Articles

This edition’s singular article homes in on anti-suit injunctions and is authored by Jose-Antonio Maurellet SC and Tom Ng. This is a topic which has seeded interesting conversations following the Dickson Valora Group Holdings Co Ltd and another v Fan Ji Qian case showcased in the last edition of A Word of Counsel featuring Anson Wong SC, Rachel Lam SC, Alan Kwong, Terrence Tai, Michael Ng and Jasmine Cheung.

Case Reports

You previously read about the Taching Petroleum Company, Limited v Meyer Aluminium Limited in the 4th edition of A Word of Counsel, as penned by DVC’s John Hui and Jonathan Chan. This case broke ground as the leading authority on setting up breach of competition law as a defence in civil proceedings. In this edition, you’ll hear from Catrina Lam and Cherry Xu as they examine the issues that arose at the second case management conference concerning Taching. One of the cardinal questions was whether senior management staff could be included in a confidentiality ring. Find out what was decided here.

In an innovative decision which saw the court discharging a regulation order and mandating the replacement of liquidators in alignment with the majority creditors’ wishes, Look-Chan Ho peels back the layers of the Cai Shuyi v Joint and Several Liquidators of Blockchain Group Co Ltd case to discuss the rationale that led to this decision.

In When Family Members Feud Over Enduring Powers of Attorney: The Legal Test and Implications, Terrence Tai and Rosa Lee spotlight the difficulties associated with challenging the validity of an enduring power of attorney in the case of To Lee Wah Samuel v. Yum Huin Ming and Another and explain how this pioneering decision was responsible for a number of firsts in this arena.

When is the new FDR procedure appropriate in the context of ownership disputes in ancillary relief proceedings? Find out in LLC v LMWA, the case report of which was authored by Catrina Lam and Tom Ng, also involving Douglas Lam SC and Jacqueline Law.

Switching gears, read about an innovative case that for the first time tested the ability of a co-defendant to seek a Mareva injunction against its co-defendant pre-trial. This case involved Rachel Lam SC and Tommy Cheung. Read on to find out how it gives you a chance to ascertain the wider implications that this will have on civil and commercial litigation in the future.

Douglas Lam SC and David Chen shine a light on how receivers’ fees are dealt with when reopened after assessment, and offer a practical solution and another angle going forward in the case of Ho Chor Ming & Ors v Hong Kong Chiu Chow Po Hing Buddhism Association Ltd.

Capping this edition’s Case Reports section, In When will severance pay? DVC’s Yang-Wahn Hew, Sharon Yuen and Howse Williams’ Partner, Patricia Yeung join forces to analyse the issues that emerged following the case of Tillman v Egon Zehnder Ltd. The Supreme Court in this case considered whether a restrictive covenant could remain valid and enforceable after severing part of it in a bid to achieve a balance between an employer’s right to protect its business as against an (ex) employee’s right to continue to earn in an open market.
Announcements

DVC welcomes four new tenants this year. Read more about their backgrounds [here](#). Elsewhere, discover who was appointed Justice of the Peace this year. In another standout appointment, find out which of DVC’s newest silks was appointed adjudicator of the Immigration Tribunal.

In other news, one of DVC’s members was appointed Director of the Financial Dispute Resolution Centre and another was elected Chairman of the Mediation Council. Pictures from an in-house gathering to kickstart the latter’s appointment can be found [here](#).

Events

DVC’s Head of Chambers, John Scott SC, JP homes in on directors duties at a seminar he was invited to speak at hosted by the Hong Kong Institute of CPA. Find out why this was a milestone advent in the context of the Hong Kong Companies Ordinance [here](#).

Over 100 members of the legal fraternity came together to break ‘bao’ at DVC’s second Juniors’ Cocktail. Headline speakers, Catrina Lam and Sabrina Ho addressed the topic of disruption brought about by legal technology and more.

What is the scope of the court’s power to protect and manage the assets of mentally incapacitated persons? Find out [here](#) as Chua Guan-Hock SC and Teresa Wu share their collective wisdom in a seminar with reference to the Mental Health Ordinance.

Presenting in front of employment law specialists at Deacons’ offices, DVC’s Connie Lee and Vincent Chiu took the audience through a decision which clarified the law in respect of bonuses and commissions in the context of employee statutory entitlements and double payments. Find out which recent decision they referred to [here](#).

Focusing on recent developments as they relate to preemptive remedies, Catrina Lam and Kevin Lau compared and contrasted a pair of pre-action discovery cases against a financial mis-selling backdrop, at a warmly received seminar held at Robertson’s offices.

Cementing their recent ascendant appointments when they took Silk in June, Jenkin Suen SC and Rachel Lam SC commemorated the occasion with members of the legal community at a cocktail reception on 24th June 2019.

Look-Chan Ho and Tiffany Chan discussed the nuances of modified universalism with supporting case law at a recent seminar.

In our penultimate write up for this edition, an exultant evening for two of DVC’s juniors when they competed in a singing competition that brought members of the Hong Kong Bar Association together.

Lastly, find out which two recent competition cases came under the spotlight at a presentation delivered by Richard Leung JP, Connie Lee and Tommy Cheung.

We hope you enjoy this edition. If you have an appetite for more, you can find DVC’s 6th edition [here](#).

DVC runs a series of thought leadership events and CPD accredited in-house seminars. These cover topical legal issues, recent developments and seminal cases our members have been involved in. These intersect with our areas of expertise. If there are any issues or themes of interest you would like to see covered, please email aparnabundro@dvc.hk
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CW Ling at an in-house gathering commemorating a recent appointment

Raising glasses at DVC’s second Juniors cocktail

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Making a Case for Anti-suit injunctions in aid of arbitration

This article was authored by José-Antonio Maurellet SC and Tom Ng

The evolving landscape

In many jurisdictions, arbitration clauses are generally given effect to, usually by way of a stay of court proceedings brought in breach of an arbitration clause.

Recently, there have been several cases involving applications to the court for an anti-suit injunction, restraining the other parties from commencing or continuing proceedings brought in breach of an arbitration clause in another jurisdiction. (See the recent innovative case of Dickson Valora Group (Holdings) Company Ltd v Fan Ji Qian [2019] 2 HKLRD 173. DVC’s Anson Wong SC, Rachel Lam SC, Alan Kwong, Terrence Tai, Michael Ng and Jasmine Cheung were at the vanguard of this ground-breaking application.)

Jurisdiction in Hong Kong

In Hong Kong, the starting point is that a party is entitled to an anti-suit injunction based on an arbitration clause: Ever Judger Holding Co Ltd v Kroman Celik Sanayii Anonim Sirketi [2015] 2 HKLRD per the Hon Mr. Justice Godfrey Lam, and the cases cited therein, in particular The Angelic Grace [1995] 1 Lloyd’s Rep 87

The Burden

Further, the burden is on the defendant resisting the injunction to demonstrate a strong reason to detract from the applicant’s prima facie right:

“It is clear, therefore, as a matter of Hong Kong law that the court in this jurisdiction should ordinarily grant an injunction to restrain the pursuit of foreign proceedings brought in breach of an agreement for Hong Kong arbitration ... unless the defendant can demonstrate strong reason to the contrary.”

As Lam J stated, “the factors raised against the injunction must be sufficiently strong to warrant not holding the opposing party to his contract”.

Jurisdiction and comity

Insofar as the jurisdiction of the Hong Kong court is concerned, if Hong Kong is the seat of the arbitration, then the Hong Kong court has the power to grant an anti-suit injunction: see, by analogy, the similar position adopted in England under the Arbitration Act...

On the other hand, in *Chen Hongqing v Persons whose names are set out in the second column of the Schedule hereto* (HCA 2648/2017, 29 May 2018), DHCJ To observed that “there is a conflict of first instance authorities in Hong Kong as to whether it is necessary, at least as a general rule, for the Hong Kong applicant to have sought a dismissal or stay of the foreign proceedings (in the jurisdiction where the foreign proceedings have been commenced) on jurisdictional (or similar) grounds before seeking an anti-suit injunction in Hong Kong”.

In *Dickson Valora Group (Holdings) Company Ltd v Fan Ji Qian* [2019] 2 HKLRD 173, G Lam J further held that:

(1) A non-party to a contract who becomes entitled to enforce an obligation which is subject to an arbitration clause must do so by arbitration according to the contract. Thus, the basis for the court’s intervention by granting an anti-suit injunction to restrain such a claimant from enforcing a contractual obligation by foreign proceedings instead of arbitration is the same as for a claimant who is an original party to the arbitration agreement.

(2) A failed jurisdictional challenge in the foreign court is no bar in itself to an application for an anti-suit injunction. However, considerations of comity arise given the need to avoid the wastage of time and resources in different jurisdictions. Thus, the longer an action continues without any attempt to restrain it, the less likely an injunction would be granted.

(3) It is not abusive for an applicant to apply for the injunction after failing in the jurisdictional challenge at first instance and at the same time as an appeal is lodged in the foreign court. The importance of comity considerations is reduced where an anti-suit injunction is sought so that the dispute could be dealt with by the contractually stipulated mechanism. This reflects the unambiguous policy of Hong Kong courts in support of arbitration.

### The court and the tribunal

- In *Nori Holdings Ltd v Bank Financial Corp* [2018] EWHC 1343 (Comm), the English court considered its jurisdiction to grant an anti-suit injunction when the arbitral tribunal had already been constituted. In that case, Males J granted an anti-suit injunction to restrain Russian proceedings in breach of an arbitration clause. In so doing, Males J considered the issue of whether the application should instead be made to the tribunal, and observed that, on the facts of that case, “the availability of anti-suit relief from the arbitrators is not a reason for the court to refuse an injunction now” (at §42).

- In any event, this decision has to be read in the context of section 44 of the Arbitration Act 1996, which provides that “If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets” (sub-section (3)), and that “In any case, the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively” (sub-section (5)).

- In England, it has been suggested that these provisions limit the jurisdiction of the court. For example, in England, it has been suggested that the availability of emergency arbitration reduces the scope for intervention on the part of the court: see *Gerald Metals S.A v Timis* [2016] EWHC 2327 (Ch):– “The obvious purpose of Articles 9A and 9B is to reduce the need to invoke the assistance of the court in cases of urgency by enabling an arbitral tribunal to act quickly in an appropriate case. It seems to me that to make commercial sense of the provisions a
similar functional interpretation of Articles 9A and 9B needs to be adopted as has been given to section 44(3) of the Arbitration Act. In other words, the test of exceptional urgency must be whether effective relief could not otherwise be granted within the relevant timescale – the relevant timescale for this purpose being the time which it would otherwise take to form an arbitral tribunal. Likewise, under Article 9B the test of what counts as an emergency must be whether the relief is needed more urgently than the time that it would take for the expedited formation of an arbitral tribunal. That, in my view, is the rational interpretation of these rules.

- Accordingly, it is only in cases where those powers, as well as the powers of a tribunal constituted in the ordinary way, are inadequate, or where the practical ability is lacking to exercise those powers, that the court may act under section 44.

**Key Takeaways**

> In Hong Kong, the Arbitration Ordinance (Cap.609) is not exactly the same, although s.45(4) provides that “The Court may decline to grant an interim measure under subsection (2) on the ground that (a) the interim measure sought is currently the subject of arbitral proceedings; and (b) the Court considers it more appropriate for the interim measure sought to be dealt with by the arbitral tribunal”.

> Moreover, in *CSSC Huangpu Wenchong Shipbuilding Co Ltd v Dry Bulk Services Ltd* (HCMP 1626/2016, 19 December 2016), the Court observed that “Under section 45(3), the court’s powers to give interim measures in aid of arbitrations may be exercised irrespective of whether or not similar powers may be exercised by an arbitral tribunal in relation to the same dispute...section 45(4) provides only that the court may decline to grant an interim measure on the ground that the interim measure sought is currently the subject of arbitral proceedings and the court considers it more appropriate for the interim measure sought to be dealt with by the tribunal”.

> There is accordingly even further room for the jurisdiction to develop.
The Diesel Cases: Hiving off a Competition defence to the Competition Tribunal?
Procedural considerations at the case management stage

This Case Report was authored by Catrina Lam and Cherry Xu.


and


This is the first case in which a competition law defence was raised in a civil litigation, culminating in interesting and novel issues on both procedural and substantive fronts.

**Background**

The Plaintiffs in CTA 1/2018 and CTA 2/2018 were Taching Petroleum Company Limited (“_Taching_”) and Shell Hong Kong Limited (“_Shell_”) respectively. Taching and Shell respectively sold industrial diesel oil to the defendant, Meyer Aluminium Limited (“_Meyer_”). Each commenced a High Court Action (the “_HCAs_”) against Meyer for the outstanding price for the industrial diesel oil supplied. Meyer’s defence in the HCAs was that Taching and Shell breached the First Conduct Rule under the Competition Ordinance, Cap. 619 (“_CO_”), by colluding to fix prices and/or to exchange pricing information.

Since Meyer’s defence raised a competition law issue, the issue was transferred to the Competition Tribunal (the “_Tribunal_”) for determination in CTA 1/2018 and CTA 2/2018 (the “_CTAs_”).

The parties, in October 2018, submitted a draft confidentiality protocol (the “_Confidentiality Protocol_”) but could not agree on whether Meyer’s in-house non-legal representatives should be included in the confidentiality ring.

Upon the Tribunal’s direction, Meyer issued a series of summonses asking that (a) no confidentiality ring be
Zero Sum Game?

It is recognized in competition law that one man’s market advantage is invariably another’s market disadvantage. In other words, it can be a zero sum game. If employees of the parties (including in-house legal advisers) or experts engaged by them have access to confidential information of an opponent, it would be extremely difficult, if not impossible for them to “unlearn” it. It would create a serious risk of such confidential information getting into the market to the detriment of the party disclosing it.

If a confidentiality ring is necessary, a staggered approach should be adopted so that the disclosure of confidential information may initially be made to external legal advisers and, if appropriate, to experts. Typically, the interested person, including in-house lawyers, will be excluded from membership. Signed undertakings will be given by members of the ring to maintain confidentiality of the information and/or provide an undertaking to pay damages for breach of the undertaking.

The Tribunal also recognized the benefit of setting up a confidentiality ring: “After the disputed issues are fully crystallized and the lawyers have inspected the documents, the relevance of the documentary evidence emerges with greater clarity. The lawyers can form a view as to whether individuals from the clients need to see some or all of the documents and make a ‘much more focused application for disclosure’ at a later stage.” (para 27)

Further, the Tribunal should also be vigilant in respect of the following:

1. Confidentiality undertakings are difficult to police and enforce. It would be difficult for a party to prove that an undertaking was breached when market rumours are frequently spread around by industry players in private.

2. The commercial harm is often difficult to quantify, for it is virtually impossible for the harmed party to estimate the extent of advantage gained by other market players.

3. The party in breach of the confidentiality

established, or (b) Meyer’s non-legal representatives be included in the confidentiality ring. At the hearing, Counsel for Meyer clarified that Meyer was only seeking an order in terms of item (b).

Shell sought a redaction of part of Shell’s points of reply (“POR”) concerning Shell’s confidential list price policy as against both Meyer and Taching, so as to prevent such confidential information from getting into the market.

The applications were heard before the Honourable Madam Justice Au-Yeung (Deputy President of the Competition Tribunal) at a recent CMC hearing, during which the issue of whether the HCAs should be stayed pending resolution of the CTAs was also ventilated.

Issues Arising at the Case Management Stage

After the CMC hearing, the Hon Au-Yeung J handed down two judgments relating to the following issues:

1. The redaction of part of the Plaintiff’s POR in CTA 2/2018;

2. The Defendant’s application to have 2 of its in-house non-legal representatives included in the confidentiality ring;

3. Whether the HCAs should be stayed pending resolution of the CTAs.

Members of the Confidentiality Ring

The Tribunal examined the relevant authorities and summarised the legal principles governing the establishment and membership of a confidentiality ring.

There is no dispute that the Tribunal has power to impose a confidentiality ring, but confidentiality rings are the exception rather than the rule.

The onus is on the party seeking to show that the case is sufficiently exceptional to justify restrictions on disclosure to the litigant on the other side, notwithstanding onerous undertakings as to confidentiality and the like, rather than on the party, who is prima facie entitled to see the documents, to justify its entitlement to access.
undertaking may be a relatively small enterprise who may not have sufficient resources to meet any claim for damages.

In the present case, the Tribunal was not satisfied that Shell had discharged its burden of showing why Meyer’s suggested restriction on access to 2 non-legal in-house representatives was not sufficient. Shell had not filed an affidavit to show why the 2 employees of Meyer were not appropriate persons to have access, or what potential and significant harm could be caused to Shell if any employee of Meyer were included in the ring, or that Meyer would not be able to meet a claim for damages for breach of the undertaking as to confidentiality. Shell had not even alleged that all documents claimed to be confidential fell within the List Price Policy.

In the circumstances, the Tribunal granted Meyer’s request to include 2 named employees as members of the confidentiality ring.

The Tribunal also made it clear that the decision would not affect the confidentiality of any specific document. This meant that the parties were free to apply for or contest confidentiality treatment in respect of specific documents in the future.

Redaction of Shell’s POR

Shell was concerned that the widening of the confidentiality ring may cause its confidential list price policy to be disclosed to Taching and Meyer, culminating in further disclosure by Taching and Meyer to other market players, which would have a significant adverse impact on Shell’s legitimate commercial interests.

Having read the unredacted POR in full, the Tribunal was of the view that Shell’s concern was justified as against Taching, a competitor. However, the Tribunal was not satisfied that Shell had made out its case as against Meyer, who was not a competitor.

Counsel for Shell submitted that it was not sufficient just to say that Meyer was not a competitor – as Meyer might disclose the confidential information to Shell’s competitors in the market. It was argued that there was a need to prevent the confidential information from getting into the market.

The Tribunal rejected Shell’s arguments. The Tribunal did not consider it likely that Meyer’s in-house non-legal representatives would be put in a position to exploit the relevant information to Meyer’s advantage.

The Tribunal placed weight on the fact that Meyer had voluntarily limited itself to having only 2 employees within the confidentiality ring, with an express undertaking as to confidentiality. In addition, Shell had not discharged its onus to show why it was necessary to further restrict a party’s access to the pleading.

In the circumstances, the Tribunal gave retrospective leave to Shell to redact the POR as against Taching, but not Meyer.

No Stay of the HCAs

In a separate judgment handed down in the HCAs, Hon Au-Yeung J dealt with the procedural issue of whether there should be a stay of the HCAs pending resolution of the competition issue in the Tribunal.

The Court considered the general rule that all issues in a case should be tried at the same time, which should apply notwithstanding the fact that competition issues are involved and are hived off to the Tribunal.

The pleadings in this case disclosed that the only issue on liability was whether, by reason of the breach of the First Conduct Rule in the CO, the relevant agreements for supply of industrial diesel oil between Shell/Taching and Meyer was tainted with illegality and unenforceable against Meyer.

The Court found that the issues of illegality and unenforceability in the HCAs had no independent existence from the competition defence in the Tribunal. The Court therefore considered that all issues on liability must be tried together with the CTAs.

On the issue of quantum, Meyer argued that it should be tried separately because it would only have a cause of
action after the Tribunal had found a contravention of the First Conduct Rule.

The Court refused such an argument on the basis that, as a matter of law, a future cause of action cannot support a defence to a present claim. There was therefore no basis for ordering a split trial.

In the premises, the Court ordered that the HCAs and the CTAs should be tried together before the same judge constituting the Tribunal.

Key Takeaways

➢ The Court will take a flexible and practical approach to solving procedural issues at the case management stage. Where the competition issue is hived off from a High Court action, the Court may order that the High Court action be tried together with the competition proceedings unless there are good reasons not to do so.

➢ The Tribunal recognizes the usefulness of the mechanism of the confidentiality ring. The Tribunal will take a practical and staggered approach to the setting up and composition of a confidentiality ring. The issue of whether employees of a party should be included in the confidentiality ring is a fact-sensitive issue that has to be determined in light of all the relevant circumstances.

➢ If a party wishes to restrict access to its pleading and/or certain documents on the basis of confidentiality, it is important for that party to show the justification for such confidential treatment by way of affidavit evidence.

Catrina Lam and Cherry Xu appeared on behalf of Taching, the Plaintiff in CTA 1/2018 and HCA 1929/2017.
Message to Official Receiver – discharging regulating order and replacing liquidators

*Cai Shuyi v Joint and Several Liquidators of Blockchain Group Co Ltd [2019] HKCFI 1522*

This Case Report was authored by Look-Chan Ho.

The *Blockchain* decision seems to be the first ever reported decision where the Court discharged a regulating order and replaced the liquidators in accordance with the majority creditors’ wishes. It indirectly sends a message to the Official Receiver (“*OR*”) that an application for a regulating order should not be lightly made.

**Background**

Sections 227A and 227B of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) (“*CWUMPO*”) confer on the Court the power to make a regulating order. The Court’s power to make a regulating order is aimed at addressing the problem of insolvencies with a large number of small creditors or where it is otherwise impracticable to hold the first meeting of creditors and contributories.

Blockchain Group Co Ltd (“*Company*”) is a Cayman-incorporated company listed on the Hong Kong Stock Exchange.

A regulating order in respect of the Company came about in the following circumstances:

(a) In October 2018, in light of a winding-up petition against the Company and expecting an imminent winding-up order, the OR decided to apply for a regulating order because the OR thought the Company had hundreds or even thousands of contributories (although in fact the Company had only 69 contributories).

(b) Before applying for the regulating order, the OR consulted 19 known creditors.

(c) On 19 November 2018, as soon as the Court made a winding-up order, the OR applied for a regulating order without doing further investigation or consulting other creditors.

(d) On 21 November 2018, the Court granted the OR’s application on the papers and appointed two individuals of EY recommended by the OR as the liquidators.

In the meantime, hundreds of other creditors were completely unaware of the OR's ultra-swift actions and the regulating order. The OR was also unaware of the existence of these creditors because the OR did not investigate, although most of these creditors were holders of bonds issued by the Company with public announcements.
On 23 November 2018, the solicitors for the Applicant (one of the creditors) wrote to the OR to urge the OR to convene a creditors’ meeting, and to inform the OR of the Applicant’s intention to nominate liquidators.

On 26 November 2018, the OR responded to the Applicant’s solicitors informing the Applicant of the regulating order and the appointment made under the regulating order.

Naturally, such development surprised and dismayed the Applicant and many other creditors. The Applicant (supported by hundreds of creditors) then applied to discharge the regulating order so that meetings of creditors and contributories could be held to determine the choice of liquidators.

On 27 February 2019, Deputy High Court Judge Maurellet SC ordered the liquidators to, by way of letter correspondence, obtain from all known creditors and contributories their votes on a resolution of whether or not an application should be made to the Court for appointing new liquidators in place of the existing liquidators.

It turned out that a majority of the creditors voted for the appointment of new liquidators, while the contributories voted for the status quo.

The Applicant then returned to the Court to seek the appointment of new liquidators.

Decision

Deputy High Court Judge William Wong SC discharged the regulating order and appointed new liquidators in accordance with the majority creditors’ wishes. His Lordship reasoned as follows.

The Court has jurisdiction to appoint liquidators under section 194 of CWUMPO. The principles governing the Court’s discretion under section 194 are well-established. In particular, the cardinal principle is the principle of creditors’ democracy. In the case of an insolvent liquidation, it is the interests of creditors that are of paramount importance and their views should carry weight.

Key Takeaways

- This case serves as a salutary reminder that while a regulating order has a proper role in liquidation, its use has to be based on well-established principles. In particular, “the court must be satisfied it is right in [the] circumstances to make a regulating order and appoint liquidators forthwith, as the creditors’ right to nominate a liquidator of their choice should not be easily overridden”: Re Legend International Resorts Ltd (No 3) [2006] 3 HKLRD 289 at [9].

- In the present case, it is hard to see any legitimate justification for the regulating order, nor the way in which its application was rushed through the Court. This in turn necessitated the incurrence of creditors’ time and costs to restore their statutory right to nominate liquidators.

- It is also perhaps a good time to revisit if an application for a regulating order should be allowed to be made on the papers.

Look–Chan Ho acted for the Applicant in this case.
This recent High Court case sheds light on the difficulties associated with challenging the validity of an enduring power of attorney: *To Lee Wah Samuel v Yum Huin Ming and Another* [2019] HKCFI 1441.

This case concerned two enduring powers of attorney, the validity of which were challenged by the Plaintiff. This decision appeared to be the first ever reported decision where the Hong Kong court considered (a) the legal requirements of a donor’s mental capacity for executing an enduring power of attorney, and (b) the burden of proving such capacity or lack thereof.

**Background**

The 1st Defendant executed an enduring power of attorney on 3 November 2015 (“1st EPoA”), the execution of which was witnessed by a registered medical practitioner and a solicitor in accordance with the requirements of the Enduring Powers of Attorney Ordinance (Cap. 501). The 1st EPoA was registered on 18 July 2016.

On or around 24 July 2017, the Plaintiff commenced Part II proceedings under the Mental Health Ordinance (Cap. 136) (“Part II Proceedings”) seeking, amongst other things, the appointment of a committee over the 1st Defendant’s estate. For the purpose of commencing the Part II Proceedings, the Plaintiff’s experts examined the 1st Defendant on a number of occasions.

In the meantime, the 1st Defendant executed an enduring power of attorney on 26 January 2018 (“2nd EPoA”), the execution of which was again witnessed by a registered medical practitioner and a solicitor. The 2nd EPoA was registered on 26 January 2018.

In light of the execution of the 1st EPOA and the 2nd EPOA (collectively “EPoAs”), the Court took the view that it would be unnecessary for a Committee to be appointed under the Part II Proceedings unless and until the EPoAs were set aside. Accordingly, the Plaintiff commenced the present action in order to set aside the EPoAs.

**Decision**

The Hon. Mr Justice Louis Chan dismissed the Plaintiff’s claim and adjudged that the Plaintiff had failed to discharge the burden of proving that the 1st Defendant
A Word of Counsel

A Word of Counsel

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expert was prepared for the Part II Proceedings (i.e. to determine whether the 1st Defendant was incapable, by reason of mental incapacity, of managing and administering his property and affairs), and that the statutory criteria for deciding whether a person was incapable was different from the criteria for determining whether a person has the mental capacity to execute an EPoA. As such, the Plaintiff’s expert evidence and examination were of no use in determining whether the 1st Defendant had the requisite capacity to execute the two EPoAs.

**Actionable takeaways**

- This case serves as a restorative reminder that capacity is issue specific and that it would be wrong to utilize a medical report and/or examination used for a specific purpose (e.g. in support of a Part II application) for another purpose (e.g. for challenging the validity of an enduring power of attorney). By failing to have regard to the relevant issues, the value of a medical examination or a report will be severely curtailed.

- This case also highlights the importance of keeping a clear and contemporaneous record of any medical examination conducted (particularly in cases which are potentially contentious). Such records will help refresh the memory of the medical practitioner conducting the examination and will let the Court know whether the relevant medical examination was properly conducted.

**Terrence Tai and Rosa Lee** acted for the Defendants in this case.

**The legal test**

As regards the requisite test for determining the issue of capacity, his Lordship summarized the effect of the relevant provisions of the Enduring Powers of Attorney Ordinance (Cap. 501) and the Powers of Attorney Ordinance (Cap. 31), and stated that a person is mentally incapable of executing an EPoA if he is suffering from a mental disorder or mental handicap and is either (i) unable to understand the effect of the power of attorney or (ii) by reason of his mental disorder or mental handicap unable to make a decision to grant a power of attorney. Alternatively, even if a person is not suffering from a mental disorder or mental handicap, he is also incapable of executing an EPoA if he is unable to communicate to any other person who has made a reasonable effort to understand him, any intention or wish to grant a power of attorney.

**The burden of proof**

As regards the question of burden, his Lordship accepted the Defendants’ submissions that under the common law, everyone is presumed to have mental capacity unless it is shown otherwise. Since an adult is presumed to have mental capacity to make decisions, the burden rests on those asserting otherwise to prove that that person has no such capacity. Accordingly, the burden is on the Plaintiff to prove on the balance of probabilities that the donor did not have the requisite mental capacity to execute the two EPoAs at the times they were executed.

His Lordship was critical of the Plaintiff’s evidence. In particular, his Lordship highlighted the fact that the assessment and the report of the Plaintiff’s medical expert did not have the requisite mental capacity to execute the two EPoAs. His Lordship also dismissed the Part II Proceedings.

In dismissing the Plaintiff’s claim, his Lordship elaborated on a number of issues including (a) the legal test in deciding whether a donor has the requisite capacity to execute an enduring power of attorney and (b) the party who bears the burden of proving such capacity or lack thereof.

In dismissing the Plaintiff’s claim, his Lordship elaborated on a number of issues including (a) the legal test in deciding whether a donor has the requisite capacity to execute an enduring power of attorney and (b) the party who bears the burden of proving such capacity or lack thereof.
Ownership disputes in ancillary relief proceedings: the Court of Appeal breaks new ground

In *LLC v LMWA* [2019] HKCA 347, the Court of Appeal broke new ground when it came to determining ownership disputes in ancillary relief proceedings.

In that case, the petitioner-wife argued that certain properties ostensibly in the name of the father of the husband actually belonged to the husband, such that they should be included in the matrimonial pool. The family court judge decided to determine this issue by way of a trial of preliminary issues, before the parties proceeded to FDR.

As a result, significant costs were incurred on both sides.

TL v ML should not be slavishly followed

Traditionally, following *TL v ML* [2006] 1 FLR 1263, such a dispute relating to the ownership of properties would indeed, be resolved by way of a trial of preliminary issues.

However, the Court of Appeal in this case broke new ground by observing that (§§21–23):

“However, we have reservations prescribing that a trial at preliminary issue is the only way forward once an issue on third party beneficial ownership is raised. We also have reservations on [sic] prescribing that a FDR must be postponed until after the trial of preliminary issue.

One must not lose sight [of the fact] that the dispute on ownership in these cases often arises from matrimonial proceedings. But for the breakdown of marriage and the application for ancillary relief by one spouse in a divorce petition, there would not be any claim on the property. In other words, the parties only raise the issues on beneficial ownership for the court to determine because of the matrimonial proceedings.

The underlying matrimonial dispute and the application for ancillary relief, in our judgment, is the origin and the substratum for the litigation on ownership irrespective of the procedural routes adopted by the parties and the court to
resolve the same. If the underlying ancillary relief claim is settled or resolved satisfactorily between the spouses, often there would be no further need or justification for proceeding with a determination of a dispute on the ownership.”

In view of the Court of Appeal’s observation, the TL v ML procedure should not be followed slavishly.

**New FDR procedure**

Further, in view of the facts in this case, the Court of Appeal suggested a new FDR procedure, namely the “FDR cum mediation” procedure (at §68):

“The husband and the wife had previously attempted mediation without success. At the hearing, this Court suggested that the effectiveness of the process could be enhanced if a FDR can be held with the assistance of a mediator. There can be matters on which a FDR judge can give useful views and steer the parties to explore at greater length with a mediator. With such steering, a mediator can work more effectively with the parties separately in a way which a FDR judge cannot. The mediator can also refer some issues which divided the parties to the FDR judge for an authoritative opinion. With synergy between the FDR judge and the mediator, it is also more likely in cases where parties reach agreement on some but not all the issues, a more costs effective way to resolve the outstanding issues could be worked out.”

This new procedure, if effective, may pave the way for further reform in this area of law.

**Douglas Lam SC** and **Jacqueline Law** acted for the wife in the trial of preliminary issues. **Jacqueline Law** dealt with the issue of costs before the Family Court, and **Catrina Lam** and **Tom Ng** acted for the wife before the Court of Appeal in the costs appeal.
Recalibrating the scope of Marevas as seen in the recent case of Tang Jialin v SinoPac Securities (Asia) Limited & Others [2019] HKCFI 2087

This Case Report was authored by Rachel Lam SC and Tommy Cheung.

This recent decision handed down on 23 August 2019 (the “Decision”) dealt with two novel issues of law. The Decision is the first decision in Hong Kong which:

1. Examines whether a co-defendant can, based on an alternative case that it would lose at trial, seek a Mareva injunction against its co-defendant pre-trial (“Issue 1”); and

2. Deals with the interesting doctrinal issue as to whether liability for knowing receipt or in unjust enrichment should be treated as “compensation” under the Civil Liability (Contribution) Ordinance (Cap 377) (“CLCO”) (“Issue 2”).

The Judge ruled that although a co-defendant is in theory permitted to seek a Mareva injunction against its co-defendant, on the facts of this case, a Mareva injunction should not be granted. Through a scholarly doctrinal analysis, the Judge also ruled that the English Court of Appeal decision, Charter plc & Another v City Index Ltd & Others [2008] Ch 313, was wrongly decided since liability for knowing receipt does not constitute “compensation”.

Background

The Plaintiff (P) in this case asserted a claim against the 1st Defendant (D1). It was alleged that D1, a securities house, had acted in breach of fiduciary duties, breach of contract and/or negligently in transferring 117 million shares in a listed company (the “Company”) (the “117 Million Shares”) to the 2nd Defendant (D2)’s account. It was alleged that the transfer had been procured by an unnamed third party impersonator posing as P.

D1 denied P’s claim, but in the alternative scenario that it might lose the case against it, issued a Third Party Notice seeking to claim (in the event that it was liable to P) against D2 on the basis of fraudulent misrepresentation and/or knowing receipt (of the 117 Million Shares).
On a conceptual level, the Judge answered this question in the affirmative. One apparent difficulty faced by a co-defendant is that, strictly speaking, it does not have an accrued cause of action since it has not yet lost at trial. However, the Judge took the view that the recognition that the Court has jurisdiction to grant *quia timet* injunctions prior to the suffering of actual loss tends to support that an accrued cause of action in the strict sense is not required for injunctive relief. Further, the English Court of Appeal decision, *Kazakhstan Kagazy plc v Zhunus* [2017] 1 WLR 1360, supports the proposition that although a co-defendant does not have an accrued cause of action in the strict sense, so long as it has a right to institute proceedings (e.g. by way of contribution or third party notice), the Court has jurisdiction to grant *Mareva* relief. There is no sufficient reason to doubt the reasoning in *Zhunus*.

Just because one can, theoretically, obtain such relief does not mean that it must be granted in every case where a co-defendant asserts an alternative claim...
against its other co-defendant(s), however. The Judge went on to examine what was required to be shown in order to successfully obtain injunctive relief.

Of particular relevance in the present case was the fact that P here had not sought Mareva relief against any of the Defendants. This was to be contrasted the situation in Zhunus where the claimant had already sought and obtained injunctive relief against all the defendants (thereby demonstrating the claimant had a good arguable case against all of them). D2 therefore argued that before D1 could argue its own “good arguable case” (under the Third Party Notice), it also had to demonstrate that P had a good arguable case against all the Defendants. D1, in contrast, sought to circumvent this latter requirement, suggesting that it was not necessary for it to demonstrate a good arguable case of P’s case and invited the Court to err on the side of preserving the assets in any event.

The Judge rejected D1’s argument, and held that the Court should adopt a principled approach in granting Mareva relief. In other words, the Court cannot proceed on the basis that on balance, there is lesser harm in granting a Mareva injunction, then a Mareva injunction should be granted. To push D1’s argument to its logical extreme, it would mean in a case where a plaintiff does not have a good arguable case, a Mareva injunction could still be granted simply because there is a risk or possibility that one of the defendants who has issued a third party notice could be found liable after trial. This, according to the Judge, could not be right.

The Judge found that on the facts P had no good arguable case in the present case (and D1 could not demonstrate as such). On this basis alone, D1’s application for Mareva injunction could be rejected. For completeness, however, the Judge proceeded to address inter alia Issue 2.

**Issue 2 – Can liability for knowing receipt or in unjust enrichment be treated as “compensation” within the meaning of the CLCO?**

Even assuming that P had a good claim in knowing receipt against D2, there was a question as to whether D1 could claim contribution against D2. After a thorough review and analysis of the authorities and commentaries, the Judge answered in the negative.

In gist, the Judge preferred the analysis of Lord Steyn in *Royal Brompton NHS Trust v Hammond* [2002] 1 WLR 1397 as well as the commentaries by Professor Andrew Burrows, Professor Graham Virgo and the editors of *Goff & Jones* (as against the English CA decision of *City Index Ltd*), and held that it cannot be justified in principle to treat a restitutionary claim such as knowing receipt as one for “compensation”. Knowing receipt is “purely
“remedial” and knowing recipients’ sole obligation is to restore the assets: Williams v Central Bank of Nigeria [2014] 2 WLR 355 per Lord Sumption. As such, the focus of this “remedy” is on what the defendant has received, and not what the plaintiff has lost.

Hence, the Judge took the view that City Index Ltd had been wrongly decided, and liability for knowing receipt or in unjust enrichment should not be treated as “compensation”. On the basis of this dicta, CLCO is not applicable insofar as it concerns P’s knowing receipt claims. In any event, as the Judge observed, D1 has not sufficiently pleaded contribution as part of its case.

Conclusion

This decision is legally significant as it recognised a co-defendant’s right to seek a Mareva injunction against another co-defendant to protect its interest in the event that it loses at trial. The elements that a co-defendant has to satisfy were examined at length. Notably, in a scenario where a plaintiff has not sought injunctive relief against the defendants, the co-defendant must first demonstrate that the plaintiff has a good arguable case against the defendants before then developing its own good arguable case (as to its alternative claim). Further, because of the Judge’s detailed (albeit admittedly obiter) analysis on the nature of knowing receipt claims and their interaction in the context of contribution, this Decision is potentially of wider implication to other aspects of civil and commercial litigation. Readers are invited to read the facts and analysis of this important decision in full.

Rachel Lam SC, leading Tommy Cheung, acted for the 2nd Defendant in successfully resisting the injunction application.
Will discretion abide as long as the rules provide?

What you need to know about reopening a receiver’s fees after assessment as confirmed in the novel case of Ho Chor Ming & Ors v Hong Kong Chiu Chow Po Hing Buddhism Association Ltd [2018] 3 HKLRD 270

This Case Report was authored by Douglas Lam SC and David Chen.

Introduction

Shareholder disputes are commonplace. When a membership dispute arises, receivers are sometimes appointed to manage the company pending the resolution of the dispute. If the receivership is prolonged, the receivers might seek payment of their fees during the course of receivership. Their fees might be assessed by the Court (normally a Master) and paid out of the company’s assets while the receivers remain in control of the company. When the company emerges from receivership, is it entitled to challenge or even set aside the assessed payments? This question does not appear to have been considered in the common law world. In Ho Chor Ming & Ors v Hong Kong Chiu Chow Po Hing Buddhism Association Ltd [2018] 3 HKLRD 270, G Lam J gave a detailed examination into the issue. His judgment has recently been upheld on appeal.

Background Facts

Hong Kong Chiu Chow Po Hing Buddhism Association Ltd (“Association”) is a charitable institution. In 2012, a dispute arose over its membership. In August 2013, the Court appointed a receiver (“Receiver”) over the Association to manage its assets and to verify its register of members. The membership dispute was eventually resolved in November 2015 when the Court concluded that 7 individuals were members of the Association (see [2016] 1 HKLRD 513). In August 2016, the individuals formed a new board of directors of the Association (“Board”).

The Order appointing the Receiver provided that his remuneration was to be charged on a time-costs basis and paid out of the Association’s assets. Subsequent Court Orders and directions confirmed this arrangement, and further provided that the Receiver’s fees and disbursements should be assessed by a taxing master. Pursuant to these Orders and directions, the Receiver submitted six bills and the Receiver’s solicitors (“Solicitors”) submitted four bills (collectively the “Bills”) to the Court for assessment over the period August 2013 to March 2017 (collectively the “Assessments”). Three out of six of the Receiver’s bills and two out of four of the Solicitors’ bills were assessed before the Board was elected. The remaining bills were assessed after the Board was elected, but the Board was not notified and therefore did not participate in those Assessments. The total fees and disbursements allowed amounted to approximately HK$15.2 million.

After the Board became aware of the Assessments, the Association applied to set aside the Assessments, for an
order that the Receiver do provide the Association with the relevant Bills (with full particulars and supporting documentation), and for leave to participate in the reopened assessments.

**First Instance Judgment**

The Judge approached the matter by considering the following questions:

1. Should the Association, in principle, be permitted to take part in the assessment of the Receiver’s remuneration and disbursements ("First Issue")?

2. Does the Court have the power to reopen or set aside the “taxation” decisions of the Master made in the absence of the Association as separately represented ("Second Issue")?

3. If so, should that be done in this case ("Third Issue")?

As regards the First Issue, the Judge rejected the Receiver’s submission that the assessment of his remuneration was “strictly between the Court and the Receiver”. The starting point was that as a matter of natural justice, the Association being the paying party ought to be permitted to take part in the assessments if it so desired. Historically, a receiver’s remuneration and disbursements were matters to be set out in his accounts which had to be passed by the Court. The authorities showed that parties who are interested in the assets which were subject to receivership were normally entitled to raise objections to the receiver’s accounts. Further, in cases concerning provisional liquidators’ remuneration (which is governed by the Court’s inherent jurisdiction), the Court repeatedly emphasized that natural justice demands that a paying party be afforded an opportunity to be heard (see e.g. *Re Baldwin Construction Co Ltd* (unreported, HCCW 340/2002, 7 November 2006) and *Lu Jun v Yu Qi* [2017] 2 HKC 327). The Judge concluded that the Association being the paying party “can legitimately seek to take part” in the assessment of the Bills.

As regards the Second Issue, the Judge held that there are two juridical routes to reopen the Assessments. First, since the Assessments were conducted *ex parte* without the Association’s independent participation, they may be set aside as an *ex parte* order under RHC O 32 r.6, which provides that “The Court may set aside an order made *ex parte*”. Second, approaching the issue as a matter concerning the Receiver’s accounts, RHCO 30 r.5 provides that the Court may direct a receiver to submit
accounts to a party, that such party should have access to the underlying books and papers, and that he may specify items to which objection is taken, which is then to be examined by the Court. The authorities also show that a master’s decision passing a receiver’s accounts could be opened up and varied if there was a valid objection. In the present case, upon an objection being raised by the Association, the previous Assessments cannot be an answer as they were not rulings on any such objections raised by the Association.

As regards the Third Issue, the Judge observed that the right of access to the court and the right to a fair hearing are fundamental rights. The Court’s orders and directions that the Receiver’s fees should be “assessed” or “taxed” did not mean that the Assessments must be carried out ex parte or without notice to any interested parties. Similarly, the direction that the Receiver’s fees should be paid “out of the assets of the Association” simply indicated the incidence of costs. The Judge rejected the Receiver’s submission that there must be “legitimate and properly substantiated complaints” about the Bills before the Assessments could be reopened. This point carried little weight in this case because the Association was not provided with sufficient information about the Bills to make any meaningful complaints. While the reopening of the Assessments would lead to further expenses and time being incurred to complete the exercise, a balance had to be struck between the interests of the Receiver and the interests of the Association being the paying party. There was no prejudice to the Receiver if he was required to disgorge what he should not have received in the first place. There was no suggestion that the Receiver would be hampered by lapse of time, loss of information or documents if the Assessments were to be conducted again.

In the circumstances, the Judge held in favour of the Association and answered “yes” to all three questions. He directed the Receiver to:

- provide the Association with the Bills (with full particulars);
- the Association to file a statement of objections and;
- that the assessment in relation to the objected items be reopened and referred to a Master for assessment in which the Association do have leave to participate.

The Court of Appeal’s Judgment

The Receiver appealed against the Judgment. On appeal, the Receiver did not contend that his remuneration is a question strictly between the Court and the Receiver. He accepted that the Association had a right to participate in the assessment of a receiver’s remuneration but drew a distinction between a “forward looking” application (when an assessment has not yet been made) and an “ex post facto” application (for reopening a concluded assessment for reassessment). The Receiver contended that the Association is entitled to participate in a “forward looking” application but could not reopen a concluded assessment unless there were valid grounds or special circumstances. The Receiver also contended that the Judge had no jurisdiction to reopen the Assessments and had in any event wrongly exercised his discretion.

The Court of Appeal held that the Judge was “obviously right” to reject the Receiver’s submission that the assessment of his remuneration is strictly between the court and the receiver such that the Association, being the paying party, would not be entitled to participate in the assessment.

The Court of Appeal confirmed the two juridical routes under RHC O.32 r.6 and RHC O.30 r.5 to reopen the Assessments.

1. In relation to RHC O.32 r.6, the Court of Appeal rejected the Receiver’s submission that the Association was a party to the Assessments in that the Receiver represented them before the Board was constituted. Given the inherent conflict of interest on the part of the Receiver regarding the assessment of his own remuneration, the Receiver’s representation of the Association was not meaningful or effective. As regards the Bills that were assessed after the Board was constituted, the Court of Appeal rejected the Receiver’s
(2) As regards the Receiver’s contention that RHC O.32 r.6 does not empower the Court to order the Receiver to provide the Association with the detailed Bills, the Court has inherent jurisdiction to provide for the steps to be taken incidental to the setting aside of an ex parte order. In the present case, the provision of detailed Bills by the Receiver was an incidental step following the setting aside of the Assessments.

(3) In relation to RHC O.30, rule 3 is a general empowering provision, the detailed workings of which are complemented by rule 5, which provides for a mechanism by which objection may be raised to any item in the accounts submitted by the receiver, including his remuneration and disbursements. RHC O.30 r.5 clearly provides a juridical basis to set aside and reopen the Assessments.

(4) As regards the Third Issue, there was nothing wrong with the Judge’s pragmatic approach to direct a rolled-up hearing to deal with the reopening and reassessment of the objected items within the Bills. It was unnecessary to hold a separate inquiry or apply some filtering process separately to ascertain if there was a valid objection against any item in the Bills. The Master retains the power to rule on the validity of any objection against any item of costs so there is no question of the Association dictating the basis and threshold for any reopening and reassessment. It is unnecessary for the Association to demonstrate some wrongdoing, bad faith or misfeasance on the part of the Receiver in order to raise a valid objection. The Judge gave due and proper weight to the fact that the Association was the paying party without the opportunity of being heard. It was an exaggeration to say that this factor would necessarily feature in most cases so that the
reopening and reassessment of a bill would occur in virtually every receivership, at the election of the subject entity.

(5) In the circumstances, the Association prevailed and the Court of Appeal dismissed the Receiver’s appeal.

Practical Solutions and Actionable Takeaways

➤ As a matter of natural justice, a paying party should normally be afforded an opportunity to be heard when his assets are potentially being used to discharge an obligation. Within the context of receivership of a company, if the company emerges from receivership, it should be able to challenge the fees paid to the receiver and his agents during the receivership.

➤ A company’s ability to challenge the receiver’s fees does not necessarily impinge upon the principle that a professional carrying out significant work should be paid within a reasonable time. Instead of seeking an assessment as the Receiver did in the present case, it is suggested that a receiver in a similar position in the future would benefit from seeking interim payment instead. The principal difference between the two is that there is an element of finality in an assessment of a receiver’s fee – the Master would scrutinize the bill presented by the receiver and assess the appropriate amount to be awarded to the receiver. In an application for interim payment, however, the Court would ensure that the amount awarded to the receiver included a sufficient buffer in case the receiver’s bills are subsequently taxed down significantly. The Court might also require the receiver to undertake to repay any excess amount of the interim payment should his fees and disbursements ultimately be determined to be less than the amount received by him: see e.g. *Re Lehman Brothers Securities Asia Ltd (No 1)* [2010] 1 HKLRD 43 at 55 (§38) per Barma J (as he then was); *Re MF Global HK Ltd (No 2)* [2012] 3 HKLRD 56 and *Chen Yung Ngai Kenneth v Shinewing Specialist Advisory Services Ltd* (unreported, HCCW 279/2010, 18 February 2014) at §§15-20 per DHCJ Le Pichon. While these cases concerned provisional liquidators and liquidators, the same principles should apply to a receiver’s application for interim payment.

➤ If the Receiver in the present case had applied for interim payment instead of assessment of the Bills, he would have been paid a part of his fees during the receivership. After the conclusion of the receivership, the Receiver would submit the Bills for assessment. The Association would be able to participate in the assessment and raise objections to the Bills. The assessed amount, less the amount of interim payment already paid, would be paid to the Receiver. If the assessed amount is less than the amount of interim payment already paid, the Receiver would be required to pay back the excess. The issue of “reopening” a concluded assessment would not arise.

Douglas Lam SC and David Chen acted for the Association. Rachel Lam (now Rachel Lam SC) acted for the Receiver.
When will severance pay? Exploring the limits of the blue-pencil doctrine.

This Case Report was authored by DVC’s Yang-Wahn Hew and Sharon Yuen and Howse Williams’ Patricia Yueng.

In this judgment, the Supreme Court of the United Kingdom provided long-awaited clarification on issues central to post-termination restrictions and restrictive covenants in employment agreements, namely:

- the interpretation of the commonly-used phrase prohibiting an employee from being “engaged or concerned or interested” in a competing business; and
- the correct test to be applied in relation to severability of unenforceable provisions;

Their Lordships also clarified the scope and operation of the “validity principle” to be applied in relation to contractual construction.

Facts

The respondent, Ms Tillman (“T”), was employed by the appellant, Egon Zehnder Ltd (“EZ”), in various positions from 2004 under an employment agreement (“Agreement”). T became the Global Head of Financial Services in 2012. Upon termination of her employment with EZ in January 2017, T sought to become employed by a competitor firm in May 2017.

The Agreement contained a non-competition covenant which purported to restrict T from, within a period of six months from the termination date, "directly or indirectly engag[ing] or be[ing] concerned or interested in any business carried on in competition with any of the business of [the appellant]" within a period of 12 months prior to the termination date and "with which [she was] materially concerned during such period".

EZ sought an interim injunction to restrain T from entering into the proposed employment. T argued that the non-competition covenant was wider than necessary to protect EZ’s interests and therefore should be void as an unreasonable restraint of trade, on the basis that the words "interested in" prevented her from even having a minority shareholding in a competing business.

The High Court granted an interim injunction against T, considering that the words "interested in" did not preclude a minority shareholding. The injunction was subsequently set aside by the Court of Appeal, which held that these words did prohibit even a minority shareholding and refused to sever those words. The covenant was thus held to be unenjustifiably wide and unenforceable.

EZ appealed to the Supreme Court, which had to consider the following three issues. Lord Wilson gave the only judgment, with which the rest of the Court (Lady Hale, Lord Kerr, Lord Briggs, and Lady Arden) agreed.

Issue (A): Whether the restraint of trade doctrine was applicable

After revisiting the history of the doctrine of restraint of trade, the Court held that if (as examined in Issue B) the words "interested in" extended to a prohibition on
shareholding in a competing business, that part of the non-competition covenant fell within the restraint of trade doctrine.

This was because such a restraint on shareholding was – in both form and substance – part of the restraint on the respondent’s ability to work following the end of her employment. In doing so, their Lordships approved and adopted a “broad, practical, rule of reason approach” and considered that:

• there were other clauses within the Agreement providing for the “reasonableness” and severance of the material restraints; and

• even a minority shareholding in a company (say 25% with three other shareholders) would enable her to influence its operations, and that the employment of a top executive such as T would be frequently subject to conditions that she should hold shares in her employer or be remunerated partly in its shares or in options to purchase them.

Issue (B): Whether the words "interested in" prevented T from holding shares in a competing business

In considering the proper construction of the words "interested in", their Lordships:

• noted that the phrase "engaged or concerned or interested" has long been included in standard non-competition covenants and that “interest” has been regarded as covering a shareholding prohibition;

• had regard to and set out the extent of the “validity principle” of contractual construction, which they observed required a "realistic" alternative construction (per Tindall Cobham 1 Ltd v Adda Hotels [2014] EWCA Civ 1215, [2015] 1 P & CR 5; and

• noted that in this case, no realistic alternative construction could be advanced.

As a result, their Lordships held that the natural construction of the words meant that they created a shareholding prohibition (the size of which being irrelevant) which EZ had conceded was an unreasonable restraint of trade, subject to severance of the offending part.

Issue (C): Whether the offending words "or interested" could be severed such that the rest of the covenant remained enforceable

EZ argued that even if the words "or interested" constituted an unreasonable restraint of trade, they should be severed and removed from the covenant such that the remaining part of the covenant survived.

In determining the question of severance, their Lordships conducted a comprehensive analysis of the
authorities and overruled the approach set out by the Court of Appeal in *Attwood v Lamont* [1920] 3 KB 571 as certain of the requirements therein were “instantly controversial and ultimately unsatisfactory”. Instead, the court upheld and clarified the approach laid down in *Beckett Investment Management Group Ltd v Hall* [2007] ICR 1539, as follows:

i. The first criterion is whether the unenforceable provision is capable of being removed (or “blue-pencilled”) without the need to add to or modify the remaining provision. While this could operate arbitrarily, it was an “appropriate brake” on the ability of employers to secure severance of an unreasonable restraint which, customarily, they would have devised.

ii. The second criterion is whether the remaining terms continue to be supported by adequate consideration. Such criterion had only arisen since in prior (and unusual) cases it was the claimant employee who sought the severance of unreasonable obligations imposed by the contract. However, this requirement could normally be ignored in the “usual post-employment situation” where an employer seeks severance of a clause, since the employer would not be proposing to diminish consideration passing from himself under the contract.

iii. The third criterion is that (as reformulated by their Lordships) the removal of the unenforceable provision would not generate any major change in the overall, legal effect of all the post-termination restrictions in the employment agreement.

Applying these tests, the Court concluded that the words "or interested" were capable of being removed independently, without generating any major change in the overall effect of the restraints, and so severed them to render the remainder of the restrictions enforceable. In doing so the Court also made observations on the circumstances in which an employee could be “concerned” with a business.

### Key takeaways

Their Lordships’ analysis and clarification of the law is highly likely to influence the Hong Kong courts’ approach to the construction of post-termination restrictions and the question of severance. In particular, practitioners and employers should be aware that:

- Special care should be taken when drafting or revising contractual restrictions, including the commonly-used prohibition on an employee being “engaged or concerned or interested” in a competing business. Particular consideration should be given as to:
  - whether the wording precludes senior employees from having some sort of post-contractual “interest” (such as a shareholding) in a competing business; and
  - whether there is in fact a competing, “realistic” construction that it does not.

- Since Hong Kong’s fast-paced business environment can change the nature of a business, post-termination restrictions should be periodically reviewed to ensure that they remain enforceable, and are no wider than necessary to protect an employer’s legitimate business interests.

- Although it cannot be safely assumed that objectionable restrictions will be “fixed” by way of severance, to facilitate successful attempts, clauses should be drafted (or re-visited) in line with the re-stated test, and with regard to their legal effect, rather than their perhaps changing significance for the parties, and in particular the employee.
DVC welcomes new joiners

DVC is delighted to announce that for the 6th consecutive year, all 4 of DVC’s 9 month pupils have been offered tenancy. DVC’s new joiners include:

**Euchine Ng**
Euchine graduated with First Class Honours in her BA in Law from the University of Cambridge and as a Senior Scholar of Trinity College for her academic excellence. She further obtained her LLM from the University of Cambridge on full scholarship under the Trinity College Graduate Studentship and achieved an overall First Class Honours.

**Tinny Chan**
Tinny graduated from the University of Oxford with a BA (Jurisprudence) with First Class Honours and a BCL (Distinction). She was also awarded the Bar Scholarship in 2018 and the Harry Liu Postgraduate Scholarship in 2017. Tinny represented the University of Oxford in the Philip C Jessup International Law Moot Court Competition, and advanced to the semi-final of the international rounds. She was ranked the 4th best oralist in the international rounds.

**Sakinah Sat**
Sakinah obtained her BA Jurisprudence on a full scholarship and as a David Blank Scholar, as well as her BCL from the University of Oxford. She was awarded the Bar Scholarship in 2018. Sakinah represented the University of Oxford at the Philip C Jessup International Law Moot Court Competition in 2015 and the Oxford International Intellectual Property Moot in 2017, advancing to the semi-finals of international oral rounds on both occasions.

**Martin Lau**
Martin obtained his LLB from the University of Hong Kong with First Class Honours, ranking 2nd overall in his cohort. He then read law at Pembroke College, Oxford and obtained his BCL with Distinction. In 2018, Martin was awarded the Middle Temple Advocacy Scholarship for advocacy training in London.
DVC is delighted to announce that Dr. William Wong SC was appointed Justice of the Peace on 1 July 2019. He joins a cohort of five other DVC members who were also appointed JP’s including Daniel Fung SBS, SC, QC, JP, John Scott SC, QC, JP, Winnie Tam SC, JP, Johnny Mok SC, BBS, JP, and Richard Leung JP.
DVC’s Rachel Lam SC has been appointed adjudicator of the Immigration Tribunal. The appointment took effect on 1st October.

DVC is pleased to announce that Richard Leung JP was appointed a Director of the Financial Dispute Resolution Centre on 2nd September 2019.
DVC is delighted to announce that CW Ling has been elected as Chairman of the Mediation Council, HKIAC. The Mediation Council celebrates its 25th anniversary this year: it was set up in 1994 to promote the development and use of mediation as an alternative method of resolving disputes.

On Friday, 16th August, CW Ling hosted a Happy Hour drinks gathering at Des Voeux Chambers. Old and new HKMC Committee members, Interest Group members and HKIAC Secretariat staff mingled happily and built up rapport over a free flow of wine. The HKMC looks forward to another fruitful and harmonious year for all its members!
Happy Birthday to the Companies Ordinance (Cap 622) – a seminar featuring DVC’s John Scott, SC, QC, JP

An eminent panel of legal practitioners and specialists came together on 3 June 2019 to discuss the effectiveness of the Hong Kong Companies Ordinance – 5 years after it was enacted – in a presentation entitled Happy 5.25 Birthday to the Companies Ordinance (Cap 622.)

The seminar was hosted by the Hong Kong Institute of CPA.

Thought leaders included:
➤ DVC’s Head of Chambers, John Scott QC, SC, JP;
➤ Karen Ho, Consultant at the Companies Registry;
➤ Francis Mok, Senior Solicitor, Trust and Company Service Providers, Companies Registry;
➤ Ernest Lee, Technical Partner, Deloitte China;
➤ Natalia Seng, Vice Chairman of Tricor Hong Kong and Offshore; Member, Tricor China Management Committee of Tricor Group/ Tricor Services Limited;
➤ Dr. Davy Wu, Senior Lecturer, Department of Accountancy and Law, Hong Kong Baptist University; and
➤ Professor CK Low, Associate Professor in Corporate Law, The Chinese University of Hong Kong Business School.
DVC’s John Scott QC, SC, JP focused on directors’ duties. He took the audience through seminal changes; notably the duty of care – which was previously based on common law principles. John explained that the new Companies Ordinance altered the position – as the duty of care is now a statutory one. The relevant section contained two limbs – which created both an objective requirement for compliance, and a second more onerous limb, which set out a subjective standard for directors. The subjective standard essentially enables the court to weigh the director on his or her own merits. John examined the much-discussed tension between the two, how the hybrid approach played out in practice and he cited relevant case law to paint a portrait of the current position.

The 3 hour CPD accredited symposium was essentially a referendum on the proficiency of the newer Ordinance and it was geared to answer the following questions:

1. Did the key changes enshrined in Cap 622 translate into enhanced corporate governance and better regulation for Hong Kong?

2. Did it facilitate business and modernize the law?

3. Did it ensure the continued success of Hong Kong as an international finance centre of choice?

The speakers concluded that the new Cap 622 had given way to a changing slate of jurisprudence and had provided for greater clarity mirroring the approach taken in the UK and Australia.
This year’s iteration of the annual DVC Juniors’ Cocktail mirrored the strength-in-numbers we saw at last year’s event – with a turn-out over-indexing the 100 mark.

The cocktail was held at China Tang on 13 June 2019 and it was a prime opportunity for DVC’s Juniors (under 10 years’ call) to mix with solicitors and in-house counsel of the same vintage.

It facilitated one and two degree introductions within the legal fraternity and enabled many of DVC's members to reconnect with friends from Law School and 'break bao' with their counterparts from law firms in an informal setting over drinks and dim sum.

Catrina Lam and Sabrina Ho were the headline act this year and their 15 minute talk centred on AI and algorithms and how this is inevitably becoming part of the legal universe – disrupting the current infrastructure. Catrina homed in on algorithms in the context of competition law. She asked: will humans agree to collude and use computers to create, monitor and police cartels in the digital equivalent of a smoke-filled room agreement?
Catrina also reviewed recent competition case law.

Sabrina acknowledged that AI’s multi-faceted abilities would of course be helpful for lawyers, adding that features like predicting litigation and arbitration outcomes could impact legal strategy. However, she advocated that whilst AI would be useful, it would only assist lawyers, but not replace us. She focused on three main areas to demonstrate where humans would still outshine AI. This included:

1. Resolving complex issues which entailed more than comparing judgments. This, Sabrina argued involved understanding various dynamics and policy issues with a critical mind;

2. The fact that cross-examination could not be undertaken by robots and that advocacy necessarily involved human persuasion and interaction; and

3. Client interaction and empathy which could not be left to AI as an intelligence tool.

The atmosphere at the event was upbeat and lively and gave DVC’s members a chance to learn more about what solicitors and in-house counsel wanted to see featured at future events. And also a chance to tune into the conversations that their contemporaries wanted to have.
Management of the Property and Affairs of Mentally Incapacitated Persons

26 June 2019

Chua Guan-Hock SC and Teresa Wu of DVC were invited by Ms. Sherlynn Chan, the Author of “A Practical Guide to Mental Health Law in Hong Kong”, to share with practitioners in the field their experiences on the topic of Management of the Property and Affairs of Mentally Incapacitated Persons.

As the Hon Mr. Justice Johnson Lam, the Vice President of the Court of Appeal, stated at the beginning of the Foreword of the book, “People who lost their mental capacities are vulnerable and the law should protect them from being exploited. At the same time, it can be quite taxing for those who take care of such persons and the law should not unduly burden such carers with administrative duties on them. Further, different members in the family of such a person can have different views on what is the best for that person. Sometimes, for one reason or another, such differences cannot be resolved amongst these members by themselves. In those cases, the law needs to provide an efficient and effective means to resolve such differences.”

With those in words mind, Hock and Teresa homed in the following topics for discussion at their seminar:

(1) Introduction to Part II of the Mental Health Ordinance (“MHO”) (Cap. 136), with references to PD. 30.1 and the relevant and recent case law/judgments;

(2) The court’s power to protect and manage assets of mentally incapacitated persons;

(3) The jurisdiction, scope and power of the committee appointed by the court under MHO s.11;

(4) The question of mental capacity, which is the subject of the inquiry by court (c.f. O. 80, r. 3 of the Rules of High Court (Cap. 4A); and

(5) The court’s power to make a statutory will.
Recent Events

**DVC's Connie Lee and Vincent Chiu provide clarification on a novel employment case**

Connie Lee and Vincent Chiu delivered an engaging seminar on a recent employment case at Deacons’ offices on 13 June 2019. The presentation was entitled “Testing the waters: Are Team-Based Commissions and Bonuses Deductible from Employees’ Statutory Entitlements?”

Taking the audience through the novel decision in *Mak Wai Man & Ors v. Richfield Realty Limited* [2019] HKDC 358, Connie and Vincent explained the reasoning behind the decision which clarified the law in respect of bonuses and commissions in the context of employees’ statutory entitlements and double payments.

The Court held that Team-Based Commission/Bonus paid already covered statutory entitlements of holiday pay, sickness allowance and annual leave and should accordingly be deducted.

Connie and Vincent explained that this was the re-trial of the 4 Plaintiffs’ claim against the Defendant for shortfalls of their statutory entitlements.

After providing a detailed analysis of this case set against the backdrop of the history and legislative intent in the lead up to this decision, Connie and Vincent shared some actionable takeaways and food for thought with the attendees. These included:

1. The need for employers to provide transparent and unequivocal directives in relation to calculation mechanisms coupled with the importance of guiding employees through the appropriate laws in order to reduce the possibility of a conflict between the employer and employee.

2. They queried whether this was a stand-alone decision which was confined to its own facts i.e. team-based commission and asked: What about commission that accrued on a daily basis?

The lunchtime presentation was well received and was followed by a lively Q&A session.
Recent Events

The Big Freeze – a seminar highlighting recent case law on Pre-emptive Remedies

DVC’s Catrina Lam and Kevin Lau were invited to deliver a seminar on the topic of “Pre-emptive Remedies” at Robertsons on 21 June 2019. Catrina focused her presentation on injunctions in aid of foreign proceedings and arbitrations, whilst Kevin delved into the salient features associated with pre-action discovery and applications to inspect the court files of related proceedings.

Catrina reviewed recent developments in the case law, particularly on the Hong Kong courts’ recent strict approach to the element of risk of dissipation, how a Hong Kong court should approach a foreign forum court’s refusal to grant equivalent relief, and the interesting recent decision in *China Merchants Bank Co. Ltd v Cai Sui Xin and Prosper Talent (Third party)* [2018] HKCFI 2358 (which she was involved in) in which Lok J suggested that a third party with a pre-existing security interest over assets frozen by a Mareva injunction could realise those assets without being in contempt of the injunction order.

Kevin compared and contrasted a pair of pre-action discovery cases in the financial mis-selling context, and concluded that given the particular stringency of the Hong Kong pre-action discovery regime, it was important for applicants to highlight how the sought discovery was necessary for him/her to formulate a pleaded case. He also discussed the recent English case of *Cape Intermediate Holdings Ltd v Dring* [2019] 1 WLR 479, in which the English Court of Appeal held *inter alia* that under (the English equivalent of) O.63 r.4, a plaintiff could apply to inspect documents filed in court by a defendant in related actions.

The talk was warmly received and was followed by an entertaining Q&A session and a well-attended Friday evening office cocktail kindly arranged by Robertsons.
Commemorating two new Silks at DVC

Saturday, 22nd June 2019 was a day of celebration as DVC’s Jenkin Suen SC and Rachel Lam SC were called to the Inner Bar.

Hong Kong’s Honourable Chief Justice, Mr. Geoffrey Ma Tao-li GBM delivered a short speech welcoming the new silks to the Inner Bar at the Court of Final Appeal. The ceremony took place before the Secretary for Justice, Teresa Cheng SC, GBS, Chairman of the Bar, Philip Dykes SC, and President of the Law Society, Melissa Pang MH, JP, and as Jenkin and Rachel were surrounded by friends and family, including over 60 members from DVC.

The ceremony was followed by a convivial cocktail reception at the Hong Kong Club. Over 100 barristers, solicitors and judges came together to commemorate the occasion.
New developments underpinning the concept of Modified Universalism

Set against the backdrop of cross-border insolvency, Look-Chan Ho and Tiffany Chan delivered an insightful contemplation of the concept of modified universalism at a course organised by Lex Ominbus.

Braided with a multitude of landmark cases, including Re China Solar Energy Holdings Limited, Re CW Advanced Technologies, and China Medical Technologies Inc v Samson Tsang Tak Yung, the insolvency specialists presented their seminar before a lively audience of about 50 people on 23 August 2019.

Developments in modified universalism since A Co v B Co [2014] 4 HKLRD 374 have given way to a changing panorama of case law. These notable advancements – which may give rise to further evolution of the law in the future – merited discussion.

The talk was anchored by a consideration of the following areas:

• The Hong Kong Court’s jurisdiction to wind up foreign companies;

• Recognition and assistance of foreign insolvency proceedings in Hong Kong; and

• Cross-border restructuring and the restructuring powers of provisional liquidators.

The presentation was warmly received and incisive questions were posed in the Q&A session which followed the presentation.
Weekend Singing Competition brings members of the HK Bar Association together

On Saturday July 27th, members of the Bar Association converged to participate in and support a singing competition organised by the Recreation and Sports Club for HK Professional Bodies.

DVC’s Rosa Lee and Michael Ng came first in the group singing contest, with Rosa also coming first in the solo singing competition.

Additional contestants at the annual competition included representatives from the HK Institute of Certified Public Accountants, the HK Institute of Architects, the HK Dental Association, the Law Society of HK, the HK Medical Association and the HK Institute of Surveyors.

The event took place at the HK Academy of Medicine.

It was a jubilant and festive evening and 40 supporters from the Bar Association rallied to encourage and cheer on the participants. This included supporters from DVC as well as members from various Chambers in HK.
What can we learn from the first two competition cases in Hong Kong?

In an illuminating seminar on recent competition enforcement actions in Hong Kong, DVC’s Richard Leung JP, Connie Lee and Tommy Cheung presented a dynamic discussion centering on two milestones competition cases before 60 members of the Hong Kong Institute of Chartered Secretaries (HKICS) on 5th September. Delivering strategic insights on the current state of play and the challenges that can sometimes be encountered in this context, the presentation was geared towards shedding light on this topic and leaving the audience with actionable takeaways.

Richard, Connie and Tommy provided an overview of two key competition enforcement actions which included (i) Competition Commission v. Nutanix & Ors [2019] HKCT 2 & (ii) Competition Commission v. W. Hing Construction Co. Ltd & Ors [2019] 3 HKLRD 46. Teasing out relevant keystones to show how competition law in Hong Kong is still continually evolving, the speakers set the tone for a resonant conversation with the attendees.

Tommy initially took the audience through the fundamental concepts of competition, Richard Leung JP sketched in typical anti-competitive conduct – clearly delineating how victims could seek redress, and Connie concluded with an overview of i) the significance of the rulings regarding attribution of liability to the employer and ii) the subcontractor defence in the two landmark decisions.

In an empowering discussion between the speakers and the audience (made up of accountants, company secretaries and senior management of listcos,) issues that emerged including the following:

- how an enforcement action can assist the victims who suffered loss as a result of anti-competitive conduct; and
- how proper companies’ internal monitors and compliance procedures can protect companies and their employers.

Ciphering out practical tips on how to train staff and red flags to look out for, the trio of speakers shared their views on how to also implement proper compliance procedures around this framework.

The dialogue gave way to an animated exchange of views, progressive thinking and what was thought to be (from feedback received) a “very interactive, practical and easy to understand” presentation.
DVC’s preeminent members are commended for being “fearless advocates”, and “experts at trial craft,” and for variously, their “impressive thoroughness,” “smooth advocacy” and for being “excellent strategists.”

CHAMBERS & PARTNERS ASIA PACIFIC (2019)

GET IN TOUCH

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

DVC also runs a series of thought leadership events and CPD accredited in-house seminars. These cover topical legal issues, recent developments and seminal cases our members have been involved in. These intersect with our areas of expertise. If there are any issues or themes of interest you would like to see covered, please email aparnabundro@dvc.hk

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