



DCC COMMERCIAL DIGEST

Issue No. 7
By **Richard Yip** and **Keith Cheung**

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Authors

“One of the strongest junior barristers around, his stand-out qualities include an excellent handle on the detail, an insightful legal mind, and sound commercial sense.”

Legal 500 Asia-Pacific 2021 – 2025, Commercial Disputes — Leading Juniors, Tier 1

Richard has a broad civil practice with a focus on shareholder disputes, commercial litigation, financial regulation, competition law and personal injuries. He joined Denis Chang’s Chambers in 2011. Prior to joining the bar, Richard was a corporate finance solicitor at Herbert Smith Freehills.

He represented four respondents in the second case before the Hong Kong Competition Tribunal, where the economic efficiency defence was raised for the very first time in Hong Kong.

He was also involved in a number of substantial shareholder disputes, including *Acropolis Ltd v W&Q Investment Ltd*, 2018 HKCA 379 (appeal against interlocutory injunction concerning the EGM voting results of a listed company) and *Waddington Ltd v Chan Chun Hoo Thomas*, HCA 3291/2003 (trial of a double derivative action). Richard is also actively involved in the community and academia. He is a part-time lecturer at the University of Hong Kong.



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“Keith is knowledgeable and commercially astute and he can present arguments clearly and persuasively. Keith can readily understand complex facts and legal principles and explain them to lay client in a simple and clear manner.”

Legal 500 Asia-Pacific 2025, Commercial disputes — Rising Stars

Keith is developing a broad civil practice with particular experience and interest in commercial litigation, company law, insolvency, arbitration, trusts, probate and intellectual property. He has represented domestic, Mainland and overseas clients in Hong Kong and worked with legal teams in offshore litigation in the Cayman Islands and the British Virgin Islands.

Keith is a member of the Chartered Institute of Arbitrators and the Hong Kong Institute of Arbitrators. Prior to joining the Bar, Keith qualified as a solicitor with a major international law firm.



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Case 1

Court considers allegation of dishonest breach of fiduciary duty and Duomatic principle*Highfit Development Co Ltd (in liquidation) v Koo Siu Ying & Ors* [2025] HKCFI 2775

Date of Judgment: 2 July 2025

Coram: Mimmie Chan J

The issue was whether a sale by a company (now in liquidation) 25 years ago of its entire shareholding in a mainland entity (“HF”) was at undervalue and in breach of directors’ duties. The claim is brought by the liquidators alleging that the 1st and 2nd Defendants transferred ownership of HF to the 3rd Defendant (“HHL”) and to also waive substantial shareholders loans owed by the 3rd Defendant to the Plaintiff. The 1st and 2nd Defendants are the third wife and daughter of the late tycoon Mr Lim Por Yen.

The Defendants contended that as the 1st and 2nd Defendants and Mr Lim unanimously agreed to the transaction, there was no breach of fiduciary duty. The judge clarified that the Duomatic principle comes into play only where the transaction is “intra vires”, “honest”, where the matter is “one which a general meeting of the company could carry into effect” and where the shareholders “acted intra vires and in good faith” [177].

The Court found that the Mr Lim had in place a family arrangement and the transaction was approved by him, the 1st and 2nd Defendants who represented all the shareholders of the company. The 1st and 2nd Defendants had simply relied on Mr Lim’s decision and did not know that no consideration was paid or that the sale was at undervalue [190]. Hence, the *Duomatic* principle is not disapplied as there was no dishonesty or fraudulent breach of fiduciary duty.

Case 2

Court reviews authorities on directors’ duty where company is insolvent*Joint and Several Liquidators of Hong Tak (Lin Fat) Home for the Aged Company Ltd (in compulsory liquidation) v Lee Tao Ying & Ors* [2025] HKCFI 2855

Date of Judgment: 3 July 2025

Coram: Recorder Abraham Chan SC

This was as application made pursuant to section 276 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32). Under that section, the Court may order a person to repay or restore money or property from a person found liable or accountable for misapplication of funds, misfeasance or breach of duty.

The plaintiff alleged that the two former directors had received interim dividend of HK\$2,330,000 when the company was insolvent. Hence, they should repay this sum to the company. It was undisputed that at the time the dividends were declared, the company was insolvent since 31 March 2019 and that the decision to have dividends was resolved on 15 April 2019. The dividends were used to offset a substantial portion of debts owed by the two former directors to the company at the expense of creditors.

In reviewing the local and overseas authorities, the Court confirmed that:

1. For already insolvent companies, HK law clearly recognises that directors have a fiduciary duty to consider the interests of creditors when making decisions that may affect the company's financial position, at least where they know or ought to know the company is insolvent [14];
2. The HK case law largely aligns with *BTI 2014 LLC v Sequana SA* [2022] UKSC 25 [15]. [23];
3. The proposition that knowledge is required for the creditor duty to arise is far from settled [25]. There are also other HK authorities which recognise the existence of the creditor duty without expressly referring to any legal requirement of knowledge [27].

Since it was undisputed that the resolution for dividend was passed when the company was insolvent, the Court did not have to resolve (1) the extent to which knowledge of insolvency bears on the scope and application of the creditor duty [28] and (2) the more difficult, less settled position as to companies whose solvency is merely doubtful or at significant risk [13]. The Court confirmed that this difficulty was because the legal test for triggering the creditors' interest duty involves a difficult amalgam of principle, policy, precedent and pragmatism.

The decision case was shortly considered by DHCJ Jonathan Wong in *Archid Garment Factory Ltd v Tse Yuet Yu* [2025] HKCFI 2933 [4.3] dated 14 July 2025 where he found that the defendants had raised triable issues as to whether the creditor interests duty was engaged [5.1] and granted unconditional leave to defend.

Case 3

Foreign judgment as evidence

Chen Jinhui v Wong Kam San & Ors [2025] HKCA 646

Date of Judgment: 17 July 2025

Coram: G Lam and Chow JJA

This was an application for leave to adduce new evidence in the defendants' appeal against judgment given below. The defendants sought to adduce:

1. a criminal judgment of the Liaoning Benxi Intermediate People's Court ("Item 1");
2. a criminal judgment of the Liaoning Higher People's Court (ie. upholding Item 1) ("Item 1A");
3. an e-mail and attachments ("Item 2"); and
4. another e-mail and attachments ("Item 3").

The Court of Appeal agreed that Items 2 and 3 can be adduced in the sense that they may be placed before the Court for consideration without prejudice to any submissions as to admissibility, weight and/or truthfulness of the evidence contained in them or any parts thereof [10].

Insofar as Items 1 and 1A are concerned, the Court of Appeal confirmed that under the *Hollington* principle, a judgment and factual finding of another court or tribunal in earlier proceedings, whether civil or criminal, is inadmissible in subsequent proceeding, unless the party against whom the finding sought to be deployed is bound by it by reason of an estoppel *per rem judicatum*. Hence, *prima facie*, neither judgment is admissible as evidence [15].

While the Court accepted that summary of the factual evidence presented to the PRC courts (eg the testimony of prosecution witnesses) and such evidence relates to the issues in the Hong Kong proceedings, the contents of those judgments are not excluded under the *Hollington* principle nor can they be excluded as hearsay evidence given that such exclusionary rule has been abolished in civil proceedings, it is incumbent on the defendants to clearly identify the proposed new evidence which they seek to place before the Court for its consideration. It is not for the Court to identify for the defendants the relevant passages in the said judgments which may constitute admissible evidence for the purpose of their appeal [16].

Case 4

Practice reminder from Arbitration Court

L v R [2025] HKCFI 3162

Date of Decision: 18 July 2025

Coram: Mimmie Chan J

By Originating Summons, the plaintiff applied under sections 66 and 81 of the Arbitration Ordinance (Cap. 609) to set aside a settlement agreement made in relation to arbitral proceedings and procedural orders. Defendant then applied to expunge certain parts of plaintiff's affirmation. That expunge application was adjourned. Then defendant issued a further summons for security for cost and sought to have the latter fixed on the same occasion as the call-over hearing of the expunge summons. At the hearing, neither application was pursued.

The Judge in charge of the Arbitration List reminds practitioners that:

1. Parties should be aware by now that it is not the practice of the Arbitration Court to permit any party unilaterally to set a summons down for hearing on the day set for the hearing of an earlier summons on a different subject matter. Any attempt to do so will only derail the hearing and the preparations made for a summons issued and set down for disposal at the time indicated by the parties.
2. Proceedings on the Arbitration List are conducted to further the object and principles of the Arbitration Ordinance (Cap. 609) reflected in section 3, to facilitate “the speedy resolution of disputes”. Interlocutory skirmishes should be avoided, as parties and the Court should focus on dealing with the substantive subject matter of the proceedings expeditiously, the usual subject matter being the setting aside of arbitral awards or orders granted to enforce arbitral awards, or challenges to the jurisdiction of the tribunal.
3. Applications for security can be dismissed on the ground of delay alone, in the absence of some exceptional circumstance which can explain the party’s inaction. For proceedings on the Arbitration List, bearing in mind the objective of the Arbitration Ordinance (Cap. 609), delay in making the application for security is an important factor which may lead to the refusal of the order. Unwarranted applications will be penalised by costs orders, including orders against the legal representatives in appropriate cases.

Case 5

Creditors’ winding up petition on the basis of unpaid wages

Re Greater Bay Area Dynamic Growth Holdings Ltd [2025] HKCFI 3316

Date of Judgment: 31 July 2025

Coram: Anthony Chan J

The creditor’s winding up petition was presented on the basis of an award of HK\$1,211,642.01 being an award from the Labour Tribunal for unpaid wages, holiday pay and interest. The debtor resisted the petition on the basis there are cross claims in two High Court actions against the petitioner.

The Court confirmed that where a creditor’s winding up petition is met with a genuine and serious cross-claim, the rule of practice is to dismiss the petition save in special circumstances where the court may exercise its discretion to wind up the company.

The Court agreed that there are special circumstances warranting the Court to nonetheless wind up the debtor. Here, the special circumstance is section 32 of the Employment Ordinance (Cap. 57) which provides that no deductions shall be made by an employer from the wages of his employee or from any other sum due to the employee otherwise than in accordance with the Ordinance. In particular, the Court emphasised that it is clear that wages claim stands in a special position under our law. When it comes to an exercise of judicial discretion, plainly the court will strive to uphold the law rather than frustrating it. Allowing the Company to put off the payment of wages until years later when judgments are obtained in the two other actions would frustrate the purpose and effect of s.32 of the Employment Ordinance [43].

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