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Editorial

We feature three articles in this edition.

The first article talks about the Government's proposal to introduce Special Rates on vacant first-hand private residential units with a view to encouraging a more timely supply of these units.

The second article briefly sets out the scope of application of the Companies Ordinance (Cap. 622) and the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) to companies incorporated outside Hong Kong.

The third article discusses the usual remedies for breach of contract such as damages, specific performance and injunction.

We also feature three case reports in this edition.

The first case is about the stamp duty payable in respect of the conveyances on sale of two properties. There were some peculiar features about this case: (i) the two properties situated on the same floor of the same building, (ii) the seller of the two properties was the same and the buyers were related as husband and wife, (iii) the parties signed the provisional sale and purchase agreements, formal sale and purchase agreements and the conveyances on sale of the two properties on the same day, (iv) the formal sale and purchase agreements of the two properties provided that the conveyance of both properties must be completed at the same time. Should the two transactions be assessed together for stamp duty purposes?

The second case is about the rule that a binding agreement by the creditor to extend the time for the performance of the debtor's obligations under the main contract releases the guarantor from liability. One of the exceptions to this rule is consent given by the guarantor to the extension of time. The court in this case held that the consent could be given before or after the extension was granted to the debtor.

The third case is about whether there is a duty on the part of a company or its shareholders to give reasons to a director for a proposed resolution to remove the director from office at a general meeting of the company. The relevant provision in the Companies Ordinance (Cap. 622) does not specify that reasons for the proposed removal are required to be given to the director. Should such a requirement be read into the statute by necessary implication?

YUNG Lap-yan

Introduction of Special Rates

Background

In Hong Kong, the number of unsold first-hand private residential units in completed projects has increased from around 4,000 units in 2013 to around 9,000 units in 2019. The Government considers that this trend is undesirable in the face of a housing shortage and more effective measures should be taken to encourage developers to expedite the supply of first-hand private residential units in completed projects.

Against such background, the Rating (Amendment) Bill 2019 (the "Bill") was gazetted on 13 September 2019. The Bill aims to implement the proposal announced by the Chief Executive on 29 June 2018 to introduce Special Rates (額外差餉) on vacant first-hand private residential units with a view to encouraging a more timely supply of these units. The Bill seeks to add a new part to the Rating Ordinance (Cap. 116) to provide for a separate regime for the collection of Special Rates.

Main Features of the Bill

(1) Application of Special Rates

The target housing units under the Special Rates regime are the first-hand private residential units with their occupation permits issued for 12 months or more. A person who owns a unit on the day when the occupation permit was issued (normally a developer) is referred to as a "first-owner" under the Bill. To guard against tax avoidance, if the first-owner which is a body corporate sold the unit to an associated company, or if the first-owner who is an individual sold the unit to his family member or a body corporate under his control, such "related party" will still be regarded as the first-owner and be liable for Special Rates.

The Bill sets out certain types of exempted premises which are excluded from the application of Special Rates. These exempted premises are permitted for domestic use under the occupation permit but their nature is different from that of private residential units. They include subsidised housing units, hotels and guesthouses, quarters in schools and universities, hospitals, residential care homes for the elderly or the disabled, etc.

(2) Liability for Special Rates

A first-owner who holds a unit is required to submit annual returns to the Rating and Valuation Department (the "RVD") to declare the status of the unit in the preceding year (i.e., the "reporting period"). The first-owner is liable for Special Rates in respect of the unit unless in that reporting period, the unit (i) has been sold to an unrelated party by entering into an agreement for sale and purchase (the "ASP")[1], (ii) has been let to an unrelated party at market rent for not less than 183 days, (iii) has been used as employees' quarters (whether or not at a rent) for not less than 183 days, or (iv) has been the only unit held by the first-owner.[2]

Special Rates will be collected by RVD annually. The rate of Special Rates is two times the rateable value of the unit concerned, which is roughly equal to 5% of the property value. A first-owner who fails to pay Special Rates is subject to an additional charge of not more than 10% of the amount of the unpaid Special Rates. The outstanding Special Rates and any additional charge are recoverable as a debt due to the Government.

(3) Duty to submit annual returns

In order for RVD to assess whether Special Rates are chargeable on a unit, the first-owner of the unit is required to furnish annual returns to RVD in respect of the status of the unit. The returns are required to include information on:

(a) whether an ASP in respect of the unit has been entered into by the first-owner as vendor with another person (other than a related party of the first-owner) as purchaser, and that such ASP remains in force on the last day of the reporting period;
(b) whether any assignment of the unit has been executed by the first-owner as assignor and, if so, whether the assignee is a related party of the first-owner;
(c) whether the unit is let to a person (other than a related party of the first-owner) under a stamped tenancy agreement at a rent not less than the

[1] Since a first-owner (normally a developer) can sell uncompleted first-hand residential units by pre-sale, a unit is regarded as "sold" under the Bill and therefore not subject to Special Rates if an ASP has been signed in respect of the unit, notwithstanding that the assignment has yet to be executed. However, in the event of subsequent cancellation or termination of the ASP, the first-owner may have to pay back the Special Rates.

[2] Where a first-owner holds only one unit in a reporting period, Special Rates are not chargeable on that unit. This is to cater for the scenario where a first-owner retains only one residential unit for self-use.

market rent and for not less than 183 days in aggregate during the reporting period;

(d) whether the unit is provided (whether or not at a rent) by the first-owner as an employer to his employee as staff quarters for not less than 183 days in aggregate during the reporting period;

(e) whether the unit is the only unit held by the first-owner during the reporting period;

(f) whether the unit falls within the description of any types of exempted premises to which Special Rates do not apply; and

(g) any other matters specified by RVD.

RVD may, where necessary, require a first-owner to provide relevant information and produce supporting documents, such as stamped tenancy agreements, ASPs, assignments, etc., for verification of the details in the returns.

(4) Objection and appeal

The Bill provides for an objection and appeal mechanism for the Special Rates regime which is similar to the existing mechanism for rates. Any person who disagrees with the liability for payment of Special Rates may raise an objection to RVD and may further appeal to the Lands Tribunal.

(5) Offences and penalties

For the effective enforcement of the Special Rates regime, the Bill has provided for specific offences to penalize a person who fails to submit annual returns to RVD, provides false or misleading information to RVD for the assessment of Special Rates, or evades Special Rates by fraudulent means. A person convicted of any of such offences is, in addition to any penalty imposed for the offence concerned, liable to a fine of treble the undercharged amount of Special Rates.

To enhance the deterrent effect, if an offence (relating to false or misleading representation/information or fraud) created in the Bill is committed by a body corporate with the consent or connivance of, or is attributable to the neglect or omission of, its officer (e.g., the director, the company secretary or the principal officer), the officer is also guilty of the offence.

Way Forward

The First Reading of the Bill took place on 23 October 2019.

To allow sufficient time for developers to get prepared for the implementation of the Special Rates regime, the Bill, if passed, will come into operation three months after the enacted Ordinance is published in the Gazette.

Patrick Yeung

Non-Hong Kong Companies under the Companies Ordinance

Introduction

The Companies Ordinance (Cap. 622) ("CO") does not generally apply to foreign companies but certain specific provisions of the CO and the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) ("CWUMPO") do apply. This article briefly sets out the scope of application of these Ordinances to foreign companies.

Non-Hong Kong companies

Certain parts of the CO apply to "non-Hong Kong companies", defined in CO s.2(1) to mean companies incorporated outside Hong Kong that have established a place of business in Hong Kong.

Whether a non-Hong Kong company has established a place of business in Hong Kong is a question of fact. In *Re Yung Kee Holdings Ltd*[3], the Court of Appeal set out the following legal propositions relating to "establishing a place of business":

"*First, 'establishing a place of business' is not the same as carrying on business. The expression points to the company having 'a local habitation of its own' …*

Second, the word 'established' connotes not only the setting up of a place of business at a specific location, but a degree of permanence or recognisability as being a location of the company's business. The concept is of some more or less permanent location, not necessarily owned or even leased by the company, but at least associated with the company and from which habitually or with some degree of regularity

[3] [2014] 2 HKLRD 313

business is conducted …

Third, 'business' … should be interpreted in the general sense to mean activities, and not be confined to the narrow sense of commercial transactions … [I]t is not necessary that the place of business is used to transact business which creates legal obligations …

Fourth, the 'business' carried on … must be activities connected with the company's paramount or subsidiary objects …"[4].

In *Kam Leung Sui Kwan v Kam Kwan Lai*[5], the Court of Final Appeal noted that the term "place of business" connotes a place where or from which the company either carries on or possibly intends to carry on business.

Main requirements for non-Hong Kong companies

The main requirements for non-Hong Kong companies are set out in CO Part 16, the Companies (Non-Hong Kong Companies) Regulation (Cap. 622J) and the Non-Hong Kong Companies (Disclosure of Company Name, Place of Incorporation and Members' Limited Liability) Regulation (Cap. 622M)[6].

Registration requirement

A non-Hong Kong company must, within 1 month of the establishment of a place of business in Hong Kong, apply to the Registrar of Companies (the "Registrar") for registration as a "registered non-Hong Kong company". Registered non-Hong Kong companies are subject to certain continuing obligations under the CO.

Continuing requirements

A registered non-Hong Kong company must appoint an authorized representative in Hong Kong to accept service of documents on the company's behalf.

A registered non-Hong Kong company must deliver to the Registrar for registration an annual return together with a certified copy of its latest published accounts every year (subject to certain exceptions).

If there is any change in a registered non-Hong Kong company's constitution, directors, company secretary or authorized representative (or their particulars), principal place of business in Hong Kong, or registered office or principal place of business in its place of incorporation, a return containing particulars of the change must be delivered to the Registrar for registration within 1 month after the change.

If a registered non-Hong Kong company ceases to have a place of business in Hong Kong, it must notify the Registrar of that fact within 7 days after the cessation. However, the company must still have an authorized representative in Hong Kong for at least 11 months after the cessation.

If a registered non-Hong Kong company commences liquidation or is dissolved, the Registrar must, within 15 days, be notified of the particulars of the liquidation (including the particulars of the liquidator) or dissolution, as the case may be.

Other applicable provisions

The provisions on registration of charges in CO Part 8 also apply to a registered non-Hong Kong company in relation to charges created by the company over its property in Hong Kong.

The provisions on members' remedies[7] in CO Part 14 apply to any non-Hong Kong company as well, whether or not the company is registered under CO Part 16.

The provisions on winding up by the court in Part X of CWUMPO apply to "unregistered companies", which is defined to include registered non-Hong Kong companies as well as any other company incorporated outside Hong Kong[8]. Subject to the court's discretion, any foreign company may be wound up by the court under CWUMPO if: (a) the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs; (b) the company is unable to pay its debts; or (c) the court is of opinion that it is just and equitable that the company should be wound up[9].

Most of the provisions on schemes of arrangement in Division 2 of Part 13 of the CO also cover foreign companies by reason of the definition of "company" in s.668(1)[10] of the CO.

The provisions on disqualification of directors under

4 *Ibid*, [81]-[85]
5 (2015) 18 HKCFAR 501, [13]
6 See the Summer 2019 edition of the Commercial Law Review in relation to the new Cap. 622M.
7 E.g., unfair prejudice, statutory derivative action, statutory injunction and inspection of company's records.
8 CWUMPO s.326
9 CWUMPO Part V and s.327
10 The definition extends to a company liable to be wound up under CWUMPO.

Part IVA of CWUMPO also apply to directors of registered non-Hong Kong companies as well as directors of foreign companies carrying on business in Hong Kong or which have carried on business in Hong Kong.

Finally, Part XII of CWUMPO sets out requirements for, and restrictions on, the issuance, circulation or distribution in Hong Kong of prospectuses offering for subscription shares in or debentures of any company incorporated outside Hong Kong, whether or not the company has established a place of business in Hong Kong.

Conflict of laws

Subject to statutory provisions such as the above which are expressly applied to foreign companies, the law that governs a foreign company will be determined by conflict of laws rules[11]. All matters concerning the constitution of a company are governed by the law of its place of incorporation[12]. The powers or capacity of a company may be limited by its constitution as interpreted under the law of its place of incorporation[13]. The law of the place of incorporation also determines the composition and powers of different organs of the company, the nature and extent of the duties owed by the directors to the company, the persons who are authorized to act on behalf of the company and the dissolution of the company[14].

Ida Chan

[11] Lo and Qu, *Law of Companies in Hong Kong* (3rd ed., 2018), para. 2.075

[12] *Dicey, Morris & Collins on the Conflict of Laws* (15th ed., 2018), para. 30R-020

[13] *Ibid*, para. 30-021

[14] *Ibid*, paras. 30-011 and 30-028

Remedies for Breach of Contract

Where there is a breach of contract, the starting point for remedies for a claimant's loss and damage is often recovery of damages at common law. In most cases this affords adequate reparation. Where damages are not an adequate remedy, the court may decree equitable remedies such as specific performance and injunction.

Damages

Damages for loss in breach of contracts are available as of right. Depending on whether the innocent party has suffered loss as a result of the other party's breach, damages that an innocent party may claim may be nominal or substantial. Nominal damages is generally awarded when no actual damage is proved but the defendant is liable for breach of contract. Substantial damages, on the other hand, are awarded as monetary compensation for loss suffered as a result of the other party's breach. In assessing whether a claimant is entitled to damages, the court will first consider what kind of damage the claimant is entitled to recover. A claimant may recover for losses only if they naturally flow from the breach or were losses that were contemplated by the parties at the time the contract was made as the probable result of the breach. This is often referred to as the principles on remoteness of damage. If the loss does not fall within either of the above categories, it will be too remote and will not be recoverable.

Once it is established that the claimant has suffered loss as a result of the breach i.e. the damage is not too remote, the court will proceed to evaluate and quantify the damage in terms of money. The two methods most commonly adopted by the court in calculating the damages are expectation loss and reliance loss. The general position for expectation loss is that if the claimant has suffered damage that is not too remote, he must, so far as money can do it, be restored to the position he would have been in had the contract been properly performed. Reliance loss, on the other hand, may be sought when it is unclear what and whether any profit would have been made because it could be difficult to predict an outcome, but the claimant has already incurred expenditure in reliance on his expectation that the defendant would perform his undertaking and the latter's breach results in that expenditure being wasted. Nevertheless, the claimant will not recover damages for expenditure which he would not have recouped even if the contract had been performed.[15]

Despite the above, the law does not allow a claimant

[15] Chitty on Contracts Volume 1 General Principles, 32nd Ed, para. 26-022

to recover damages to compensate him for loss which would not have been suffered if he had taken reasonable steps to mitigate his loss.[16] The burden is on the party in breach to show that the claimant has failed to mitigate his loss.

Penalty and Liquidated Damages

Some parties may attempt to prescribe a specified sum to be paid if the contract is breached by way of incorporating a liquidated damages clause in the contract. However, one must be cautious when drawing up such clause because a clause which purports to impose a penalty is generally not enforceable. The use of words "penalty" or "liquidated damages" in the clause is not conclusive.[17] Historically, for a liquidated damages clause to be valid, the specified sum must be a genuine pre-estimate of the anticipated loss which the claimant would be likely to suffer in the event of a breach of the obligation in question. If a specified sum is extravagant and unconscionable in comparison with the greatest loss that could possibly have been proved in the event of breach of contract, it is likely for such sum to be regarded as penalty. The Supreme Court in the UK revisited this principle in recent years[18] and reformulated the test to one which focuses on the legitimate interests of the claimant and whether the relevant contract term is proportional to the protection of such interests. In the reformulated test, a contract term will not be regarded as penalty so long as it serves the legitimate business interests of the claimant and is not extravagant, exorbitant or unconscionable. The reformulated test has yet to be adopted in Hong Kong.

Specific Performance

A claimant may also seek for equitable relief apart from making a claim as of right. Specific performance is a decree issued by the court to compel a party to perform his contractual obligations. It is usually exceptionally granted in cases where damages at common law are not an adequate remedy. Specific performance is often decreed when the contract in issue has clearly defined the contractual obligations and emphasized on results rather than the carrying on of an activity over a period of time which may require constant supervision[19]. Further, the court generally will not grant such equitable remedy for contracts requiring personal services such as employment contracts because such an order would restrict an individual's freedom.

In exercising its discretion to grant equitable relief, the court will weigh the benefit to the claimant and the detriment to the party in breach. Some factors which the court may take into consideration are whether the performance of the contract would involve ordering the defendant to perform an act he is not legally competent to perform, whether the claimant comes to the court with "clean hands" and whether the claimant has delayed in making his claim.

Injunction

Similar to specific performance, an injunction is only granted at the discretion of the court and is awarded in cases where damages would not be an adequate remedy to compensate the claimant, particularly when the claimant wishes to restrain the party in breach from starting or continuing a breach of a contractual undertaking not to perform certain act (in which case it would be a prohibitory injunction), or to compel the party in breach to perform a contractual obligation (in which case it would be a mandatory injunction).

Owing to the nature of certain contracts e.g. contracts for personal service, contract of agency and of partnership, it is undesirable and sometimes impossible, to compel an unwilling party to maintain continuous personal relations with another.[20] As these types of contracts may not be specifically enforceable at the suit of either party, seeking an injunction which forbids the defendant to perform a similar personal service for other persons may be more appropriate. For instance, Actor A contracted with Director B to produce a movie and not to produce any movies with any other directors. The relationship between A and B turned sour and A breached the contract. In such circumstances the court may refuse the award of specific performance and instead grant an injunction which forbids A to produce movies with other directors.

Fiona Lai

Wong Sau Har & Anor v The Collector of Stamp Revenue [2019] 3 HKC 299

Facts

16 Cheshire, Fifoot and Furmston's Law of Contract, 16th Ed., p.778

17 Ibid footnote 1 at para. 26-178

18 *Cavendish Square Holding BV v Talal El Makdessi* and *ParkingEye Ltd v Beavis* [2015] UKSC 67

19 *Jeune v Queens Cross Properties Ltd* [1973] 3 All ER 97

20 Ibid footnote 2 at p.800

On 5 April 2009, Mr Wong signed a provisional sale and purchase agreement to buy a non-residential property at Flat A, 11/F, Hang Fat Trading House ("Property A") at $1,851,400. On the same day, his wife Ms Wong signed a provisional sale and purchase agreement to buy a non-residential property at Flat B, 11/F, Hang Fat Trading House ("Property B") at the same price of $1,851,400 from the same seller. The formal sale and purchase agreements and the conveyances on sale in respect of the properties were subsequently signed on 20 April 2009 and 19 May 2009 respectively. On 26 May 2009, the conveyances on sale were each stamped at $100 under Head 1(1)(a) of the then First Schedule of the Stamp Duty Ordinance (Cap. 117) ("SDO").[21]

The Collector of Stamp Revenue took the view that the conveyances on sale in respect of Property A and Property B should not be separately assessed as the transactions thereunder formed a larger transaction or series of transactions. On the basis that the total consideration for the two properties (i.e. $3,702,800) exceeded $3,290,320 but not $4,000,000, the Collector assessed stamp duty of $41,657 as being payable in respect of each conveyance on sale pursuant to Head 1(1)(e) of the then First Schedule of the SDO.[22]

Mr Wong and Ms Wong appealed to the District Court against the Collector's assessments.

Issue

The issue was whether the transactions under the conveyances on sale in respect of Property A and Property B formed a larger transaction or series of transaction for the purpose of s.29(1) of the SDO.[23]

Decision

The Court accepted the respondent's submission that in considering whether a transaction formed part of a larger transaction or series of transactions, the court should consider any evidence of interdependence that might be so related that one would cause or qualify another, and the circumstances were not fortuitous; it should also consider the facts of the case as to whether there was any integral relationship and any elements of essential unity and if so, whether that integral relationship was fortuitous (*AG v Cohen*[24]; *Jeffrey v Commissioner of Stamps*[25]; and *Old Reynella Village Property Ltd v Commissioner of Stamps*[26]).

In the present case, the Court found that:

(1) Property A and Property B were situate on the same floor of the same building;

(2) the sale of the properties (which required deed partitioning) involved the same seller;

(3) the appellants were related as husband and wife;

(4) the appellants bought Property A and Property B at the same price, and provided the same amount of deposit by way of cheque (cheque numbers 000265 and 000266 respectively);

(5) the appellants signed the provisional sale and purchase agreements (both of which provided that the transactions thereunder had to be completed on or before 29 May 2009) through the same estate agent on the same day;

(6) the formal sale and purchase agreements were signed on the same day;

(7) clause 45 of both formal agreements provided for a condition precedent that the conveyance of Property A and that of Property B had to be completed at the same time;

(8) the conveyances on sale were signed on the same day; and

(9) the provisional sale and purchase agreement, formal sale and purchase agreement and conveyance on sale for Property A and that for Property B were in substantially identical form.

Having considered the above factors, the Court held that the transactions under the two conveyances on sale formed a larger transaction or a series of transactions for the purpose of s.29(1) of the SDO.

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21 Under the then Head 1(1)(a), a conveyance on sale was to be charged with stamp duty at $100 where the amount or value of the consideration does not exceed $2,000,000 and the instrument is certified in accordance with s.29 at $2,000,000.

22 Under the then Head 1(1)(e), a conveyance on sale was to be charged with stamp duty at 2.25% of the consideration where the consideration exceeded $3,290,320 but not $4,000,000 and the instrument is certified in accordance with s.29 at $4,000,000.

23 S.29(1) states that "References in head 1(1) in the First Schedule to a conveyance on sale being certified at a particular amount mean that such conveyance on sale contains a statement certifying that the transaction effected by the instrument does not form part of a larger transaction or series of transactions in respect of which the amount or value, or aggregate amount or value, of the consideration exceeds that amount."

24 [1937] 1 KB 478, [1937] 1 All ER 27

25 (1980) 23 SASR 398, (1980) 80 ATC 4126

26 (1989) 51 SASR 378, (1989) 89 ATC 4916

In particular, the Court considered that the transactions were interdependent or would cause or qualify the other as the appellants had to complete the transactions at the same time. Further, as the parties were acting in accordance with clause 45 of the formal sale and purchase agreements, their actions were not fortuitous.

The Court rejected the appellants' argument that they had not been advised by their estate agent and lawyers that the conveyances of Property A and Property B might form a larger transaction or a series of transactions for stamp duty purposes. In accordance with s.11 of the SDO, all the facts and circumstances which might affect the assessment of the stamp duty chargeable should be fully and truly set forth in the instrument. The subjective view and intention of the appellants on the transaction were not matters for the Court's consideration when interpreting the instrument (*Chan Koon Ping & Anor v Collector of Stamp Revenue*[27]).

Accordingly, the appeals were dismissed.

Blondie Poon

Re Sit Kwong Lam (Debtor) [2019] 2 HKLRD 924

Facts

Sit Kwong Lam (the Debtor "D") was the chairman and indirect controlling shareholder of a listed company in Hong Kong (the "Holding Company"). A wholly-owned subsidiary of the Holding Company (the "Subsidiary") bought goods from the Petitioner totalling over US$30 million but failed to meet payment in time.

D gave a personal guarantee of punctual performance by the Subsidiary of its obligation to pay the sum due by a Deed of Personal Guarantee ("Personal Guarantee") executed by D in favour of the Petitioner. The Petitioner and the Subsidiary subsequently entered into a settlement agreement ("Settlement Agreement") which contained an arbitration clause for arbitration in Singapore. Pursuant to the Settlement Agreement, D executed an addendum to the Personal Guarantee (the "Addendum") in favour of the Petitioner to cover the performance of the Subsidiary's obligations under the Settlement Agreement.

The Subsidiary failed to discharge its payment obligations under the Settlement Agreement. When full payment was not made, a statutory demand was issued against D for the payment of the outstanding settlement sum pursuant to the Personal Guarantee and the Addendum. When this demand was not complied with, a bankruptcy petition was issued by the Petitioner against D for the sum of over US$30 million. D opposed the petition.

Arguments, Analyses and Decision

D argued, *inter alia*, that the court should exercise its discretion to stay or dismiss the petition due to the existence of an arbitration clause. D relied on the Addendum which provided that "all other terms and conditions of the Personal Guarantee, including the arbitration clause, shall remain unchanged and this Addendum shall constitute an integral part of the Personal Guarantee".

It was also contended that since the Petitioner relied on the Personal Guarantee, the Settlement Agreement and the Addendum to hold D liable as guarantor for the Subsidiary's liability under the Settlement Agreement, the Addendum should be construed as containing an arbitration clause in the same term as a provision in the Settlement Agreement or it should be rectified to that effect.

Looking at the actual language used in the Addendum, the judge held that he was not able to find -

(i) any reference to the arbitration clause in the Settlement Agreement at all, or

(ii) any purported attempt to incorporate the arbitration clause in the Settlement Agreement into the Addendum.

All one could find in the Addendum was a reference to a non-existent arbitration clause in the Personal Guarantee. The judge agreed with the Petitioner that the reference to "arbitration clause" was indeed a clerical mistake and should be ignored as a matter of construction. The judge further held that even if there had been an arbitration clause it would not be enforced. Insofar as a clause which purported to preclude, restrict or fetter a creditor's statutory right to petition for bankruptcy or winding up on the ground of insolvency, it was contrary to public policy and would not be enforced by the courts.

D's second argument was based on the Petitioner having granted an extension of time to the Subsidiary to pay by virtue of the Settlement Agreement and this

[27] [1985] HKCU 58

was said to have the effect of releasing the D's liability under the Personal Guarantee. This ground was also premised on the Addendum post-dating the Settlement Agreement.

The court considered the ground unmeritorious for the following reasons:

(a) the general rule was that a binding agreement by the creditor to extend the time for the performance of the debtor's obligations under the main contract released the guarantor from liability;

(b) this general rule was subject to a number of exceptions, the most important of which for the present purpose was consent by the guarantor to the extension of time. Such consent could be given before or after the extension was granted to the debtor;

(c) if such consent was given after the extension was granted, the consent would be binding on the guarantor notwithstanding the absence of further consideration for his guarantee. In other words, the guarantor was taken to have waived his rights to treat himself as discharged from the guarantee or to have elected to be bound by it;

(d) the consent need not be express – it could be implied, e.g. where the guarantor requested or instigated the extension of time and/or where the guarantor was a director of the principal debtor company and negotiated with the creditor for the extension;

(e) D had consented to the extension of time both before and after the extension was given. As for before, D's consent to the extension of time could be inferred from his signature on the Settlement Agreement, albeit as a director. D had either instigated the extension of time and/or negotiated with the creditor for the extension. As for after, his consent was self-evident from his executing the Addendum and hence, it was clear that D consented to the extension of time and accepted he would continue to be liable as a guarantor under the Personal Guarantee.

For the above reasons, the court rejected the second argument.

D further tried to argue that there was a reasonable prospect of the underlying debt being paid by the Subsidiary within a reasonable time. But the validity of this ground depended on the cogency of the evidence adduced by D, viz. a couple of affirmations which, in the court's view, were just an expression of hope, on instructions, that sometime in the future, the Subsidiary would be able to arrange its re-financing which if successful would enable the Subsidiary to repay the debt.

On such evidence, the court was not satisfied there was a reasonable prospect of the debt being paid, either by the Subsidiary or D, within a reasonable time.

The court granted the petition.

Danny Yuen

Re Mount Oscar Ltd [2019] 3 HKC 82

This case is concerned with whether there is a duty on the part of a company or its shareholders to give reasons to a director for a proposed resolution to remove the director from office at a general meeting of the company. The Court of First Instance (the "CFI") considered the rules on internal management of companies and removal of directors under the Companies Ordinance (Cap. 622) (the "CO") and whether a requirement to give reasons can be implied into the CO under principles of statutory interpretation. The CFI laid down a high threshold for a requirement to be read into a statutory provision by necessary implication.

Facts

Kenneth Yeung (the "Applicant") was one of the four directors of the respondent, Mount Oscar Ltd (the "Company"). The Applicant was removed as a director by way of an ordinary resolution ("Ordinary Resolution") passed at an extraordinary general meeting of the Company ("EGM"). The EGM was called by the board of directors upon request of the Company's majority shareholder. The Applicant took out an originating summons to seek a declaration that the Ordinary Resolution was invalid or otherwise null and void and an injunction to restrain the Company from implementing or otherwise acting upon the Ordinary Resolution (the "Application").

Issue

The Applicant contended that there was a procedural irregularity in respect of the passing of the Ordinary Resolution since the Applicant was not given reasons for the proposal to remove him as a director despite

his repeated demands. S.463 of the CO requires that a director, faced with a proposed resolution to remove him from office, be given an opportunity to be heard and to make representations at the general meeting. However, s.463 does not specify that reasons for the proposed removal are to be provided to the affected director. Given the lack of any express provision in the CO in respect of a requirement to give reasons for removal of a director, the issue was whether such a requirement should be read into s.463 by necessary implication.

Decision of CFI

The CFI dismissed the Application.

The CFI set out the following principles of company law to provide the legal context relevant to the present case:-

(a) s.462 of the CO provides a statutory right to majority shareholders to remove a director of the company;
(b) s.462 is said to be an important provision governing the power structure of a limited company that cannot be circumvented or abrogated by, for instance, an agreement with the company that someone cannot be removed as a director; and
(c) the court will not interfere with the internal management of companies acting within their powers and has no jurisdiction to do so.

The CFI also set out the relevant principles of statutory interpretation as follows. The court construes the relevant words in a statutory provision having regard to its context and purpose. The context includes other relevant provisions in the statute and their history. The court would also ascertain the purpose of the statutory provision in a flexible and open-minded manner, having regard to the Explanatory Memorandum to the bill introducing the provision where necessary.

A requirement said to be imposed by a statute may arise from the express words of a statute or by necessary implication. The CFI cited earlier case law in observing that a necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. A necessary implication is a matter of express language and logic rather than interpretation.

Applying the above principles, the CFI held that a high threshold is required for reading into s.463 a requirement to provide the reasons for removal to the affected director by way of necessary implication. "*It is not enough for the applicant to show that the additional requirement is reasonable, sensible or, if the legislature had thought about it, would probably have included this requirement in s.463. In order to succeed, the applicant must show it is clear from the express language of s.463 that the additional requirement must have been included*."

The CFI held that the Applicant "*has not even come close to reaching the high threshold required*", for the following reasons.

First, the additional requirement of providing reasons to the affected director will put the company in an impossible position. It is entirely conceivable that there will be situations in which a company does not know the reason why a shareholder proposes the resolution to remove a director. Yet under s.567(1) of the CO, the directors have no choice but to call a general meeting requested by shareholders.

Second, the CFI noted that under s.566(3)(b) of the CO (shareholders' powers to request directors to call a meeting), it is only optional for a shareholder to include the text of a proposed resolution in its request for a meeting. If even the production of the text of a shareholder's proposed resolution is optional, the CFI did not consider it to be clear that there could be an additional requirement for shareholders to provide reasons to the affected director or the company.

Third, the CO already provides an elaborate procedure for removal of a director in general meetings. The CFI stated that it is difficult to see why, in the context of such an elaborate procedure, it could be clear from the express language of s.463 or s.566 of the CO that the additional requirement must have been included.

The CFI also rejected the Applicant's argument that it is sensible and reasonable to add the requirement to provide reasons to the CO, as reasonableness is not the applicable test.

Accordingly, the CFI concluded that there is no legal basis for the Applicant's contention that a requirement to provide reasons for a director's removal should be read into the CO.

Kennis Lam

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