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Editorial

We feature three articles in this edition.

This first article talks about the provisions in the Companies (Winding Up and Miscellaneous Provisions) Ordinance empowering the court to set aside transactions at an undervalue.

The second article talks about the Vessel Subsidy Scheme which will be launched in 2021. Under the Scheme, the Government will provide financial assistance to the ferry operators of certain outlying island ferry routes to replace their vessels with new and greener fast vessels. The objectives of the Scheme are to enhance ferry service quality and promote the development of a greener city.

The third article provides an overview of the common law doctrine of frustration and the force majeure clause in a contract which may release parties from further performance of a contract.

We also feature three case reports.

The first case is about whether certain Articles of Association of German Swiss International School Association Ltd, which provided, amongst other things, that any member of the school who was fluent in written and spoken German was eligible for election to the Board of the school, contravened s.4 of the Race Discrimination Ordinance and therefore void.

The second case is a case of email fraud in which the plaintiff was deceived by a fraudulent email into remitting a substantial amount of money into the defendant's bank account. The question was whether the court had jurisdiction to grant a vesting order under s.52(1)(e) of the Trustee Ordinance to order the defendant to transfer the money in his bank account to the plaintiff.

The third case involved the application of the twin requirements in a recognition order granted by a Hong Kong court in rendering assistance to a foreign court in a cross-border insolvency case.

YUNG Lap-yan

Invalidity of Transactions at an Undervalue in a Liquidation

Introduction

For better creditor protection, provisions empowering the court to set aside transactions at an undervalue were introduced into Hong Kong corporate insolvency legislation in 2017, based on provisions which have existed in the Bankruptcy Ordinance (Cap. 6) for personal bankruptcies since 1996.

Transaction at an undervalue

S.265E of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) provides that a company enters into a transaction with a person at an undervalue if —

(a) the company makes a gift to that person, or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration; or
(b) the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company.

Below are some examples of transactions at an undervalue[1]:

- Gratuitous payments of monies said to be loans but which were held to be gifts in circumstances where the payments were made without intent that they should be repaid and which were not repayable on demand.
- Overpayments by the company for goods or services.

Court order and its effects

On application, the court may set aside a transaction at an undervalue under s.265D of Cap. 32 if:

(a) the company has gone into liquidation[2];
(b) the company has entered into a transaction with a person at an undervalue;
(c) the transaction was entered into within 5 years before the commencement of the winding up of the company[3]; and
(d) the company was unable to pay its debts (within the meaning of s.178 of Cap. 32) (i.e. insolvent) at the time the transaction was entered into, or the company became unable to pay its debts in consequence of the transaction[4].

If the above elements are satisfied, the court may make an order it thinks fit for restoring the position to what it would have been if the company had not entered into the transaction ("Restoration Order")[5]. For example, an order requiring any person holding the property transferred (or its sale proceeds) to transfer the property or proceeds back to the company, or an order releasing or discharging any security given by the company[6]. The funds or assets recovered would be available to the liquidator for distribution to the general creditors of the company and would not be covered by any charge over the company's assets[7].

Defence

A transaction at an undervalue would not be voidable under s.265D if the court is satisfied that: (a) the company entered into the transaction in good faith and for the purpose of carrying on its business; and (b) at the time the company did so, there were reasonable grounds for believing that the transaction would benefit the company.

Third parties

The Restoration Order may affect the property of, or impose an obligation on, any person whether or not that person is the person with whom the company entered into the transaction at an undervalue[8].

However, for the protection of certain innocent third parties, the Restoration Order must not (a) prejudice any interest in property which was acquired from a person other than the company and was acquired in good faith and for value, or any interest deriving from such an interest; or (b) require a person who received a benefit from the transaction in good faith and for value

1 Lo and Qu, *Law of Companies in Hong Kong* (3rd ed., 2018), para. 20.148

2 A company goes into liquidation when: (a) the company passes a resolution for voluntary winding up; (b) a winding-up statement is delivered to the Registrar of Companies for registration under s.228A of Cap. 32 for the company; or (c) the court makes a winding-up order in respect of the company: Cap. 32 s.265A(4).

3 Cap. 32 s.266B(1)(a)

4 Cap. 32 s.266B(2). A rebuttable presumption of insolvency applies if a transaction at an undervalue was entered into by a company with a person connected with the company (otherwise than by reason only of being the company's employee): Cap. 32 s.266B(3).

5 Cap. 32 s.265D(3)

6 Cap. 32 s.266C(1)

7 Lo and Qu (above), para. 20.161

8 Cap. 32 s.266C(2)

to pay a sum to the liquidator, except where that person was a party to the transaction at a time when that person was a creditor of the company[9].

If a third party has acquired an interest in property from a person other than the company, or has received a benefit from the transaction, then unless the contrary is shown, it is presumed that the interest was acquired or the benefit was received otherwise than in good faith if, at the time of the acquisition or receipt, the third party had notice of the fact that the company entered into the transaction at an undervalue and of the relevant liquidation proceedings [10]. There is also a presumption of absence of good faith if, at the time of the acquisition or receipt, the third party was connected with the company[11] or was connected with, or was an associate[12] of, the person with whom the company entered into the transaction[13].

Where a transaction at an undervalue is also an unfair preference

It is possible that one transaction can amount to both a transaction at an undervalue and an unfair preference (which is another category of voidable transactions under Cap. 32). In that case, either set of provisions for setting aside the transaction may be relied on, but the claw-back period under s.266B of Cap. 32 for transactions at an undervalue (5 years) is longer than that for unfair preferences (6 months; or 2 years for preferences given to persons connected with the company)[14].

Ida Chan

9 Cap. 32 s.266C(3)

10 A third party has notice of the relevant proceedings if: (i) in the case of the company going into liquidation on the making of a winding-up order on a petition – that party had notice of the fact that the petition had been presented, or the company had gone into liquidation; (ii) in the case of the company going into liquidation on the delivery of a winding-up statement to the Registrar of Companies under s.228A – that party had notice of the fact that a resolution had been passed under s.228A(1)(a) in respect of the company, or the company had gone into liquidation; or (iii) in any other case – that party had notice of the fact that the company had gone into liquidation: Cap. 32 s.266C(6).

11 A person is connected with a company if that person is (a) an associate of a director or shadow director of the company; or (b) an associate of the company: Cap. 32 s.265A(3).

12 The concept of associate in ss.265B and 265C of Cap. 32 broadly covers (a) family relationships; (b) partnership relationships; (c) trust relationships; (d) employment relationships; and (e) office-holder relationships. Further, the concept of associate will apply not only to individuals but also to corporate entities, based on individual or corporate control: see Kwan, *Hong Kong Corporate Law*, [3204].

13 Cap. 32 s.266C(4)-(5)

14 Lo and Qu (above), para. 20.162

Vessel Subsidy Scheme

Background

The Chief Executive announced in the 2019 Policy Address that the Transport Department would launch a Vessel Subsidy Scheme (the "Scheme") to replace the fleets of vessels on most of the outlying island ferry routes involving the introduction of some 47 new and greener fast vessels, with the total cost estimated to be no less than HK$5.8 billion. The Scheme will be carried out in two phases over a period of ten years starting from 2021. The objectives of the Scheme are to enhance ferry service quality and promote the development of a greener city.

The Government will provide financial assistance to the ferry operators by fully subsidising the procurement of the new vessels in order to satisfy the public aspiration for improving the quality of vessels in terms of speed, comfort level, facilities and environmental performance whilst not financially burdening the operators which might encounter difficulties if they are to invest in renewing or even replacing their entire fleets. The Government will be involved in conceiving the specifications of the subsidised vessels and selecting the shipbuilders whom the Government will pay directly.

Under the Scheme, the Government would enter into a subsidy agreement with each operator (the "Subsidy Agreement") pursuant to which the operator, as the legal and beneficial owner of the subsidised vessels, are required to bear all the operational and legal responsibilities / liabilities in respect of the vessels' management, repair and insurance. Furthermore, if an operator ceases to provide the relevant public ferry services, it is required to transfer all its subsidised vessels to the Government or a Government's nominee (e.g. the succeeding operator for the continued operation of the relevant route). To ensure the operator's performance of all its obligations under the Subsidy Agreement including making the transfer as required, a legal mortgage of the subsidised vessel will be executed by the operator in favour of the Government. The operators are also prohibited from disposing of any of their legal or equitable interests in

any of the subsidised vessels. If any subsidised vessel is disposed of in breach of the Subsidy Agreement, the operator would be required to repay the Government the subsidy in full in respect of that particular vessel.

There are views that the Government should procure and own the new vessels itself and then contract out the operation to the operators. This would, nevertheless, involve a much larger public spending as compared with the Scheme but with lower cost-effectiveness. To adhere to the well-established policy that public transport services should be run by the private sector in accordance with the commercial principles to enhance efficiency and cost-effectiveness, and to avoid the sudden change of the current operation mode in the provision of ferry services which may bring about a disruption of the normal ferry services, the introduction of the Scheme is considered a better option.

Protection of the Government's interest

Given the vast amount of the public money at stake, it is necessary to put in place additional safeguards to protect the Government's interest.

During the construction stage of a vessel

As a general practice in the shipbuilding industry, title to a partly-constructed vessel rests with the shipbuilder until delivery and acceptance by the buyer. In such circumstances, the buyer risks the shipbuilder running into financial difficulties before delivery, which would place the buyer in a position no different from other unsecured creditors when recovering the deposit and stage payment(s) previously made to the indebted shipbuilder. This is of particular concern because the buyer usually pays for a substantial part of the vessel in advance of delivery. Hence, it is commonplace in the shipbuilding industry that shipbuilders are called upon to provide the buyer, at the outset of a shipbuilding contract, a refund guarantee to mitigate against the risk that the shipbuilder defaults or becomes insolvent. A refund guarantee is essentially an undertaking by a creditworthy bank that it will repay all pre-delivery payments to the buyer in full if any of the specified events of default occurs. In this way, the refund guarantee provides a form of security to the buyer insofar as the advance payments are concerned.

In the context of the Scheme, an additional and effective safeguard to the Government would be to require the operator to assign all of its rights, title, interest and benefits in, to and under the refund guarantee to the Government, so that the security and protection offered under the refund guarantee will be passed to the Government.

After delivery and during the work life of a vessel

Upon delivery of the subsidised vessels, the operator, who then becomes the legal and beneficial owner of the same, will be required to execute certain security documents in favour of the Government, including the above mentioned legal mortgage and an insurance assignment.

The legal ship mortgage would be registered on the Hong Kong Register of Ships under the Merchant Shipping (Registration) Ordinance (Cap. 415), and the Government, being the first mortgagee, will rank in priority in any event.

An assignment of insurances (e.g. insurances against fire and usual marine risks (including hull and machinery and excess risks), war risks (including acts of terrorism and piracy) and protection and indemnity risks) will also be executed by the operator so that the benefits under all such insurances will be assigned in favour of the Government.

After the work life of a vessel

When a subsidised vessel is no longer operable or where the Government considers necessary, the Government is entitled under the Subsidy Agreement to require the disposal of a subsidised vessel with the net sales proceeds held by either the Government or the operator on trust for the Government's nominee.

Concluding Remarks

It is believed that the launch of the Scheme will assist the operators in maintaining their financial viability, improve service quality and promote environmental protection while keeping the fares at a reasonable level.

Vivian Cheung and Silvia Tang

Background

Amidst the Covid-19 outbreak, government bureax/departments and contractors may find it difficult or impossible to perform contracts entered into before the onset of the pandemic. Non-performing parties may seek to rely on the common law rules on frustration and/or contractual force majeure provisions so as to relieve themselves from performance of the contract. This article provides an overview on frustration and force majeure under contract law.

Frustration

A contract may be discharged on the ground of frustration when something occurs after contract formation which renders it physically or commercially impossible to fulfil the contract, or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of entry into the contract[15]. The test for frustration is summarized in *National Carriers Ltd v Panalpina (Northern) Ltd*[16], "*Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance*."

In determining whether a contract has been frustrated, the court will first construe the contract to ascertain the parties' contractual obligations in the original circumstances. Then, the court will ascertain what would be the obligation of the parties if the contract was enforced in the new circumstances. The last step is to compare the two obligations to decide whether the new obligation is a radical or fundamental change from the original obligation[17]. The key question is "*was performance ... fundamentally different in a commercial sense?*"[18]

Various factors may be taken into account when deciding whether a contract has been frustrated e.g. the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations as to risk at the time of contract, and nature of the supervening event[19].

At common law, frustration does not rescind the contract from the beginning. Rather, it brings the contract to an end forthwith and automatically, and releases both parties from further performance of the contract[20]. Frustration does not affect the obligations which have accrued prior to the date of frustration[21]. This rule, however, creates unsatisfactory results. For instance, a payer could only recover money upon a total failure of consideration: a partial failure did not give rise to a right of recovery[22]. In *Whincup v Hughes*[23], a premium was paid at the time of contract for a six-year apprenticeship. The master died after instructing the apprentice for a year. The court held that while the contract was frustrated, no money could be recovered by the apprentice as there was no *total* failure of consideration (i.e. the master did provide services for a year).

The above unsatisfactory result is mitigated by s.16 of the Law Amendment and Reform (Consolidation) Ordinance, Cap. 23 ("LARCO"), which provides that money paid before frustration shall be recoverable, and the court may, if it considers just, allow the payee to retain a sum for the expenses incurred in performance of the contract. Hence, money paid is recoverable even upon a partial failure of consideration[24]. In the situation where a service provider had provided some services prior to frustration but payment was due on completion, s.16(3) of LACO allows the service provider to recover a sum, as the court considers just, for a valuable benefit conferred on the payer before frustration.

Force Majeure

A force majeure clause is normally used to describe a contractual term by which a party is entitled to cancel the contract, be excused from performance, suspend performance, or claim time extension for performance upon the happening of a specified event beyond his control[25].

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15 *Chitty on Contracts* (Vol 1, 33rd ed., 2018), [23-001]
16 [1981] A.C. 675, 700
17 *Chitty on Contracts*, [23-014]
18 *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] A.C. 93, 119
19 *Chitty on Contracts*, [23-019]
20 *Chitty on Contracts*, [23-071]
21 *Chitty on Contracts*, [23-072]
22 *Chitty on Contracts*, [23-073]
23 (1871) L.R. 6 C.P. 78
24 *Chitty on Contracts*, [23-077]
25 *Chitty on Contracts*, [15-152]

A force majeure clause normally includes a list of specified events which trigger the operation of the clause, the reporting obligations of the party who wishes to invoke the protection of the clause, and the consequences of the occurrence of the force majeure event.

Generally, a party relying upon a force majeure clause has to prove that his non-performance was due to circumstances beyond his control and that there were no reasonable steps that he could have taken to avoid or mitigate the event or its consequences[26]. Where a force majeure clause states that a party is relieved of liability if he is "prevented" from carrying out his obligations, he must show that performance has become physically or legally impossible, and not merely more difficult or unprofitable[27]. For example, in a contract for sale of goods, it is not sufficient for the seller to show that his intended supplier is unable to supply the goods if he can obtain goods from another supplier[28].

In *The Center (76) Ltd v Victory Serviced Office (HK) Ltd* [29], the court considered whether the social disruption in 2019 and Covid-19 pandemic are frustrating events. The court found that while the said events may be unforeseen at the time of the tenancy agreement, they have not fundamentally or radically changed the nature of the parties' obligations or rendered it physically or commercially impossible to fulfil the tenancy agreement, and therefore do not amount to frustration. The court also rejected the defendant's alternative argument that the said events constitute "Acts of God" under a force majeure clause. The said events had not rendered the premises unfit for occupation or inaccessible, which is an express requirement for invoking the force majeure clause.

Conclusion

In the absence of a force majeure clause, a party who is unable to perform his obligations due to circumstances beyond his control will be left to rely on the doctrine of frustration for relieving himself from performing of the contract. Inclusion of a force majeure clause in a contract will offer greater protection to parties against the risk of unforeseeable events, though parties should carefully consider how the clause is to operate in order to invoke its protection.

Emily Cheung

[26] *Chitty on Contracts*, [15-155]
[27] *Chitty on Contracts*, [15-156]
[28] *Hoecheong Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 W.L.R. 404
[29] HCA 1020/2020

Re German Swiss International School Association Ltd [2020] HKCFI 1341

Facts

German Swiss International School Association Ltd (the "Company") was incorporated with limited liability under guarantee. The objects in the Articles of Association (the "AoA") included, *inter alia*, to manage on a non-profit basis the German Swiss International School (the "School"). The School operated two streams, one teaching a curriculum in German and one teaching an English curriculum. The English stream had significantly more pupils than the German stream.

The AoA included the following (the "Concerned Articles"):

(a) Art. 47.2, which provided that any member "who is fluent in written and spoken German" was eligible for election to the Company's Board;
(b) Art. 63, which provided that Board meetings shall be conducted in German; and
(c) Art. 68, which provided that the Board shall elect from its members the Chairman, the First and Second Deputy Chairman, all of whom "must have a German speaking background".

Following a complaint by a member of the Company to the Equal Opportunities Commission asserting that the Concerned Articles were in breach of ss.4(1)(b) and 36 of the Race Discrimination Ordinance (the "RDO"), [30] the Company sought from the court a declaration that the Concerned Articles were void and unenforceable for contravening the RDO; and alternatively, that Arts. 47.2 and 68 were void for uncertainty.

Another member of the Company (the "Respondent") counterclaimed for: (i) a declaration that the Concerned Articles did not contravene the RDO; and (ii) orders that individuals elected to the Board who did not satisfy Art. 47.2 be removed.

Issues

The issues as identified by Harris J were as follows:

(i) whether the Concerned Articles were discriminatory under ss.4(1)(b)(ii) of the RDO;
(ii) whether the RDO was applicable to the Company. More specifically, whether the Company fell within the definition of a "club" under the RDO; and

[30] Cap. 602

(iii) whether Arts. 47.2 and 68 were void for uncertainty.

Decision

The Concerned Articles were Discriminatory

S.4 of the RDO:

"(1) In any circumstances relevant for the purposes of any provision of this Ordinance, a person (***the discriminator***) discriminates against another person if — …

(b) the discriminator applies to that other person a requirement or condition which the discriminator applies or would apply equally to persons not of the same racial group as that other person but—

(i) which is such that the proportion of persons of the same racial group as that other person who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it;

(ii) which the discriminator cannot show to be justifiable irrespective of the race of the person to whom it is applied; and

(iii) which is to the detriment of the other person because that person cannot comply with it.

(2) For the purposes of subsection (1)(b)(ii), a requirement or condition is justifiable if it serves a legitimate objective and bears a rational and proportionate connection to the objective."

The Court noted that the Respondent did not dispute that the Concerned Articles were discriminatory under s.4(1)(b), because the proportion of non-German, Swiss and Austrian members who could comply with them was far smaller than the proportion of German, Swiss and Austrian families.

Thus, the Court considered whether the Concerned Articles were justifiable so that they fell under the exceptions of ss.4(1)(b)(ii) and (2). For Art. 47.2, the court held that there was no justification for requiring all directors to be fluent German speakers and excluding the majority of members from standing for election. Art. 63 was not justified as the German-speakers likely to be elected would be able to speak English well enough to participate in board meetings conducted in English (which is an official language in Hong Kong). Art. 68 was also not justified. Given the current demographics of the School, it must be just as desirable to have members who represented the majority of the community to fill these offices as it is to have officers who are familiar with the German language and culture.

RDO is applicable

Even if the AoA were discriminatory contrary to s.4 of the RDO, the court had to be satisfied that the Company came within the definition of "club" in the RDO in order for s.36 (which regulates discrimination by clubs) of the RDO to apply. Otherwise, s. 81 of the RDO would not render the Concerned Articles void.

According to s.2 of the RDO, a "club" is defined as "an association, incorporate or unincorporate, of not less than 30 persons, associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes and which provides and maintains its facilities, in whole or in part, from the funds of the association".

The court considered whether "other lawful purposes" included a school. The Respondent argued that "club" did not generally connote an organization like a school, and by way of statutory interpretation, the RDO was not intended to apply universally.

The court held that in cases of clubs, the *genus* was not the nature of the specified activity, but that generally they were non-commercial and commonly non-profit making. Associations formed to carry out these kinds of activities were of a type in which discrimination was considered by the legislature objectionable. There was no reason why the legislature would intend to prohibit discrimination in non-commercial associations formed to facilitate members practicing sports or pursuing a common interest in an art form, but leave those providing education untouched and free to implement racially discriminatory practices. Therefore, a school should fall within this *genus* and the Company was a club for the purposes of ss.2 and 36 of the RDO.

Void for Uncertainty

The Company's alternative argument was that Arts. 47.2 and 68 were void for uncertainty.[31]

The court did not find Art. 47.2 void for uncertainty. It held that the word "fluent" when used to describe

[31] Relying on *New World Development Co Ltd v Sun Hung Kai Securities Ltd* (2006) 9 HKCFAR 403

the facility in a language is well understood; a very high level, but not native. For Art. 68, the Court considered that the expression "German speaking background" could have a range of plausible interpretations which had significantly different consequences. It was not possible to ascertain what was intended and the court therefore found Art. 68 void for uncertainty.

Josephine Ho
(Commentary prepared with the assistance of Mr Carter Chim of Denis Chang's Chambers)

Tokić, D.O.O. v Hongkong Shui Fat Trading Limited & Ors [2020] HKCFI 1822

Facts

This is an all-too-common case of email fraud. The Plaintiff's accounting department was deceived by a fraudulent email from a rogue impersonating the Plaintiff's CEO into remitting some US$1,977,500 into the 1st Defendant's account in the period between 21 to 27 February 2020. The bulk of the sums were quickly dissipated from the 1st Defendant's account and remitted into various accounts of the 2nd to 10th Defendants.

The Plaintiff applied for default judgment and other reliefs against the 1st, 4th, 5th and 6th Defendants under Order 19 r.7 of the Rules of the High Court (Cap. 4A) ("RHC"). The Plaintiff claimed against the Defendants for *inter alia* declarations that they held the sums received as constructive trustees for the Plaintiff, repayment of the sums as money had and received, equitable compensation and vesting orders pursuant to s.52 of the Trustee Ordinance (Cap. 29) ("TO").

The court ("the Court") granted judgment in default of defence and the declaratory reliefs sought, but dismissed the application for vesting orders under s.52(1)(e) of the TO in respect of bank balances standing to the credit of the 1st and 5th Defendants which were traceable proceeds of the fraud.

Issue

S.52(1)(e) of the TO provides *inter alia* that "where stock or a thing in action is vested in a trustee whether by way of mortgage or otherwise and it appears to the court to be expedient, the court may make an order vesting the right to transfer or call for a transfer of stock, or to receive the dividends or income thereof, or to sue for or recover the thing in action…".

The issue before the Court was whether s.52(1)(e) of the TO was applicable to this type of fraud cases so as to enable the Plaintiff as the victim to have transferred to him expeditiously those assets and proceeds declared to be held by the Defendants as constructive trustees.

Reasons for the Decision

The Court considered two conflicting decisions of the Court of First Instance which also concerned email fraud, namely, *Wismettac Asian Foods Inc. v ZL Trade Limited & Others*[32] and *800 Columbia Project Company LLC v Chengfang Trade Ltd & Others*.[33] In the former case, DHCJ Paul Lam SC conducted a survey of a long line of first instance decisions in Hong Kong where the courts considered vesting orders under s.52(1)(e) of the TO in respect of proceeds of fraud. In all of those cases reviewed, with the exception of one, the courts proceeded on the assumption that they had jurisdiction to make a vesting order under s.52(1)(e). The only exception was Recorder Eugene Fung SC's decision in the latter case.

Relying on *Williams v Central Bank of Nigeria*,[34] Recorder Eugene Fung SC in *800 Columbia* noted that there were two types of constructive trust:

(1) the first type comprises persons who have lawfully assumed fiduciary obligations in relation to the trust properties, but without a formal appointment. They are true or *de facto* trustees; and

(2) the second type comprises persons who have never assumed and never intended to assume the status of a trustee, but have exposed themselves to equitable remedies by virtue of their participation in the unlawful misapplication of trust assets. They may be required by equity to account as if they were trustees or fiduciaries, although they are not.

With the above distinction in mind and after a thorough analysis of section 52(1) of the TO, Recorder Eugene Fung SC held that the court did not have jurisdiction to make a vesting order under s.52(1)(e) in that fraud case.

DCHJ Paul Lam SC in *Wismettac* declined to follow Recorder Eugene Fung SC's decision and held that s.52(1)(e) of the TO was wide enough to give the court the necessary jurisdiction to grant a vesting order in a fraud case because:

[32] [2020] HKCFI 1504
[33] [2020] HKCFI 1293
[34] [2014] AC 1189

(1) the word "trustee" in s 52(1)(e) would extend to a constructive trustee as s.2 of the TO provides that, unless the context otherwise requires, the expressions "trust" and "trustee" extend to "implied and constructive trusts"; and

(2) the phrase "or otherwise" in s.52(1)(e) is extremely broad and would cover constructive trusts arising in respect of proceeds of fraud.

The Court in the present case considered both decisions of DCHJ Paul Lam SC and Recorder Eugene Fung SC and agreed with the latter. The Court pointed out that the distinction between the two types of constructive trust was confirmed by the Court of Final Appeal in *Peconic Industrial Development Ltd v Lau Kwok Fai & Others*,[35] and it held that:

(1) the Defendants were no more than recipients of proceeds of fraud and not true trustees, constructive or otherwise. They were merely required by equity to account *as if* they were trustees or fiduciaries. The "trust" was purely remedial in nature such that the sole obligation of the Defendants was to restore the assets immediately to the Plaintiff;

(2) the English Trustee Act 1925, and by the same token, the TO,[36] were never intended to apply, and can have no application, to persons in this category. As explained in *Williams* referred to in *800 Columbia*, "The Trustee Act 1925 is concerned with the administration of true trusts. It is not concerned with constructive trusts imposed by equity on strangers to the trust in the exercise of its remedial jurisdiction"; and

(3) the extension of trustees to constructive trustees in s.2 of the TO was confined to true constructive trustees or *de facto* trustees. The phrase "or otherwise" in s.52(1)(e), despite its wide import, could not have the effect of expanding the meaning of "trustee" or "constructive trustee" beyond the scope of the TO to include persons other than true trustees. Therefore, the Court did not have the jurisdiction to grant a vesting order under s.52(1)(e) in this case.

Alternative Remedies

The Court suggested that the following alternatives were available to the Plaintiff:

(i) Garnishee proceedings under RHC Order 40 to enforce the default judgment; and

(ii) An order to execute a conveyance, contract or document under s.25A of the High Court Ordinance (Cap. 4) ("HCO").

In the end, the Court ordered the 1st and 5th Defendants to execute such documents as may reasonably be required to instruct the banks in which the relevant bank accounts are held to transfer to the Plaintiff the sums declared to be held by the Defendants as constructive trustees, failing which the Plaintiff would be at liberty to apply for an order under s.25A of the HCO.

Blondie Poon
(Commentary prepared with the assistance of Mr Carter Chim of Denis Chang's Chambers)

The Joint & Several Liquidators of Rennie Produce (Aust) Pty Ltd v Cheung Fong Chau Alan and Others [2020] HKCFI 1500

Facts

Rennie Produce (Aust) Pty Ltd ("Company") was incorporated and was being liquidated in Australia. The liquidators ("Liquidators") were appointed in 2010 and obtained a Recognition Order in Hong Kong in 2016, recognising their authority to act for the Company in Hong Kong.

Pursuant to a Deed of Settlement ("Deed") made in 2012 (i.e. subsequent to the appointment of the Liquidators), the Company and another company belonging to the same group settled a dispute between (1) the companies and (2) what was termed the "Rennie Parties", including Mr Paul Rennie and a number of corporate entities. As a result of the Deed, assets held offshore by or for the benefit of the Rennie Parties became the property of the Company. While the Company could point to a clear interest in the offshore assets after the Deed was executed, those assets could not be said to clearly belong to the Company as at the date of the commencement of the liquidation.

The Liquidators applied to the Court for an order for production of documents and examination of the respondents (who were certain persons who had dealings with Mr Rennie or related companies prior to the Company's liquidation) on the basis that they had reasonable grounds to believe that (1) Mr Rennie had not repatriated his overseas assets which he was required to do pursuant to the Deed, and instead he

[35] (2009) 12 HKCFAR 139
[36] The TO was substantially based on the English Trustee Act 1925.

appeared to have used various offshore transactions to move his assets beyond the reach of his creditors, and (2) the respondents were capable of providing information relating to a certain bank account in Hong Kong held by or for the Rennie Parties. For these reasons, the Liquidators requested the respondents to produce their communications with Mr Rennie, as well as documents which relate to any funds or assets held or previously held outside Australia not just for the benefit of the Company but also for the Rennie Parties.

The respondents objected on the ground that the Liquidators had not produced expert evidence to demonstrate that the Australian Courts would have made an order like the order that the Liquidators sought. In particular, the respondents suggested that the parties should have filed expert evidence dealing with both the statutory jurisdiction and the applicable case law which would identify factors considered to be relevant in the Australian Court's exercise of discretion that might differ from those factors which were considered to be relevant under the Hong Kong equivalent.

Analysis

The Recognition Order granted by Harris J empowered the Liquidators to "exercise such powers as are available to them as a matter of Australian law and would be available to them under the laws of Hong Kong as if they had been appointed liquidators of the Company under the laws of Hong Kong".

The twin requirements in the Recognition Order reflected a line of authorities which were discussed in the judgment, including the *dicta* of the Privy Council's advice in *Singularis Holdings Ltd v PricewaterhouseCoopers*[37] and the CFI's decision in *Joint and Several Liquidators of BJB Career Education Co Ltd v Xu Zhendong*[38].

The twin requirements were elaborated upon in the latter case, where it was stated that "the common law power of assistance extends to ordering an oral examination if such a power (a) exists in the jurisdiction of liquidation and that is the jurisdiction of the place of incorporation and (b) the power exists in the assisting jurisdiction; as is the case in Hong Kong."[39] The Court also reiterated that "while the Liquidators are the applicants, the Court is effectively rendering assistance to the Courts of another jurisdiction. It must be satisfied that it is not going beyond what would have been allowed in the home jurisdiction, in the present case the Australian Courts. To go beyond what the Australian Courts would allow would not be to assist."[40]

In view of the twin requirements, the Court in general has to ascertain whether the power sought to be exercised exists in the place of jurisdiction of the liquidation. If there is no similar statutory power in the place of liquidation, that is the end of the matter. If the place of liquidation has a similar statutory jurisdictional power, the Court has to exercise its discretion by taking into account the settled practice of the court of the home jurisdiction as to the way in which it will exercise its power to hear and determine issues which fall within its jurisdiction or as to the circumstances in which it will grant a particular kind of relief which it has jurisdiction to grant, including its settled practice to refuse to exercise such powers, or to grant such relief in particular circumstances.

Decision

The Court was of the view that the Australian Courts would have the statutory jurisdiction to make the order sought by the Liquidators in Hong Kong. The Court also expressed its view that on its face, the Australian provision for examination and production was at least as extensive if not more extensive than the Hong Kong equivalent. Nevertheless, the Court found that it was unable to proceed on the assumption that the relevant Australian law is the same as that of Hong Kong. In particular, the Court was not satisfied that it could proceed on the assumption that the "settled practice" of the Australian Court would necessarily result in an order such as the one sought by the Liquidators being made. Accordingly, the Court decided to adjourn the Liquidator's application *sine die* with liberty to restore. It would be more appropriate for the Liquidators to first seek such an order in Australia. The Hong Kong Court would then have the benefit of the reasoned judgment of the Australian Court. If the Hong Kong Court is satisfied that it would also have the power to make the same order in the circumstances, an order would then be made quite promptly.

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(Commentary prepared with the assistance of Mr Carter Chim of Denis Chang's Chambers)

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[37] [2015] AC 1675
[38] [2017] 1 HKLRD 113
[39] *Ibid*, [7]
[40] [2020] 3 HKLRD 685, [45]