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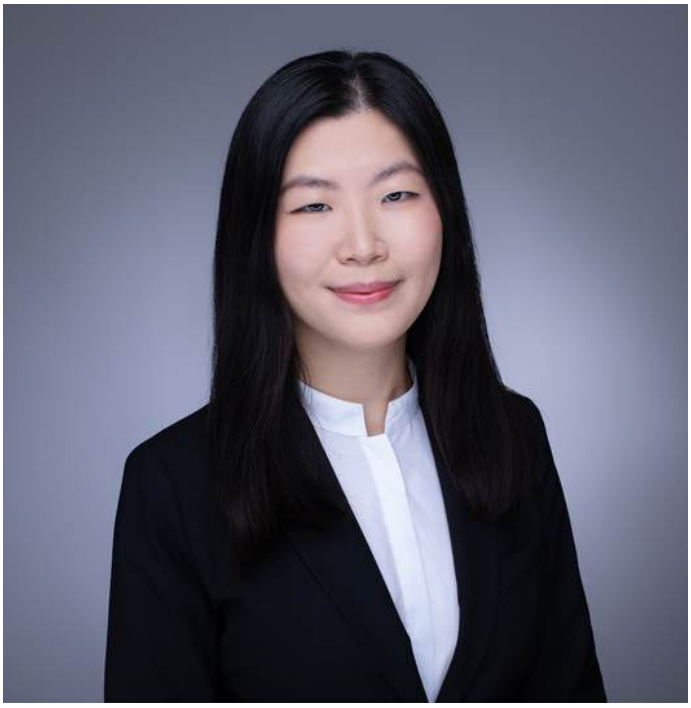

Case 1

Bank's duties in advising customers on transaction risks:

ICBC Ltd v Interpro Manufacturing Ltd [2025] HKCFI 177

Date of Judgment: 2 January 2025
Coram: DHCJ Phoebe Man

A recent case from the High Court has further clarified how codes/guidance issued by financial institutions such as the SFC, the HKMA and the Hong Kong Association of Banks, affect a bank's duties in advising customers on transaction risks. It provides a notable example of how the principles in ***Shine Grace Investment Ltd v Citibank NA*** [2022] HKCA 1341 apply to a corporate customer relying on a range of codes/guidance to allege mis-selling.

The bank claimed against D3 under a guarantee for a sum owed by a company (the "Company") where D3 was a director. The Company's indebtedness arose from financial products / banking facilities with the bank. D3 argued that the bank breached regulatory codes by selling financial products to the Company, knowing (or having ought to have known) it did not need the facilities of those products. D3 relied on an SFC Code of Conduct, an HKMA circular, and the Code of Banking Practice issued by the Hong Kong Association of Banks.

DHCJ Phoebe Man dismissed D3's defence, holding pertinently inter alia that:

1. On duties: Whilst the bank "has obligations under various Regulatory Codes, such obligations do not translate to a duty owed by [the bank] to its customers". Factors considered included whether the bank specified it was not acting as a fiduciary or an adviser, the preclusion of a wider duty of care upon there being an agreement on respective rights and duties, and whether the bank took steps to disclose the degree of risk involved.
2. On sufficiency of steps: The customer not needing the financial facilities did not lead to a conclusion of mis-selling. The bank had taken sufficient steps to assess the customer's requirements for the product, taking into account inter alia that the person negotiating on the corporate customer's behalf was well-versed in financial products and the bank was entitled to rely on the representations made by the corporate customer's authorised representatives as to its needs without further confirmation.

Case 2

Court of Appeal guidance on implication of terms into contracts:

High Route Ltd v Wong Chung Kai [2025] HKCA 42

Date of Judgment: 6 January 2025
Coram: Kwan VP, Au and G Lam JJA

The Court of Appeal has in a recent case set out further guidance on the restrictive approach to the implication of terms into contracts, emphasising that the stringent test of necessity must not be relaxed or watered down. The case centred on contended implied terms giving the right to refuse to complete a transaction upon objectively reasonable dissatisfaction with corporate due diligence of the target company.

The plaintiff entered into a provisional agreement for sale and purchase ("PSP") for the shareholding of a company, in order to acquire a building owned by the company. The plaintiff in correspondence raised a series of questions about the company, and was dissatisfied with the vendor's replies. The plaintiff refused to complete on completion date, and for the return of $24 million deposit given under the PSP. The plaintiff argued on appeal for implied terms granting the purchaser the right to carry out corporate due diligence and for completion to be conditional upon the purchaser being satisfied with due diligence results as assessed by the objective standard of a notional reasonable purchaser.

The Court of Appeal dismissed the appeal, noting that incorporation of an objective standard reduced the vagueness of the implied term contended, but going on to observe that it cannot re-write a contract in a way it believes to be reasonable via the process of implication. The Court reviewed the authorities on implied terms and necessity and held that:

1. The PSP already provided for certain protections by way of warranties, indemnities and guarantees (eg. warranty by vendor that the company is not involved in legal proceedings or subject to financial or tax liability). Hence even if some form of due diligence was envisaged, it did not follow that it was necessary to imply the contended term.
2. The express terms in the PSP did not give as much protection to a purchaser as a right to refuse completion when dissatisfied with due diligence results, but the latter was not the deal struck between the parties and was thus irrelevant.
3. The PSP, without the contended term to refuse completion, did not lack commercial or practical coherence, and the test for necessity was not satisfied.

Case 3

Class constitution in schemes of arrangement:

Re China Aoyuan Group Ltd [2025] HKCFI 310

Date of reasons for decision: 13 January 2025
Coram: Harris J

The Court of First Instance sanctioned the Hong Kong schemes of arrangement ("Schemes") (under s.673 of the Companies Ordinance (Cap. 622)) for Chinese property developer China Aoyuan Group Ltd ("China Aoyuan") and its directly held subsidiary Add Hero. As his Lordship observed at §4 of the decision, this decision will "*probably have significance for the restructuring of other Mainland property groups*" which will come before the Hong Kong courts, in particular with regard to issues relating to class constitution.

The main issue in dispute was whether the additional entitlements enjoyed by certain "overlapping creditors" who were creditors of both the Group and Add Hero would fracture a class of creditors called on to vote as a single class.

The opposing creditor argued that the inter-locking and inter-conditional nature of the two Schemes meant that the Scheme creditors' rights under the two Schemes as a whole needed to be considered when determining whether or not the class had been properly constituted, relying on the English cases ***Re The Baltic Exchange Limited*** [2016] EWHC 3391, ***Re Sunbird Business Services Limited*** [2020] EWHC 2860 (Ch), ***Re Codere Finance 2 (UK) Limited*** [2020] EWHC 2441.

Mr Justice Harris declined to follow this line of English decisions, determining that the opposing creditor's argument was not consistent with the Court of Final Appeal's decision in ***Re UDL Argos*** (2001) 4 HKCFAR 35. Lord Millett NPJ at §27(4) of Re UDL had stated that "*The question is whether the rights which are to be released or varied under the Scheme or the new rights which the Scheme gives in their place are so different that the Scheme must be treated as a compromise or arrangement with more than one class*", which suggests that it is only the rights compromised by the particular scheme in question, or granted by that scheme, that are relevant to the question of class composition.

His Lordship also observed that other English cases (including ***Re Hawk Insurance Co Ltd*** [2001] EWCA Civ 241, [2001] 2 BCLC 480 and ***Re Dundee Pikco Limited*** [2020] EWHC 89 (Ch)) appeared to have taken a different view from the ***Baltic*** line of decisions.

However, Mr Justice Harris emphasised that the rights or interests beyond the confines effected by the scheme in question will nevertheless still be relevant at the "special interest" stage, i.e. the discretionary stage at which the court considers whether the result of the meeting fairly reflected the views of creditors, and at which stage the court may discount or disregard votes of creditors who had such other interests or rights that their support for the scheme cannot be regarded as fairly representative of the class.

His Lordship also added one qualification, that a right to payment granted to some scheme creditors in return for voting for a scheme, can properly be viewed as a relevant right when determining a class. Where such a right to payment is included in the scheme and is material, this might (depending on the size and significance of the payment) justify those creditors who the company have agreed to pay voting in a separate class.

Case 4

The nature of termination by payment in lieu of notice:

Lo Wai Keung v Hannover Ruck Se [2025] HKCFI 262

Date of Judgment: 15 January 2025
Coram: Mimmie Chan J

This case considers a novel issue of whether termination by payment in lieu of notice under s.7 of the Employment Ordinance (Cap. 57) constitutes "termination without notice" in the context of a clause in an employment contract. This case is notable given the relative lack of authorities directly on the nature of a termination by payment in lieu of notice, and whether it is equivalent to termination with, or without, notice.

The defendant employer gave notice to the plaintiff employee 21 days before the employment was terminated and tendered payment in lieu of 6 months' notice. The issue was whether such termination constituted "*extraordinary cancellation* (of the employment) *without notice*", which if so, would disentitle the employee from certain share awards under the employment contract.

Mimmie Chan J held that when the employer terminated the contract by making payment in lieu of the 6 months' notice, it had terminated the employment without notice. The Court held that a payment in lieu of notice extinguishes and sets against any damages payable to the employee for the employer's breach of contract by failing to serve the contractual period of notice. Hence, if termination by payment in lieu is equivalent to termination with proper contractual notice (in that the employee's entitlement to notice is recognized and reflected in the payment in lieu), there will be no breach of contract and no cause for damages.

Case 5

Duties of liquidators as officers of the Court:

NHD Systems (Asia) Limited (in liq.) v Li Xiao Yi [2025] HKCFI 408

Date of reasons for judgment: 21 January 2025
Coram: Harris J

A recent Court of First Instance decision setting out the failings of a liquidator in his conduct of the case serves as a reminder of liquidators' duties as officers of the Court, and generally the importance of witnesses taking their obligation to give honest evidence seriously.

The plaintiff company was placed into liquidation in 2000. AT had been one of the Company's first liquidators from May 2000 to November 2001, and was reappointed together with TK in June 2016. In 2018 the Company acting under its liquidators commenced proceedings against the Defendant, a former director, for repayment of an alleged loan of US$1 million to the Defendant in 1992. The Court dismissed the action following the Defendant's no case to answer submission.

A major focus of the decision concerned the conduct of the case by AT. A liquidator is an officer of the Court. By virtue of the office they hold, the Court's officers are expected to carry out their duties fairly and with integrity. As held in ***Lehman Brother Australia Ltd (In Liquidation) v MacNamara*** [2021] Ch 1 at §35, The Court will not permit its officers to act in a way which, although lawful and in accordance with enforceable rights, does not accord with the standards which right-thinking people or, as it may be put, society would think should govern the conduct of the court or its officers.

The Judge found that AT as liquidator had "fallen materially short of his duties to the Court" (§35). In particular: -

1. AT failed to check the Company's ledgers or bank statements, which would have been in the documents in the Liquidators' possession, to verify the existence of the loan;
2. The Company and the Liquidators had both breached their discovery obligations; and
3. AT lied on affirmation in respect of several matters.

The other liquidator, TK, also owed a duty to the Court to ensure the liquidation was conducted properly, and it was his obligation to do so even if that meant having to challenge AT's conduct.

The Court referred the matter to the Official Receiver to consider commencing disqualification proceedings against AT and referred to the judgment to the Hong Kong Institute of Certified Public Accountants to consider potential disciplinary proceedings against TK.

Case 6

Various issues in liquidation of company operating cryptocurrency platform: *Re Gatecoin Limited (in liq.)* [2025] HKCFI 493

Date of decision: 24 January 2025
Coram: Linda Chan J

Following the 2023 decision in the liquidation of Gatecoin in which it was held that cryptocurrency is "property" and is capable of being held on trust (***Re Gatecoin Ltd*** [2023] 2 HKLRD 1079), the liquidators of Gatecoin sought the Court's directions on, *inter alia*, issues on allocating trust assets and nature of claims of Ethereum Debt holders.

Linda Chan J addressed the classification of customers who did not consent to the 2018 Terms and Conditions (non-consenting customers, i.e. "NCCs") and whether their transactions after the relevant date were automated or required access to the platform. The court identified seven scenarios to determine if customers should be classified as NCCs, with four scenarios being treated as NCCs and three requiring proof from customers to be classified as such.

Her Ladyship also considered the nature of the beneficial interest of NCCs in the cryptocurrencies held by Gatecoin, and determined that each NCC is a beneficial tenant-in-common in a pool of cryptocurrency, sharing the pool proportionately based on their account balances.

In respect of how NCCs' trust claims should be met, it was decided that:-

1. Where there is no shortfall, NCCs should receive their trust property, subject to the deduction of administration costs. In cases of shortfall, the remaining assets should be allocated on a proportionate basis using a "*pari passu ex post facto*" approach.
2. Subject to administration costs, cryptocurrencies should be allocated in *specie* unless impractical, in which case they may be sold and the proceeds distributed to meet the claims of the NCCs.

There was a cyberattack on the Gatecoin platform in 2016 in which 90% of Ethereum held by Gatecoin was stolen, after which Gatecoin credited accounts who lost Ethereum with Ethereum Debt ("ETD"). The Court determined that ETD represents a cause of action by ETD holders against Gatecoin for breach of trust, and Gatecoin is liable to return the Ethereum lost which remains unaccounted for. The claims should be quantified based on the highest value of Ethereum during the period between the day after the cyberattack to the date of liquidation.

Case 7

Non-commencement orders under Bankruptcy Ordinance:

Re Yeung Chun Wai Anthony [2025] HKCFI 523

Date of decision: 28 January 2025
Coram: Linda Chan J

The Court discussed the purpose of a non-commencement order ("NCO") against the bankrupt, how the Official Receiver or trustees in bankruptcy could make use of such an order, the factors which the court may take into account when deciding whether to exercise its discretion to extend time for making such an application, and also warned against dilatory applications.

The Bankrupt was adjudged bankrupt on 21 April 2021. In November 2024, the Trustees of the estate of the Bankrupt applied for an NCO against the Bankrupt and extension of time to apply for the NCO under ss.30AB and 30AC of the Bankruptcy Ordinance (Cap. 6).

Linda Chan J held that the substantive requirements for an NCO under s.30AB were met, but the main issue was whether the Court should exercise its discretion to extend the time for the Trustees to make the NCO application, as the Trustees only issued the application in November 2024, more than 3 years after the expiry of the initial 6-month period specified under s.30AB(2)(a) of the Bankruptcy Ordinance.

The Court held that in deciding whether to extend time for the Official Receiver or trustee to make an NCO application, the paramount consideration is whether the bankrupt has in the period prior to the application, approached the OR or trustee and performed the obligations stipulated in s.30AB(1) or rendered any meaningful assistance to the OR or trustee in the administration of his estate. Where, as in this case, the Bankrupt has ignored all the requests for interview and failed to assist the Trustees, the Court is entitled to take into account such failings as justifications for exercising its discretion to extend time for making the NCO Application, and to make the NCO against the Bankrupt.

In this case, there were sufficient grounds for the Court to exercise its discretion to extend time as the Bankrupt had been uncooperative since the beginning of his bankruptcy, concealed his assets, and the amount claimed by creditors was very significant.

However, her Ladyship emphasised that an NCO application should be made by the OR or trustee(s)-in-bankruptcy with promptitude within the initial 6-month period, given the potentially draconian nature of an NCO in delaying a bankrupt's financial rehabilitation.

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