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Court of Final Appeal clarifies the second core requirement to wind up foreign company

Richard Hudson and Judy Wu

The Hong Kong Court has power pursuant to section 327 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) to wind up a foreign-incorporated company in Hong Kong. Before the Court can exercise its statutory jurisdiction, the following three well known “core requirements”, cited by the Court of Final Appeal in *Kam Leung Siu Kwan v Kam Kwan Lai* (2015) 18 HKCFAR 501, must be satisfied:

1. There must be a sufficient connection with Hong Kong, but it does not necessarily have to consist of the presence of assets within the jurisdiction;
2. There must be a reasonable possibility that the winding up order will benefit those applying for it; and
3. The court must be able to exercise jurisdiction over one or more persons in the distribution of the company's assets.

In our previous article [“Court of Appeal reaffirms three core requirements to wind up foreign company”](#), we reported on the decisions of the Court of First Instance and the Court of Appeal in *Shandong Chenming Paper Holdings Ltd v Arjowiggins HKK 2 Limited* (HCMP 3060/2016 and CACV 158/2017) which concern the second of the core requirements. Shandong Chenming argued that the second core requirement had not been met, namely that the winding up order would not benefit Arjowiggins. There was no controversy regarding the first and third core requirements in this case.

The Court of First Instance (Harris J) held that the second core requirement was satisfied such that the leverage created by the prospect of a winding-up petition would constitute a reasonable prospect of benefit for Arjowiggins. This decision was upheld by the Court of Appeal.

The issue on which Shandong Chenming was granted leave to appeal to the Court of Final Appeal ([2022] HKCFA 11) was a narrow one, concerning the nature of the benefit: whether the Hong Kong Court should exercise its winding-up jurisdiction over foreign companies on the basis that a “benefit” is made out under the second core requirement if such “benefit” does not arise as a consequence of the winding-up order being made, but rather, would only ever be realised if the winding-up order is either avoided or discharged. In other words, is the “leverage” created by the prospect of a winding up order (as opposed to the making of the order) a legitimate form of “benefit”

Shandong Chenming argued that the core requirements are jurisdictional restraints, that their rationale is comity, and the accompanying presumption against extra-territoriality. Therefore, the proper interpretation of the core requirements must be informed by their limitations and the principle of non-interference, and in particular that comity militates against accepting leverage as a proper benefit. Shandong Chenming also contended that the second core requirement has always insisted that the benefit referred to has to be a benefit resulting from the making of the winding-up order, and is either money or something convertible into money.

The Court of Final Appeal dismissed Shandong Chenming's appeal on the basis of the following observations:

1. There is no doctrinal justification for confining the relevant benefit narrowly to the distribution of assets by the liquidator in the winding up of the company;
2. It is sufficient that the benefit would be enjoyed solely by the petitioner;
3. There is also no doctrinal justification requiring the relevant benefit to come from the assets of the company;
4. There are cases where even though there was nothing for the liquidator to administer, the courts did not find any difficulty in holding that the second requirement was satisfied, so long as some useful purpose serving the legitimate interest of the petitioner can be identified;
5. The benefit need not be monetary or tangible in nature; and
6. The fact that a similar result could be achieved by other means does not preclude a particular benefit from being relied upon for the purposes of fulfilling the second requirement.

The Court of Final Appeal confirmed that the leverage created by the prospect of a winding-up (as opposed to the making of a winding-up order) is a legitimate form of benefit under the second core requirement. Indeed, the fact that the adjournment of the winding up petition was ordered on terms, which were complied with, that Shandong Chenming procure the payment of the amount in the statutory demand plus interest, demonstrated the efficacy of the commercial pressure that the presentation of the petition gave rise to. They added that the benefit to the petitioner had to be a real possibility, rather than a theoretical one.

The Court of Final Appeal also stated that the three core requirements above are not statutory provisions, but self-imposed restraints on the exercise of the statutory jurisdiction. They do not preclude the existence of the jurisdiction to wind up foreign-incorporated companies.

Comment

This decision confirms that the second core requirement will likely be relatively easy to satisfy going forward, on the basis that we see it as likely that many petitioners will be able to demonstrate an identical "benefit" as in these proceedings.

Pro-female bias in sexual harassment complaint? A lesson for the employer

Paul Kwan and Jasmine Yung

The Sex Discrimination Ordinance (Cap. 460) (SDO) makes it unlawful to discriminate against a person by virtue of his / her sex, marital status, pregnancy or breastfeeding, in prescribed areas of activities, such as employment, education, provision of goods, services and/or facilities and participation at clubs.

In *Tan, Shaun Zhi Ming v Euromoney Institutional Investor (Jersey) Ltd, DCEO 4/2017*, Mr. Tan (T), a male employee, successfully claimed against his ex-employer, Euromoney, for unlawful termination, in breach of the SDO. Despite the lack of direct evidence, the court readily inferred that the termination was due to pro-female bias against T, based on circumstantial evidence. The court ordered Euromoney to pay damages to T as compensation for his loss of income in the sum of HK\$150,000 and to apologise to T.

Facts

T worked for Euromoney as a reporter. T was accused of sexually harassing a female colleague during lunch in a restaurant (Lunch Event). Upon receiving a sexual harassment complaint (Complaint) from the female colleague

(Complainant), Euromoney conducted an investigation and interviewed several witnesses and T. In the meetings with T, Euromoney asked T to apologise to the Complainant, but he refused on the grounds that he had not done anything wrong. T also asked for details of witnesses' evidence against him, but Euromoney did not respond.

Euromoney then terminated T's employment with immediate effect by paying him wages in lieu of notice. The termination was said to be because of T's conduct during and following the investigation of the Complaint. Euromoney requested T to either resign or face termination, but did not allow T time to consider this. T decided not to resign and was terminated.

T initiated proceedings against Euromoney for breach of s.5(1)(a) and s.11(2)(c) of the SDO, claiming that Euromoney terminated him as a result of its pro-female bias. T argued that had he been a female colleague in a similar situation, Euromoney would not have fired the female colleague in an unlawful manner in circumstances where the Complaint was flimsy and unsubstantiated.

Euromoney's position was that as its termination of T was lawful, it was not obliged to provide any reason to justify the termination. At the trial, apart from relying on the argument that T was terminated because of his conduct during and following the investigation of the Complaint, Euromoney changed its stance to rely on T's conduct prior to the Lunch Event as a reason for dismissal. Euromoney argued that such termination was based on s.32K(a) of the Employment Ordinance (i.e. the termination was due to the employee's conduct, which falls within one of the prescribed valid reasons) and its employment contract with T, which allowed Euromoney to dismiss T by payment in lieu of notice.

Prior to the present proceedings, Euromoney successfully applied to the District Court to strike out T's claim. T appealed and the Court of Appeal allowed his appeal and handed down written reasons for the judgment. The District Court referred to the Court of Appeal's written reasons for its judgment in the present proceedings.

Sexual Discrimination under SDO

Under sections 5(1)(a) and 11(2)(c) of the SDO, no person including a company, may discriminate against a person on the ground of his / her sex, by treating him/her less favorably than it treats or would treat a person of the other sex or to discriminate against him / her by dismissing that person or subjecting that person to any other detriment.

In determining whether there is sexual discrimination under s. 5(1)(a) of the SDO, the court adopted the four-step approach in *Leung Kwok Hung (Long Hair) v Commissioner of Correctional Services* as below:-

- (1) There must be a difference in treatment between one person, the complainant, and another person, real or hypothetical, from a different sex group (i.e. the compared person).
- (2) The relevant circumstances between the complainant and the compared person are the same or at least not materially different.
- (3) It must then be shown that the treatment given to the complainant is less favourable than that given to the compared person.
- (4) The difference in treatment is on the basis of sex.

The burden to prove discrimination, on the balance of probabilities, is on the claimant. Where there is no direct evidence on discrimination, the claimant may have to rely upon inferences based upon the primary facts.

Court's decision

The court held that s.32K(a) of the Employment Ordinance was not relevant as it only applies to certain categories of employees, which do not include T¹. Euromoney could not defend the lawfulness of its termination decision by referring to its right to terminate the employment by payment in lieu of notice under the employment contract.

In assessing whether there was sex discrimination against T, the court looks at all the factual evidence to decide whether there is a satisfactory reason in support of the termination. If no explanation is forthcoming, or if it is inadequate or unsatisfactory, it would be legitimate for the court to infer that there was discrimination against T by reason of a pro-female bias.

Having reviewed the evidence, the court held that there was no satisfactory reason for terminating T. As the Complaint was unsubstantiated, this could not be a valid reason for termination. Euromoney was also unable to prove that the conduct of T during and following the investigation of the Complaint or his prior conduct were the reason for termination. The lack of documentation and emails recording the discussion concerning the termination amongst Euromoney's

¹ Although not made clear by the Judge in the judgment, it seems that the court was referring to section 32Q of the Employment Ordinance which provides that Part IVA (including section 32K(a) – a valid reason for dismissal by virtue of the conduct of the employee) would not apply to acts of discrimination within the meaning of the SDO.

management was inherently improbable and suggested that Euromoney had chosen not to disclose its real reason to the court.

Based on this, the court inferred that the real reason for the termination was the pro-female bias of Euromoney, as advanced by T. By requiring T to tender an apology to the Complainant, even though the Complaint was unsubstantiated, and dismissing T when he refused to apologise, Euromoney had treated T less favourably than it would have treated a female employee in breach of the SDO.

Takeaways

For businesses dealing with HR matters in their daily operations, the handling of sexual harassment complaints requires special care. These complaints on one hand, involve the victim seeking redress for their grievances and, on the other hand, the accused, who should also be treated fairly during the investigation process.

There is often mounting pressure for businesses (especially staff within the organisation) to side with victims who make the complaint. Yet, professionals are reminded to stay neutral and undertake an independent investigation before making any adverse decisions (including disciplinary action) in order to ensure fairness in the workplace. Enquiries should be made through HR professionals who must have clear reasons in support of any decisions made.

HR professionals are also reminded of the following:-

- There must be valid reasons for termination. An unsubstantiated sexual harassment complaint should not be relied upon as a valid reason. In the absence of a justified or satisfactory explanation, the court may draw inferences based upon the primary facts against the employer that the termination was unlawful, driven by pro-female bias and in breach of the SDO.
- All employee termination decisions should be supported by documentation. There is a need to preserve evidence, which may include all correspondence, communications, investigation reports and interview notes.

Businesses may consider inviting independent third parties to conduct the internal investigation and conduct interviews with the person accused, to send the message that the business is neutral and aiming for a fair investigation outcome.

Proprietary relief granted to victims of cryptocurrency fraud

Genevieve Lam

In the recent judgment in *Nico Constantijn Antonius Samara v Stive Jean Paul Dan* [2022] HKCFI 1254, the Hong Kong Court granted proprietary relief to a victim of misappropriated bitcoins, including the recovery of the sale proceeds and the fruits of such.

Factual background

The Plaintiff orally agreed that the Defendant would sell the Plaintiff's 1,000 bitcoins, as sales agent, for a 3% commission.

As the Plaintiff (being a non-resident) could not open a Hong Kong bank account to handle the sale proceeds, he agreed that they should be deposited into the Defendant's account in Hong Kong, from which the funds would be transferred to the Plaintiff's bank account in Germany.

The Defendant gave the Plaintiff access to the Hong Kong bank account, by providing him with the login details and security token. The Plaintiff could then make transfers of funds to his account in Germany.

Between June and September 2017, some of the bitcoins were traded. The main way in which this was done was through the Defendant's nominated bitcoin wallet. The Plaintiff transferred some bitcoins from his personal bitcoin wallets into the Defendant's bitcoin wallet, so that they could be traded by the Defendant. The agreed arrangement was that the proceeds of sale would be transferred to the Hong Kong bank account. Since November 2017, the Plaintiff was unable to gain online access to the Defendant's Hong Kong bank account.

As a result, the Plaintiff claimed against the Defendant, as his sales agent, for failing to account for the sale of the bitcoins and the sale proceeds.

Injunctions

In November 2019, a Mareva injunction was granted by the court freezing the Defendant's assets, including the bitcoins remaining in the Defendant's wallet.

Subsequently, documentary disclosure was given by the Defendant's bank. Based on those documents, the Plaintiff was able to trace the sale proceeds of the bitcoins. Subsequently, upon the Plaintiff's application, the court, in January 2021, granted a proprietary injunction over the remaining bitcoins and the sale proceeds.

Trial – Court findings

The court found that:-

1. Agency principal relationship was established between the plaintiff and Defendant for the sale of the bitcoins.
2. The Plaintiff transferred the bitcoins to the Defendant's nominated bitcoin wallet and entrusted him to sell the same on his behalf as his sales agent.
3. The Defendant had been in breach of his fiduciary duties as agent, for failing to account to the Plaintiff for his bitcoins and sale proceeds.
4. By reason of the Defendant's blatant breaches of his fiduciary duties as agent, which amounted to repudiatory breaches of the Agency Agreement, the Defendant was not entitled to any commission in respect of the sales. Thus, all sale proceeds and fruits of such found due were ordered to be paid over to the Plaintiff.

The court granted:-

1. A declaration that the bitcoins transferred by the Plaintiff to the Defendant's account, the sale proceeds and the fruits of such were held by the Defendant on trust for the Plaintiff absolutely.
2. An order for all necessary accounts, inquiry and directions as to what was due to the Plaintiff.
3. An order that the Defendant do transfer the property and/or pay the amount found due to the Plaintiff upon the taking of the accounts, inquiry and directions.
4. An order that the Defendant pay equitable compensation to the Plaintiff.

Takeaway points

It seems that the High Court has recognised cryptocurrency as property. Hence in this case, the High Court declared that the bitcoins were held on trust and proprietary remedies were granted over the bitcoins.

Another interesting feature of this case is that a public bitcoin ledger, an open distributed ledger using blockchain technology, which shows bitcoin transaction records, was admissible at trial and accepted by the court. This means that victims of cryptocurrency fraud are able to prove ownership and a tracing exercise can be conducted when disputes involve cryptocurrency.

Series on Mainland/Hong Kong Cross-Boundary Marriages – Article 1

Sherlynn Chan and Rachael Leung

Deacons' Family Practice is at the forefront of handling issues related to cross-boundary marriages. In light of the new Mainland Judgments in Matrimonial and Family Cases (Reciprocal Recognition and Enforcement) Ordinance (Cap.639), we have prepared a series of articles on Mainland/Hong Kong cross-boundary matrimonial matters including nuptial agreements, matrimonial property rights, the division of assets, dissipation of assets and third-party interests etc. In this series, we have invited Mainland lawyers to share their views on each topic.

This first article will explore the property rights of married couples in Hong Kong and the Mainland respectively.

“My husband and I were married in the Mainland and we own certain assets there and in Hong Kong. We are contemplating divorce and I want to know what my rights are in Hong Kong and the Mainland respectively.”

In Hong Kong, marriage itself does not change the ownership of assets, and one is free to use, sell and deal with his/her properties acquired before and during the marriage.

However in the event of divorce, all assets held by the parties - be it in their sole names, joint names or in the name of third parties - will need to be fully disclosed in the Financial Statement known as "Form E". This includes all assets, whether held in Hong Kong or outside Hong Kong, and any significant change in one's assets during the last 36 months.

The Court will then decide whether all or part of the assets disclosed will form part of the matrimonial pot, and make appropriate orders under the Matrimonial Proceedings and Property Ordinance (Cap.192) (MPPO) for:-

- Maintenance pending suit;
- Periodical payments;
- Secured periodical payments;
- Lump sum provision;
- Settlement or transfer of property/ property adjustment;
- Variation of settlement; and/or
- Sale of property.

Section 7 of the MPPO sets out the matters that the Court will have to consider when making the above orders, which includes the income and earning capacity of the parties, their respective financial needs and responsibilities, the standard of living enjoyed by the family, age of the parties and duration of the marriage etc.

In the landmark case of *LKW v DD (2010) 13 HKCFAR 537*, the Court of Final Appeal set out the approach on how to apply section 7 of the MPPO and affirmed the "equal sharing principle". We will discuss this case in greater detail in upcoming articles.

Regarding the position **in the Mainland**, our Mainland/Hong Kong dual-qualified lawyer, Helen Liao, has the following to say:-

"Unlike Hong Kong which follows a common law system, the Mainland adopts a civil law system which is based on statute. In particular, the Civil Code categorises properties owned by a married couple into two types, namely (1) "community property" jointly owned by a couple as marital property and (2) "separate property" which is owned by a spouse.

Generally speaking, "community property" refers to the properties acquired by a couple during the marriage with their own or joint effort such as through work or investment. As to "separate property", they are properties which a spouse acquired before marriage, as gifts or as inheritance. Whilst both parties have equal rights to dispose of their community property, each party has the exclusive right to dispose of his/her own separate property.

Specifically, "community property" is defined under Article 1062 of the Civil Code to include the following received during the subsistence of the marriage:

- (I) *Salaries and wages as well as bonuses and other remuneration received from personal services rendered;*
- (II) *Earnings from production, business operation and investment;*
- (III) *Earnings arising from intellectual property rights;*
- (IV) *Properties acquired from inheritance or given as a gift (save and except property that belongs to only one spouse as provided in a will or gift contract); and*
- (V) *Other properties that shall be jointly owned by them.*

On the other hand, "separate property" of a spouse refers to the following under Article 1063 of the Civil Code:

- (I) *Pre-marital property of one spouse;*
- (II) *Compensation or indemnification received by one spouse for injury inflicted upon him;*
- (III) *Property that belongs to only one spouse as provided in a will or gift contract;*
- (IV) *Private articles exclusively used by one spouse for daily life; and*
- (V) *Other properties that shall be owned by one spouse.*

Unless a couple enters into a marital agreement to set out their own financial arrangements, the above regime will apply."

It is therefore important for parties to a Mainland/Hong Kong cross-boundary marriage to consider the above matters when dealing with their assets.

In the next article, we will explore the topic of nuptial agreements, which allow couples to determine their own financial arrangements during marriage and in matrimonial proceedings.

Our Family Law team at Deacons is experienced in handling matrimonial and family matters involving cross-boundary elements. Please reach out to us if you would like to know more.

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