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What's inside

Editorial

We feature three articles in this edition. The first article is about the recent decisions in the United Kingdom and Hong Kong on the doctrine of piercing the corporate veil. The second article talks about the extinction of rights in contracts of insurance, e.g. where the contract is void by illegality or mistake, or where the contract is voidable by statute or misrepresentation. The third article talks about the remoteness of damage and measure of damages for breach of contract, and the rule in Hadley v Baxendale, and Victoria Laundry (Windsor) Ltd v Newman Industries Ltd.

We also feature three case reports in this edition. The first case is about the construction of the provisions of an agreement regarding the sale and purchase of a village home. This case shows how difficult it is to persuade the Court to re-write or ignore certain provisions in an agreement if the provisions are sufficiently clear to convey a meaning which can make commercial sense. The second case is about the admissibility of evidence of pre-contractual negotiations and the limited circumstances under which terms will be implied into an agreement. The third case is about the construction of provisions in an agreement which are contained in different documents.

YUNG Lap-yan

Piercing the Corporate Veil : Recent Developments

A fundamental principle of corporate law is the separate entity principle, namely that a company is a legal entity separate to its members, officers and employees. This means, for example, that the company's assets are not the assets of its members. Also, generally the liabilities of a company are the company's own liabilities, and the persons who own the company or who operate the company are not personally liable. This can give rise to abuse, and so it has generally been recognised that courts can "pierce the corporate veil" in appropriate circumstances to avoid abuse. Under this idea of piercing of the corporate veil, the court can, for example, impose the company's liabilities on persons behind the company. The scope of the doctrine of piercing of the corporate veil has been discussed in a number of decisions in the United Kingdom and in Hong Kong in recent years.

In *VTB Capital plc v Nutritek International Corp*,[1] a lender sought to bring a contractual claim against the controllers of the borrowing company by arguing that the corporate veil of the borrower should be pierced because of misrepresentations made by the controllers of the borrower. Against the lender's claims, it was argued that there is actually no doctrine of piercing of the corporate veil under the common law. Although both judges and academic writers have generally accepted the existence of the doctrine, there is no decisive authority at the highest level. However, the U.K. Supreme Court declined to rule on the question, deciding the case on the basis that even if there is a doctrine of piercing of the corporate veil, the doctrine was inapplicable in the present circumstances. It was held that it is not possible to hold "A responsible for B's contractual liabilities to C simply because A controls B and has made misrepresentations about B to induce C to enter into the contract".[2]

The U.K. Supreme Court was faced with the issue again in *Prest v Petrodel Resources Ltd*,[3] which involved matrimonial proceedings for ancillary relief following a divorce. The husband wholly owned and controlled a number of companies which owned various properties. One of the issues was whether the court had power to order the transfer of those properties to the wife on the basis of piercing of the corporate veil under the common law. Being the second case before the U.K. Supreme Court in quick succession raising the issue of veil piercing, the court considered it appropriate to address the question of the existence of the doctrine in order to clarify the law. The court observed that the doctrine has been criticized as being uncertain and lacking in coherent principle. However, a majority of the members of the court expressly affirmed the existence of the doctrine under the common law. It was accepted that the doctrine can provide a potentially valuable judicial tool to undo wrongdoing in some cases where no other principle is available.[4]

Although the U.K. Supreme Court accepted that the veil piercing doctrine exists under the common law, a number of members of the court adopted a narrow formulation of the principle. For example, Lord Sumption stated that "there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality."[5] However, there is no binding majority view endorsing the above principles on the precise scope of the doctrine.

On the particular facts of the case, the court was unanimous in deciding that the doctrine of piercing of the corporate veil could not be applied. When the husband had used the companies to acquire the properties, there was no impropriety on his part. The legal interest in the properties was vested in the companies long before the marriage broke up. Accordingly there was no evading of any existing legal obligation owed to his wife. The wife, however, succeeded in the case on a different ground which did not involve a piercing of the corporate veil.

1 [2013] 1 All ER 1296.
2 [2013] 1 All ER 1296 at para. 138.
3 [2013] UKSC 34.
4 [2013] UKSC 34 at para. 80.
5 [2013] UKSC 34 at para. 35.

Hong Kong courts appear to be more liberal than the English counterparts in application of the veil piercing doctrine. For example, it has been held in Hong Kong that where X controls Company A which owes contractual liabilities to a third party, the corporate veil can be pierced if X causes Company A to transfer all its assets to Company B in order to prevent the third party from being able to recover anything under the contract with Company A. The Hong Kong courts have accepted that the corporate veil can be pierced such that Company A's liabilities can be imposed on Company B[6] or on X himself.[7]

To date it seems that the existence of the doctrine has not been questioned before the courts in Hong Kong. In *Winland Enterprises Group Inc v WEX Pharmaceuticals Inc*,[8] the Court of Appeal stated: "There are but two exceptions [to the separate entity principle] created as a result of judicial decisions based on either a well founded principle of public policy or the principle that devices used to perpetrate frauds or evade obligation will be treated as nullities." It was said that "the court will lift the corporate veil of a company if it is a façade or a puppet of the parent company used to perpetrate fraud or evade legal obligation and liability."[9] The court emphasized that there must be some "illegitimate purpose" proved before the veil can be pierced. On the facts of the case, it was held that the mere fact that a subsidiary is wholly owned by another company and that the two companies shared the same staff and office premises is not sufficient to pierce the corporate veil of the subsidiary to impose the contractual liabilities of the subsidiary on the parent.

The *Winland* decision was decided before the U.K. case of *Prest v Petrodel*. Although the corporate veil was not pierced in *Winland*, the court appears to accept that the "evasion" cases are only one example of the situations where the veil can potentially be pierced. This is consistent with much of the pre-existing understanding of the scope of the doctrine and is wider than the approach adopted by Lord Sumption in *Prest v Petrodel*. It waits to be seen how the Court of Final Appeal would deal with the question should the issue arise in any proceedings coming before the court in future.

Stefan Lo

6 *Liu Hon Ying v Hua Xin State Enterprise (Hong Kong) Ltd* [2003] 3 HKLRD 347.

7 *Lee Sow Keng v Kelly McKenzie Ltd* [2004] 3 HKLRD 517.

8 [2012] 5 HKC 494 at para. 51.

9 [2012] 5 HKC 494 at para. 54.

Extinction of Rights in Contracts of Insurance

Insurance is the equitable transfer of the risk of a loss, from one entity to another in exchange for the payment of a premium. It is a form of risk management primarily used to hedge against the risk of a contingent, uncertain loss. The transaction involves the insured/policyholder making the payment of a relatively small sum of premium to the insurer in exchange for the insurer's promise to compensate (indemnify) the insured in the case of a financial (personal) loss. The insured receives a contract of insurance, known as the policy, which sets out the terms, conditions and circumstances under which the insured will be indemnified.

To "indemnify" means to make whole again, or to be reinstated to the position that one was in, to the extent possible, prior to the happening of a specified event or peril. When the policyholder experiences a loss for a specified peril, the coverage entitles the policyholder to make a claim against the insurer for the covered amount of loss as specified by the policy. There are different types of contracts of insurance that seek to indemnify an insured, but from an insured's point of view, the result is usually the same: the insurer pays the loss.

Parties to a contract of insurance are often aware of the need to observe the legal doctrine of "the utmost good faith" in making a full and honest declaration of all material facts in the insurance proposal lest the insurer may either declare the entire policy void or dispute coverage of a particular loss based on the concealment. Little do the policyholders know that there are many other situations that the insurer could avoid the pay-out. This article will examine the situations under which an insurer is under no obligation to pay the policyholder.

The contract of insurance is void

A "void contract" is a contract which from the beginning has no legal effect. A contract is void under the following circumstances:

- *Illegality*

The court will not permit a person to enforce his rights under a contract if it is tainted by illegality. Hence a contract of insurance will be void where the

policy is illegal in its formation as a result of statutory prohibition.

Examples of statutory provisions rendering a contract of insurance void are sections 64B and 64C of the Insurance Companies Ordinance, Cap. 41. Section 64B(1) provides, inter alia, that no contract of insurance shall be entered into on the life of any person or on any other event if the person for whose use or benefit or on whose account the contract is to be entered into has no interest. Section 64C provides that where the name of the beneficiary of a life insurance policy is not inserted into the contract, the contract will be void.

- *Mistake*

A mistake by both parties to the contract can render a contract void.

Examples in which the doctrine of common mistake is likely to be applicable in insurance law are:

(a) The insured property does not exist;

(b) The insured is already dead when the life insurance contract is entered into.

The contract of insurance is voidable

A "voidable contract" is a contract which is initially valid, but where one or more of the parties has a right to elect either to avoid or continue it. Unless and until such right of avoidance is exercised, a voidable contract remains valid. A contract is voidable under the following circumstances:

- *Statute*

Section 6A(1)(b) of Cap. 41 provides that a contract of insurance entered into with an unauthorized insurer is voidable at the election of the policyholder.

- *Misrepresentation*

In insurance law, the doctrine of utmost good faith states that an insured has a duty to make full disclosure of all material circumstances to the insurer[10]. Where the insured misrepresents[11] or fails to disclose a material fact, the insurer can avoid the contract of insurance. Such avoidance puts an end to the liability of the insurer.

The policyholder is prevented from making a claim against the insurer

- *Breach of Condition*

Where a policyholder has breached a term in the contract of insurance and that term is a condition precedent to the liability of the insurer, the breach of that term may prevent the insured from bringing a claim. An example would be a condition saying that the insured has to submit a claim within a specified period of time, or else the insurer need not pay any compensation.

- *Illegality under Common Law*

There can be a situation where the contract of insurance itself may be unaffected by illegality but the insured is prevented from recovering for loss where, e.g. the insured subject matter is tainted by illegality or results of misconduct, as the case may be. An example is when the goods insured in a contract of insurance are in fact smuggled goods, the court would not allow the insured to enforce the contract[12].

The insurer is dissolved

If an insurer is a company, its dissolution puts an end to its existence and extinguishes a plaintiff policyholder's right of action against it.

The policyholder breaches a warranty in the contract of insurance

A warranty is a term of the contract, as opposed to a representation. In general terms, a warranty is either a promise by the insured of a present state of affairs, whether fact or opinion, or it may be a promise by the insured imposing continuing obligations upon himself.

In a contract of insurance, there is very often a warranty that the statements/representations made by the insured are true. Therefore, when a representation of fact is false, there will also be a breach of warranty. The result of a breach of warranty is to release the insurer from liability towards the policyholder from the date of breach.

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10 *Rozanes v Bowen* (1928) 32 LI LR 98, 102.

11 A misrepresentation is an untrue statement of fact by one party which induces the other party to enter into the contract.

12 *Geismar v Sun Alliance and London Assurance Ltd* [1978] 1 QB 383.

There is no need for the insurer to claim misrepresentation to avoid the contract.

Danny Yuen

Remoteness of Damage and Measure of Damages

A breach of contract generally entitles the innocent party to claim damages from the party in breach. However, the law has its limits, so does a plaintiff's entitlement to damages for breach of contract. Lord Wright's speech in *Liesbosch Dredger v Edison SS*[13] is probably the best way of illustrating the need to confine the extent and amount of damages a plaintiff can claim for breach of contract:

> **The law cannot take account of everything that follows a wrongful act; it regards some subsequent matters as outside the scope of its selection, because 'it were infinite for the law to judge the cause of causes,' or consequences of consequences.** Thus the loss of a ship by collision due to the other vessel's sole fault, may force the shipowner into bankruptcy and that again may involve his family in suffering, loss of education or opportunities in life, but no such loss could be recovered from the wrongdoer. **In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic but simply for practical reasons.** (emphasis added)

In almost every claim for damages for breach of contract, the issues to be considered are "remoteness of damage" and "measure of damages". **Remoteness of damage** involves delineation of the type of damage that the plaintiff is entitled to recover as compensation for the defendant's breach of contract, and damage that should be excluded for being "too remote", and **measure of damages** involves quantification of damage in terms of money.

[13] [1933] 7 AC 449.

Remoteness of damage

Hadley v Baxendale[14] lays down the fundamental rule that the damages a plaintiff is entitled to receive for a breach of contract in a claim for unliquidated damages should be **either**:

(i) damage or loss that arises **naturally**, or occurs **in the usual course of things**, from the breach of contract ("First Rule"), **or**

(ii) damage or loss that arises because of **special or exceptional circumstances**, and may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach ("Second Rule").

Victoria Laundry (Windsor) Ltd v Newman Industries Ltd[15] elaborated on the rules in *Hadley v Baxendale*. The court explained that:

(i) in cases of breach of contract, the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract **reasonably foreseeable** as liable to result from the breach;

(ii) what was at that time reasonably foreseeable depends on the **knowledge** then possessed by the parties or by the party who later commits the breach; and

(iii) for the purpose of (ii), knowledge "possessed" is of two kinds; one **imputed**, the other **actual**. Everyone, as a reasonable person, is taken to know the "ordinary course of things" and consequently what loss is liable to result from a breach of contract in that ordinary course. Hence, a contract-breaker is assumed to possess such **imputed knowledge** whether or not he actually possesses it. There is also a particular knowledge the party in breach actually possesses, which is of the special circumstances outside the "ordinary course of things", and of such a kind that a breach in those special circumstances would be liable to cause more loss, i.e. **actual knowledge**. Such "imputed knowledge" and "actual knowledge" relate respectively to the First Rule and the Second Rule in *Hadley v Baxendale*.

[14] (1854) 9 Exch 341.

[15] [1949] 2 KB 528.

The House of Lords in *The Heron II*[16] differed with *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* on the latter's use of "reasonable foreseeability" as a criterion to determine remoteness of damage. In particular, the question is not whether the damage should have been reasonably foreseeable by the defendant. Instead, the proper test should be whether **the probability of occurrence of the damage should have been within the reasonable contemplation of both parties at the time when the contract was made**, having regard to their knowledge at that time. According to this "reasonable contemplation" criterion, the assessment of damages should depend upon the assumed common knowledge and contemplation of the parties to a contract, e.g. in relation to the consequence of a breach to the other party, rather than on a foreseeable but most unlikely consequence.

Measure of damages

Once a particular type of damage is regarded as "not too remote" and hence recoverable or actionable, the next issue is to measure the amount of damages payable by the defendant. In this regard, the plaintiff must, so far as money can do it, be restored to the position he would have been in had the contract been properly performed. Historically, it has been treated as clear in principle that what is to be recovered by way of damages is the loss which the plaintiff has suffered, and not the profit which the defendant has made.

In the context of sale of goods where the seller breaches the contract, the amount of damages payable to the buyer for the actionable damage of, e.g. the seller's delay in delivery or non-delivery, is calculated by the difference between the contract price and the market price on the contract delivery day. In Hong Kong, a similar principle is incorporated in section 53(3) of the Sale of Goods Ordinance (Cap. 26) ("SOGO"), which provides that:

> Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed for delivery, then at the time of the neglect or refusal to deliver.

In the event where the buyer breaches the contract, the amount of damages recoverable by the seller, who is not a dealer, for the actionable damage of, e.g. the buyer's wrongful neglect or refusal to accept and pay for the goods, is ascertained by the difference between the contract price and the resale price of the goods. Section 52(3) of SOGO provides for a similar principle, which states that:

> Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the neglect or refusal to accept.

Section 52(3) of SOGO is only a *prima facie* rule, and may be inapplicable for calculating the amount of damages if the plaintiff seller is a dealer. This is because in this case the actionable damage, i.e. damage recoverable "in the usual course of things", is the profit that the seller would have made **on that particular bargain**. Such loss of profit cannot be compensated by the difference between the contract price and the resale price of the goods even if the seller could resell them to another buyer, as it is a **separate bargain** that would have been **additional to** the earlier bargain had the defendant buyer not breached the contract. Damages would therefore be measured on the basis of the seller's loss of profit.

The above example illustrates the interrelationship between the measure of damages and the remoteness of the damage in question. It should be added that, difficulties and complications would arise in estimating the amount of damages in special circumstances where, e.g. there is no other available market for the goods, or the plaintiff has suffered non-pecuniary losses, in which there is no general rule to be relied upon. However, the fact that damages cannot be accurately calculated is not a reason for depriving the plaintiff of his entitlement to damages, and in such cases the fair and reasonable amount of damages would be a matter for the court to determine.

Christie Kwong

[16] [1969] 1 AC 350.

Champion Concord Ltd & Anor v Lau Koon Foo & Anor [2012] 1 HKC 467

A conditional agreement is an agreement under which the parties agree that a transaction will only be completed if certain condition is fulfilled. The parties to the agreement usually agree on the deadline by which such condition must be fulfilled and which party is to be responsible for fulfilling such condition. If the condition cannot be fulfilled by the deadline, it is normally agreed that the agreement shall be of no further force and effect save for certain specified consequences. The Court of Final Appeal ("CFA") in *Champion Concord* case had to construe such a conditional agreement.

Facts

The appellant purchaser ("P") and respondent vendor ("V") entered into an agreement regarding the sale and purchase of a village home ("Agreement"). The sale required the consent of the District Lands Officer ("DLO"). The Agreement stipulated a time limit of 10 months from the date of the Agreement by which DLO's consent had to be obtained ("Long Stop Date"). It further provided that if for any reason such consent could not be obtained by the Long Stop Date, the Agreement would be automatically cancelled. The Agreement nevertheless allowed an extension to the Long Stop Date for a further period of 12 months in the event that on or before the Long Stop Date, DLO decided not to give consent and P decided to contest such decision of DLO.

DLO's consent was not obtained by the Long Stop Date. The consent was only obtained about one and a half months after the Long Stop Date. V refused to proceed with the sale on the basis that the Agreement had already been cancelled due to the non-availability of DLO's consent by the Long Stop Date. P then sought an order for specific performance. P failed and V succeeded before the High Court and the Court of Appeal, which held that the clauses providing for automatic cancellation had been triggered. P then appealed to CFA.

Decision

CFA dismissed the appeal and held that the Agreement had been cancelled pursuant to the relevant provisions of the Agreement. CFA was unanimous concerning the proper construction of the relevant provisions of the Agreement. In the words of Riberio PJ, "the language of the [provisions] leaves no room for doubt as to what the parties meant[17]". CFA took the view that the relevant provisions were clear to the effect that the Agreement would be automatically cancelled if the consent of DLO was not obtained by the Long Stop Date. The other provision which allowed for an extension of the Long Stop Date was only applicable under the situation where on or before the Long Stop Date, DLO decided not to give consent and P decided to contest such decision.

CFA rejected P's counsel argument that a liberal approach should be adopted in interpreting the Agreement. P's counsel argued that where the language used in an agreement would involve attributing to the parties an intention that they plainly could not have had, the Court should construe the agreement with a view to arriving at the meaning that a reasonable person would have understood the parties to have intended. P's counsel cited a passage from a House of Lords' decision in *Chartbrook Ltd. v Persimmon Homes Ltd*.[18] to invite CFA to ascribe to the parties an intention that the extension of the Long Stop Date should be allowed. The passage was to the effect that when the language used in an instrument gives rise to difficulties of construction, the Court would have to decide what a reasonable person would have understood the parties to have meant by using the language which they did. The passage goes on to state that the fact that the Court might have to express that meaning in language quite different from that used by the parties is not reason for not giving effect to what they appear to have meant.

However, CFA refused to accept that there is anything wrong in the language used in the Agreement and found that the provisions gave good commercial sense viewed from both sides of the Agreement. For the same reasons, CFA rejected that the above passage would assist P's arguments.

Analysis

From P's angle, there is indeed some harshness in the operation of the provisions of the Agreement. If DLO had conveyed its decision not to give consent by the Long Stop Date, P would have had an extra 12 months

[17] [2012] 1 HKC 467 at para. 73.
[18] [2009] AC 1101 at para. 21.

from the Long Stop Date to contest against such decision and to obtain the consent within the extended period. V would then have to wait for a further 12 months before it could cancel the Agreement. In this case, DLO did not convey its decision not to give consent by the Long Stop Date. DLO's consent was indeed obtained, but was conveyed to P one and a half months after the Long Stop Date. Under these circumstances, P had no right to seek extension of the Long Stop Date under the relevant provisions of the Agreement.

However, the Court is normally reluctant to re-write or ignore provisions in an agreement if they are sufficiently clear to convey a meaning which can still make commercial sense. The provisions can work unreasonably against P but certainly not to the point of being absurd.

When drafting agreements, all eventualities should be considered. As CFA has pointed out, P could have provided in the Agreement that if DLO's decision to give consent has been made but DLO was not yet in a position to communicate it to the parties by the Long Stop Date (perhaps because the premium payable is yet to be determined), there should equally be an extension of the Long Stop Date. The parties should also agree in the Agreement on the evidence to be provided to prove that such scenario has happened and ascertain that such evidence can indeed be obtained.

Denise Lam

Konwall Construction & Engineering Co Ltd v Strong Progress Ltd [2013] 3 HKLRD 503

The commentary below focuses on the issues of admissibility of evidence of pre-contractual negotiations and implied terms considered by the Court of First Instance in this case.

Facts

Strong Progress Ltd (the "Defendant") agreed to sell steel bars to Konwall Construction & Engineering Co Ltd (the "Plaintiff") for the Plaintiff's building contracting business. A dispute arose between the parties. In settling such action, the parties entered into another contract for the Defendant to supply steel bars to the Plaintiff (the "Sales Contract"). The Sales Contract contained, amongst others, the following express terms:

> "Delivery: Goods to be collected by the buyer from the seller's warehouse…And the seller undertakes to supply by partial delivery the quantity of steel required by the buyer who shall notify the seller by fax 24 hours in advance notice." (the "Delivery Clause")
>
> "Project: Under various projects in Hong Kong." (the "Project Clause")

Subsequently, the Defendant refused to deliver certain orders placed by the Plaintiff. The Defendant contended, inter alia, that it undertook to supply steel bars to the Plaintiff's projects in Hong Kong only, and the orders placed by the Plaintiff were incomplete due to the omission of specific project names. The Plaintiff sued the Defendant for damages for non-delivery of the steel bars under the Sales Contract. The Defendant argued it was not liable, seeking to rely, amongst other things, on:

(i) an implied term that the Delivery Clause should be subject to the requirement of reasonableness, in that delivery would not be made by the Defendant, if it would be manifestly unreasonable for the Plaintiff to require delivery within 24 hours by Defendant of the quantity of steel so specified (the "Implied Delivery Term"); and

(ii) an implied term that in giving advance notice to the Defendant for the supply of steel bars, the Plaintiff must identify the project in Hong Kong for which the steel bars were to be used (the "Implied Notification Term").

The express terms of the Sales Contract were arrived at after some negotiations between the parties. Both parties sought to adduce evidence on some details of those pre-contractual negotiations.

Decision

Admissibility of evidence on pre-contractual negotiations

The Court accepted Lord Hoffmann's observations in *Investors Compensation Scheme Ltd v West Bromwich Building Society*[19] that the law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent.

[19] [1998] 1 WLR 896.

Accordingly it ruled that all evidence in relation to the pre-contractual negotiations between the parties leading to the conclusion of the Sales Contract was inadmissible.

Implied terms

The Court held that terms would only be implied if it is necessary, in the business sense, to give efficacy to the contract. Reasonableness would not be a ground for doing so.

Regarding the Implied Delivery Term, the Court observed that the wording of the Sales Contract was chosen by the parties and did not see any sufficient basis to re-write it. The Sales Contract was entered into to settle a dispute and was not a casual document. People are supposed to have chosen their words in legal documents with care. For the following two main reasons, the Implied Delivery Term should not be implied into the Sales Contract: (i) it was contrary to the express terms agreed by the parties and (ii) the Defendant's own evidence was that it could have delivered the steel bars if it had been satisfied with the project particulars supplied by the Plaintiff. There was nothing unreasonable, much less "manifestly unreasonable" about the terms or operation of the Sales Contract which warranted implication of the Implied Delivery Term. The Court's view was that the Implied Delivery Term was not necessary to give business efficacy to the Sales Contract and it refused to imply the Implied Delivery Term into the Sales Contract.

Regarding the Implied Notification Term, the Court did not find any basis to suggest a common understanding between the parties of such term and found the terms vague. The Court commented that the wording of the Project Clause did not mean that the details of the projects would necessarily be known at the time when the orders were placed. Even if the Plaintiff were obliged to provide the project particulars and failed to provide such to the satisfaction of the Defendant, the failure would not have gone to the root of the Sales Contract and been a fundamental breach which excused the Defendant from delivering. Further, the Court did not find the Implied Notification Term necessary to give business efficacy to the Sales Contract. Accordingly the Court refused to imply the Implied Notification Term into the Sales Contract.

Josephine Ho

Ko Hon Yue v Chiu Pik Yuk [2012] HKEC 265

Facts

The plaintiff ("P") was a teacher in the employ of the defendant ("D") in an aided school that received subsidies from the Government according to the Code of Aid for Secondary Schools as amended from time to time ("Code"). D informed P by letter that his employment contract when expired by the end of August 2000 would not be renewed after receiving complaints from students on his teaching performance and behaviour, and issuance of formal warnings. Later, D agreed to suspend termination of P's employment and transferred P to teach at an associated school, also aided by Government's subsidies, for a year from September 2000.

The terms and conditions of P's employment with D are found in:

(1) a letter of offer to P offering an appointment as a teacher. The offer was made subject to a set of conditions of service ("Conditions"). The Conditions included a termination clause for summary dismissal or for unsatisfactory service by giving a three months' prior notice ("Termination Clause"). The Conditions also stated the duration of employment is a one-year term from 1 September of the school year (each school year commences on 1 September and ends on 31 August in the following year). The last clause in the Conditions referred to other conditions and the Code; and

(2) a letter of acceptance signed by P that expressly stated his acceptance of the appointment was in accordance with the Conditions and the Code.

The Code prescribed, amongst other things, that (i) the duration of a teacher's employment shall not be subject to annual renewal but may specify a period of time to which its terms and conditions shall refer (Clause 54(b)); (ii) a teacher's employment shall only be terminated by a three months' prior notice (Clause 56(c)); (iii) a teacher shall only be dismissed for "good and sufficient reasons" (Clause 56(g)). Clause 56(g) referred to Appendix 17 of the Code, which listed the procedure to be followed in case of dismissal or termination of appointment of a teacher.

P's performance at the associated school was again unsatisfactory and his employment was terminated by D by payment of one month's salary in lieu of notice

via D's letter dated 13 July 2001. P's first claim against D for arrears of wages for July/August 2001 was settled when D paid in full. P's second claim against D under separate proceedings was for wrongful termination of contract that came before the Court of First Instance ("CFI"). CFI dismissed P's second claim on the basis that P's employment contract was for a fixed one-year term that required no contractual notice of termination. Accordingly, CFI did not need to consider if P's employment contract had been lawfully terminated by D by reason of unsatisfactory service or summary dismissal. The Court of Appeal ("CA") reversed CFI's decision. CA found that P's employment contract was not for a fixed term but on permanent term to last until P reached retirement age. CA held that on the facts of the case, P's employment contract was unlawfully terminated by D.

CFA's Decision

On D's appeal to the Court of Final Appeal ("CFA"), CFA allowed the appeal to the extent of remitting the matter to the CFI to determine whether the P's employment contract was lawfully terminated.

Reasoning

CFA gave useful guidance on the court's approach to construction of contract: (i) when construing a contract that incorporated terms of another document (the Code, in this case), where there is no outright conflict between the contractual terms written into the contract (a letter of offer to P and a letter of acceptance signed by P, in this case) and those in the incorporated document (the Code, in this case), the court should ascertain the intention of the parties by looking at the language of the terms they agreed and all the relevant surrounding circumstances; and (ii) the court should not readily be predisposed to finding inconsistencies between clauses of the contract and those in the incorporated document. Instead, the court should see whether effect could be given to every clause in the contract and whether clauses could be read together. It is only if the court could not do this and there was actual inconsistency that the question of whether a particular clause should prevail over another be considered.

CFA on the main issue as to how P's employment contract could be terminated by D determined that:

(1) The terms of the Code dealing with termination of employment were incorporated into P's employment contract with D by P's signing of the letter of acceptance. On a proper construction, P's employment contract should be read as if it were entered into so as to give effect to the provisions of the Code as far as possible.

(2) The Termination Clause (in the Conditions) was not inconsistent with Clause 56(g) of the Code as the Termination Clause only sought to repeat the termination requirement (by a three months' prior notice) to terminate P's employment. Clause 56 was more extensive than the Termination Clause and there was no reason to cut it down.

(3) Clause 56(g) referred to dismissal for "good and sufficient reasons" and it also referred to Appendix 17. Clause 56(g) and Appendix 17 of the Code should be read together when ascertaining how a school could dismiss a teacher.

(4) Clause 56(c) (termination by a three months' prior notice) was not a self-standing provision and must be seen together with Clause 56(g) which referred to Appendix 17.

CFA concluded that unless D could show that the termination requirements in Appendix 17 have been fulfilled and P's dismissal was for "good and sufficient reasons" (Clause 56(g)), P's dismissal by D would have been unfair and in breach of contract. D could not just rely on the contract being terminated either by effluxion of time or by the giving of three months' notice.

Annie Cheung

Editors : **Yung Lap Yan**
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Advice should be sought from CU before applying the information in the CU Review to particular circumstances.