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Case 1

Termination of contract – contractual termination clause does not necessarily oust termination at common law for repudiatory breaches

Golden Miles Group Holdings Limited v Jacob & Co. Ltd. [2025] HKCFI 663

Date of Judgment: 6 March 2025
Coram: Hon Cheng J

Background

The dispute arises out of an agreement (the "Agreement") under which the Defendant, Jacob & Co, engaged the Plaintiff, Golden Miles Group Holdings Limited ("Golden Miles") as its sole and exclusive distributor for the marketing and sale of various products, including watches and jewelry in the brand name of "Jacob & Co" in Hong Kong, Macau and the PRC for a period of ten years.

Jacob & Co alleged that it validly terminated the Agreement in September 2017 for Golden Miles' failure to pay an amount of US$470,198.15 owed to Jacob & Co and for Golden Miles' submissions of a false account of its expenses, which was later discovered. Golden Miles claimed that Jacob & Co wrongfully terminated the Agreement as no amount was owing to Jacob & Co at the time of the alleged termination as a result of an agreement in March 2017 and sought a range of declaratory and injunctive relief.

The CFI dismissed Golden Miles' claim.

Decision

Of significance is Clause 7.2 of the Agreement, which was a contractual termination clause. Relevantly, Cheng J made the following important remarks:

1. **Construction of a Termination Clause**: The starting point in construing a termination clause is that there is a presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption. Construing Clause 7.2, it was not worded so as to catch all breaches of contract and to exclude the right to terminate at common law.

2. **Notice Period for Remedying a Breach:** Alternatively, Golden Miles sought to rely on the notice period under Clause 7.2 and argued that even if the clause did not exclude the common law right to terminate the Agreement, it nevertheless applied to a common law termination of the Agreement, such that it was necessary to give notice of an intended termination and the opportunity to the defaulting party to cure it within the notice period. Cheng J rejected this argument and held that if termination of a contract for repudiatory breach at common law was not excluded by a termination clause, then *prima facie*, the terminating party could terminate by simply accepting the contract as terminated, being the mode of termination at common law, unless the clause provided otherwise.

Another noteworthy aspect of this case concerns whether Jacob & Co could rely on a breach which was discovered after the termination of the Agreement to justify its termination. In answering the question in the affirmative, the CFI reaffirmed the principle that a party who terminated a contract for a wrong reason could rely on another valid reason to justify the termination, even if he did not know of that valid reason at the time of termination, so long as (1) the valid reason (a) existed at the time of the termination, and (b) could not have been put right by the defaulting party, and (2) the terminating party was not precluded by waiver or estoppel from relying on the valid reason. Here, due to the loss of trust between the parties, Golden Miles' breach could not have been put right and Jacob & Co was entitled to rely on the later discovered breach to terminate the Agreement.

Takeaway

In general, contractual termination clauses do not preclude termination for repudiation in common law. Parties seeking to preclude so must exercise caution when drafting such a clause.

Case 2

Inspection of accounting records pursuant to sections 373 – 378, 740 of the Companies Ordinance (Cap. 622) – relevance of shareholders' agreement

Lui Yau Tak (雷有得) and Lui Yau Bun Raymond (雷有彬) v Melofield Nursery and Landscape Contractor Limited (經緯園藝有限公司) [2025] HKCFI 663

Date of reasons for decision: 17 March 2025
Coram: Mr. Recorder Suen, SC

Background

In the present case, a former director and a shareholder made an application for inspection of various accounting records pursuant to sections 373 – 378 and 740 of the Companies Ordinance (Cap. 622) against the Defendant, being the Company.

The CFI granted the Plaintiffs' request for inspection with some limitation to its scope.

Decision

One noteworthy aspect of this case concerns the fact that the shareholder had entered into a shareholders' agreement (the "SHA") which conferred on him various rights of access to information. In light of the Australian decision in *Simba Global Pty Ltd v IFOTA Pty Ltd* [2019] FCA 1020, the Court considers the relevance of the SHA to the present application. Mr. Recorder Suen, SC held that:

1. **Relevance of the SHA:** The rights under the SHA and the rights under company law related to two different planes. It followed that a shareholder could not contend that, simply because he might be entitled to right of access under the SHA as a matter of contract, he could *ipso facto* invoke the statutory right to obtain access against the company. However, relevant provisions in a shareholders' agreement might form an important factual matrix or context against which the Court would assess whether a request is made in "good faith" and for "proper purpose".

2. **Substantive Contents of Contractual Provisions:** Insofar as the SHA provided for specific rights and obligations of shareholders and there was a need to seek access to relevant documents for the purpose of performing such rights and obligations, the Court must be entitled to consider such contractual rights and obligations as the relevant context in evaluating the statutory requirements. This aspect relates to the substantive contents of contractual provisions, independent from any right of access provisions.

3. **Context Pertaining to a Shareholder's Level or Extent of Participation in the Business of the Company:** Insofar as the SHA provided for right of access or indirect access, this is a relevant context pertaining to such shareholder's level or extent of participation in the business of the company, and the right to information commensurate with the same. Hence, in a context where a shareholder is envisaged to participate and/or be kept informed of the daily business of a company, as contrasted with being a passive investor *simpliciter*, the Court might well consider a wider request for inspection to be made in good faith and for proper purpose.

Considering the content of the SHA, the Plaintiffs' various concerns as to the Company's expenses and liquidity issues and the Plaintiffs' continuing requests for information, the Court held that the Plaintiffs' request was made in good faith and for proper purpose.

Case 3

Damages - whether a breach of contractual liquidity obligation by a holding company caused actionable loss to its contracting subsidiaries

Peking University Founder Group Company Limited (北大方正集團有限公司) v Nuoxi Capital Limited (諾熙資本有限公司) (in liquidation in the British Virgin Islands) (in FACV 7/2024) [2025] HKCFA 6

Date of Judgment: 19 March 2025
Coram: Chief Justice Cheung, Mr Justice Ribeiro PJ, Mr Justice Fok PJ, Mr Justice Lam PJ and Mr Justice Allsop NPJ

Background

The case involved three consolidated appeals (FACV Nos 7, 8, 9 of 2024) before the Hong Kong Court of Final Appeal. The appellant, Peking University Founder Group Company Limited ("PUFG"), a Mainland Chinese company under reorganization, was sued by three of its offshore subsidiaries (Nuoxi Capital Limited, Hongkong JHC Co Limited, and Kunzhi Limited) in liquidation.

These subsidiaries had issued bonds under the "Keepwell Deeds" (the "Deeds") in 2017-2018, which, amongst others, required PUFG to ensure their liquidity and maintain their consolidated net worth. In early 2020, PUFG's financial collapse triggered cross-defaults on bond payments after Kunzhi Limited missed an interest payment. After PUFG failed to meet these obligations, the subsidiaries sought declarations that PUFG breached the Deeds, causing their insolvency and liability for the bond debts.

The CFI dismissed most claims, ruling that PUFG could not obtain regulatory approvals post-restructuring. However, the CA reversed this ruling, holding in favour of the respondents that PUFG's failure to provide funds led to the respondents' insolvency and declared PUFG liable for specific sums tied to the unpaid bond obligations.

The main issue revolves around whether PUFG's breach of the liquidity obligations under the Deeds caused actionable loss to the respondents. The CFA had to determine if such a breach of the contractual liquidity obligations indeed resulted in measurable damages, considering whether, as argued by PUFG, providing funds e.g. via loans (as a means to fulfill obligations) merely replaced one liability with another, namely their liabilities to bondholders with liabilities to PUFG, resulting in no net loss; or that, as argued by the respondents, the said breach caused insolvency, which constituted an actionable loss.

Decision

The CFA analyzed the contractual obligations under the Deeds, particularly clauses 4.1(i) (balance sheet obligation) and 4.1(ii) (liquidity obligation), and of significance:-

1. **Permissibility of Loans Under the Deeds:** The CFA held that clause 4.1(ii) permitted PUFG to satisfy liquidity obligations through loans. The deeds explicitly required PUFG to establish a lending facility under clause 6.2 to address defaults, indicating that the loans were a compliant mechanism. The subsidiaries' own pleadings acknowledged the loans as a valid performance method, and they failed to argue otherwise during the trial.

2. **No Net Loss to the Subsidiaries:** The Court emphasized that compensatory damages aim to restore the plaintiffs to the position they would have occupied had the contract been performed. If PUFG had provided the loans, the subsidiaries' pre-existing bond liabilities would have been substituted with equal debts to PUFG, leaving their net financial position unchanged. The subsidiaries' insolvency status alone did not equate to a quantifiable loss, as they had pleaded no specific damages arising from the liquidity shortages (e.g., asset devaluation or increased borrowing costs).

3. **The Bondholders' Losses and the Trustee's Role:** The CFA noted that the true loss fell on the bondholders, who retained enforceable rights through the trustee. The Deeds expressly granted the trustee standing to sue for breaches affecting bondholders' interests. Thus, there was no "legal black hole" — the trustee could pursue claims directly, eliminating any need for subsidiaries to recover third-party losses.

4. **Rejection of the "Transferred Loss" Argument:** The subsidiaries argued they could claim the bondholders' losses under the "transferred loss" doctrine. The Court dismissed this argument, stressing the doctrine applies only where contractual intent explicitly benefits third parties or where no alternative remedy exists. Here, the bondholders had an independent recourse via the trustee, making the subsidiaries' claim redundant.

As such, although PUFG breached clause 4.1(ii) of the Deeds by failing to provide liquidity to the subsidiaries, the Court concluded that the said breach did not result in any actionable loss because any funds provided via loans would not change the respondents' net worth. The Court emphasized that the true loss was suffered by the bondholders, who could claim through the trustee, but not the respondents. As a result, the Court unanimously allowed the appeals and overturned the Court of Appeal's declarations of liability for substantial damages, and only awarded nominal damages.

Takeaway

The decision reinforces the principle that damages for breach of contract must reflect the actual loss. It delineates the roles of corporate entities in complex financing structures, emphasizing that subsidiaries acting as bond-issuing vehicles cannot claim damages for third-party losses when alternative remedies exist.

Case 4

Contractual terms and illegality - CA denies enforcement of expired contract with clear and express terms and on public policy grounds

Chinachem Financial Services Limited v Century Venture Holding Limited [2025] HKCA 265

Date of decision: 21 March 2025
Coram: Hon Kwan VP, Chow JA and Anthony Chan J

Background

The dispute arose from a 2009 agreement (the "Agreement") between Chinachem Financial Services Limited ("Chinachem") and Century Venture Holdings Limited ("Century Venture"). Chinachem sought Century Venture's assistance to recover shares and dividends in China Minsheng Bank from a Mainland Chinese company, being a

China SME, after a prolonged legal battle. Chinachem initially invested $10.94 million through the China SME in 1995, but ownership disputes led to a 2002 Beijing Court ruling limiting Chinachem's recovery to its initial investment plus partial dividends. Dissatisfied, Chinachem appealed to China's Supreme People's Court (the "SPC"). The case was stalled for years.

In 2009, Century Venture, represented by individuals claiming to have "connections" in China, entered into the Agreement to act as Chinachem's litigation agent. The Agreement stipulated that Century Venture would secure a favorable SPC judgment or settlement, with remuneration tied to the excess recovery over the initial award. Key terms of the Agreement included:

- A term of **18-month** (expiring on 25 February 2011) unless extended in writing (Clause 9).
- A requirement for **written consent** for any amendment to the Agreement (Clause 11.5).
- A "**Desired Results Deadline**" for obtaining the second instance desired litigation result (originally 6 months, later extended to August 2010), after which Chinachem could terminate the Agreement if no progress was made (Clause 10(c)).

Century Venture failed to meet the Desired Results Deadline, and no further extension agreements were signed. Despite the expiry of the Agreement, the Defendant continued to work in relation to the litigation matter, claiming that there was a new contract implied by conduct. In 2012, the SPC ruled in Chinachem's favor, awarding 40% of the shares' value (exceeding the original award by ~RMB 1.9 billion). Century Venture demanded a share of the award under the Agreement, but Chinachem argued that the Agreement had expired and was in any event unenforceable due to Century Venture's conduct which was contrary to public policy. The lower court held in favour of Chinachem.

Decision

Century Venture's appeal was dismissed:-

1. **The Agreement Expired and was not Renewed**

    a. The Agreement explicitly terminated on 25 February 2011. Clause 11.5 required written consent for extensions, which was never provided by Chinachem.

    b. Century Venture's continued performance (e.g., drafting settlement proposals, attending meetings) did not give rise to an implied contract by conduct and simply aligned with Century Venture's hopes for a renewal of the Agreement. Key considerations included:-

        i. Century Venture's awareness of Chinachem's internal approval processes for extensions.

        ii. Century Venture's repeated attempts to draft unsigned supplemental agreements post-2011.

        iii. The high-stakes nature of the Agreement (of which around RMB 949 million were at stake), making informal renewal implausible.

2. **The Agreement was unenforceable on the Grounds of Illegality**

a. The CA ruled that the Agreement violated public policy in both Mainland China and Hong Kong due to Century Venture's conduct including:-

i. Interference with judicial independence: Century Venture took various actions, including the promise to make a donation to Renmin University and securing an SPC judge's appointment as a PhD supervisor, with a view to influence the opinions of the China Banking Regulatory Commission and the SPC judge.

ii. Disclosure of confidential SPC deliberations: Century Venture obtained and used internal SPC discussions to strategize Chinachem's case.

iii. Breach of the PRC laws: These actions violated Chinese laws mandating judicial independence (e.g., *PRC Constitution, Civil Procedure Law*).

b. Following *Ryder Industries Ltd v Chan Shui Woo* (2015) 18 HKCFAR 544, which ruled that contracts violating foreign public policy (if sufficiently serious) are unenforceable in Hong Kong, it is held that Century Venture's acts were central, not incidental, to their performance of the Agreement, and aimed at perverting the course of justice for financial gain. Hence, the Agreement was unenforceable.

Takeaway

The decision highlights that the Court will not infer a renewal of contract without clear and objective evidence of mutual intent. Written amendment clauses (e.g. Clause 11.5) are strictly observed and that conduct alone may not be sufficient to override express terms. Besides, contracts involving practices which are against public policy (e.g., bribery, influencing the opinions of the courts) will be voided on public policy grounds, regardless of jurisdictional boundaries.

Case 5

Competition Law - penalty calculation – structural methodology upheld for the First Conduct Rule

Competition Commission v Gray Line Tours of Hong Kong Limited & Ors [2025] HKCT 2

Date of Judgment: 25 March 2025
Coram: Hon Harris J, President of the Competition Tribunal

The case centered on Prudential Hotel (BVI) Limited (“Prudential”), a Hong Kong hotel operator, which allowed Gray Line Tours of Hong Kong Limited (“Gray Line”) to operate a tour desk and Tink Labs Limited (“Tink Labs”) to provide handy devices in guest rooms for selling tourist attraction tickets. Between May 2016 and May 2017, Prudential facilitated an agreement where Gray Line and Tink Labs fixed ticket prices to avoid undercutting each other. This arrangement violated the First Conduct Rule (the “FCR”), which prohibits anti-competitive agreements.

The Competition Commission (the “Commission”) sought penalties against Prudential, arguing it actively facilitated the price-fixing arrangement by facilitating the arrangement and monitoring its compliance. Prudential admitted liability but contested the penalty amount. Prudential argued for a “structured methodology” tied to its limited turnover from Gray Line’s tour desk rental (HK$171,290), which was established in the *Competition Commission v W Hing Construction Co. Ltd* [2020] 2 HKLRD 1229 which calculates penalties by applying a gravity percentage (15–30%) to the relevant turnover, adjusting for aggravating/mitigating factors. On the other hand, the Commission advocated for a “lump sum approach”, being a discretionary sum, for a higher penalty (HK$1.25 million) to reflect Prudential’s role as an active facilitator.

The Tribunal upheld the structured approach, emphasizing its role in promoting deterrence and consistency. In dismissing the Commission’s proposal of the lump sum approach, the Tribunal noted that it lacked a clear rationale and risked inconsistency.

In considering the actual calculation, The Tribunal also ruled that comparisons to the penalties imposed on Gray Line (around HK$4.17million) and Tak How Investment Limited (“Tak How”) – another hotel that allowed Gray Line to operate a tour desk (HK$1.6 million) were irrelevant, as Prudential’s role and revenue were distinct:-

1. **Gray Line & Tink Labs:** They were **direct competitors** in the market for ticket sales. They actively set prices to eliminate competition, directly harming consumers. The penalties against them reflected their **central role** in the anti-competitive arrangement.

2. **TakHow**: Its penalty (HK$1.6 million) was based on its **specific turnover** from Gray Line’s ticket sales at its premises.

3. **Prudential**: Acting solely as a **facilitator**, not a market participant, it did not sell tickets or profit from the ticket sales but only earned a fixed rental fee (HK$171,290) from Gray Line. Its role was passive and limited to enabling the arrangement.

As a result, the Tribunal imposed a penalty of HK$104,000 on Prudential based on the following calculation and ordered it to implement a compliance program. Costs were awarded to Prudential, reflecting the Commission’s unsuccessful push for a higher penalty.

- **Base Amount**: HK$171,290 (rental income from Gray Line).
- **Gravity Percentage**: 15% (reflecting Prudential’s role as a facilitator, not an instigator).
- **Duration Multiplier**: 1 (contravention lasted <1 year).
- **Deterrence Multiplier**: 4× (to disgorge profits and deter future violations).

Takeaway

The ruling reinforces the primacy of the structured methodology in Hong Kong competition law, ensuring that penalties are proportionate to the economic impact of contraventions. It clarifies that facilitators of anti-competitive conduct would face penalties based on their financial gain, and reaffirms that penalties should reflect individual culpability and economic reality. Prudential's passive facilitation and minimal financial gain justified a penalty distinct from active market participants like Gray Line. The decision underscores the importance of transparency and predictability in regulatory enforcement, balancing deterrence with fairness.

Case 6

Enforcement - vesting orders inapplicable for remedial constructive trusts in fraud cases and garnishee proceedings as primary remedies

Amidas Hong Kong Limited v Che Si Limited [2025] HKCFI 1128

Date of Judgment: 25 March 2025
Coram: Hon Au-Yeung J

The case arose from an internet fraud where the fraudsters impersonated the Plaintiff's (Amidas Hong Kong Limited) ("Amidas") supplier, TriTech, and deceived it into transferring HK$5,186,160 to the Defendant's (Che Si Limited) bank account. Upon discovering the fraud, Amidas obtained a proprietary and Mareva injunction and commenced the present legal proceedings, seeking:

1. **Default judgment** for monetary and declaratory relief (constructive trust over the funds);

2. **A vesting order** under section 52(1)(e) of the Trustee Ordinance (Cap. 29) (the "TO") to directly transfer the funds from the Defendant's account; and

3. **Alternative enforcement mechanisms**, including a garnishee order and an execution order under section 25A of the High Court Ordinance (Cap. 4) (the "HCO").

The Defendant did not participate in the proceedings, leading to a default judgment application. However, the key dispute centered on whether a vesting order was an appropriate remedy.

Conflicting Authorities on Vesting Orders

The Court examined the following conflicting judicial approaches adopted by the CFI, which has not been settled by the CA or the CFA, on whether section 52(1)(e) of the TO permits the grant of vesting orders in fraud cases where defendants are deemed "category 2" (remedial) constructive trustees (see *Paragon Finance plc v D B Thakerar & Co* [1999] 1 All ER 400) (i.e., wrongdoers holding misappropriated funds in cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff).

1. **Against the Grant of Vesting Orders** (see *800 Columbia Project Co LLC v Chengfang Trade Ltd* [2020] 3 HKLRD 674 and *Tokic DOO v Hongkong Shui Fat Trading Ltd* [2020] 4 HKLRD 189):-

   a. Vesting orders apply only to “category 1” (institutional) constructive trusts, where trustees assume fiduciary duties by a lawful transaction independent of and preceding the breach of trust and are not impeached by the plaintiff.

   b. Section 52(1)(e) of the TO was intended for trust administration (e.g., trustee changes), not remedial fraud cases.

   c. A fraudster is not “appointed” a trustee - equity merely imposes liability to restore the funds.

2. **In Favour of the Grant of Vesting Orders** (see *Wismettac Asian Foods Inc v United Top Properties Ltd* [2020] 3 HKLRD 732 and *Concrete Waterproofing Manufacturing Pty Ltd v Changxuan Co Ltd* [2020] 4 HKLRD 166):-

   a. Interpreting section 52(1)(e) of the TO broadly, it covers any constructive trust, including fraud cases.

   b. Expediency justifies the grant of vesting orders to avoid delays in fraud recovery.

   c. The phrase “or otherwise” under section 52(1)(e) of the TO was read expansively to include remedial trusts.

Au-Yeung J preferred *800 Columbia Project* and *Tokic*, holding that:-

- **Vesting orders are unavailab**le for remedial constructive trusts, as fraudsters, namely wrongdoers holding the misappropriated funds, are not "trustees" under the TO.

- **Garnishee proceedings** (not vesting orders) were the proper enforcement mechanism.

- **Execution orders under section 25A of the HCO** were also rejected, as no prior obligation existed for the Defendant to execute any document to transfer the sum to the Plaintiff.

Takeaway

This decision provides much-needed clarity on enforcement mechanisms in fraud cases, ensuring that the statutory remedies align with equitable principles. Plaintiff should structure fraud claims carefully, prioritizing tracing, declaratory relief and garnishee orders over vesting orders.

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