Commercial Law Review – Summer 2019

The Commercial Unit, Civil Division
The Department of Justice

What's inside

Editorial

We feature three articles in this edition.

Most people in Hong Kong have received unsolicited P2P calls offering to sell different kinds of goods or services to them. The first article talks about the Government's proposal to regulate such calls by amending the Unsolicited Electronic Message Ordinance.

There have been numerous complaints against beauty parlours and fitness centres in relation to the use of aggressive tactics, forcing consumers into making purchases with substantial prepayments. The second article talks about the Government's proposal to establish a cooling-off regime for beauty and fitness services consumer contracts.

The third article discusses the major amendments to the Companies Ordinance introduced by the Companies (Amendment) (No. 2) Ordinance 2018. Many of the amendments seek to reduce compliance costs of companies and to cater for the needs of small and medium-sized enterprises.

We also feature three case reports in this edition. The first case is about shareholders' right to remove a director from office under s.157B of the old Companies Ordinance, Cap. 32 (now provided in ss. 462 and 463 of the new Companies Ordinance, Cap. 622). In this case, the CFI expressed doubts whether the statutory right to remove a director under s.157B can be circumvented by an unqualified agreement between shareholders.

The second case is about whether a document entitled "Settlement Agreement" and expressed to be made "in full and final settlement" of a dispute, signed by the parties to the dispute at the end of a mediation session and witnessed by the mediator, was legally binding.

In the third case, the Court of Appeal considered the application of the common law principle that the lawfulness of a decision made by a meeting of members or directors of a company cannot be questioned if the only facts alleged to make it unlawful is a mere informality and irregularity of the meeting.

YUNG Lap-yan

Regulation of Person-to-Person Telemarketing Calls

Background

"Person-to-person telemarketing calls" ("P2P calls") generally refer to telephone calls involving interactive communications that are used as a marketing tool by trades to promote goods or services to customers/potential customers[1].

P2P calls are common in Hong Kong. A consultancy study commissioned by the Government in 2015 showed that 94% of the 1004 respondents interviewed had received P2P calls before and 35% were said to have received at least 6 P2P calls in a week. It was estimated that around 7,000 employees in Hong Kong were directly or indirectly engaged in making P2P calls[2].

Current Regulatory Regime

The Unsolicited Electronic Message Ordinance (Cap. 593) (the "UEMO") regulates the sending of commercial electronic messages such as faxes, messages sent via short message services and pre-recorded telephone calls. P2P calls which do not have any pre-recorded or synthesized (machine-generated or simulated) element, or with pre-recorded or synthesized element activated in response to information communicated by the caller, are exempted from the application of the UEMO (s.7 of and Schedule 1 to the UEMO). Exemption was provided to P2P calls when the UEMO was introduced to allow limited forms of electronic marketing activities and to address the concerns of small and medium enterprises[3].

The use of personal data in direct marketing is regulated by Part 6A of the Personal Data (Privacy) Ordinance (Cap. 486) (the "PD(P)O"), which, inter alia, prohibits the use of personal data in direct marketing without prior consent of the data subject (s.35E of the PD(P)O). "Direct marketing" in this context includes the offering, or advertising of the availability, of goods, facilities or services through making telephone calls to specific persons[4].

As for non-statutory measures, since 2011, the respective trade associations of the four sectors which were found to have made most of the P2P calls (namely the finance, insurance, telecommunications and call centres sectors) have promulgated codes of practice on P2P calls for their members to follow. The codes of practice cover, inter alia, the hours of calling, the need to reveal the identity of telemarketers and a pledge to honour un-subscription requests[5].

Proposed Legislative Framework

Following a public consultation in mid-2017 and having considered the views of different stakeholders, the Government proposes to strengthen regulation of P2P calls by legislative means and other non-statutory measures (such as enhancement of call-filtering smartphone applications)[6]. It is proposed that the existing UEMO may be expanded to regulate unsolicited P2P calls[7]. Some salient features of the proposal are highlighted below.

Currently, the UEMO applies to "commercial electronic message" which has a "Hong Kong link". The definition of "commercial electronic message" in s.2(1) of the UEMO is broadly based on whether or not the electronic message has a commercial purpose (such as offering to supply or provide, or advertising or promoting, goods, services, facilities, land, etc.) and is in the furtherance of any business. The Government proposes regulating P2P calls that are of "commercial" nature and adopting a similar definition.

---

1 The Administration's paper on "Major Parameters of Proposed Legislative Framework for Strengthening Regulation of Person-to-Person Telemarketing Calls"
LC Paper No. CB (1)873/18-19(01)) (available at https://www.legco.gov.hk/yr18-19/english/panels/itb/papers/citb20190416cb1-873-1-e.pdf), para. 2

2 See the Administration's paper on "Report on the Findings of the Survey on Person-to-Person Telemarketing Calls"
LC paper No. CB(4)816/15(05)) (available at https://www.legco.gov.hk/yr15-16/english/panels/itb/papers/itb20160411cb4-816-5-e.pdf)

3 Hansard, 12 July 2006 at p. 9509

4 See the definitions of "direct marketing" and "direct marketing means" in s.35A(1) of the PD(P)O.

5 See the "Updated Background Brief on Review on Regulation of Person-to-Person Telemarketing Calls"
LC Paper No. CB(1)873/18-19(02)) (available at https://www.legco.gov.hk/yr18-19/english/panels/itb/papers/citb20190416cb1-873-2-e.pdf)

6 See the Administration's paper on "Report on the Public Consultation on Strengthening the Regulation of Person-to-Person Telemarketing Calls"
LC Paper No. CB(4)835/17-18(03)) (available at https://www.legco.gov.hk/yr17-18/english/panels/itb/papers/itb20180409cb4-835-3-e.pdf)

7 More details may be found in the Administration's paper on "Major Parameters of Proposed Legislative Framework for Strengthening Regulation of Person-to-Person Telemarketing Calls" (see fn. 1 above)

Under s.3 of the UEMO, "Hong Kong link" covers, inter alia, messages sent by a person physically present in Hong Kong or a Hong Kong company, and messages sent to an electronic address the registered user of which is a person physically present in Hong Kong or an organization carrying on business in Hong Kong. The Government proposes that the concept of "Hong Kong link" should be adopted to define the scope of P2P calls to be regulated under the expanded UEMO.

At present, the Communications Authority has established 3 do-not-call registers for faxes, short messages and pre-recorded telephone messages respectively under s.31 of the UEMO. Sending commercial electronic messages to electronic addresses listed in these registers is prohibited under s.11 of the UEMO. It is proposed that a similar register for P2P calls will be established and that making P2P calls to phone numbers so registered will be prohibited.

The Government also proposes to suitably adapt the existing control measures on sending commercial electronic messages in Part 2 of the UEMO for P2P calls. The proposed requirements for P2P calls include disclosing calling line identification, providing accurate caller information in the calls, and ceasing to call the telephone numbers concerned within 10 working days after an unsubscribe request has been made.

It is proposed that the enforcement mechanism under Part 5 of the UEMO currently applies to unsolicited electronic messages will be similarly adopted for regulating P2P calls. Currently, if the enforcement authority forms an opinion that a person is contravening any provision of Part 2 (*rules about sending commercial electronic messages*) of the UEMO or has contravened any such provision in circumstances that make it likely that the contravention will continue or be repeated, it will issue an enforcement notice to the person, directing specified steps to be taken to remedy the contravention. Failure to comply with an enforcement notice will be an offence.

The functions of the existing Unsolicited Electronic Messages (Enforcement Notices) Appeal Board established under s.47 of the UEMO are proposed to be expanded so that it will also handle appeals against enforcement notices in respect of P2P calls in addition to those relating to unsolicited electronic messages.

Maggie Chan

Legislative Proposal to establish a Cooling-off Regime

Background

The Government recently completed a public consultation exercise on its proposal to implement a statutory cooling-off period for beauty and fitness services consumer contracts. Cooling-off period refers to the period of time following a purchase of services within which a consumer may cancel or withdraw from the contract at little or no costs.

In 2012, the Government amended the Trade Descriptions Ordinance (Cap. 362) to prohibit various unfair trade practices, including aggressive commercial practices ("ACP"). Although ACP is being prohibited, there have been numerous complaints against beauty parlours and fitness centres in relation to the use of aggressive tactics, forcing consumers into making purchases with substantial pre-payments. Some traders even targeted the disadvantaged in the community and pressurised them to enter into contracts which were not even comprehensible to them.

Under the common law, a consumer does not have the right to "cancel" a contract unless one of the "vitiating factors" (such as misrepresentation, mistake, duress or undue influence) which renders a contract void or voidable is proved. In the event that aggressive tactics have allegedly been deployed to sell the services, the consumer may avoid a contract on the ground of "duress" upon proof that the trader has exerted illegitimate pressure to coerce him or her to enter into the contract.[8] Alternatively, a declaration may be sought from the Court to rescind a contract under the Unconscionable Contracts Ordinance (Cap. 458) ("UCO") if the circumstances upon which a

[8] *Chitty on Contracts – Volume 1: General Principles* (33rd ed., 2018), para. 8-005

contract was concluded were unconscionable within the meaning of the UCO.[9] However, unless the parties are able to settle the case, the consumer has to go through a costly litigation process.

In light of the seriousness of ACP complaints and widespread public outcry, the Government proposes to establish a statutory cooling-off regime in respect of beauty and fitness consumer contracts with a view to providing additional protection for consumers. Details of the Government proposal for public consultation are summarized in the ensuing paragraphs.

Scope of Application

(1) Beauty services

Statutory cooling-off period is proposed to target beauty parlours that offer a variety of beauty services, including, among others, various procedures of the face or body for beautifying purpose, hair-removal and cosmetic surgery. Exemptions will be provided to services provided by or in public hospitals/clinics, facilities operated by the Government, schools and education institutions, charitable organisations and clubhouses in hotels and residential properties, as they are not commonly associated with ACP.

(2) Fitness services

Fitness centres equipped with exercise machines will also be required to provide cooling-off rights with respect to the provision of their facilities or fitness services. In other words, the cooling-off regime will not apply to establishments without exercise machines, such as ballet schools, dance studios and Tai Chi studios, as these establishments are considered to be rarely involved in ACP. Similar to beauty services, further exemptions will be granted to the establishments set out in the preceding paragraph.

(3) Monetary threshold

Statistics reveal that over 90% of ACP complaints involved beauty and fitness services contracts that were worth more than $3,000. With a view to curbing these ACP complaints while minimizing disruption to other small-value transactions, it is proposed that cooling-off rights only apply to a beauty or fitness services contract under which the consumer prepays all or part of the services and the total potential payment obligation is $3,000 or above.

Operational features of the cooling-off regime

(1) Cooling-off and refund periods

A consumer will be allowed to cancel a relevant contract within the cooling-off period, and thereafter a trader shall make a refund to the consumer within the refund period. The Government proposed the following two options in the public consultation:

(a) a 3-working-day cooling-off period with a 7-working-day refund period; or

(b) a 7-calendar-day cooling-off period with a 14-calendar-day refund period.

(2) Traders to provide specified information

A trader will be required to inform consumers of their cooling-off rights and to provide consumers with the information to be specified in the legislation, including the trader's name, its business address and other contact details to enable consumers to send the cancellation notice. If a trader fails to do so, the cooling-off period would be extended up to a maximum of 3 months after the contract is concluded.

(3) No curtailment of cooling-off right

In order to guard against unscrupulous traders using various tactics to induce, mislead, or pressurise consumers into waiving or restricting the cooling-off right, the proposed legislation will provide that any waiver, restriction or modification of the statutory cooling-off right by mutual agreement between a consumer and a trader would not have any legal effect.

[9] See *Lau Ying Wai v Emperor Regency International Limited* DCCJ 1600/2013, in which a consumer who entered into a "timeshare" contract (under which the consumer would be entitled to the right to occupy and use overseas holiday resorts for specified periods upon payment of a membership fee) under persistent persuasion by the staff of a trader successfully sought a declaration that the contract be rescinded, on the ground that it was unconscionable under the UCO.

(4) Charges for services consumed

Traders will be allowed to accept payments and supply services during the cooling-off period. If a consumer has received any services prior to contract cancellation, the trader may deduct a charge for such services on a pro-rata basis.

(5) Administrative fee

If a consumer uses non-cash means to effect payment, such as credit cards or EPS, the trader is generally required to pay a fee to the payment service provider. In order to mitigate the trader's costs in arranging cancellation, the trader will be allowed to deduct an administrative fee in arranging refund for a contract if the payment by the consumer was effected by non-cash means, to be capped at 3% of the transaction amount, or 5% if the payment involved an instalment payment plan arranged by the payment service provider. No administrative fee shall be deducted for payments settled by cash.

(6) Redress mechanism

If a trader fails to make a refund upon contract cancellation, consumers will be encouraged to apply to the payment service provider for refund and to attempt alternative dispute resolution through the Consumer Council. Consumers will also be entitled to institute a private action against the trader to recover their loss.

Moreover, complaints may be lodged with the Customs and Excise Department, which will be empowered to conduct investigations and issue enforcement notices to direct traders to remedy non-compliance under the cooling-off regime. If a trader is dissatisfied with the enforcement notice, it may appeal to the Administrative Appeals Board. Contravention of an enforcement notice will be a criminal offence. Offenders will be liable to a fine on conviction.

Beverly Yan and Daniel Yan

Recent Amendments to the Companies Ordinance

Introduction

The new Companies Ordinance ("CO") was enacted in July 2012. Based on the Companies Registry's operational experience since the commencement of the new CO in March 2014 and on feedback from stakeholders, amendments to the CO have been introduced by the Companies (Amendment) (No. 2) Ordinance 2018 (the "Amendment Ordinance") to improve the clarity and operation of certain provisions in the CO, to incorporate new developments and to further facilitate business in Hong Kong. Major amendments include: expanding the types of companies eligible for the reporting exemption, updating relevant accounting-related provisions to reflect the latest accounting standards, and providing for miscellaneous matters in relation to various administrative, procedural and technical requirements regulating local companies and non-Hong Kong companies. Many of the amendments seek to reduce compliance costs of companies and to cater for the needs of small and medium-sized enterprises ("SMEs").

This article highlights some of the key changes introduced by the Amendment Ordinance.

Expanding the types of companies eligible for reporting exemption

Under the CO, private companies or companies limited by guarantee, and holding companies of a group of private companies or a group of companies limited by guarantee, that satisfy the specified qualifying criteria are referred to as companies falling within the reporting exemption[10]. Other private companies (not being a member of a group of companies) may also be eligible for the reporting exemption if all of their members agree in writing. Companies that fall within the reporting exemption can prepare simplified financial statements and are subject to less stringent requirements for the preparation of auditors' reports and directors' reports.

The Amendment Ordinance has introduced amendments to facilitate enterprises, mainly SMEs in the group context, in taking advantage of the reporting exemption. Provided that the specified qualifying criteria are satisfied, the following categories of

[10] CO ss.359-366 and Sch.3. However, certain types of companies are specifically excluded from eligibility for the reporting exemption.

holding companies can now also benefit from the reporting exemption in respect of the holding companies' consolidated financial statements for the group:

(a) the holding company of a mixed group[11] (i.e. a group of companies comprising one or more small private companies/eligible private companies and one or more small guarantee companies); and

(b) the holding company of a group of small private companies, a group of eligible private companies, a group of small guarantee companies or a mixed group, that includes non-Hong Kong subsidiaries.

The qualifying criteria for groups with non-Hong Kong subsidiaries are largely the same as the existing criteria for groups consisting solely of Hong Kong subsidiaries. The qualifying criteria for the new category of mixed groups are summarized below.

If the holding company of a mixed group is a small private company, the company may fall within the reporting exemption if any 2 of the following conditions are satisfied in a financial year:

- aggregate total revenue not exceeding HK$100 million;
- aggregate total assets not exceeding HK$100 million;
- aggregate number of employees not exceeding 100.

If the holding company is an eligible private company, then any 2 of the following conditions need to be satisfied in a financial year:

- aggregate total revenue not exceeding HK$200 million;
- aggregate total assets not exceeding HK$200 million;
- aggregate number of employees not exceeding 100.

Also, there must be 75% approval from members of the holding company and no member voting against the resolution.

If the holding company is a small guarantee company, the aggregate total revenue of the mixed group must not exceed HK$25 million in a financial year.

[11] CO s.366A

Updating accounting-related provisions

The Amendment Ordinance has amended the definition of "holding company" to clarify that a "parent undertaking" that is a company is also a holding company for the purpose of the provisions on accounts in Part 9 of the CO[12].

The Amendment Ordinance has also updated the definition of "parent undertaking" to reflect the latest accounting standards, so as to avoid any inconsistency between the CO and the accounting standards. Under the new provisions, an undertaking is a parent undertaking of another undertaking if it has control over that other undertaking; or it is a parent of that other undertaking for the purposes of the accounting standards applicable to its financial statements[13].

Company names

Amendments have been made to the Companies (Disclosure of Company Name and Liability Status) Regulation (Cap. 622B) ("Cap. 622B") to clarify that a company registered with both an English name and a Chinese name may display its English name or Chinese name at its registered office, without the need to display both. However, if such a company displays its English registered name and intends to display a name of the company in Chinese as well, the latter must be the company's Chinese registered name (and *vice versa*).

For a company with both an English name and a Chinese name, its common seal may now be engraved with either its English name or Chinese name instead of both[14]. However, both names must be stated in the company's articles of association[15].

Non-Hong Kong Companies (Disclosure of Company Name, Place of Incorporation and Members' Limited Liability) Regulation[16] (the "New Regulation")

The CO and Cap. 622B contain detailed provisions on display of names of companies incorporated in Hong Kong. To align the obligations of non-Hong Kong companies with those of local companies in the display of company names, etc., the Amendment Ordinance has added new ss.805A and 805B to the CO to empower the Financial Secretary to make regulations to require non-Hong Kong companies to

[12] CO s.357(4)(b)
[13] CO Sch.1 s.2
[14] CO s.124
[15] CO s.81(1)
[16] L.N. 31 of 2019

disclose prescribed information and to provide for criminal sanctions for failure to make such disclosures. The current provision on the display of names, etc. for non-Hong Kong companies (s.792 of the CO) will be repealed and the New Regulation will provide for the requirements, applicable to non-Hong Kong companies, on the display of the company's name and place of incorporation, and on disclosure of the limited liability status of members.

Implementation

The Amendment Ordinance, except for two provisions, became effective on 1 February 2019. The two provisions not yet commenced, which will repeal s.792 and item 7 of Sch.7 of the CO, relate to the requirements on the display of company names, etc. for non-Hong Kong companies. Those two provisions and the New Regulation will come into operation on 1 August 2019.

Please visit the new thematic section on the Amendment Ordinance on the Companies Registry's website[17] for more information.

Ida Chan

Re E-Harbour Services Ltd [2014] 5 HKLRD 180

Facts

Tso was the sole shareholder of e-Harbour Services Limited (the "Company") in 2007. Tso, Lam and Chan were directors of the Company. In 2008, Tso sold 30% of his shares to Kung and Kung was appointed as a director of the Company. Kung alleged that he reached an oral agreement with Tso that he would be entitled to jointly participate with Tso in the management of the Company ("Oral Agreement"). In 2009, Lam and Chan resigned and only Tso and Kung remained as the directors of the Company. Subsequently in 2011, Tso transferred his remaining shares (70% of the issued share capital of the Company) to JT Ltd ("JT") in which Tso was a director and shareholder.

Tso alleged that Kung was in breach of his fiduciary duties to the Company as Kung had: (i) enticed away nine employees from the Company to work for his new company, Leaguer Shipping Ltd; (ii) been operating Leaguer Shipping Ltd in direct competition with the Company; and (iii) interfered and tampered with the Company's communication system.

Issue

Under article 10(b) of the Articles of Association ("Articles") of the Company, the quorum for the transaction of business at any general meeting is two members. Tso, through JT, attempted to convene an extraordinary general meeting ("EGM") in 2012 and 2013 but both EGMs were inquorate due to the absence of Kung.

JT sought an order under s.114B of the Companies Ordinance (Cap. 32)[18] (the "Ordinance") to convene an EGM with one member of the Company in person or by proxy to constitute a quorum. The purpose of the EGM was to remove Kung as a director and to discuss the financial loss and damage suffered by the Company as a result of the alleged breaches of duties and wrongdoing by Kung.

Legal principles

The purpose of s.114B is to enable a company to manage its affairs and to avoid it being frustrated by the impracticability of calling or conducting a general meeting in the manner prescribed by the articles and the Ordinance.

To obtain an order under s.114B, the applicant must satisfy a two-fold test: (i) it is "impracticable" to call a meeting; and (ii) the Court must be satisfied that it should exercise its discretion to convene a meeting.

Impracticability of calling or conducting a meeting

The question raised by the word "impracticable" is whether, in the circumstances of the particular case, the desired meeting of the company can, as a practical matter, be convened, held or conducted in the manner prescribed by the articles. The refusal of another shareholder to form a quorum for a meeting is a classic example of a situation where it would be impracticable to call a meeting of the company. A quorum requirement in the articles does not confer on a minority shareholder some form of veto in relation to the company's business by giving him the ability to prevent the holding of a general meeting.

Discretion

The Court will refuse to order a meeting under s.114B

[17] www.cr.gov.hk/en/companies_ordinance2018

[18] This section is now repealed and the power of the Court to order a meeting is now provided in s.570 of the Companies Ordinance (Cap. 622).

if it would override the class rights of a shareholder, deliberately entrenched in a shareholders' agreement for his protection, which require his presence in general meetings in order to form a quorum. Mere assertion of a quasi-partnership or an oral agreement or understanding between the only two shareholders as to joint management of the company is, however, normally not a sufficient ground for refusing to order a meeting under s.114B sought to be convened to remove one of them as director.

In exercising its discretion, the Court would bear in mind s.157B[19] of the Ordinance which gives majority shareholders a right to remove a director from office, notwithstanding anything in the company's memorandum or articles or in any agreement between the company and him. The Court expressed doubts whether a statutory right conferred by s.157B can be circumvented or abrogated by an unqualified agreement between shareholders not to remove a particular person as a director. The reason is that any such agreement would constitute an unlawful fetter on the statutory power conferred by s.157B to remove a director. Even if a contractual restriction on the exercise of the statutory power under s.157B is legally permissible, it will require (i) "strong evidence" of an unqualified right to participate in the management of a company while the director remains a shareholder; and (ii) "very clear and unambiguous wording" to achieve such a result. Such "strong evidence" would normally require a written agreement between shareholders, to which the company is not a party, containing an express prohibition against his removal as a director which can be enforced by injunction.

Decision

The Court granted an order that an EGM of the Company be convened with a quorum of one to remove Kung as a director.

On the facts, the Court was satisfied that it was impracticable for a general meeting of the Company to be convened and conducted in accordance with the Articles.

The Court held that there was nothing to support the existence of the Oral Agreement apart from Kung's own assertion. The Oral Agreement was neither "clear" nor "unambiguous" and did not contain an express or implied unqualified promise that Tso would under no circumstances exercise his statutory right to remove Kung as a director. The Oral Agreement should be regarded as little more than an initial understanding between Kung and Tso as to how the Company's business was to be managed. The Court also doubted whether the Oral Agreement can be regarded as binding on future shareholders of the Company (i.e. JT).

Angel Li

Yan How Yee v Yu Kin Sang Paul & Ors [2019] 3 HKC 170

Facts

P and D1 were business partners, engaging in the wood and timber industry through a number of companies in Hong Kong and Mainland China. One of those companies was Haywood International Development Limited ("Haywood"), where P and D1 were the only two shareholders and directors.

D1 controlled and beneficially owned another company, Wos Building Materials (HK) Company Limited ("Wos"), which carried on the same business as Haywood.

D2 and D3 were previously employed by Haywood. They joined Wos after leaving Haywood.

In 2008, P commenced a derivative action on behalf of Haywood against, *inter alia*, Ds ("2008 Action") for D1's breach of fiduciary duty as a director by carrying on a rival wood product business by Wos and companies of similar names. It was also alleged that D1 siphoned off business from Haywood and enlisted the assistance of D2 and D3 in the competing business.

Leave was granted by the Court to the parties to the 2008 Action to attempt mediation. During a joint session ("Joint Session") of the mediation, P's solicitor drafted (by hand) a document entitled "Settlement Agreement", which was signed by P and D1. The mediator and P's solicitor signed it as witnesses. D2 and D3 signed next to the signatures of the witnesses.

In the present action, Ds contended that there was no agreement on the terms of any settlement of the 2008 Action and the Settlement Agreement only recorded the terms of P's proposals. Also, D2 and D3 only signed it as witnesses but not as parties.

The essence of P's case was that the parties had already reached an agreement on the terms of

[19] This section is now repealed and the power to remove a director is now provided in ss.462 and 463 of the Companies Ordinance (Cap. 622).

settlement which were recorded in the Settlement Agreement and that the mediator had explained its contents to all present, including Ds, who signed it as parties.

The issue to be determined was whether the Settlement Agreement was a finalized agreement binding on all parties.

Analysis and Decision

The Court found that the Settlement Agreement was binding for the reasons below: -

(1) The attendance notes of P's solicitor (and his assistant) clearly showed that (i) during the early stage of the mediation, D1 had indicated his agreement on one of the terms of settlement; (ii) it had been understood by all that D1 led the discussion on behalf of D2 and D3 who had regarded the dispute as primarily one between P and D1; and (iii) at the beginning of the Joint Session, the mediator recited the agreement that he believed the parties had reached. The authenticity and contemporaneity of the attendance notes were not disputed by Ds.

(2) The wording of the Settlement Agreement was transparently clear, with its terms (which D1 accepted that he had read) bearing all the hallmarks of a final binding agreement, e.g., it was stated that Ds agreed to pay P a sum by way of 15 post-dated cheques "*in full and final settlement of these proceedings [i.e. the 2008 Action]*". Although some details like the dates of such post-dated cheques had not been put in, the Court took the view that D1's signing of a document entitled "Settlement Agreement" when there was actually no agreement would be the very antithesis of prudence. Therefore, it was overwhelmingly likely that the reason why D1 signed the Settlement Agreement was because it recorded the final agreement between the parties which had been reached during mediation.

(3) Reasonably substantial amendments were made to two clauses of the Settlement Agreement, where P and Ds initialed. This was inconsistent with any suggestion that the document was understood to be a draft document, or a document recording P's proposal, with no legal effect. The fact that Ds were asked to sign the document and to initial amendments demonstrated clearly that the understanding was that it was a document recording a final and immediately binding agreement.

(4) If it was not the parties' intention that the Settlement Agreement should be binding, it would be extremely irresponsible, and hence extremely unlikely, for the mediator (who is a barrister) not to amend the terms of the document but to sign it as a witness. The fact that the mediator had signed on the Settlement Agreement was a strong factor pointing towards P's factual version.

(5) The contemporaneous correspondence between the solicitors cast copious doubt on Ds' version of events. There was a gap of more than a month between the signing of the Settlement Agreement and Ds' challenge to its validity. Any such assertion should have been contained in the correspondence of Ds' solicitor to P's solicitor at the earliest opportunity.

(6) It was inherently extremely unlikely for P's solicitor (an experienced litigation solicitor) to have, as Ds alleged, deliberately tricked Ds into signing a document which appeared to be a final and binding agreement, and then to proceed on the basis that a final and binding agreement was concluded, when it was obvious that no such agreement was reached.

(7) Shortly after the mediation, P's solicitor caused a draft consent summons reflecting the terms of the Settlement Agreement to be prepared and sought confirmation from Ds' solicitor as to their instructions to agree to the terms of a consent summons. A draft report on mediation was also prepared by P's solicitor, proposing to report to the Court that the 2008 Action had been settled in mediation. Such conduct strongly indicated that to the understanding of P's solicitor (and his assistant), a final and binding agreement had been reached at the mediation.

(8) D2's evidence in court was that at the beginning of the Joint Session, the mediator did say that the parties had reached an agreement.

The Court also held that D2 and D3 signed the Settlement Agreement as parties but not witnesses, despite the fact that their signatures appeared next to the signatures of the true witnesses. The fact that they had initialed the amendments clearly showed that the capacity in which they signed the Settlement Agreement was the same as P and D1.

Concluding Remark

This case demonstrates that a settlement agreement which is handwritten and signed by parties at odd places (in this case, next to witnesses' signatures) could still be binding on all parties. The court will

look at all the surrounding circumstances in determining whether it is intended to be binding.

Silvia Tang

Re Dalny Estates Ltd [2018] 1 HKLRD 409

The Irregularity Principle ("Principle")

In calling and conducting a company meeting, there may be procedural irregularities. "*The occurrence of procedural irregularities may raise a question on the validity of the meeting or the decisions that the meeting has purportedly made. Unlike the company legislation of some other common law jurisdictions, [the Companies Ordinance, Cap. 622] does not contain a provision on procedural irregularities. Problems raised by such irregularities will therefore need to be resolved on the basis of common law rules*"[20].

Facts

The Plaintiff was a director and a shareholder of Dalny Estates Ltd and Genius Villa Ltd (collectively "Companies"). The majority shareholders of the Companies purportedly removed the Plaintiff as a director by resolutions and appointed new directors for the Companies. The Plaintiff took out originating summonses against the new appointees and the Companies ("Summonses"). The Plaintiff claimed that neither he nor another shareholder of the Companies had been given notice of the relevant meetings and that the relevant meetings had never been held. The Plaintiff also claimed that the Companies were acquired with his money and that the shareholders held their shares on trust for him. The defendants in the Summonses ("Defendants") applied to strike out the Summonses on the ground that even if proper notice had not been given, the Plaintiff could not challenge the resolutions as they could be confirmed by a vote by the majority shareholders ("Applications"). The issue was whether the Summonses should be struck out by virtue of the Principle.

Decisions of the High Court ("HC") and the Court of Appeal ("CA")

HC held in the Defendants' favour and allowed the Applications. HC considered that a procedural failure in convening a meeting and putting a resolution to shareholders would not justify the Court setting aside a resolution that the majority of shareholders wished to have passed. HC held that the Principle should apply. Accordingly, the position was clear and HC ordered that the Summonses be struck out.

CA allowed the Plaintiff's appeal and dismissed the Applications. CA considered the past decisions where the Principle has been applied. Examples include (i) inquorate general meeting so that the Court refused to declare that the directors there elected were invalidly appointed; (ii) a general meeting of which requisite notice had not been given so that the Court refused to strike down resolutions passed there to authorise specified directors to handle legal proceedings against the Plaintiff; and (iii) a general meeting where the chairman wrongly called for a poll a day before the meeting so that the Court refused to declare void the resolutions passed there.

CA also considered several legal policies behind the Principle. First, the company which has been done a wrong should be the only proper plaintiff to bring a suit for redress. Second, matters of internal management should be left to the company to be dealt with by its proper organ. Third, in exercising its equitable jurisdiction, a court of equity does not act in vain. If what has been done irregularly is capable of being and will inevitably be confirmed by the majority, the Court will not interfere. Fourth, there is the concern that if each and every breach of articles in the conduct of the affairs of the company may be the subject of any action by any shareholder, the Court would be unnecessarily inundated with internal disputes of companies.

Notwithstanding the aforesaid cases and legal policies, CA held that whether the Principle applied to the present case should be determined at trial instead of summarily dealt with on the present Applications based on the following.

First, contrary to HC's decision, CA accepted the Plaintiff's contention that he did not concede that notice of the meetings was duly given. There was neither any notice given nor any meeting actually held. On this basis, CA considered that the resolutions were made in breach of the articles of the Companies ("Articles") and s.571 of the Companies Ordinance (Cap. 622) which requires notice to be given of general meetings. In this connection, the Defendants failed to refer to any case in which the Principle applied to save a resolution where no meeting had been held at all. CA considered whether the Principle could be applied to save a resolution where no meeting had been held at all was a matter that merited

[20] *Law of Companies in Hong Kong (3rd ed., 2018), para. 9.140.*

fuller consideration at trial of the Summonses rather than summary determination.

Second, CA considered the application of the Principle was arguably dependent on it being established that the majority would inevitably be in a position to call and hold a meeting properly and regularize the decision if necessary. In the present case, the Plaintiff claimed to be a beneficial owner of the Companies' shares. CA noted that if the Plaintiff's claim succeeded, it was arguable that the registered holders as bare trustees might be enjoined from voting against the Plaintiff's will or be able to call and hold a proper meeting to rectify the irregularity if necessary. CA considered that this point also merited fuller consideration at trial rather than summarily dealt with on these Applications.

Accordingly, the Applications were dismissed.

Kennis Lam

Editors :	**Yung Lap Yan**
	Beverly Yan
	Boyce Yung
	Stefan Lo