

# Commercial Law Review – Winter 2022

The Commercial Unit, Civil Division  
The Department of Justice

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## Editorial

We feature three articles in this edition.

The first article discusses the Temporary Unemployment Relief Scheme under the Anti-epidemic Fund which sought to reduce the financial stress of those left temporarily unemployed due to the fifth wave of the COVID-19 outbreak before they find another job.

The second article outlines the main features of the Inland Revenue (Amendment)(Tax Deductions for Domestic Rents) Ordinance 2022 which provides that a taxpayer who is liable to salaries tax or tax under personal assessment can claim deduction for rent paid in respect of eligible domestic premises.

The third article talks about the Limited Partnership Fund Ordinance which was enacted in August 2020 with the aim of attracting more investment funds to establish and operate in Hong Kong.

We also feature three case reports in this edition.

The first case is about s.740 of the Companies Ordinance (Cap. 622) under which a shareholder of a company may apply to the Court for an order to authorise him to inspect a record or document of the company.

The second case is about s.327 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) in which the Court of Final Appeal held that the “leverage” (i.e. commercial pressure to achieve the repayment of debt) created by the prospect of a winding up was a legitimate form of “benefit” for the purpose of s.327.

The third case is about whether in the case of administration of the estate of a deceased who died intestate leaving a property, ad valorem stamp duty is chargeable on (i) a Deed whereby certain expectant beneficiaries renounced their interests in the property, and (ii) an Assent whereby the administratrix assented to the vesting of the property in the remaining expectant beneficiaries.

**YUNG Lap-yan**

## Temporary Unemployment Relief Scheme under the Anti-epidemic Fund

### **Introduction**

Having regard to the impact of COVID-19 and the anti-epidemic measures on the livelihood of individuals and business operation, the Government took swift and proactive action to set up the Anti-epidemic Fund (“AEF”) in February 2020, with a view to enhancing Hong Kong’s overall capability in combating the pandemic, and providing suitable relief to businesses and individuals hard hit by the pandemic or more seriously affected by the anti-epidemic measures.

The Financial Secretary Incorporated acts as the trustee of the AEF. To streamline the administrative process, the Financial Secretary Incorporated has delegated its powers to the Steering Committee on the Anti-epidemic Fund to receive, consider and approve proposals to be funded by the AEF, and to monitor and coordinate matters related to the operation of the AEF. The Steering Committee is chaired by the Chief Secretary for Administration. Its members include all relevant Directors of Government Bureaux responsible for implementing the major initiatives under the AEF.

### **Measures under the AEF**

Various rounds of measures have been introduced under the AEF to provide timely support to businesses and individuals. The AEF measures cover various sectors, including construction, property management, travel, catering, retail, convention and exhibition, arts and culture, innovation and technology, passenger transport, aviation, agriculture and fisheries, hotel, child care centres and registered private schools offering non-formal curriculum. The AEF also provides support to a wide spectrum of employees and needy groups, including licensed hawkers, frontline cleansing and security workers, low-income families, secondary, primary and kindergarten students, registered sports coaches, and school-related service providers (such as registered interest class teachers), as well as premises ordered to close under the Prevention and Control of Disease (Requirements and Directions) (Business and Premises) Regulation (Cap. 599F) or affected by the Government’s social distancing measures.

### **Temporary Unemployment Relief Scheme under the Sixth Round of AEF**

Launched under the sixth round of the AEF in March 2022, the Temporary Unemployment Relief Scheme

(“TUR”) aimed at helping those left temporarily unemployed due to the fifth wave of the local outbreak. Successful applicants were provided with a one-off subsidy of \$10,000. The TUR was not meant to be an unemployment or social security safety net to support the basic household needs of the recipients. Rather, it sought to reduce their financial stress before they find another job.

Applications for TUR were opened on 23 March and closed on 12 April 2022. To be eligible for the TUR, applicants should hold a valid Hong Kong identity card, ordinarily reside in Hong Kong from 1 October 2021 and have reached the age of 18 on or before that day. They should also fulfil other criteria, such as having worked in Hong Kong for at least one month during the period from 1 October to 31 December 2021 with monthly salary between \$2,700 and \$30,000 and having been unemployed for at least 30 consecutive days before they submitted the application. The TUR also covered employees at scheduled premises and in catering businesses who had been requested to stop working temporarily by their employers as a result of suspended or restricted operations at those premises under the tightened social distancing measures.

To better deploy limited resources targeting to help the most needy (i.e. lower-to-middle income earners), individuals who used to receive a salary exceeding \$30,000 per month before they were laid off were not eligible for the TUR. Recipients of certain social security schemes (e.g. the Comprehensive Social Security Allowance) and beneficiaries of other relevant measures in the sixth round of the AEF were not eligible either.

The application arrangement was designed based on the principles of simplicity and expeditious deliverance of relief. For the majority of applicants, their eligibility was ascertained through the contribution records in their Mandatory Provident Fund (“MPF”) accounts. Data in MPF accounts were regarded as objective and reliable third-party information for the purpose of verifying the applicants’ eligibility for the TUR. However, noting the reality that many of the applicants who had become unemployed or had been forced to stop work due to the fifth wave of the epidemic were grassroots workers without an MPF account, the Government also accepted income proof other than those in the MPF accounts for verification purpose.

The Government has further adopted a lenient and

pragmatic approach throughout the vetting and review process by exercising discretion to approve the applications where appropriate. For instance, approval was given for cases that were only one or two days short of the 30-day-"unemployment" or "suspension from work" requirements. Cases where applicants had engaged in casual work during the unemployment period had been approved as well so long as all other requirements were met.

The Government completed the processing of all

applications under the TUR in July 2022. Among the 470,000 applications received, 350,000 applicants have been granted the subsidies, which far exceed the original estimate of 300,000 beneficiaries.

**Blondie Poon**

## **Inland Revenue (Amendment) (Tax Deductions for Domestic Rents) Ordinance 2022 ("Amendment Ordinance")**

### **Introduction**

To implement the 2022-2023 budget proposal of a tax deduction for domestic rental expenses, the Inland Revenue (Amendment) (Tax Deductions for Domestic Rents) Bill 2022 was enacted in June 2022.

With the enactment of the Amendment Ordinance, domestic rents are added as a concessionary deduction under Part 4A of the Inland Revenue Ordinance, Cap.112 ("Cap. 112"), which prescribes the deductions allowable to persons chargeable to tax under Part 3 (salaries tax) or Part 7 (personal assessment) and the circumstances in which such deductions shall be so allowable.

This article outlines the major features of the Amendment Ordinance.

### **Eligible persons**

A taxpayer who is liable to salaries tax or tax under personal assessment and does not own any domestic property can claim a deduction for rent paid by him/her or his/her spouse (who is not living apart from him/her) as tenant (or by both of them as co-tenants) in respect of a relevant Year of Assessment ("YA") for renting eligible domestic premises.

In order to be eligible, the relevant domestic premises must be the taxpayer's principal place of residence.

### **Eligible premises**

To qualify for the deduction, the relevant premises must be a building or any part of such a building that is not prohibited by any law or any specified instrument from being used for residential purposes. If the relevant premises include a car parking space which is not sublet, the car parking space will be taken to be part and parcel of the premises for the

purposes of the deduction.

### **What is a qualifying tenancy?**

In order to be a qualifying tenancy, the written tenancy (or sub-tenancy) must be in respect of domestic premises and be stamped under the Stamp Duty Ordinance, Cap. 117 ("Cap. 117"). However, premises leased to the public by the Government or the Financial Secretary Incorporated as an agent of the Government at market rent, in respect of which the tenancy agreement is not required to be stamped under Cap. 117, will also qualify for deduction (e.g. government quarters leased to members of the public on market rent).

### **Deduction Rules**

- (a) In general, the **maximum amount of deduction** for domestic rent allowable to a person is **\$100,000** for each YA. The maximum amount of deduction will be reduced –
  - (i) if there is more than one tenant under the tenancy – in proportion to the number of co-tenants; or
  - (ii) if the period of the tenancy for which the domestic rent is paid covers only a part, but not the whole, of a YA – in proportion to the period of the tenancy that overlaps with the YA.
- (b) The amount of deduction allowable to a person is the amount of rent paid under the tenancy in relation to the YA or the deduction ceiling for the tenancy for the YA, whichever is less.
- (c) The total amount of deduction allowable to a married person or the person's spouse (who is

not living apart from the person) (or both of them) is the amount of rent paid under the tenancy in relation to the YA or the deduction ceiling for the tenancy for the YA, whichever is less.

- (d) If the person is married during part of the YA, paragraph (b) above applies to the part of the YA when the person is not married and paragraph (c) above applies to the part of the YA when the person is married.
- (e) If the rent is paid under more than one tenancy in relation to a YA, the amount of allowable deduction for the YA is the aggregate of the amount determined in accordance with the principle set out in paragraph (b) above for each of the tenancies.
- (f) Domestic rent paid (rather than incurred) by the person and/or the persons spouse (who is not living apart from the person) in relation to a YA is allowable for that YA.
- (g) If there is more than one tenant under a tenancy, the domestic rent paid by the tenants will be taken to have been paid by them in equal shares.
- (h) If domestic premises are used partly as a place of residence and partly for other purposes (e.g. for business use as home office or front-shop back-home), for determining the amount of the allowable deduction, the amount of rent paid under the tenancy in relation to the YA is taken to be such part of the amount of the rent that is reasonable in the circumstances of the case.

#### **Maximum number of years claimable.**

Unlike the deduction for home loan interest (under s.26E of Cap. 112), there is no limit on the number of years for which a taxpayer can claim a deduction for domestic rent.

#### **Circumstances where a deduction is not allowable**

To ensure the measures support those most in need and to prevent abuse, potential double tax benefit or tax avoidance, the Amendment Ordinance sets out the circumstances where the deduction is not allowed, including:

- the taxpayer or his/her spouse (who is not living apart from the taxpayer) is a legal and beneficial owner of any domestic premises in Hong Kong;
- the landlord or principal tenant is an associate of the taxpayer or his/her spouse (who is not living apart from the taxpayer). An associate in this context includes a relative (spouse, parent, child or sibling), a partner, a company controlled by the taxpayer or relative of the taxpayer;
- the taxpayer or his/her spouse (who is not living apart from the taxpayer) has a place of residence provided by his/her employer or is a tenant or authorized occupant(s) of a public rental housing flat;
- the sum representing the domestic rent is allowable as a deduction under any other provision of Cap. 112;
- the taxpayer or his/her spouse (who is not living apart from the taxpayer) has been allowed deduction for any other domestic rent paid in respect of any other domestic premises for the same period;
- the rented premises are not allowed for residential use or the tenancy is prohibited under any law or a government lease;
- the taxpayer or his/her spouse has, under the tenancy agreement, entered into a lease purchase agreement in respect of the premises concerned with the landlord.

**David Wan**

## **Limited Partnership Fund Ordinance**

### **Background**

In recent years, private equity funds are gaining popularity amongst investors and have become a key impetus to the growth of asset and wealth management business. To attract more investment

funds to establish and operate in Hong Kong, the Limited Partnership Fund Ordinance (Cap. 637) (“LPFO”) was enacted and came into effect on 31 August 2020.

Prior to the enactment of the LPFO, a fund could only

be structured and established in Hong Kong as a unit trust or an open-ended fund company. While such fund structures are popular among public funds or hedge funds, private funds such as private equity funds are more commonly structured and established in the form of a limited partnership.

### **Key features of a limited partnership fund (“LPF”)**

Under the LPFO, a fund may be constituted and registered in the form of an LPF in Hong Kong with the following key features.

#### ***No legal personality***

An LPF is a fund that is structured in a limited partnership form and used for the purpose of managing investments for the benefit of its investors. An LPF is not in itself a legal person.

#### ***Registration required***

A fund may register as an LPF by submitting an application to the Registrar of Companies (“Registrar”). If the Registrar is satisfied that the application contains the documents/information made in the specified manner and the specified fee is paid, the Registrar will register the fund as an LPF and issue a certificate of registration to the fund as proof of registration as an LPF. The Registrar will maintain a register (“Register”) of LPFs containing the documents/information submitted by an LPF in its application and any subsequent changes reported. The Register will be open for public inspection upon payment of a specified fee. Maintaining the Register can provide useful information to investors and parties which deal with an LPF. It is similar to the existing practice of maintaining the Companies Register for conventional companies for public inspection.

#### ***General partner and limited partner***

A fund qualifying for registration under the LPF regime must be constituted by one general partner and at least one limited partner.

The general partner has unlimited liability for all the debts and obligations of the LPF and ultimate responsibility for the management and control of the LPF.

The limited partner is essentially an investor and hence does not have day-to-day management rights or control over the assets held by the LPF. As such, its liability is generally limited up to the commitment it makes to the LPF. Nevertheless, the limited partner has the right to participate in certain safe harbour activities which are not regarded as management of

the LPF and do not therefore compromise its limited liability status, such as (i) serving on a board or committee of the LPF; (ii) advising the general partner or investment manager on the business or transactions of the LPF; and (iii) taking part in a decision about the admission and withdrawal of any partner, the term of the LPF or a change in the investment scope of the LPF.

#### ***Limited partnership agreement (“LPA”)***

An LPF must be constituted by an LPA, which should include matters concerning the LPF’s operation like (i) the admission and withdrawal of partners; (ii) the organisation, management structure, governance and decision-making procedures; (iii) the investment scope and strategy; (iv) the powers, rights and obligations of the partners; (v) the life of the LPF with possibility of extension; (vi) the custodial arrangement; and (vii) the dissolution procedures. An LPA must not contravene the LPFO or any other applicable law.

#### ***Contractual freedom among partners***

To cater for the operational needs of the private equity funds, the LPFO enshrines that partners in an LPF enjoy freedom of contract in respect of the operation of the LPF.

#### ***Tax and stamp duty treatment***

An LPF can benefit from profits tax exemption on transactions in qualifying assets specified in Schedule 16C to the Inland Revenue Ordinance (Cap. 112) and transactions incidental to the carrying out of such transactions if the relevant criteria are satisfied.

An instrument under which an interest in an LPF is contributed/transferred/withdrawn is also not chargeable with stamp duty under the Stamp Duty Ordinance (Cap. 117).

#### ***Dissolution and liquidation mechanisms***

The LPF regime offers a straightforward dissolution process that an LPF may be dissolved in accordance with the LPA. An LPF may also be dissolved with or without a court order in certain default situations.

In addition, an LPF may be wound up by the court if a winding-up petition is presented against the LPF under certain situations. In this case, an LPF may be wound up by the court as an unregistered company under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32).

## ***Migration of existing funds***

The LPFO provides a streamlined process for an existing Hong Kong fund established under the Limited Partnerships Ordinance (Cap. 37) to register as an LPF if the specified eligibility requirements are met.

## **Concluding Remarks**

The enactment of the LPFO is much welcomed by the industry. It is believed that the introduction of the modern LPF regime can attract more investment funds to establish and operate in Hong Kong, which can in turn further enhance Hong Kong's position as a premier international asset and wealth management centre.

**Silvia Tang**

## **Wong Suet Foon Shirly v Collector of Stamp Revenue [2021] 3 HKLRD 862**

### **Facts**

The appellant taxpayer ("T") was an administratrix of the estate of her mother (the "Deceased") who died intestate leaving a property ("Property"). The only persons entitled to the Deceased's estate are her five surviving children, including T.

The five children entered into a deed of family arrangement ("Deed") whereby it was agreed that three siblings ("3 Siblings") would renounce their rights and interests in the Property, leaving it to the remaining two siblings, T and A.

Pursuant to the Deed, T, as the administratrix of the Deceased's estate, by a deed of assent ("Assent"), assented to the vesting and assignment of the Property to A and T herself, in her personal capacity as one of the beneficiaries, as joint tenants.

The Collector of Stamp Revenue ("Collector") issued an assessment and charged stamp duty on the Deed and the Assent, taking the view that (a) ad valorem stamp duty was chargeable on the Deed and the Assent under s.27(1)<sup>1</sup> of the Stamp Duty Ordinance (Cap. 117) ("SDO"), as the Deed and the Assent operated as a "voluntary disposition inter vivos" to the extent that the transfer of the Property was in excess

<sup>1</sup> By virtue of s.27(1), any conveyance of immovable property operating as a voluntary disposition inter vivos is chargeable with stamp duty as if it were a conveyance on sale, with the substitution of the value of the property conveyed for the amount or value of the consideration (if any) for the sale.

of the transferees' entitlement in the estate in accordance with the Intestates' Estates Ordinance (Cap. 73) ("IEO") and (b) the vesting of the Property by T as administratrix in herself and A as beneficiaries was not a transfer of residential property between close relatives for the purpose of s.29AL<sup>2</sup> of the SDO, and so the higher Scale 1 rates applied.

On T's appeal, the Collector changed his stance, stating that stamp duty was chargeable on the Assent only. The District Court agreed with the Collector and dismissed the appeal, ruling that the Assent (but not the Deed) was chargeable with ad valorem stamp duty on the 60% interest in the Property disclaimed by the 3 Siblings. T appealed to the Court of Appeal.

### **Issues**

The core issues were:

- (a) whether the Deed and/or the Assent is a conveyance of immovable property operating as a voluntary disposition inter vivos and hence chargeable with ad valorem stamp duty under s.27(1) of the SDO; and
- (b) if so, whether the lower rate in Scale 2 of Head 1(1) in the First Schedule to the SDO applies by reason of s.29AL of the SDO.

### **Decision**

#### ***The Deed is not chargeable with ad valorem stamp duty***

The Court held that no beneficial interests in the Property passed under the Deed and therefore no ad valorem stamp duty was chargeable on the Deed. The five children, as expectant beneficiaries of the Deceased's intestate estate, could not assert any legal or equitable interest in any of the assets forming part of the unadministered estate. The 3 Siblings had nothing which they could convey by way of the Deed which operated as a disclaimer of their interest in the Property, and not a conveyance or transfer.

#### ***The Assent is not chargeable with ad valorem stamp duty***

The Court also held that the Assent was not chargeable with ad valorem stamp duty under s.27(1) and/or s.27(4)<sup>3</sup> of the SDO on the following grounds:

<sup>2</sup> S.29AL provides for ad valorem stamp duty to be chargeable at the lower Scale 2 rates on certain conveyances on sale of residential property between closely related persons.

<sup>3</sup> As a result of s.27(4), a conveyance of immovable property or transfer of Hong Kong stock will be deemed to operate as a voluntary disposition inter vivos if the Collector considers that

- (a) There was no interest in the estate to which the 3 Siblings were “originally” entitled to under the IEO. At most, the 3 Siblings were originally entitled to only an expectation that they would receive 60% of the residuary estate after the administration of the estate was completed. Such expectation could not be the subject matter of a disposition that would attract ad valorem stamp duty.
- (b) The Assent was a transfer from T, as the administratrix representing the Deceased, to herself and A (i.e. not inter vivos)<sup>4</sup> as the only expectant beneficiaries who did not disclaim the gift. As with an “ordinary assent” where a personal representative distributed a deceased’s estate in accordance with the IEO, T, in her capacity as the administratrix, was acting in accordance with the rules of intestacy under the IEO when she distributed the whole of the Property to herself and A. There was no conveyance or transfer of interest of the Property to the 3 Siblings because they had disclaimed any of their entitlement by the Deed, the effect of which was that T and A became the only remaining beneficiaries entitled to the estate. There was no proper basis to regard the Assent as effecting two dispositions of 40% and 60% interest of the Property; it effected one disposition vesting 100% of the Property to T and A. A testamentary disposition under the IEO as such does not amount to a disposition inter vivos and does not attract stamp duty under s.27(1) of the SDO.
- (c) S.27(4) of the SDO operates to deem a conveyance or transfer with valuable (but inadequate) consideration, which as a matter of law was not voluntary, to be voluntary. It was not intended to deem a conveyance which was not inter vivos to be inter vivos. As the Assent did not amount to a disposition inter vivos, s.27(4) of the SDO did not apply so as to make it chargeable with stamp duty under s.27(1) of the SDO.

#### ***Applicable scale of rates under s.29AL of SDO***

In view of the Court’s ruling that both the Deed and the Assent are not chargeable with ad valorem stamp duty under s.27(1) and/or s.27(4) of the SDO, the

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the value of the property conveyed or transferred is substantially greater than the stated consideration.

<sup>4</sup> A personal representative holds property in the estate in *auter droit*, that is in the right of another as the minister and dispenser of the goods of the dead: Williams, Mortimer & Sunnucks on Executors, Administrators and Probate (21st ed.) at [35-09].

Court in passing provided their brief views that even if the Assent was chargeable with stamp duty, the lower Scale 2 rates would apply for the following reasons:

- (a) When considering whether an administratrix and a beneficiary are closely related for the purposes of s.29AL of the SDO, the Collector should have regard to the fact that a personal representative represents and steps into the shoes of the deceased in administering the estate.
- (b) Having considered the legislative background, the legislature has not intended that the higher Scale 1 rates should apply to the situation where an administratrix transfers property of the estate to the transferee beneficiaries in accordance with the IEO<sup>5</sup>.

**Sandy Hung**

### **General-Lite Group Corp. v T&L Securities Limited [2022] HKCFI 3080**

#### **Facts**

The defendant, T&L Securities Limited (the “Company”), was used as a vehicle for the development of certain luxury houses which were completed in 2012. Shares in the Company were ultimately owned by B (40%), T (10%) and a third party (50%) and held through their respective companies.

B held his 40% shareholding in the Company via the plaintiff, General-Lite Group Corp (the “Plaintiff”). B was the Plaintiff’s sole director and shareholder.

In around 2012, B discovered that T (who was also his estranged wife) had claimed to be the sole shareholder and director of the Plaintiff. B regained control of the Plaintiff after court proceedings where T was ordered to transfer the shareholding in the Plaintiff back to B. This process was completed in 2020.

The Plaintiff then requested access to documents and information pertaining to the Company’s management which was refused by the Company. Hence, the Plaintiff made an application to the High Court

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<sup>5</sup> The Court remarked that it would be absurd if a person could enjoy Scale 2 rates when conveying residential property to close relatives in his/her lifetime but would have to pay Scale 1 rates when his/her personal representative, either in accordance with a will or the IEO, made such a transfer after his/her death.

pursuant to s.740 of the Ordinance.

### Legal Principles

S.740(2) of the Ordinance provides that:

“The Court may make an order authorizing a person to inspect a record or document if it is satisfied that – (a) the application is made in **good faith**; and (b) the inspection is **for a proper purpose**.”

The Court noted that the applicable legal principles are well settled, which include:

- (1) the basis of a member’s rights to inspection flows from his proprietary interest in the company. Although a member does not have a proprietary interest in the assets of a company, he has a real interest in the company itself. He can reasonably expect to be able to protect his interest. S.740 facilitates this by providing the member with access to corporate information, which might not otherwise be available to him (*Wong Kar Gee Mimi v Hung Kin Sang Raymond*);
- (2) s.740 of the Ordinance is enacted for the protection of shareholder rights and interests and the community’s more general interest in the maintenance of good corporate governance. To be consistent with these objectives, a generous approach should be taken as to the interpretation of what constitutes an interest ‘reasonably related’ or ‘germane’ to the applicant’s status as a shareholder (*Wong Kar Gee Mimi (supra)*);
- (3) the good faith and proper purpose requirements to be satisfied for an inspection order to be granted under s.740 constitute two separate and independent tests (*Wong Kar Gee Mimi (supra)*);
- (4) the Court will determine whether an applicant is acting in good faith and whether the inspection is made for a proper purpose by applying an objective test (*Veron International Ltd v RCG Holdings Ltd*);
- (5) the rights provided by s.740 should not be regarded as affecting the basic rule of company law that a shareholder should not ordinarily have recourse to the Courts to challenge a managerial decision made by or with the approval of the directors (*Veron International Ltd (supra)*); and
- (6) an applicant is not entitled to go on a fishing expedition in search of a cause of action to support his mere suspicion of wrongdoings.

S.740 shall not be used as a substitute for pre-action discovery (*Wong Kar Gee Mimi (supra)*).

### Grounds of opposition

The Company’s main grounds of opposition to the Plaintiff’s application were –

- (a) the application was not for the purpose of the Plaintiff but B, its sole shareholder and director. In view of the concept of separate legal entity, the Company submitted that if an order was granted, the Company would not consent to disclosure of any information upon inspection to any person who was not the Plaintiff (i.e. whether application was made **for a proper purpose**).
- (b) the scope and breadth of the inspection sought was such that there was a lack of good faith on the part of the Plaintiff and that it was fishing for information with an ulterior motive (i.e. whether application was made in **good faith**).

### Decision

In respect of (a) above, the Court found that the argument was misconceived, at least in the circumstances of the present case, where B was the sole shareholder and director of the Plaintiff. The application pertained to the Plaintiff’s corporate interest as a shareholder of the Company rather than B’s personal interest in disguise.

In respect of (b) above, the Court found that the mere fact the application had requested for a wide scope of documents did not per se entitle the Court to draw the inference that the application was a fishing expedition with an ulterior motive. The Court would first ask whether the extensive coverage of the documents requested was justified. If not, the Court would proceed to consider whether the said inference should be made. The scope of documents requested being too wide alone would not entitle the Court to make such inference.

Of the five contested categories of documents requested, the Court found that only one category was too wide in scope, i.e. the Plaintiff sought audited financial statements of the Company from the date of its incorporation (in 1992) to 2017. Even so, that was not enough for the Court to infer that there was a lack of good faith on the part of the Plaintiff or that it had an ulterior motive in launching the present application.

Eventually, the Court only granted the Plaintiff’s request for audited financial statements from 2012



(the time when B began to temporarily lose control of the Plaintiff to T) to 2017.

David Wan

**Shandong Chenming Paper Holdings  
Limited v Arjowiggins HKK 2 Limited  
[2022] HKCFA 11**

**Facts**

Shandong Chenming Paper Holdings Limited (the “Appellant”) was a company incorporated in Mainland China listed on both the Shenzhen Stock Exchange and the Stock Exchange of Hong Kong Limited (“HKSE”). It is registered as a non-Hong Kong company under Part 16 of the Companies Ordinance, Cap. 622.

Disputes arose between the Appellant and Arjowiggins HKK 2 Limited (the “Respondent”). The Respondent obtained an arbitral award in Hong Kong and a court order for leave to enforce the arbitral award. The Respondent subsequently served a statutory demand on the Appellant for contractual damages, costs, interest and various fees payable.

The Appellant did not pay the amounts demanded and obtained an interim injunction order from the Hong Kong Court of First Instance (“CFI”) to prevent the Respondent from presenting a petition to wind it up. It subsequently sought declaratory relief that the Respondent would not be able to satisfy the core requirements for the Hong Kong court to exercise its jurisdiction to wind up the Appellant pursuant to s.327(3) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap. 32.

**The Law**

As explained in *Kam Leung Sui Kwan v Kam Kwan Lai*<sup>6</sup>, to invoke the jurisdiction of the Hong Kong courts to wind up a foreign-incorporated company, a petitioner has to demonstrate that:

- (a) there must be a sufficient connection with Hong Kong, but this did not necessarily have to consist of the presence of assets within the jurisdiction (the “First Core Requirement”);
- (b) there must be a reasonable possibility that the winding-up order would benefit those applying for it (the “Second Core Requirement”); and
- (c) the court must be able to exercise jurisdiction

over one or more persons in the distribution of the company’s assets (the “Third Core Requirement”).

**The CFI Decision**

The parties did not dispute the First Core Requirement and the Third Core Requirement were met and the only dispute was whether the Second Core Requirement was fulfilled.

The CFI held, *inter alia*, that the Second Core Requirement was satisfied as the “leverage” (i.e. commercial pressure to achieve the repayment of a debt in the present case) created by the prospect of a winding-up petition constituted sufficient benefit for the Respondent.

**The Court of Appeal (“CA”) Decision**

The CA upheld the CFI’s decision and dismissed the appeal. The CA agreed that there was a real possibility of benefit to the Respondent in the making of a winding-up order against the Appellant.

**The Court of Final Appeal (“CFA”) Decision**

***The Appellant’s arguments***

The Appellant put forward that the benefit referred to in the Second Core Requirement has to result from the making of the winding-up order and that the nature of the benefit is either money or something convertible into money rather than an intangible benefit in a loose sense.

The Appellant also contended that the core requirements are jurisdictional restraints and that their rationale is comity and the presumption against extra-territoriality. The Appellant contended that comity militates against accepting “leverage” as a proper benefit.

***Decision***

The CFA held that the core requirements did not go to the existence of the jurisdiction to wind up foreign companies, which was entirely statutory. Rather, they were a judicially fashioned threshold for the exercise of the discretion of the court to set in motion the winding-up procedures. The statutory demand mechanism was a convenient method for establishing that a company was unable to pay its debts. It was perfectly proper for a creditor to present a winding-up petition and use such petition as a means of applying commercial pressure to seek payment of an undisputed debt.

<sup>6</sup> (2015) 18 HKCFAR 501

The CFA considered that the benefit that a petitioning creditor could rely upon to satisfy the Second Core Requirement would vary from case to case depending on its facts. There was no doctrinal justification for confining the relevant benefit narrowly to the distribution of assets by the liquidator in the winding up of the company nor that the benefit should come from the assets of the company. The benefit needed not be monetary or tangible in nature and the fact that a similar result could be achieved by other means did not preclude a particular benefit from being relied upon for the purposes of fulfilling the Second Core Requirement. The low threshold to find benefit would be satisfied so long as some useful purpose serving the legitimate interest of the petitioner could be identified.

The CFA concluded that once it was accepted that commercial pressure to achieve the repayment of an undisputed debt was an entirely proper purpose for a creditor's winding-up petition, there is no principled basis for excluding commercial pressure as a relevant benefit for the purposes of the Second Core Requirement. Any potential impact in terms of possible sanctions by the Listing Division of the HKSE was effective before and after the making of a winding-up order. The "leverage" created by the prospect of a winding-up (as opposed to the making of a winding-up order) was a legitimate form of benefit. There was no difficulty in regarding the commercial pressure caused by the presentation of a winding-up petition as a qualifying benefit under the Second Core Requirement.

**Joyce LY Chan**

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