real estates in Hong Kong. She also highlighted the differences in the roles of courts in Hong Kong and PRC when granting an order for execution.

Further, Eva enlightened the audience on how Hong Kong barristers maybe of assistance in arbitrations in the PRC involving foreign companies, Hong Kong law or listing rules, or other Hong Kong or common law related elements.

In particular, the audience positively reacted to the fact that Hong Kong barristers are permitted under the Bar Code to directly act as consultants for PRC law firm in relation to Hong Kong law. Eva drew the audience’s attention to the fact that for matters concerning proceedings before the Hong Kong courts it would be necessary to engage solicitors in Hong Kong before instructing counsel.

The arbitration summit enabled a helpful exchange of information on the symbiosis between Hong Kong and the PRC in the context of arbitration. It also provided an optimum opportunity for Eva to not only promote Hong Kong’s robust common law resources for arbitrations in the PRC but also to take away useful suggestions as to further collaboration prospects between Hong Kong and the PRC in the future.
In a trio of Competition events, DVC’s Catrina Lam joined forces with Paul Harris QC of Monckton Chambers and David Chu of Proskauer Rose to deliver industry driven presentations before an audience consisting of in-house counsel, practitioners from the finance sector and delegates from the construction industry.

The first event was held in collaboration with the HKCCA on Tuesday 13th March at the Bankers Club, (“Know your Competition Risks & Protect your Goals”) the second took place at the Landmark Mandarin on Wednesday 14th March (“Competition Red Flags to look out for in the Finance sector”) and the final consecutive event (“Capstones of the Competition Ordinance within the Construction Industry”) was held with the support of the Society of Construction Law Hong Kong at the HKIAC on the evening of 15th March.

Catrina took the audience through a number of significant developments that had unfolded since the inception of the Competition Ordinance in 2015. This included a maiden case before the Tribunal (Competition Commission v. Nutanix) which involved collusion between a software company and BT, whereby IT friends were invited to submit dummy bids to the YWCA. Various judgments were handed down, Catrina explained - the first of which related to s42 notices. The Competition Commission clarified the scope of the protection against self incrimination in the context of compulsory interviews and as Catrina elucidated- this only extended to the employee/ the person to whom the notice had been served. The employee could not refuse to answer a question on the ground that it might incriminate his/her employer or a company of which he/she was a director. (For more on this and steps to take to protect yourself, as a corporate client, please also see pages 6-8.)

At the Construction seminar, Catrina walked the audience through the nuts and bolts of cartel agreements, bid-rigging, illustrating her points with helpful case law and she ended by scanning the horizon to conclude her presentation with actionable takeaways for the audience. The session was peppered with fascinating and complex questions from guests for all the panellists, and this included questions which related variously to class actions and joint tendering.
Interested in hearing more about what’s coming in 2018, and the reason why the construction industry has become a major target for Competition authorities around the world? Click to listen to Catrina’s podcast from “Capstones of the HK Competition Ordinance within the Construction Industry”

Paul drew on his experience of litigating for and against regulators, and in multinational competition damages litigation, to address the audiences on some tips for handling competition investigations, such as how to use leniency (and complementary whistle-blowing policies) both as a shield and as a sword. In the world of finance, Paul identified some different types of infringement that have interested both regulators and follow-on claimants, ranging from straightforward information exchange and price-fixing cartels (e.g. LIBOR and FX), to complicated institutional rules (credit card interchange fees) to wide-ranging market investigations (UK retail banking). In the field of construction, the discussion had a focus on the benefits and pitfalls of trade associations. Overall, the presentations identified plenty of lessons for likely forthcoming developments under the Competition Ordinance by drawing upon UK, EU and other multinational experience.

David shared strategies, with specific examples on how to respond to a dawn raid, including how to preserve legal professional privilege over relevant documents and procedures to adopt during the search to protect the rights of both the company whose premises are searched and the employees whose conduct may be described in company documents. He also addressed the subject of the investigatory powers of the Competition Commission, particularly as they are used by the Commission during compulsory interviews and with mandatory documents production notices. David also discussed Leniency agreements, and how to take full advantage of them to secure immunity from prosecution by the Commission.
In an event that captured the hearts and minds of 81 attendees on Saturday 24 March, a panel made up of 8 IP experts comprising: keynote speaker, and Associate Professor, Dr Dev Gangjee, Visiting Fellow, DVC Oxford-HKU Visiting Fellowship, and DVC's Winnie Tam SC, (moderator of the 2nd Panel) DVC's Ling Chun Wai and Stephanie Wong, Mayer Brown JSM’s Partner and Co-Leader of Global Intellectual Property Practice, Gabriela Kennedy (moderator of the 1st Panel) and Counsel, Amita Haylock, Dr Haochen Sun, Associate Professor from the Hong Kong University, and Head of Legal/General Counsel for L’Oreal Eugene Yap converged to present an engaging breakfast Symposium entitled “Evolving IP Issues in Brand Protection in the Digital Marketing Era” at Mayer Brown JSM’s offices. The speakers quickly showed that they were more than the sum of their accomplishments when they unpacked a robust and illuminating presentation that was nuanced with real world examples of the positive and negative forces of digital marketing, the distinctions between SEO and SEM, Google AdWords and AdSense and this was supported with relevant case law.

Dr Gangjee opened with a map of the key digital marketing issues including: brand value addition, scope of protection, enforcement, hashtags and subsequently delved into the co-creation of brand image and values and demonstrated how hashtags had undergone a shakedown since the first ever trademark application was filed in 2010, given that they had experienced a 64% rise in 1 year. He concluded with an expertly crafted summary of enforcement as it related to freedom of expression defences, misappropriation and hijacking by competitors. To view Dr Gangjee’s PPT presentation please click here

In an animated presentation, Dr Haochen Sun lifted the lid on the Shan Zhai phenomenon - a term which was originally coined to describe Chinese bandit/outlier companies. Today however, he explained, the term is used to describe manufacturers of fake or counterfeit goods who differentiate themselves from their competitors by incorporating an innovative twist. Essentially highly successful market disruptors with their own IP portfolios,
Dr Sun showed the audience by way of various examples, how effectively these fast and flexible companies have carved out a niche in the Chinese market by offering consumers more choice at lower price points.

Ling Chun Wai discussed the Argos Ltd v. Argos Systems Inc case, a trademark infringement and passing off dispute where the British retailer’s case against the US defendant (for use of the sign ARGOS in its domain name www.argos.com and on its website,) was dismissed for a host of reasons. Hot on the heels of the Interflora v. Marks & Spencer case, CW Ling examined the Argos case in the context of Google keyword advertising, the sufficiency test and, consent and targeting issues, and the lawful opportunism that resulted. To view CW Ling’s presentation please click here.

Gabriela Kennedy deftly moderated the 1st panel and concluded the day’s first session with a memorable video/soundbite from the personal care brand Dove which portrayed how the brand was changing the landscape by partnering with other brands to ‘hack the industry from the inside’ in a bid to change the way advertising depicts women. Gabriela made the point that not only was Dove using digital media to empower women but it was one of the rare examples of a big corporation stepping outside of its comfort zone to collaborate with other companies/brand agencies to further a cause through digital marketing. To see the Dove video click here: https://www.youtube.com/watch?v=Bjrio1AUlKE

After a lively networking session, Winnie Tam SC expertly steered the 2nd panel and paved the way for presentations from Stephanie Wong, Amita Haylock and Eugene Yap. Stephanie examined the
benefits and challenges associated with social media by breaking down various components of Google Analytics and how it tracked the performance of websites and engagement rates, and demonstrated how this was being increasingly adduced as evidence in IP proceedings. She also peeled back the layers on two landmark judgments including the *Google v. Louis Vuitton and Interflora* cases, and left the audience with actionable takeaways. [For more on Stephanie’s talk, click here to view her PPT](#).

**Amita Haylock** cited various examples of how social media can help vs how it can harm and also referred to website cloning, that is the copying or modifying of an existing website to steal personal information to generate additional advertising income. [For more on Amita’s talk, click here to view her PPT](#).

**Eugene Yap** wrapped up the day with a talk on grey goods, that is the selling of goods through unauthorised distribution channels and the innovative campaigns designed to try and extend the reach of a product through digital marketing.

A round of astute questions from the audience followed in a Q & A session. This included topics ranging from artificial intelligence to Brexit to comparable case law in the US, which made for an edifying exchange between the audience and the panellists. The event was held with the support of Hong Kong University and with thanks to Mayer Brown JSM for their venue and a delicious breakfast.
Commencing Actions or Arbitrations in the PRC and Freezing Assets in Hong Kong

Sabrina Ho delivered a talk in Mandarin on interim relief in aid of PRC actions and arbitrations at the invitation of the Hong Kong and Mainland Legal Profession Association (香港與內地法律專業聯合會) on 27 March 2018. The sharing session was held in collaboration with the China Merchants Group (招商局集團), one of the 4 largest state-owned companies in Hong Kong.

Sabrina’s co-speakers were Li Lianjun, Partner of Reed Smith Richards Butler and Sam Tsui, Partner of Tsui & Co. At the event, Sabrina exchanged with around 70 Hong Kong and Mainland lawyers the legal bases and characteristics of injunctions and receivership orders granted by the Hong Kong Courts to facilitate legal proceedings and arbitrations in the PRC.

The seminar was followed by a question and answer session. Participants further discussed the differences and similarities between the interim relief granted by the Hong Kong and PRC Courts, and deliberated on the ways in which Hong Kong and PRC lawyers can better cooperate in cross-border cases to provide clients with the most effective solutions.
GET IN TOUCH

If there are any topics you would like to see covered in upcoming editions of DVC’s newsletter, please contact Editor Tom Ng (tomng@dvc.hk) or Practice Development Director, Aparna Bundro (aparnabundro@dvc.hk)

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