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Editorial

We feature three articles in this edition. The first article highlights some of the consequences resulting from a winding-up order being made against a Hong Kong company, including for example dispositions of company property being void and the automatic stay of proceedings.

The second article talks about the legal framework for the implementation of the automatic exchange of financial account information in tax matters in Hong Kong as set out in the Inland Revenue (Amendment) Bill 2016.

The third article discusses the statutory and equitable assignment of contractual rights and the transfer of contractual liabilities by novation.

We also feature three case reports in this edition. The first case is about the implication of terms into a contract. The Supreme Court of the United Kingdom considered the traditional principles concerning the implication of terms.

The second case is also a case about the implication of terms into a contract. This is a Hong Kong case about the application of the traditional principles concerning the implication of terms to a joint investment contract for the purchase and sale of uncompleted property in Hong Kong. Both the first and second cases show that in practice it is quite difficult to persuade the Court to imply a term into a contract.

The third case is a judicial review case in which TVB challenged the decision of the Communications Authority that TVB had infringed ss.13 and 14 of the Broadcasting Ordinance by imposing contractual restrictions on its artistes and singers with the purpose or effect of preventing, distorting or substantially restricting competition in the local TV market.

YUNG Lap-yan

Consequences of a Winding-up Order

What are the consequences resulting from a winding-up order being made against a Hong Kong company? This article highlights some of the immediate consequences in the context of a winding-up by the court.

The winding-up order

There is no winding-up until the court makes the order for winding-up. On the order being made, its effect will relate back to an earlier time which is deemed to be the time of the commencement of the winding-up by the court, that is, (a) the time of the presentation of the winding-up petition[1], or (b) the time of the passing of the members' resolution for voluntary winding-up where the company was already in a voluntary winding-up before conversion to winding-up by the court[2].

A winding-up order operates in favour of all the creditors and of all the contributories of the company as if made on the joint petition of a creditor and of a contributory[3]. On the making of a winding-up order, a copy of the order must forthwith be delivered to the Registrar of Companies for registration[4]. To warn persons dealing with a company which is in liquidation, every invoice, order for goods or business letter issued by or on behalf of the company or a liquidator, being a document on which the company's name appears, must contain a statement that the company is being wound up[5].

The winding-up order terminates the directors' powers and operates as notice discharging employees, except where the company's business is continued for its beneficial winding-up, the liquidator indicates that he would like them to remain in employment and they agree to do so[6]. The directors however retain certain residuary powers, e.g. to appeal against the making of the winding-up order[7].

[1] S.184(2) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) ("CWUMPO")
[2] S.184(1) of CWUMPO
[3] S.187 of CWUMPO
[4] S.185 of CWUMPO
[5] S.280 of CWUMPO. The conventional statement is "(in liquidation)" after the company's name.
[6] Goode, *Principles of Corporate Insolvency Law* (4th ed, 2011), at 5-24
[7] *Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105 at 1113

Appointment of provisional liquidators/liquidators

On the making of a winding-up order, if a provisional liquidator other than the Official Receiver has been appointed under s.193 of CWUMPO, he continues to act as the provisional liquidator under s.194(1)(aa) of CWUMPO until a liquidator is appointed. Otherwise, the Official Receiver becomes the provisional liquidator and continues to act as such under s.194(1)(a) of CWUMPO until a liquidator is appointed.

The provisional liquidator will summon the first meetings of creditors and contributories of the company to decide whether to apply to the court for the appointment of a liquidator and of a committee of inspection. The court may make any appointment[8].

The liquidator may exercise a wide range of powers under s.199 of CWUMPO, e.g. the power to carry on the company's business so far as may be necessary for its beneficial winding-up and to sell the company's property.

Where a winding-up order has been made or where a provisional liquidator has been appointed, the liquidator or the provisional liquidator has a duty to take into his custody or control all the property to which the company is or appears to be entitled[9]. The liquidator is to discharge the court's duties to collect the company's assets and to apply the assets in discharge of the company's liabilities[10], and to exercise the court's powers to require delivery or transfer of the company's property to the liquidator[11].

Void dispositions of company property

Section 182 of CWUMPO provides that any disposition of the company's property, including things in action and any transfer of shares or alteration in the status of the members of the company, made after the commencement of the winding-up is void, unless the court otherwise orders.

[8] S.194(1)(b), (c) and (d) and s.206(2) of CWUMPO
[9] S.197 of CWUMPO
[10] S.210(1) and s.226(b) of CWUMPO and r.66(1) of the Companies (Winding-up) Rules (Cap. 32H) ("CWUR")
[11] S.211 and s.226(c) of CWUMPO and r.67 of CWUR

The word "disposition" within s.182 is not defined but must be given a wide meaning which should include "not only any dealing in the company's tangible or intangible assets by sale, exchange, lease, charge, gift or loan, but also the conferment of a possessory or other lien on an asset and any other act which, in reducing or extinguishing the company's rights in an asset, transfers value to another person"[12]. Thus, s.182 may have the practical effect of paralyzing a company's trading.

Section 182 only applies to free assets to which the company is beneficially entitled as at the commencement of the winding-up and which can be realized for the benefit of creditors[13].

The court may make an order to authorise a disposition which would otherwise be void under s.182. The purpose of s.182 is to preserve the company's assets primarily for the benefit of the unsecured creditors and to ensure that there is no dissipation of assets after the presentation of a winding-up petition and before the making of a winding-up order[14].

Automatic stay of proceedings

Section 186 of CWUMPO provides that when a winding-up order has been made, or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose. Section 186 provides for an automatic stay of proceedings. "Action or proceeding" within s.186 includes distress, arbitration and criminal proceedings[15]. The rationale of this section is to protect the company's assets from being diminished in litigation and to ensure that creditors' rights are dealt with in accordance with the statutory scheme for distribution of assets.

Section 186 does not prevent a secured creditor or receiver from dealing with the assets covered by the security that has been taken into possession before the winding-up order is made. The section also does not prevent a secured creditor from appointing a receiver pursuant to its contractual right after a winding-up order has been made. However, any proceedings for taking possession of the secured assets from the liquidator or for enforcement of the security against the company would require leave pursuant to s.186. Leave would invariably be given to enable a secured creditor to enforce its security[16].

Stefan Lo and Ida Chan

[12] *Principles of Corporate Insolvency Law* (above), at 13-128
[13] *Re M W Lee and Sons Enterprises Ltd* [1999] 2 HKC 686 at 697; affirmed *Lee Tak Samuel v Lee Tak Wan* [1999] 4 HKC 12
[14] *Lee Tak Samuel v Lee Tak Wan* (above), at 16
[15] Tyler and Lo, *Butterworths Hong Kong Company Law (Winding Up and Miscellaneous Provisions) Handbook* (2014), at [186.03]
[16] Lo and Qu, *Law of Companies in Hong Kong* (2nd ed, 2015), at 20.080

Automatic Exchange of Financial Account Information in Tax Matters ("AEOI")

To meet the latest standard of the Organisation for Economic Co-operation and Development ("OECD") for AEOI, the Inland Revenue (Amendment) Bill 2016 (the "Bill") was introduced into the Legislative Council ("LegCo") in January 2016. The Bill seeks to amend the Inland Revenue Ordinance (Cap 112) ("IRO") in order to provide a legal framework for the implementation of the AEOI regime in Hong Kong.

The AEOI Regime in Hong Kong

Exchange of information for tax purposes between tax authorities of different jurisdictions serves to enhance tax transparency and to combat cross-border tax evasion.

At present, Hong Kong exchanges information with an overseas tax authority only upon request. In July 2014, OECD called on governments to collect from their financial institutions ("FIs") financial account information of overseas tax residents, and to exchange the information with the relevant jurisdictions on an annual basis (instead of upon request).

Under the AEOI regime, reporting FIs are required to identify reportable accounts held by tax residents of reportable jurisdictions by application of the due diligence procedures, and to collect and keep the required information concerning the reportable accounts. Reporting FIs should report the required information to the Inland Revenue Department (IRD") in a prescribed format. In respect of account holders who are tax residents of a reportable jurisdiction, IRD will annually exchange the required information of the account holders with the tax authority of the reportable jurisdiction.

Reporting FIs

Reporting FIs include depository institutions, custodial institutions, insurance companies and investment entities, unless they present a low risk of being used for evading tax and are excluded from reporting (e.g. governmental entities, international organizations, and central banks).

Reportable account

A reportable account is a financial account held by a tax resident with a reporting FI and identified as such under the due diligence procedures by the reporting FI as required under the AEOI regime.

Tax resident

In general, a tax resident in relation to a jurisdiction is an individual/entity who is subject to taxation as a resident in the jurisdiction. Separately, an entity is a tax resident in relation to a jurisdiction if it has effective management situated in the jurisdiction (e.g. the board of directors of the entity makes its decisions in the jurisdiction) and is not subject to taxation as a resident in any other jurisdiction.

Reportable jurisdiction

Reportable jurisdictions are overseas jurisdictions with which Hong Kong has signed comprehensive avoidance of double taxation agreement ("CDTA") or tax information exchange agreement ("TIEA"), both of which have been given effect in Hong Kong by way of orders made under s.49(1A) of the IRO. For the purpose of AEOI, IRD will sign a new Competent Authority Agreement ("CAA"), which sets out the modalities of transfer of information collected pursuant to the AEOI standard, with the tax authorities of CDTA/ TIEA partners.

Due diligence procedures

In order to collect and report the required information to IRD, reporting FIs are required to conduct the due diligence procedures laid down by OECD to identify tax residents and reportable accounts. Such procedures are set out as a schedule to the IRO. The schedule may be amended by the Secretary for Financial Services and the Treasury by notice in the Gazette, subject to negative vetting by the LegCo.

Required information

Information in relation to the reportable accounts collected by reporting FIs includes the name, address, jurisdiction of residence, taxpayer identification number, and date and place of birth of the reportable person, as well as the account number and balance of the reportable account.

Collecting the required information

Under the due diligence procedures, a reporting FI must obtain a self-certification (i.e. a declaration) from its account holder that allows the reporting FI to identify and establish the tax residence of the account holder. If the self-certification establishes that the account holder is a tax resident of a reportable jurisdiction, the reporting FI must treat the account as a reportable account and shall obtain the required information from the account holder for the purpose of AEOI.

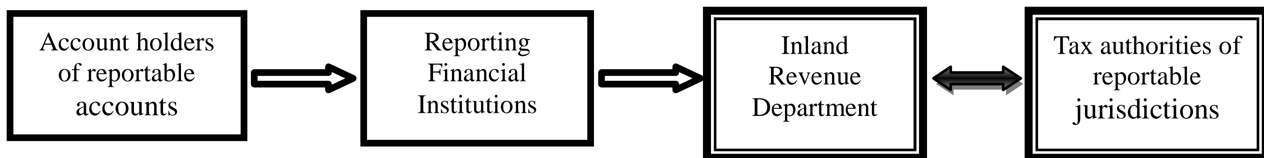
Reporting and keeping the required information

A reporting FI is required to furnish to IRD a return containing the required information of reportable accounts maintained by the reporting FI during a reporting period as specified by IRD. The return should be furnished in such manner and in the form of an electronic record as specified by IRD. A nil return is required if the reporting FI maintains no reportable accounts within the specified period. Further, sufficient records to enable the correctness and accuracy of the return furnished must be kept by the reporting FI for six years from the date on which the return is furnished.

Exchange of the required information

IRD will exchange the required information with tax authorities of the relevant reportable jurisdictions on an annual basis. The diagram below briefly sets out how the required information flows under the AEOI regime.

Diagram: Information flow under the AEOI regime



Engaging service provider

A reporting FI may engage a service provider to carry out its due diligence and reporting obligations. The service provider is liable for its failure to carry out such obligations. The reporting FI, however, is not relieved from the obligations and is also liable for such failure.

Powers

For effective implementation of the AEOI regime, IRD will be empowered to have access, on prior notice, to a reporting FI or its service provider's business premises for checking compliance with the due diligence and reporting obligations. If authorized by the Magistrate by warrant, IRD may enter and search, without prior notice, any place suspected of containing evidence for assessing the liability of an FI or its service provider under the IRO and the liability of any other person for tax of a reportable jurisdiction.

Sanctions

Under the Bill, criminal sanction is imposed on FIs, their employees, service providers, directors or other officers concerned in the management of a corporation in respect of non-compliance with the due diligence and reporting obligations. Criminal sanction is also imposed on an account holder who makes misleading, false or incorrect self-certification in a material particular.

Commencement of AEOI

It is expected that the first information exchange under the AEOI regime in Hong Kong will take place by the end of 2018 if the Bill is enacted this year.

Boyce Yung and Quinnci Wong

Assignment of Contractual Rights and Liabilities

Introduction

According to the Oxford Dictionary of English, an "assignment" is "*an act of making a legal transfer of a right or liability*". However, in law, the word "assignment" has a more technical meaning. It refers to "*a transfer of a right by a person entitled to it (the "assignor") to a third party (the "assignee")* ***without the consent*** *of the other party liable for the provision of the right (the "debtor")*". Yet, the law does **not** recognize the transfer of a *liability* from an assignor to an assignee without the consent of the debtor. A transfer of liability has to be done by way of "novation". This article outlines the basic principles of "assignment" and "novation".

For ease of reference, the expressions "debt" and "debtor" are used in this article. However, the principles mentioned here are **not** restricted to cases concerning the payment of money. They apply to a transfer of all types of benefits and rights under a contract.

Assignment

In Hong Kong, s.9 of the Law Amendment and Reform (Consolidation) Ordinance (Cap 23) ("LARCO") provides for the making of statutory

assignment. It is the most commonly used form of assignment of contractual benefits. According to s.9 of LARCO, a statutory assignment has to be (a) absolute; (b) in writing by the assignor; and (c) with express notice in writing given to the debtor. Each of these elements is discussed below.

Absolute

An absolute assignment means that it must be an assignment of the whole and not part of the debt. For example, if A owes B $300, an absolute assignment will require B to assign his benefit of receiving the full $300 from A to an assignee. If B purports to assign his right to receive repayment of only part of the debt, say $200, to an assignee, it is not an absolute assignment. On the other hand, if A owes B $300 and A has already repaid B $100, it is still an absolute assignment if B assigns to an assignee his right to receive the remaining $200. This rule protects the debtor so that he can only be sued by one party (i.e. either B or the assignee) at any one time.

In writing by the assignor

The assignment must be in writing by the assignor but no particular form of words has to be used to effect an assignment.

Express notice given to debtor

Either the assignor or the assignee may give a written notice to the debtor (or the debtor's agent who has the authority to receive the notice) about an assignment under s.9 of LARCO ("Notice"). Again, no particular form of words is needed but the Notice must clearly and unconditionally inform the debtor to pay or provide the benefit to the assignee in the assignee's own capacity and **not** as the assignor's agent. There is a Hong Kong case which suggests that even a service of a writ can constitute a sufficient Notice to the debtor[17]. The Notice rule is strict and is still applicable when the debtor cannot read. It is not an excuse for failing to give a Notice that the debtor already has knowledge about the assignment or the contents of the assignment have already been read over and explained to the debtor[18].

There is no requirement that Notice be given to the debtor at the date of the assignment. A Notice is effective so long as it is given before the assignee enforces his benefits or rights against the debtor. A Notice may also be given after the death of the assignor or the assignee by his executor or administrator[19]. As a statutory assignment is only completed when the Notice is given, in a case where the same benefit is assigned twice by the assignor, the first assignee who gives the Notice will have priority, unless he knew of the earlier assignment when he took his assignment. Hence, it is important for an assignee to ensure that a Notice is issued to the relevant debtor as soon as possible.

Title Defects

An assignee takes an assignment subject to "equities". The "equities" refer to (a) any defects in the assignor's title; or (b) claims which the debtor has against the assignor, regardless of whether the assignee knew the existence of these defects and claims when he took his assignment. The reason for this rule is that the assignee should not be in a better position than the assignor. For example, if a debtor has successfully established that his contract with an assignor is illegal (and hence void), an assignee of the contract will not be able to enforce the assigned right against the debtor, even if the assignment itself is valid (i.e. it has fulfilled all the conditions of a statutory assignment). Depending on the exact terms and conditions of the assignment between the assignor and the assignee, the assignee may have a claim against the assignor.

Consideration

It is well established that consideration is not required for a statutory assignment to be valid[20].

Non-assignable Rights

Parties to a contract can expressly provide that the rights arising under the contract shall not be assigned unless with the consent of other party[21]. In addition, the benefit of a contract cannot be assigned if it is clear that a debtor is willing to perform only in favour of an assignor and it would be unjust to force him to perform for another person, such as an assignee. These contracts are commonly known as "personal contracts". Examples of personal contracts include employment contracts and contracts involving personal confidence.

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[17] *Linfield Ltd v Taoho Design Architects Ltd & Others* HCCT 68/2001

[18] *Hockley and Papworth v Goldstein* (1920) 90 L.J.K.B. 111.

[19] *Walker v Bradford Old Bank* (1884) 12 Q.B.D. 511

[20] *Harding v Harding* (1886) 17 QBD 442

[21] *Hendry v Chartsearch Ltd* [1998] CLC 1382

Equitable Assignment

An assignment, which fails to be statutory because of (a) not giving the Notice; or (b) not being absolute, may take effect as an equitable assignment. The principles on title defects and non-assignable rights above apply to an equitable assignment. There is no unified view whether a consideration is required for an equitable assignment.

Novation

From a strict legal sense, a contractual liability cannot be "assigned" and "novation" is required. Novation refers to the process where the original contracting parties agree that the original obligor under a contract is effectively replaced by another person (the "new obligor"). A novation therefore requires the consent of the original contracting parties and the new obligor. In law, the effect of novation is **not** to transfer a contractual liability. Instead, it extinguishes an original contract and replaces it by a new one. Thus, if A is under a contract to do something for B and A, with the consent of B, novates its contract to C, B is bound by to accept C's act as complete performance so long as C fulfills all that A has agreed to do. For any non-performance or breach, B can only sue C, but not A. Fresh consideration is required for a valid novation.

Patrick Yung

Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another [2015] 3 WLR 1843

In this case the Supreme Court of the United Kingdom clarified the law relating to implied terms in contracts. In particular it considered Lord Hoffmann's suggestion in *Attorney General of Belize v Belize Telecom Ltd*[22] that the process of implying terms into a contract is part of the exercise of the construction, or interpretation, of the contract.

Facts

The defendants ("D") were the landlords and Marks and Spencer ("P") was the tenant under four sub-leases (each a "Lease") of different floors in The Point, an office building in London. The issue at hand for each Lease was whether P could recover rent it had paid in advance relating to a period after its Lease had terminated.

The Lease had been granted for a term expiring on 2 February 2018. Rent was payable quarterly in advance on the usual quarter days. The Lease contained a break clause allowing P to terminate the Lease on 24 January 2012 by giving D six months' prior written notice, provided that, on the break date, there were no arrears of rent and that P had paid D a break premium equivalent to one year's rent.

On 7 July 2011, P served a break notice on D to terminate the Lease on 24 January 2012. In December 2011, P paid D the rent due up to 24 March 2012. P then paid the break premium on 18 January 2012. Accordingly, the break notice was effective and the Lease determined on 24 January 2012. P then demanded repayment of the apportioned rent for the period from 24 January to 24 March 2012. There was no provision in the Lease which expressly obliged D to repay the apportioned rent but P contended that such an obligation should be implied into the Lease. P's claim was successful in the High Court but the Court of Appeal disagreed. P then appealed to the Supreme Court.

Decision

The resolution of the issue turned on the interpretation of the Lease, and it required the Supreme Court to consider the principles by reference to which a term is to be implied into a contract.

The Supreme Court considered various cases on implied terms. In particular it approved the approach taken by Lord Simon in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*[23]:

> "*for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be*

[22] [2009] 1 WLR 1988

[23] (1977) 180 CLR 266 at 282-283. Details of the case were provided in the article "Implication of Terms in a Contract" in CU Review Winter 2014 Issue.

necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that it 'goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

To these principles, the Supreme Court added the following observations:

(1) Implication of a term was not critically dependent on proof of the parties' actual intention. Rather, one was concerned with what notional reasonable people, in the position of the parties at the time at which they were contracting, would have agreed.

(2) It was a necessary but not sufficient condition for implying a term that it appeared fair or that the court considered that the parties would have agreed to it if it had been suggested to them.

(3) It is questionable whether Lord Simon's requirement of reasonableness and equitableness adds anything; if a term satisfies the other requirements, it is usually reasonable and equitable.

(4) Lord Simon's requirements for business necessity and obviousness are alternatives, although in practice it would be rare if only one of those two requirements were satisfied. Lord Simon's requirements are otherwise cumulative.

(5) If one approaches the issue by reference to the officious bystander, it is "vital to formulate the question to be posed by [him] with the utmost care".

(6) Lord Simon's requirement for business efficacy is not for absolute necessity. A term can only be implied if, without the term, the contract would lack commercial or practical coherence.

The Supreme Court then analyzed *Belize Telecom Ltd* and Lord Hoffmann's comment that "There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?" This comment suggests that the process of implying terms is part of the exercise of the construction, or interpretation, of a contract. The Supreme Court accepted that both construing the words which the parties have used in their contract and implying terms into the contract involve determining the scope and meaning of the contract and so are part of its construction or interpretation in a broad sense. However, construing the words used and implying additional words are different processes governed by different rules. In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered[24].

Belize Telecom Ltd has also been interpreted by some as relaxing the traditional restrictive approach to implication of terms on the basis that reasonableness is sufficient. However, the Supreme Court held that *Belize Telecom Ltd* should not be interpreted in this way, affirming that the case had not diluted the requirements which have to be satisfied before a term will be implied.

In the case at hand neither the common law nor statute apportioned rent in advance on a time basis. Against this background, the Supreme Court held that it would be wrong, save in a very clear case, to attribute to a landlord and tenant who had entered into a full and professionally drafted lease an intention that, on the exercise of a break clause, the tenant should recover an apportioned part of the rent paid in advance. Implication was not necessary to make the lease work or to avoid absurdity. Accordingly, the Supreme Court dismissed P's appeal.

Josephine Ho

Kwang Qian Wen Marie v Kwan Kit Yuk [2016] 1 HKLRD 891

Facts

P and D orally agreed (the "First Agreement") to purchase an uncompleted unit in a residential development in Causeway Bay (the "Property") in equal shares with a view to sub-selling the Property prior to completion. They also agreed to each contribute 50% of the deposit and part payment required for the Property before the completion date (the "Pre-completion Payment"), and that the Property

[24] The Hong Kong's Court of First Instance in *Yifung Developments Limited v Liu Chi Keung Ricky and Others* [2016] HKEC 934 followed the approach in *Marks and Spencer plc*.

would, for the purpose of the provisional and formal sale and purchase agreements, be purchased in D's name with D holding it on trust for P and D in equal shares. D would be responsible for managing all affairs regarding the Property and finding a sub-purchaser. Pursuant to the First Agreement, D entered into sale and purchase agreements with the developer. A few days later, upon P's request, D executed a declaration of trust (the "Declaration of Trust") that she held the Property on trust for herself and P, as tenants in common in equal shares.

Over the next two years, a sub-purchaser could not be found by either P or D. As the completion date was drawing near, the parties discussed various options on the assumption that no sub-sale of the Property could take place. On the day of completion, without prior notice to P, D proceeded to complete the purchase of the Property on her own and refused to return P's contribution. Based on an implied term in the First Agreement, P brought an action against D for the return of her contribution.

Implied term

Under common law, to qualify as an implied term, the term:

(i) must be reasonable and equitable;

(ii) must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;

(iii) must be so obvious that "it goes without saying";

(iv) must be capable of clear expression; and

(v) must not contradict any express term of the contract.[25]

P's Implied Term

P's counsel identified four possible outcomes of a sub-sale not materializing before completion, namely, (a) the parties not completing thereby forfeiting the Pre-completion Payment to the developer; (b) the parties selling the Property at a loss prior to completion; (c) one party taking over the Property alone upon completion; or (d) both parties completing the purchase together, each holding 50% of the beneficial interest in the Property. P pleaded that outcome (a) and (b) were what both parties would not have agreed to whereas outcome (c) was what a reasonable bystander would regard as the parties' intention to govern their relationship. Outcome (c) entailed the term which P sought to imply into the First Agreement, that is, if the Property could not be sub-sold before completion, then one party, to be agreed, would complete the purchase on her own and return the other's contribution towards the Pre-completion Payment.

P further claimed that the parties subsequently reached a second agreement under which D would complete the purchase alone and become the sole beneficial owner of the Property and would return to P her contribution to the Pre-completion Payment (the "Second Agreement").

The Court regarded this investment as a joint venture to speculate in the property market and the common intention of the parties was to sub-sell the Property hopefully at a profit. It was obvious that P never intended to hold the Property jointly with D on a long-term basis. The Court also agreed that there could be more than one possible outcome if there was no sub-sale with outcome (c) being one of the possible outcomes. However, the Court took the view that the parties always had a choice not to sell especially if not at a profit or even at a loss. If no sub-purchaser could be found, it did not necessarily mean that one of the parties would take over the Property alone. The parties could have jointly completed the purchase in order to buy more time to procure a sub-sale in the future at a profit. The First Agreement did not envisage only outcome (c) and might well be effective even without P's Implied Term. In effect, the Court considered that P's Implied Term was neither necessary as to give business efficacy to the First Agreement nor so obvious that "it goes without saying". Accordingly, P's Implied Term cannot be implied in the First Agreement.

D's Implied Term

D argued that there was a partnership agreement between the parties (the "Partnership Agreement") as evidenced by the First Agreement, the Declaration of Trust and the sale and purchase agreements. It was a term of the Partnership Agreement that if a sub-sale did not materialize, the parties had to provide finance for completion in the sole name of D who would hold a 50% interest in the Property in trust for P. D pleaded that it was an implied term of the Partnership Agreement that upon any party breaching or withdrawing from the Partnership Agreement without the consent of the other, the deposit would not be

[25] *Kensland Realty Ltd v Whale View Investment Ltd* [2001] 4 HKCFAR 381

returnable since it could be inferred from the forfeiture clause commonly found in the sale and purchase agreements that the parties intended such implied term, which was necessary to give the Partnership Agreement business efficacy.

The Court accepted that it was common for conveyancing contracts between the buyer and the seller to contain a forfeiture clause. However, there was hardly any necessity for transposing such forfeiture clause into a private agreement for a joint investment. Although the Court did not expressly deal with the existence of the Partnership Agreement, it considered that D's Implied Term was not reasonable or equitable, nor so obvious as to go without saying since an innocent party could always sue for damages for breach of contract. D's Implied Term cannot be implied either.

D initially denied the existence of the Second Agreement but subsequently conceded that she had reached an agreement with P for herself to take over the Property alone but it was subject to the preconditions that the trust arrangement would be revoked and that P would pay for all costs pertaining to the revocation of trust.

Based on the evidence of the case, the Court was satisfied that the parties did reach the Second Agreement and held that D was in breach of the Second Agreement in failing to return P's contribution.

Fiona Lai

Television Broadcasts Ltd v Communications Authority [2016] 2 HKLRD 41

Facts

In 2013, the Communications Authority ("CA") issued a decision against Television Broadcasts Limited ("TVB"), the holder of a domestic free television programme service licence under the Broadcasting Ordinance (Cap. 562) ("BO"), finding that TVB had infringed ss.13(1) and 14(1) of the BO[26] ("ss.13-14") by imposing contractual restrictions and policies on its artistes and singers with the purpose and effect of preventing, distorting or substantially restricting competition in the local television programme service ("TV") market. CA directed TVB to take remedial actions by abandoning all restrictions and policies in question, and imposed a financial penalty of $900,000. TVB applied for judicial review ("JR") of the decision and the direction (collectively, "Decision"). It challenged the compatibility of the process in the BO with the Hong Kong Bill of Rights ("HKBOR") and the contents of the Decision.

TVB also appealed to the Chief Executive in Council ("CEIC") under s.34 of the BO ("s.34")[27] against the Decision. CEIC suspended the appeal pending determination of the JR.

Judgment of the Court of First Instance ("CFI")

CFI held that the Decision should be quashed for infringement of Article 10 of HKBOR ("Art.10"), and alternatively, the Decision should be partially quashed for the disproportionate remedial measures adopted by CA.

Compatibility with HKBOR

Art.10 provides that:

> *All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law…*

CFI considered Art.10 was engaged as the issue of

[26] Ss.13-14 respectively prohibit a licensee from engaging in anti-competitive conduct and abusing its dominant position, which have the purpose or effect of preventing, distorting or substantially restricting competition in a television programme service market. Ss.13-14 had been repealed and substituted by the relevant provisions in the Competition Ordinance (Cap. 619) since 14 December 2015.

[27] Under s.34 of the BO, a licensee aggrieved by (a) a decision of CA made under the BO or the Broadcasting (Miscellaneous Provisions) Ordinance (Cap. 391); (b) a direction, order, or determination under the BO; or (c) any Code of Practice may appeal by way of petition to CEIC.

whether TVB had breached ss.13-14 involved a determination of TVB's "rights and obligations in a suit at law", which should be subject to sufficient control by a judicial body.

It was held that having regard to CA's policy-making and advisory roles and numerous statutory functions, CA was not an independent and impartial tribunal for the purpose of Art.10. To vest the determination of breach of ss.13-14, which embodied questions as to the state of competition in the market, in CA whose mandate was to promote competition in the broadcasting market and whose function was to advise the Government on related policies would give rise to a reasonable apprehension of bias in the mind of a fair-minded and informed observer. There was legitimate doubt whether CA could make a decision on ss.13-14 solely on the legal and factual merits of the case with the detachment and objectivity required by Art.10, untainted by policy considerations and views formed in performing its other functions.

Availability of an appeal under s.34 to CEIC could not cure the lack of independence and impartiality of CA, and the appeal mechanism did not comply with Art.10. Section 64(4) of the Interpretation and General Clauses Ordinance (Cap. 1) prohibits CEIC to act in a judicial or quasi-judicial capacity when considering an appeal. Given the nature of an appeal under s.34 was a review based not only on law and evidence but also on expediency of the Decision, an appeal to CEIC did not offer the requisite independence and impartiality of a tribunal.

Another curative measure to render the entire process compliant was that the decision-maker being subject to subsequent control by a judicial body that had full jurisdiction and provided the protection of Art.10. Full jurisdiction did not necessarily mean jurisdiction to re-examine the merits of the case in full, but jurisdiction to deal with the case as the nature of the decision required. However, the Decision was not one of policy or expedience. It was a finding of legal liability and a decision on sanction that involved questions of fact. The court upon JR in this case was not a court of full jurisdiction for purposes of the curative principle. The fact that TVB could apply for JR of the Decision or CEIC's decision on appeal did not make the process in the BO compliant with Art.10.

The Decision had to be set aside for infringement of Art.10.

CFI considered that Article 11 of HKBOR ("Art.11") was not engaged. The Decision did not involve the determination of a criminal charge within the meaning of Art.11, having regard to (a) the classification of the offence under domestic law; (b) the nature of the offence; and (c) the nature and severity of the potential sanction. Even if Art.11 was engaged, CFI took the view that: the legislature had intended the standard of proof to be proof on a balance of probabilities, as CA rightly adopted in the Decision; and TVB's argument based on Art.11(4), i.e. the right of a convicted person to have his conviction and sentence reviewed by a higher tribunal according to law, had been dealt with in the analysis on Art.10.

Proportionality of remedial measures

CFI applied the proportionality principles that remedial measures must (a) be effective to achieve the legitimate aim in question; (b) be no more onerous than required to achieve that aim; (c) be the least onerous if there was a choice of equally effective measures; and (d) not produce adverse effects that were disproportionate to the aim pursued. Requiring TVB to abandon all relevant clauses and policies in all current contracts with artistes and singers was more than necessary to end the infringement. CA erred in law and the relevant part of the Decision should be quashed.

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Advice should be sought from CU before applying the information in the CU Review to particular circumstances.