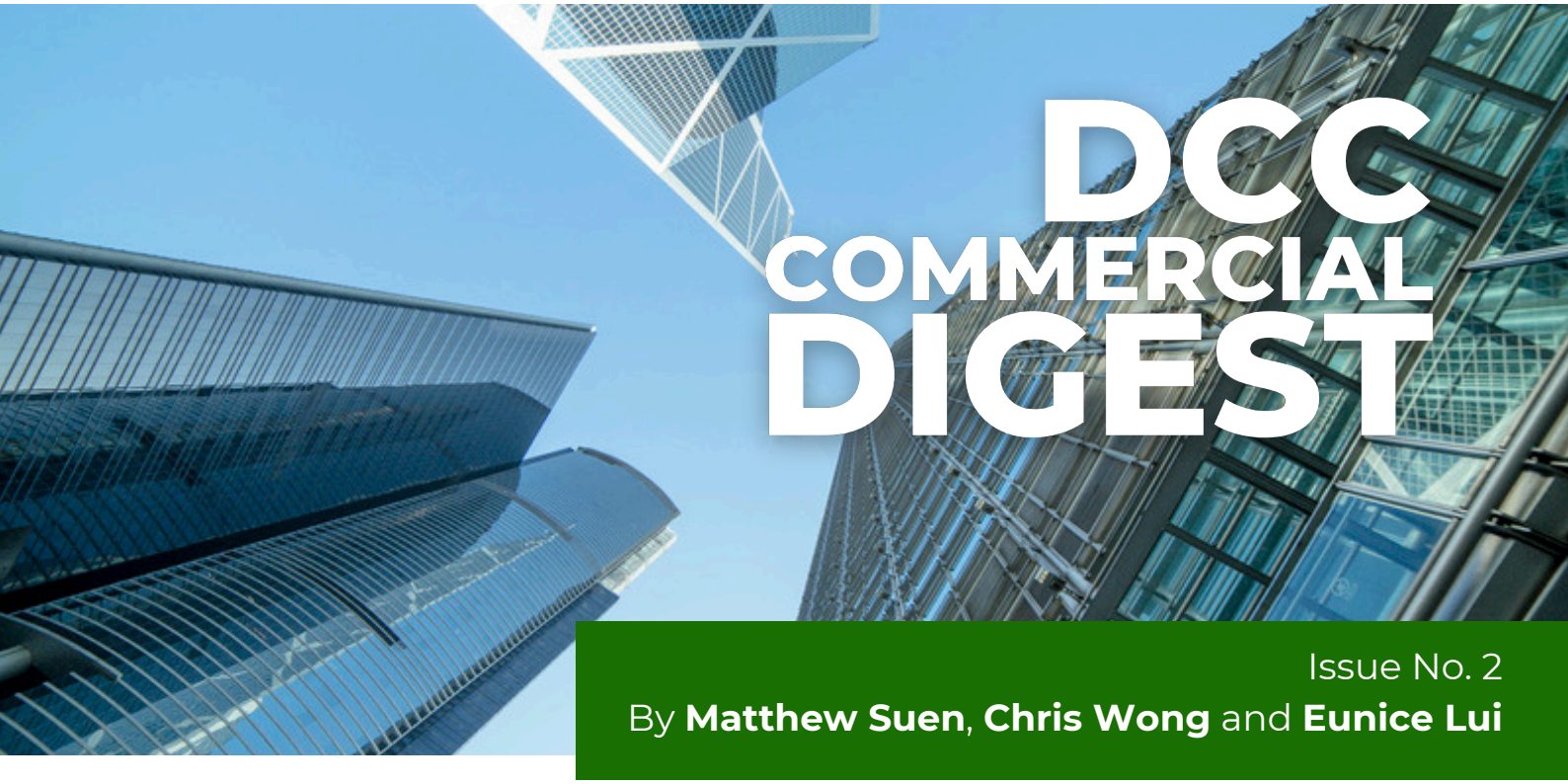
FEBRUARY 2025



DCC COMMERCIAL DIGEST

Issue No. 2

By **Matthew Suen**, **Chris Wong** and **Eunice Lui**

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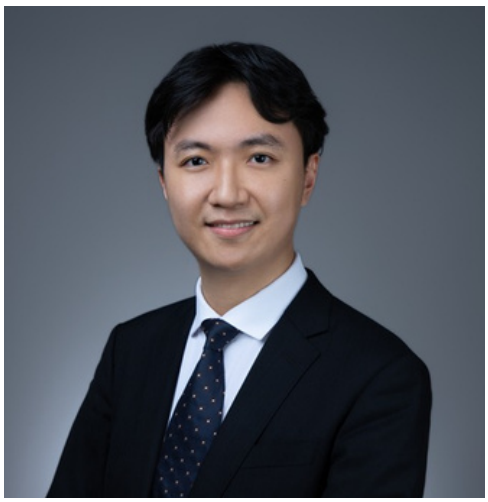

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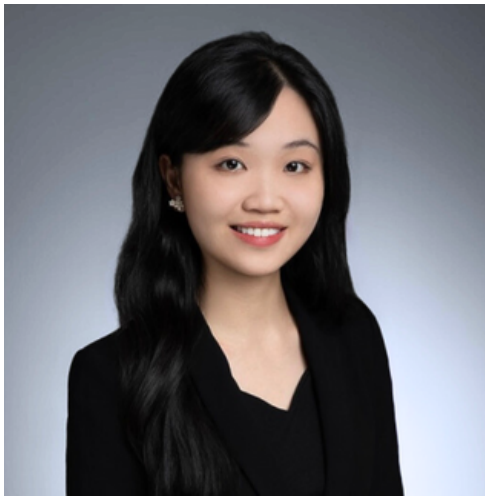

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Case 1

No fork in the road: commencing a writ action does not preclude the issuing of a statutory demand as a means to seek repayment

VPower Group Holdings Ltd v CRRC Hong Kong Capital Management Co Ltd [2025] HKCFI 551

Date of Judgment: 3 February 2025
Coram: DHCJ Kent Yee

Introduction

The decision concerns two classic applications by VPower Group Holdings Limited ("VPG") and VPower Group International Holdings Limited ("VP ListCo") (the "Companies") for an injunction restraining a creditor from presenting winding-up petitions against them. These applications arose from statutory demands dated 5 August 2024 for a debt of US$12,634,870.95 (the "Disputed Debt"). The Companies contended that the Disputed Debt was unenforceable on various grounds, including that the underlying finance lease agreements were in substance disguised loan agreements, making them unenforceable under the Money Lenders Ordinance (Cap. 163) ("MLO").

Factual Background

The Companies were part of the "VPower Group", which operated power plants and was engaged in power generation and distribution. The Creditor was a wholly owned subsidiary of a listed company in Hong Kong. Between 2015 and 2017, the Creditor entered into finance lease agreements with VPG and its former subsidiary, VPower Technology Company Limited ("VPT"), under which the Creditor acquired certain assets from VPG and VPT and leased them back to them. VPG and VPT later defaulted on payments, leading to repayment undertakings and guarantees, including a guarantee by VP ListCo in 2019. In 2022, VPG and VPT executed a payment undertaking acknowledging their liabilities and agreeing to a repayment schedule (the "2022 Payment Undertaking"). The statutory demands were based on this 2022 Payment Undertaking.

Key Issues and the Court's Findings

Whether the finance lease agreements were disguised loan agreements, making The Creditor an unlicensed money lender

The Companies argued that the agreements were a sham designed to disguise loans, pointing to an alleged understanding between the parties that VPG and VPT were always obliged to repurchase the leased assets. The Court rejected this claim, finding that the contemporaneous documents—including the IPO prospectus of VP ListCo—consistently described the agreements as sale and leaseback transactions without a mandatory repurchase obligation.

The Court further noted that, even if the transactions were in fact loans as alleged, they would have been exempted under paragraphs 14 and 15 of Schedule 1 Part 2 of the MLO, which applies to loans made to listed companies and their subsidiaries.

Whether the statutory demands were defective due to misattribution of liabilities

The Companies contended that the 2022 Payment Undertaking did not impose joint and several liability on VPG and VPT, making the statutory demands defective. The Court, however, held that the language of the 2022 Payment Undertaking did impose a joint obligation to repay, with no express division of liabilities. It found no defect in the statutory demands.

Whether the guarantee by VP ListCo had been discharged due to material variations

The Companies argued that modifications to the repayment obligations of VPG under the 2019 and 2022 undertakings discharged VP ListCo's liability under the guarantee, applying the rule in *Holme v Brunskill* (also known as the "material variation" rule). The Court rejected this argument, holding that the guarantee expressly covered all liabilities of VP ListCo and its subsidiaries up to US$54,462,000, notwithstanding modifications or amendments. In any event, as VP ListCo's controller had executed the 2022 Payment Undertaking, it was deemed to have consented to the variations.

Whether D's actions amounted to an abuse of process

The Companies contended that The Creditor had initially commenced an action by writ but later abandoned it in favour of winding-up proceedings, demonstrating an abuse of process. The Court disagreed, holding that The Creditor was entitled to choose its enforcement mechanism and that its actions did not indicate an intention to avoid scrutiny of the debt's validity.

Conclusion and Key Takeaways

The Court dismissed the applications, holding that the Companies failed to establish a genuine dispute regarding the Disputed Debt. The Creditor was entitled to pursue winding-up proceedings. Costs were awarded to the Creditor on a nisi basis, with a certificate for two counsel. There are a few key takeaways which can be discerned from the Court's decision:

First, it is clear that contemporaneous documents in support of an assertion would be given significant weight – and in this case they were fatal to the Companies' claim that the Disputed Debts were in fact loans (as opposed to sale and leaseback transactions). When a debtor company makes an application "to put away the evil day", it must be prepared to make out its factual claims by reference to ample contemporaneous documents, and must be mindful of any purported contemporaneous documents which clearly contradict its own case.

Second, a guarantor (or even its "controller") which agrees to a payment schedule would likely be taken to have consented to any alleged "variation" to the exposure under the guarantee, thus disapplying the rule in *Holme v Brunskill*. Extreme care must be taken when a guarantor is invited to agree to any payment schedule.

Third, the fact that a Writ action has been issued is simply neither here nor there, and does not, contrary to common (mis)conception, indicate any knowledge or acceptance by the plaintiff-creditor of any factual disputes. Put simply, there is no "fork in the road" which requires a creditor to make a "final choice" between (1) commencing a civil action and (2) issuing a statutory demand for the purpose of pursuing winding-up relief. This decision makes it amply clear that there is no general principle that prevents a creditor who has issued a Writ from serving a statutory demand at a later stage.

Case 2

"Deadlock" is not unfair: a warning to unfair prejudice petitioners who seek receivership orders

Vasily Trubnikov v Julimar Management Limited & Ors [2025] HKCFI 575

Date of Judgment: 6 February 2025
Coram: Linda Chan J

Background

The Court of First Instance considered an application for the appointment of interim receivers and managers over the Hong Kong-incorporated company, Julimar Management Limited (the "Company"), which carries on a transnational mining business. The application arose from the wider context of an unfair prejudice petition brought by Vasily Trubnikov (the "Petitioner") against, amongst others, East Minerals Limited, each being 50% "beneficiaries" in the Company (the "Respondents").

In gist, the Petitioner's complaint of unfairly prejudicial conduct consisted of allegations of breaches of a Shareholders' Agreement ("SHA"), exclusion from management, and diversion/concealment of assets. The Respondents contested the claims, arguing inter alia that the SHA was procured under duress.

Decision

Linda Chan J held that the appointment of receivers was not justified, and dealt with the various arguments raised by the Petitioner:

1. ***Risk of Dissipation:*** The Court found no real risk of dissipation of assets, as the Respondents had provided undertakings to appoint the Petitioner as a director and to maintain US$60.5 million in company accounts. Allegations of undervalued sales and document forgery did not meet the threshold for urgency justifying receivership.

2. ***Deadlock as a Ground for Receivership:*** Deadlock does not automatically justify appointing receivers. Since the Petitioner had already been reinstated as a director, he could participate in management, undermining his purported claim of corporate paralysis. More fundamentally, the Court observed that while "functional deadlock" or "irretrievable breakdown in trust and confidence" may justify a just and equitable winding-up, they *per se* do not necessarily constitute unfair prejudice under sections 724-725 of the Companies Ordinance (Cap. 622)("CO").

3. ***Buy-Out as an Alternative Remedy***: Where the principal relief sought is a buy-out order, courts prefer to maintain the status quo rather than disrupt business operations through interim receivership. It remains generally undesirable to replace the management of the Company at the interlocutory stage.

The key takeaway from the decision is that the appointment of an interim receiver would not be lightly made by the Companies Court. The Court emphasised that where a petitioner seeks a buy-out order, it is preferable to allow existing management or likely future owners to continue operations unless there is a real likelihood that the economic value of the company would be diminished "significantly", *and* the prejudice to the petitioner cannot be compensated by a buy-out order. Also, the decision highlights the high threshold required for appointing interim receivers, particularly in shareholder disputes where allegations of "deadlock" are made. It makes clear the position that the classic grounds of "functional deadlock" and "irretrievable breakdown in trust and confidence" (which justify the grant of just and equitable winding up relief) *per se* do not assist those petitioners who *only* pursue unfair prejudice remedies under sections 724-725 of the CO.

Case 3

The burden of proof lies with the Plaintiff when both parties' case theories are improbable

CB v Anthorp Brian Drew [2025] HKDC 208

Date of Judgment: 14 February 2025
Coram: DDJ David Chan

Background

The Plaintiff, a domestic helper, brought a personal injuries action against her employer, i.e. the Defendant, alleging that the Defendant sexually abused her. The harassment complained of included 4 separate incidents. The Defendant admitted 3 of the 4 instances of sexual abuse but raised positive defences. The Deputy District Judge David Chan dismissed the Plaintiff's claims having ruled against her on the issue of liability. DDJ Chan found both parties' evidence to be improbable.

The Plaintiff sought leave to appeal. The principles on granting leave to appeal were not disputed. In contention was the Deputy Judge's alleged failure to consider the employer's admission of 3 of the 4 sexual abuse incidents from which should follow the shifting of the evidential burden to the employer in his positive defence.

The Plaintiff's application for leave was dismissed.

Decision

DDJ Chen held that: -

1. When there are two contradicting cases, both being improbable, the elimination of one does not automatically lead to the acceptance of the other improbable theory. There is open to the Court a third alternative, i.e. the party on whom the burden of proof lies in relation to any fact has to discharge that burden;

2. The assessment of burden of proof is practically an assessment of parties' relative credibility and cogency; and

3. It is only when the Plaintiff has discharged her evidential burden of proof that the court will then move on to consider whether the Defendant discharged his evidential burden of raising a *prima facie* innocent explanation.

Case 4

Evergrande's subsidiary and guarantor Tianji Holdings wound up by Court despite disputes on liability and Tianji Holding's sole director was ordered to pay costs

In the matter of Tianji Holdings Limited [2025] HKCFI 765

Date of Judgment: 17 February 2025
Coram: Linda Chan J

Background

Tianji Holding Ltd is a key subsidiary and guarantor of China Evergrande Group (CEG), which was wound up back in January 2024. This petition was filed by CEG to wind up Tianji in order to gain control over it. Tianji raised defences including that the statutory demand was defective, that there was a bona fide dispute over the amount owed, that CEG was not a creditor under certain notes, and that CEG lacked standing to present the petition. Linda Chan J made an order to wind up Tianji and dismissed Tianji's attempts to introduce expert evidence on PRC law to support its argument of bona fide dispute on the amount owed.

Decision

Linda Chan J made the following important remarks: -

1. First, the judgment confirmed that a Statutory Demand is valid so long as it states the consideration for the debt, or if there is no such consideration, the way in which the debt arises. This is the **only** requirement to bring the Statutory Demand in conformity with rule 3B(1)(b)(ii) of the Companies (Winding-up) Rules (Cap. 32H).

2. Secondly, the court noted the difficulties in overcoming the company's previous admissions as to indebtedness. In fact, if previous admissions were made, they are more than prima facie evidence of indebtedness such that mere denial of liability is insufficient, and the company has to deal with the admission "head-on". To resile from the admission, the company must adduce proper or compelling evidence.

3. In the present case, the court found the sole director of Tianji personally liable for the Petitioner's costs since (1) there is no valid reason for Tianji to oppose the Petition and (2) it was the sole director who made the decision to adopt the present stance.

Case 5

Unfair preference transactions

Chen Yung Ngai Kenneth and Sun Wing Sze (being the joint and several liquidators of Best Year Enterprises Limited) (in liquidation) v Sin Kwok Lam & Anor [2025] HKCFI 741

Date of Judgment: 24 February 2025
Coram: Mr Recorder William Wong SC

This case involves an unfair preference claim brought by the liquidators of a BVI company (P) against Mr Sin, its sole director and shareholder (D1) and EPL, a related entity (D2). The liquidators sought to recover three payments totalling HK$14.3 million, alleging these were unfair preferences under Section 266 of the Companies (Winding Up and Miscellaneous Provision) Ordinance (Cap 32) ("CWUMPO"). These payments were made when the company was insolvent, amid significant financial distress following a sharp decline in the value of its primary asset (shareholdings in First Credit) and demands from another creditor.

The Court found that the subject payments were unfair preferences in favour of D1 over other creditors, breaching Section 266 of CWUMPO, and ordered the payments of HK$14.3 million be set aside and repaid to the company. The decision underscores a rigorous application of the statutory presumptions and evidentiary standard in unfair preference claims, particularly against controlling insiders.

1. ***Unfair Preference and EPL's Role***: Recorder Wong SC held that as EPL (D2) acted as Mr Sin's (D1) agent, the payments to D2 were effectively payments to D1, a creditor, which reduced the company's liability to him personally. This collapsed the separate legal identity of D2 for the purpose of recovery.

2. ***Insolvency Context***: The Court found that the company's cash-flow was insolvent at the time of the making of payments, citing its inability to meet another creditor's demand after its holdings of First Credit's shares became worthless. This satisfied the statutory precondition for an unfair preference claim.

3. ***Secured Creditor Defence*:** D1's argument of security via an oral agreement was rejected, as no credible evidence, contemporaneous or otherwise, supported the existence of the alleged oral agreement, and D1's prior legal filings contradicted his evidence in this regard.

4. ***Running Account Argument*:** D1's alternative argument that the subject payments were part of a mutual dealing was also rejected, given that there was no reciprocal payment transferred from D1 or D2 into the company. Citing *Re Wing Hong Woo Co Ltd* [2000] 4 HKC 186, the Court held that the subject payments were unilateral extractions rather than "running account" operations.

5. ***Desire to Prefer*:** As a connected person under Section 266(5), D1 bore the burden to disprove the presumption of intent to prefer. The Court found that for the lack of contrary evidence, D1's awareness of the company's insolvency and his personal benefits from the payments showed a subjective desire of preference.

Case 6

Postponing commencement of limitation period for deliberate concealment

Sun Tian Gang & Anor v Changchun High & New Technology Industries Development Parent Company & Ors [2025] HKCA 188

Date of Judgment: 26 February 2025
Coram: Hon Kwan VP, Cheung and Au JJA

The Court of Appeal decision arose from a trial of preliminary issues ("TPI") concerning deliberate concealment under Section 26 of the Limitation Ordinance (Cap 347). The Plaintiffs sought to amend their pleadings to include claims that are *prima facie* time-barred, arising from the "CG Transaction" and "NXG Transaction" made between 2005 and 2007. The Plaintiffs' claims to be added include breaches of duty, dishonest assistance, and unjust enrichment against the Defendants, alleging that relevant facts were deliberately concealed from them, hence the limitation period for their claim should be postponed under Section 26.

At the Court of First Instance, after assessing whether the facts relevant to these claims were deliberately concealed and, if so, when they were or could have been discovered with reasonable diligence by the Plaintiffs, DHCJ Le Pichon allowed the amendments related to the "nominee sale" aspect of the CG Transaction but rejected the others. Both groups of Defendants appealed, challenging the scope and findings of the TPI, while the Plaintiffs cross-appealed the refused amendments.

In dismissing both the Defendants' appeal and the Plaintiffs' cross-appeal, the Court of Appeal clarified the application of Section 26 of the Limitation Ordinance.

1. ***Deliberate Concealment under Section 26(1)(b):***

Under Section 26(1)(b), a limitation period is suspended where the defendant deliberately conceals a fact relevant to the cause of action, postponing its commencement until such facts were or could have been discovered with reasonable diligence. The Court affirmed that the concealment must be intentional, but the defendant needs to know that the concealed facts are relevant to the claim. Mere failure to disclose *per se* is insufficient unless the defendant was under a duty to disclose.

2. ***Extension via Breach of Duty under Section 26(3):***

Section 26(3) extends the basis of deliberate concealment under Section 26(1)(b) to where a defendant deliberately commits a breach in circumstances "unlikely to be discovered for some time". This requires (i) a breach, (ii) deliberate intent, and (iii) objective unlikelihood of timely discovery.

In this case, the Court upheld the Deputy Judge's approach of assuming breaches in a TPI as a case management decision and reserving their proof for trial. It balances the plaintiff's right to a claim without causing possible prejudice or unfairness to the defendant.

3. ***Reasonable Diligence Test:***

The Court reaffirmed that reasonable diligence is assessed objectively. Applying the objective test in this case, what a reasonably attentive person could discover in the Plaintiffs' circumstances (e.g. P1's house arrest and lack of funds) is relevant consideration, but any personal traits (e.g. P1's ignorance of public announcements) is not. The two-stage test is (i) whether there is anything to put the plaintiff on notice to investigate, and (ii) what a reasonably diligent investigation would reveal.

The Court rejected a proposed distinction between one's characteristics affecting the ability to investigate (which should be considered) and those affecting the desire to investigate (which should be ignored). Following *Peconic Industrial Development Ltd v Lau Kwok Fai* (2009) 12 HKCFAR 139 and *OT Computers Ltd v Infineon Technologies AG* [2021] QB 1183, the Court endorsed that reasonable diligence assumes a desire to investigate what was deliberately concealed.

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