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What's inside

Editorial

We feature three articles in this edition. The first article talks about the new abscondee regime under the Bankruptcy Ordinance which came into effect on 1 November 2016.

The second article discusses the basic legal principles of misrepresentation and available remedies at common law and under the Misrepresentation Ordinance.

The third article outlines the major amendments made to the Stamp Duty Ordinance to tackle the overheated property market.

We also feature three case reports in this edition. The first case is about the Court of Final Appeal decision on the application of the "no conflict rule" to a director of a company which operated the first Itamae sushi restaurant in Hong Kong.

The second case is a Court of Appeal decision on the proper construction of s.29DF(2) of the Stamp Duty Ordinance concerning the "buy-first-sell-later" exception – whether a partial refund of double stamp duty paid is available to a purchase who beneficially owned more than one residential property on the date of acquisition of the new residential property.

The third case is about a Court of Appeal decision on the validity of a liquidated damages clause – the factors that the Court will take into account in determining whether a liquidated damages clause represents a genuine pre-estimate of damages.

YUNG Lap-yan

To address the constitutionality issues which have arisen from the abscondee regime as decided by the Court of Final Appeal ("CFA")[1], the Bankruptcy (Amendment) Ordinance 2016 (the "Amendment Ordinance") was enacted to replace the abscondee regime with a new regime pursuant to which the trustee in bankruptcy ("TIB") may apply to the court for a non-commencement order if the bankrupt fails to attend an initial interview or to provide the TIB with information requested.

Discharge from bankruptcy

S.30A(1) and (2) of the Bankruptcy Ordinance (Cap. 6) ("BO") provides that a bankrupt will automatically be discharged from bankruptcy on the expiry of the relevant period, namely four years for first-time bankrupts and five years for repeat bankrupts, beginning with the commencement of the bankruptcy. The bankruptcy commences with the day on which the bankruptcy order is made[2].

Objection regime

Under s.30A(3) of BO, the TIB or a creditor of the bankrupt may apply to the court to object to the automatic discharge of the bankrupt on specified grounds set out in s.30A(4) of BO. Such grounds include: that the discharge of the bankrupt would prejudice the administration of his or her estate, the bankrupt's failure to co-operate, the bankrupt's unsatisfactory conduct and that the bankrupt has departed from Hong Kong and has failed to return following a request from the Official Receiver or the TIB. If any ground is made out, the court may make an order to suspend the running of the relevant period for up to four years for first-time bankrupts or up to three years for repeat bankrupts.

Abscondee regime

The former s.30A(10) provided for automatic suspension of the relevant period for a bankrupt under the following three circumstances –

(i) a bankrupt has left Hong Kong before the commencement of the bankruptcy (s.30A(10)(a));

(ii) a bankrupt leaves Hong Kong after the commencement of the bankruptcy without notifying the TIB of the bankrupt's itinerary and contact details (s.30A(10)(b)(i)); or

(iii) after the commencement of the bankruptcy, a bankrupt fails to return to Hong Kong as required by the TIB (s.30A(10)(b)(ii)),

in which case the relevant period would only commence or resume running when the bankrupt has returned to Hong Kong and notified the TIB of his or her return.

CFA's judgments

Chan Wing Hing

CFA ruled the former s.30A(10)(b)(i) unconstitutional. It was held that the need for a bankrupt to notify the TIB, together with the sanction for the bankrupt's failure to notify in s. 30A(10)(b)(i), was a restriction on the right to travel, specifically the right to leave Hong Kong, guaranteed by both article 31 of the Basic Law and article 8(2) of the Hong Kong Bill of Rights. In order to be valid, the restriction must be necessary to protect the rights of creditors. On whether the restriction was necessary, the proportionality test applied: (i) the restriction must be rationally connected to the protection of the rights of others; and (ii) the means used must be no more than was necessary to protect the rights of others.

The restriction was rationally connected to the protection of the rights of the creditors. The purpose of the restriction was to ensure that a bankrupt stayed within the radar of the TIB so that the TIB could seek the bankrupt's co-operation when required to facilitate the effective administration of the bankrupt's estate.

However, the restriction in s.30A(10)(b)(i) was more than necessary for the protection of the rights of creditors. First, once it was triggered, the relevant period was suspended indefinitely until the bankrupt returned to Hong Kong and notified the TIB of his or her return. Second, it operated indiscriminately,

[1] *Official Receiver & Trustee in Bankruptcy of Chan Wing Hing v Chan Wing Hing* (2006) 9 HKCFAR 545; *Official Receiver v Zhi Charles* (2015) 18 HKCFAR 467

[2] S.30(a) of BO

irrespective of: (i) the reason for the bankrupt's failure to notify, which might be wholly innocent; (ii) the stage already reached in the relevant period; and (iii) whether it had occasioned any prejudice to the administration of the estate. Third, there was no discretion in the court to disapply the sanction or to mitigate the consequences. Finally, the TIB and the creditors were already able to object to the bankrupt's discharge at the expiration of the relevant period on grounds under s.30A(4).

Zhi Charles

CFA also declared the former s.30A(10)(a) unconstitutional. CFA held that the restriction in s.30A(10)(a) was more than necessary to protect the rights of creditors. S.30A(10)(a) operated automatically and without exception in respect of any bankrupt who was already outside Hong Kong on the date when the bankruptcy order was made. Also, the sanction imposed by s.30A(10)(a) applied regardless of whether the bankrupt was ready and willing to afford all cooperation to the TIB in the administration of the bankrupt's estate. Finally, s.30A(10)(a) did not vest in the court any discretion to disapply the sanction that arose by reason of a bankrupt's absence from Hong Kong.

CFA found the obligation imposed by s.30A(10)(a) more onerous than the mere notification requirement under s.30A(10)(b)(i) considered in its earlier judgment in *Chan Wing Hing* as the former required the bankrupt must physically return to Hong Kong and notify the TIB of his or her return.

Amendment Ordinance

In response to the above decisions, the Amendment Ordinance was enacted in March 2016 to repeal s.30A(10) entirely and introduce new arrangements in ss.30AB and 30AC to encourage a bankrupt to fulfil his or her obligations at the outset of the administration of the bankrupt's estate by the TIB. The court may now exercise its discretion whether to make an order, on the TIB's application, that the relevant period of a bankrupt should be treated as not commencing to run on the date of the bankruptcy order, if the court is satisfied that the administration of the bankrupt's estate has been prejudiced due to the bankrupt's failure to physically attend the initial interview with the TIB or the bankrupt's failure to provide all of the information concerning the bankrupt's affairs, dealings and property as reasonably required by the TIB at the initial interview. The court will take into account all relevant facts and factors in making a determination on whether a non-commencement order should be made. The automatic discharge of the bankrupt will be delayed if such an order is made. The relevant period will not commence to run until the bankrupt fully complies with the terms of the order.

The Amendment Ordinance commenced operation on 1 November 2016[3].

Ida Chan and Stefan Lo

Misrepresentation and Remedies

If a party is misled by another party to enter into a contract, the contract may be invalid on the ground that it has been procured by misrepresentation. This article discusses the basic legal principles of misrepresentation and available remedies.

What is a misrepresentation?

A misrepresentation is a representation that is untrue. A representation is a statement of fact which relates to some existing facts or some past events made by one party to the contract (the "representor") to the other (the "representee") and which, while not forming a term of the contract, is yet one of the reasons that induces the representee to enter into the contract[4].

Depending on the relevant factual circumstances, a statement of intention or opinion may or may not be a representation of fact[5]. A misrepresentation may also be constituted by conduct[6].

Generally speaking, mere silence is not a misrepresentation except that (a) where the silence

3 http://www.oro.gov.hk/eng/news/pdf/PressRelease_20161028E.pdf

4 Furmston, *Cheshire, Fifoot & Furmston's Law of Contract* (16th ed., 2012), p.340

5 See, for example, *Chiu Wai Shing v Lau Chi Wai* HCA 3013/2002, 1 November 2006, where a representation about the purpose of executing a sales and purchase agreement of a property was found to be an untrue statement of intention constituting a fraudulent misrepresentation, and *Esso Petroleum Co Ltd v Mardon* [1976] QB 801 where an erroneous opinion as to the throughput of a filling station made in the course of negotiating a tenancy agreement was held to be a negligent misrepresentation.

6 In *Shum Kong v Chui Ting Lin Teresa*, HCA 16227/1999, 6 June 2001, the conduct of an estate agent showing prospective buyers a village house as well as a garage and a garden without telling them that the property to be sold comprised the house only was held to be an actionable misrepresentation.

distorts positive representation, (b) where the contract requires "utmost good faith" (e.g. contracts of insurance) or (c) where a fiduciary relation exists between the contracting parties[7].

Depending on the representor's state of mind and degree of carefulness, there are three types of misrepresentations [8], namely, (a) fraudulent misrepresentation which is a false statement made knowingly, without belief in its truth or recklessly, careless whether it be true or false, (b) negligent misrepresentation which is a misrepresentation founded on an actual honest belief in its truth, yet the honest belief is not reasonably held, and (c) innocent misrepresentation which is a misrepresentation made without fault (fraud or negligence).

Inducement and Materiality

For a misrepresentation to give rise to a cause of action, the misrepresentation must be intended to cause and in fact caused the representee to make the contract. The misrepresentation must have produced a misunderstanding in the representee's mind, and that misunderstanding must have been one of the reasons (not necessarily the sole reason) which induced him to make the contract. It follows that a misrepresentation is legally harmless if the representee (a) never knew of its existence, (b) did not allow it to affect his judgment, or (c) was aware of its untruth[9]. It is not a defence that had the representee checked the veracity of a representation he would have discovered the falsity of the representation[10]. Where, however, the representee does take steps to verify a statement, he will not be able to claim relief for misrepresentation in respect of that statement[11].

In addition, the misrepresentation which induced the representee to enter into the contract must be material, namely that the subject matter of the misrepresentation must be related to a matter which would have influence on the judgement of a reasonable man[12].

Remedies for misrepresentation

In case of a misrepresentation (be it fraudulent, negligent or innocent), the contract is voidable and not void (i.e. valid unless and until it is set aside). In other words, the representee will be entitled to rescind the contract. A contract is rescinded if the representee makes it clear that he refuses to be bound by its provisions. Rescission for misrepresentation operates both prospectively and retrospectively and its effect is that the contract will be terminated from its very inception as if it had never existed and the representor and the representee will be restored to the original positions in which they stood before the contract was entered into[13]. This is different from rescission for repudiation which terminates the contract from the date the repudiation was accepted and operates only prospectively[14].

The representee's right to rescind will be lost or barred (a) if the representee affirms the contract, (b) in certain circumstances by lapse of time, (c) if it is no longer possible to restore the parties substantially to their original positions, or (d) if rescission would deprive a third party of a right in the subject matter of the contract which he has acquired in good faith and for value[15].

Under common law, whilst all types of misrepresentation give rise to a right in the representee to rescind, a right to damages is only available for fraudulent misrepresentations and negligent misrepresentations[16].

Under the Misrepresentation Ordinance (Cap. 284) ("MO"), s.3(1) enables the representee of a non-fraudulent misrepresentation to claim damages as if the misrepresentation had been made fraudulently. This section works more favourably to the representee in that it effectively reverses the onus of proof by requiring the representor to prove that he did have reasonable grounds for believing in the truth of the facts represented. Another salient feature of MO is s.3(2) which enables a court to substitute damages in lieu of rescission where the misrepresentation has been made otherwise than fraudulently, i.e. where the misrepresentation was negligent or innocent[17].

Sandy Hung

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7 *Cheshire*, p.344

8 *Cheshire*, p.340

9 *Cheshire*, p.346

10 *Welltech Investment Ltd v Easy Fair Industries Ltd* [1996] 4 HKC 711

11 *Attwood v Small* [1835-1842] All ER Rep 258

12 *Green Park Properties Ltd v Dorku Ltd* [2000] 4 HKC 538

13 *Cheshire*, p.359

14 Hall, *Law of Contract in Hong Kong: Cases and Commentary* (4th ed., 2015), [12-32]

15 *Cheshire*, pp.363-368

16 *Law of Contract*, [12-31], [12-45] and [12-49]

17 *Law of Contract*, [12-56] and [12-62]

Amendments to the Stamp Duty Ordinance

On 4 November 2016, the Government, in an attempt to cool off the overheated property market, announced that the Stamp Duty Ordinance (Cap. 117) would be amended to increase the ad valorem stamp duty ("AVD") for all residential property transactions to a flat rate of 15% with effect from 5 November 2016.

This is the fourth round of measures introduced by the Government to suppress property demand in Hong Kong since 2012. All these measures require amendments to Cap. 117.

This article outlines the major amendments to Cap. 117 under each of the cooling measures.

1. Special Stamp Duty ("SSD")

Any instrument for sale, purchase or transfer of *residential property* acquired either by an individual or a company and (a) disposed of within 24 months if the property was acquired within the period from 20 November 2010 to 26 October 2012, or (b) disposed of within 36 months if the property was acquired on/after 27 October 2012 is subject to SSD, unless specifically provided otherwise. SSD ranges from 5% to 20% of the stated consideration or market value of the property when it is disposed of. Generally, the shorter the holding period, the higher will be the SSD rate. SSD is added on top of AVD.

2. Buyer's Stamp Duty ("BSD")

With effect from 27 October 2012, any instrument for acquisition of *residential property* executed by a non-Hong Kong permanent resident ("non-HKPR") or a company is subject to BSD at a flat rate of 15% of the stated consideration or market value of the property. BSD is added on top of AVD.

3. Double Stamp Duty ("DSD")

With effect from 23 February 2013, unless specifically provided otherwise, the original AVD (under Scale 2 in Cap. 117) payable on an instrument executed for sale, purchase or transfer of *residential or non-residential property* is generally doubled (i.e. DSD) (under Scale 1 in Cap. 117). A major exception is where the property is residential property, and the purchaser is a Hong Kong permanent resident ("HKPR") who is acting on his own behalf and who is not a beneficial owner of any other residential property in Hong Kong at the time of acquisition. In such case, the instrument is subject to the original AVD under Scale 2. Table 1 compares DSD (under Scale 1) with the original AVD (under Scale 2).

Property consideration or market value (whichever is the higher)	**DSD** (under Scale 1)	**Original AVD** (under Scale 2)
Up to $2,000,000	1.50%	$100
$2,000,001 to $3,000,000	3.00%	1.50%
$3,000,001 to $4,000,000	4.50%	2.25%
$4,000,001 to $6,000,000	6.00%	3.00%
$6,000,001 to $20,000,000	7.50%	3.75%
$20,000,001 and above	8.50%	4.25%

(Table 1: DSD and Original AVD)

4. The Proposed New Stamp Duty ("NSD")

On 4 November 2016, the Government announced that Cap. 117 would be further amended to *increase* AVD for *residential property* transactions from DSD rates to a flat rate of 15% of the consideration or market value of the residential property (i.e. NSD). Any instrument executed on or after 5 November

2016 for sale, purchase or transfer of residential property, unless specifically provided otherwise, would be subject to NSD. Table 2 compares DSD with NSD.

NSD would not apply to instruments for sale, purchase or transfer of non-residential properties.

Property consideration or market value (whichever is the higher)	**DSD** (under Scale 1) (with effect from 5/11/2016, applicable to *non-residential* properties)	**NSD** (with effect from 5/11/2016, applicable to *residential* properties)
Up to $2,000,000	1.50%	**15%**
$2,000,001 to $3,000,000	3.00%	
$3,000,001 to $4,000,000	4.50%	
$4,000,001 to $6,000,000	6.00%	
$6,000,001 to $20,000,000	7.50%	
$20,000,001 and above	8.50%	

(Table 2: DSD and NSD)

Exceptions & Exemptions under NSD

Under the Government's proposal, no exemption would be given to an instrument in respect of purchase of residential property by a purchaser who is a non-HKPR or a company. The applicable stamp duty for the instrument would be NSD instead of DSD.

As proposed, the exemptions and exceptions introduced with DSD would be applicable to NSD. It means that a residential property acquired by a *HKPR* who is acting on his own behalf and who is *not a "beneficial owner" of any other residential property* in Hong Kong at the time of acquisition would continue to be subject to the original AVD under Scale 2 (a major exception for DSD provided under s.29AJ and s.29BB of Cap. 117).

According to s.29AC of Cap. 117, a "beneficial owner", in relation to a residential property, (a) includes a purchaser under a subsisting agreement for sale of the property; and (b) excludes a vendor under a subsisting agreement for sale of the property. As for the term "agreement for sale", it includes an "instrument in which a person *contracts* to sell or purchase immovable property" (s.29A(1)), which would include a provisional agreement for sale and/or purchase of residential property. Accordingly, a HKPR, who owns some residential properties and who has signed provisional agreement(s) to sell *all* of them, is not a "beneficial owner" for the purpose of s.29AJ. Even if the transactions for the sale of his properties relating to the signed provisional agreement(s) are yet to complete, he would not be subject to NSD if he purchases a new property. However, if any of the transactions is later cancelled, annulled or rescinded, the HKPR would be held liable to pay NSD for the purchase of the new property (s.29DG).

Refund Mechanism

According to the Government's proposal, the present refund mechanism under the DSD regime would be applicable to NSD.

The present DSD refund mechanism mainly includes a *HKPR* who *replaces* his *only* residential property *within 6 months* (i.e. acquiring a new residential property first and then disposing of the original one within 6 months from completion of the acquisition of the new one). As in the DSD regime, the HKPR would be subject to NSD in the first instance, but he may apply for a refund of the stamp duty paid in excess of that computed under the original AVD under Scale 2 (s.29DF).

The duty is on the applicant to prove to the satisfaction of the Collector of Stamp Duty that the relevant refund criteria are satisfied.

As in the DSD regime, the refund mechanism for NSD would not apply to a case where a HKPR who

beneficially owns *more than one* residential property when he acquires a new one (s.29DF). On the interpretation of s.29DF, please see the case commentary on the Court of Appeal decision in *Ho Kwok Tai v Collector of Stamp Revenue* [2016] 6 HKC 268 in this issue of CU Review.

Boyce Yung

Cheng Wai Tao and Others v Poon Ka Man Jason (2016) 19 HKCFAR 144

Facts

Jason, Daisy (both Respondents) and Ricky (the 1st Appellant) had entered into an agreement to operate a chain of sushi restaurants (the "2004 Agreement") as business partners. It was agreed that each restaurant in the chain would be owned by a separate company and each business partner would hold substantial shares in each company. Smart Wave Limited ("Smart Wave") was set up to operate the first sushi restaurant under the name "Itamae". Jason, Daisy and Ricky (also the sole director) each held substantial shares in Smart Wave.

Ricky then opened more sushi restaurants under the name "Itamae" *via* companies of which he was the sole director and shareholder. Disputes arose between Jason, Daisy and Ricky over Ricky's failure to allot shares in those companies to Jason and Daisy.

The disputes led to the execution of a shareholders' agreement (the "Hero Elegant Agreement"). Hero Elegant Limited ("Hero Elegant") was formed as the holding company of the subsidiaries that would each operate one Itamae restaurant. Ricky and Fine Elite Group Limited ("Fine Elite"), owned by Jason and Daisy, were the shareholders of Hero Elegant.

Despite the Hero Elegant Agreement, Ricky opened more Itamae restaurants and sushi restaurants under the name "Itacho", all *via* companies of which he was sole shareholder.

The decisions of the Court of First Instance ("CFI") and the Court of Appeal ("CA")

In respect of the opening of further Itamae and Itacho restaurants, Fine Elite brought an action against Ricky for breach of the Hero Elegant Agreement. Jason also brought a derivative action against Ricky on behalf of all shareholders of Smart Wave except Ricky, for breach of fiduciary duty as a sole director.

CFI dismissed the contractual action on the basis that Fine Elite was in repudiatory breach and Ricky accepted the breach which brought an end to the Hero Elegant Agreement.

CFI also dismissed the derivative action in relation to the Itamae restaurants. It was held that the shareholders had intended Smart Wave to be a single purpose company operating the first Itamae restaurant only and had never intended Smart Wave to have the exclusive right to carry on the Itamae restaurant chain. However, CFI held Ricky to be in breach of his fiduciary duty by setting up the Itacho restaurants which were in competition with the first Itamae restaurant.

No appeal was made against CFI's judgment concerning the contractual action. For the derivative action, CA found no evidence suggesting that the other shareholders of Smart Wave knew or intended Smart Wave not to have an exclusive right to carry on the Itamae restaurant chain. CA held Ricky was in breach of his fiduciary duty by opening the subsequent Itamae restaurants as well as by opening the Itacho restaurants.

The Court of Final Appeal's ("CFA") decision

The central issue before CFA was whether (i) the "no conflict rule" applied to a director of a chain business where the agreed *modus operandi* was to have one company for one agreed operation; and (ii) where the company was of a "limited nature" as found by CFI, with the agreed *modus operandi* of only operating one restaurant, whether the "*Duomatic* principle" [18] applied.

The conflict rule is generally stated in the form that a fiduciary may not put himself or herself in a position where his or her interest and duty conflict. However, it is well established that there must be a "real sensible possibility of conflict".

[18] Namely, the established principle in *Re Duomatic Ltd.* [1969] 2 Ch 365 that "where it could be shown that all the shareholders with the right to attend and vote at a general meeting had assented to some matter which a general meeting of the company could carry into effect, the assent was as binding as a resolution in general meeting …"

In determining the scope of the fiduciary duty owed by a company director, CFA considered that the facts and circumstances of a particular case might be such as to modify the subject matter to which the fiduciary duty of a director applied, provided that the modification must be binding on the company – such as where the modification is contained in the constitution or a resolution of the members.

CFA also accepted that the *Duomatic* principle could be applied to modify the scope of fiduciary duty of a director. CFA considered that unless such scope was limited in the way for which Ricky contended, Ricky was in breach of the "no conflict rule" in respect of both the subsequent Itamae restaurants and the Itacho restaurants.

Ricky's case was that the scope of his duty was limited in view of the agreed sole purpose restriction on Smart Wave. Ricky argued that such limited scope meant that his fiduciary duty owed to Smart Wave did not extend to his conduct in establishing and operating other sushi restaurants, and there was no position of conflict.

The majority rejected Ricky's arguments. First, the *Duomatic* principle did not apply in this case because there was no agreement or even acquiescence from the minority shareholders of Smart Wave (who were not parties to the 2004 Agreement) to the effect that the scope of Ricky's duty was limited.

Second, even if the *Duomatic* principle had applied, it would not have helped Ricky's case. The majority considered that although Daisy and Jason expected and agreed with Ricky that Smart Wave would be the first of a number of corporate vehicles, each operating one restaurant, such expectation or agreement was expressly interconnected with an expectation and agreement that Daisy and Jason would be substantial shareholders in each such vehicle. These two elements were so closely interconnected, that the parties could not be said to have agreed to Ricky opening further restaurants on his own without them also being shareholders in the new companies.

Kennis Lam

Ho Kwok Tai v Collector of Stamp Revenue [2016] 6 HKC 268

In 2013, the Government introduced new stamp duty measures to tackle the perceived overheated property market. One such measure is to double the original rates of ad valorem stamp duty ("Original AVD") on instruments relating to sale, purchase or transfer of residential or non-residential properties, the so-called double AVD ("DSD") subject to a number of exceptions. One exception is related to the partial refund of the DSD paid if a Hong Kong permanent resident, after acquiring a new residential property, sells his original residential property within the prescribed period in accordance with s.29DF(2) of the Stamp Duty Ordinance (Cap. 117) ("the buy-first-sell-later exception"). In the captioned case, Ho thought that the buy-first-sell-later exception applied if he "exchanged" all his properties for a new one, but the Court of Appeal ("CA") held otherwise.

Facts

Ho purchased a new residential property ("NP") in 2013. Shortly thereafter, he sold two original residential properties ("OP1" and "OP2") jointly held with his wife. Ho paid the DSD on the formal agreement ("FA") for the acquisition of NP and applied for refund of the difference between the DSD paid and the Original AVD ("Additional AVD"), on the basis that both OP1 and OP2 were sold within the period prescribed in s.29DF(5), i.e. six months after the date of the assignment executed in conformity with the FA. His application was rejected by the Collector of Stamp Revenue on the ground that he owned two properties, instead of one, at the time he purchased NP. Ho applied for judicial review of such decision. The High Court ("HC") held in favour of Ho and ordered the Collector to refund the Additional AVD to Ho. The Collector appealed to CA.

The only issue in the appeal was the true construction of one of the two conditions for refund prescribed in s.29DF(2)(b): "had the original property been disposed of before the [new] property was acquired, the applicable instrument would have been chargeable with [the Original AVD]."

Purposive approach to statutory interpretation

In interpreting s.29DF(2)(b), CA emphasized that its task was to ascertain the legislature's intention as

expressed in the language of the statute, and it cannot attribute to a statutory provision a meaning that the language cannot bear, as understood in the light of its context and purpose.

Proper construction of s.29DF(2)(b)

Having examined the statutory context and purpose with reference to (among others) the Explanatory Memorandum to the Stamp Duty (Amendment) Bill 2013[19] and the related Legislative Council Brief[20], and considering s.29DF as a whole, the CA considered the legislative intent to be clear that a partial refund of the DSD paid is not available to a purchaser who beneficially owned more than one residential property on the date of the acquisition of the new residential property.

Hypothetical scenario

First, CA considered the hypothetical scenario under s.29DF(2)(b). Had OP1 (or OP2) been disposed of before Ho acquired NP, the FA would still be chargeable at the DSD rate, because Ho would still be the beneficial owner of another original property, bearing in mind s.29BB which allows a purchaser to be exempted from paying the DSD if he has disposed of all his residential properties prior to the acquisition of the new property. As such, though OP1 and OP2 were sold within the prescribed period, when each disposal is considered separately and individually, the hypothetical scenario in s.29DF(2)(b) could not be satisfied.

"Original property"

Second, the expression "original property" (原物業) in s.29DF(1) is defined as "…another residential property…of which the person is a beneficial owner on the date of [acquisition of the new property]"). The expression "another residential property" in Chinese is "另一住宅物業". This clearly indicates that the expression "original property" cannot refer to more than one property.

Timeframe for refund application

S.29DF(3)(c) prescribes the time limit for making an application for refund of the Additional AVD, i.e. "not later than 2 years after the date of the applicable instrument, or not later than 2 months after the date of the conveyance on sale under which the original property is transferred or divested, whichever is the later". If there is more than one original property, there could be more than one such "date of the conveyance on sale". This would make it difficult to determine the precise timeframe to make a refund application. This is another indication of the clear legislative intent that a beneficial owner of more than one residential property at the time of acquisition of the new property is not entitled to refund of the Additional AVD paid, even if he subsequently disposes of all his existing properties in the prescribed period.

In the light of the above analysis, the general interpretative aid in s.7(2) of the Interpretation and General Clauses Ordinance (Cap. 1), which provides that words in the singular include the plural, does not apply as s.29DF shows a contrary intention from its context.

Decision

CA added that there was no sound basis to support the HC's approach of looking at the disposal of OP1 and OP2 collectively instead of individually for the purpose of s.29DF(2)(b). If a collective approach were to be adopted, the same approach should be used to determine the refund application time limit under s.29DF(2)(c), but that would simply be unworkable if the assignment of the original properties took place on different dates.

CA allowed the Collector's appeal and held that Ho was not entitled to a refund of the Additional AVD under s.29DF(2)(b).

Boyce Yung and Quinnci Wong

[19] The Bill later became the Stamp Duty (Amendment) (No. 2) Ordinance 2014, incorporating the provisions for the DSD and the partial refund mechanism.

[20] In particular, the Legislative Council Brief read as follows: "…purchasers who acquire a new residential property before disposing of their original one (must be their only other residential property)…have to pay stamp duty…for the newly acquired property at the [DSD] rates in the first instance…Yet, the Bill proposes…a refund mechanism…after the disposal of the old property…IRD will refund…the [Additional AVD]…".

Brio Electronic Commerce Ltd v Tradelink Electronic Commerce Ltd [2016] 2 HKLRD 1449

Facts

Both the defendant, Tradelink Electronic Commerce Ltd ("D") and the plaintiff, Brio Electronic Commerce Ltd ("P") operated in a niche market for online trade declarations. Between 1997 and 2003, D held an exclusive licence issued by the Government to provide electronic trade declaration facilities ("TDEC") for importers and exporters to make online submissions of trade declarations. P was not licensed to provide TDEC but it had developed a software system which enabled importers/exporters to handle various import/export related tasks (such as freight booking, generation of transport documents and the making of trade declarations through TDEC) easier and faster.

In 2003, the Government started to introduce competition to the market and granted a second licence to provide TDEC to another company in addition to D. With the advent of competition, D entered into an exclusive agreement with P ("2003 Agreement") whereby P agreed to cooperate solely with D, and not with D's competitor. In return, D agreed, amongst others, not to seek to persuade P's customers from leaving P to use D's own services instead.

In 2006, D poached two of P's most important customers, DHL and Fedex. The dispute was settled by D paying P HK$1.9 million and entering into a second agreement with P ("2006 Agreement"). Similar to the 2003 Agreement, the 2006 Agreement contained a clause whereby D agreed not to seek to persuade P's customers from leaving P to use D's own services ("Non-solicitation Clause"). The 2006 Agreement also contained a liquidated damages provision whereby D agreed that P would be irreparably injured by D's breach of the Non-solicitation Clause and that in the event of breach D shall immediately make full payment of HK$5 million (which represented two years' loss of commissions) to P ("Liquidated Damages Clause").

P claimed that in 2009 D was in breach of the Non-solicitation Clause by having sought to persuade five of its customers to cease using its services to connect to TDEC and switch instead to D's own services.

CFI's Decision

The Court of First Instance ("CFI") held that the breach was established in relation to two out of the five customers and awarded to P HK$5 million as damages for the breach in accordance with the Liquidated Damages Clause. D appealed to the Court of Appeal ("CA").

CA's Decision

D contended that CFI was wrong to conclude that the Liquidated Damages Clause represented a genuine pre-estimate of damages so as to be enforceable. D argued that the clause was an attempt by P to deter D from breaching the 2006 Agreement and thus an unenforceable penalty.

In the course of argument, counsel for D suggested that assistance could be derived from *Murray v Leisureplay Plc*[21] which provided a step by step guide to the questions the court should ask itself in determining whether a clause was a penalty. It involved a comparison between the amount of damages provided for by the contract and the amount that would have been awarded in common law.

CA took the view that the question of whether a clause was a penalty should be considered in broad and general terms. It rejected the restrictive approach in *Murray*, noting that such approach would remove one of the commercial advantages that a liquidated damages clause is recognised as achieving, namely, the dispensation with the need to adduce evidence on damages and to calculate them, particularly in cases where proof of the amount of damages suffered may be difficult to achieve to any degree of precision.

CA noted that D's obligations under the Non-solicitation Clause could be breached in many different permutations and depending on the permutation, the consequences in terms of damage could vary substantially. However, CA considered that focusing on the actual breach that has been found to have taken place, and then seeks to compare the damages that might be suffered with the stipulated damages was not the right approach to take. What is required is to consider the likely outcome of the

[21] [2005] EWCA Civ 963

breach at the time when the parties entered into the contract.

Where a breach could have a range of consequences, then a clause would be held to be a penalty where the amount stipulated for is extravagant compared with the greatest loss that could be proved to flow from the breach[22]. CA noted that this approach recognised that the consequences of a breach cannot be foreseen with precision, and allowed the parties to stipulate for a sum which will provide adequate compensation in the event of breach.

On the facts of the case, having already lost two of its most important customers, P was, at the time of entering into the 2006 Agreement, very concerned at the prospect of losing further customers as continued loss of customers might well result in its business no longer being viable. In the circumstances, CA took the view that an assessment of the likely damage flowing from a breach of the Non-solicitation Clause by reference to two years' commissions was not unreasonable.

Based on the above, CA held that the Liquidated Damages Clause was a valid liquidated damages provision and that CFI was right to have regard to the following factors in reaching such conclusion:

(a) the 2006 Agreement was a commercial agreement entered into by parties, who were very familiar with the trade with which the 2006 Agreement was concerned, after lengthy negotiations;

(b) the genesis of the Liquidated Damages Clause was the prior breach of the 2003 Agreement;

(c) the assessment of damages for a breach of the Non-Solicitation Clause was a highly uncertain and difficult exercise; and

(d) the agreed amount of HK$5 million was the parties' best pre-estimate of the damages that were likely to be suffered in the event of a breach of the Non-Solicitation Clause, which was by no means extravagant or unconscionable.

D's appeal was dismissed.

Blondie Poon

[22] *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79

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