

A WORD OF COUNSEL

1st Edition 2021 (12th Issue)



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ForeWord

Featuring noteworthy articles, watershed cases, vital announcements and erudite webinars cutting across key sectors, DVC's members come together once again in this quarterly flagship newsletter to reflect on recent trends, and to highlight for you seminal developments in a rapidly evolving market.



Articles

Kicking off this segment, **Jose-Antonio Maurellet SC** and **Tom Ng** clarify the principles applicable to an injunction restraining the presentation of a winding-up petition, exploding a common myth, in an article entitled “Stop winding me up!”

Jonathan Chan analyses the nuances of the fiduciary duty between an expert and his/her client as discussed in a recent UK Court of Appeal case in an article entitled “No Conflict Zone”

Switching gears, **Vincent Chiu** compellingly portrays why reform is needed in the mental health sphere in Hong Kong, and supports

this proposition by relying on a slew of relevant cases including a case he co-piloted with **Christopher Chain**.

DVC's **Adrian Lai** spotlights the 4 seminal clarifications that have come about following the Supplemental Arrangement to the “Arrangement of the Supreme People’s Court on the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong SAR” which were announced towards the tail end of last year.

Wrapping up the articles section, find out how the practice development panorama has changed in light of the geopolitical and economic tilt we experienced

in 2020 in an article that was recently featured in the *Legal 500’s* magazine *fivehundred*.



Case Reports

Crystallizing the myriad strands emanating from the epic **Convoy** saga, **Michael Lok** and **Jasmine Cheung** outline the state of play relating to various proceedings which have fallen under the Convoy banner of late.

Jasmine Cheung weighs in again, this time in a case report co-authored with **Douglas Lam SC**, to delineate the evidence required for a company to satisfy to the Court that an adjournment is justified in the context of the presentation of

a winding-up petition as clarified in the recent case of **Re Lerthai Group Ltd [2021] HKCFI 207**, where **Douglas** and **Jasmine** acted for the Petitioner and **Jose-Antonio Maurellet SC** and **Terrence Tai** acted for the Company.

John Scott SC, QC, JP, William Wong SC, JP, and **Look-Chan Ho** examine the recent milestone case of **Re Allied Properties [2020] 5 HKLRD 766**, where the Court of Appeal sanctioned a privatisation scheme of arrangement for the first time. Find out how and why the Court of Appeal exercised its discretion to sanction the scheme, and why this is a groundbreaking and welcome decision in the insolvency landscape.

In another watershed case featuring **Jose-Antonio Maurellet SC, Look-Chan Ho** and **Tom Ng**, the Court recalibrated Hong Kong's winding-up jurisdiction over foreign companies in the case of **Re China Huiyan Juice Group Ltd [2020] HKCFI 2940**. Determine what made this a pivotal decision and why creditors need to re-evaluate enforcement risks when lending to Mainland businesses, and what the Court will take into account when deciding whether to adjourn a winding-up petition.

How do securities brokers deal with unclaimed cash and securities when they are in the process of ceasing their business? In another case from Q4 of 2020, **Jasmine Cheung** explores this issue, providing helpful takeaways

following the case of **Re Gold Fund Securities Company Limited [2020] HKCFI 2884** where she acted on behalf of the applicant.

Investors should be aware of the potential ramifications of the so-called "no-action clauses" in widely traded instruments such as bonds, cautions DVC's **Rachel Lam, SC** and **Yang-Wahn Hew**. Click [here](#) to read more about this case, in a Case Report entitled Rights, Default, No-Action?: **REXLot Holdings Ltd [2020] HKCFI 2212**.

Majority Rules? What are the limits to the Irregularity Principle and what remedies are there for an aggrieved director? DVC's **Benny Lo** is joined by junior counsel, in an examination of this axiom. Here, they highlight relevant changes you should be aware of.

Review this 3 part narrative piloted by a quartet of DVC members in the **Re New Castle Investments Limited [2020] HKCA 931** and **[2020] HKCA 755** case. DVC's **Jenkin Suen SC, Michael Lok, Tommy Cheung** and **Euchine Ng** chronicle the decisions delivered by the Court of Appeal and the Court of Final Appeal and provide you with the CFA's Reasons for Determination. Find out [here](#) why the Court of Final Appeal stated that the Court of Appeal's reasoning was *"compelling... and would have had grave doubts as to the arguability of the arguments to the contrary."*

Look-Chan Ho represented the company in **Re China Ocean Industry**

Group Ltd [2021] HKCFI 247 in a milestone decision where it was held that no validation order was needed for issuing new shares. Read more about this decision which corrected an entrenched mistake and which provided much needed clarity according to **Look**.

Find out how and why a lengthy statement of claim was struck out in a similarly lengthy judgment in **Polyline Development Ltd v Ching Lin Chun and Others [2021] HKCFI 483**. DVC was represented on all sides by variously, **Barrie Barlow SC, Anson Wong SC, Martin Kok** and **Michael Lok**. **Michael** acted on behalf of the 1st, 6th, 12th and 14th – 16th Defendants and authored this Case Report.

An inconvenient truth: can a party such as a defendant ever be held liable for contempt for making an erroneous admission of the plaintiff's allegation? This question was asked and answered in a recent Court of Appeal case helmed by **CW Ling**.

Discover why **Look-Chan Ho** commends the recent decision of **Re: FDG Electric Vehicles Limited [2020] HKCFI 2931** which explodes the long-standing myth in relation to staying HK winding-up petitions. He also explains why this case takes a decisive step towards achieving harmony with international insolvency standards.

Catrina Lam reviews and explains the ramifications that emerged from two momentous competition

cases that she helmed. The first considers the lump-sum approach for penalties, adopted by the Competition Tribunal in the first bid-rigging case in HK. And the second elucidates on the way in which the Carecraft Procedure was endorsed in the case of ***Competition Commission v Quantr Limited & Cheung Man Kit* [2020] HKCT 10**. **Catrina** sets out actionable takeaways flowing from this case.

Find out which DVC member represented *UA Cinemas* following the renowned theatre's closure.

Announcements

A formidable line-up of DVC members appear in the latest *Chambers & Partners'* rankings for 2020-2021. Find out who was featured in the opening act of the Announcements section.

Following closely on the heels of this, a similarly robust cohort appear in the inaugural edition of the *Legal 500* for the HK Bar. More about who was accredited can be found [here](#).

DVC's Head of Chambers secured a new appointment, find out more about this [here](#).

A host of members are spotlighted as Global Leaders in the most recent *Who's Who Legal 2021* directory. Find out more about who featured and which practice areas these practitioners were recognised for [here](#).

DVC's **CW Ling** and **Teresa Wu** netted multiple appointments in different spheres recently. Our Announcements section reveals which Boards they are now sitting on.

Find out which portal DVC is collaborating with to share content on a real time basis – bringing you relevant developments as they unfold!

On the publishing front, an array of members have contributed to a series of eminent publications. Find out which members and which publications these were [here](#).

Containing cardinal insights mined from the legal landscape, vital stats on DVC's practitioners, and topical interactive multimedia content, review DVC's new keystone literature: Vol 4 of our Brochure (2020).

Multimedia

DVC's **William Wong SC, JP** and **Look-Chan Ho** helm an edifying webinar on the state of play of Cross-border liquidation and asset/debt restructuring under HK Company Law.

On the same topic of company law and insolvency, two of DVC's members co-pilot a webinar series with ONC lawyers.

Pivoting to arbitration, two of DVC's senior juniors welcomed other luminaries to debate the merits of Outcome-Related Fee Structures for arbitration on the ICC-YAF panel.

DVC's **Daniel Fung SC** considered the resounding impact of population pressures against the backdrop of China's One Child Policy at the Next75 event for Russian Television (RT) in December of last year.

Closing out this edition, you will find a hat tip to women across the world as DVC celebrated International Women's Day on 8 March 2021 by curating a book/podcast and movie list featuring standout women.

We hope you enjoy this issue.



To read DVC's 10th and 11th editions of this newsletter, scan the adjacent QR code.

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Frequently sought out to act as counsel in contentious trusts and probate cases, this junior has been recognised for being "a joy to work with," and for being "knowledgeable, approachable, hard-working and responsive" with "a knack for making lay clients feel at ease." She is described as "mindful of details" and has "excellent people skills." "She is everything you want from a junior: she's very meticulous, thorough and works well in a team."

Chambers & Partners Asia-Pacific 2020-2021



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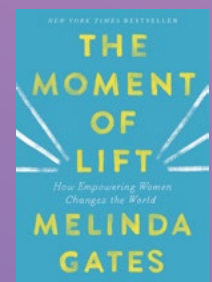
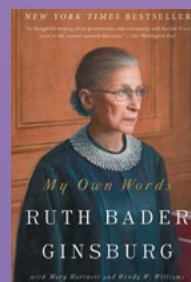
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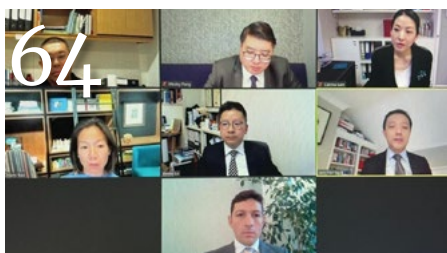
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Singled out as a “fantastic” and “fearsome opponent with a unique brand of advocacy,” which is described as a “very understated but powerful and effective style,” this silk provides deft handling of a wide range of commercial litigation matters, but comes particularly highly recommended for her expertise in company law and insolvency disputes. “She’s really responsive, and terrifically detail-oriented particularly on difficult points of law. She’s prepared to roll up her sleeves and get into the detail to give a very expert opinion,” enthuses a source. She is further credited for earning for “herself a strong reputation” and is “bright, very calm under pressure and one of those unflappable people who maintains a very calm style, even in the face of adversity from the Bench.”

Chambers & Partners Asia-Pacific 2021

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Charles Sussex SC

Chua Guan-Hock SC

Johnny Mok SC, BBS, JP

William M. F. Wong SC, JP

Douglas Lam SC

Rachel Lam SC

Patrick Fung SC, BBS, QC, FCI Arb

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Johnny Ma

Frances Lok

Benny Lo

Sabrina Ho

Alexander Tang

Justin Lam

Eva Leung

Ross Li

Stephanie Wong

Tommy Cheung

Michael Ng

Howard Wong

Sakinah Sat

Alfred Liang

Richard Leung JP

Frances Irving

Teresa Wu

Gary Lam

Alvin Tsang

Connie Lee

Ebony Ling

Martin Kok

Joseph Wong

Ellen Pang

Cherry Xu

Lai Chun Ho

Jasmine Cheung

Look-Chan Ho

Martin Lau

Lawrence K F Ng

Ling Chun Wai

Janine Cheung

Hew Yang-Wahn

Adrian Lai

Alan Kwong

Patrick Siu

Jason Yu

Jacqueline Law

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New Tenants

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Stop Winding me Up – Injunction to restrain presentation of winding-up petition: clarification as to the correct test to be applied

➤ Authored by [Jose-Antonio Maurellet SC](#) and [Tom Ng](#).

1. In *Hung Yip (HK) Engineering Company Ltd v Kinli Civil Engineering Ltd* [2021] HKCFI 153, Harris J reminded practitioners of the true principles applicable to an injunction restraining the presentation of a winding-up petition. Prior to this judgement, it would be fair to say that a number of practitioners had proceeded on the assumption that the hurdle for an applicant to cross was effectively the same as that to defeat a creditor's petition.

Introduction

2. The jurisdiction of the Court to grant an injunction restraining a prospective petitioner from presenting a petition against a company is well recognised: see *Goodway Ltd v Pirelli Cables Ltd* [1997] HKLRD 1039.

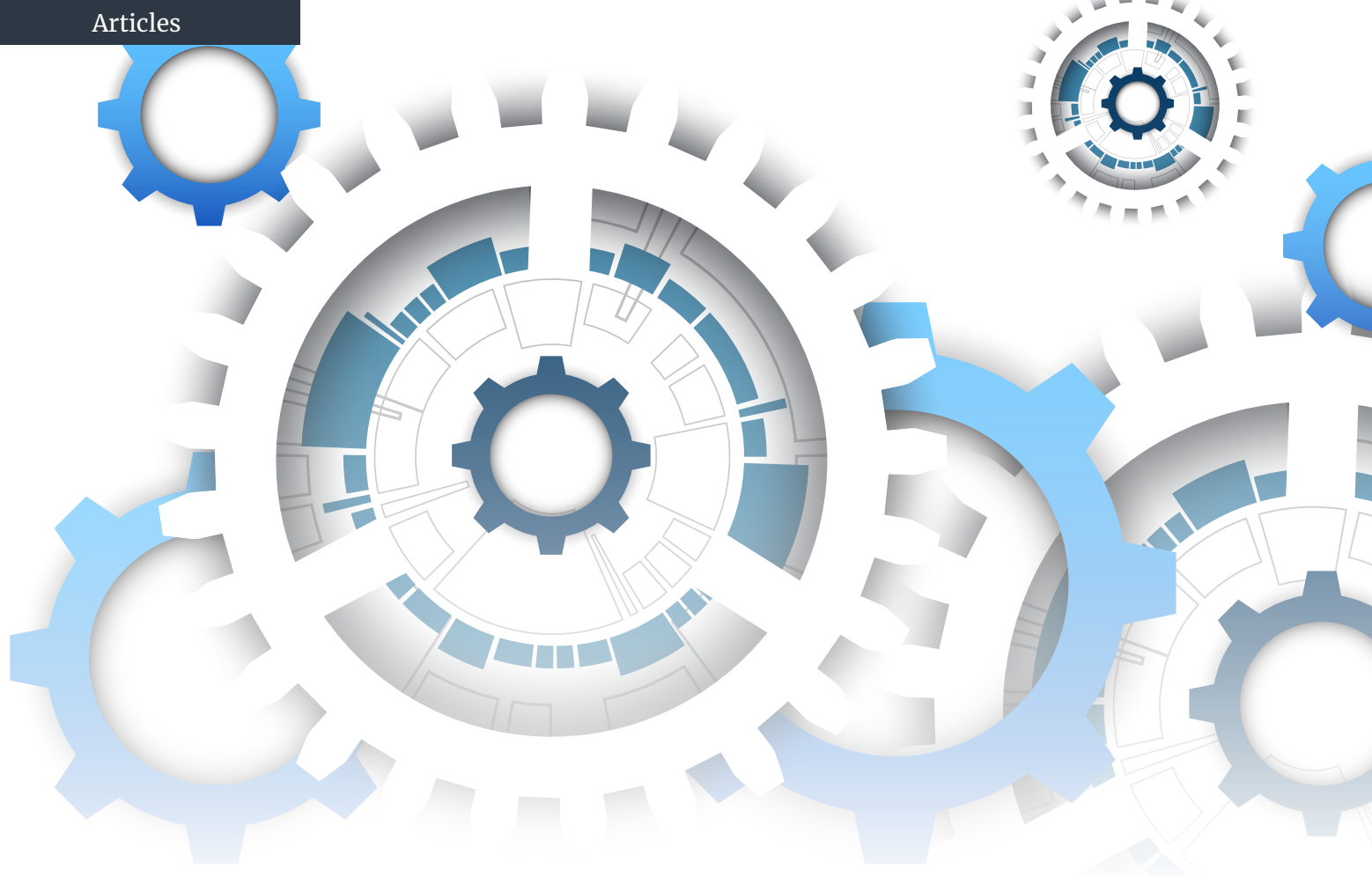
3. In *Re Sinom (Hong Kong) Ltd* [2009] 5 HKLRD 487, Kwan J (as her Ladyship then was) held at §9–11:

9. The principles governing applications for interim injunctions in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 do not apply to this situation, as the granting of an injunction to restrain the presentation of a winding-up petition would finally dispose of the issue in dispute in the present proceedings (*Bryanston*

Finance Ltd v De Vries [1976] 1 Ch 63 at pp.80E–81E).

10. The court will grant a *quia timet* injunction to prevent the presentation of a winding-up petition which it considers would be an abuse of process. Great circumspection must be exercised in doing so, as the right to petition for winding-up in appropriate circumstances is a right conferred by statute, and a would-be petitioner should not be restrained from exercising it except on clear and persuasive grounds (*Bryanston Finance Ltd v De Vries* at pp.78D–E, 79A–D).

11. As with a petition where there is a bona fide dispute of the debt on substantial grounds (a disputed debt petition), where the company has a genuine and serious cross-claim against the petitioner greater than or equal to the petitioner's debt (a cross-claim petition), such a petition may be restrained from proceeding (*Re Pan Interiors Ltd* [2005] EWHC 3241, paras.34–39). It is an abuse of the process of the court to make a statutory demand or present a winding-up petition based on a claim to which there is a triable defence. (*Re Company* [1992] 1 WLR 351). A cross-claim petition is regarded in the same way (*Southern Cross Group Plc v Deka Immobilien Investment GmbH* [2005] BPIR 1010, paras.29–30; *Re Pan Interiors Ltd*, para.35).” (emphasis added)



“ The onus is on the company to put forward credible evidence that demonstrates sound reasons to think that the asserted facts may be proved at the trial ”

4. The onus is on the company to put forward credible evidence that demonstrates sound reasons to think that the asserted facts may be proved at the trial:

China Health Group Limited v Li Hong Holdings Limited (HCMP 2593/2016, 29 March 2017), at §§26–31.

The Need To Show Abuse

5. In **Hung Yip (HK) Engineering Company Ltd v Kinli Civil Engineering Ltd** [2021] HKCFI 153, Harris J emphasized the need to show abuse on the part of the prospective petitioner:–

10. Counsel for both parties seem to have read

[14(3) to (5)] of the judgment as indicating that the issue on the hearing of the originating summons was the same as if a petition had been issued and come on for trial, namely, had the Company demonstrated that the Company had a bona fide defence on substantial grounds. Whilst on occasion, that may in practice be the case, as I have explained, it is not what a company has to demonstrate. What has to be demonstrated is that presentation of a petition is an abuse of process. The facts of the present case allow the distinction and its importance to be illustrated and explained with some precision.

What Is Abusive

6. Harris J went on to explain what his Lordship meant by abuse:–

14. It seems to me that if a petition had been issued on 6 March 2020 there would have been very little room for argument that it was an abuse of process. In my view, it is implicit in the test applied by the court that for presentation of a

petition to be an abuse, a creditor must either have been told enough to understand that the debt is disputed on substantial grounds or must be assumed to have known this from facts of which he was aware. As the authorities make clear a putative petitioner should not lightly be prevented from exercising his statutory right to present a petition. I would have thought it self-evident that the procedure that permits a company to apply to court to restrain the presentation of a petition is not intended to provide a mechanism by which a dispute that would normally be determined on the hearing of a petition is determined at the instigation of a company by a preliminary summary process. The scope of the insolvency regime is defined by the Companies (Winding-up and Miscellaneous Provisions) Ordinance, Cap 32 (“**Ordinance**”), and its subsidiary legislation, which does not provide any mechanism for challenging a statutory demand unlike the regime for personal bankruptcy, which so provides in Rule 48 of the Bankruptcy Rules, Cap 6A. The ability to present a petition promptly in the case of a company believed

to be insolvent is important to creditors as by virtue of s184(2) of the Ordinance, it is relevant to the date any winding-up is deemed to commence. This affects the period within which claims may arise for transfers at an undervalue and unfair preferences pursuant to ss 265D and 266 of the Ordinance.

15. As I have emphasised in [8], what needs to be demonstrated is an abuse of process. Although, in the present context this has a largely technical meaning it does involve some element of impropriety in the sense of misuse of the procedure in s179 of the Ordinance for presentation of a petition to wind-up a company, particularly if the creditor knows that the debt is disputed on substantial grounds and issue of a petition is threatened with a view to asserting pressure to pay rather than out of a genuine concern as to a company’s solvency. It

is, however, well settled that there is nothing objectionable in principle to a creditor owed a debt that he believes cannot be disputed issuing a petition to wind-up a company he suspects is insolvent[6]. This suggests that presentation of a petition relying on a debt genuinely believed to be payable is not an abuse even if a subsequent inquiry demonstrates that for a reason unknown to the creditor at the time the petition was issued there existed a bona fide defence on substantial grounds.

16. What constitutes an abuse of process in this context has been considered by me in cases in which a petition has been dismissed and a company suggests that the petitioner knew at the time the petition was presented, or should have appreciated, that the Company had a bona fide defence on substantial grounds and that in such circumstances, presentation of a petition was an abuse of process and justified ordering costs on an indemnity basis.

Evidence Required

7. Finally, his Lordship helpfully identified the evidential issues to be addressed by the Company at paragraph 18:-

“Generally, in order to establish that presentation of a petition would be an abuse it is necessary for a company to adduce evidence that addresses the following matters, which are likely to be relevant to some degree to the question in most cases:

- (1) *The debt and how it is alleged by the creditor to*

arise. It might be thought that this is fairly obviously the first thing that has to be addressed, but one need only look at the evidence and skeletons filed for the present case to find illustrated that this is not always the case.

- (2) *When and how the debt has been disputed prior to presentation of the statutory demand and any application to the court for an injunction. As I explain in [20] this was not done properly in the present case.*
- (3) *What is said to be the bona fide defence on substantial grounds.*
- (4) *The solvency of the company.*
- (5) *Prejudice that will be caused by the presentation of the petition.*
- (6) *Whether or not it is asserted that the creditor is consciously using the threat of presentation of a petition improperly and if so the facts and matters relied on as demonstrating this.”*

8. Companies should bear these guidelines in mind when considering applying for an injunction to restrain a winding-up petition.





No Conflict Zone? Can an expert witness act both for and against the same client in two related arbitrations?

➤ This article was authored by [Jonathan Chan](#).

The UK Court of Appeal recently examined the issue in ***Secretariat Consulting Pte Ltd and others v A Company* [2021] EWCA Civ 6**

Can an expert witness act both for and against the same client in two related arbitrations? Related to this issue, does an expert witness owe a fiduciary duty of loyalty to his/her client? These issues were recently considered by the UK Court of Appeal in ***Secretariat Consulting Pte Ltd and others v A Company* [2021] EWCA Civ 6, [2021] 4 W.L.R. 20**, a case which concerned the engagement of delay/quantum experts in construction arbitrations. Although the Court of Appeal ultimately found that it was unnecessary to find the existence of a fiduciary duty of loyalty owed by the expert to the client, it nevertheless found that an expert's overriding duty to the court/tribunal and the duty which he/she owes to his/her instructing client are not inconsistent, and that depending on the circumstances, the relationship between an expert and his/her client may bear the hallmarks or the characteristics of a fiduciary relationship.

In that case, SCL and SIUL were entities belonging to the same corporate group (the “**Secretariat Group**”) that provided litigation support services in construction arbitrations. SCL was engaged by a developer (“**C**”) of a large petrochemical plant (the

“**Project**”) to act as its delay expert in an arbitration brought by certain sub-contractors against C (“**Arbitration 1**”). SIUL was later engaged to act as a quantum expert for the third-party project manager against C in a separate arbitration (“**Arbitration 2**”) relating to the same Project.

C applied for an injunction preventing SIUL from doing any further work in Arbitration 2, on the basis that SCL had owed C a fiduciary duty of loyalty which prevented SIUL from providing similar services to the third party in a claim in a different arbitration against the same claimant arising out of the same development that involved the same or similar subject matter.

At first instance ([2020] EWHC 809 (TCC)), O’Farrell J held that there was a clear relationship of trust and confidence between SCL and C such as to give rise to a fiduciary duty of loyalty, which was owed not only by SCL, but also by SIUL as they were part of the Secretariat Group being marketed as one global firm and having a common financial interest. The judge went on to find that SCL and SIUL were in breach of the fiduciary duty of loyalty, in circumstances where SCL and SIUL were advising and assisting in arbitrations which concerned the same delays and accordingly there was a significant overlap in the

issues. O'Farrell J thus granted the injunction. SCL and SIUL appealed.

The Court of Appeal dismissed the appeal albeit based on different reasoning. Referring to Lord Phillips' dicta in *Jones v Kaney* [2011] UKSC 13, Coulson, Males and Carr LJ concurred that a fiduciary duty of loyalty or a duty to avoid conflicts of interest on the part of an expert to his/her client would not be contradicted by the expert's overriding duty to the court or arbitral tribunal to give independent and objective evidence. Coulson LJ further said that *"the expert's overriding duty to the court could be said to be one of the prime reasons why the expert may indeed owe a duty of loyalty to his client"*, as the client wants a *"frank and honest appraisal"* of his case by the expert. Moreover, it is in the client's interest that the expert's evidence is and is seen to be independent and unbiased. Thus, *"complying with the overriding duty to the court is the best possible way in which an expert can satisfy his professional duty to his client"*.

Notwithstanding, *"the Court of Appeal was reluctant to conclude that there was such a fiduciary duty of loyalty owed by the expert to the client"*, saying that such a conclusion may have many unseen ramifications and that a fiduciary duty relationship might not be the most accurate way of describing what a litigation support professional/expert does and should do when instructed in litigation or a commercial arbitration. Coulson LJ only stated as follows: *"Depending on the terms of the retainer, the relationship between a provider of litigation support services/expert, on the one hand, and his or her client on the other, may have one of the characteristics of a fiduciary relationship, namely a duty of loyalty or, to put it another way, a duty to avoid conflict of interest. That is not contradicted by the expert's obligation to the court. But, unlike the judge, I do not consider that it is necessary or appropriate to find the existence of a freestanding duty of loyalty in the present case"*.

Instead, the Court of Appeal based its decision on the expert's contractual duty to avoid conflict of

interests arising out of a conflict of interest clause in SCL's retainer which was based on a conflict check carried out in respect of all the Secretariat entities. It was held that in light of the conflict check (and as the various entities within the Secretariat Group were marketed as one global firm), the undertaking given by SCL in its retainer was binding on all the companies in the group. The defendants' argument that such a finding would amount to *"piercing the corporate veil"* was rejected on the basis that it was *"a question of contract construction, informed by the factual background"* and that it reflected *"the reality of the scope of the conflict check actually undertaken"*. Coulson LJ further said, and Males LJ agreed, that: *"It is perfectly possible for a group like Secretariat, if it thought it commercially sensible to do so, to make plain that its representations as to conflict of interest and its undertakings for the future were based solely on the entity involved, and that, despite the scope of the conflict check that they had undertaken, no such representations or undertakings were given in relation to any other entity in the Secretariat Group"*.

The Court of Appeal then turned to consider whether there was a conflict of interest in that case. Acknowledging that a conflict of interest was a matter of degree, the Court of Appeal considered the roles of SCL and SIUL as delay/quantum experts, which were to provide wide-ranging support and advice in arbitrations. The Court observed that delay/quantum experts are usually *"retained at an early stage to sift through the reams of factual material, looking for particular events on which to focus"*. They are *"important resources for the lawyers and others responsible for the conduct of the case"*, and they are rarely mere testifying experts but part of the client's litigation team. Such roles and responsibilities had increased the risk that there would be a conflict of interest with such an expert, having been engaged by a client, employed by another party to carry out the same or similar wide-ranging role against the interests of that client. Further, and importantly, on the facts of the case, there was an overlap of parties, role, project, and subject matter. For such reasons, the Court of Appeal found a clear conflict of interest and a breach of the obligation to avoid conflict of interest.

It is noteworthy, however, that Coulson LJ stressed that: *“None of this should be taken as saying that the same expert cannot act for and against the same client. Of course, an expert can do so. Large multinational companies often engage experts on one project and see them on the other side in relation to a dispute on another project. That is inevitable. But a conflict of interest is a matter of degree. In my judgment, the overlaps to which I have referred – of parties, of role, of project, of subject matter – make it plain that in the present case, there was a conflict of interest.”*

Although this case was decided on its own facts, this decision is significant in at least four respects. First, as noted by the Court of Appeal in the judgment, this is the first direct English authority that considered the issue of whether an expert owes a fiduciary duty of loyalty to his/her client. Although the Court of Appeal declined to determine this point, the Court of Appeal recognised that it is possible that the relationship between an expert and his/her client may have one of the characteristics of a fiduciary relationship.

Second, the Court of Appeal did not only follow *Jones v Kaney* saying that there was no conflict between an expert’s obligations to the court and his/her obligations to his/her client, but it went further to say that *“complying with the overriding duty to the court is the best possible way in which an expert can satisfy his professional duty to his client”*. Whilst the Court of Appeal did not consider it necessary or appropriate to find the existence of a freestanding duty of loyalty in this case, this dicta has removed a major obstacle facing the court in recognising a duty of loyalty owed by an expert to his/her client in an appropriate case in the future.

Third, from a more practical point of view, this decision illustrated how the Court would look at the contractual provisions in a retainer to find whether an expert owes any duty to avoid conflict of interest to his/her client, and depending on the wording and context, the Court may even find that the duty extends to other entities within the same corporate group.

“Providers of litigation support services/expert should therefore pay attention to any representations or undertakings that they may make to their clients as regards conflict of interest.”

Providers of litigation support services/expert should therefore pay attention to any representations or undertakings that they may make to their clients as regards conflict of interest.

As the Court of Appeal suggested, an expert witness group may, if it wishes, make clear that other companies in that group remain free to act for parties opposed to the client in the same or related disputes. It remains to be seen, however, whether this is feasible or commercially sensible in practice.

Fourth, although this case concerned delay/quantum experts, the Court’s analysis that a close working relationships between experts, lawyers and clients exacerbated the risk of conflict of interest and it should also apply to other disciplines where the experts are heavily involved in the preparation of their client’s case, and this case has wider implications which go beyond construction litigation/arbitration. However, As the Court of Appeal stated: *“A professional expert witness offers his services in return for payment and the relationship between the expert and his client is essentially contractual. It is therefore necessary to focus on the incidents of that relationship, concentrating on the terms of the expert’s retainer and the role which he is required and expected to perform.”* In other words, a conflict of interest is a matter of degree, and each case turns on its own facts and circumstances.



Jonathan Chan



The Court's Inherent Protective Jurisdiction in Access-Related Matters of Mentally Incapacitated Persons: why reform is needed

➤ This article was authored by [Vincent Chiu](#)

As reaffirmed in ***Re TBS* [2019] HKCFI 2919**; ***Re CML* [2020] 3 HKLRD 481**, the Court has inherent protective jurisdiction to make orders relating to the welfare of mentally incapacitated persons (or MIPs), including access to an MIP. This note respectfully agrees with the judicial observations that a more practically desirable approach to all matters relating to the finances, health and welfare of MIPs should be dealt with under one single forum instead of through parallel inquiries of the Court and the Guardianship Board. Absent reforms in this area, practitioners are reminded of the bifurcated approach adopted in MIP applications, and the need to invoke the Court's inherent protective jurisdiction.

In Hong Kong, broadly speaking, matters relating to MIPs are governed by a bifurcated regime: the property and financial affairs of MIPs are dealt with under Part II of the Mental Health Ordinance (the "**Ordinance**"), while Part IVB of the Ordinance provides for the establishment of

a Guardianship Board for appointments of guardians to address the domestic affairs and welfare of MIPs.

On occasions, this distinction may break down. A good example is when the access to an MIP is in issue (an issue frequently encountered by the Guardianship Board: ***LWY v Guardianship Board* [2009] 3 HKLRD 30** at §36). In ***LWY***, Lam J (as Lam VP then was) held that a guardian appointed by the Guardianship Board does not have power under Part IVB to restrict access to an MIP, and that a guardian who encounters such problems has to make an application to the court for coercive declaratory relief.

Recently, the Court was again called upon to adjudicate similar issues, and on those occasions, the Court held that the court had jurisdiction to make an order in respect of access of MIPs:–

(1) In ***Re TBS* [2019] HKCFI 2919**, B Chu J held that the Court has jurisdiction to make interim access or care arrangements, arising not from section 10A of

the Ordinance but from the inherent protective jurisdiction of the Court (§§36–56). In that case, interim residential, access and care arrangements in respect of an elderly MIP aged 92 were made pending the appointment of a guardian by the Guardianship Board.

(2) In ***Re CML* [2020] 3 HKLRD 481**, Lok J affirmed that the Court has inherent jurisdiction to make an order concerning the access to the MIP (at §§18–33). On the other hand, on its proper construction, section 59R(3) of the Ordinance (which sets out the six essential powers the Guardianship Board may confer upon a guardian) does not confer upon the Guardianship Board jurisdiction to make an order that a family member, a relative or other person be granted access to an MIP (at §§13–17). Lok J also ruled that section 10A of the Ordinance does not extend beyond financial matters (at §§11–12). Hence, neither the Guardianship Board nor the Court has jurisdiction under the Ordinance to make such orders relating to access to an MIP. On the facts, children of an elderly MIP aged 92 were granted access to the MIP at her residence at specified times.

The implication of the Court’s rulings is this: when access related matters arise, notwithstanding its role in the bifurcated regime, the Guardianship Board does not have jurisdiction to deal with the matter. The guardian and/or the relevant parties must seek relief from the Court as opposed to the Guardianship Board.

As Lam J pointed out in ***LWY*** (at §§36–37) and echoed by Lok J in ***Re CML*** (at §§41–43), it is not a satisfactory state of affairs for the following reasons:–

- Multiplicity of proceedings in different forums would arise. The Court or the Tribunal would not be able to take a holistic approach in considering the interrelated welfare matters of the MIP. Time and costs

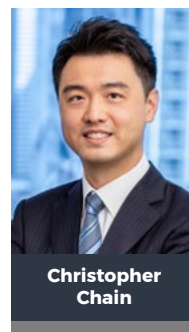
would be wasted on legal proceedings instead of being better spent on advancing the interests of the MIP.

- Private guardians and committees might not have the knowledge or resources to conduct these proceedings in different forums.
- Most unfortunately, delay and misunderstandings amongst family members could brew over the course of the multiple proceedings.

“While the Courts have repeatedly urged reforms in this area of the law, regrettably, the Government has not taken the initiative for the time being.”

While the Courts have repeatedly urged reforms in this area of the law, regrettably, the Government has not taken the initiative for the time being. For those advising family members of MIPs, it would be useful to bear in mind the different functions served by the Court and the Guardianship Board and the possible need to invoke the inherent protective jurisdiction of the Court when access-related matters arise.

Christopher Chain and **Vincent Chiu** acted for the Intervener in ***Re TBS***.



Supplemental Arrangement to the “Arrangement of the Supreme People’s Court on the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong SAR” (the “Arrangement”)

➤ This Article was authored by [Adrian Lai](#)

On 27 November 2020, the Mainland Supreme People’s Court and the HKSAR concluded the Supplemental Arrangement to the Arrangement.

The 2-page Supplemental Arrangement has brought about 4 important clarifications and/or changes to the existing Arrangement:

- (1) It clarifies that the Arrangement shall be interpreted to cover not only the execution phase but also the recognition phase of a Hong Kong or mainland award;
- (2) It removes the concept of “recognized Mainland arbitral authorities” from the existing Arrangement, and hence all awards made in the Mainland will be covered under the Arrangement;
- (3) It allows parallel enforcement (or “double enforcement” as termed by A Cheung J. (as he then was) in *Shenzhen Kai Long Investment and Development Co Ltd v. CEC Electrical Mfg (Int’l) Co Ltd* [2001-2003] HKCLR 649) of a Hong Kong or Mainland award in both jurisdictions at the same time; and
- (4) It expressly provides that the enforcement court may grant interim measures at the pre- or post-enforcement stage of a Hong Kong or Mainland award.

The clarifications and changes referred to at (1) and (4) above came into effect immediately, while the effective date of the other two changes remains to be announced.

“ The Supplemental Arrangement draws the existing Arrangement closer to the New York Convention in that it recognizes the two-stage approach in enforcement of an arbitral award ”

The clarifications and changes made to the existing Arrangement are important in the following respects from the perspective of Hong Kong legal practitioners:

- (1) The Supplemental Arrangement draws the existing Arrangement closer to the New York Convention in that it recognizes the two-stage approach in enforcement of an arbitral award, namely the recognition stage and the execution stage;
- (2) It does away with the unjustified exclusion of Mainland awards from the existing Arrangement if such awards are not made by the “recognized Mainland arbitral authorities”. Such an exclusion did not exist prior to 1 July 1997 (pre-1997 Mainland awards were enforced on the strength of the New York Convention) and no similar restriction is applied in Hong Kong vis-à-vis



awards made in other New York Convention contracting States;

- (3) The parallel enforcement addresses the difficult situation and unfairness faced by an award creditor when on one hand the enforcement proceedings in one jurisdiction have been prolonged (out of his control); and on the other the limitation period of the other jurisdiction continues to run and is about to expire: e.g. the ***Shenzhen Kai Long*** case (*supra*); ***CL v. SCG* [2019] 2 HKLRD 144** and ***Wang Peiji v. Wei Zhiyong* [2019] HKCFI 2593**; and
- (4) Prior to the Supplemental Arrangement, it was unclear as to whether Mainland courts had powers to make post-award interim measures for awards made outside the Mainland. The Supplemental Arrangement,

once in force, will permit a Hong Kong award creditor to apply for such measures from the Mainland courts. This highlights the unique position of Hong Kong in the international arbitration community.

A copy of the Supplemental Arrangement (Chinese only) can be found on the Chinese version of DVC's website.

Adrian Lai authored this article.



**Adrian
Lai**



The Bold and the Bountiful

➤ **Aparna Bundro, Practice Development Director, Des Voeux Chambers, Hong Kong, on successful business development strategies during political and economic change.**

This article first appeared in The Legal 500's magazine fivehundred.

There was no looking back with 20:20 vision last year and we certainly didn't get the start to the new decade that we had all hoped for. With geopolitical and economic tectonic plates shifting so extraordinarily in the wake of Covid-19, how do we in the business of law and marketing stay ahead of a possible tsunami of change?

Recalibrating our operating systems to account for what appears to be the end of the globalisation era is one suggestion. Whereas globalisation is often characterised by a connected world coming together to meet a common enemy, multiple rival ideologies have now come into play which will drive different ways of doing things and will likely forge a new world (dis)order. The result may be countries aligning themselves based on shared values as opposed to geographic proximity. Do we then target our practice development (PD) efforts depending on these shared values instead of for larger cookie-cutter legal audiences?

Corporations have historically controlled media and advertising but with the advent of social media, this has changed stratospherically. A democratisation movement has led to the empowerment of consumers – a trend that has gone beyond branding – and has resounded globally on many different levels. With consumers taking charge and spearheading branding

efforts rather than conglomerates, there has been a fundamental shift in the cultural zeitgeist resulting in brands being created by the people for the people.

So, how do we tie these strands together in devising practice development strategy for 2021 and beyond? How, more relevantly, do we do this in Hong Kong, noting that practice development within chambers is relatively nascent?

A Blank Canvas

“In law firms, business development is a membrane over the company but this is not the case with barristers' chambers.”

In law firms, business development is a membrane over the company but this is not the case with barristers' chambers. Before 2017, PD did not exist for Hong Kong sets. Parachuting in four years ago, at a time when there was no infrastructure on the ground, I viewed this as a refreshing challenge. It gave Des Voeux Chambers (DVC) a blank canvas to originate strategy, and formulate new initiatives. Given this was a pioneering role in Hong Kong, we had a unique opportunity to put the architecture in place and we secured first-mover advantage in this space.

Given that the Bar Code of Conduct strictly regulates the parameters for practice promotion, we take a more restrained approach to marketing versus law

firms. Barristers are, of course, independent and not siloed by practice areas, so there are no delineated sector groups – something you would commonly find in law firms.

There is also no ‘direct access’ so the Bar retains its role as a referral institution in Hong Kong. Clients’ access to a barrister usually requires a solicitor, the Director of Legal Aid, or the government. There are, however, some exceptions to the general rule and barristers may accept instructions directly from recognised institutions. They can also act, without the involvement of a solicitor, as third-party neutrals in alternative dispute resolution procedures e.g. as mediators, adjudicators, barristers, or umpires.

From a PD perspective, this means the solicitor or in-house/general counsel is the client. We, therefore, gear our PD around solicitors and not lay clients. Barristers are precluded from touting, meaning the PD team cannot make pitches to clients; we need to think of creative initiatives that do not involve soliciting. We also shy away from hyperbole to describe members and refrain from using expressions like ‘best of breed’. The guiding principle is that statements made need to be ‘objectively verifiable’.

Exploding Myths

This role has exploded the myths surrounding the difficulty formerly associated with a PD function in a Hong Kong set. In less than two years, we demonstrated that our PD efforts had an outsize impact and acted as a lever of change in chambers. One way we did this was by appearing in the *‘Financial Times’ innovation shortlist in the Business of Law: New Business Development & Service Delivery models category in 2019*. We were the only set to be shortlisted from a wide range of candidates across Asia and Australia.

In Q1 2020, DVC was the first Hong Kong set to recognise that Covid-19 gave rise to a need for related commentary in various sectors. We

also moved quickly to restructure from bricks-and-mortar presentations to digital marketing. We did this by being the first chambers to publish an announcement about how we were re-engineering our efforts around the pandemic and the measures we had taken; by slating numerous webinars and podcasts on a diverse range of topics; by being the first set to produce and animate sector booklets and our quarterly newsletter; and by piloting a corporate video in place of our annual cocktail. These initiatives demonstrated our agility and adaptability.

On the sustainability and social impact front, we are also the first chambers to spearhead CSR and D&I drives. We partnered with various local organisations to install new libraries for under-served children in the community and ran story-telling sessions in tandem, and sourced opportunities for our female members to join external mentorship programmes.

A combination of these drives has not only resulted in higher year-on-year ROIs and an increase in RFPs in 2017–2021, but they have also enabled our barristers to develop more T-shaped skills. These drives serve to strengthen our relationship with clients, reinforce our brand, empower women and demonstrate a commitment to worthy causes.

Analysis Paralysis

As we wrapped up a strangely dystopian year last year, many of us experienced ‘analysis paralysis’ or ‘knowledge obesity’, a heightened phenomenon as busy-ness became a proxy for productivity. With the realisation that we became overwhelmed – amplifying our self-doubt – some employers nixed this by setting up gratitude interventions. By authentically acknowledging and appreciating staff, people started to feel more valued, and with a year of mostly working from home around the world, expressing this on the phone, by email or other channels became more important than ever.

Aparna Bundro is the Director of Practice Development at Des Voeux Chambers, Hong Kong, and 1 of 30 people to watch in the Business of Law 2020.



Case Reports

Recent Developments in the Convoy saga

➤ This Case Report was authored by [Michael Lok](#) and [Jasmine Cheung](#).

To recap, the present case arises out of a number of legal proceedings stemming from the “*allegation that over several years up to 2017, a wrongdoer and fraudster called Roy Cho wrongfully and illicitly acquired and maintained secret ownership in and control over*” Convoy Global Holdings Limited (“**Convoy Global**”), per Coleman J in ***Re Convoy Global Holdings Ltd* [2020] HKCFI 2874**.

Convoy Global is a Cayman Islands company, which was formerly listed on the Main Board of the Hong Kong Stock Exchange. The plaintiff, Kwok Hiu Kwan (“**Mr Kwok**”), is the registered shareholder of 4,468,182,000 ordinary shares in Convoy Global.

At an extraordinary general meeting held on 29 December 2017 (“**EGM**”), which was chaired by Mr Johnny Chen (“**the Chairman**”), in response to an objection raised, the Chairman decided that Mr Kwok’s shares shall not be counted, pursuant to Article 74 of the Articles and Restated Articles. Mr Kwok commenced proceedings to challenge the Chairman’s decision.

On 13 November 2020, in **[2020] HKCFI 2874**, Coleman J dismissed Mr Kwok’s application for (urgent) injunctive relief in respect of an upcoming extraordinary general meeting of Convoy Global.

On 24 November 2020, in ***Re Convoy Global Holdings Limited* [2020] HKCA 972**, the Court of Appeal (per Kwan VP, with whom Barma JA and G Lam J agreed) affirmed the decision of Harris J on the proper construction of the power conferred on the chairman of a general meeting pursuant to Article 74.

At first instance, the application was dealt with in two parts, resulting in two separate decisions: **[2018] 6 HKC 394** and **[2020] 3 HKC 403**. In the latter decision, Harris J considered, inter alia, (1) what constitutes bad faith; (2) whether it is sufficient to show something less than bad faith, and if so what, in order to overturn the Chairman’s decision; and (3) has bad faith been proved. This is the decision which forms the subject matter of the latest appeal in **[2020] HKCA 972**.

As to (1), it was held that it is bad faith knowingly to exercise a power for an improper purpose and Harris J accepted that if it is demonstrated that the Chairman's decision was motivated by a desire to ensure that one camp of shareholders retained control over the board, the Chairman would have acted in bad faith and the Chairman's decision should be set aside. Regarding (2), the learned Judge held that any suggested qualification to the finality of the Chairman's decision should be founded on established contractual or company law principles. On (3), Harris J found on the evidence that Mr Kwok had failed to prove that the Chairman's decision was made in bad faith.

On appeal, Mr Kwok primarily contended that Article 74 should, contrary to the decision of Harris J, be read subject to certain implied qualifications, such that something less than bad faith (i.e. unreasonableness in the *Wednesbury* sense) would suffice to disturb the Chairman's decision.

In affirming the first instance decision, the Court of Appeal applied the well-established principles on the implication of terms. It was emphasised that whether there should be any such implication is a matter of "*value judgment*". The Court of Appeal agreed with the learned Judge's view that, having regard to the "*particular context of article 74*", it was not "*necessary or obvious that such a restriction should be implied*" (para. 48).

On what is inherently a question of Cayman law, the Court of Appeal was also referred to, and cited, the decision of Segal J (sitting in the Grand Court of the Cayman Islands) in ***Re China Agrotech Holdings*, FSD 68/2019**, 16 July 2019. The decision post-dated the first decision of Harris J, but preceded the second. However, Segal J came to the same view as Harris J subsequently did on the proper construction of Article 74 (while noting that this was a point which required full argument and citation of authority).

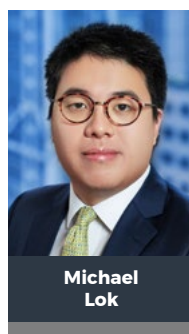
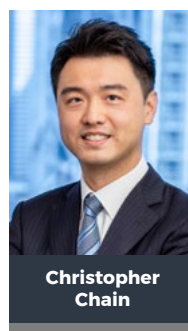
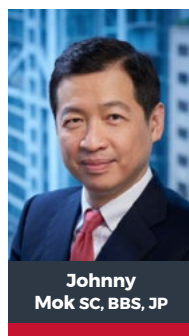
The Court of Appeal further addressed questions as to whether there was any significance in the fact that Convoy Global had not previously applied for an interim injunction to restrain Mr Kwok from voting the shares.

DVC's involvement in **[2020] HKCFI 2874** and **[2020] HKCA 972**:

Johnny Mok SC, BBS, JP and **Frances Lok** acted for Mr Kwok.

Jose-Antonio Maurellet SC, Jason Yu and **Jasmine Cheung** acted for the Chairman (in **[2020] HKCA 972** only).

William Wong SC, JP, Christopher Chain (in **[2020] HKCFI 2874** only), **Michael Lok** (in **[2020] HKCA 972** only) and **Lai Chun Ho** acted for Convoy Global.





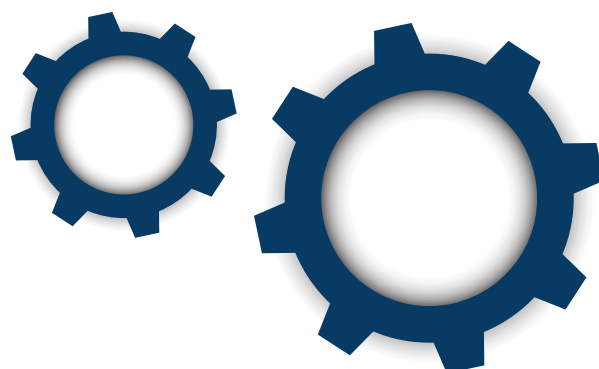
Adjournment of winding-up petitions for restructuring – An indulgence not lightly granted

➤ This Case Report was authored by [Douglas Lam SC](#) and [Jasmine Cheung](#).

In recent years, it has become increasingly common for companies seeking to avoid an immediate winding-up order, particularly listed companies, to pray in aid of alleged efforts to restructure their debts in a bid to obtain adjournments of a winding-up petition. All too often, these valiant attempts fail: see ***Re Chase On Development Limited* [2020] HKCFI 629**, ***Re SMI Holdings Group Limited* [2020] HKCFI 824** and ***Re REXLot Holdings Ltd* [2020] HKCFI 2212** to name a few.

As explained in ***Re Chase On Development Limited* [2020] HKCFI 629** at §5 and ***Re China Huiyuan Juice Group Ltd* [2020] HKCFI 2940** at §51, where a company is insolvent and the petitioner's debt is not disputed, and the Court is asked to adjourn a petition by a company to allow it to restructure its debts, the Court will normally take into account all the circumstances including the following considerations:

- (a) *A qualitative assessment of the number of creditors for and against a winding-up order. It is not just a matter of counting the number of creditors in favour and those against or the proportion of the value of the debt they hold.*
- (b) *The reasons proffered by the supporting and opposing creditors.*
- (c) *The feasibility of the proposed restructuring.*



In an illuminating judgment handed down very recently in ***Re Lerthai Group Limited [2021] HKCFI 207***, Harris J elaborated on the evidence required for a company to satisfy the Court that an adjournment is justified. In particular, the Court emphasised that it is not enough for a company to show that it will be able to pay off those creditors pressing for immediate payment after restructuring; it must also show that it will continue to operate a profitable business or at least pay its debts as they fall due in at least the medium term (§7). In this regard, the restructuring proposal should be consistent with the character of the business and the debt (§6).

The Court will therefore expect evidence on any proposed restructuring proposal to cover at least the following:

- What the company's business model has been (§6) How the debt arose (§6)
- How the company's financial difficulties arose (§§6, 8)
- How the company will pay off the debts in the immediate term (§8)
- How the company will be returned to financial viability in the short to medium term (§§7, 8)

“...companies seeking to adjourn a winding-up petition in an attempt to restructure their debts must not take the task of adducing satisfactory evidence lightly”

Such evidence should be filed before a winding-up petition first comes before a judge. The Court is unlikely to have sympathy for companies who are not able to do so, particularly as substantial businesses must be alive to their financial difficulties and the demands of creditors for repayment long before a petition is presented (§11).

All in all, companies seeking to adjourn a winding-up petition in an attempt to restructure their debts must not take the task of adducing satisfactory evidence lightly.

To avoid an immediate winding-up order, comprehensive evidence on the matters set out above should be prepared so that the Court can consider the appropriate course to take in winding-up proceedings.

Douglas Lam SC and **Jasmine Cheung** acted for the Petitioner and **Jose-Antonio Maurellet SC** and **Terrence Tai** acted for the Company in ***Re Lerthai Group Limited [2021] HKCFI 207***.



**Douglas
Lam SC**



**Jasmine
Cheung**



**José-Antonio
Maurellet SC**



**Terrence
Tai**

Hong Kong Court of Appeal's Inaugural Sanction of a Privatisation Scheme of Arrangement: Re Allied Properties (HK) Ltd

➤ This Case Report was authored by [John Scott SC, QC, JP](#), [William Wong SC, JP](#), and [Look-Chan Ho](#).

For the first time in Hong Kong, in *Re Allied Properties (HK) Ltd* [2020] HKCA 973; [2020] 5 HKLRD 766, the Court of Appeal itself sanctioned a privatisation scheme of arrangement, overruling the refusal of the first instance Judge to do so.

The Court of Appeal judgment confirms the following law and practice for privatisation schemes:

- (1) *The usual headcount test for a scheme of arrangement does not apply to a privatisation scheme in a takeover situation.*
- (2) *The mere fact that part of the scheme consideration is funded by dividends declared by the company is unobjectionable.*
- (3) *The scheme explanatory statement should explain to the scheme shareholders realistic alternatives to the scheme.*

The Material Facts

Allied Properties (HK) Ltd (“**Company**”) was a Hong Kong-listed company. In April 2020, its majority shareholder (“**Offeror**”) made a proposal to privatise the Company using a scheme of arrangement, whereby the scheme shareholders’ shares would be cancelled in return for HK\$1.92 per share in cash. This amount consisted of HK\$0.42 per share from the Offeror and HK\$1.50 per share by way of a special dividend declared by the Company.

More than 99% of the scheme shareholders voted for the scheme. However, at first instance, Linda Chan J. refused to sanction the scheme for two reasons. First, she was not satisfied that the scheme shareholders’ meeting satisfied the headcount test. Secondly, she held that the scheme explanatory statement did not adequately explain the scheme alternatives and did not provide adequate value comparisons:

“A relevant comparison of value, in this context, would be a comparison between what the scheme shareholders can expect if they remain as shareholders and what they can expect under the scheme. As to the former, the company should inform the scheme shareholders that if they remain as shareholders, they can expect the company to be able to declare and pay dividend out of its accumulated profits in future unless there are valid reasons not to do so... It is reasonable to expect the directors to act in accordance with their duties and cause the company to declare and pay dividend to the extent that it has sufficient accumulated profits and cash for that purpose...”

[G]iven that the Company proposed to use ... its accumulated profits ... to pay the Special Dividend upon the Scheme becomes [sic] effective, it would be fair and reasonable for the Company to inform the Scheme Shareholders that they can expect the Company to use the same amount to declare and pay a dividend to all the shareholders if the Scheme falls through. This is because the board of directors has already considered the financial position of the Company and decided that it is appropriate to use the Relevant Reserve to pay the Special Dividend. It would be unreasonable, if not perverse, for the board to

refuse to use the Relevant Reserve to declare and pay a dividend to all the shareholders if the Scheme is not implemented” ([2020] HKCFI 2624 at [46] and [62]).

The Court of Appeal’s Decision

The Court of Appeal reversed Linda Chan J’s decision and exercised its own discretion to sanction the scheme.

The Court of Appeal reasoned as follows:

➤ First, the headcount test is inapplicable to a privatisation scheme in a takeover situation:

*“The Scheme involves a **“takeover offer”** within section 674(5). And where a scheme involves a takeover offer, by virtue of section 674(2) the headcount test in section 674(1)(c)(ii) is replaced by the requirement that the votes cast against the scheme of arrangement do not exceed 10% of the total voting rights attached to all disinterested shares in the company (**“the negative 10% test”**). In other words, for schemes involving a takeover offer, the dual requirements as stated in section 674(2) consist of a 75% majority in value of the voting rights of the members present and voting ... and the negative 10% test. See Re Cheung Kong (Holdings) Ltd [2015] 2 HKLRD 512 at §§37 to 39; Re Enice Holding Co Ltd [2018] 4 HKLRD 736 at §34; Company Registry’s Briefing Notes in January 2013, §§5 to 14” (at [27]).*

➤ Secondly, the Court of Appeal noted that the explanatory statement had made it abundantly clear that the alternative to the scheme if voted down would be reversion to the Company’s existing dividend policy and in that scenario no special dividend would be paid. It could not be said that the intention to revert to the existing dividend policy must be unreasonable if the board of directors in the exercise of their commercial judgment considered this to be in the best interests

of the Company. Therefore, the learned Judge’s hypothesis on dividend was illegitimate.

➤ Thirdly, the Court of Appeal held that scheme was such that an intelligent and honest person, a member of the class concerned and acting in respect of his interest, might reasonably approve. The privatisation has the overwhelming support of the scheme shareholders, who were in a position to consider the information provided in the scheme document on the commercial impact of the scheme.

Commentary

This decision is a most welcome appellate confirmation and clarification of the privatisation scheme law and practice.

In addition to the matters mentioned above, the Court of Appeal judgment also contains a number helpful procedural points practitioners should pay attention to.

John Scott SC JP, **William Wong SC JP**, and **Look-Chan Ho** acted for the Company in this case.



Landmark Recalibration of Hong Kong's Winding-up Jurisdiction over Foreign Companies: Re China Huiyuan Juice Group Limited

➤ This Case Report was authored by [Look-Chan Ho](#).

In the landmark case of **Re China Huiyuan Juice Group Limited** [2020] HKCFI 2940, Mr Justice Harris recalibrated the Hong Kong winding-up jurisdiction and its application to an offshore incorporated, Hong Kong-listed entity.

In particular, the decision explains why the Hong Kong court may be unable to wind-up an offshore incorporated, Hong Kong-listed company where all of the company's operating assets are in the Mainland.

The Material Facts

China Huiyuan Juice Group Limited ("**Company**") is a Cayman incorporated, Hong Kong-listed company. The Company is an investment holding company, and all its operating subsidiaries are in the Mainland (together, "**Group**"). The Company holds the operating subsidiaries via intermediate holding companies incorporated in the BVI.

Both the Company and the Group are financially distressed.

In April 2018, the Company's shares were suspended from trading.

In September 2019, a creditor (petitioner) issued a winding-up petition against the Company. At the time of the petition, the Company was on the verge of being delisted.

The Company opposed the petition on the grounds that the petition could not satisfy the second of the three core requirements for the Hong Kong court to exercise its winding-up jurisdiction ("**Core Requirements**"). The Core Requirements are these:

- (1) *There is a substantial connection between the company and Hong Kong.*
- (2) *There is a reasonable possibility of a winding-up order benefiting those applying for it.*
- (3) *There is a person within the jurisdiction with sufficient economic interest in the liquidation of the company to justify a winding-up in Hong Kong.*

The Court's Decision

Mr Justice Harris held that the Company would not be liable to be wound up in Hong Kong because the petition did not meet the second Core Requirement of the Hong Kong winding-up jurisdiction.

His Lordship concluded that a Hong Kong winding-up order would not benefit the petitioner for three reasons.

- First, other than the listing status, the Company had no assets in Hong Kong.
- Secondly, the petitioner did not produce evidence showing that there was a real prospect that the value of the Company's listing status could be realised by liquidators for any meaningful amount.

➤ Thirdly, liquidators appointed by a Hong Kong court would be unable to take control of the Company's operating subsidiaries in the Mainland because the Hong Kong liquidators would be unable to take control of the Company's direct subsidiaries in the BVI. As Hong Kong liquidators of a Cayman company, they would not be able to change control of the Company's direct BVI subsidiaries. Therefore, if the benefit that was sought by winding-up the Company was to recover assets in the Mainland, it was not a benefit that could be obtained by winding-up the Company in Hong Kong.

Commentary

“ This is a momentous decision showing the limits of the Hong Kong winding-up jurisdiction in the context of Mainland business groups listed in Hong Kong. ”

This is a momentous decision showing the limits of the Hong Kong winding-up jurisdiction in the context of Mainland business groups listed in Hong Kong. It shows that creditors need to re-evaluate enforcement risks when lending to Mainland businesses that use offshore structures. Indeed Mr. Justice Harris correctly sums up the implications of his decision thus:

“As will be apparent from this decision the practice has developed of Mainland businesses listing in Hong Kong using corporate vehicles which have no connection with the Mainland, which is commonly the COMI, or Hong Kong where the business is to be listed. The structure is made more complicated by group architecture which involves inserting between the listed company and the mainland companies at least one, and my impression is commonly more than one, intermediate subsidiary incorporated in a different offshore jurisdiction. As this decision demonstrates this structure creates a

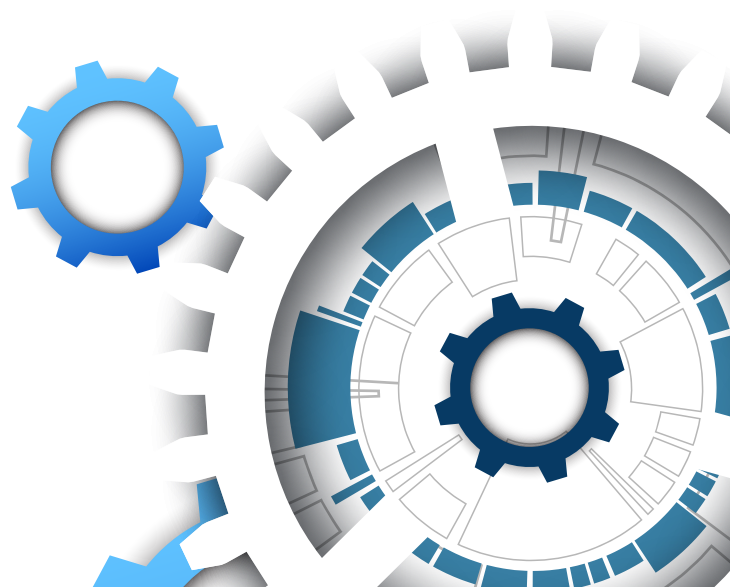
significant barrier to steps being taken by creditors and shareholders to enforce rights using the courts of Hong Kong, which is the legal system that they have probably assumed they will be able to access if they need to take steps to enforce their legal rights against a company listed here.”

In addition to the matters mentioned above, this judgment also explains the key considerations the Court would take into account when deciding whether to adjourn a winding-up petition on the basis of the company's debt restructuring.

Jose-Antonio Maurellet SC and **Tom Ng** acted for the petitioner.



Look-Chan Ho acted for the Company, and prepared this Case Report.



Going for the funds: Re Gold Fund Securities Company Limited [2020] HKCFI 2884 looks at how to deal with unclaimed cash and securities of a securities broker ceasing business

➤ This Case Report was authored by **Jasmine Cheung**.

Securities brokers looking to cease their securities business may sometimes be faced with the stumbling block of not being able to contact or otherwise obtain instructions from their clients to deal with, dispose of or return certain unclaimed cash and securities.

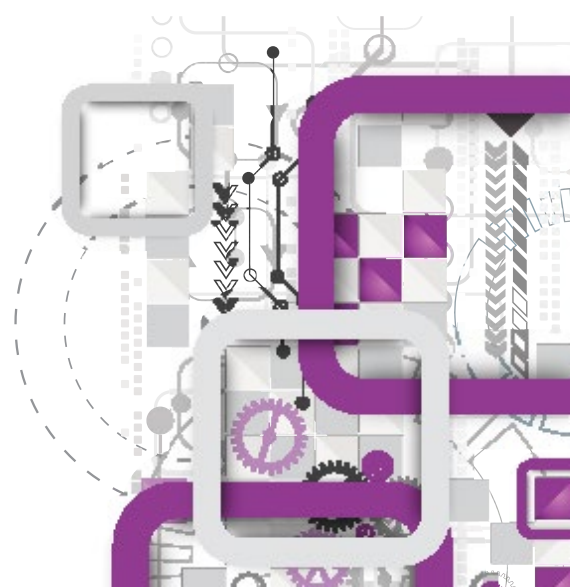
Section 62(1) of the Trustee Ordinance (Cap. 29), which provides that “Trustees, or the majority of trustees, having in their hands or under their control money or securities belonging to a trust, may pay the same into court, and the same shall, subject to the rules of court, be dealt with according to the orders of the court”, is a “flexible and pragmatic” solution for securities brokers in such scenarios to pay into court any unclaimed assets, in a way that would allow the applicant to cease its securities business while at the same time enabling the unclaimed assets to be dealt with a way that protects the interests of the beneficiaries. This was what had occurred in the recent case of **Re Gold Fund Securities Company Limited [2020] HKCFI 2884**.


In particular, after applying the test that an applicant generally needs to establish that (1) the assets in question are held by the applicant as trustee, and (2) despite reasonable endeavours, the beneficiaries cannot be contacted or are unresponsive, or the trustee is otherwise unable to obtain instructions as to how to deal with, dispose of or return the trust assets (see §13), the Court went on to consider how each category of unclaimed assets should be dealt with (see §§15–18). In short:

- (a) For unclaimed cash, this can simply be paid into Court.
- (b) For unclaimed securities which physical certificates could be withdrawn, the certificates could be withdrawn and deposited with the Court.
- (c) For unclaimed securities which physical certificates could not be withdrawn, given the small total value, leave was granted to the applicant to sell or otherwise dispose of (including forfeiture thereof) the same as it sees fit, and to pay any proceeds into court.

It can therefore be seen that in applications of this nature, thought should be given as to how the unclaimed assets in question should be delineated into different types, and how each type of unclaimed assets can best be dealt with, taking into account matters such as their physical nature and value. Technical requirements, such as the need for advertising the order in question (see §19(c)) should also be considered.

Jasmine Cheung acted for the Applicant and authored this Case Report.





Rights, Default, No-Action?: REXLot Holdings Ltd. [2020] HKCFI 2212

Public policy, “No-Action” and arbitration clauses, and the substitution of petitioners

➤ This Case Report was authored by [Yang-Wahn Hew](#)

Background

Bonds that are traded via clearing houses, such as Euroclear and Clearstream, often contain terms providing that there will be a trustee for the issue, who may be appointed by the participants in the relevant clearing system or by the beneficial owners.

Quite often, the terms of the bonds will contain so-called “no-action clauses”, pursuant to which the trustee may be accorded certain rights and powers to take action on behalf, and instead, of the beneficial bondholders.

Regular readers may also be aware that the Court of Appeal has yet to grasp the opportunity to endorse, or otherwise modify/disagree with, the 2 approaches to arbitration clauses in winding-up proceedings as set out in Re Southwest Pacific Bauxite (HK) Ltd. [2018] 2 HKLRD 449 (sub nom Lasmos): see But Ka Chon v Interactive Brokers LLC [2019] 4 HKLRD 85 (CA) and similarly *obiter*

discussion in Asia Master Logistics Ltd. [2020] HKCFI 311.

Finally, Rule 33 Companies Winding-Up Rules sets out the various circumstances in which one petitioner may be substituted for another.

Proceedings Before the Court of First Instance

In REXLot, the Company had defaulted on nearly HK\$3.3 billion worth of bonds held via Euroclear. Several beneficial bondholders, who collectively held a substantial amount of the bonds, petitioned for the Company to be wound up. They relied on their status as contingent creditors, citing the reasoning used in relation to schemes of arrangement as set out in Re Mongolian Mining Corp [2018] 5 HKLRD 48 and Re Enice Holding Co. Ltd. [2018] 4 HKLRD 736.

The Company did not dispute insolvency or the status of the bondholders as contingent creditors. However, it sought to resist the proceedings on the basis of the

argument, *inter alia*, that there was a “no-action clause” which deprived the beneficial bondholders of locus standi to wind-up the Company.

The beneficial bondholders naturally demurred. They argued that on its true construction, the so-called “no-action” clause did not exclude their statutory rights to petition to wind-up the Company, citing *inter alia* **Re Greater Beijing Region Expressways Ltd. [1999] 4 HKC 807 (CA)**, **Re Sit Kwong Lam (Debtor) [2019] 2 HKLRD 924**, **But Ka Chon**, *supra*, and *Asia Master*, *supra*.

In the alternative, the beneficial bondholders submitted that the clause was unenforceable as it would constitute a fetter on their statutory right to present the petition to wind-up the Company on the grounds of insolvency, and was hence contrary to Hong Kong public policy. As the issue had never been decisively determined in Hong Kong, submissions were made by the parties with reference to various commonwealth authorities, including those immediately above, **Re Colt Telecom [2002] EWHC 2815 (Ch.)**, **A Best Floor Sanding [1999] VSC 170**, and **Re Team Y&R Holdings Hong Kong Ltd.**, unrep., CACV 6/2017, 21 July 2017.

Alternatively, the beneficial bondholders suggested that either the “traditional approach”, or the “exceptional circumstances approach” to arbitration clauses (both of which had been analysed in *Lasmos*, *supra*) could be applied by analogy so as to enable the Companies Court to make a winding-up order.

At the hearing of the Petition, Deputy High Court Judge Maurellet S.C. did not delve into such matters as the Trustee had applied – pursuant to *Rule 33 Companies Winding-Up Rules* and without opposition from the Company – to be substituted as petitioning creditor in place of the beneficial bondholders. His Lordship hence granted the order for substitution and, after argument, an order winding-up the Company on the ground of insolvency: see **[2020] HKCFI 2212**.

The Upcoming Appeal

The matter did not end there. A different legal team has been instructed, presumably by the Company’s former management, to file an appeal (CACV 488/2020) against his Lordship’s orders.

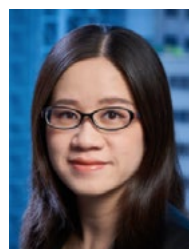
The hearing before and judgment of the Court of Appeal should be of considerable interest as it is likely to deal with both the issues raised at first instance between the Company and the beneficial bondholders (as the original petitioning creditors), and whether the jurisdiction to order that the Trustee be substituted as petitioning creditor only exists if the beneficial bondholders had locus to present the petition.

Summary

- There is every reason the Hong Kong Companies Court should adopt and apply the reasoning from schemes of arrangement in relation to the question of locus of a beneficial bondholder.
- Investors should be aware of the potential ramifications of so-called “no-action clauses” in widely traded instruments, such as bonds.
- Public policy considerations will continue to play an important role in winding-up proceedings, given *inter alia* the collective nature of winding-up proceedings.

Rachel Lam SC acted for the Trustee in this case.

Yang-Wahn Hew acted for the beneficial bondholders in this case.



Rachel
Lam SC



Yang-Wahn
Hew

Majority Rules? What are the limits to the Irregularity Principle and what remedies are there for an aggrieved director?

➤ This Case Report was authored by DVC's **Benny Lo** and Junior Counsel, **Lawrence Pang**

Introduction

When an aggrieved member of a company challenges the lawfulness of a decision made by a company, the latter may deploy the established “irregularity principle” and argue that, even though the decision might be irregular, the Court should nevertheless refrain from interfering in its internal management: see MacDougall v Gardiner (1875) 1 Ch D 13; Burland v Earle [1902] AC 83; Yip Peter v Asian Electronics Ltd [1998] 2 HKC 96; Re Hong Kong Sailing Federation [2010] 1 HKLRD 801. If what has been done irregularly is capable of being and will inevitably be confirmed by the majority, the Court would not interfere: see Re Dalny Estates Ltd [2018] 1 HKLRD 409 (CA).

The recent case Chen Pao-Tzu v Chen Sheng Kuei & Ors [2021] HKCFI 299 (Linda Chan J) presented the High Court with an opportunity to clarify the true scope and limits of the irregularity principle. In the judgment, the Court also expressly held that

an aggrieved director (who is not also a member) of a company does have the *locus standi* to commence proceedings under section 42 of the Companies Ordinance (Cap. 622) (“**Ordinance**”) to challenge the relevant decision and seek declaratory relief.

Material Facts of the Case

The subject company, Fully Hong Kong Limited (“**Company**”), is a Hong Kong corporation used by the Chen family as a vehicle to hold various Mainland Chinese subsidiaries that operate a substantial chemical and fertilizer business. At the material times, the Company’s issued capital was held as to 10% by the patriarch Mr. Chen, while the remaining 90% was held by Full Kang Co Limited (“**Full Kang**”) a Seychelles company whose shares were also held by the second generation of the family.

As part of a boardroom battle between the siblings after the father fell ill, an extraordinary general meeting was convened by Full Kang, which was

then controlled by the majority faction of the siblings. Prior to the meeting, the only directors of the Company were the plaintiff and Mr Chen. Among the resolutions passed at the meeting were those to remove the plaintiff as director and appoint the principal defendants as new directors of the company. Even though the quorum of the Company's general meetings was two members in person or by proxy, those resolutions were only passed by two representatives of the same member, Full Kang, each purporting to hold a split portion of Full Kang's total shareholding in the Company in voting, as if the quorum was present. An ND2A form was then subsequently filed with the Companies Registry to report the purported changes in directorship.

Shortly after the meeting, the plaintiff applied under section 42 of the Ordinance to impugn the resolutions. He argues, *inter alia*, that the member's meeting was inquorate and seeks, *inter alia*, (i) declarations that the resolutions purportedly passed thereat and the ND2A form were void and (ii) an order that the ND2A form be expunged or struck out from the company register.

At the substantive hearing, the defence did not dispute that the general meeting was inquorate, but resisted the application on the basis of the irregularity principle. The argument is that since Full Kang held 90% of the shareholding in the Company and voted in favour of the impugned resolutions, it was plain that the resolutions would have been passed by a majority had there been a quorum. The defence also challenged the *locus standi* of the plaintiff (who was not a member) to make the application.

Decision

In rejecting the defence's argument based on the irregularity principle, Linda Chan J made clear that the Court would look at more than what the majority shareholders would think:-

*"19....As the authorities explain, the Court does not simply look to ascertain whether the result of the resolution was one which the majority shareholders would approve of. Rather, it considers whether the same result would have been obtained had the correct procedure been followed (**Re Dalny Estates**, S18 per G Lam J). There is thus an implicit requirement that the irregularity was one which could have been cured by the majority. In other words, the principle does not operate to validate a resolution which the majority shareholders could not have lawfully passed."* (emphasis added)

On the evidence, the defence was unable to show that Full Kang could have been able to convene and hold member's meeting that would comply with the quorum requirement. In fact, on the defence's own evidence, it was impossible for Mr Chen (being the only other member of the Company) to attend such a meeting to constitute a two-member quorum. It was also far from inevitable that the majority would have obtained an order, under section 570 of the Ordinance, for the members' meeting to be held without a quorum. The Court also considered it relevant to note that Full Kang never sought to convene a fresh general meeting to ratify the purported resolutions nor did he make any application under section 570 of the Ordinance.

As to the plaintiff's *locus standi*, the Court acknowledged the wide ambit of the wordings under section 42 of the Ordinance ("*The Court may, on application by any person, by order direct the Registrar...*") and found that the plaintiff had sufficient legitimate interest to invoke the section and ensure that the public records accurately reflected the true position with regards to the directorship of the Company. The Court also noted that a person who is not an officer of a company also has a legitimate interest in ensuring that he/she is not named as an officer in the public records concerning the company.

Accordingly, the Court acceded to the plaintiff's application and declared the resolutions purportedly passed at the general meeting void and of no legal effect, and ordered the ND2A form be removed.

Commentary

“The fact that the majority agrees with a decision made irregularly is not the end of the matter.”

This decision is significant for practitioners in two aspects.

First, it clarifies the limits of the irregularity principle. It is now clear that the majority shareholders cannot just get around with irregular decisions simply by saying that they are in control of the company and that they are in favour of those decisions.

The fact that the majority agrees with a decision made irregularly is not the end of the matter. To invoke the irregularity principle, the majority must show that the same result would inevitably be obtained had the correct procedure been followed.

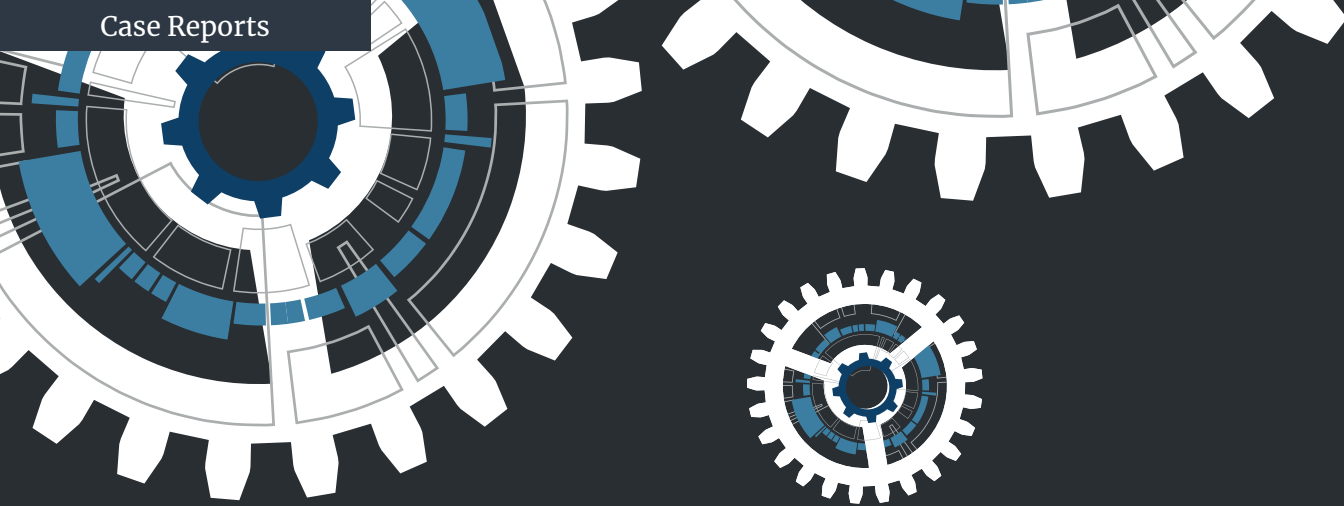
In this regard, practitioners should read the earlier decision of **Lim Jonathan v She Wai Hung [2011] 1 HKLRD 305** (where DHCJ Louis Chan applied the irregularity principle in relation to an inquorate general meeting and refused to declare that the directors that were elected there were invalidly appointed) with the present case in mind. Practitioners should further note that when seeking to invoke the irregularity principle, they should make sure (i) the irregularity is one that could and would be remedied by the majority and (ii) the same decision would inevitably be reached.

Second, the decision confirms that an aggrieved director, despite not being a member of the company, may seek redress under section 42 of the Ordinance to ensure that the company's information filed with the Companies Registry is accurate and correct. Section 42 confers a wide jurisdiction to the Court to deal with applications made by “any person” and a director has a legitimate interest to ensure that the public records of a company are accurate. Furthermore, practitioners should note that the irregularity principle and the proper plaintiff rule (that an irregularity in decision is a wrong done to the company and it is the company alone who is the proper plaintiff to bring a suit for redress, see **Foss v Harbottle (1843) 2 Hare 461**) are the flip sides of each other. When an irregularity is not capable of being regularised by the majority, the proper plaintiff rule does not operate as a bar to a claim made by the minority.

DVC's **Benny Lo** and Junior Counsel, **Lawrence Pang** authored this Case Report and represented the successful plaintiff director.



Benny
Lo



Nothing New on Rental Deposits, says Court of Appeal in HK\$2 million monthly rental tenancy dispute: *Re New Castle Investments Limited* [2020] HKCA 931 and [2020] HKCA 755

➤ This Case Report was authored by [Michael Lok](#)

In the related appeals of *New Castle Investments Ltd v. Foo Wai Lok and Others* [2020] HKCA 931 and [2020] HKCA 755, the Court of Appeal addresses the construction of a clause found in a tenancy agreement, the subject of which is a property consisting of three Houses on Shouson Hill Road (reportedly owned and previously resided in by Li Ka-shing [1]), at a monthly rental of HK\$2 million.

Upon the tenant's default of its rental payment, the landlord obtained default judgment against the tenant (and the personal guarantors under the tenancy agreement). In seeking to set aside the default judgment, it was contended in essence that the rental deposit paid in the sum of HK\$8.5 million ("**Deposit**") should have been automatically applied to reduce the outstanding rent. It thus follows, so the argument goes, that there had been no extant liability when default judgment was entered.

The key issue revolved around the proper construction of a clause in the tenancy agreement

which provides, *inter alia*, that "*the amount of the Deposit paid to the Landlord by the Tenant shall be deemed to have been reduced by the amount of Rent or other charges in arrears or the loss or damage suffered by the Landlord*" ("**Subject Clause**").

At first instance, it was held that the Subject Clause essentially gave rise to an automatic "set-off" or extinguishment of the tenant's liability to pay rent or other charges. Thus, a good defence was shown by the tenant and the personal guarantors in seeking to set aside the default judgment.

In [2020] HKCA 755 (which concerns an application to set aside the default judgment), the Court of Appeal (consisting of Lam VP and Barma JA) departed from the approach at first instance. In particular, in applying established principles on construction, it was held that the deeming effect of the Subject Clause was only for the limited purpose of enabling the landlord to make a demand for topping up under that clause and the reduction of the amount of Deposit repayable back to the tenant. It therefore did not give rise to any automatic "set-off" or

extinguishment of the tenant's liability.

This analysis takes into account the true purpose of the Deposit, which was paid to the landlord prior to the commencement of the tenancy for the purpose of securing the due observance and performance by the tenant of its obligations throughout the duration of the same. Thus, so far as the Deposit was concerned, it was the landlord's money in the legal as well as beneficial sense.

In **[2020] HKCA 931** (which concerned the bankruptcy petitions presented against the personal guarantors on the basis of the default judgment), there was no challenge against the above construction before the Court of Appeal (now consisting of Lam VP, Barma and Au JJA). Instead, it was contended on behalf of the personal guarantors that a term should be implied in all tenancy agreements, to the effect that upon the election by a landlord to terminate a tenancy, the landlord must immediately apply the deposit towards the reduction of arrears of rent so that a clean break would be achieved.

In rejecting the argument, it was held that there was no proper basis for implying such a term. In particular, having regard to the true nature of the Deposit and the proper construction of the Subject Clause, there was no basis for implying a term that the landlord must give immediate credit to

the tenant for an amount equivalent to the deposit when it commenced proceedings for termination of the lease and recovery of possession.

Michael Lok and **Euchine Ng** acted for the landlord, both at first instance and on appeal, and were led by Edward Chan SC in **[2020] HKCA 755** and **Jenkin Suen SC** in **[2020] HKCA 931**.

Tommy Cheung acted for the personal guarantors in **[2020] HKCA 931**.



**Jenkin
Suen SC**



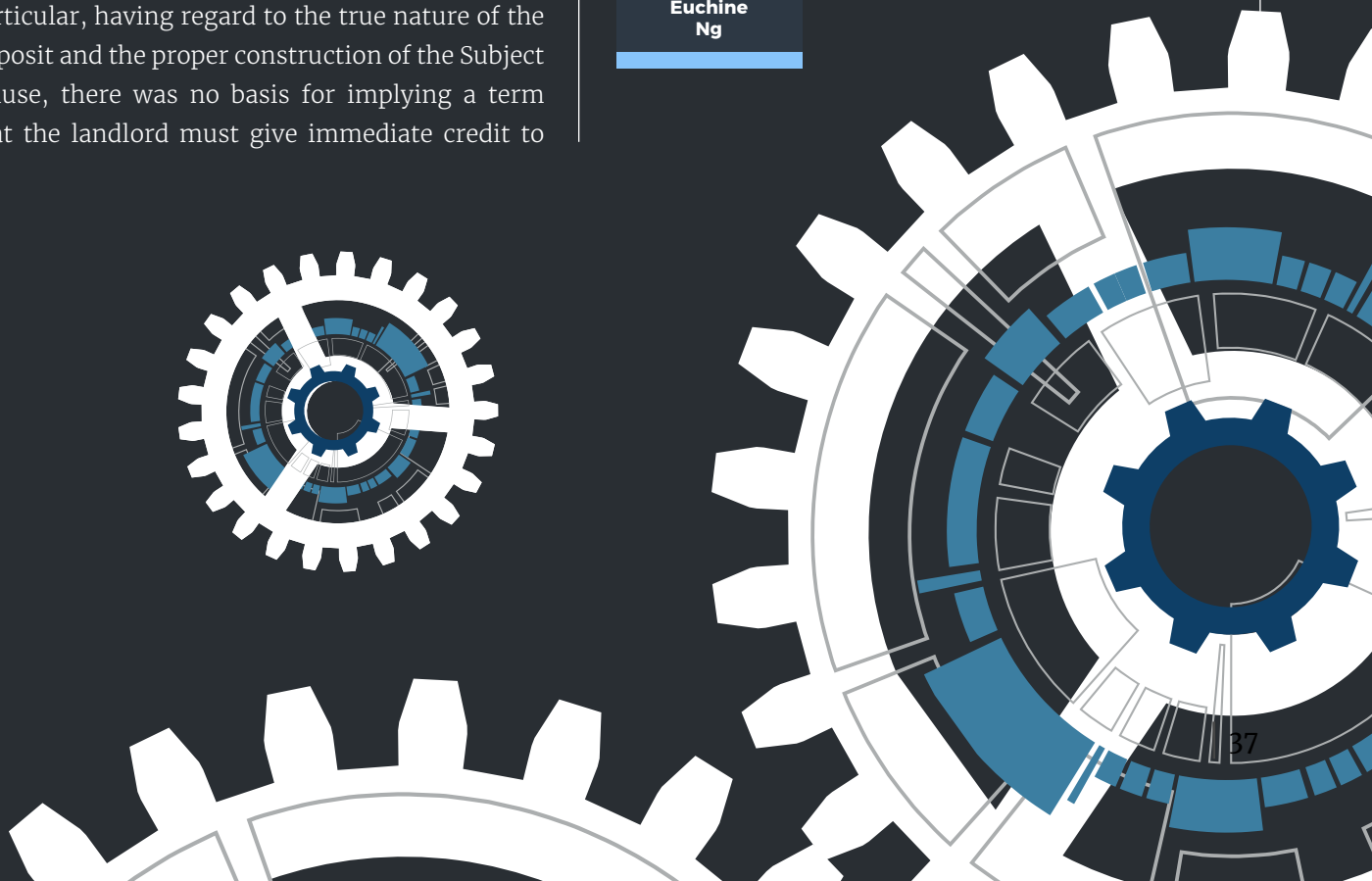
**Michael
Lok**



**Tommy
Cheung**



**Euchine
Ng**



Court of Final Appeal's decision in *Re New Castle Investments Limited*

➤ This Case Report was authored by **Michael Lok**

Further to the Case Report which precedes this, the Appeal Committee of the Court of Final Appeal handed down its Reasons for Determination on 1st March 2021 in *New Castle Investments Ltd v. Foo Wai Lok and Others* [2021] HKCFA 5.

At paragraphs 12–13, Ribeiro PJ (giving the Reasons of the Court, also consisting of the learned Chief Justice and Fok PJ) rejected the reliance on an alleged implied term which requires a landlord to have recourse to the rental deposit first, instead of pursuing a monetary claim against the tenant.

Interestingly, while the applicant no longer relied upon the construction arguments advanced and accepted at first instance (as overturned by the Court of Appeal in [2020] HKCA 931 and [2020] HKCA 755), Ribeiro PJ (at paragraph 11) considered the Court of Appeal's reasoning to be "*compelling and would have had grave doubts as to the arguability of the arguments to the contrary*".

Michael Lok and **Euchine Ng** acted for the landlord, both at first instance and on appeal, and were led by Edward Chan SC in [2020] HKCA 755 and in [2021] HKCFA 5 (and by **Jenkin Suen SC** in [2020] HKCA 931).

Tommy Cheung acted for the tenant and the personal guarantors in [2020] HKCA 931 and in [2021] HKCFA 5.



**Jenkin
Suen SC**



**Michael
Lok**



**Tommy
Cheung**



**Euchine
Ng**

Mistake Corrected – No Validation Order Needed for Issuing New Shares: *Re China Ocean Industry Group Ltd* [2021] HKCFI 247

➤ This Case Report was authored by [Look-Chan Ho](#)

Correcting a widespread mistake, Mr Justice Harris in *Re China Ocean Industry Group Ltd* [2021] HKCFI 247 held that the Court has no jurisdiction to make a validation order after a winding-up petition in respect of the issue of new shares and convertible bonds (“CBs”).

The correct position is that a company subject to a winding-up petition may issue new shares and CBs without a validation order.

Background To The Widespread Mistake And The Present Case

For years, the Hong Kong Stock Exchange (“HKSE”) imposed a strict requirement that any listed company subject to a winding-up petition wishing to issue new shares and CBs must first obtain a validation order under section 182 of the Companies (Winding-up and Miscellaneous Provisions) Ordinance (Cap. 32) (“Ordinance”). Without a validation order, HKSE would not permit the issue of new shares and CBs.

China Ocean Industry Group Ltd (“Company”) is listed on HKSE and subject to a winding-up petition. The Company proposed to issue some new shares and CBs in order to raise finance.

Because of the HKSE requirement, the Company applied for a validation order.

Although the Company realised that technically such validation order would be beyond the Court’s jurisdiction under section 182, the Company made the application solely to comply with the HKSE requirement.

The Court’s Decision And Reasoning

Mr Justice Harris agreed with the Company’s submissions and held that the Court could not grant a validation order, and that the Company could proceed to issue new shares and CBs without a validation order.

His Lordship reasoned as follows.

Issuing new shares and CBs would not engage section 182 because section 182 is concerned only with a “disposition of the property of the company”, “**transfer of shares**”, or “alteration in the status of the members of the company”.

But issuing new shares and CBs would not involve an “alteration in the status of the members of the company”, let alone “disposition of the property of the company” and “transfer of shares”.

There are a few authorities for this position.

First, in *Bank of China (Hong Kong) Ltd v Oasis HKTL o4A Ltd* (Unrep., HCA 763/2008, 26 May 2008), DHCJ Lisa KY Wong SC held that the issue of new shares did not involve any “alteration in the status of the

members of the company” within the meaning of section 232 of the Ordinance.

Secondly, some Australian authorities (including Sellers; in the matter of ***Beckley Forge [2003] FCA 523; (2003) 21 ACLC 1319*** and ***Lollback v Brakepower [2010] NSWSC 1457***) held that issuing new shares did not involve an “alteration in the status of members of a company” under the relevant Australian insolvency legislation in pari materia with section 182.

Thirdly, that issuing new shares and CBs would not engage section 182 is consistent with the rationale behind section 182 because issuing new shares and convertible bonds would not lead to existing contributories evading their liability.

While there were precedents in Hong Kong where the Court granted validation orders in respect of the issue of new shares and CBs, the Court’s attention was not brought to the correct authorities.

It follows that the precedents and the HKSE requirement were mistaken.

Commentary

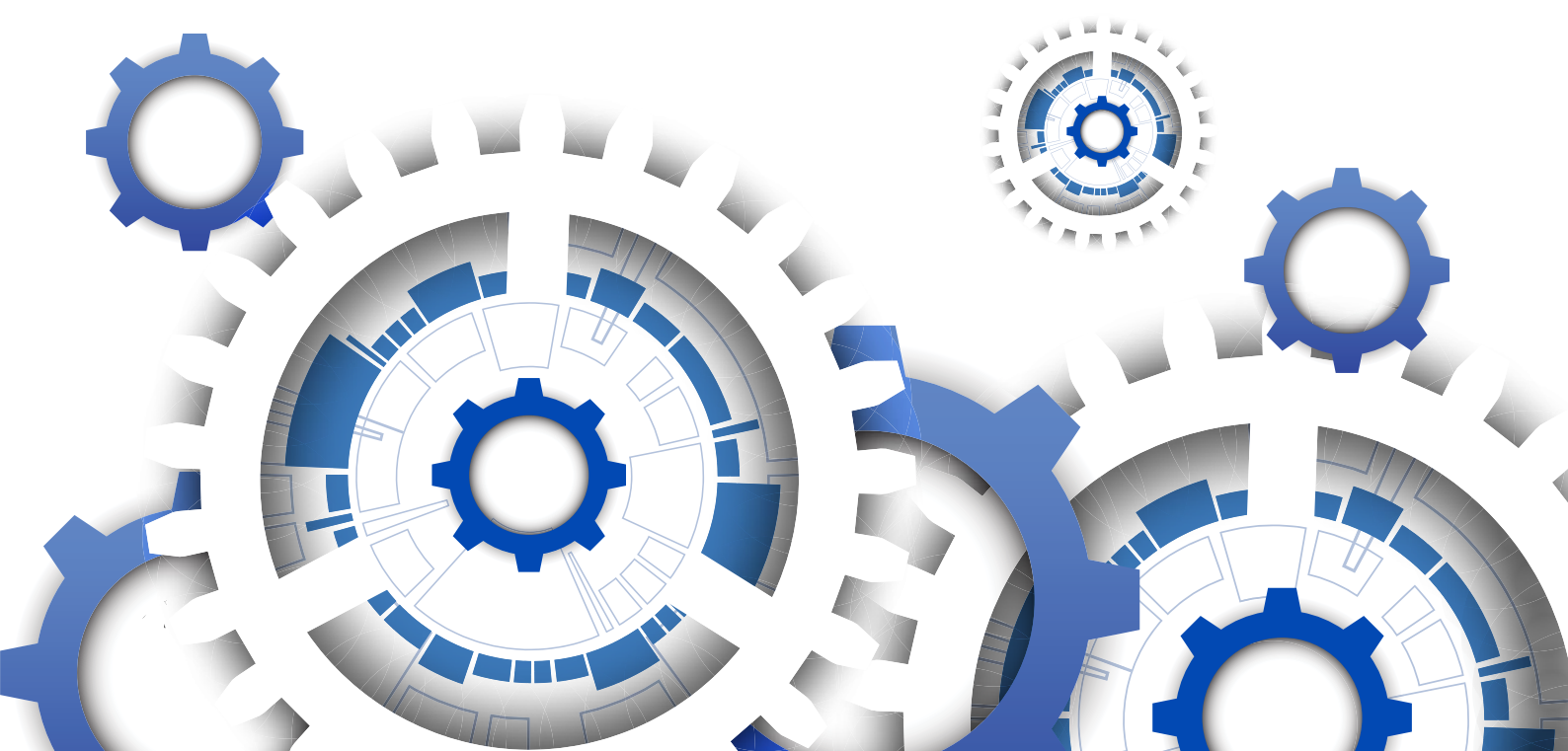
This decision is a most welcome correction of the mistake made by many quarters about the need for a validation order in respect of the issue of new shares and CBs.


“Correcting such a mistake will save a lot of unnecessary costs in future...”

Correcting such a mistake will save a lot of unnecessary costs in future which is especially important to many companies subject to a winding-up petition.

Thanks to Mr Justice Harris’s wise decision, all the previous precedents granting validation orders for the issue of new shares may now be safely forgotten.

Look-Chan Ho acted for the Company in this case.





Multiple Lines of Attack on a Statement of Claim considered in *Polyline Development Ltd v Ching Lin Chun and Others* [2021] HKCFI 483

➤ This Case Report was authored by [Michael Lok](#)

In the recent decision of *Polyline Development Ltd v Ching Lin Chun and Others* [2021] HKCFI 483, Mr Recorder Manzoni SC struck out the Plaintiff's statement of claim and action on a number of grounds. At para. 9 of the judgment, the learned Recorder highlighted the length of the submissions and evidence put forward by the parties, before remarking that *"it may be thought that if such voluminous material is necessary in order to persuade the court that the claim is obviously unsustainable, the application is somewhat ambitious"*.

“...the learned Recorder came to the firm view that the Statement of Claim, described by one side as being a “kitchen sink” (para. 20), was indeed liable to be struck out.”

As it turned out, however, in an extraordinary 70-page judgment, the learned Recorder came to the firm view that the Statement of Claim, described by one side as being a “kitchen sink” (para. 20), was indeed liable to be struck out.

The Plaintiff was a developer of Ding Houses in the New Territories. It had been in liquidation since June 2003. In the Statement of Claim, the Plaintiff (acting by its liquidators) pleaded a lengthy list of causes of action, including resulting trust, constructive trust, breach of fiduciary duty, sham transactions, claim for an account, unlawful means conspiracy, intention to defraud creditors, dishonest assistance and knowing receipt.

While the judgment meticulously discussed each of the above in turn, this article will focus on and highlight a number of interesting features.

The Merits/Facts – Briefly Stated

At its heart, the Plaintiff's pleaded case was that the 1st to 3rd Defendants breached their fiduciary duties owed to the Plaintiff. This arose because, prior to its liquidation, the directors had caused the transfer of properties out of the Plaintiff for no or inadequate consideration.

The learned Recorder pointed out that the pleaded case was not inconsistent with the pleaded business model of the Plaintiff. The subject transfers simply could not be said to have been made in breach of a fiduciary duty when they were pleaded as having been made with an intent to complete a certain step as part of the business model. Thus, the learned Recorder concluded that the basis of the breach of fiduciary claim was not clearly identified in the Statement of Claim, and the claim and the other related claims were

struck out for being demurrable.

On the resulting trust claim, based on nil consideration, while the learned Recorder held that there was a reasonable cause of action disclosed in the statement of claim on its face, his Lordship went on to conclude that this claim should nevertheless be struck out as bound to fail in light of the doctrine of contractual estoppel and the evidence adduced in this application (see paragraphs 126–130).

Pleading Dishonesty

In his Judgment, the learned Recorder reviewed the principles on the pleading of dishonesty. At para. 64, the learned Recorder came to the view that “*at least where dishonesty is expressly pleaded, the necessary particulars of facts for the relevant cause of action do not need to be in themselves consistent only with a conclusion of dishonesty or fraud for the pleading to be legitimate.*”

In an earlier decision (*The New China Hong Kong Group Limited & Another v Ng Kwai Kai Kenneth & others* (Unrep., HCA 519/2010, 11 February 2011)), Fok JA (as his Lordship then was, sitting as an Additional Judge of the Court of First Instance) appears to have expressed the view that when the cause of action requires dishonesty, a plea of facts consistent with honesty is unsustainable and insufficient. In *Polyline* at para. 65, the learned Recorder refused to “*accept that it is a trite proposition that a pleading which expressly pleads dishonesty needs also to plead facts which are consistent only with dishonesty and which cannot themselves permit*

of an innocent explanation, and that if it does not it should be struck out". Having regard to the remarks of Fok JA, the learned Recorder was of the view that "[I]f Fok JA (as he then was, albeit sitting as an additional judge of the court of first instance) has indeed expressed the contrary view (which is not entirely clear given the limited scope of his analysis of the point), with the greatest of respect to his seniority and experience, I do not consider myself to be bound by it and I do not consider it to be right."

“ It thus followed that the plea of resulting trust was likewise liable to be struck out as being bound to fail. ”

Contractual Estoppel and Receipt Clauses

In respect of the resulting trust claim, reliance was placed on the doctrine of contractual estoppel, arising out of the receipt clauses found in the relevant assignment deeds. The learned Recorder held (at para. 129) that the doctrine, applying well-established common law precedents, did apply as between the immediate parties to the transaction. It thus followed that the plea of resulting trust was likewise liable to be struck out as being bound to fail.

However, the learned Recorder assumed, without deciding, that it would not apply “to prevent a claim by a company against a director for a breach of fiduciary duty in entering into the contract in the first place, or as against any accessories to that breach of fiduciary duty” (para. 129). This question did not strictly arise in this case, and there was therefore no reason to embark upon a detailed analysis.

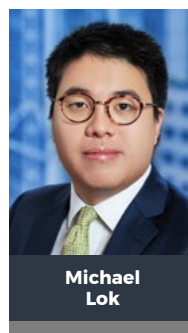
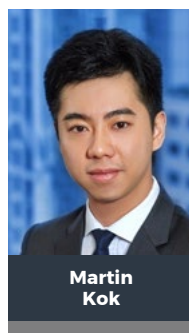


Limitation and Laches

On the issue of limitation, while the learned Recorder accepted that the primary period of limitation in respect of all the claims had expired against all the Defendants (other than the claims in respect of which there was no limitation period), a statement of claim could only be struck out on this ground if the limitation defence was “*manifestly and immediately destructive of the plaintiff’s claim*” (para. 141). As such, his Lordship held (obiter) that the case was not one where the limitation period for all claims had unquestionably and inevitably expired. In light of the Plaintiff’s arguable case based on section 26 of the Limitation Ordinance to extend the limitation period, the learned Recorder would not have struck out any claims on the ground of limitation.

For the same reasons, the Statement of Claim would not have been struck out for laches as the question of where the balance of justice lay was not plain and obvious at this stage of proceedings.

Barrie Barlow SC (who was not the pleader) acted for the Plaintiff; **Michael Lok**, led by **Horace Wong SC**, acted for the 1st, 6th to 12th, 14th to 16th and 18th Defendants; **Anson Wong SC** and **Martin Kok** acted for the 4th Defendant.



An inconvenient truth: Can a party (such as a defendant) ever be held liable for contempt for making an erroneous admission of the plaintiff's allegation?

➤ This Case Report was authored by [CW Ling](#)

The facts in summary

Bizarre as it may seem, the question arose in a Court of Appeal case, *Mathnasium Center Licensing LLC v Chang Chi Hung* [2020] HKCA 1016, 11 December 2020 (Kwan V-P, Cheung JA, Au JA). The plaintiff sued for breach of a franchise agreement in relation to an educational program, related know-how and other intellectual property rights. One of the complaints was that the defendant, a former franchisee, failed to pay royalties and report the number of learning centres opened and operated by it. In the statement of claim the plaintiff asserted, incorrectly, that the learning centres were owned and operated by the defendant. In its defence, the defendant admitted the allegation as a result of a mistake made by its solicitor. In the usual way, the defence was supported by a statement of truth signed by its director (Mr Chang). The parties signed a consent judgment which was said to be based on the erroneous assumption contained in the admission. Later when the plaintiff encountered difficulties in enforcement proceedings, it sought to commit Mr Chang for contempt on the basis of the false statement of truth.*

At first instance, Wilson Chan J found Mr Chang liable for contempt. The judge held that Mr Chang had no honest belief in the statement of truth in so far as it also verified the admission. Moreover, he knew that the false admission was likely to interfere with the administration of justice. The judge rejected the defence based on mistake and accepted the plaintiff's theory that Mr Chang had

deliberately lied in order to make it more difficult for the plaintiff to enforce the judgment. On appeal, the Court of Appeal overturned those factual findings, holding that there was at least a reasonable doubt as to how the erroneous admission came to be made.

A Novel Point of Law

Both the Court of First Instance and the Court of Appeal were invited to grapple with a new point of law. The question was whether an admission (as opposed to an averment) can be regarded as a statement of fact at all for the purpose of the "statement of truth" regime under O 41A, Rules of the High Court. Hitherto the contempt jurisdiction has only been employed to punish and deter dishonest allegations made by a party, usually a plaintiff putting forward a fraudulent case. It is used typically in relation to bogus employee compensation and insurance claims. In the Mathnasium case, however, the plaintiff sought, for the first time, to raise a charge of contempt against its opponent for erroneously admitting part of its (i.e. the plaintiff's) own case.

“ It effectively imposes a burden on the defendant to vet the other side's pleading for mistakes on pain of committal. ”

Quite apart from the absence of precedent, it may come as a surprise that a plaintiff may be allowed to do so when the error originates its own pleading. The idea appears to run counter to the adversarial nature of litigation. It effectively imposes a burden on the defendant to vet the other side's pleading for mistakes on pain of committal.

Finally the rules of pleading are designed to encourage admissions and narrow disputes. Hence it is widely understood that a party may choose to admit as much of the opponent's case as it sees fit, and cannot be forced to put into issue a point that it has no interest in challenging for reason of economy or otherwise.

Despite such formidable arguments to the contrary, the Court of Appeal upheld the judge's view that an admission is indeed susceptible to the rigours of the statement of truth regime, just as much as a positive averment is. Given the grave consequences of a finding of contempt, the ruling may send shivers down the spine of every litigant and his legal adviser. No longer is it open to a litigant casually to admit its opponent's case, even if the admission is against its own interest. Even though the requisite mens rea (lack of honest belief and knowledge of likely interference with the course of justice) may not be present in the majority of cases, it may be thought that the spectre of committal for his client is enough to make every pleader wary of making any unnecessary concession in his pleading.

An Important Rider

Ultimately the Court of Appeal overturned the finding of contempt on the facts. While it was open, as a matter of law, to hold a person who makes a false and dishonest admission liable for contempt, in order to do so the court must be satisfied that the admission must be clear and unambiguous. On the face of it the admission in the defence appeared to be free-standing and unqualified. But the Court of Appeal found that admission was contradicted by other parts of the lengthy defence. Moreover, the statement of claim itself, read as a whole, was less than crystal clear on the asserted ownership status of the learning centres. For this reason the Court of Appeal disagreed with the judge's view that the admission constituted a false statement of truth.

A Sequel

Finally it is interesting to note that in allowing the appeal the Court of Appeal not only ordered the plaintiff to bear the costs of the committal application and of the appeal, but to do so on an indemnity basis. As is well-known it is common practice to order a respondent who is found guilty of civil contempt to pay the applicant's costs on an indemnity basis. However the converse is not always the case: an unsuccessful applicant is not ordinarily made to pay the respondent's costs on a higher basis.

In this case the Court of Appeal found there were unusual features in the plaintiff's conduct of the proceedings. The plaintiff had been told from the start that the admission relied upon was not clear and unqualified. Instead of withdrawing the charge it engaged in questionable tactics with a view to disguising the weakness in its case. Echoing the dicta of Russell LJ, the court opined that the committal application should not have been brought in the first place:

"Motions to commit a man to prison should not be launched except on solid grounds, and it would, I think, be unfortunate if plaintiffs were encouraged to think that where a defendant has acted rashly and foolishly, their threat to his liberty may, with luck, be made at his expense when they fail to establish a case of contempt."

*Mr Chang was represented by **CW Ling** at first instance and in the Court of Appeal.



CW
Ling

Myth Punctured – Offshore PL Order Cannot Stop HK Winding-up Petitions: Re FDG Electric Vehicles Limited [2020] HKCFI 2931

➤ This Case Report was authored by [Look-Chan Ho](#)

Puncturing a popular myth, Mr Justice Harris in Re FDG Electric Vehicles Limited [2020] HKCFI 2931 held that when the Hong Kong court recognises offshore provisional liquidation orders (“**PL Order**”), there would not be an automatic stay on proceedings in Hong Kong.

Further, any assistance granted to the offshore provisional liquidators must be restricted to assets in Hong Kong.

The decision is sound in principle and sits well with international insolvency standards.

The Myth

“The myth has now vaporised after FDG.”

Before FDG, a myth had been circulating that an offshore PL Order could serve to stay and stall a Hong Kong winding-up petition.

The myth arose from a misunderstanding of a general stay provision in the standard-form recognition order the Hong Kong court grants when recognising foreign insolvency proceedings.

The myth was so widespread that recently the Cayman court in Re Sun Cheong Creative Development Holdings Limited (20 October 2020) held that a Cayman PL Order “would have the effect of adjourning the HK [winding-up] Petitions”.

The myth has now vaporised after FDG.

The Facts and Decision in FDG

FDG Electric Vehicles Limited (“**Company**”) is a Bermuda-incorporated company listed in Hong Kong. Through companies incorporated in the BVI, the Company has an indirect subsidiary (FDG Kinetic Limited) (“**Kinetic**”) which is also a Bermuda-incorporated company listed in Hong Kong.

In July 2020, because of financial distress, the Company went into provisional liquidation in Bermuda. The Bermuda provisional liquidators (“**PLs**”) then applied for recognition in Hong Kong.

While the recognition application was on the whole fairly conventional, two matters arose for the Court’s further consideration.

- First, the PLs sought a provision in the recognition order that would allow them to control all direct and indirect subsidiaries of the Company (“**Control Provision**”).
- Secondly, consistent with the standard-form recognition order, the PLs sought a general stay provision staying proceedings against the Company in Hong Kong.

Kinetic opposed the grant of the Control Provision.

The Court held as follows: The PLs would be recognised. But their powers under the recognition order to control the Company’s subsidiaries must be restricted to companies incorporated in Hong Kong. Further, no general stay provision would be granted. Instead, if the PLs would like to apply for an order

staying particular proceedings, they should apply to the Companies Judge for directions.

The Court reasoned that the Control Provision sought was too broad because the PLs' powers should be restricted to assets in Hong Kong. Subsidiaries incorporated abroad are not assets in Hong Kong because, as a matter of conflict of laws, the shareholdings in the foreign subsidiaries are located in their country of incorporation.

A case management provision would be more appropriate than a general stay provision. The erstwhile general stay provision was in fact intended to be in the nature of a case management provision, which would ensure that action would not take place in Hong Kong without the relevant parties being aware of (a) the impact of the foreign insolvency proceedings and, (b) any stay granted. The Court would need to decide on a case-by-case basis the propriety of any stay.

The Court also mentioned two considerations relevant to the propriety of any stay. The first concerns whether offshore soft-touch provisional liquidation should be treated as a collective insolvency process for all purposes. Secondly, a stay might not be appropriate if it would violate the Gibbs rule (so called because it derives from the English Court of Appeal decision in *Antony Gibbs & Sons v La Société Industrielle et Commerciale Des Métaux* (1890) 25 QBD 399). The Gibbs rule states that the question of whether an obligation has been discharged is governed by its proper law.

Commentary

The decision has punctured a long-standing myth that, because the Hong Kong court would recognise offshore provisional liquidation, obtaining an offshore PL Order is a convenient tool to stay and stall Hong Kong winding-up petitions.

In truth, it was never proper to use the erstwhile general stay provision to stay legitimate Hong

Kong winding-up petitions. That is why the recognition order in *Re Joint and Several Provisional Liquidators of China Oil Gangran Energy Group Holdings Ltd* [2020] HKCFI 825 expressly carved out a pending Hong Kong winding-up petition from the general stay provision. The *China Oil* decision shows that the Hong Kong court's universalist attitude must not be exploited by foreign soft-touch provisional liquidation to stonewall creditors and stall legitimate Hong Kong proceedings.

Despite the *China Oil* decision, the myth continued to spawn hype, as the Cayman decision in Sun Cheong shows. It is thus laudable and healthy that the *FDG* decision has now once and for all punctured this tired myth. In future, there will be no more general stay provision in recognition orders and thus no more confusion.

From the perspective of international insolvency standards, Mr Justice Harris's decision is eminently correct. Where the debtor maintains only a letterbox presence offshore, the offshore PL Order is not entitled to extensive insolvency assistance (such as a general stay). The PL Order is not eligible for extensive assistance under the doctrine of modified universalism which the Hong Kong court subscribes to. Indeed the PL Order would not be eligible for recognition under the UNCITRAL Model Law on Cross-Border Insolvency which is also premised on modified universalism.

Tom Ng acted for the applicants in this case.

Look-Chan Ho acted for the opposing subsidiary, FDG Kinetic Limited, and authored this Case Report.



Tom
Ng



Look-Chan
Ho

Competition Tribunal Endorses Lump–Sum Approach for Penalty in First Bid Rigging Case

➤ This Case Report was authored by [Catrina Lam](#)

On 16 December 2020, Mr. Justice Godfrey Lam, President of the Competition Tribunal, handed down a judgment in relation to the pecuniary penalties to be imposed on the parties in **Competition Commission v Nutanix Hong Kong Ltd & Ors [2020] HKCT 11**.

This judgment follows an earlier ruling in May 2019 ([2019] HKCT 2) where the Tribunal found that 4 IT firms (Nutanix, BT, Innovix and Tech-21) had contravened the First Conduct Rule by engaging in bid-rigging in connection with a tender exercise conducted by the YWCA for the supply and installation of a Nutanix hyper-converged server system.

The Commission had reached a collective agreement with Nutanix, BT and Innovix pursuant to the procedure used in **Competition Commission v Kam Kwong Engineering Co Ltd & Ors [2020] HKCT 3** in relation to the terms of the orders sought from the Tribunal. No agreement had been reached with Tech-21.

Key Rulings

➤ The Tribunal emphasized that under the “Kam Kwong procedure”, the parties’ consent does not remove the need for the Tribunal to be satisfied that the penalty agreed is appropriate having regard to the circumstances of the case including the matters specified under section 93(2) of the Competition Ordinance. Once satisfied, however, the Tribunal should exercise a degree of restraint when scrutinizing

the proposed settlement terms, particularly when both parties are legally represented and are able to evaluate the desirability of the settlement.

➤ While the 4-step “structured approach” laid down in **Competition Commission v W Hing Construction Co Ltd & Ors [2020] HKCT 1** was adopted in determining the appropriate penalties to be imposed, the Tribunal departed from the previous methodology used by endorsing a “lump-sum approach” in determining the Base Amount for BT under Step 1, instead of using the Value of Sales (i.e. the value of the undertaking’s sales directly or indirectly related to the contravention in Hong Kong in the financial year in question).

➤ Two reasons were cited to justify the conclusion that it would not be practicable to use the Value of Sales in determining the Base Amount for BT: (1) BT did not generate any turnover from sales of any Nutanix hyper-converged server system and related services in the financial year in question; and (2) the Commission had examined BT’s Value of Sales in the preceding year but took the view that it did not reflect the actual scale of BT’s activities in the relevant product..

In determining the Base Amount under Step 1, the Tribunal accepted:

(a) A Gravity Percentage of 17%, a figure towards the lower of the range of 15% to 30% for serious anti-competitive conduct, having regard to the fact that

the conduct was a “one-off” relating to a single tender and the overall circumstances of the case, including that there was no price inflation between the first and second tenders and there was no direct financial reward for the firms who put in the dummy bids.

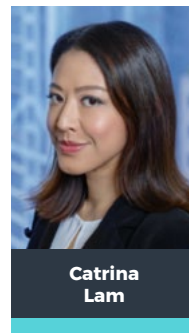
- (b) *A Duration Multiplier of 1 because bid-rigging by its nature will often be very short in duration, while its harmful effects on competition may potentially last much longer. If the number of days on which the relevant conduct occurred is turned into a fraction of a year to be applied as a multiplier, the Base Amount will end up being inordinately small.*


➤ For Step 2:

- (a) *An uplift of 40% was applied to the Base Amount for Nutanix to reflect its role as the leader or instigator in the contravention, in the sense that it took part in formulating the bid-rigging scheme and coordinated the dummy bids from the other respondents.*
- (b) *A downward adjustment of 20% to the Base Amount was applied for Nutanix, Innovix and Tech-21 to take into account the fact that YWCA did not ultimately award a contract pursuant to the tainted tender.*
- (c) *An uplift of 50% was applied to the Base Amount for Innovix as the resultant amount, if not further adjusted, would represent only a very small percentage of its total turnover for the relevant year. To ensure the effectiveness of the competition regime, the Tribunal accepted that specific deterrence was called for to deter Innovix from engaging in further anti-competitive practices.*
- A Cooperation Discount was given to Nutanix, BT and Innovix at Step 4 on account of their cooperation at the penalty/costs stage of the proceedings by providing financial documents and information on a voluntary

basis and agreeing to make a joint application to the Tribunal pursuant to the Kam Kwong procedure. BT received an additional discount for its cooperation during the investigation stage by assisting the Commission with accessing devices seized from BT’s premises and making submissions on factors such as relevant market structure.

Catrina Lam (led by **Mark Hoskins QC**) acted for the Competition Commission.





Competition Tribunal hands down first judgment on liability and penalty using Carecraft procedure in IT Cartel case

➤ This Case Report was authored by [Catrina Lam](#)

On 3 November 2020, the Tribunal handed down its judgment in **Competition Commission v Quantr Limited & Cheung Man Kit [2020] HKCT 10** approving for the first time a joint application by the Commission and the Respondents, Quantr Limited and its director, to dispose of both the liability and relief portions of the proceedings by consent using the Carecraft procedure.

“ This case represents an important milestone for the Commission and sheds light on the Commission’s enforcement trend in encouraging competition compliance. ”

This is the first set of enforcement proceedings resulting from a successful leniency application and the first time in which the Commission has made use of its power to issue an infringement notice to resolve the matter with another participant in the cartel conduct, Nintex Proprietary Limited.

This case represents an important milestone for the Commission and sheds light on the Commission’s enforcement trend in encouraging competition compliance.

Facts

On 22 January 2020, the Commission commenced proceedings pursuant to sections 92, 94, 96 and 101 of the Competition Ordinance (“**Ordinance**”) against the Respondents for their participation in cartel conduct in relation to a bidding exercise organised by Ocean Park Corporation for the procurement of IT services.

Ocean Park had planned to carry out a workflow automation project using Nintex software.

As Nintex did not deal directly with end-users in Hong Kong, its representative H recommended to Ocean Park a number of Nintex’s local resale partners who could be invited to submit quotations including Quantr.

Shortly after Ocean Park sent out invitations to submit quotations, H of Nintex, Quantr's director and a representative of a co-bidder ("**Co-bidder**") exchanged future price sensitive information and discussed who would win in relation to the bidding exercise via WhatsApp messages.

Infringement Notices

Before the commencement of the proceedings, the Commission attempted to resolve the matter by issuing infringement notices to Quantr and Nintex pursuant to section 67(2) of the Ordinance. Nintex accepted the infringement notice and committed to take steps to strengthen its competition compliance programme. As a result, Nintex was not named as a respondent in the proceedings. Quantr refused to make a commitment to comply with the requirements set out in the infringement notice, resulting in the enforcement proceedings against it and its director.

Successful Leniency Application

The cartel conduct was brought to the attention of the Commission by the Co-bidder who made a leniency application, which the Commission accepted. Consequently, the Commission entered into a leniency agreement with the Co-bidder that it would not bring enforcement proceedings for a pecuniary penalty against it or its employees in exchange for their cooperation. Neither the Co-bidder nor any of its employees were therefore named as respondents in the proceedings.

Tribunal's Ruling and Orders

The Tribunal held that the Respondents contravened or were involved in the contravention of the First Conduct Rule by coordinating their return bids and exchanging future pricing

information, which amounted to price fixing, a serious anti-competitive conduct for the purpose of section 2 of the Ordinance. The Tribunal took the view that the recommended pecuniary penalty of HK\$37,702.26 was appropriate and proportionate to Quantr's contravention, taking into account the following facts and matters:

- 1) The value of sales directly related to the contravention was less than HK\$150,000 and the contravention took place within a few months;
- 2) Quantr agreed to undertake steps to ensure genuine compliance with the Ordinance in the future;
- 3) The amount of the recommended pecuniary penalty was less than 10% of the turnover of Quantr in the year of infringement; and
- 4) Quantr cooperated with the Commission and admitted the facts in the Statement of Agreed Facts shortly after the commencement of the proceedings.

In addition to ordering Quantr to pay a pecuniary penalty and both Respondents to pay the Commission's costs of the proceedings, the Tribunal was also satisfied that it would be appropriate to order a stay of the remaining claims originally sought by the Commission, including a pecuniary penalty and director disqualification order against its director, on condition that the Respondents (i) circulate certain brochures and guidelines published by the Commission to all its staff (ii) adopt a competition compliance programme and (iii) procure all current staff to attend one of the Commission's public seminars or workshops on competition law within 12 months.

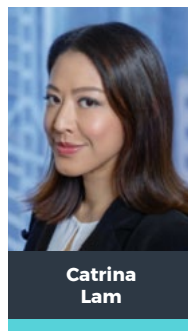
Key Takeaways

- This case is testament to the importance of leniency in detecting and combatting cartels. Businesses involved in anti-competitive conduct should consider approaching the Commission for leniency or cooperation at an early stage. The revised **Leniency Policy for Undertakings Engaged in Cartel Conduct** and the new **Leniency Policy for Individuals Involved in Cartel Conduct** published by the Commission in April 2020, together with the **Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct** published in April 2019, will make it easier and more attractive for companies and individuals to come forward and cooperate with the Commission.
- The Commission has stated in its **Enforcement Policy** that during the initial years of the operation of the Ordinance, its resources would be focused on encouraging competition compliance. This case demonstrates that the Commission will encourage compliance by targeting anti-competitive conduct that is clearly harmful to competition and seeking resolutions that are proportionate to the nature of the conduct by making use of an infringement notice as a remedy. However, a lesson to be extracted here going forward for companies who reject the lesser penalty of an infringement notice when such a remedy is offered, the likely outcome is the commencement of enforcement proceedings before the Tribunal.
- The importance placed on compliance programmes by the Commission cannot be overlooked. Where appropriate, the Commission will require infringing parties to implement compliance programmes through an infringement notice or the scheduled terms of a Tomlin Order. This is the first time such

an order has been recommended to the Tribunal and it is interesting to note that the order is specifically designed to enable the Commission to revive parts of the original claims in the event Quantr fails to fulfil its obligations to implement the compliance requirements detailed in the scheduled terms.

- Businesses in all sectors should thoroughly review their commercial practices and consider implementing workplace guidelines and compliance programmes to ensure employees do not engage in anti-competitive conduct.

This Case Report was authored by **Catrina Lam** who acted for the Competition Commission.



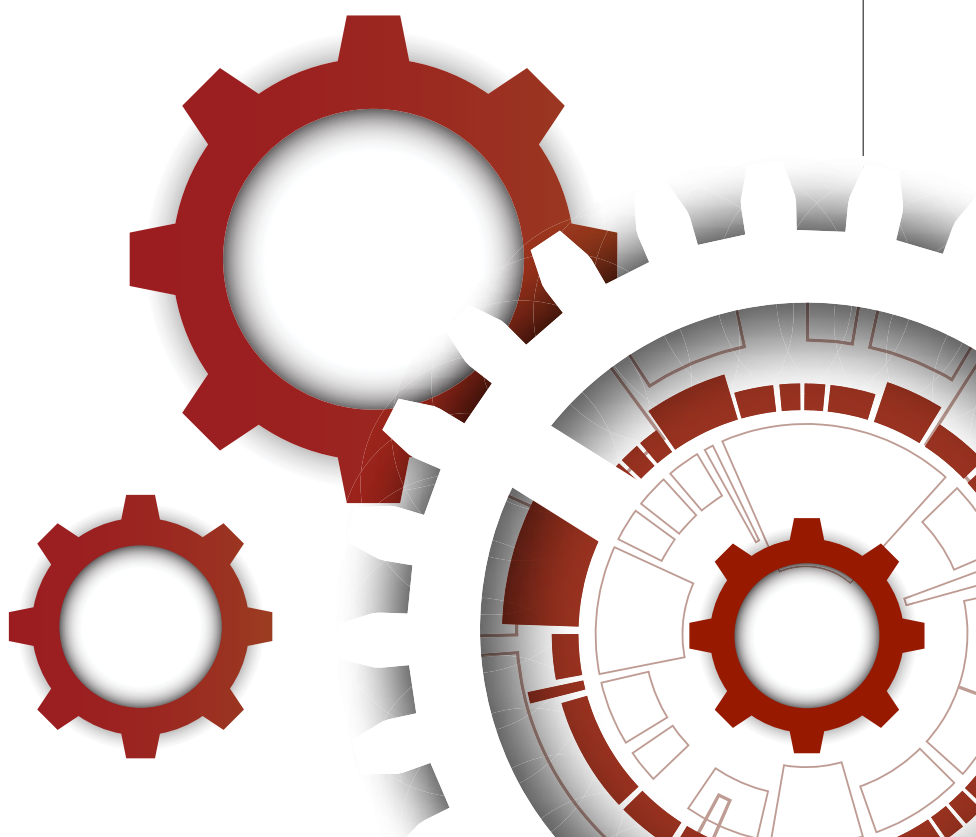
Provisional Liquidators appointed for *UA Cinemas*



On 8 March 2021, the iconic *UA Cinemas* closed down, and Mr Justice Harris appointed provisional liquidators instantly to protect creditors' interests once again demonstrating the best traditions of the Hong Kong Companies Court in meeting acute business challenges. **Look-Chan Ho** acted for the Applicant, **UA Cinema Circuit Limited**.



**Look-Chan
Ho**





Announcements

Chambers & Partners Asia-Pacific 2020-2021

DVC is delighted to announce that the following Senior Counsel & Juniors have been recognised in this year's rankings:



John Scott
SC, QC, JP



Charles Sussex
SC



Simon Westbrook
SC



Clifford Smith
SC



Joseph Tse
SC



Winnie Tam
SC, SBS, JP



Johnny Mok
SC, BBS, JP



Barrie Barlow
SC



William Wong
SC, JP



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SC, QC



Anson Wong
SC



Douglas Lam
SC



José-Antonio Maurellet
SC



Jenkin Suen
SC



Rachel Lam
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Mairéad Rattigan



Frances Irving



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Sabrina Ho



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Justin Lam

Click [here](#) for an overview of members' accolades from Chambers and Partners Asia-Pacific 2021.

Legal 500 Asia-Pacific 2021 Directory

DVC is delighted to announce that the following members have been recognised and accredited in various sectors by the Legal 500 Asia-Pacific 2021 directory.

The following Silks were recognised:



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SC, QC, JP



Charles Sussex
SC



Simon Westbrook
SC



Clifford Smith
SC



Chua, Guan-Hock
SC



Winnie Tam
SC, SBS, JP



Johnny Mok
SC, BBS, JP



Barrie Barlow
SC



Anthony Houghton
SC



Ian Pennicott
SC, QC



Anson Wong
SC



Douglas Lam
SC



José-Antonio Maurellet
SC



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SC



Rachel Lam
SC



John Litton
QC

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**Mairead
Rattigan**



**David
Tsang**



**CW
Ling**



**Richard
Zimmern**



**Frances
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**Catrina
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**Calvin
Cheuk**



**Frances
Lok**



**Gary
Lam**



**John
Hui**



**Christopher
Chain**



**Sabrina
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**Connie
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**Alexander
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**Jason
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**Kerby
Lau**



**Jacqueline
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**Michael
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**Kaiser
Leung**



**Ellen
Pang**



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[Set Overview](#)

New appointment for DVC's Head of Chambers

DVC's Head: Winnie Tam SC, SBS, JP has been appointed to the Independent Commission on Remuneration for Members of the ExCo and the Legislature, and Officials under the Political Appointment System of the HKSAR.

Click [here](#) to find out more about this distinguished appointment.



Winnie Tam
SC, SBS, JP

Recognition as a Global Elite Thought Leader for Construction Law by Who's Who Legal 2021

DVC's Deputy Head, [Ian Pennicott SC, QC](#) has been acknowledged as a Global Elite Thought Leader by Who's Who Legal 2021 for Construction Law.

Click [here](#) for the write up.



Ian Pennicott
SC, QC

DVC's Anthony Houghton SC has been singled out by Who's Who Legal 2021 as a Global Leader for Arbitration

DVC's [Anthony Houghton SC](#) has been singled out by Who's Who Legal 2021 as a Global Leader for Arbitration.

Click [here](#) for the write up.



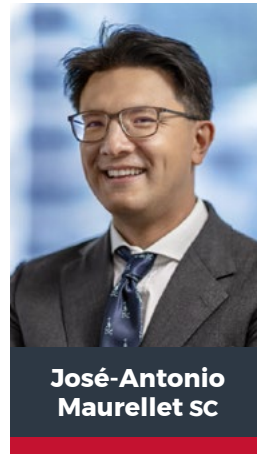
Anthony Houghton
SC

Two of DVC's members feature in the Who's Who Legal Future Leaders 2020 List for Litigation

From 183 litigation partners and non-partners aged 45 or younger canvassed from around the world, DVC's **Jose-Antonio Maurellet SC** and **Jason Yu** were recognised for their outstanding litigation work.

Jose-Antonio Maurellet SC is a highly regarded "accomplished commercial practitioner, with a particular emphasis on companies work" and **Jason Yu** is highlighted for his "superb litigation practice and strong expertise in company law, insolvency and IP disputes."

Click [here](#) for the write up.



Who's Who Legal: Restructuring & Insolvency 2021 Global

DVC's **Look-Chan Ho** is uniquely, the only Hong Kong barrister featured as a Global Leader in this year's Who's Who Legal: Restructuring & Insolvency – 2021 Global Guide.

Click [here](#) for the write up.



Twin appointments for DVC's Ling Chun Wai

DVC's **CW Ling** has been appointed a Member of the Board of Revenue (Inland Revenue Ordinance) for a term of three years with effect from 1 January 2021.

He has also accepted a position on the HKIAC Domain Name Dispute Resolution Panel for a period of 5 years expiring on 31st December 2025.

The HKIAC Domain Name Dispute Resolution ("**DNDR**") Panel comprises individuals who have acquired extensive experience and depth of expertise in resolving domain name disputes.



Deputy Chairman of the Board of the Inland Revenue (2021)

DVC's **Teresa Wu** has been appointed Deputy Chairman of the Board of the Inland Revenue for a term of 3 years with effect from 1 January 2021.



DVC partners with Lexology

DVC is pleased to be collaborating with Lexology to disseminate our content on a real time basis. You will find dedicated and exclusive Articles and Case Reports from members, multimedia presentations including podcasts and videos, news about members' recent publications, appointments and CSR and D&I drives.

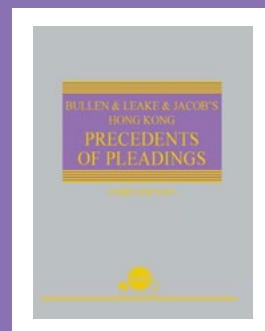
9 of DVC's members feature in Bullen & Leake & Jacob's Hong Kong Precedents of Pleadings, 3rd Edition (2020)

A lofty line-up of 9 members (and 1 pupil) feature in the latest Bullen & Leake & Jacob's Hong Kong Precedents of Pleadings, 3rd Edition, published in December 2020.

DVC is delighted to have 9 of its members featured – as portrayed below. A full list of these contributors and external luminaries who joined them in authoring this publication can be found [here](#).

德輔
DESVOEUX
CHAMBERS

DVC's cast of 9 as featured in Bullen & Leake & Jacob's Precedents of Pleadings Hong Kong, 3rd Edition



Teresa
Wu



John
Hui



Alan
Kwong



Micheal
Lok



Kaiser
Leung



Tom
Ng



Tommy
Cheung



Euchine
Ng

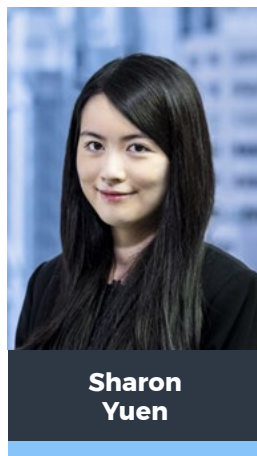


Martin
Lau

Updated publications by members of DVC

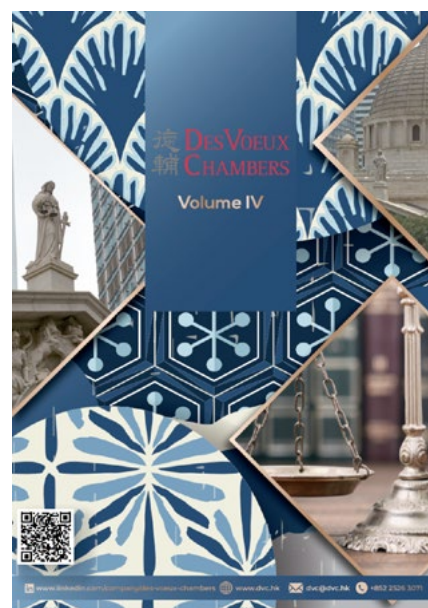
Yang-Wahn Hew and **Kevin Lau** recently updated *The Annotated Ordinances of Hong Kong: Immigration Ordinance (Cap.115)* and the *Butterworths Hong Kong Immigration Law Handbook (3rd Edition)*. These updates take into account the latest developments in Hong Kong immigration law, including (1) the impact of the right to family and humanitarian considerations on the dependent visa policy promulgated by the Director of Immigration, (2) challenges to immigration law and policy based on discrimination for sexual orientation, and (3) the significant jurisprudence built up concerning the Unified Screening Mechanism to process non-refoulement claims since 2014.

Previously, **Yang-Wahn Hew**, **Adrian Lai**, **Kevin Lau** and **Sharon Yuen** contributed updates to the *Butterworths Hong Kong Contract Law Handbook (4th Ed, 2019)*, and **Yang-Wahn Hew** and **Sharon Yuen** further revised *The Annotated Ordinances of Hong Kong: Electronic Transactions Ordinance*."



DVC's English Brochure Vol. 4 (2020)

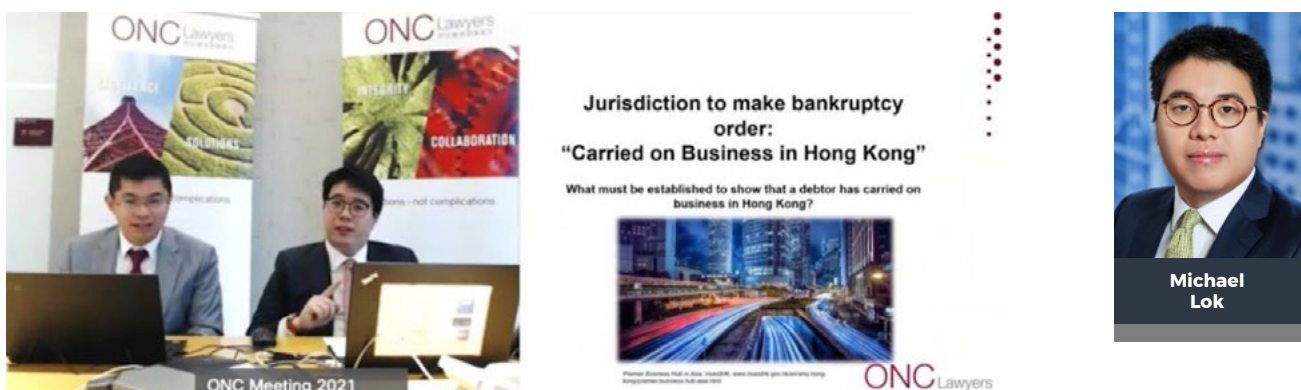
Containing cardinal insights mined from the legal landscape, vital stats on DVC's practitioners, and topical interactive multimedia content, review DVC's updated keystone literature: Vol 4 of DVC's Brochure (2020) [here](#).



Multimedia

Part 1 in a series of Company & Insolvency webinars co-hosted by DVC and ONC Lawyers

On 22 January 2021, at a seminar co-hosted by Des Voeux Chambers and ONC Lawyers, DVC's **Michael Lok** and **Eric Woo** of ONC delivered a lively lunch-time seminar to more than 200 attendees. The virtual seminar was entitled “Insolvency Law and Practice: Corporate and Shareholder Disputes”. Eric focused on recent decisions in Hong Kong, whilst Michael took the audience to different common law jurisdictions in order to hear about recent cases of interest in this area of the law.



Part 2: Cross-border Insolvency, Corporate Rescue and Restructuring: a webinar featuring DVC's Look-Chan Ho

At the end of January, **Look-Chan Ho** collaborated with ONC's Senior Partner, **Ludwig Ng** to deliver a webinar entitled “Cross-Border Insolvency: Corporate Rescue and Restructuring.” **Look-Chan Ho** walked the attendees through a stream of recent cases, extracting relevant trends and teasing out actionable takeaways. He also highlighted the novel practice of Recognising and assisting foreign insolvency proceedings in HK and how this is carried out.



An edifying webinar on the state of play of Cross-border liquidation and Asset/Debt Restructuring under HK Company law

On 20th January 2021, DVC's **William Wong SC, JP** and **Look-Chan Ho** presented erudite and illuminating narratives on the state of play in the context of Cross-border liquidation and Asset/Debt Restructuring under HK Law in a collaborative webinar with Wolters Kluwer. Geared for a HK and mainland audience, this talk covered a helpful array of topics touching principally on the ways in which mainland liquidators can seek recognition and assistance from the HK Courts, the duties and liabilities of shareholders and directors and key cases that emerged from the HK landscape in 2020 before an engaged audience.

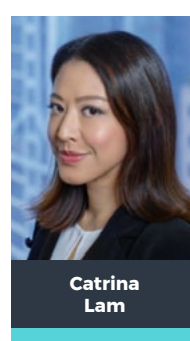
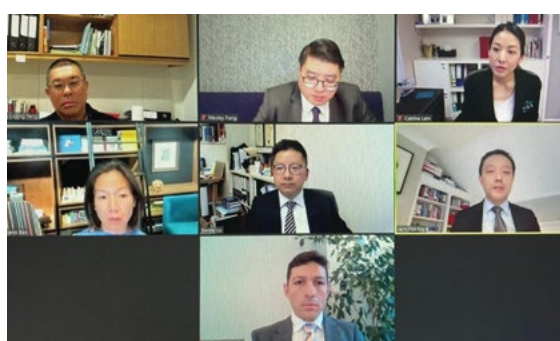


**William
Wong SC, JP**



**Look-Chan
Ho**

Two of DVC's members and other luminaries debate the merits of Outcome-Related Fee Structures for arbitration on the ICC YAF panel



**Catrina
Lam**



**Benny
Lo**

DVC's **Benny Lo** moderated a lively debate on 11 February 2021 organized by the ICC YAF on whether Outcome-Related Fee Structures for arbitration are good for Hong Kong in a distinguished panel comprised of **Catrina Lam**, Jern-Fei Ng QC and Wesley Pang, with Chiann Bao and Ing Loong Yang as judges. The consultation paper can be accessed [here](#).

A Talk on "Population Pressures"

DVC's **Daniel Fung SC** considered the resounding impact of population pressures against the backdrop of China's One Child Policy at the recent Next75 event for Russian Television (RT) in December of last year.

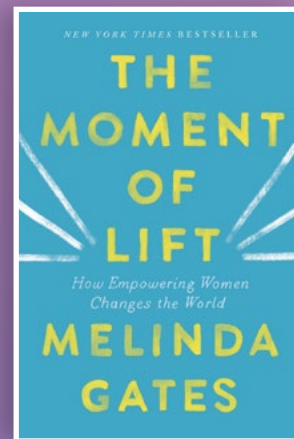
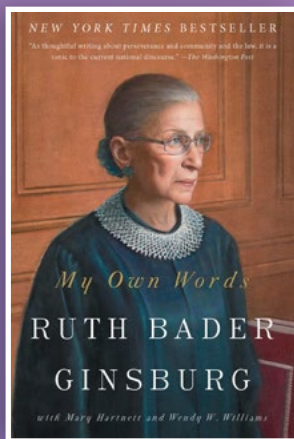
Click the play button to watch the video.



INTERNATIONAL WOMEN'S DAY

Take a look at DVC's recommended book, podcast and movie list with sound bites from our members:

Here you will find a myriad selection of novels and other multimedia presentations authored by inspiring women by way of a hat tip to females across the world for International Women's Day today, 8 March 2021.



When Ginsburg enrolled at Harvard Law school in 1956, the class had 552 men but just eight other women. At a dinner party, the Dean of the Law School asked her, "How do you justify taking a place that would have gone to a man?"

"On The Basis Of Sex"
Recommended by DVC's
[CW Ling](#)



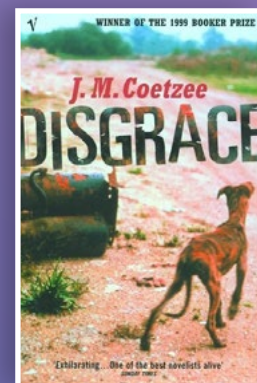
The author, Ms Yeo, is a Cambridge Gates Scholar, was Malaysia's first and only female Minister of Energy, Science, Technology, Environment and Climate Change, and was recognised in 2019 by the World Economic Forum as a Young Global Leader.

"Reimagining Malaysia"
Recommended by DVC's
[Yang-Wahn Hew](#)



Katherine Johnson knew, once she took the first step, anything was possible.

Margot Lee Shetterly,
Author of Hidden Figures



"Disgrace"

Recommended by DVC's
[Johnny Mok SC, BBS, JP](#)



Baroness Hale: "This is your life"

Recommended by DVC's [Catrina Lam](#)

Click the play button to watch the video.



"Untamed" by Glennon Doyle

Recommended by DVC's
[Catrina Lam](#)

The Portia effect

Early women law students and their legacy

By Laura Noakes

100 years ago, women could not practise law. One woman, albeit fictional, stood apart from all others: Portia. In William Shakespeare's *The Merchant of Venice*, Portia impersonates a male legal apprentice and wins a case. However, Portia's fictitious achievements failed to have any real-world effect – women could not practise as a barrister, or solicitor, until the Sex Disqualification (Removal) Act was passed in 1919, paving the way for Helena Normanton to become the first practising woman barrister.

However, women could study law at university. Access to higher education for women became an increasing aim of the women's movement in the 19th century – Bedford College, opened in 1849 by Elizabeth Jesser Reid, was the first higher education college for women, and the University of London was the first higher education institution to award degrees to women in 1878, after introducing 'special examination' for women 10 years earlier. The first woman to gain a law degree in England and Wales was Eliza Orme, who graduated from the University of London in 1888. She was soon followed by others – between 1888 and 1919 eight women graduated with a law degree from the University of London. Often referred to as 'Portia' in the popular press, the women who graduated prior to the 1919 Act were legally trained, but unable to practise officially.

Law on the margins

So, what was a woman with a law degree to do? Well, although they were unable to become solicitors or

barristers, there were other avenues for those who wished to engage in legal work. Eliza Orme had already established her office on Chancery Lane by the time she graduated. Eliza worked as a 'devil' – she drafted documents for conveyancers and patent agents. However, this quasi-legal work was a small part of Eliza's role in life.



She was a member of the Liberal political party, and in favour of women getting the parliamentary vote. However, her suffrage ideal came second to her political loyalty: she sided with the party when the Women's Liberal Federation split on the issue in 1902.

By the time the Sex Disqualification (Removal) Act received royal assent, Eliza was 71 years old. She had remained involved in legal work until 1904 and passed away – having seen the achievement of both suffrage and women lawyers – in 1937.

Entry into academia

Ivy Williams was the first woman to be called to the bar, in 1922. Although she never practised – she became an academic lawyer instead – this moment marked an important landmark for women in higher education.

Ivy came from a distinguished line of lawyers; her father was a solicitor and her brother became a barrister. She studied law at the University of Oxford and had completed all her examinations by 1903. However, Oxford did not allow women to matriculate or graduate until 1920.

Instead, she received her LLB from the University of London in 1901, and her LLD from the same university in 1903.

Ivy was the first woman to teach law at a British university. She taught at the Society of Oxford Home Students (a forerunner to St Anne's College, Oxford) from 1920 to 1945, and was awarded her Doctor of Civil Law in 1923. She was elected an Honorary Fellow of St Anne's College in 1956. All of these achievements are incredibly important – it meant that, for the first time, women were involved in legal education.

A woman KC

Whilst Ivy beat her to the bar by a few months, Helena Normanton was the first female barrister to practise. Prevented from graduating with her LLB in 1912 by a 'coughing fit' during her final exam, Helena finally gained her law degree in 1930, from the University of London. She was the first woman to obtain a divorce for her client (in 1922), the first woman to prosecute a murder case (in 1948) and was appointed King's Counsel, along with Rose Heilbron, in 1949.

Helena was also a committed feminist, and heavily involved in the fight for women's votes. She was a member of the Women's Freedom League, a democratic but militant suffrage group. Although Helena married in 1921, she was committed to keeping her maiden surname for professional reasons – she was the first married

woman in Britain to keep her maiden name on her passport. She campaigned passionately for divorce reform and was president of the Married Women's Association.

She also fought for women's rights to financial independence, publishing a radical pamphlet in 1914 entitled *Sex Differentiation in Salary* which argued that women should be given equal pay for equal work.

'During and after a war, many soldiers' wives and widows become the breadwinners for families. Should they be paid according to their sex or their work?'

By the time of her death in 1957, she had paved the way for women barristers, and achieved many 'firsts' for women in law.

Legacy

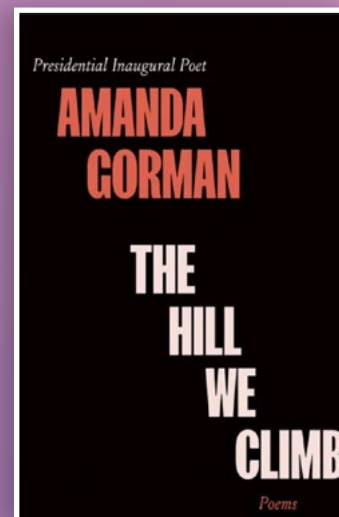
All graduating with a law degree from the University of London, these women were variously involved in the campaign for women's suffrage, national and local politics, academia and reforming the law to improve women's lives. The diversity in their later lives is testament to their legal training – they utilised their skills even though they could not officially practise law until 1919. However, their pioneering achievements, and the challenges they faced in their careers and in their activism, have left a lasting legacy.



Helena Florence Normanton KC, the first woman to practise as a barrister in England and a shining example of a female pioneer in our profession.

Recommended by DVC's [John Scott SC, QC, JP](#)

"Helena Normanton KC should be to women lawyers what Neil Armstrong is to astronauts."



*"If we merge mercy with might,
and might with right
then love becomes our legacy
And change our children's birthright."*

Amanda Gorman

This is the most touching, inspiring and transforming book that I have read in the last year. Madam Justice Zhang was born in China in the 1950's, and had witnessed China transforming from a closed communist country struggling in poverty, to opening up to the world and eventually returning to the world political stage as a world power to be reckoned with. As a speaker of several foreign languages, she was at the negotiating table as a representative of China at various summits on trade, investment, and intellectual property. She helped shape the law of China on foreign trade and investments, and was the first Chinese to be elected a judge on the international tribunal on WTO disputes.

Quote: “人生有順境，鮮花，美酒和贊美；人生也有逆境，艱難，困苦和迷茫；無論何時何地，樂觀向上，努力拼搏。勝不驕，敗不餒，低谷不沮喪，永遠不停步。幹一行，愛一行，鑽一行，做到極致，成為專家、模範。”

(Translation) *"There are good times and bad times, blossoms and wine in life, as there are adversities, difficulties, hardship, and confusion. No matter where you are, stay optimistic and strive for advancement. Win without feeling conceited, and lose without feeling discouraged. Lapse not into despair, let your pace never stop. Wherever your career takes you, pursue it with passion, delve deep into it. Do your utmost to become an expert and a role model."*



“我的人生路 - 張月姣大法官自傳”

"My Path in Life, by Madam Justice Zhang Yuejiao"

Recommended by DVC's Head

Winnie Tam SC, SBS, JP



"He is the kind of person you could put into an infinite number of scenarios and he would flourish."
This junior focuses his practice on multi-jurisdictional cases, with experience across a wide range of civil and commercial instructions, covering company law and insolvency disputes in addition to contentious real estate, trusts and probate matters. *"People think highly of him"* and *"he is considered to be very intelligent and meticulous counsel. He is switched-on and able to accommodate tight deadlines. He's been presenting very well in court and has been key in getting us a favourable result."*

Chambers & Partners Asia-Pacific 2021

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)



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DVC has recommenced seminars. If you would like to see any of the topics considered in this issue covered by way of a seminar or webinar, please contact Aparna Bundro, DVC's Practice Development Director, at aparnabundro@dvc.hk or 3413 0600.



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Douglas Lam SC

Rachel Lam SC

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