Chapter 1

INTRODUCTION TO COMPANY LAW

¶1-000 Purpose of this Manual

This Manual is designed to advise about the duties and responsibilities that the law imposes, and that the community expects, of a company director. In particular, it seeks to identify those areas and activities in which a director has a potential personal liability, and for which the company is liable by reference to the principles of attribution for the acts and omissions of the director.

The topics included in this Manual are comprehensive, ranging from discussion on the most fundamental issues such as a director's fiduciary duties to those of corporate culture and corporate governance. It covers recent developments in legislation and subsidiary regulation of directors and their duties, as well as those Codes, Circulars, Guidelines and so on which are **not** binding in law but for which compliance is required in the interests of a stable situation. Notice of the nonmandatory nature of various Codes and guidelines is given in relation to the materials (see e.g., in the *Code of Conduct for Persons Licensed by or registered with the Securities and Futures Commission* which notes that: "This Code does not have the force of law and should not be interpreted in a way that would override the provision of any law.") and refers to recent decisions on questions of attribution, fiduciary obligations and others.

This Manual should raise awareness in directors and/or would-be directors so that they are better equipped with the information and knowledge to play the role of a corporate leader.

This chapter discusses the sources of Hong Kong law governing the operations and functions of the corporation, and the implications of the company as a legal entity.

Subsequent chapters deal with specific aspects of the functions, duties, and obligations of a director.

Legislative structure

¶1-020 Sources of Hong Kong laws referred to in the Manual

This section provides a brief introduction to all the laws referred in this Manual, and where appropriate discusses recent court interpretation of those laws.

Company law

From 3 March 2014, Hong Kong company law Hong Kong has been governed mainly by the provisions of the *Companies Ordinance* (Cap 622), and the remaining provisions of the former Companies Ordinance (Cap 32) which has now become the *Companies (Winding-Up and Miscellaneous Provisions) Ordinance* (Cap 32). The provisions in the current Cap 32 include those for:

- share capital and debentures;
- Disqualification Orders;
- winding up;
- receivers and managers;
- sales of shares and offers of shares for sale; and
- other matters.

Both Cap 32 and Cap 622 have been amended since 2014. An amendment in 2018, inserting ss 653A to 653ZK introduced the "significant shareholder's register" (ss 653A to 653ZK). In addition, other legislation and regulations are relevant in establishing and enforcing the duties and obligations of directors. For example, listed companies are also subject to the terms of the *Securities and Futures Ordinance* (Cap 571). In particular, that ordinance is supported but a large package of provisions, some of which have the force of law, and some represent practices that should be complied with. In addition, there is a series of ordinances and regulations designed to prevent, as well as deal with the consequences of, money laundering (see e.g., the *Anti-Money Laundering and Counter-Terrorist Financing Ordinance* (Cap 615)).

Provisions

The former *Companies Ordinance* (Cap 32) was modelled on legislation starting out as the United Kingdom's *Companies Act 1862*, with various amendments thereafter; much of Cap 32 was repealed in 2014. However, the provisions relating to winding-up and some other matters were retained as the *Companies (Winding-Up and Miscellaneous Provisions) Ordinance* (Cap 32).

Company legislation in Hong Kong now differs in some details from company legislation in England but the underlying general principles still

remain the same. While decisions of the House of Lords (now the Supreme Court), were often applied in Hong Kong, and decisions of the Privy Council (on non-Hong Kong appeals) made prior to 30 June 1997 were persuasive authority in Hong Kong, recent decisions from these courts and those of some other "common law jurisdictions" continue to be considered and often adopted in Hong Kong.

In the Court of Final Appeal, Lord *Millett* NPJ observed in *China Field Ltd & Anor v Appeal Tribunal (Buildings) & Anor* [2009] HKCFA 95, that:

> "[81] On the resumption of the exercise of sovereignty by China the Privy Council ceased to be the final appellate court of Hong Kong and its place was taken by this Court. The jurisdiction to ascertain, declare and develop the common law of Hong Kong formerly exercisable by the Privy Council is now exercisable by this Court. It will continue to respect and have regard to decisions of the English courts, but it will decline to adopt them not only when it considers their reasoning to be unsound or contrary to principle or unsuitable for the circumstances of Hong Kong, but also when it considers that the law of Hong Kong should be developed on different lines."

The two exceptions referred to in *China Field*, namely, (i) those overseas decisions that are considered unsound or contrary to principle and (ii) the law that should be developed on different lines and have not resulted in wholesale disinclination to follow overseas decisions. Consequently, decisions on Cap 622 often make reference to the *Companies Act 2004* (UK) and the *Corporations Act 2001* (Australia); legislation and decisions from Singapore and Canada are also considered from time to time.

The decision in *A Solicitor (24/07) v Law Society of Hong Kong* [2008] HKCFA 15 also considers the relevant law. Further, the Hong Kong courts continue to "refer to precedents of other common law jurisdictions" (Art 84 of the *Basic Law*) where appropriate. While the company legislation of England is similar to that of Hong Kong, there were differences in its interpretation resulting from the time when the United Kingdom (UK) was a member of the European Union (EU). This membership terminated on 31 December 2020. For England, the consequence of that membership of the EU required certain areas of commercial law to follow European Courts and jurisprudence, neither of which applies in Hong Kong. The differences came from this dichotomy rather than from the spirit of company law. Hong Kong company law also follows in most situations, albeit there are some differences between the terms of the *Corporation Act 2001* (Australia) and those of Cap 622.

The former *Companies Ordinance* (Cap 32) was supplemented by subsidiary legislation which include:

- *Companies (Disqualification Orders) Regulation* (Cap 32I);

- *Companies (Forms) Regulations* (Cap 32B) (note that only sec 6, relating to transactions, remains: see s 914(6)(b) of Cap 622 on extended effect of saving provision);
- *Companies (Reports on Conduct of Directors) Regulation (*Cap 32J);
- *Companies (Winding Up) Rules* (Cap 32H); and
- *Companies (Disqualification of Directors) Proceeding Rules* (Cap 32K).

The Provisions in the *Companies Ordinance* (Cap 32) (now the *Companies (Winding-Up and Miscellaneous Provisions) Ordinance* (Cap 32)) relate primarily to winding-up, although other matters have been retained; these include ss 37 to 48 (part of Pt 2 on Prospectus) and ss 168C to 168T (Pt 4A on Disqualification Orders). That Ordinance was amended in 2008. Unless otherwise stated, all section references in this chapter and in this Manual are to the Hong Kong *Companies Ordinance* (Cap 622) which took effect (with few exceptions) from 3 March 2014.

While a limited number of sections of Cap 622 remain to now brought into force, there was some change from 23 August 2021 in relation to parts of these sections). These are:

- Section 47 (interpretation),
- Section 49 (Registrar may withhold residential address and identification number from public inspection),
- Section 50 (restriction on use or disclosure of withheld information),
- Section 51 (permitted use or disclosure of withheld information by Registrar),
- Section 52 (disclosure under order of Court),
- Sections 53-59 (protection of residential address and identification number contained in certain documents)
- Section 202 (paperless holding and transfer of shares and debentures), and
- Schedule 8 (amendments relating to paperless holding and transfer of shares and debentures).

However, a "new inspection regime" was instructed from 23 August 2021 to enable a company to withhold certain information in the register of directors and that of company secretaries. The permitted omissions relate to (a) the usual residential address of directors and (b) full identification numbers of directors and company secretaries. This has allowed ss 49(8), 49(9), 51(5) and 58(3) to come into force from that date, although several other parts of the sections will not be in force until 2023.

To enable the new regime to proceed there have been some changes to various regulations and notices. These are:

- *Companies Ordinance (Commencement) Notice 2021*;
- *Companies Ordinance (Commencement) (No 2) Notice 2021*;
- *Companies Ordinance (Commencement) (No 3) Notice 2021*;
- *Companies (Residential Addresses and Identification Numbers) Regulation* (622N);
- *Company Records (Inspection and Provision of Copies) (Amendment) Regulation 2021* (Cap 622J);
- *Companies (Non-Hong Kong Companies) (Amendment) Regulation* (2021 622I); and
- *Companies Ordinance (Amendment of Schedule 11) Notice 2021*.

Other changes are to be made in 2022 (replacement of protected information by correspondence address and partial IDNs for public inspection) and in 2023 changes relating to data subjects.

Large-scale developments were mooted from 2006

From 2006, the Government of the HKSAR had undertaken an extensive review of the company legislation with a view to rewriting the former *Companies Ordinance* (Cap 32). Three consultative papers, the Company Law Rewrite papers, were issued, and several amendments have been made already to the Ordinance based on suggestions from papers 1 and 2 in particular.

The *Companies (Amendment) Ordinance 2010* (with effect, partly on 10 December 2010 and the rest on 1 February 2011) dealt with some of the recommendations from the *Company Law Rewrite Paper 2* (including company names, extension of the statutory derivative action to include "multiple derivative actions") and extended electronic communications. The Companies Registry has published Company Names Guidelines to assist with observance of those new provisions; materials on electronic filing of documents and information have also been provided by the Registry.

The 2014 ordinance

The *Companies Ordinance 2012* was enacted by the Legislative Council ("LegCo") on 12 July 2012 but did not come into force until 3 March 2014. Amendments to the former Ordinance are in 921 sections and 11 schedules; as noted some provisions remain to be brought into force by 2023. In addition, there have been several amendments since 3 March 2014.

For directors, particular clauses of interest are those contained in Pt 10 (Directors and Company Secretaries, from ss 453 to 483), Pt 11 (Fair Dealing by Directors, from ss 484 to 546) and Pt 12 (Company Administration and Procedure, from ss 547 to 665) as amended by the insertion of Div 2A (Register of Significant Controllers, from ss 653A to 653ZK) and Sch 5A (Significant Control over Applicable Company) by the *Companies (Amendment) Ordinance* 2018 (Ordinance No 3 of 2018) with effect from 1 March 2018.

Other relevant amendments, and recent circulars of the Companies Registry in respect of Cap 622 include:

- The repeal of s 792 in Pt 16 (Non-Hong Kong Companies) by s 79 of the *Companies (Amendment) (No 2) Ordinance No 35 of 2018*, with effect from 1 February 2019. Inserted, in lieu of that section, was s 805A imposing a requirement for a non-Kong Kong company to disclose to the Companies Registrar the name and other pertinent information about the company; and see s 805B detailing the criminal consequences of non-compliance.
- Recent Circulars include that of 7 January 2020: (a) detailing licensing obligations of family offices; and (b) referring to matters concerning private equity firms seeking to be licensed.
- A Circular on 30 March 2020 waived the annual licensing fee.

Part 10 deals with various matters including appointment, removal, resignation of directors and of company secretaries, liabilities and contains a codification of the care, skill and diligence duty of directors, and provides that the "penalty" on breach will be subject to common law and equitable principles as currently apply. See s 465 on duty to exercise reasonable care, skill and diligence; and s 466 on civil consequences of breach of duty to exercise reasonable care, skill and diligence.

Part 11 deals with all types of companies and can in certain cases refer to a former director. This part also deals with financial assistance and with loans to directors.

Part 12 deals with the administration of the company. The new provisions of ss 653A to 653ZK in Div 2A concern the establishment of the "significant controller register" to identify equitable ownership of the company. The amendment was made pursuant to requirements from Financial Action Task Force relating to anti-money laundering procedures (see in particular the *Anti-Money Laundering and Counter Terrorist Financing Ordinance* (Cap 615)).

The *Companies (Amendment) (No 2) Ordinance 2018* came into operation on 1 February 2019. The purpose of these amendments was:

- to improve the operation of the account provisions;
- to expand the types of companies within the reporting exemption; and
- for miscellaneous matters.

The *Companies (Amendment) (No 2) Ordinance 2018* contains extensive amendments to Cap 622 and provides also for amendment to s 20 of the *Companies (Revision of Financial Statements and Reports) Regulation* (Cap 622F).

For listed companies under the *Securities and Futures Ordinance* (Cap 571), the "manager in charge" procedure has been adopted to identify core activities of a licensed corporation. See Pt V (ss 113 to 143) and Pt 1 of Sch 5. Note that licences for types 11 and type 12 are not at present in force. On this see

General Principle 9 of the *Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission*. One of the core functions is that of "overall management oversight".

There have been amendments to regulations, including:

- *Companies (Disclosure of Company Name and Liability Status) Regulation* (Cap 622B) was amended by ss 90–93 of the *Companies (Amendment) (No 2) Ordinance 2018* (No 35 of 2018), with effect from 1 February 2019;
- *Company (Accounting Standards (Prescribed Body)) Regulation*, amended by ss 94–95 of the *Companies (Amendment) (No 2) Ordinance 2018* (No 35 of 2018), with effect from 1 February 2019;
- *Companies (Summary Financial Reports) Regulation* (Cap 622E) was amended by ss 99 to 101 of the *Companies (Amendment) (No 2) Ordinance 2018* (No 35 of 2018) with effect from 1 February 2019;
- *Companies (Disclosure of Information about Benefits of Directors) Regulation*, amended by ss 106 and 107 of the *Companies (Amendment) (No 2) Ordinance 2018* (No 35 of 2018) with effect from 1 February 2019; and
- *Companies (Non-Hong Kong Companies) Regulation* (Cap 622J) was amended by ss 111–115 of the *Companies (Amendment) (No 2) Ordinance 2018* (No 35 of 2018) with effect from 1 February 2019.

Additional regulations include:

- *Companies (Model Articles) Notice* (LN 77 of 2013), which makes provision, when in force, for Model Articles for public companies limited by shares, private companies limited by shares, and companies limited by guarantee. The Model Articles were amended by ss 108–110 of the *Companies (Amendment) (No 2) Ordinance 2018* (No 35 of 2018) with effect from 1 February 2019.
- *Companies (Revision of Financial Statements and Reports) Regulation* (amended by ss 102–105 of the *Companies (Amendment) (No 2) Ordinance 2018* (No 35 of 2018) with effect from 1 February 2019 and
- *Companies (Directors' Reports) Regulation* (LN 10 of 2013) (now Cap 622D) relating to the report provided for in s 388(1) and (2) of the *Companies Ordinance* (Cap 622) and Sch 5 amended by ss 96–98 of the *Companies (Amendment) (No 2) Ordinance 2018* (No 35 of 2018) with effect from 1 February 2019.
- *Non-Hong Kong Companies (Disclosure of Company Name, Place of Incorporation and Members' Limited Liability) Regulation* (Cap 622M) came into force on 19 September 2019. (ss 805A and 805B)

Some of the amendments contained in Cap 622 are based on recent amendments to the company laws of several overseas, common law jurisdiction, such as:

- *Corporations Act 2001* of Australia,
- *Companies Act 1993* (as amended) of New Zealand,
- *Companies Act* (Cap 50) of Singapore, and
- *Companies Act 2006* of the UK.

This means that in interpreting the legislation from 2014 the Hong Kong courts, as authorised by Art 84 of the *Basic Law*, and in conformity with the opinion of the Court of Final Appeal on the question of "Hong Kong common law", have had a large database of decisions on which to draw on so that similar problems already faced overseas may act as guidance for Hong Kong where necessary and as appropriate.

In addition to the regulation of the company by the *Companies Ordinance* (Cap 622), a public company that has been listed or registered on the Stock Exchange is subject not only to the *Securities and Futures Ordinance* (Cap 571) and subsidiary legislation thereon, but also a large amount of non-statutory regulatory materials such as the *Rules Governing the Listing of Securities on The Stock Exchange of Hong Kong Ltd* (the "Listing Rules") and various Codes (e.g., the *Code of Corporate Governance Practices* and the *Takeover Codes*), and guidance note (some of which are found in the Appendices to the *Listing Rules*).

An additional non-statutory Guide from 31 December 2012 is insertion of the *Environmental, Social and Governance Reporting Guide* (the "ESG Guide") as an Appendix to the *Listing Rules*. The *ESG Guide* requires the listed company to provide disclosure on:

- workplace quality,
- environmental protection,
- operating practices, and
- community involvement.

The provisions of the *ESG Guide* are treated as "recommended practice", meaning that it is desirable to follow the provisions but not essential. It is thought that most companies are complying with the *ESG Guide*, although for some of these company, compliance seem to be merely "box-ticking". Note also the *Corporate Governance Code and Corporate Governance Report* as set out in Appendix 14 of the *Listing Rules* for listed companies.

Anti-Money Laundering

While generally a company and its directors and officers are responsible for the company's observance of:

- *Drug Trafficking (Recovery of Proceeds) Ordinance* (Cap 405),
- *Organised and Serious Crimes Ordinance* (Cap 455), and
- *United Nations (Prevention of Terrorism) Ordinance*,

to ensure that there is no money laundering or financing of terrorists, the *Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance* (Cap 615) binds a variety of "financial institutions" including:

- licensed corporations [see s 1, Pt 1, Sch 1 to the *Securities and Futures Ordinance* (Cap 571), and Pt 1 of Sch 5 which lists the current 10 types of licences available for "regulated activities" under the Ordinance; note that type 11 (not yet in force) and type 12 (partly in force)];
- licensed insurance companies and others under the *Insurance Companies Ordinance* (Cap 41),
- "authorised institutions" under the *Banking Ordinance* (Cap 155) (so licensed banks, restricted licensed banks, and deposit taking companies),
- money changing services [see s 24 of *Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance* (Cap 615)], and
- the Postmaster General under the *Post Office Ordinance* (Cap 41).

For a detailed list, see Pt 2, Sch 1 to the *Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance* (Cap 615).

Amendment was made from 1 March 2018 to expand the list of those subject to Cap 615 (see in particular s 5A and Pt 2 of Sch 1). These now include:

- Solicitors (including foreign lawyers, estate agents and accountants; referred to as "Designated Non-Financial Businesses and Professionals") [DNFBPs] who act for clients in relation to matters listed in s 5A(3), including buying and selling land, managing clients' money, securities or other assets, and acting on the sale or purchaser of business entities (see also s 7 of Sch 2); and
- Trust and Company Service Providers [TCSPs] who must also be licensed to carry on their business. The first prosecution of an unlicensed TCSP business took place in the Magistrates' Court on 30 October 2018 at which the defendant was fined HK$50,000 and disqualified from holding a licence for 6 months.

Following on the Lehman Brothers-related product problems of recent years, the Financial Services and Treasury Bureau consulted the public and stakeholders broadly on two matters in particular, in respect of listed companies. The first was the establishment of an Investor Education Council, resulting from amendments in 2011 to the *Securities and Futures Ordinance* (Cap 571) enabling the setting up of the Council for which the Securities and Futures Commission has delegated its responsibilities, for investor education, to an Investor Education Council. The council continues to expand its educational activities.

The second matter concerns financial disputes resulting from investments in Lehman Brothers-related products. The Financial Dispute Resolution Centre commenced its activities in November 2011.

Liability

Unlike partnerships where all partners generally are liable without limitation for the firm's debts, a member of a registered, limited company is liable either

- for the unpaid portion of his shareholding (if any), or
- in the case of a corporation limited by guarantee, liability is restricted in amount he guaranteed to pay.

A company may also be unlimited in which case, members' liability is unlimited.

Takeovers and mergers

For a public company, or a listed company whose primary listing is in Hong Kong, or for a REIT with a primary listing in Hong Kong (see Pt IV of the *Securities and Futures Ordinance* (Cap 571)), takeovers and mergers are governed by the *Codes on Takeovers and Mergers and Share Buy-backs* which represent the integration of the previously separate *Takeovers Code* and the *Share Repurchases Code*. The Codes do not have the force of law; instead, they seek to cultivate an environment of voluntary compliance. Their administration is undertaken by the Takeovers and Mergers Panel.

A takeover of a private company is a matter of contract involving the sale of a commercial asset. The transaction has no relationship to specialised legislation. The process is referred to as a merger and acquisition. It is regulated by the contract between the parties, the common law and any relevant provisions of the *Companies Ordinance* (Cap 622) and associated legislation, such as the *Transfer of Businesses (Protection of Creditors) Ordinance* (Cap 49), or general legislation such as s 9 of the *Law Reform and Consolidation Ordinance* (Cap 23) relating to the statutory/legal assignment of the benefit of a chose in action.

Income taxation

The system of taxation operating in Hong Kong is that of a territorial basis, i.e., only income with a Hong Kong source is subject to tax. Income tax is levied under the *Inland Revenue Ordinance* (Cap 112). It can be categorised into "salaries tax" and "profits tax".

Individuals are chargeable for salaries tax on any income with a Hong Kong source which has been obtained from an office, employment or pension. However, note that even though services may be rendered in Hong Kong, an employee may not be subject to salaries tax if the period he spent in Hong Kong does not exceed a total of 60 days during the year of assessment.

Individuals, corporations, partnerships and all unincorporated businesses carrying on a trade, profession or business in Hong Kong are subject to profits tax on profits which are generated from sources within Hong Kong. In determining liability to profits tax, assessable profits or loss, as the case may be, are aggregated to determine the total loss or profit.

Labour law

The set of Ordinances which govern labour law in Hong Kong includes:

- *Employment Ordinance* (Cap 57),
- *Contracts for Employment Outside Hong Kong Ordinance* (Cap 78),
- *Employees Retraining Ordinance* (Cap 423),
- *Labour Relations Ordinance* (Cap 55),
- *Labour Tribunal Ordinance* (Cap 25),
- *Trade Unions Ordinance* (Cap 332),
- *Sex Discrimination Ordinance* (Cap 480),
- *Disability Discrimination Ordinance* (Cap 487),
- *Family Status Discrimination Ordinance* (Cap 527), and
- *Race Discrimination Ordinance* (Cap 602).

Besides statutory provisions, labour law in Hong Kong is also based on English common law concepts. The relationship between the employer and the employee is based on the individual contract of employment, and there is little restriction from legislation affecting the freedom to contract. This contractual basis is supplemented by statutory minimum standards. There is little reliance on collective bargaining and industrial action. Matters such as confidentiality, restraint of trade and the distinction between employees and contractors are governed by the common law. Some rights and protections in the *Employment Ordinance* (Cap 57) are negotiable but others are compulsory and may not be opted out of.

Since 1 May 2011, the *Minimum Wage Ordinance 2011* has provided a minimum wage for every employee in Hong Kong other than those referred to in ss 6 and 7; for those to whom it applies, the first minimum wage of HK$28 per hour was set in 2011; in 2013, the rate was HK$30 per hour; in 2015 it was HK$32.50 per hour, and in 2017 it was set as HK$ 34.50 per hour. From 1 May 2019, the minimum wage has been HK$37.50 per hour.

In *HKSAR v Lor Wai Por* [2010] HKCFI 643, s 64B of the *Employment Ordinance* (Cap 57) was applied to the sole director of a one-member company by making him an "employer" within the definition in s 2 of Cap 57. He was then personally liable to employees for unpaid wages.

¶1-040 Application of precedents from United Kingdom

In general, English company law cases are of persuasive authority in Hong Kong, subject to the comments in the Court of Final Appeal in *China Field Ltd & Anor v Appeal Tribunal (Buildings) Ltd & Anor* [2009] HKCFA 95, per Lord *Millett* NPJ at para 257. Their applicability was also subject to their generalisation during the time that the UK was a member of the EU.

Article 84 of the *Basic Law* then makes it clear that Hong Kong Courts are able to follow relevant precedents from any other common law jurisdiction.

As changes in company law reflect legislation in Australia, New Zealand and Singapore as well as England, the courts have a broad base of decisions that they can consult if they so wish.

Since the coming into force of Cap 622, reference continues to be made to external common law decisions, in particular because overseas company legislation was referred to in the formulation of the substance of Cap 622.

¶1-060 Importation of English law

The development of company law in Hong Kong can be traced to three distinct periods. The first covered the years from 1865 to 1948, the second from 1948 to 1984 and the third from 1985 to early 2014.

The former *Company Ordinance* (Cap 32) had its beginnings in the *Companies Ordinance 1865* which was based on the English *Companies Act 1862*. The latter was the consolidation of English legislative changes of the preceding 20 years. Subsequent consolidations of the English *Companies (Consolidation) Act 1908* and *Companies Act 1929* were duplicated in 1911 and 1932 respectively.

This synchronisation of company law in the two jurisdictions ended with the introduction of the English *Companies Act 1948*, when the new provisions were not similarly enacted in Hong Kong. This Act incorporated a majority of the recommendations of the Cohen Committee whose terms of reference were:

> "to consider and report what major amendments are desirable in the *Companies Act 1929* and, in particular, to review the requirements prescribed in regard to the formation and affairs of companies and the safeguards afforded for investors and for the public interest".

A further divergence arose in 1967 when Hong Kong did not duplicate the English reforms which had incorporated some of the recommendations of the Jenkins Committee.

Subsequently there were no significant changes to the *Companies Ordinance* until 1984. In that year, the *Companies (Amendment) Ordinance* was enacted. The amending provisions reflected the majority of the recommendations contained in the Second Report of the Companies Law Revision Committee published in 1973. This relied heavily on the English *Companies Act 1948*.

In early 1984 the Hong Kong government, in response to the last recommendation of the Second Report of the Companies Law Revision Committee, established the Standing Committee on Company Law Reform which was mandated "to advise on amendments required to the *Companies Ordinance* as and when experience has shown them to be necessary". In keeping with the practices of the past, the Standing Committee has attempted to keep abreast of the development of company law in the UK.

There has been a distinct trend of divergence between the UK and the Hong Kong enactments due in part to the different pace of company law reform but also because of the different legal demands formerly imposed upon the UK as a member of the EU. That relationship between the UK and the EU ceased on 31 December 2020. The *Companies Ordinance* (Cap 622) continues to imitate appropriate English and Australian judgments in the interpretation of Cap 622.

Corporate characteristics

¶1-160 General

The classic definition of the purpose of incorporation was provided by *Marshall* CJ of the US Supreme Court (in *Dartmouth College v Woodward NH* (1819) 4 Wheat 518) where he said:

> "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons is considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities

> and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being."

The principal characteristics of a company can be illustrated by comparing a company with a partnership.

The essential distinction between a company and a partnership is one of structure. A company is a legal person distinct and separate from its members. This body comes into existence on registration of the application to incorporate under the *Companies Ordinance* (Cap 622). On the other hand, a partnership consists of two or more persons trading together bound by a contract and subject to the *Partnership Ordinance* (Cap 38). Principles of Equity are also referred to in considering the operation of the partnership as each partner is in a fiduciary relationship with the others. The principle that the company is a legal person distinct from its members is guarded by the reluctance of a court to "lift the corporate veil" and thereby to identify its prompters and members, and the purpose for incorporation. Only in cases of fraud or as required by legislation would the veil be lifted. In *Prest v Petrodel Resources Ltd* [2013] 4 All ER 673, SC, it was held that the company was a resulting trustee for the sole shareholder and directors, thereby enabling his interest in the company to be dealt with in distribution as matrimonial property. (See also ¶1-200.)

The partnership is not a separate, legal entity in Hong Kong. The partnership is produced by the contract between parties who are usually subject to the *Partnership Ordinance*. But in both cases, it is assumed that the members/partners have entered into these transactions to make a profit. The relationship of the partners is contractual with elements of equitable principles such as confidentiality and loyalty in its operation.

There are many other points of comparison set out in the following paragraphs.

Note also the *Limited Partnership Fund Ordinance* (No 14 of 2020) came into operation on 31 August 2020. The Ordinance "establishes a limited partnership fund regime which enables funds to be registered in the form of limited partnerships in Hong Kong": see in particular s 3 that defines the "fund" and s 12 which refers to a relevant fund as a limited partnership fund.

In the Press release[1] from the Companies registry on 9 July 2020, it was said that:

> "the new Ordinance made impressive strides on this front in attracting investment funds (including private equity and venture capital funds) to set up and operate in Hong Kong. This would further promote Hong Kong's private equity market and drive demand for local related

1 https://www.cr.gov.hk/en/publications/news-press/press/20200709.htm

professional services, and in turn strengthen Hong Kong's position as an international financial centre."

"Limited partnership is a common constitution form for private funds such as private equity funds. In a limited partnership, the general partner (i.e., operating per-son) with unlimited liability in respect of the debts and liabilities of the fund and the limited partner(s), who are essentially investors, with limited liability will have freedom of contract in respect of the operation of the partnership.

The new LPF regime enables private funds to be registered in the form of limited partnerships in Hong Kong."

Section 7 provides for the register and registration, reregistration, striking off and other factors. The registered office of the Fund must be in Hong Kong. A Limited Partnership Fund (LPF) has no legal personality; to assist in identification, from 1 November 2021, each Fund is given a Unique Business Identifier. It is also to be noted that certain provisions of the Partnership Ordinance apply to LPFs.

¶1-180 Perpetual succession

A company has a continued existence and can be dissolved only by operation of law, such as on winding-up. A continuity of business is therefore certain and is unaffected by the death of even the principal shareholder.

Where the company has only one member, the *Companies Ordinance* provides that the existing member, as the sole director, may nominate a reserve director to act in his place in the event of the death of the sole director (see s 455 on nomination of reserve director of private company at a general meeting). That meeting should be held as soon as possible after incorporation in case something adverse happens to the sole director, thereby requiring extensive, and often expensive, actions to deal with the company.

The element of perpetual succession enables a company to hold property without the constant problem of transmitting it from one generation to the next. "It is chiefly for the purpose of clothing bodies of men in succession, with these qualities and capacities, that corporations were invented and are now in use" (per *Marshall* CJ in *Dartmouth College v Woodward NH* (1819) 4 Wheat 518). With a partnership, the retirement or death of one of two partners usually brings the partnership to an end.

¶1-200 Personality

Background

A company's separate existence means that it may contract at arm's length with its shareholders. It has the right to sue and be sued in its corporate name and the right to hold, deal and dispose of property. The articles may contain restrictions on the powers of the company (see ss 115 to 117). The title to all assets vests in the company.

The decision of the Supreme Court in *Prest v Petrodel Resources Ltd* [2013] 4 All ER 673, indicated that in certain circumstances, the company of which there is only one shareholder may hold the assets of the company as trustee for that shareholder. In that case, the husband had incorporated seven companies, and when he and his wife were divorcing, the Court refused to pierce the corporate veil as there were no fraud or legislative provision requiring it and further "no public policy imperative which justified lifting the veil". However, it was held that:

> "the husband had, at all relevant times, been the beneficial owner of the properties. The seven properties were held by the companies on trust for the husband."

Apart from the novelty of the decision, other questions of the nature and effect of the one-member company have caused concern. The Supreme Court confirmed in that case that there was no special law relating to family law as distinct from the general common law.

Since the decision in *Prest*, and as part of continuing obligations on companies and others to prevent money laundering and to report suspicions of it, Div 2A has been incorporated into Pt 12 as ss 653A to 653K. These sections deal with the now required "significant controller register" to identify beneficial ownership of a company. See *Take Point Investment Holdings Ltd & Anor v Ngai Lok Kei & Ors* [2020] HKCFI 1709 where questions concerned breach of a fiduciary duty, misrepresentation and economic duress.

In *Take Point*, it was said that:

> "[92] An honest person would not deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless. The imputation of 'blind eye' knowledge requires satisfaction of two conditions, namely (1) the defendant's suspicion that certain facts may exist, and (2) the defendant's conscious decision to refrain from taking any step to confirm their existence. The existence of suspicion is to be judged subjectively by reference to the beliefs of the defendant, and the decision to avoid obtaining confirmation must be deliberate: see *Galleria (Hong Kong) Ltd (in compulsory liquidation) v DBS Bank Ltd, Hong Kong Branch* [2019] HKCFI 1877 at §§51-53."

Then in *Perfekta Enterprises Ltd v Commissioner of Inland Revenue* [2019] HKCFA 25, it was said that:

> "[40] The fact that a subsidiary of the appellant was to be used for the purpose of the redevelopment of the Lot is important. The appellant and Prodes were two separate legal entities and 'the court is not free to disregard the principle of *Salomon v A Salomon & Co Ltd*. [1897] AC 22', save in limited circumstances.30 In the present context, one such circumstance might have been where the respondent was able to rely on section 61 or section 61A of the IRO which deal respectively with 'artificial or fictitious' transactions and transactions designed to avoid

> liability for tax, but there is no suggestion in the present case that those provisions apply and the respondent has not sought to invoke them. Otherwise, as Lord Millett NPJ held in *ING Baring Securities (Hong Kong) Ltd v Commissioner of Inland Revenue*:
>
> > '… for tax purposes in this jurisdiction a business which is carried on in Hong Kong is the business of the company which carries it on and not of the group of which it is a member; the profits which are potentially chargeable to tax are the profits of the business of the company which carries it on; and the source of those profits must be attributed to the operations of the company which produced them and not to the operations of other members of the group.'"

In *Roberts v Coventry Corp* [1947] 1 All ER 308, the owner of land which was acquired compulsorily by a local authority was a director and majority shareholder of the company which was a tenant of the land. She alleged that if the company were dispossessed of the land then the value of her shares would suffer. The court held that she could not claim compensation. Per *Croom-Johnson* J, "a corporator in a company has no direct claim as corporator in respect of a loss which the company makes".

In *Macaura v Northern Assurance Co Ltd* (1925) AC 619, a landowner in Ireland sold all the timber on his estate to a company. He and his nominees held all the shares in the company. After the sale, the landowner insured the timber in his own name. Two weeks later the timber was destroyed in a fire. The House of Lords held that a claim on the insurance policy must fail as it was not his timber but that of the company. Hence, only the company had an insurable interest in the assets of the company. In his judgment, Lord *Sumner* said that:

> "It is clear the appellant has no insurable interest in the timber. It was not his. It belonged to [the company]. He had no lien or security over it, and, though it lay on his land by his permission he had no responsibility to its owner or its safety, nor was it there under any contract which enabled him to hold it for his debt. He owned almost all the shares in the company, and the company owed him a good deal of money, but, neither as creditor nor as shareholder could be insure the company's assets. His relationship was to the company not to its goods."

Classification of property (e.g., the chose in action)

The identification of the property of the company has been somewhat disjointed in recent years. The confusion has been largely in relation to the identification as an item of property of the share certificate. It was sent by some courts that identifying a share certificate was different from considering the nature of a share. The share is clearly a chose in action — intangible and immovable; it requires action in court to give effect to the right of the holder.

The share as a chose in action is capable of ownership, being used as security, transferred and so on. Generally, the share is also a fungible asset that any

share of the same value can be exchanged for any other share of the same value.

However, the proprietorial identity of a share certificate as a chose in possession (with a physical body) caused confusion in some courts where those courts and authorities treated the certificate as a chose in possession — hence tangible and movable. That meant there was no barrier against the owner of a share certificate (and thus the share) taking action in tort for conversion of the share certificate when the piece of paper was unlawfully interfered with. Thus, cases of conversion began to appear. However, in *OBG Ltd v Allan & Ors*]2007] 4 All ER 545, HL, it was held that a certificate for a share was merely evidence of the existence of the chose in action; thus, there was no asset that could be converted. Conversion is a physical act; where there is no physical "body" representing the share, there can be no conversion. The piece of paper was merely evidence and was not per se an asset.

In *OBG*, *Baroness Hale* J spoke of this:

> "[308] Conversion is another area of judge-made law, of much greater antiquity than the other two, and hence it has undergone even more momentous developments than they have done. The common law, as is well known, lacked any general proprietary remedy equivalent to the Roman law vindicatio. It provided three separate remedies for wrongfully taking away, keeping, or disposing of another's goods: trespass, detinue and trover or conversion. Conversion had distinct procedural advantages over the other two and rapidly extended its boundaries to cover much the same ground as they did: see JW Salmond *'Observations on Trover and Conversion'* (1905) 21 LQR 43, 47. The contrivances used to achieve this desirable end led to many technicalities and controversies which continued to plague the law long after the reason for them had gone (see 43). But of one thing there could be no doubt: although nominally tortious, conversion had become the remedy to protect the ownership of goods: see *Kuwait Airways Corp v Iraqi Airways Co* [2002] UKHL 19 at [77], [2002] 3 All ER 209 at [77], [2002] 2 AC 883, per Lord Nicholls. It follows that fault is irrelevant:
>
> > 'An honest but mistaken claim of right on the part of the defendant is just as much a conversion as a fraudulent purpose to retain another's property is': *Salmond* (1905) 21 LQR 43, 49. The remedy is either the value of what has been lost or (following the Torts (Interference with Goods) Act 1977) the return of the goods.'
>
> [309] In a logical world, there would be such a proprietary remedy for the usurpation of all forms of property. The relevant question should be, not 'is there a proprietary remedy?', but 'is what has been usurped property?' Rights of action were not seen as property in the fifteenth and sixteenth centuries when the tort of conversion was first developing. The essential feature of property is that it has an existence independent of a particular person: it can be bought and sold, given and received,

> bequeathed and inherited, pledged or seized to secure debts, acquired (in the olden days) by a husband on marrying its owner. So great was the medieval fear of maintenance that the law took a very long time to recognise any right of action (even a reversionary right to tangible property) as having this quality: see WS Holdsworth *'The History of the Treatment of Choses in Action by the Common Law'* (1920) 33 Harvard Law Review 997. But it is noteworthy that, when new forms of chose in action which could be assigned were developed during the seventeenth and eighteenth centuries, the remedy of conversion was adapted to accommodate them: it did so by pretending that the document or other token representing or evidencing the obligation had the same value as the obligation itself."

Baroness Hale J added that:

> "the shareholder is a purchaser of a fungible stream of income who enters and exists the company through the stock market".

At no point of time does a shareholder own company property; even as a sole shareholder, company property is generally company property not that of the shareholder; however, see the decisions in *Prest v Petrodel Resources Ltd & Ors* [2015] UKSC. See also ¶1-160.

¶1-240 Transferability of interest

In addition to precedents from England the Hong Kong Courts are able to "refer to precedents of other common law jurisdictions". See Art 84 of *Basic Law* (Cap 2101)) and *China Field v Appeal Tribunal (Buildings)* [2009] HKCFA 95 where it was said, considering Art 8 of the *Basic Law* that:

> "The jurisdiction to ascertain, declare and develop the common law of Hong Kong formerly exercisable by the Privy Council is now exercisable by this Court. It will continue to respect and have regard to decisions of the English courts, but it will decline to adopt them not only when it considers their reasoning to be unsound or contrary to principle or unsuitable for the circumstances of Hong Kong, but also when it considers that the law of Hong Kong should be developed on different lines."

A share or other interest of a member in a company constitutes personal property. Shares or other interests are transferable in accordance with the company's articles. So, any restrictions contained in a company's Articles of Association must be observed (see s 134 of Cap 622) in the sales of or dealing with shares.

Abuse of the possession of that asset gives rise to an action in tort for conversions, and sometimes detinue.

The decision in *OBG Ltd v Allan* [2008] 1 AC 1, HL was not unanimous [3:2] but the principle from that case is that the strict liability tort of conversion applied only to chose in possession, i.e., chattels; and the court would make

no extension as to cover the appropriation of choses in action. In para 99, it was said:

> "… The economic torts were highly restricted in their application by the requirement of an intention to procure a breach of contract or to cause loss by unlawful means. Even liability for causing economic loss by negligence is very limited…."

See: *Silver Stone Development Ltd & Anor v Lau Kwong Ching James & Ors* [2007] HKCA 213.

This strict and traditional view has been considered in several recent decisions dealing with novel forms of property, generally referred to as "some other form of intangible property". These forms of assets, being intangible and immovable, are referred to as "property". However, some Courts refer to them as assets. This seems to place the asset on the contract-side of the transaction thereby removing the problem of whether to not the asset is proprietary or personal. Queries in this regard seem to define the asset as either a property right or merely as a right to a remedy. While some Courts refer to the asset as a chose in action, that is a 'proprietary" right, or otherwise merely as a right to an interest *in rem*. Choses in action are classified into three types:

- the "pure" chose, that is the intangible and immovable asset which can be exercised only by successful court action;
- the documentary chose in action where the traditional form of the pure chose in action is evidenced by a document, e.g., a share certificate; and
- the virtual chose in action. This third category is the modern asset entered into a ledger in a cloud or whatever. This category is the most difficult for deciding whether it is a chose in action, as known to the law, or whether it is the starting point for a remedy, probably based in equity on the basis of restitution for unjust enrichment when that asset is "steel" by another.

There are divergent views on the classification of the virtual chose in action. In *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] 3 All ER 425, Ch, it was said that:

> "English criminal law has sometimes struggled with the concept of intangible assets and whether these can be a statutory crime of "theft" of a bank credit balance of which the only record of its existence is in a ledger — electronic or otherwise — or some such statutory crime as gaining a pecuniary advantage by deception".

Then in *Your Response Ltd v Datateam Business Media Ltd* [2014] 4 All ER 928, CA (Eng), using the language of "electronic property", it was said that:

> "physical changes in the storage medium which were the entry of information and which enabled it to be revealed did not render the information itself a physical object capable of possession independently

> of the medium in which it was held." To date, there is no clear judicial decision on how these types of interests are to be dealt with, other than the certainty that these "other forms" are not chose in possession and may be chose in action."

The holding of shares in a listed company are usually registered with the Hong Kong Securities Clearing Co Ltd (as nominee holder of the legal title) (the "CCASS") which holds the relevant share certificates. The Court of Appeal said in *Silver Stone Development Ltd & Anor v Lau Kwong Ching, James & Ors* [2007] HKCA 213, that on registration in the CCASS,

> "[14]… the shares became a chose in action in the form of a credit entry of [the] shares in favour of the [beneficial owner] in CCASS**.** The registration system enables shares to be transacted in Hong Kong in a scriptless form. Because the shares had become a chose in action, the cause of action of conversion was no longer available to the plaintiffs."

But for that registration, it would seem that the Court would have allowed an action in conversion or detinue to proceed on the basis perhaps, though not expressly so stated, that the certificate elevated the chose in action [the share] into a chose in possession (the certificate). However, this view does not seem to be the current view especially in overseas jurisdictions.

So, the modern view may well be that the classification, of these virtual choses in action, is too unsettled and so the asset is neither proprietary nor personal (for establishing the law relative to its abuse), but rather that the asset gives a right to sue on its abuse. That action would have elements of a debt but there would be no corresponding right to "recover" the asset abused.

When then looking at the interest of a partner, it is clear that a partner can only transfer his status as a partner with the consent of all other partners. What is being transferred is the financial benefit of the partnership, that is, a chose in action to share the profits. The liability of partners is generally joint and several, unless for example a partner has limited liability (ss 11 and 12 of the *Partnership Ordinance* (Cap 38)). The partnership, having no legal personality, usually functions through a "firm" which also has no legal personality (s 7).

¶1-260 Business action

Unity of action in a company emerges from a centralised authority found in its board of directors. The directors can very effectively limit the number of persons who can bind them as agents, for members of a company as such are neither managers nor agents (unlike partners in a firm). On the other hand, the shareholders can maintain a control over the company's directors who are special agents of the company and who have their power solely from the statutory provisions regulating them and the Articles of Association of the company.

The business activities of a company are considered by reference to modern principles of corporate governance. On this see:

- the *Corporate Governance Code* and *Corporate Governance Report* as set out in Appendix 14 of the *Listing Rules*,
- the *Securities and Futures Ordinance* (Cap 571); and
- the Directors' report in the form of Sch 5 to the *Companies Ordinance* (Cap 622).

From 1 January 2022, there will be changes in the *Corporate Governance Code* designed to "further enhance the governance regime for listed companies". In relation to the Board, these changes will "enhance independence, strengthen the role of the nomination committee, promote succession planning and gender diversity (see the new Code Provision A1.1).

¶1-280 Number of members

Section 11 indicates that a private company must not have more than 50 members. Public companies are not limited in respect of their membership size. Partnerships are, not subject to any restrictions on numbers (see s 3 of the *Partnership Ordinance* (Cap 38)). Section 455 provides that if there is only one shareholder of the company, then a reserve director may be appointed to take over (where appropriate) the duties of that shareholder as the sole director. That appointment should be made as soon as possible after incorporation; it does require a decision to be made at a general meeting.

¶1-300 Constitution

Traditionally, a company required a written constitution made up of Memorandum and Articles of Association. However, the Memorandum is no longer part of the constitutional documents of a Hong Kong Company (see s 98 of Cap 622 wherein memoranda existing as at 3 March 2014, were regarded, thereafter, as provisions of articles).

A partnership will generally be based upon a written agreement although this need not be the case. A partnership is not a legal entity, being a contract. That contract is supplemented by terms of the *Partnership Ordinance* (Cap 38). The partnership will register as a firm under the *Business Registration Ordinance* (Cap 310). The firm is also not a legal entity. Instead, a partnership is a contractual "institution" subject to contractual principles of common law and equity, and in some cases statutory.

The abolition of the memorandum began in 1997 where it was said that a company (other than a charitable company) no longer had to state objects in the Memorandum (see s 5 of Cap 32). This followed from the then insertion of s 5A (see now s 115 of Cap 622: a company has the same powers and rights and privileges as a natural person) and s 5B (non-compliance with the objects in a pre-1997). Failure to insert the objects in the Memorandum no longer made a transaction void for that reason only.

Articles of Association

The Articles of Association regulate the internal functioning of the company.

The articles of an unlimited company are required to state the number of members with which the company proposes to be registered and, if applicable, the amount of share capital with which it proposes to be registered. The articles of a company limited by guarantee are also required to state the number of members with which the company proposes to be registered. (s 114 of Cap 622)

Apart from these required statements, a company may include in its Articles any lawful provision that it considers desirable for the regulation of its internal administration. (See *Samuel Tak Lee v Chou Wen-hsien* (1983) HKLR 350)

The main areas which are normally regulated by Articles of Association are:

- *Capital* – share capital, issue and allotment, variation of class rights, liens, calls, transfers, transmission, forfeiture, alteration of capital;
- *Members* – notice and constitution of meetings, proceedings at meetings, and voting by members;
- *Officers* – appointment and removal of officers, notice and constitution of meetings, proceedings at meetings, voting by directors, delegation of authority to committees and managing directors, and company secretary; and
- *Disclosure and distributions* – accounts and audit, treatment of dividends and reserves, and capitalisation of profits.

A company may seek incorporation, i.e., registration as a company, using the articles set out in the *Companies (Model Articles) Notice* (Cap 622H).

Documents required for incorporation

To form a company, the following documents have to be delivered to the Companies Registry:

1. Articles of Association – under s 12, these must be signed by the founder member named in the form, or if two or more founder members, by any one of them (see s 69 of Cap 622 on signing of incorporation form, and Sch 2 on content of incorporation form). A company may draft its own Articles or use the appropriate form in the *Companies (Model Articles) Notice* (Cap 622H) (see ss 75, 79 and 80).
2. A statement of compliance with the requirements of incorporation under s 70 of Cap 622. The statement should certify that all requirements regarding matters precedent to incorporation have been complied with. These requirements include the address of the company, and it can include an email address for the company. The details of the first secretary and the directors of the company must

be included. For the secretary a residential address is required and to facilitate electronic communication an email address may also be given. Previously, the HKID number or details of the passport of the secretary were required. Sections 47 to 52 of Cap 622 are not yet in force, but when they are in force it is expected that they will provide protection against disclosure of the residential address of directors, and others, and of their identity numbers.

Similar information is required for the first directors. In addition, each director must state that he has consented to be a director and sign Form NNC3 (Consent to Act as First Director). Each director is also "advised" to read *A Guide on Directors' Duties* published by the Companies Registry.

3. The appropriate fees. See the *Companies (Fees) Regulation* (Cap 622K).

4. Since 21 February 2011, each application for incorporation must be accompanied by Form IRBR1 (Notice to the Business Registration Office), together with the prescribed fee and levy pursuant to ss 5A(1) and 5D(2) of the *Business Registration Ordinance* (Cap 310) as application for incorporation is now taken to include the application for a business name registration.

   For a non-Hong Kong Company seeking to be registered in Hong Kong, Form NN1 (Application for Registration as Registered Non-Hong Kong Company) is required to be filed within one month of the company establishing a place of business in Hong Kong. The form is to be signed by a director, secretary, manager or an authorised representative, and accompanied by the correct registration fee. The email address of the authorised representative may be supplied to the registry to facilitate electronic communication. Email addresses of the secretary or director may also be provided for this purpose. The HKID number or passport number of the secretary or director should also be given. Copies of the Charter, Statute or Memorandum or other Document defining the constitution of the company should be provided, or a certified copy thereof. See the *Companies Registry Circular No 8 of 2014* dealing with *Requirements for Documents Delivered for Registration*.

   The non-Hong Kong Company must also comply with ss 5B(1) and 5D(2) of the *Business Registration Ordinance* (Cap 310), and file Form IRBR2 (Notice to Business Registration Office).

Since 18 March 2011, it has been possible to apply electronically for incorporation of a company, and to comply with the provisions of ss 5A(1) and 5D(2) of the *Business Registration Ordinance* (Cap 310). Applicants for incorporation can adopt one of three models of Memorandum and Articles of Association in the application process. Details to be provided include company name, details of share capital and founder members. The application can be signed electronically in line with the provisions of

the *Electronic Transactions Ordinance* (Cap 553). See also *Companies Registry Circular No 9 of 2014* relating to the *Introduction of Electronic templates of Newly Specified Forms* at the e-Registry.

Certificate of incorporation

Upon submission of the required documents and fees, the Registrar of Companies will retain and, assuming that the proposed company name is in order, register the incorporation documents specified in s 67 of Cap 622, i.e.,

- an incorporation form in the specified form and
- a copy of the articles.

Upon registration the Registrar issues a certificate of incorporation (ss 71 and 72).

By issuing a certificate of incorporation, the Registrar is in effect warranting, to anyone dealing with the company, that he has been satisfied with all requirements of registration and matters precedent.

As from the date of incorporation shown in the certificate of incorporation, the company is incorporated under the ordinance either as a limited or unlimited company, as appropriate, with a list of members in a register maintained by the company (s 627 of Cap 622). From the date of incorporation, the company enjoys all the incidents of corporate status, namely:

- all the functions of a body corporate,
- the ability to sue and be sued,
- perpetual succession, and
- the right, but not the obligation, to have a common seal.

¶1-320 Raising finance

While the *traditional* limits on company borrowing were largely related to the purposes for which the company was incorporated, as set out in the Memorandum, the question of *ultra vires* (see s 117 of Cap 622 on transaction or act binds company despite limitation in articles etc.) is now totally irrelevant, as there are no longer "purposes" for which the company was incorporated, unless restrictions on the activities of the company have been inserted into the Articles. Note that there is now no Memorandum of Association for a company: the Constitution of the company is found in its Articles of Association. See also *Shun Hing Holdings Co Ltd & Ors v Li Kwok Po David & Ors* [2020] HKCA 309 where the Court referred to concepts of "proper purposes and in the best interests of the company".

However, the concept of a loan requiring complying with a corporate benefit remains relevant (see e.g., *Kasikornbank v Akai Holdings (In Liq)* [2010] HKCFA 63 where the chief executive officer of the company purporting to be authorised by forged minutes sought funds from the bank for the benefit of another company). In the circumstances the Court of Final Appeal said

that while the other company and the bank received "substantial benefits" from the loan, the defendant company received "nothing". Due to the circumstances of the loan, it was held to be unenforceable and the value of the shares, deposited by the purported agent which had by then been sold, was recoverable by Akai in an action for conversion (see also *Re Moulin Global Eyecare Holding*s [2010] HKCA 119). The remedy given was that of "equitable compensation" on the basis that the money received from the sale of the shares was held by the bank as constructive trustee for the company; the contract of loan was void *ab initio* on the ground that the "agent" had no capacity to bind the company, and that until the shares were sold and the money detained by the bank, it would have been possible to order specific restitution of the shares. But reviewing decisions on "constructive notice" received through "wilful blindness", that is the failure of a party to ask appropriate questions because he does not want to receive the answer he would receive, or by the "irrationality" in the failure of the bank to do due diligence, it was said that the principle from *Royal Brunei Airlines Sdn Bhd v Tan* [1995] UKPC 4 to the effect that "knowing receipt" of trust property operated, thereby creating a constructive trust over the proceeds of the sale. Further the court was of the opinion that compound interest could be awarded.

A private company is not entitled to seek a loan from the public or to issue a debenture in favour of members of the public (s 11 of Cap 622). Once shares are sold outside the company membership, the company automatically becomes a public company with a timely need to comply with the provisions of the ordinance relating to public companies. However, it has been held that a charging order may be given in support of a judgment debt against assets of a private company. Primarily, those assets were the shares of the company. The common asset subjected to a charging order is usually the equitable interest in land. The effect of the order is to enable the sale of the shares of the subject assets; while those assets are the company, it is presumed that the potential buyers are members of the public. But a private company cannot sell its shares to the public, otherwise it is converted into a public company. In *Amerwax Plus Ltd v DenIce Y Foster Harris* [2012] HKDC 1366, a charging order was awarded against the shares of a private company. On execution of that order, it was possible that any buyer of the shares would be a member of the public. However, the Court did add that any transfer of shares would only be registered in accordance with the articles of the company, and there would be – inevitably – a restriction on those articles from transferring shares to a non-member – especially if the effect was to elevate the number of members beyond the statutory number of 50.

See further at ¶18-000 "Raising Capital and Funds" and following.

A partnership is not restricted by an objects clause.

¶1-340 Procedure

Companies are subject to complex and detailed statutory rules governing their activities. The operation of a partnership is not as closely controlled

because the relationship is founded on a contract; however, the partnership is subject to the *Partnership Ordinance* (Cap 38) and is required to comply with other Hong Kong legislation including the *Business Registration Ordinance* (Cap 310).

¶1-360 Dissolution

A company can generally be dissolved only by a formal liquidation. On this see the *Companies (Winding-Up and Miscellaneous Provisions) Ordinance* (Cap 32). A partnership, by contrast, can be dissolved by agreement of the partners.

¶1-380 Taxation

Companies pay profits tax on profits and gains. Partners in a firm pay income tax on any earnings.

Separate legal entity and corporate liability

¶1-480 Separate legal entity – the *Salomon's case*

A company and the individual or individuals forming that company are separate legal entities however complete the control might be by one or more of those individuals over the company. This principle was settled by the case of *Salomon v Salomon & Co Ltd* (1897) AC 22.

Briefly the facts in *Salomon's case* were as follows: S had a leather business which he operated together with his four sons. Under the UK *Companies Act 1862*, he incorporated the business and set it up as A. Salomon Co Ltd. The Act required at least seven shareholders so S transferred one share to each of six relatives, but he was in reality the only substantial shareholder. S entered into an agreement with the company to sell his business to it for £38,782 and to apply the money for the purchase of £10,000 of debentures secured by a mortgage over the assets of the company, and with the rest to purchase £20,000 of share capital. All these transactions were carried out by deed and no money changed hands. After some time, the company went into liquidation and creditors of the company found that there was a prior encumbrance of £10,000 secured by an unsecured mortgage. Upon the sale of the assets, the sum realised was less than the amount of the mortgage and the creditors were able to realise nothing. They then brought an action to have the transaction set aside.

The creditors claimed that:

- the company was a mere agent of S,
- the scheme was a fraud on the *Companies Act 1862*, since the Act required seven shareholders and there was in reality only one, and
- the business was sold in excess of its real value.

As to the first objection, the House of Lords held that the company was not an agent of S. The company was a distinct legal entity and owned the business. If the company was not a legal entity, then there was no one to be an agent of S. Thus, it was made clear that *prima facie* there is no agent or trustee relation between a shareholder and the company.

As to the second claim, the House said in effect that it was not illegal to form a "one-man company". The Act required seven shareholders and did not specify the number of shares to be held by each. The Act, therefore, was literally complied with. The only way to attack the incorporation for fraud was by proving fraud in becoming incorporated. This had not been done and while the incorporation stood the company had to be recognised as a separate and distinct legal entity. This enabled the concept of the corporate veil to disallow the court to go behind the incorporation to identify the members, except in exceptional cases, such as that of suspected fraud.

As to the third claim, the House of Lords replied that since the sale was completed before any money was advanced to the company, the creditors took the debtor as they found him. In addition, the creditors had notice of the limited liability by the use of the word "Limited" after the company name. The Act also required registration of the debentures and the creditors could have informed themselves as to the prior charge on the company's assets before advancing money.

Salomon's case established no new principle, but through this case the House of Lords affirmed that a company is separate from its shareholders; it is a principal, not an agent or trustee in contracts with or for its shareholders, in absence of facts showing an agency or trustee relation.

Lord *Halsbury* stated that "once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself".

Lord *Macnaghten* provided the classic description of the modern joint stock company:

> "When the memorandum is duly signed and registered, though there be only seven shares taken, the subscribers are a body corporate 'capable forthwith', to use the words of the enactment, 'of exercising all the functions of an incorporated company'. Those are strong words. The company attains maturity on its birth. There is no period of minority — no interval of incapacity. I cannot understand how a body corporate thus made 'capable' by statute can lose its individuality by issuing the bulk of its capital to one person, whether he be a subscriber

> to the memorandum or not. The company is at law a different person altogether from the subscribers to the memorandum; and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act. That is, I think, the declared intention of the enactment. If the view of the learned Judge were sound, it would follow that no common law partnership could register as a company limited by shares without remaining subject to unlimited liability."

At the time when a company was required to have at least two shareholders (and in Hong Kong required at least seven members), it was said that the fact, that substantially all shares are held by one person (as happened in *Salomon*), did not make the company's business the business of that shareholder (see *Gramophone and Typewriter Co Ltd v Stanley* [1908] 2 KB 89). The effect of incorporation in *Salomom* was to convert a firm into a company. The decision in *Prest v Petrodel Resources Ltd* (see ¶1-200) does require reflection on this point. In that case, the Court had not lifted or pierced the corporate veil. Perhaps it would have been thought that had the veil been lifted, then the beneficial interest of the husband would have been openly displayed. So, it was because there were no reasons justifying the lifting of the veil that the court was able to decide that there was a resulting trust.

Lifting the corporate veil – by statute

¶1-500 General

The principle derived from *Salomon case* to the effect that a company is distinct from its members and directors is of general application. However, if applied universally it could produce unsatisfactory results in particular circumstances. There are, accordingly, certain statutory exceptions to the principle of separate personality (see ¶1-820 to ¶1-900). "Lifting the corporate veil" allow those adversely affected by the actions of the company to seek to establish the identity of the members of the company thereby making those members liable for the actions of the company. Generally, the members will be protected by the veil itself from liability for the abuses of the company. Directors on the other hand usually are available for members, and creditors, and others to answer for their defaults. When the court does lift the corporate veil, the rationale is sometimes said to be that the company is merely an agent of the members, and thus they are liable for its wrongs; in other cases,

the relationship is referred to as one of the members as beneficiaries and the company is their trustee. *Prest* did not involve lifting the corporate veil but the effect was similar to that and the company was treated as the resulting trustee for the sole member.

In *Horace Yao Yee Cheong & Ors v Pearl Oriental Innovation Ltd* [2010] HKCA 101, [2010] HKCLC 133, the Court of Appeal discussed lifting the veil as:

> "[38] It has to be observed that lifting or piercing the corporate veil does not give rise to a cause of action in itself. It is a relief or remedy which can be granted when there is an underlying cause of action. It is, therefore, important to determine what the underlying cause of action is.
>
> [39] In the second place the device of lifting the corporate veil has been said to be a blunt instrument. Whatever a blunt instrument might mean in the context, I consider it more appropriate to regard the device of lifting the corporate veil as arbitrary. It is something that must be carefully applied and, in the context of circumstances said to warrant it in this case, it must be clearly established that the whatever liabilities were incurred the party said to be liable to discharge those liabilities on the basis of lifting the veil had used the party nominally incurring the liability as a façade."

The result in that case was that the rights and liabilities of the company and its parent were "as one for any purpose".

In *Winland Enterprises Group Inc v Wu Pharmaceuticals Inc & Anor* [2012] HKCA 155, the Court of Appeal discussed the various circumstances enabling the lifting of the corporate veil. It was said that:

> "[51] Thus, the law permits the use of a corporate veil to avoid legal obligation and liability. What the law does not permit and that is when the court will lift the corporate veil is its use for illegitimate purposes such as evading legal obligation and liability. . [A]voiding or confining legal obligation was precisely the reason for which the principle of corporate personality came to be evolved. As commercial activities become more complex, a system of holding and subsidiary companies was developed to protect members of the group from liability caused by activities of other members. However, the members operates as one integrated whole . [and] may even share common management, common directors and common staff. A subsidiary may appear to have a separate existence but no separate mind of its own. It may even be one economic unit with the parent company. However, the law is not concerned with the functional organisation of the group . It is wrong to place undue emphasis on those factors and to infer from those factors that a subsidiary was a façade or a puppet and for that reason alone the corporate veil ought to be lifted But unless on the fact it carries that latter meaning and that when its use is in conjunction with some illegitimate purpose, such as to evade legal obligation and liability, there is no justification for lifting the corporate veil."

Several recent decisions have looked at the principle of attribution to determine whether the acts or knowledge of as agent, or other person, are attributed to the company thereby making the company liable or responsible for the acts or omissions of the agent. In *Moulin Global Eyecare Trading Ltd (In Liq) v Commissioner of Inland Revenue & Anor* [2012] HKCA 144, the Court of Appeal dealt with an application for judicial review where the family directors of a listed company had falsified records through the creation of fictitious sales to assist in obtaining finance. The INEDs had not been notified of a relevant Board meeting. The falsified records were also submitted to the Commissioner of Inland Revenue resulting in the assessment of a high amount of tax. Subsequently the liquidators of the company found that there were more losses than profits for the relevant years; the liquidators then sought recovery of wrongly paid tax. Assessments were issued also in respect for profits for other years. The liquidators sought a refund of the tax paid. However, the Commissioner refused to extend time for objection, and also for refund of the tax paid. In the Court of First Instance, it was ordered that the decision for extension of time, and for revisions of the assessment, were quashed. The Commissioner appealed. The Court of Appeal then allowed the appeal on the basis, *inter alia*, of attribution and that the provisions of the *Inland Revenue Ordinance* (Cap 112) that required prompt and accurate returns were designed to protect the public revenue (s 70A of Cap 112).

The court discussed three forms of attribution. First, the primary rule of attribution meant that the knowledge of the family directors in the manipulation of the accounts was attributed to the company. Those making the false statements did so as the proper officers of the company in making the returns to the Commissioner with the result that their dishonest acts were treated as the acts of the company resulting in the company's liability in criminal law. This meant that the exception provided by *Re Hampshire Land Co* [1896] 2 Ch 743 did not apply. The court added that:

> "[T]he outer limits of the primary rules of attribution was reached and exceeded when the directing mind and will ceased completely to act, in fact or in substance, in the interests of the company and when all the activities of the directing mind and will were directed against the interest of the company with a view to damaging it. When that time was crossed, he ceased to be the directing mind and will and the doctrine that he was to be identified with the company ceased to operate." (para 67)

But this extreme position was not found in this case.

The second type of attribution was referred to as the "special rules". These are devised where the primary or general rules are inapplicable. These special rules are devised "for the purpose of the true construction of the relevant statutory provisions". In this case special rules were required to promote the policy of the substantive rule so as to prevent the frustration of that policy. The question in this case was whether a tax assessment could be re-opened without time limit to recover over-paid tax as a result of corporate

fraud. The policy of the legislation required no delay in raising and objection to a tax assessment; the time limit on doing so was one month. The time limit could be extended but only in situations of absence from Hong Kong, sickness, or "other reasonable cause". The legislation produced finality to avoid hardship to taxpayers. Special rules were in line with the need for a company to have sufficient internal controls to prevent, or to discover fraud or error. The Ordinance was not required to protect a company from the negative consequences of the fraud of directors. Thus, the knowledge of the family directors of the listed company in causing falsified accounts to be prepared was attributed to the company. The company, being primarily liable for its conduct, it cannot be said to have acted reasonably, or to have been prevented from giving notice of objection within the statutory time limit.

The third rules are the general or agency rules:

> "which apply equally to natural persons. A company will be vicariously liable for the acts of its duly appointed agents and knowledge of its agents may be imputed to the company under the general principles of agency." (para 78)

On the part of the judgment that the Board had not been properly constituted, see *Re Moulin Global Eyecare Holdings Ltd* [2010] HKCA 119.

¶1-510 Fraudulent trading

If in a winding up it appears that the company's business has been carried on with intent to defraud creditors or for any fraudulent purpose, the court may declare under s 275 of the *Companies (Winding-Up and Miscellaneous Provisions) Ordinance* (Cap 32) that any persons who were knowingly parties to the carrying on of the business in that manner shall be personally responsible, without any limit on liability for all or any of the company's debts.

The relevant test under s 275 was referred to in *Aktieselskabet Dansk Skibsfinansiering v Brothers & Ors* [2000] HKCFA 49 where Lord *Hoffmann* NPJ said that the offence of fraudulent trading under s 275(1):

> "requires proof that someone carried on the business of the company with a fraudulent intent and that the other directors sought to be held liable were knowingly party to his fraud… [T]he question of whether the person carrying on the business was fraudulent was subjective in the sense that he personally must have been dishonest…"
>
> "…[W]hether a person carrying on the business was dishonest must depend...upon an assessment of all the facts…"
>
> "…[T]he notion of a degree of probability that the company will, one way or another, trade out of its difficulties, is built into the notion of honesty. The directors must honestly believe that there is a reasonable prospect that the company will be able to pay the debts which it incurs.

> But…the fact that the likelihood of survival is objectively low is not inconsistent with honesty."
>
> "… [T]here is a danger in… invoking the concept of the hypothetical decent honest man...because decent honest people also tended to behave reasonably, considerately and so forth; there may be a temptation to treat shortcomings in these respects as a failure to comply with the necessary objective standard. It seems to me much safer, at least in the context of al allegation of fraud, to concentrate upon the actual defendants and simply ask whether they have been dishonest…"

In so deciding the court considered *Re William C Leitch Brothers Ltd* [1932] 2 Ch 71 and *Royal Brunei Airlines Sdn Bhd v Tan* [1995] UKPC 4.

Another aspect of fraudulent trading is found in *Tradepower (Holdings) Ltd (In Liq) v Tradepower (Hong Kong) Ltd & Ors* [2009] HKCFA 103 where the Court of Final Appeal considered the operation of s 60 of the *Conveyancing and Property Ordinance* (Cap 219) in relation to whether or not there had been a disposal of assets of the company at an undervalue when the company was insolvent, and the disposition depleted the funds of the company. The consequence is that the disposition is made with the intent to defraud creditors. See also recent decisions such as *China Medical Technologies Inc (In Liq) & Ors v Bank of China (Hong Kong) Ltd* [2020] HKCFA 28; and *Galleria (Hong Kong) Ltd (In Compulsory Liq) & Anor v DBS Bank Ltd, Hong Kong Branch* [2021] HKCA 611, [2021] HKCLC 753. Similar factors were considered in both of these cases, and no appeal to the Court of Final Appeal was granted. The elements of the claims concerned knowing receipt of trust property, fraudulent trading, unjust enrichment, dishonest assistance, and generally, the law on "knowledge and dishonesty". These matters are covered full in Ch 15 of this Book on Dishonest Assistance.

¶1-515 Misdescription of company's name

Where an officer of a company signs or authorises to be signed on behalf of the company a bill of exchange, endorsement, promissory note, cheque or order for goods or money, and the company's name is not referred to as required under s 661 of Cap 622, he is personally liable to the holder of the document if the company defaults (s 93(5)). Since 1983, s 26A of the *Bills of Exchange Ordinance* (Cap 19) has provided that a person who makes, accepts or indorses a bill for, in the name of, on behalf of or on account of a company is not liable in respect of that bill where the making, acceptance or endorsement is that of the company.

A related matter concerning the common seal of the company, as required under s 93 of the former *Companies Ordinance* (Cap 32) [now the *Companies (Winding-Up and Miscellaneous Provisions) Ordinance* (Cap 32)], was that of *Wang Zhidun v Tsoi Ling Pui* [2011] HKDC 90 where the seal had been affixed but the corporate name of the party was totally illegible. The question arose in a conveyancing case where a requisition had been made as to the validity of the document which had been sealed using the illegible seal. The court

held that the vendor was unable to prove good title because of the seal, and the purchaser was able to withdraw from the contract without loss of the deposit.

¶1-520 Payment of dividends when no profits are available

Directors who allow the payment of dividends when there are no profits available are liable to the creditors of the company for the amount of the company's debts to the extent by which the dividends exceed profit (see the following section).

Dividends must be paid out of profits

The principle relating to distributions of funds by a company is that dividends may only be paid out of profits. The reason is that a company's paid-up share capital can only be applied for the objects of the company and cannot be repaid to shareholders except in the event of winding up unless the court or the *Companies Ordinance* (Cap 622) provides otherwise.

The rationale for the principle is that the only security a creditor has is over the assets of the company, and credit will only be given to the company on the understanding that the capital shall be applied only for business purposes. The creditor is therefore entitled to expect that the corporation shall keep its capital, and not return it to the shareholders.

Under s 297 of the *Companies Ordinance* (Cap 622), a company may only make a distribution out of distributable profits. The distributable profits of a company are its accumulated realised profits, so far as previously not utilised by distribution or capitalisation, less its accumulated realised losses, so far as not previously written off in a reduction or re-organisation of capital duly made.

A distribution may be made out of profits available for that purpose. So, a gift made by the company where the gift renders the company insolvent is in contravention of s 297. This was the result in *Tradepower (Holdings) Ltd (In Liq) v Tradepower (Hong Kong) Ltd & Ors* [2009] HKCFA 103 where it was said that:

> "[124] … Since the directors clearly had reasonable grounds to believe that the distribution constituted such a contravention, they became liable under section 79M [see now s 297 of Cap 622] to pay to Holding a sum equivalent to the value of the THK share transferred to Girvan [by way of gift]. There can be no question of any contravention of those statutory provisions being legitimised by the company's members ratifying the prohibited distribution."

¶1-525 Accounts

The accounts provisions of the *Companies Ordinance* (Cap 622) provide another instance of the Ordinance disregarding the corporate veil. Section 379 of Cap 622 requires the directors of a holding company to prepare group

accounts consolidating the financial position of the holding company and its subsidiaries. In this respect the Ordinance does not treat each company in the group as a separate legal entity but recognises the reality that a group of related companies functions as a single entity. Note that this section has been amended by s 42 of the *Companies (Amendment) (No 2) Ordinance No 35 of 2018* with effect from 1 February 2019. The amendments relate to subsection (3) and the insertion of subsection 3A.

¶1-530 Taxation

The veil of incorporation may be lifted in favour of the Inland Revenue; the Commissioner of Inland Revenue may ignore transactions which have the effect of avoiding or evading tax (ss 61 and 61A of the *Inland Revenue Ordinance* (Cap 112)).

Lifting the corporate veil – by case law

¶1-550 General

In addition to the statutory exceptions to the principle in *Salomon's case* there are cases which indicate that the doctrine laid down in *Salomon's case* has to be watched very carefully (see generally *Winland Enterprises Group Inc v Wex Pharmaceuticals Inc & Anor* [2012] HKCA 155).

Lord *Denning* in *Littlewoods Mail Order Stores Ltd v McGregor* (1969) 3 All ER 855 (see ¶1-565) has, with reference to that doctrine said (at para 860):

> "It has often been supposed to cast a veil over the personality of a limited company through which the courts cannot see. But that is not true. The courts can and often do draw aside the veil. They can, and often do, pull off the mask. They look to see what really lies behind."

In cases in which an exercise of a discretionary jurisdiction by the court has been involved the courts have taken into account as one of the factors relevant to the exercise of that discretion the fact that one company is under the control or is the alter ego of another.

In other cases, the courts have lifted the corporate veil to look at the commercial reality beneath in order to prevent evasion of taxing statutes, or social or administrative legislation, or to identify enemy shareholders or

shareholders wearing the corporate mask. In *Re A Company* (1985) 1 BCC 99,421, *Cumming-Bruce* LJ stated that:

> "the court will use its powers to pierce the corporate veil if it is necessary to achieve justice irrespective of the legal efficacy of the corporate structure under consideration."

Briefly it might be put that the courts will look behind the company mask in two main categories of cases:

- when a discretionary privilege or licence is involved; and
- when the obligation of the company as a citizen or quasi-citizen to obey the general law of the land, is at issue.

In *Winland Enterprises Group Inc v Wex Pharmaceuticals Inc & Anor* [2012] HKCA 155, it was said that:

> "[50] The principle of separate corporate personality must be viewed with commercial realism. Corporate personality was created under our laws to give to a company a separate legal identity so that it can carry on commercial activities as an individual distinct from its shareholders and to insulate them from legal liability arising out of those activities, but only in so far as the law permits. The … articles of association and the statutes set out the regime within which the corporation operates from its inception to its dissolution… There are but two exceptions created as a result of judicial decisions based on either a well founded principle of public policy or the principle that devices used to perpetrate frauds or evade obligation will be treated as nullities. … The use of a corporate veil to insulate its shareholders or its parent company from legal liability is not objectionable, unless...it is coupled with some illegitimate purpose, such as devices to perpetrate frauds or to evade legal obligation…" [per *Yo* J.]

Some examples of common law cases applied to lifting of the corporate veil are included in ¶1-555 onwards for reference.

¶1-555 Court's discretion

The court is reluctant to exercise its power to lift the veil. So, in *HKSAR v Lor Wai Por* [2010] HKCFI 643, the court said that it was unnecessary to do so because the sole director of a one-member company was treated by s 2 (definition) and s 65 of the *Employment Ordinance* (Cap 57) as the "employer" for the purposes of action against him for failure to pay the salary of employees.

¶1-560 Trading with the enemy

For purposes of the law relating to trading by enemy aliens the court was entitled to go behind the facade of a company incorporated within the jurisdiction in order to ascertain who its real controllers were (see *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* (1916) 2 AC 307).

However, this rule must be read subject to Art 13 of the *Basic Law* which provides:

> "The Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region. The Ministry of Foreign Affairs of the People's Republic of China shall establish an office in Hong Kong to deal with foreign affairs. The Central People's Government authorizes the Hong Kong Special Administrative Region to conduct relevant external affairs on its own in accordance with this Law."

Hence, it is not a matter for the courts of Hong Kong to determine the identity of an "enemy alien" for the purposes of this principle. Generally, there have been few cases overseas in which this concept has been referred to.

¶1-565 Tax deduction for rent to subsidiary

In *Littlewoods Mail Order Stores Ltd v McGregor* (1969) 3 All ER 855, Littlewoods was lessee of premises for a £23,444 annual rental. Through an arrangement by which a subsidiary of Littlewoods became the freeholder and Littlewoods relinquished its lease, Littlewoods took a new lease from that subsidiary for £42,450. The claim for a deduction in computing profits for tax of the rental increase of £19,006 was disallowed by the UK Court of Appeal because, looking at the reality of the position and notwithstanding *Salomon's* case, that subsidiary was not a separate and independent entity but a creation of the taxpayer company who (and not the subsidiary) benefited from the additional rent.

¶1-570 Whether companies buying own shares

In *August Investments Pty Ltd v Poseidon Ltd and Samin Ltd* (1971) 2 SASR 71 (Australia), a dispute arose from a proposed takeover and one argument was that the offeror company A would be in breach of the law (trafficking in own shares) because the offeree company B owned some shares in company A. The court decided that this was not the sort of situation justifying a look behind the company veil.

¶1-580 Fraud

Per *Phillimore J* in *Re Darby, ex parte Brougham* [1911] 1 KB 95, two undischarged bankrupts registered a company. They were its only directors. The company purported to float a Welsh Slate Quarries Ltd to which it sold plant at a considerable profit. The prospectus did not mention the role of the bankrupts. The slate company failed, and the liquidator claimed against one of the bankrupts. It was argued on behalf of the bankrupt that it was not he who was promoter but the company. *Phillimore* J held that the claim could succeed:

> "The fraud here is that what they did through the corporation they did themselves and represented it to have been done by a corporation of

> some standing and position, or at any rate a corporation which was more than and different from themselves."

The decision in *VTB Capital plc v Nutritek International Corp & Ors* began in *VTB Capital Plc v Nutritek International Corp* [2012] 2 BCLC 437 (Chancery Division), continued onto the Court of Appeal (*VTB Capital Plc v Nutritek International Corp* [2012] 2 CLC 431), and was decided finally in the Supreme Court (*VTB Capital Plc v Nutritek International Corp* [2013] 1 All ER 1296, SC).

All three benches (from Chancery to Supreme Court) upheld the claim that the contract was unsustainable as a matter of law.

In the Court of Chancery where the claim commenced, the court referred to the corporate veil, noting that the principle under which the corporate veil of a company could be pierced was, "in its application, a limited one, which has been developed pragmatically for the purpose of providing a practical solution in particular factual circumstances". "Ownership and control of a company and the interests of justice were not of themselves sufficient to justify piercing the veil", since there had to be some impropriety. On the other hand, the company's involvement in the impropriety did not by itself justify piercing the veil, since the impropriety had to "be linked to use of the company structure to avoid or conceal liability" for "an independent wrong that involves the fraudulent or dishonest misuse of the corporate personality of the company for the purpose of concealing the true facts". Accordingly, "it was necessary to show both control of the company by the wrongdoer and impropriety in the sense of misuse of the company as a device or façade to conceal wrongdoing". Although the court, by piercing the corporate veil, could in an appropriate case substantially identify the company with the person or persons in control of it, it did not follow that once the veil was pierced the puppeteer controlling the company could or would be held to be "a party to a contract procured by him between the puppet company and a third party".

Then in the Court of Appeal, the theme was continued with.It was established law that:

> "First, ownership and control of a company were not of themselves sufficient to justify piercing the veil. Second, the court cannot pierce the veil, even when no unconnected third party is involved, merely because it is perceived that to do so is necessary in the interests of justices. Third, the corporate veil can only be pierced when there is some impropriety. Fourth, the company's involvement in an impropriety will not by itself justify a piercing of its veil: the impropriety 'must be the linked to use of the company structure to avoid or conceal liability' (a principle derived from *Trustor*). Fifth, it follows that if the court is to pierce the veil, it is necessary to show both control of the company by the wrongdoer *and* impropriety in the sense of a misuse of the company as a device or façade to conceal wrongdoing. Sixth, a company can be a façade for such purposes even though not incorporated with deceptive intent."

Further, it "does not follow that a piercing of the veil will be available only if there is no other remedy available against the wrongdoers for the wrong that they have committed". Furthermore, the "relevant wrongdoing must to be in the nature of an independent wrong that involved the fraudulent or dishonest misuse of the corporate personality of the company for the purpose of concealing the true facts".

Finally, in the Supreme Court, the terms of the contract were upheld. "Assuming" the court had "jurisdiction to pierce the corporate veil" at all, the principle of piercing the veil of incorporation could not be extended to hold that a person controlling the company was "liable as if he had been a co-contracting party, with the company concerned to a contract where the company was a party but he was not". To do so would be contrary to a fundamental principle "on which contractual liabilities and rights are based, namely what an objective reasonable observer would believe was the effect of what the parties to the contract, or alleged contract, communicated to each other by words and actions, as assessed in their context". Even if Mr Malofeev was the person controlling the companies he could not be held liable as if he was a co-contracting party to the facility and other agreements, since "(i) at the time the agreement was entered into, none of the actual parties to the agreement intended to contract with Mr Malofeev, and he did not intend to contract with them, and thereafter, Mr Malofeev never conducted himself as if, or led any other party to believe, he was liable under the agreements."

Then in the Privy Council in *Persad v Singh* [2017] UKPC 32, it was said that it was settled law that "piercing the veil is only justified in very rare circumstances", namely "where a person is under an existing legal obligation or liability, or subject to an existing legal restriction, which he deliberately evades, or whose enforcement he deliberately frustrates by interposing a company under his control". The fact that "the purpose of an individual interposing a company into a transaction was to enable that individual who owned or controlled the company to avoid personal liability, did not justify piercing the veil of incorporation". If it did, "it would make something of a mockery of limited liability both in principle and in practice."

The procedural elements in the decision in *VTB Capital plc* have been applied in Hong Kong.

In *Convoy Collateral Ltd v Cho Kwai Chee* [2020] HKCA 537, the Court adopted the words of *Lloyd* LJ in *VTB Capital v Nutritek International* [2012] 2 CLC 431, at para [177]:

> "… However, where (as here) the dishonesty alleged is at the heart of the claim against the relevant defendant, the court may well find itself able to draw the inference that the making out, to the necessary standard, of that case against the defendant also establishes sufficiently the risk of dissipation of assets."

It could be said that the upsurge in England of decisions on refusing to lift the corporate veil could be the result of the decision in *Prest* by causing a

re-think of the earlier principles but confirming that there is to be no change in those principles.

The question of "dishonesty" was considered in *Ivey v Genting Casinos UK Ltd* [2018] AC 391, SC, where the Supreme Court equated dishonesty at civil law with that of criminal law. On this, generally see *Predicine Holdings v Bianchi (HK) Ltd* [2021] HKCFI 631, and *Americhip Inc v Chu Hongling & Ors* [2021] HKCFI 3530, and Ch 16 of this Book on Dishonest Assistance. See also *Group Seven Ltd v Nasir* [2020] 1 WLR 2663, SC, where the Supreme court refused permission to appeal against the decision in [2019] Ch 129, CA.

¶1-585 Specific performance

Specific performance is a remedy of the court of equity which is granted, primarily, for transactions dealing with land. The plaintiff may approach equity for relief, rather than seeking damages at common law, because not is said that "no two pieces of land are the same", thus only the land I have contracted to buy will achieve performance of the contract: see s 20AB of the *High Court Ordinance* (Cap 4). The remedy is discretionary so the plaintiff must indicate that he is "ready, willing and able" to perform his obligations.

In *Jones v Lipman* (1962) 1 All ER 442, (1962) 1 WLR 832, a landowner agreed to sell a house to a prospective purchaser. Before completion, the owner sold the land to a company of which he and a clerk of his solicitors were sole shareholders and directors. The prospective purchaser sued for specific performance. The court granted specific performance since the company was merely a cloak, and it had been set up "in a deliberate attempt to evade an existing obligation". Further, the former owner of the land [i.e., the company was the vendor in control] was in a position to compel the transfer of the land to the prospective purchaser.

In *Tse Kwong Lam v Wong Chit Sen & Ors* [1979] 1 HKC 121, it was said that:

> "In the end one has to look at practicalities of the matter, whilst recognising that a person may have control of a company although he is only a nominal shareholder and that the legal insignia may be consistent with him having no control. At some time one must remember that what has to be shown is not merely control but such control other facts as demonstrate that the company is a sham – a mere mask to cover acts which, if done by the person himself, would have been improper."

The breach of contract had nothing to do with the company, and thus the facts of the case were not suitable to raise the corporate veil.

¶1-590 Competitive business

In *Gilford Motor Co v Horne* (1933) Ch 935, the managing director of a company covenanted not to solicit customers of the company after leaving its employment. After terminating his employment, he set up his own competing business which he later carried on through the medium of a company. His wife and an employee were sole shareholders and directors.

Per Lord *Hanworth* MR:

> "I am quite satisfied that this company was formed as a device, a strategem, in order to mask the effective carrying on of a business of Mr E B Horne. The purpose of it was to try to enable him, under what is a cloak or sham, to engage in business which, on consideration of the agreement which had been sent to him just about seven days before the company was incorporated, was a business in respect of which he had a fear that the plaintiffs might intervene and object."

The Court, in deciding that the covenant was not too wide, granted an injunction against the company and against Horne.

¶1-595 Agreement of all members

In *Re Express Engineering Works Ltd* (1920) 1 Ch 466, the agreement of all members entitled to vote is equivalent to the consent of the company. Five persons who were the only directors and members of a company resolved at a board meeting to purchase certain property in which they were personally interested. The company's articles disqualified a director from voting at a board meeting in relation to any contract in which he was interested. The liquidator sought to have the transaction set aside. He failed as the unanimous but informal consent of the members was held to bind the company. In the court of first instance, *Ashbury* J had expressed the view that it was immaterial that the assent was obtained at different times, and that it was not necessary that it should be at a meeting of all directors. On appeal, Lord *Sterndale* affirming the decision of *Ashbury* J said that:

> "[T]here being no suggestion of fraud, that the company was bound in a matter *intra vires* by the unanimous agreement of its members. Although the meeting was styled a directors' meeting, all the five shareholders were present, and they might well have turned it into a general meeting, and transacted the same business. In these circumstances the issue of the debentures was not invalid."

Lord *Sterndale* M.R. in *Re Express Engineering Works Ltd* [1920] 1 Ch 466, 470, went on:

> "It was said here that the meeting was a directors' meeting, but it might well be considered a general meeting of the company, for although it was referred to in the minutes as a board meeting, yet if the five persons present had said, 'We will now constitute this a general meeting,' it would have been within their powers to do so, and it appears to me that that was in fact what they did."

¶1-600 Associated companies

In *DHN Food Distributors Ltd v Tower Hamlets London Borough Council* (1976) 1 WLR 852, a company ran a wholesale cash-and-carry grocery business from premises which were owned by its wholly owned subsidiary company which had the same directors. The subsidiary carried on no business,

simply owning the piece of land which the holding company occupied as licensee. The land was compulsorily acquired by the local council and the holding company had to close down its business. The subsidiary obtained compensation for loss of title, but the holding company could only obtain compensation for disturbance of its business if it could show that it had an interest in the land greater than that of a bare licensee. The UK Court of Appeal held that the group of companies should be treated as a single economic entity, and therefore compensation for a disturbance should be paid.

As is was said in *Peregrine Investments Holdings Ltd (In Liq) & Anor v Asianinfrastructure Fund Management Co Ltd LDC & Ors* [2003] HKCFI 912 (on appeal on a different point see [2004] HKCA 115), the company "was controlled in every respect by the parent company", and thus the corporate veil could be pierced.

Section 2(1) of Cap 622 defines "associated company" as meaning:

- a subsidiary of a body corporation,
- the holding company of a bond corporate, or
- a subsidiary of such a holding company (see also s 15 on "subsidiaries"). Note that previously s 16 was relevant; however, it was repealed by s 6 of the *Companies (Amendment) (No 2) Ordinance*, No 35 of 2018, with effect from 1 February 2019.

Generally, the term "associated" has been used as an alternative to "subsidiary" in appropriate circumstances (see *Re Kong Wah Holdings Ltd & Anor (No 2)* [2006] HKCA 149).

See generally *Re Duomatic Ltd* [1969] 2 Ch 365.

Intention of the company

¶1-620 A company's state of mind

The principle of separate legal personality enunciated in *Salomon's case* has obviously raised problems for the courts. Legal thoughts have had to adjust to the legal fiction of a company having a personality and has done so by attributing to companies, conceptually and by analogy, individual attributes in keeping with their functions, including having knowledge and forming intentions.

The steps in this process may be put in this way –

A company:

- is a separate legal entity,

- has no mind of its own (because it is an abstraction),
- can, therefore, only act through its servants and agents, and
- has, through these human agents, a capacity of having knowledge and forming an intention.

Lord *Reid* in *Tesco Supermarkets Ltd v Nattrass* (1971) 2 All E R 127 put it this way (at para 131):

> "I must start by considering the nature of the personality which by a fiction the law attributes to a corporation. A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company. It must be a question of law whether, once the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent. In that case any liability of the company can only be a statutory or vicarious liability…"

Thus, the question that has occupied much of the courts' thought has been which of the company's agents, officers or other servants can have knowledge and intention for the company.

The most often quoted passage on this problem has been Lord *Denning's* famous analogy in *HL Bolton Engineering Co Ltd v TJ Graham & Sons Ltd* (1956) 3 All ER 624 when he said (at para 630):

> "A company may in many ways be likened to a human body. They have a brain and nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind and will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such. So you will find that in cases where the law requires personal fault as a condition of liability in tort, the fault of the manager will be the personal fault of the company."

To which, Lord *Parker* (in *John Henshall (Quarries) Ltd v Harvey* (1965) 1 All ER 725) has added (at para 729):

> "There is no doubt that there are many cases where somebody who is in the position of the brains — maybe a director, the managing director, the secretary or a responsible officer of the company — has knowledge, his knowledge has been held to be the knowledge of the company. It seems to me that that is a long way away from saying that a company is fixed with the knowledge of any servant. Again, to adopt the simile of *Denning* LJ, the knowledge of the hands as opposed to the brains, is not imputed to the company merely because it is the servant's duty to perform that particular task."

Denning LJ's remarks were also commented upon by Lord *Reid* in the *Tesco Supermarkets' case* (at para 132). Lord *Reid* has discussed the directing mind and will of the company, and he continued:

> "In that case the directors of the company only met once a year; they left the management of the business to others, and it was the intention of those managers which was imputed to the company. I think that was right. There have been attempts to apply *Denning* LJ's words to all servants of a company whose work is brain work, or who exercise some managerial discretion under the direction of superior officers of the company, I do not think that *Denning* LJ intended to refer to them. He only referred to those who represent the directing mind and will of the company, and control what it does.
>
> I think that is right for this reason. Normally the board of directors, the managing director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation he can act as the company. It may not always be easy to draw the line but there are cases in which the line must be drawn."

In *Stanfield Properties Ltd v National Westminster Bank plc (London and County Securities Ltd, third party)* (1983) 2 All ER 249, the question of how a company knows was raised. The issue in the case concerned interrogatories. It was held that a director, liquidator or other officer of a company answering interrogatories should seek to find out what the company knows by making inquiries of all officers, servants and agents who might be expected to have some relevant knowledge. As Sir *Robert Megarry* VC said (at para 251):

> "A director or liquidator who answers that he does not know is not answering the question; for the question is what the company knows, not merely what the director or liquidator knows. The person answering the interrogatories is accordingly bound to make all reasonable inquiries which are likely to reveal, or may reveal, what is known to the company."

The phrase "directing mind and will" is used to "impute the acts and mental states of natural persons to corporations". On this see:

- *Emperor Finance Ltd v La Belle Fashions Ltd & Anor* [2003] HKCFA 23;
- *Waddington Ltd v Chan Chun Hoo Thomas & Ors* [2008] HKCFA 63, [2008] HKCLC 295;
- *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705;
- *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685; and
- *Moulin Global Eyecare Trading Ltd (In Liq) v Commissioner of Inland Revenue & Anor* [2011] HKCFI 82 where *Reyes* J discussed the question of attribution of knowledge of a company through its agents.

This phrase "directing mind and will" will no doubt now be replaced by the phrase "responsible person" in identifying the person responsible for acts attributable to the company in certain cases, or the person able to bind the company generally (see s 3 of Cap 622).

Attribution was also referred to in *HKSAR v Lok Kin Peter Joseph* [2016] HKCFA 81 where Lord *Hoffmann* NPJ in the Court of Final Appeal observed that:

> "[40] The third certified question asks whether 'the common law principles' as expressed in two old cases about conspiracy to defraud and theft were applicable to statutory offences under the Ordinance. That suggests that there are uniform common law principles by which one will attribute acts, knowledge, states of mind etc to a company.
>
> [41] In my opinion it cannot be too strongly emphasized that there are no such 'common law principles'. The authorities since *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 and in particular the more recent cases of *Moulin Global Eyecareen Trading Ltd v Commissioner of Inland Revenue* (2014) 17 HKCFAR 218 and *Bilta (UK) Ltd (in liquidation) & Ors v Nazir & Ors (No 2)* [2016] AC 1 make it clear that in every case the criteria for attribution must be such as will give effect to the purpose and policy of the relevant substantive rule, whether that rule is contained in a statute or the common law. The fact that the knowledge or state of mind of, say, a director, must be attributed to a company for the purpose of one rule (for example, imposing liability on the company to a third party) does not mean that his knowledge or state of mind must be attributed to the company for the purpose of a different rule (for example, imposing liability on the director for defrauding the company). In the case of section 9(1) and (2) of the Ordinance, it would be absurd to hold that the knowledge by the directors of their own breach of duty to the company by giving and taking a bribe was to be attributed to the company. That would defeat the purpose and policy of the rule."

The relevant legislation is the *Prevention of Bribery Ordinance* (Cap 201).

¶1-625 Authority of agents

In *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd & Anor* (1964) 2 QB 480, the court said that a company can only act through its agents and officers. According to the court, a company is bound by the contracts made by its agents on its behalf only if they have acted within their actual authority. Besides actual authority the agent also has ostensible or apparent authority to bind the company. While actual authority is the result of a legal relationship between the company and the agent, ostensible or apparent authority is derived from a legal relationship between the company and the other party which is created by or on behalf of the company. And in *Hely-Hutchinson v Brayhead Ltd & Anor* (1968) 1 QB 549, ostensible or apparent authority is the authority that the agent appears to have to the outside world.

When an agent is acting within his ostensible or apparent authority, the company will not be able to claim that he has no actual authority. Usually, a company will be estopped from denying the agents' authority if there was representation by the company to some person that the agent in question had authority to do the act and that the representation was made by someone who was authorised to make the representation on behalf of the company.

In *Akai Holdings (In Liq) v Kasikornbank PCL* [2010] HKCFA 63, an officer of a company, purporting to be an agent of the company entered into a contract with the bank under which a third party would benefit from an advance, and in so doing deposited shares of the company as security for repayment of the loan. On default the bank sold the shares. It was held by the Court of Final Appeal that the bank had acted not dishonesty, but irrationally, (by recklessness or willful blindness), as to whether or not the officer had power to bind the company. Accordingly, the transaction was void, and the bank was liable in conversion to the company.

¶1-630 Combined knowledge of officers

The term "officer" is defined in s 2(1) of Cap 622 to refer to "in a body corporate, includes a director, manager and company secretary of the body corporate".

In an Australian case, *Brambles Holdings Ltd v Carey* (1976) 2 ACLR 176, *Bray* CJ said that:

> "[I]t is fallacy to say that any state of mind to be attributed to a corporation must always be the state of mind of one particular officer alone and that the corporation can never know or believe more than that one man knows or believes. This cannot be so when it is a case of successive holders of the office in question or of the holder of the office and his deputy or substitute during his absence. Let us suppose that a piece of information, x, is conveyed to one office of the company, A. Then A goes on holidays and B takes his place and a further piece of information, y, is communicated to him. It is a fallacy to say that the company does not know both x and y because he is told about y to find out about x. I hasten to add that although I think a corporation has

> in a proper case the combined knowledge or belief possessed by more than one of its officers, that does not mean that it can know or believe two contradictory things at once. It is rational belief, not schizophrenia, which is to be attributed to it."

Attribution is the principle that can be described as:

> "[94] Not being a natural person, the state of a company's knowledge at any specific time can only be determined by attributing the knowledge of a relevant natural person to the company. For the purpose of such attribution, who is a relevant natural person?"

(See *Moulin Global Eyecare Trading Ltd (In Liq) v Commissioner of Inland Revenue & Anor* [2011] HKCFI 82, per *Reyes* J at para 94.)

It was said then that the Memorandum and Articles of Association generally will set out the company's primary rules of attribution. Alternatively, and in addition, these rules can be set out in legislation.

An exception to the general rule of attribution is found in *Re Hampshire Land Co* [1896] 2 Ch 743 (Ch D) to the effect that the company's agent in defrauding will not be attributed to the company because "it would be fanciful to expect an agent to disclose to (rather than conceal from) the company that agent's deliberate act of fraud or breach of duty aimed at harming the company." (para 103)

There have been several overseas decisions identifying an "officer" of a company, primarily in relation to situations where the officer's action have sought to be attributed to the company. Section 3 of the *Companies Ordinance* (Cap 622) refers to a "responsible person" and the circumstances in which his action results in the liability of the company. A "responsible person" in this section is one who is "an officer or shadow director of a body corporate of the company or non-Kong Kong company" (s 3(3)(a)) and acts within the terms of s 3(3)(b) and (c). Section 2 of Cap 622 defines an "officer" in relation to a body corporate as including a "director, manager or company secretary of the body corporate".

In *Australian Securities and Investments Commission v King* [2020] HCA 4, then court considered s 9 of the *Corporations Act 2001* (Commonwealth). The definition in s 9 of "officer of a corporation" includes "a director or secretary of the corporation, or a person who makes or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation" (s 9(a)(b)(1)). Section 9(b)(ii) and (iii) expand the person involved to include, *inter alia*, ''who has the capacity to affect significantly the corporation's financial standing".

In considering the terms of the section, the High Court noted that action (b)(i) and (ii) "captured those persons who do not hold an office within the company but who are engaged in the corporation's decision-making qua management".

When considering an "officer" as acting in the sense of "a recognised position with rights and duties attached to it". The section was considered to officer in this case who although not holding a formal executive role at the time of the transaction with capacity to affect significantly the financial standing of the company who actively intervened in the business of the company.

Two members of the Court identified three factors relevant to identification of an "officer" as:

- identification of the role of a person in relation to the corporation,
- what they did or did not do to fulfil that role, and
- the relationship between their actions or inaction and the financial standing of the corporation.

Criminal liability of companies

¶1-650 Company's criminal intent

A company's capacity to have knowledge or intention has most often been at issue in those cases where companies have been charged with a criminal offence, although, of course, it must be taken as an everyday occurrence that a company intends legal relations in its contracts (cf *Kleinwort Benson Ltd v Malaysia Mining Corp Bhd* (1988) 4 BCC 217, CA (Eng)). That decision concerned a Letter of Comfort given by a parent company, where it would not guarantee the obligations of a subsidiary; it was held:

> "a letter of comfort from a parent company to a lender stating that it was the policy of the parent company to ensure that its subsidiary was 'at all times in a position to meet its liabilities' in respect of a loan made by the lender to the subsidiary did not have contractual effect if it was merely a statement of present fact regarding the parent company's intentions and was not a contractual promise as to the parent company's future conduct. On the facts, para 3 of the letters of comfort was in terms a statement of present fact and not a promise as to future conduct and in the context in which the letters were written was not intended to be anything other than a representation of fact giving rise to no more than a moral responsibility on the part of the defendants to meet M's debt."

The Court found that the letter *excluded* an intention to be legally bound (cf *Banque Brussels Lambert SA v ANI Ltd* (1989) 21 NSWLR 502).

In a more recent decision involving a lease where the tenant sought an option to renew, but this was expressly rejected by the lessor (*Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* (2016) 333 ALR 384). On the termination of

the lease, the tenant sought to exercise an option based on estoppel claimed to result from a statement of the landlord at the time of entry into the lease that the tenant "would be looked after at renewal time". However, the High Court of Australia held that there was no such interest:

> "The tenants' representative did not act upon an expectation that the tenants would be granted renewed leases on terms acceptable to them. The statement which was found to have been made could not reasonably have engendered the expectation on which he claimed to have acted. No one in his position could reasonably have understood the statements found to have been made to him as an assurance renewal of the leases for 5 years on the same terms and conditions as had been agreed in the leases or on terms reasonably corresponding to those terms. In the course of the negotiations, the landlord had explicitly rejected a promise of a renewal of the leases; it refused to bind itself to renewal of the leases on terms acceptable to the tenants or at all. Any claim based on estoppel was bound to fail."

Further, the Court held that there was no collateral contract able to be enforced to give effect to the tenants claim for an option to renew.

The difficulty arose out of the criminal law doctrine of *mens rea* or the guilty mind. Criminal liability requires both *mens rea* and *actus reus*. In most criminal cases, at least in those involving common law crimes, the onus was on the prosecution to prove the guilty intent. In *Mousell's case* (1917) 2 KB 836 and *DPP v Kent & Sussex Contractors Ltd* (1944) 1 All ER 119, the courts, therefore, had the difficult problem of deciding whether or not a company was capable of such intent. However, they did so decide, and it is now regarded as well-established that a company can be criminally liable even if the offence involves proof of intent. In such cases, the guilty mind of the person who acts or speaks for the company is the guilty mind of the company itself.

It was to this point that Lord Reid was addressing himself in the quotation from the *Tesco Supermarkets' case* (1971) 2 All ER 127:

> "It must be a question of law whether, after the facts have been ascertained, a person in doing particular things is to be regarded as the company or merely as the company's servant or agent."

Only if it can be decided that the particular person in question is "an embodiment of the company", hearing and speaking through the persona of the company, only if it can be said that his mind is the mind of the company, can the company be liable for an offence involving *mens rea*. Or, as Lord *Reid* put it (at para 134):

> "I think that the true view is that the judge must direct the jury that if they find certain facts proved then as a matter of law they must find that the criminal act of the officer, servant or agent including his state of mind, intention, knowledge or belief is the act of the company."

As to a comment made from the bench in an earlier case to the effect that whether there was evidence to go to a jury depended not only on the state of mind, knowledge and belief of the company's agent but also on the nature of the charge, Lord *Reid* said (at para 134):

> "I do not see how the nature of the charge can make any difference. If the guilty man was in law identifiable with the company then whether his offence was serious or venial his act was the act of the company but if he was not so identifiable then no act of his, serious or otherwise, was the act of the company itself."

In *R v Her Majesty's Coroner for East Kent, ex parte Spooner & Ors* (1987) 3 BCC 636, the Court of Appeal has been prepared, rather tentatively, to assume that a company can be indicted for manslaughter. However, the question had not been fully argued and the court did not find it necessary to reach a final conclusion.

See also:

- *Regent National Enterprises Ltd v Goldlion Properties Ltd & Ors* [2009] HKCFA 58;
- *Akai Holdings (In Liq) v Kasikornbank PCL* [2010] HKCFA 63; and
- *Moulin Global Eyecare Trading Ltd (In Liq) v Commissioner of Inland Revenue & Anor* [2011] HKCFI 82.

The Court of Final Appeal in *HKSAR v Choi Wai Lun* [2018] HKCFA 18 in a prosecution under the *Crimes Ordinance* (Cap 200) has made some general comments relevant to offences under other legislation:

> "[34] … [A] statutory offence is presumed to require proof of *mens rea* unless the presumption is displaced expressly or by necessary implication. Whether such displacement occurs is a matter of statutory construction requiring examination of the statutory language; the nature and subject-matter of the offence; the legislative purpose and any other matters indicative of the statutory intent.
>
> [35] As pointed out in *Hin Lin* Yee, the availability of intermediate bases of liability inevitably influences the approach to deciding whether a dislodging of the presumption is intended. A court may recoil from imposing absolute liability for a particular offence and so hold against displacement, while it may be prepared to hold that the presumption is supplanted in favour of the second or third *Kulemesin* alternative…
>
> …
>
> [41] Absolute liability is primarily imposed for what are essentially regulatory offences rather than serious criminal offences, and then only where some useful purpose (such as encouraging preventive safety measures) may be served by the imposition of such liability… before concluding that an offence is one of absolute liability, it is necessary to consider whether the statutory purpose can be sufficiently met by

> construing it as laying down a less draconian, intermediate form of liability. Absolute liability should only be resorted to if the answer is in the negative."

In *HKSAR v Yeung Sing Carson* [2016] HKCFA 52, the Court of Final Appeal observed that:

> "[108] … [T]he starting-point is the abovementioned principle that section 25(1) requires proof that the defendant had the requisite reasonable grounds to believe. In this context, it is important to appreciate that an examination of the defendant's state of mind may be relevant for two purposes.
>
> [109] The first is inculpatory…
>
> [110] The defendant's state of mind is assessed for the inculpatory purpose of asking whether, on the reasonable grounds proven to have been available to him, he would have been led to have the requisite belief. His knowledge or appreciation of the circumstances which supply such grounds provide the element of moral blameworthiness...
>
> [111] The second is an exculpatory purpose. Thus, it … was wrong to exclude from consideration … 'the personal beliefs, perceptions and prejudices' of the accused… such matters fit readily within the concept of a 'ground' which a particular person can be said to have 'had' and which may be such as to exclude a culpable state of mind."

That decision concerned prosecution for dealing with the proceeds of money laundering under the *Organised and Serious Crimes Ordinance* (Cap 455).

In *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 Ac 500, PC, it was said by Lord *Hoffmann* that that different rules should apply in different circumstances, depending on the rule of law which is being applied. This factor is thus relevant in relation to the different sources of liability.

¶1-655 Strict liability offences

The problem of a company's liability for an offence is, however, further confused by various statutes which impose a duty on persons (which includes companies) the non-performance of which is made a criminal offence without any requirement of *mens rea*. Strict liability prevents reliance on any defence.

Again, the position is explained by Lord *Reid* in the *Tesco Supermarkets' case* (at para 130):

> "Over a century ago the courts invented the idea of an absolute offence. The accepted doctrines of the Common Law put them into a difficulty. There was a presumption that when Parliament makes the commission of certain acts an offence it intends that *mens rea* shall be a constituent of that offence whether or not there is any reference to the knowledge or state of mind of the accused. And it was and is held to be an invariable

> in rule that where *mens rea* is a constituent of any offence the burden of proving *mens rea* is on the prosecution … For the protection of purchasers or consumers Parliament in many cases made it an offence for a trader to do certain things. Normally those things were done on his behalf by his servants and cases arose where the doing of the forbidden thing was solely the fault of a servant, the master having done all he could to prevent it and being entirely ignorant of its having been done. The just course would have been to hold that, once the facts constituting the offence had been proved, *mens rea* would be presumed unless the accused proved that he was blameless. The courts could not, or thought they could not, take that course. But they could and did hold in many such cases on a construction of the statutory provision that Parliament must be deemed to have intended to depart from the general rule and to make the offence absolute in the sense that *mens rea* was not to be a constituent of the offence.
>
> This has led to great difficulties…"

What the legislature sometimes does in relation to these absolute offences is to allow a defence for the accused to prove that he (or in the case of a company, it) was no party to the offence and had done all that could be done to prevent it. As Lord *Reid* saw such provisions, their main object:

> "must have be to distinguish between those who are in some degree blameworthy and those who are not, and to enable the latter to escape from conviction if they can show that they were in no way to blame".

This clearly raises a different problem from the earlier one of whether the company had a guilty intent; rather it involves determining whose failure to observe proper diligence or whose lack of care within the company meant that the company had failed to do all it could to prevent the offence. If, e.g., the defence provision allows a person charged to prove that he took all reasonable precautions and exercised all due diligence to avoid commission of such offence by himself and any person under his control, is it reasonable for a limited company charged with the offence to argue that failure to exercise due diligence on its part would only occur where the failure was that of a director or senior manager in the actual context of the company's operations who could be identified with the controlling mind or will of the company? In other words, just as an office boy's mind cannot be the directing mind of the company, can his failure to exercise diligence (in contravention of instructions) be a failure by the company to exercise due diligence? The *Tesco Supermarkets' case* is authority for the proposition that the company could set up the defence of due diligence where – in a large scale business the board set up a chain of authority through regional and district managers and its shop managers had to obey general directions from the board and take orders from their superiors, and where the board had exercised due diligence in instituting an effective system to avoid the commission of the offence in question – the failure of one shop manager to properly supervise his subordinates in carrying out the system was not the act of the company itself.

Lord *Diplock* had this to say on the general question of strict liability and of the availability of the defence of due diligence under it (at para 158):

> "Where Parliament in creating an offence of 'strict liability' has also provided that it shall be defence if the person on whom the duty is imposed proves that he exercised all due diligence to avoid a breach of the duty, the clear intention of Parliament is to mitigate the injustice, which may be involved in an offence of strict liability, of subjecting to punishment a careful and conscientious person who is in no way normally to blame. To exercise due diligence to prevent something being done is to take all reasonable steps to prevent it. It may be a reasonable step for an employer to instruct a superior servant to supervise the activities of inferior servants whose physical acts may in the absence of supervision result in that being done which it is sought to prevent. This is not to delegate the employer's duty to exercise all due diligence; it is to perform it. To treat the duty of an employer to exercise due diligence as unperformed unless due diligence was also exercised by all his servants to whom he had reasonably given all proper instructions and on whom he could reasonably rely to carry them out, would be to render the defence of due diligence nugatory and so thwart the clear intention of Parliament in providing it."

In *Hin Lin Yee & Anor v HKSAR* [2010] HKCFA 11, the court referred to the following:

> "[10] In many cases of statutory offence, the legislative policy may be such that offences are created by statute where it is clearly intended that criminal liability is imposed upon proof of the prohibited act or activity and the accused is not allowed to rely on any defence or to show that he is free from fault. These are sometimes described as absolute liability offences (although some would also loosely call them strict liability offences). This happens when, upon a proper construction of the statute in question, the court holds that the presumption of *mens rea* has been displaced. In some cases, however, in order to alleviate the harshness on the accused charged with an offence which does not require proof of *mens rea* in respect of the elements of *actua reus* and thus running the risk of being convicted without any fault on his part, the courts are inclined to allow the accused to rely on the common law defence by showing that he had an honest and reasonable belief in a state of facts which, if they exist, would make the prohibited act innocent…"

However, on the facts of that case, involving breach of the *Public Health and Municipal Services Ordinance* (Cap 132), it was not necessary for the prosecution to prove *mens rea* so that the common law defence was not available to the defendants.

And see *HKSAR v Lor Wai Por* [2010] HKCFI 643 where the sole director of a one-member company was treated by s 2 (definition) and s 65 of the *Employment Ordinance* (Cap 57) as the "employer" for the purposes of action against him for failure to pay the salary of employees.

In *HKSAR v Choi Wai Lun* [2018] HKCFA 18, the Court of Final Appeal referring to absolute liability in a prosecution under the *Crimes Ordinance* (Cap 200) made some general points to the effect:

> "[39] Absolute liability departs from basic common law principles of criminal responsibility which generally require some degree of knowledge or intention to accompany the prohibited conduct. As this Court recognised:
>
> > '...it is in principle objectionable, especially where the offence is serious, that a person should be made criminally liable where he did not deliberately or recklessly engage in the prohibited conduct or where he was ignorant of circumstances making his conduct criminal or where he acted harbouring an honest and reasonable belief inconsistent with liability.'
>
> [40] It is thus never lightly to be inferred that the legislature intended to create an offence of absolute liability since, as Lord Reid put it: '... someone could be convicted of it who by all reasonable and sensible standards is without fault.'
>
> [41] Absolute liability is primarily imposed for what are essentially regulatory offencee rather than serious criminal offences, and then only where some useful purpose (such as encouraging preventive safety measures) may be served by the imposition of such liability. As was made clear in *Hin Lin Ye* and *Kulemesin* before concluding that an offence is one of absolute liability, it is necessary to consider whether the statutory purpose can sufficiently be met by construing it as laying down a less Draconian, intermediate form of liability. Absolute liability should only be resorted to if the answer is in the negative."

In *HKSAR v Leung Chung Hang Sixtus* [2021] 2021 HKCFA 24, the Court of Final Appeal spelt out the principles of *Hin Lin Yee* and *Kulemesin*, noting that:

> "B.1 The principles laid down by *Hin Lin Yee* and *Kulemesin*
>
> [9] The required mental state of any given statutory offence is a matter of statutory construction. In that exercise, the principle of the presumption of *mens rea* may be engaged but it is important to note, as was pointed out in *Hin Lin Yee*, that not every case raises that presumption or involves consideration of the alternative categories identified in that decision (as later refined in *Kulemesin*). As Ribeiro PJ observed in *Hin Lin Yee*:
>
> > 'What, if any, mental state is required is a matter of statutory construction. The statute may of course be specific, saying for instance that the act must be done 'wilfully', 'knowingly', 'negligently', 'without due care and attention' and the like. It may go further and lay down a requirement not merely of a basic intent but also a specific intent: the alleged burglar, for example, must be shown to have (intentionally) entered a building as a trespasser with the specific intent of stealing or committing one of the other

named offences when inside. Such provisions pose no problems beyond having to resolve possible arguments as to the scope of the words used and their proper application to the facts.'

[10] The principles discussed in *Hin Lin Yee* and *Kulemesin* are only applicable where 'the provision which creates the offence is silent or ambiguous as to the state of mind required.' It is in those cases that the presumption of *mens rea* arises, with the starting point being 'that the statute must be construed adopting the presumption that it is incumbent on the prosecution to prove *mens rea* in relation to each element of the offence' and, to that extent, supplementing the text of the statutory language.

[11] However, the presumption is merely a starting point because it is 'equally firmly established that a statute may, on its proper construction, displace the presumption of *mens rea* expressly or by necessary implication.' So the first question of construction arising is whether the presumption is to be maintained or displaced: *Hin Lin Yee* at [45] and [98]; *Kulemesin* at [40]. And if it is determined to be so displaced, Hin Lin Yee requires that a second question be considered in tandem, namely: 'By what, if any, mental requirement is the supplanted requirement of *mens rea* to be replaced?'

[12] As reformulated in *Kulemesin*, there are five constructional choices that present themselves as possible alternatives when asking, in tandem, the questions 'has the presumption of *mens rea* been displaced' and 'if so, by what'. Those five alternatives are:

'(a) First, that the *mens rea* presumption persists and the prosecution must prove knowledge, intention or recklessness as to every element of the offence ('the first alternative');

(b) Second, that the prosecution need not set out to prove *mens rea*, but if there is evidence capable of raising a reasonable doubt that the defendant may have acted or omitted to act in the honest and reasonable belief that the circumstances *or likely consequences* of his conduct were such that, if true, liability would not attach, he must be acquitted unless the prosecution proves beyond reasonable doubt the absence of such exculpatory belief or that there were no reasonable grounds for such belief ('the second alternative');

(c) Third, that the presumption has been displaced so that the prosecution need not prove *mens rea* but that the accused has a good defence if he can prove on the balance of probabilities that he acted or omitted to act in the honest and reasonable belief that the circumstances *or likely consequences* of his conduct were such that, if true, he would not be guilty of the offence ('the third alternative');

(d) Fourth, that the presumption has been displaced and that the accused is confined to relying on the statutory defences expressly provided for, the existence of such defences being inconsistent with the second and third alternatives mentioned above ('the fourth alternative'); and

(e) Fifth, that the presumption is displaced and the offence is one of absolute liability so that the prosecution succeeds if the prohibited act or omission is proved against the accused, regardless of his state of mind regarding the relevant elements of the offence in question ('the fifth alternative').'

[13] Thus, where the Court holds that the presumption of *mens rea*, in terms of intention, knowledge or recklessness, is displaced on the proper construction of the statute in a given case (i.e. that the first *Kulemesin* alternative does not continue to apply), it will then go on to decide as a further matter of statutory construction which of the second, third, fourth or fifth *Kulemesin* alternatives applies. That construction will have regard to the nature and subject-matter of the offence, its seriousness in terms of penalty and social obloquy, the need to ensure protection of the public, the practicalities of prosecution and conviction, the extent to which the defendant might solely have access to relevant information, and so on. In *Hin Lin Yee* and *Kulemesin*[16], there is discussion of these considerations as they related to the particular statutory offences in those cases." [*Fok* PJ, with *Cheung* CJ, *Ribeiro* PJ, and *Stock* and *French* NPJJ agreeing]

See also *HKSAR v Cho Ting Kai* [2021] HKCFA 39 where leave to appeal to the Court of Final Appeal was refused.

¶1-660 Exceptions to liability

A company can in broad terms be charged with an offence. This general rule however is subject to two clear exceptions, namely offences:

- which by their nature cannot be committed by an artificial legal person (e.g., bigamy, rape and incest), and
- for which the punishment is such that even on a conviction, sentence could not be passed (e.g., an obligatory sentence of imprisonment, such as for murder, although note that in *R v Her Majesty's Coroner for East Kent, ex parte Spooner & Ors* (1987) 3 BCC 636, the Court of Appeal was prepared, without the point having been fully argued, that a company can be indicted for manslaughter).

¶1-690 Tortious liability of companies

A company, like any other employer, is liable for the torts of its employees committed in the course of their employment. In *Ming An Insurance Co (HK) Ltd v The Ritz-Carlton Ltd* [2002] HKCFA 34, it was said that the "course of employment" could be extended to cover acts which were "so closely

connected with his employment that it would be fair and just to hold the employer vicariously liable".

Furthermore, a company may well be held liable for a tortious act of an employee committed in the course of pursuing an *ultra vires* object.

In *Mancetter Developments Ltd v Garmanson Ltd & Anor* (1986) 2 BCC 98,924, CA, it was held that a director who authorises company employees to commit a tort may incur personal liability for doing so, but not for actions committed by the employees which he has not authorised.

In *Williams & Anor v Natural Life Health Foods Ltd & Anor* [1998] 2 All ER 577, the House of Lords observed that:

> "A director of a limited company would only be personally liable to plaintiffs for loss which they suffered as a result of negligent advice given to them by the company, if he had assumed personal responsibility for that advice and the plaintiffs had relied on that assumption of responsibility. Whether there had been such an assumption of responsibility was to be determined objectively, so that the primary focus had to be on exchanges (including statements and conduct) between the director and the franchisees. Moreover, the test of reliance was not simply reliance in fact, but whether the plaintiffs could reasonably rely on the assumption of responsibility."

In relation to the liability of "administrators" of a company (in the context in England of insolvency) where a comparison was made to that of a "director", it was said, in *John Smith & Co (Edinburgh) Ltd v Hill & Ors* [2010] 2 BCLC 556, Ch, that:

> "[34] The factual uncertainty referred to above prevents a clear conclusion at this stage about the second issue, namely whether the Administrators' participation in the process which led to the retention of the scaffolding during the temporary suspension of the development works at the Property was sufficient to render them personally liable for any nuisance thereby caused. Speaking generally, a person who causes or commits a nuisance does not avoid liability by pleading that he did so as an agent for, or upon the authority of some other person: see *Re Goldburg* (*No 2*) [1912] 1 KB 606.
>
> [35] Similarly, where a director instructs a company's employee to commit a tort, the director will generally be personally liable: see *Mancetta Developments Ltd v Garmanson* [1986] QB 1212. The editors of Lightman and Moss on the Law of Administrators and Receivers of Companies (2007) suggest, at paragraph 9-029, that the law treats administrators no differently from directors in that respect.
>
> [36] Nonetheless, in *MCA Records Inc v Charly Records Ltd* [2001] EWCA Civ 1441, the Court of Appeal held that where a director does no more than carry out his constitutional role in the governance of a company, or exercises control through the constitutional organs of the company, he may not incur personal liability in circumstances where the company,

thus controlled, commits a tort: see per Chadwick LJ at paragraphs 48 to 50. Earlier, at paragraph 47 Chadwick LJ cited with approval the following extract from the judgment of Le Dain J giving the judgment of the Federal Court of Appeal of Canada in *Mentmore Manufacturing Co Ltd v National Merchandising Manufacturing Co Inc* (1978) 89 ELR 3d 195, at 202:

> 'On the one hand, there is the principle that an incorporated company is separate and distinct in law from its shareholders, directors and office holders, and it is in the interests of the commercial purposes served by the incorporated enterprise that they should as a general rule enjoy the benefit of limited liability afforded by incorporation. On the other hand, there is the principle that everyone should be answerable for his tortious acts.'

And (at paragraph 15 in Mentmore), he continued:

> 'Enquiries into the matter will or may involve an 'elusive question' turning on the particular facts of the case, and whose resolution may in turn involve the making of a policy decision as to the side of the line on which the case ought to fall.'

[37] Administrators are vested with the control of a company in administration not through its ordinary constitutional organs such as general meetings or directors' meetings, but by a statutory code. There is as yet no authority (or at least none to which I was referred) which addresses the issues outlined in the *MCA Records* case by reference to administrators rather than directors. Again, this is therefore a case in which it would be preferable for the facts relating both to the question whether or not a nuisance was caused in the present case and, if so, precisely by what process of intervention by the Administrators into the Urbis companies' affairs, to be finally determined at trial before the issue as to the Administrators' personal liability is determined."

¶1-710 Malice in civil cases

In certain torts (civil wrongs) malice is an essential ingredient and a company in such cases may be held liable for the actions of its servants in the course of their employment. In other words, if in an action against a company it is necessary for a plaintiff to prove malice on the part of the company; he may do so by proving malice in a responsible officer of the company acting within the course of his employment.

Thus, e.g., in an action for malicious prosecution brought against a company, judgment may be given against the company if on the facts it is found that the employee of the company who instituted the prosecution did so maliciously. In such a case the responsibility for the malicious prosecution may be imputed to the company acting through its agent.

The classic passage regarding questions of this kind is in the judgment of *Willes* J in *Bayley v Manchester, Sheffield and Lincolnshire Railway Co* (1872) LR 7 CP 415 (at para 420):

> "A person who puts another in his place to do a class of acts in his absence, necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so entrusted either in the manner and doing such an act, or in doing such an act under circumstances in which it ought not to have been done; provided that what was done was done, not from any caprice of the servant, but in the course of the employment."

It will be observed that *Willes* J made the point that if an act be done from a servant's caprice, it may prove that it is not done in the course of employment. If for instance in an action for libel the defamatory matter is published for the purpose of gratifying the personal will of the servant, such a circumstance may tell against the finding that the publication was in the course of the servant's employment.

In referring to, and contrasting, various improper actions, the definition of "malice" given in *Chau Siu Woon & Anor v Cheung Shek Kong* [2010] HKCA 107, [2010] 3 HKLRD 49, was that:

> "[14] …Improper motives are associated with a power being exercised fraudulently or dishonestly; malice happens when the decision maker is motivated by personal animosity towards those who are directly affected by the exercise of power… An example of bad faith was vindictiveness.
>
> [15] … [B]ad faith is a strong accusation not lightly to be alleged and which is difficult to prove. It is also usually unnecessary given more familiar alternatives such as bias and improper motive. In the context of the tortious action of misfeasance in public office, of which improper motive is an essential ingredient, the term is used synonymously with malice and bad faith..."

Types of companies

¶1-800 Classification of companies

Companies may be classified in various ways. For example, they can be classified according to the extent of the liability of the members (ss 7-10 of *Companies Ordinance* (Cap 622)):

- companies limited by shares,
- companies limited by guarantee without a share capital, and
- unlimited companies.

Besides the above classification, there is also the equally important distinction between public companies and private companies. The *Companies Ordinance* also recognises the existence of holding and subsidiary companies (see ss 13 and 15 of Cap 622; see also ¶1-510).

¶1-820 Company limited by shares

A company limited by shares is a company in which the liability of its members is limited to the amount, if any, unpaid on the shares held by them (ss 8 and 66 of Cap 622). For example, if a shareholder purchases shares worth HK$10,000, but pays only HK$5,000 at the time of issue, the company may subsequently require the shareholder to pay the balance of HK$5,000. If the shares are fully paid up, then, in principle, the shareholder has no further liability to contribute to the company in the event that it requires further funding to discharge its debts.

¶1-840 Company limited by guarantee

A company limited by guarantee retains, throughout its life, the right to receive from all members the amount which they have undertaken to contribute, in the event of the company being wound up (ss 9 and 66 of Cap 622). A company limited by guarantee may not have a share capital. For example, the members may undertake "to contribute such sum as may be required, not exceeding HK$100".

Amounts called and received from members are for the payment of the company's debts and the costs of winding up. If the subscriptions of members at the time of winding up are not sufficient, the company may call for contributions from persons who ceased to be members no more than one year before the winding up (see ss 170(1)(a) and (c) of the *Companies (Winding-Up and Miscellaneous Provisions) Ordinance* (Cap 32)). Subscriptions from persons who have ceased to be members may only be used for the payment of debts which were incurred by the company while they were members (s 170(1)(b) of Cap 32).

¶1-860 Unlimited companies

An unlimited company is a company in which there are no limits on the liability of members (s 10 of Cap 622). An unlimited company may or may not have share capital.

For members of an unlimited company with share capital, shares in the company represent a valuable form of security comprising various rights and obligations which are capable of being transferred, pledged or charged. In the event of a winding up of a company which is solvent, share capital ranks for repayment to the extent of the sum subscribed, together with a proportionate sum of any surplus then remaining. However, where an unlimited company becomes insolvent, then those holding its shares are liable to contribute any amount unpaid on their shares, as well as any additional amount necessary to discharge the company's debts and the costs of its winding up. Members are liable to contribute amounts proportionate to their shareholdings.

In the case of an unlimited company without share capital which becomes insolvent, the members are required to make unlimited, equal contributions to discharge the company's debts and expenses. If any members default in making contributions, the other members will be liable to contribute additional amounts to account for the contributions not forthcoming from the defaulting members.

If the contributions of current members are not sufficient to discharge an unlimited company's debts and expenses upon winding up, the company may call for contributions from persons who ceased to be members no more than 12 months before the winding up (ss 170(1)(a) and (c) of Cap 32). Subscriptions from persons who have ceased to be members may only be used for the payment of debts which were incurred by the company while they were members (s 170(1)(b) of Cap 32).

¶1-880 Private companies

Companies incorporated under the *Companies Ordinance* (Cap 622) fall into two categories – private or public. A private company (as defined in s 11 of Cap 622) is a company with (and usually limited by) share capital which, by its articles of association:

- restricts a member's right to transfer its shares,
- prohibits an offering of its shares for public subscription,
- restricts the number of its members to 50, and
- is not a company limited by guarantee.

It is relatively rare for a private company to be substantially capitalised. The private company is the vehicle preferred by small traders or partnerships whose owners wish to retain full control over the company but also wish to restrict their personal liability. The vast majority of Hong Kong incorporated companies are private companies.

Private companies are subject to a less demanding reporting regime in several areas. In particular, a private company is not required to submit annual audited accounts with its annual return. The shareholders of a private company also have the power to waive certain accounts requirements

including the requirement that accounts show a true and fair view of the company's affairs (see ss 359-366 of Cap 622 on exemption from certain filing requirements).

Note that ss 359, 360, 365 to 366 have been amended by the *Companies (Amendment) (No 2) Ordinance* No 35 of 2018 with effect from 1 February 2019. Section 359 (2)(b)(ii) and (3)(b)(ii) have been amended; s (3A) has been inserted by s 33 of No 35 of 2018. Section 360(2)(3) and (5) have been amended by s 4 of No 35 of 2018. Section 364 (2) has been amended by s 35 of No 35 of 2018. Section 365 (2) has been amended by s 36 of No 35 of 2018. Section 366 (2) has been amended by s 37 of No 35 of 2018.

Note that s 359 has been extensively amended by the *Companies (Amendment) (No 2) Ordinance 2018* with effect from 1 February 2019.

Each of the three restrictions set out in s 11 of Cap 622 must continue to apply for a company to continue to be a private company. The annual return of a private company requires annual certification that the company has continued to comply with s 11.

A unique feature of Hong Kong company law is that the majority of companies, private and public, are family companies.

¶1-900 Public companies

Any company whose articles do not contain the restrictions prescribed in s 11 of Cap 622 is a public company. Companies limited by guarantee and unlimited companies without share capital are always regarded as public companies because, to be a private company, a company must have share capital.

An unlimited company with share capital may be technically regarded as a private company if its Articles contain the restrictions set out in s 11 (see also the *Companies (Model Articles) Notice* (Cap 622H)).

Public companies with share capital may allow the unrestricted transfer of their shares and are permitted to make unrestricted offerings of shares to the public, subject to strict prospectus requirements. The membership of a public company need not be restricted.

A public company is subject to a stricter reporting and disclosure regime than a private company. Audited accounts are required to be filed with annual returns and are open for inspection by the public.

Most public companies with share capital are listed on public stock exchanges (i.e., they are "listed companies"). Certain companies choose not to list. This may be because they have in substance all the features of a private company but wish to allow more than 50 people to hold their shares, or due to specific legislative requirement (e.g., a company wishing to undertake trustee business and include the word "Trust" or "Trustee" in its name is required to register under the *Trustee Ordinance* (Cap 29), whose

requirements demand that it be a public company with a restricted range of objects).

¶1-920 Holding and subsidiary companies

The term "holding company" is not directly defined. Instead, s 15 of Cap 622 refers to a company which is a subsidiary of another company, that other company being the holding company.

Under s 13 (1), a company is deemed to be a subsidiary of another company if that other company:

- controls the composition of the board of directors. The composition of the board of directors is deemed to be controlled under s 13(3) if the holding company can appoint or remove all or a majority of the directors of its subsidiary,
- controls over half of the voting power of the subsidiary, or
- holds more than half of the issued share capital (excluding any part of it which carries no right to participate beyond a specified amount in a distribution in either profits or capital). A corporation is also deemed to be a subsidiary if it is a subsidiary of a holding company that is itself a subsidiary. (s 15 of Cap 622)

¶1-940 Differences between private and public companies

The table below summarises some of the differences between private and public companies. Commentary on the different types of companies can be found in ¶1-800 to ¶1-920.

Private companies	*Public companies*
Transfer of shares restricted.	For listed companies, transfer of shares not restricted.
Number of members limited to not more than 50.	No restriction in number of members.
Cannot invite public to subscribe for shares or debentures.	No restriction as to inviting the public to subscribe for shares or debentures so long as prospectus requirements are observed.
No need to register a prospectus before allotting shares.	Must register a prospectus before shares are offered to the public. On this see the *Companies (Winding-Up and Miscellaneous Provisions) Ordinance* (Cap 32).
Can commence business immediately upon incorporation.	Can commence business only when the Registrar of Companies issues a certificate to commence business.

Private companies	*Public companies*
Not subjected to rules in the Stock Exchange listing rules.	Listed companies must observe Stock Exchange listing requirements

Administration

¶2-000 Companies Registry and Business Registration Office

The Companies Registry ("CR") is the government body responsible for the registration of companies. The Business Registration Office ("BRO"), as part of the Inland Revenue Department, is the government body responsible for issuing business registration certificates to businesses.

The law relating to companies and businesses is found in:

- the *Companies Ordinance* (Cap 622);
- the *Companies (Winding-up and Miscellaneous Provisions) Ordinance* (Cap 32);
- various Companies Regulations, e.g., the *Companies (Words and Expressions in Company Names) Order* (Cap 622A), and the *Companies (Fees) regulation* (Cap 622K);
- the *Business Registration Ordinance* (Cap 310); and
- other related legislation and subsidiary legislation.

The *Companies (Amendment) Ordinance 2010* provided that thereafter the application for incorporation has been jointly implemented by application for business registration. This process may now also be effected electronically under the electronic service portal of the companies registry, namely the "e-registry" at "www.eregistry.gov.hk".

The Registrar of Companies and any Deputy or Assistant Registrar and other officers and employees of CR are responsible for the administration of the Ordinance. The Commissioner of The Inland Revenue Department and other officers and employees of BRO are responsible for the administration of the *Business Registration Ordinance* (Cap 310), and the application for business registration of a company being incorporated is now a "one-stop" process (see *One-stop Electronic Company Incorporation & Business Registration Service* issued by the Companies Registry in March 2011).

The main functions of the CR are:

- registration of companies,
- providing information on registered companies,
- ensuring compliance with the relevant legislation, and
- advising The Hong Kong SAR Government on policies and legislative issues regarding company law and related legislation.

Address and telephone directory

The CR is located at:

12–15/F, and 29/F
Queensway Government Offices
Queensway Hong Kong
Telephone: 2867 2600, 2867 2604
Enquiry hotline: 2234 9933
Fax number: 2869 6817
Website address: http://www.info.gov.hk/cr/
E-mail address: crenq@cr.gcn.gov.hk

The BRO is located at:

4/F Revenue Tower
5 Gloucester Road Wanchai
Hong Kong Telephone: 187 8088
Fax number: 2824 1482

The following are some useful contact numbers:

Administration Section	
General Office	2867 2600, 2867 2604
Deregistration	2867 4699
Striking Off	2867 2605
(Officer in Charge)	2867 2593
General Registration Section	
General enquiry	2867 4579, 2867 4580
New Companies Section	
Company names	2867 2598
Change of company name	2867 2601
Incorporation	2867 2587
New Companies Section	
Charges section	2867 2578
New companies	2867 2587

Public Search Section	2867 2571,2867 2584
Microfilm Section	2867 4394
Company documents	
– Local companies	2867 4581
– Oversea companies	2867 4655

Opening hours

Administration Section	
Monday to Friday	8.30am to 12.45 pm 1.45 to 5.45 pm
General Registration Section	
Monday to Friday	8.30am to 5.45pm

Lodgement of documents with CR

¶2-020 Method of lodgement

All forms and returns may be lodged with the CR:

- by delivery over the counter at CR's office,
- by post, or
- electronically.

¶2-130 General requirements for documents to be lodged

The electronic system is in form and allows a variety of filing, information, and other matters to be conducted electronically. See the *Companies Registry Circular No 9 of 2014* relating to the *Introduction of Electronic Templates of Newly Specified Forms* at the e-Registry.

Where documentary lodgement is made, the document must comply with the following requirements. See:

- the *Companies Registry Circular No 8 of 2014* relating to the requirements for documents delivered for registration;
- section 31 of Cap 622 concerning "unsatisfactory documents"; and
- section 35 for the Registrar's powers to refuse to accept or register such documents.

Detailed requirements are:

1. The text must be printed or types clearly and legibly on paper ion portrait format in permanent black ink, of uniform density, and the font must be at least size 10.
2. Documents must be A-4 size.
3. Documents must be plain, white paper with a matt surface and of medium weight printed or written on one side only.
4. Letters and numbers should be clear, legible, printed or written in black ink.
5. The height of the smallest letter shall not less than 1.8mm.
6. Chinese characters shall not be less than 2.5mm in height.
7. Each page should have a margin all round of not less than 5mm wide.
8. When a document comprises two or more sheets, they must be fastened together securely in the top left-hand corner.

The document must be endorsed with:

1. the name and registration number of the company to which the document relates,
2. the title of the document, and
3. the name and address of the person lodging the document.

¶2-135 Signature on documents

Except where the *Companies Ordinance* or the *Companies Regulations* states otherwise, any document lodged with CR shall be signed by a director or secretary of the company, or, in the case of an overseas company, by a director/secretary, manager or the authorised representative of the overseas company in Hong Kong.

The signature can now be electronic if the applicant has used electronic lodgement of documents.

¶2-140 Affidavits and statutory declarations

In general, documentation requires a statement rather than an affidavit or statutory declaration.

¶2-145 Translation of documents

Any document which is not written in English or Chinese and is required to be lodged with the CR must be lodged together with a certified translation of that document in English or in Chinese.

Translations made in Hong Kong can be certified by:

- a notary public in Hong Kong, or
- a solicitor of the High Court of Hong Kong.

Translations outside Hong Kong can be certified by,

- a notary public in the place where the translation is made, or
- such other person as may be specified by the Registrar of Companies.

¶2-150 Fees for lodgement

The fees for lodgement of documents are prescribed in the *Companies (Fees) Regulation* (Cap 622K). The prescribed fees must be paid to the Registrar of Companies at the time the document is lodged (refer to ¶2-510 for a list of the prescribed fees payable to the Registrar of Companies).

Fees may be paid in cash or by cheque made payable to "The Government of Hong Kong Special Administrative Region" or "Companies Registry".

See however, the Companies Registry External Circular No. 4 of 2020[2] provides:

Company Registry External Circular No 4 of 2020

Commencement of Operation of the Companies (Fees) (Amendment) Regulation 2020

This circular announces that the Companies (Fees) (Amendment) Regulation 2020 ("the Amendment Regulation") will come into operation on 1 October 2020.

Background

2. As one of the relief measures to support enterprises and safeguard jobs, the Financial Secretary announced in the 2020-21 Budget that the registration fees for all annual returns (except for annual returns delivered late) charged by the Companies Registry ("the Registry") would be waived for two years.
3. With a view to encouraging the wider use of the Registry's electronic services, the Registry also proposed to reduce the fees payable in relation to incorporation of companies, including registration of non-Hong Kong companies, through electronic means by 10%.

2 https://www.cr.gov.hk/en/publications/docs/ec4-2020-e.pdf

4. The Amendment Regulation amends the Companies (Fees) Regulation (Cap. 622K) to effect the proposed waiver and reduction of fees.

The Amendment Regulation

5. The Amendment Regulation was published in the Gazette on 8 May 2020. As provided in the Amendment Regulation, the waiver and reduction of fees will take effect from 1 October 2020.
6. The full text of the Amendment Regulation is available on the Registry's website at www.cr.gov.hk/en/publications/docs/gazette_en_2020w0508.pdf.

Waiver of registration fees for annual returns (except for late delivery) for two years

7. The waiver of registration fees will apply to annual returns delivered to the Registry on time and within the concession period from 1 October 2020 to 30 September 2022 (both dates inclusive). Annual returns delivered on time include annual returns delivered within 42 days after the company's return date for private companies having share capital, public companies having share capital and companies limited by guarantee; and annual returns delivered within 42 days after the anniversary of registration for registered non-Hong Kong companies.
8. The registration fees which will be waived if the annual returns are delivered on time and within the concession period are as follows:
   - Local private companies having a share capital: $105
   - Local companies limited by guarantee: $105
   - Local public companies having a share capital: $140
   - Registered non-Hong Kong companies: $180
9. In cases of late delivery of annual returns, waiver of fees is not applicable and companies are still required to pay the statutory higher registration fees calculated based on the date of delivery, even though the late annual returns are delivered within the concession period.

Reduction of fees payable in relation to incorporation of companies and registration of non-Hong Kong companies through electronic means

10. With effect from 1 October 2020, the fees (excluding Business Registration Fee and Levy) payable for applications for incorporation of companies and registration of non-Hong Kong companies delivered in electronic form through the e-Registry will be reduced by 10%. The reduction does not apply to applications delivered to the Registry in hard copy form.

…

¶2-155 Time for lodgement

Documents must be lodged within the prescribed period as provided in the Ordinance.

¶2-160 Refusal to register documents

The Registrar of Companies may refuse to register any document, and request for the document to be amended or completed and re-submitted, or for a fresh document to be submitted in its place, if he is of the view that the document (s 35 of Cap 622):

- contains any matter contrary to law,
- has not been duly completed,
- does not comply with the requirements of the Ordinance, or
- contains any error, alteration or erasure.

¶2-165 Errors in documents lodged with CR

In general, a company may re-lodge the amended documents with all rectified errors underlined in black. For some major errors other than typographical or clerical errors, the Registrar of Companies may request the company to explain the reasons for causing such errors in written form.

If the error appears in the Register of Members of the company and such list of members is filed with the CR, a company may apply to the court to order the Registrar of Companies to rectify the register of members (s 167 of Cap 622).

Powers of the Registrar of Companies

¶2-280 Power to inspect

The Financial Secretary may, if he is satisfied that there is good reason for so doing, authorise competent inspectors to inspect the books of a company.

¶2-285 Power to strike off companies from the register

The Registrar of Companies has power to strike the name of any company off the register if he or she has reasonable cause to believe that the company is not carrying on business (ss 744-746 of Cap 622).

¶2-300 List of prescribed company forms

For local company and registered non-Hong Kong company

A. Specified forms for use under the Companies Ordinance (Cap 622)

A.(I) For delivery to the Registrar under Cap 622			
Form number	**Nature of Form**	**Time Frame**	**Section No.**
Amalgamation			
Form NAMA1	Approved Amalgamation Proposal		684(1)(a)
Form NAMA2	Certificate on Solvency Statement by Directors of Amalgamating Company		684(1)(b)
Form NAMA3	Certificate of Approval of Amalgamation by Directors of Amalgamating Company		684(1)(c)
Form NAMA4	Notice of Appointment of Directors of Amalgamated Company		684(1)(d)
Form NAMA5	Certificate on Claims of Creditors by Directors of Amalgamated Company		684(1)(e)
Form NAMA6	Notice of Application to Court to Intervene in Amalgamation Proposal		686(4)
Annual Return / Financial Statements			
Form NAR1	Annual Return	42 days after AGM for companies other than private companies having a share capital 42 days after its most recent anniversary of incorporation for private companies having a share capital	662

Form number	Nature of Form	Time Frame	Section No.
Form NAC3	Statement of Revision of Financial Statements	7 days	449(3)
Form NAC4	Notice of Alteration of Accounting Reference Date	15 days	371(2)
Articles of Association / Members			
Form NAA1	Notice of Alteration of Company's Articles		88, 96
Form NAA2	Notice of Alteration of Company's Objects		89
Form NAA3	Notice of Alteration of Certain Articles by Existing Company		90
Form NAA4	Notice of Change of Company Status		94(2), 95(2)
Form NMEM1	Notice of Increase in Number of Members of Company Limited by Guarantee		114(1)
Auditors			
Form NA1	Notice of Removal of Auditor	15 days	419(4)
Form NA2	Notification of Resignation of Auditor		417(3)
Change of Company Name			
Form NNC2	Notice of Change of Company Name		107(2), 770(2)
Form NNC4	Notice of Court Order Restraining Company from Use of Name		108(2)
Deregistration			
Form NDR1	Application for Deregistration of Private Company or Company Limited by Guarantee		750
Directors and Company Secretary			
Form ND2A	Notice of Change of Company Secretary and Director (Appointment/ Cessation)	15 days	645(1), 645(4), 652(1), 652(2)

Form number	Nature of Form	Time Frame	Section No.
Form ND2B	Notice of Change in Particulars of Company Secretary and Director	15 days	645(4), 652(2)
Form ND4	Notice of Resignation of Company Secretary and Director	15 days	464(3), 477(3)
Form ND5	Notice of Change of Reserve Director (Nomination/Cessation)	15 days	645(2), 645(3), 645(4)
Form ND7	Notice of Change in Particulars of Reserve Director	15 days	645(4)
Form ND8	Notice of Resignation of Reserve Director	15 days	464(3), 464(6)
Incorporation of Local Companies			
Form NNC1 & IRBR1	Incorporation Form (Company Limited by Shares)		67(1)(b)
NNC1G & IRBR1	Incorporation Form (Company Not Limited by Shares)		67(1)(b)
Form NNC3	Consent to Act as First Director		74
Inspectors			
Form NIN1	Notice of Appointment of Inspector		842(1)
Form NIN2	Notice of Delivery of Final Report by Inspector		856(4)
Form NIN3	Notice of Delivery of Interim Report by Inspector		855(4)
Mortgage & Charges			
Form NM1	Statement of Particulars of Charge	One month	335(1), 336(1), 338(2), 339(3), 340(2), 342(2)]
Form NM2	Notification of Payment/ Satisfaction of Debt, Release from Charge, etc.		345

Form number	Nature of Form	Time Frame	Section No.
Form NM3	Notice of Mortgagee Entering into Possession of Property		349(1)
Form NM4	Notice of Mortgagee Going out of Possession of Property		350(3)
Form NM5	Notice of Appointment of Receiver or Manager		348(1)
Form NM6	Notice of Cessation of Appointment of Receiver or Manager		350(2)
Form NM7	Notice of Change in Particulars of Receiver, Manager or Mortgagee in Possession of Property		350(4)
Form NM8	Statement of Particulars of Charge (For Debenture Forming Part of a Series)		335(2), 336(2), 340(3)
Form NM9	Statement of Particulars of Issue of Debentures of a Series		341(2)
Registered Non-Hong Kong Companies			
Form NN1 & IRBR2	Application for Registration as Registered Non-Hong Kong Company	One month	776(4)
Form NN2	Notification of Termination of Authorization of Authorized Representative of Registered Non-Hong Kong Company	One month	787
Form NN3	Annual Return of Registered Non-Hong Kong Company	Within 42 days after each anniversary of the date on which the certificate of registration was issued	788

Form number	Nature of Form	Time Frame	Section No.
Form NN5	Return of Change in the Charter, Statutes or Memorandum etc. of Registered Non-Hong Kong Company		791(1), 791(2)(a)
Form NN6	Return of Change of Company Secretary and Director of Registered Non-Hong Kong Company (Appointment/Cessation)		791(1), 791(2)(b)
Form NN7	Return of Change in Particulars of Company Secretary and Director of Registered Non-Hong Kong Company		791(1), 791(2)(c)
Form NN8	Return of Change of Authorized Representative of Registered Non-Hong Kong Company (Appointment/Cessation)		791(1), 791(2)(b)
Form NN8C	Return of Change in Particulars of Authorized Representative of Registered Non-Hong Kong Company		791(1), 791(2)(c)
Form NN9	Return of Change of Address of Registered Non-Hong Kong Company		791(1), 791(2)(d)
Form NN10	Return of Alteration of Corporate Name of Registered Non-Hong Kong Company		778(8)

Form number	Nature of Form	Time Frame	Section No.
Form NN11	Notice of Commencement of Liquidation and Appointment / Cessation and Change in Particulars of Liquidator/ Provisional Liquidator of Registered Non-Hong Kong Company		793
Form NN12	Return of Approved Name for Carrying on Business in Hong Kong by Registered Non-Hong Kong Company		782(4), 785(4)
Form NN13	Notice of Cessation of Place of Business in Hong Kong of Registered Non-Hong Kong Company		794(1)
Form NN14	Notice of Dissolution of Registered Non-Hong Kong Company		795(1)
Form NN15	Statement of Revision of Accounts of Registered Non-Hong Kong Company		790(4)
Registered Offices and Location of Registers			
Form NR1	Notice of Change of Address of Registered Office		658(3)
Form NR2	Notice of Location of Registers and Company Records	15 days	309(2)&(3), 351(4)&(5), 354(1)&(2), 385(2)&(3), 471(4), 543(5), 619(2)&(3), 628(2)&(3), 641(4)&(5), 648(4)&(5), 653M(2)&(3), 653N(1)&(2)

Form number	Nature of Form	Time Frame	Section No.
Form NR3	Notice Relating to Branch Register of Debenture Holders		312, 315
Form NR4	Notice Relating to Branch Register of Members		636, 639
Registration of Eligible Companies			
Form NNC5	Application for Registration of Eligible Company		807(2)
Re-Registration			
Form NU1	Application for Re-registration as Company Limited by Shares		131
Share Capital			
Form NSC1	Return of Allotment	One month	142(1)
Form NSC2	Return of Share Redemption or Buy-back	15 days	270(1)
Form NSC3	Notice of Application to Court for Cancellation of Special Resolution for Payment out of Capital	15 days	263(4)
Form NSC6	Notice of Permitted Share Commission		148(2)(c)(i)
Form NSC9	Notice of Application to Court for Restraining the Giving of Financial Assistance for Acquisition of Shares	28 days	286(5)
Form NSC11	Notice of Alteration of Share Capital	One month	171(1)
Form NSC13	Notice of Redenomination of Share Capital	One month	173(1)
Form NSC14	Notice of Reconversion of Stock into Shares	One month	175(1)
Form NSC15	Notice of Variation of Rights Attached to Shares	One month	184(1)

Form number	Nature of Form	Time Frame	Section No.
Form NSC16	Notice of Variation of Rights of a Class of Members (Company Without a Share Capital)	One month	192(1)
Form NSC17	Solvency Statement	15 days	216(1), 259(1)
Form NSC18	Notice of Application to Court for Cancellation of Special Resolution for Reduction of Share Capital	5 weeks	220(4)
Form NSC19	Return of Reduction of Share Capital (by Special Resolution Supported by Solvency Statement)	15 days	224, 225
Form NSC20	Return of Reduction of Share Capital (Confirmed by Court)	15 days	230
Form NDB1	Return of Allotment of Debentures or Debenture Stock		316(1)
A.(II) NOT for delivery to the Registrar under Cap 622			
Share Acquisition or Buy-back/Share Certificates			
Form NRE1*	Notice to Minority Shareholders – Takeover (Right of Offeror to Buy out Minority Shareholders)		694(1)(a)
Form NRE2*	Notice to Minority Shareholders – Takeover (Right of Minority Shareholders to be Bought out by Offeror)		702(1)(a)
Form NRE3*	Notice to Minority Shareholders – General Offer for Share Buy-back (Right of Repurchasing Company to Buy out Minority Shareholders)		713(1)(a)

Form number	Nature of Form	Time Frame	Section No.
Form NRE4*	Notice to Minority Shareholders – General Offer for Share Buy-back (Right of Minority Shareholders to be Bought out by Repurchasing Company)		720(1)(a)
Form NS1*	Application for New Share Certificate		163(1)
Form NS3*	Notice of Intention to Issue New Share Certificate	One month	164(1)
Form NS4*	Notice of Cancellation of Original Share Certificate and Issue of New Certificate	14 days	166(1)

B. Specified forms for use under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32)

B.(I) For delivery to the Registrar under Cap. 32			
Form Number	**Nature of Form**	**Time Frame**	**Section No.**
Receivership			
Form NRC2*	Statement of Affairs		300A(1)(b), 300B
Form NRC3	Receiver or Manager's Abstract of Receipts and Payments		300A(2), 301(1)
Winding Up			
Form NW1	Certificate of Solvency		233(1)
Form NW2	Statement of Voluntary Winding Up under Special Procedure in Case of Inability to Continue Business		228A(1B)
Form NW3	Notice of Appointment of Liquidator or Provisional Liquidator		195(a), 228A(10), 253(1)(b)
Form NW4	Notice of Change in Particulars of Liquidator or Provisional Liquidator		228A(12), 253(3)

Form Number	Nature of Form	Time Frame	Section No.
Form NW5	Notice of Cessation to Act as Liquidator or Provisional Liquidator		228A(11)(b), 253(2)(b)
Form NW6	Certificate of Release of Liquidator		226A(1)
B.(II) NOT for delivery to the Registrar under Cap. 32			
Receivership			
Form NRC1*	Notice to Company of Appointment of Receiver or Manager		300A(1)(a), 300A(3)

Companies subject to Cap 622 can deliver documents in hard copy to the Companies Registry for registration, or electronically through the 24-hour portal e-Registry.

Printed forms can be purchased from Government Publication Centre at:

G/F, Lower Block

Queensway Government Office

Hong Kong

Telephone: 2537 1910

¶2-510 Table of fees to be paid to the Registrar of Companies

The details of the fees can be found in the *Companies (Fees) Regulation (Cap 622K)*, Sch 1 (for Registration of Companies and Registration of Documents), Sch 2 (for inspection fees, or fees on obtaining documents or information), Sch 3 (for fees payable for obtaining registrar's approval or licence), and Sch 4 (for Miscellaneous Fees payable under the Ordinance).

See also certain fees payable under the *Companies (Winding-Up and Miscellaneous Provisions) Ordinance* (Cap 32).

I. By a company having a share capital

Item	*Matter*	*Fees (HK$)*
1	For registration of a company under s 67 of Cap 622	1,425
2	For re-registration of a company under s 130 of Cap 622	1,425
3	For lodging of an incorporation form and a copy of articles delivered under s 67 of Cap 622	295
4	For lodging of a specified form and a copy of articles delivered under s 131 of Cap 622	295

Item	*Matter*	*Fees (HK$)*
5	For registration of an eligible company under s 807(1)(a) of Cap 622	1,425
6	For lodging of a specified form and a copy of every constitutional document delivered under ss 807(2) and (3)(a) of Cap 622	295
7	Annual registration fee of an annual return of a private company delivered under s 662(1) of Cap 622:	
	(a) if the annual return is delivered within 42 days after the company's return date	105
	(b) if the annual return is delivered more than 42 days after but within 3 months after the company's return date	870
	(c) if the annual return is delivered more than 3 months after but within 6 months after the company's return date	1,740
	(d) if the annual return is delivered more than 6 months after but within 9 months after the company's return date	2,610
	(e) if the annual return is delivered more than 9 months after the company's return date	3,480
8	Annual registration fee of an annual return of a public company delivered under s 662(3) of Cap 622:	
	– if the annual return is delivered within 42 days after the company's return date	140
	– if the annual return is delivered more than 42 days after but within 3 months after the company's return date	1,200
	– if the annual return is delivered more than 3 months after but within 6 months after the company's return date	2,400
	– if the annual return is delivered more than 6 months after but within 9 months after the company's return date	3,600
	– if the annual return is delivered more than 9 months after the company's return date	4,800

II. By a company in relation to Company Limited by Guarantee

Item	*Matter*	*Fees (HK$)*
1	For registration of a company whose number of members as stated in the incorporation form does not exceed 25	170
2	For registration of a company whose number of members as stated in the incorporation form exceeds 25, but does not exceed 100	340
3	For registration of a company whose number of members as stated in the incorporation form exceeds 100; and	340
	For every additional 50 members or less after the first 100.	20
	But a company is not required to pay on the whole a fee greater than HK$1,025 in respect of its number of members.	
4	For registration under s 114(1) of Cap 622 of any increase on the number of members beyond the registered number of the company in respect of every 50 members, or less than 50 members, of that increase. But a company is not required to pay on the whole a fee greater than HK$1,025 in respect of its number of members, taking into account the fee paid on the first registration of the company.	20
5	For registration of an eligible company under s 807(1)(b) of Cap 622: if the number of members stated in the specified form referred to in s 807(2) of Cap 622 does not exceed 25	170
	– if the number of members stated in the specified form referred to in s 807(2) of Cap 622 exceeds 25 but does not exceed 100	340
	– if the number of members stated in the specified form referred to in s 807(2) of Cap 622 exceeds 100; and	
	– for every additional 50 members or less after the first 100 But a company is not required to pay on the whole a fee greater than HK$1,025 in respect of its number of members.	20
6	Annual registration fee for an annual return delivered under s 662(3) of Cap 622:	

Item	*Matter*	*Fees (HK$)*
	– if the annual return is delivered within 42 days after the company's return date	105
	– if the annual return is delivered more than 42 days after but within 3 months after the company's return date	870
	– if the annual return is delivered more than 3 months after but within 6 months after the company's return date	1,740
	– if the annual return is delivered more than 6 months after but within 9 months after the company's return date	2,610
	– if the annual return is delivered more than 9 months after the company's return date	3,480

III. By a company in relation to Registered Non-Hong Kong Company

Item	*Matter*	*Fees (HK$)*
1	For issuing a certificate of registration or a fresh certificate of registration under ss 777(4)(a), 779(1)(b), 782(5)(b), 783(3)(b) or 785(5)(c) of Cap 622	1,425
2	For lodging of an application and accompanying documents delivered under s 776 of Cap 622	295
3	Annual registration fee of a return delivered under s 788 of Cap 622:	
	– if the return is delivered within 42 days after the anniversary of registration	180
	– if the return is delivered more than 42 days after but within 3 months after the anniversary of registration	1,200
	– if the return is delivered more than 3 months after but within 6 months after the anniversary of registration	2,400
	– if the return is delivered more than 6 months after but within 9 months after the anniversary of registration	3,600
	– if the return is delivered more than 9 months after the anniversary of registration	4,800

IV. Fees for Inspecting or Obtaining Documents or Information

Item	*Matter*	*Fee(HK$) payable by unregistered online user*	*Fee (HK$) payable by registered online user*	*Fees(HK$) payable by on-site user*
1	Under s 647(3) or 802(3) or both, of Cap 622 for inspecting the index of directors kept by the Registrar			
	– for each inspection of the list of directors and reserve directors (if any) of a company, or of the list of directors of a registered non-Hong Kong company	11	11	11
	– for each inspection of the particulars of a director or reserve director of a company, or of the particulars of a director of a registered non-Hong Kong company	11	11	11
	– for each inspection of all the directorships and reserve directorships held by a person in any companies, and all the directorships held by that person in any registered non-Hong Kong companies (whichever is applicable)	22	22	22

Item	*Matter*	*Fee(HK$) payable by unregistered online user*	*Fee (HK$) payable by registered online user*	*Fees(HK$) payable by on-site user*
2	Under s 168R(4) of the *Companies (Winding Up and Miscellaneous Provisions) Ordinance* (Cap 32), for each inspection of the register of disqualification orders maintained by the Registrar, per disqualified person	11	11	11
3	Under s 45(4) of Cap 622, for obtaining, by way of downloading through online medium, an image record of the following documents kept by the Registrar:			
	– the prospectus of a company, or a company incorporated outside Hong Kong, registered under the *Companies (Winding Up and Miscellaneous Provisions) Ordinance* (Cap 32)	23	21	Not applicable
	– each incorporation form	18	16	Not applicable
	– the articles of a company	23	21	Not applicable
	– the memorandum or memorandum and articles of a company registered under a former Companies Ordinance	23	21	Not applicable

Item	*Matter*	*Fee(HK$) payable by unregistered online user*	*Fee (HK$) payable by registered online user*	*Fees(HK$) payable by on-site user*
	– the interim accounts under s 79H of the predecessor Ordinance or interim financial statements under s 305 of Cap 622 prepared for a proposed distribution by a listed company	23	21	Not applicable
	– the initial accounts under s 79I of the predecessor Ordinance or initial financial statements under s 306 of Cap 622 prepared for a proposed distribution by a listed company	23	21	Not applicable
	– the balance sheet (including any documents annexed to it), auditor's report and directors' report forwarded under s 109(3) of the predecessor Ordinance in relation to an annual return of a company other than a private company, or reporting documents accompanying an annual return delivered under s 662 of Cap 622 by a public company or a company limited by guarantee	23	21	Not applicable

Item	*Matter*	*Fee(HK$) payable by unregistered online user*	*Fee (HK$) payable by registered online user*	*Fees(HK$) payable by on-site user*
	– each annual return of a company (but excluding those documents described in paragraph (g))	18	16	Not applicable
	– the instrument creating or evidencing a charge and related documents delivered under ss 335, 336, 338, 339 or 340 of Cap 622	23	21	Not applicable
	– the instrument accompanying a notification delivered under s 345(3) of Cap 622	23	21	Not applicable
	– the charter, statutes, memorandum (including articles, if any), or any other instrument constituting or defining the constitution of a registered non-Hong Kong company	23	21	Not applicable
	– the lists of the directors, the company secretary and the authorised representative in a specified form delivered under an application to register a non-Hong Kong company	18	16	Not applicable
	– each annual return of a registered non-Hong Kong company	18	16	Not applicable

Item	*Matter*	*Fee(HK$) payable by unregistered online user*	*Fee (HK$) payable by registered online user*	*Fees(HK$) payable by on-site user*
	– the accounts of a registered non-Hong Kong company	23	21	Not applicable
	– the accounts made up by a liquidator in respect of a company being wound up under the *Companies (Winding Up and Miscellaneous Provisions) Ordinance* (Cap 32)	23	21	Not applicable
	– any other document	23	21	Not applicable
4	Under s 45(4) of Cap 622, for obtaining, at the office for the registration of companies, a copy of an image record of the following documents kept by the Registrar			
	– the prospectus of a company, or a company incorporated outside Hong Kong, registered under the *Companies (Winding Up and Miscellaneous Provisions) Ordinance* (Cap 32)	Not applicable	Not applicable	35
	– each incorporation form	Not applicable	Not applicable	30
	– the articles of a company	Not applicable	Not applicable	35
	– the memorandum or memorandum and articles of a company registered under a former Companies Ordinance	Not applicable	Not applicable	35

Item	*Matter*	*Fee(HK$) payable by unregistered online user*	*Fee (HK$) payable by registered online user*	*Fees(HK$) payable by on-site user*
	– the interim accounts under s 79H of the predecessor Ordinance or interim financial statements under s 305 of Cap 622 prepared for a proposed distribution by a listed company	Not applicable	Not applicable	35
	– the initial accounts under s 79I of the predecessor Ordinance or initial financial statements under s 306 of Cap 622 prepared for a proposed distribution by a listed company	Not applicable	Not applicable	35
	– the balance sheet (including any documents annexed to it), auditor's report and directors' report forwarded under s 109(3) of the predecessor Ordinance in relation to an annual return of a company other than a private company, or reporting documents accompanying an annual return delivered under s 662 of Cap 622 by a public company or a company limited by guarantee	Not applicable	Not applicable	35

Item	*Matter*	*Fee(HK$) payable by unregistered online user*	*Fee (HK$) payable by registered online user*	*Fees(HK$) payable by on-site user*
	– each annual return of a company (but excluding those documents described in paragraph (g))	Not applicable	Not applicable	30
	– the instrument creating or evidencing a charge and related documents delivered under ss 335, 336, 338, 339 or 340 of Cap 622	Not applicable	Not applicable	35
	– the instrument accompanying a notification delivered under s 345(3) of Cap 622	Not applicable	Not applicable	35
	– the charter, statutes, memorandum (including articles, if any), or any other instrument constituting or defining the constitution of a registered non-Hong Kong company	Not applicable	Not applicable	35
	– the list of the directors, the company secretary and the authorised representative in a specified form delivered under an application to register a non-Hong Kong company	Not applicable	Not applicable	30
	– each annual return of a registered non Hong Kong company	Not applicable	Not applicable	30

Item	*Matter*	*Fee(HK$) payable by unregistered online user*	*Fee (HK$) payable by registered online user*	*Fees(HK$) payable by on-site user*
	– the accounts of a registered non-Hong Kong company	Not applicable	Not applicable	35
	– the accounts made up by a liquidator in respect of a company being wound up under the *Companies (Winding Up and Miscellaneous Provisions) Ordinance* (Cap 32)	Not applicable	Not applicable	35
	– any other document	Not applicable	Not applicable	20
5	Under ss 45(3) and (4) of Cap 622, for online inspection of, and obtaining, an image record of the following documents kept by the Registrar			
	– the prospectus of a company, or a company incorporated outside Hong Kong, registered under the *Companies (Winding Up and Miscellaneous Provisions) Ordinance* (Cap 32)	29	26	Not applicable
	– each incorporation form	23	21	Not applicable
	– the articles of a company	29	26	Not applicable
	– the memorandum or memorandum and articles of a company registered under a former *Companies Ordinance*	29	26	Not applicable

Item	*Matter*	*Fee(HK$) payable by unregistered online user*	*Fee (HK$) payable by registered online user*	*Fees(HK$) payable by on-site user*
	– the interim accounts under s 79H of the predecessor Ordinance or interim financial statements under s 305 of Cap 622 prepared for a proposed distribution by a listed company	29	26	Not applicable
	– the initial accounts under s 79I of the predecessor Ordinance or initial financial statements under s 306 of Cap 622 prepared for a proposed distribution by a listed company	29	26	Not applicable
	– the balance sheet (including any documents annexed to it), auditor's report and directors' report forwarded under s 109(3) of the predecessor Ordinance in relation to an annual return of a company other than a private company, or reporting documents accompanying an annual return delivered under s 662 of Cap 622 by a public company or a company limited by guarantee	29	26	Not applicable

Item	*Matter*	*Fee(HK$) payable by unregistered online user*	*Fee (HK$) payable by registered online user*	*Fees(HK$) payable by on-site user*
	– each annual return of a company (but excluding those documents described in paragraph (g))	23	21	Not applicable
	– the instrument creating or evidencing a charge and related documents delivered under ss 335, 336, 338, 339 or 340 of Cap 622	29	26	Not applicable
	– the instrument accompanying a notification delivered under s 345(3) of Cap 622	29	26	Not applicable
	– the charter, statutes, memorandum (including articles, if any), or any other instrument constituting or defining the constitution of a registered non-Hong Kong company	29	26	Not applicable
	– the lists of the directors, the company secretary and the authorised representative in a specified form delivered under an application to register a non-Hong Kong company	23	21	Not applicable
	– each annual return of a registered non-Hong Kong company	23	21	Not applicable

Item	*Matter*	*Fee(HK$) payable by unregistered online user*	*Fee (HK$) payable by registered online user*	*Fees(HK$) payable by on-site user*
	– the accounts of a registered non-Hong Kong company	29	26	Not applicable
	– the accounts made up by a liquidator in respect of a company being wound up under the *Companies (Winding Up and Miscellaneous Provisions) Ordinance* (Cap 32)	29	26	Not applicable
	– any other document	13	12	Not applicable
6	If an image record of any document kept by the Registrar under the Ordinance is not available, for each inspection, under s 45(3) of Cap 622, at the office for the registration of ompanies of the document or the relevant record kept by the Registrar	Not applicable	Not applicable	20
7	Under s 45(4) of Cap 622, for obtaining a copy of any record containing the current particulars of a company or a registered non Hong Kong company, per company	22	22	22
8	For registering an account with the Registrar for inspecting and obtaining documents and information specified in items 1, 2, 3, 5 and 7 per year (in addition to the fees payable under those items)			

Item	*Matter*	*Fee(HK$) payable by unregistered online user*	*Fee (HK$) payable by registered online user*	*Fees(HK$) payable by on-site user*
	– for a principal account	Not applicable	500	Not applicable
	– for each subsequent account	Not applicable	100	Not applicable

V. Fees Payable for Obtaining Registrar's Approval or Licence

Item	*Matter*	*Fees* **(HK$)**
(a)	For an approval under s 100(2) of Cap 622	850
(b)	For a licence under s 103 of Cap 622	4475
(c)	For lodging of an application for a licence under s 103 of Cap 622	4605

VI. Miscellaneous Fees Payable to Registrar

Item	*Matter*	*Fees* **(HK$)**
1	For lodging of a notice of change of name delivered under s 107(2) or s 770(2) of Cap 622	240
2	For issuing a certificate of change of name under s 107(3) or s 770(3) of Cap 622	55
3	For registering:	
	– (under Part 8 of Cap 622 any specified charge described in s 334 of Cap 622 created by, or a charge existing on property acquired by, a company or a registered non-Hong Kong company	340
	– a notification under s 345(4) of Cap 622	190
	– a notice of appointment of a receiver or manager, or of a mortgagee's entering into possession, under s 348(3) or s 349(3) of Cap 622	40
4	For an application for deregistration of a company under s 750 of Cap 622	420
5	For processing an application requesting the Registrar to represent a dissolved company or its liquidator under s 757 of Cap 622	1,740
6	For the execution or signing of an instrument or a document by the Registrar under s 757 of Cap 622	1,240

Item	*Matter*	*Fees* (HK$)
7	For issuing a copy of or an extract from the relevant document or record referred to in item 6 of Part 2 of Sch 2, or an extract from any other document, per page	5
8	For certifying under s 45(4) of Cap 622 a copy of or an extract from a document, or a copy of information contained in a record, per copy or extract	130
9	For registration of a prospectus under s 38D or s 342C of the *Companies (Winding Up and Miscellaneous Provisions) Ordinance* (Cap 32)	1,415

VII. Miscellaneous Fees Payable to Financial Secretary

Item	*Matter*	*Fees* (HK$)
1	For sending a copy of the inspector' s report under s 860(1)(b) of Cap 622	
	– processing fee for provision of a copy of the report; and	130
	– fee for a copy of the report, per page	5

¶2-540 List of forms relating to businesses

Forms relating to businesses are listed as below:

Business Registration	
Form No.	**Form Title**
IRBR 61(Form 3), IRBR 168	Claim for Exemption from Payment of Fee and Levy under Section 9 of the Business Registration Ordinance
IRBR 64	Business Registration - Notification of Change of Partners
IRBR 64A	Business Registration - Notification of Change of Business Particulars for Limited Partnership Fund
IRBR 177	Appointment Letter of an agent for the purpose of Business Registration Ordinance
IRBR 184	Application for 3-year Business Registration Certificate
IRBR 188B (3/2019)	Authorisation for change of payee's name on concessionary refund cheque (Waiver Period from 1.4.2019 to 31.3.2020)

Business Registration	
Form No.	**Form Title**
IRBR 188B (3/2020)	Authorisation for change of payee's name on concessionary refund cheque (Waiver Period from 1.4.2020 to 31.3.2021)
IRBR 189 (3/2019)	Computation of the Refund Amount (Waiver Period from 1.4.2019 to 31.3.2020)
IRBR 189 (3/2020)	Computation of the Refund Amount (Waiver Period from 1.4.2020 to 31.3.2021)
IRBR 193	Notification of Change of Business Nature
IRBR 194	Request for Business Registration Application Forms
IRBR 199	Revocation of Election for 3-year Business Registration Certificate
IRBR 200	Notification of Commencement of Business by Corporation
IRBR 200A	Notification of Commencement of Business for Limited Partnership Fund
IRC 3110A	Notification of Change of Business Name
IRC 3111A	Notification of Change of Business Address
IRC 3113	Notification of Cessation of Business

¶2-600 Offences and penalties

See generally the *Companies Ordinance* (Cap 622), and in specifically noted offences, the *Companies (Winding-Up and Miscellaneous Provisions) Ordinance* (Cap 32).

See also the *Companies (Disclosure of Company Name and Liability) Regulation* (Cap 622B), the *Companies (Disclosure of Information about Benefits of Directors) Regulation* (Cap 622G) and the *Company records (Inspection and Provision of Copies) Regulation* (Cap 622I).

General description of the offence under Cap 32	***Section provision in Cap 32***	***Penalty Mode of prosecution/ punishment / daily default fine (if applicable)***
Issuing a company prospectus that does not comply with ss 38(1) and (1A)	38(1B)	Summary/level 5

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Issuing a company prospectus that does not comply with s 38	38(3)	Summary/level 6
Advertising an abstract from or an abridged version of a company prospectus	38B(3)	Summary/level 6
Issuing a company prospectus with an expert's statement in it, he not having given his consent	38C(2)	Summary/level 6
Issuing a company prospectus without delivering a copy to the Registrar or without the requisite endorsements	38D(8)	Summary/level 6/ HK$300 daily
Amendment of prospectus consisting of one document not done in compliance with Part 1 of the Twentieth Schedule (Added 30 of 2004 s 2)	39A(3)	Summary/level 6
Amendment of prospectus consisting of more than one document not done in compliance with Part 1 of the Twenty-first Schedule (Added 30 of 2004 s 2)	39B(4)	Summary/level 6
Authorising the issue of a prospectus containing an untrue statement	40A(1)	On indictment/ HK$700,000 and 3 years
		Summary/ HK$150,000 and 12 months
Allotting shares before the 3rd day after delivering a statement in lieu of prospectus to the Registrar	43(4)	Summary/level 6
Authorising a statement in lieu of prospectus under s 43(1) containing an untrue statement	43(5)	On indictment/ HK$350,000 and 2 years
		Summary/ HK$150,000 and 12 months
Allotting shares before the 3rd day after the issue of a prospectus	44A(4)	Summary/level 6

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Company failing to keep money in separate bank account when received under a prospectus stating that stock exchange listing is being applied for	44B(3)	Summary/level 5
Person contravening a disqualification order (Added 30 of 1994 s 12. Amended E.R. 1 of 2014)	168M	On indictment/ Level 6 and 2 years
		Summary/level 4 and 6 months
Person failing to comply with requirements to give information etc. to liquidator under s 190 (Amended 46 of 2000 s 39)	190(5)	Summary/level 5/ HK$300 daily
Liquidator failing to deliver dissolution order to the Registrar	227(3)	Summary/level 5/ HK$300 daily
Director signing a winding-up statement without having reasonable grounds for the opinion that the company cannot by reason of its liabilities continue its business, or to consider that the winding up should be commenced under s 228A because it is not reasonably practicable for it to be commenced under another section of Cap 32 (Added 28 of 2003 s 119, and amended by 14 of 2016 s 59)	228A(4)	Summary/level 5 and 6 months
Director failing to appoint a provisional liquidator forthwith after delivery of winding-up statement to the Registrar (Added 28 of 2003 s. 119, and amended by 14 of 2016 s 59)	228A(6) (relating to subsection (5)(b))	Summary/level 5
Director failing to cause meetings of the company or creditors to be summoned within 28 days after delivery of winding-up statement (Added 28 of 2003 s 119, and amended by 14 of 2016 s 59)	228A(6) (relating to subsection (5)(c))	Summary/level 5

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Provisional liquidator failing to deliver to the Registrar the notice of appointment required under s 228A(10) (Added 28 of 2003 s 119, and amended by 14 of 2016 s 59)	228A(13) (relating to subsection (10))	Summary/level 3/ HK$200 daily
Person ceasing to act as provisional liquidator failing to publish in the Gazette the notice required under s 228A(11)(a) (Added 28 of 2003 s 119, and amended by 14 of 2016 s 59)	228A(13) (relating to subsection (11) (a))	Summary/level 3/ HK$200 daily
Person ceasing to act as provisional liquidator failing to publish in the Gazette the notice required under s 228A(11)(a) (Added 28 of 2003 s 119)	228A(13) (relating to subsection (11) (b))	Summary/level 3/ HK$200 daily
Provisional liquidator failing to deliver to the Registrar the notice of change of particulars required under s 228A(12) (Added 28 of 2003 s 119)	228A(13) (relating to subsection (12))	Summary/level 3/ HK$200 daily
Company failing to advertise in the Gazette notice of resolution to wind up voluntarily	229(2)	Summary/level 3/ HK$200 daily
Director signing a certificate that company being wound up voluntarily can meet its debts within the time set out in the certificate without having reasonable grounds to do so (Amended 28 of 2003 s 119)	233(3)	Summary/level 5 and 6 months
Liquidator failing to call a meeting on forming the opinion that a company in voluntary liquidation will not be able to meet its debts within the time stated in the certificate of solvency issued under s 233 (Amended 28 of 2003 s 119)	237A(3)	Summary/level 3
Liquidator failing to inform creditor about disqualification	237A(1B)	Summary/level 3
Liquidator failing to call a general meeting at the end of any year	238(2)	Summary/level 3

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Liquidator failing to send the Registrar a copy of accounts etc. on completion of the winding up	239(3)	Summary/level 3/ HK$300 daily
Person failing to deliver an office copy of an order under s 239 to the Registrar for registration	239(5)	Summary/level 3/ HK$300 daily
Liquidator failing to call a final general meeting under s 239	239(6)	Summary/level 3
Company etc. failing to comply with the requirements to call creditors' meeting etc. after a meeting which proposes to wind up the company voluntarily	241(6)	Summary/level 5
Liquidator failing to call annual meeting of creditors	247(2)	Summary/level 3
Liquidator failing to send copy account or return of holding of final meeting to the Registrar	248(3)	Summary/level 3/ HK$300 daily
Person failing to deliver an office copy of an order under s 248 to the Registrar for registration	248(5)	Summary/level 3/ HK$300 daily
Liquidator failing to call a general meeting of the company or of creditors as required by s 248	248(6)	Summary/level 3
Liquidator failing to publish in the Gazette the notice of appointment required under s 253(1)(a) (Added 28 of 2003 s 119)	253(4) (relating to subsection (1)(a))	Summary/level 3/ HK$300 daily
Liquidator failing to deliver to the Registrar the notice of appointment required under s 253(1)(b) (Added 28 of 2003 s 119)	253(4) (relating to subsection (1)(b))	Summary/level 3/ HK$300 daily
Person ceasing to act as liquidator failing to publish in the Gazette the notice required under s 253(2)(a) (Added 28 of 2003 s 119)	253(4) (relating to subsection (2)(a))	Summary/level 3/ HK$300 daily

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Person ceasing to act as liquidator failing to deliver to the Registrar the notice required under s 253(2)(b) (Added 28 of 2003 s 119)	253(4) (relating to subsection (2)(b))	Summary/level 3/ HK$300 daily
Liquidator failing to deliver to the Registrar the notice of change of particulars required under s 253(3) (Added 28 of 2003 s 119)	253(4) (relating to subsection (3))	Summary/level 3/ HK$300 daily
Officer etc. failing to comply with s 271 (offences by officers of companies in liquidation)	271(1) (relating to paragraph (o))	On indictment/ 5 years
		Summary/2 years
Officer etc. failing to comply with s 271 (offences by officers of companies in liquidation)	271(1) (relating to any other paragraph)	On indictment/ HK150,000 and 2 years
		Summary/level 5 and 6 months
Officer etc. falsifying etc. books etc.	272	On indictment/ HK150,000 and 2 years
		Summary/level 5 and 6 months
Officer acting with intent to defraud creditors by giving etc, or concealing etc, property of company in liquidation	273	On indictment/ HK150,000 and 2 years
		Summary/level 5 and 6 months
Officer failing to keep books for the 2 years prior to winding up of company	274(1)	On indictment/ HK150,000 and 2 years
		Summary/level 5 and 6 months
Person being a party to carrying on the business of a company with intent to defraud creditors	275(3)	On indictment/ Fine(unlimited) and 5 years
		Summary/ HK150,000 and 12 months

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Undischarged bankrupt or body corporate acting as liquidator (Repealed 14 of 2016 s 97)	278 (Repealed)	Summary/ HK150,000 (Repealed)
Person corruptly inducing appointment of liquidator	278A	Fine
Company etc. failing to notify on invoice etc. that it is in liquidation	280(2)	Summary/level 3
Person contravening general rules made for the destruction etc. of books etc. of liquidated company	283(4)	Summary/level 3
Liquidator failing to send prescribed particulars with respect to the proceedings in and position of the liquidation during the liquidation to the Registrar	284(3)	Summary/level 3/ HK$700 daily
Person failing to deliver an office copy of an order under s 290 to the Registrar for registration	290(2)	Summary/level 3/ HK$300 daily
Body corporate acting as a receiver	297(2)	Summary/level 5
Undischarged bankrupt acting as a receiver	297A	On indictment/ HK$150,000 and 2 years
		Summary/level 5 and 6 months
Inducement affecting appointment etc of receiver/manager	297B	Summary/fine
Company etc. authorising etc. the issue of invoices etc. without reference to its being in receivership, etc.	299	Summary/level 3
Receiver failing to give notices etc. as required under s 300A	300A(7)	Summary/level 3/ HK$300 daily
Persons defaulting in complying with requirements of s 300B (special provisions as to statement submitted to receiver)	300B(5)	Summary/level 3/ HK$300 daily
Receiver etc. failing to deliver accounts to the Registrar	301(2)	Summary/level 3/ HK$300 daily

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Amendment of prospectus consisting of one document not done in compliance with Part 2 of the Twentieth Schedule (Added 30 of 2004 s 2)	342CA(3)	Summary/level 6
Amendment of prospectus consisting of more than one document not done in compliance with Part 2 of the Twenty-first Schedule (Added 30 of 2004 s 2)	342CB(4)	Summary/level 6
Person responsible for issue etc. of prospectus etc. contravening ss 342 to 342C (Note: Except ss 342, 342A, 342B and 342C)	342D	Summary/ HK$150,000
Authorising the issue, circulation or distribution in Hong Kong of a prospectus (containing an untrue statement) relating to shares in or debentures of a company incorporated outside Hong Kong (whether the company has or has not established a place of business in Hong Kong) (Added 86 of 1992 s 20. Amended 30 of 2004 s 2; 28 of 2012 ss 912 & 920)	342E(1)	On indictment/ HK550,000 and 3 years
		Summary/ HK150,000 and 12 months
Person making a false statement	349	Summary/level 6 and 6 months
Person obstructing Official Receiver	360J	Summary/ HK$150,000 and 6 months
Registrar of Companies and Companies Register		
Company failing to comply with a requirement under s 39 (1)(b)	39(3)	Summary/level 5/ HK$1,000 daily
Person commiting an offence under s 40(2)	40(3)	Summary/level 5/ HK$1,000
Company contravening s 56(5), (6) or (7) This section is not yet in force	56(9) Not yet in force	Summary/level 4/ HK$700 daily Not yet in force

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Offence for destruction etc. of registers, books or documents	65(4)	On indictment/ HK$150,000 and 2 years
		Summary/level 5 and 2 years
Company Formation and Related Matters, and Re-registration of Company		
Failing to deliver all the signed consent(s) in specified form to act as director with the Registrar in accordance with the prescribed requirement and within the prescribed time	74(2)	Summary/level 4/ HK$700 daily
Failure to deliver to the Registrar (a) a notice of the alteration in the specified form or (b) a copy, certified by an officer of the company as correct, of the articles as altered	88(6)	Summary/level 3/ HK$300 daily
Failure to deliver to the Registrar a notice after passing a special resolution altering its objects	89(9)	Summary/level 3/ HK$300 daily
Failure to deliver to the Registrar the documents after passing a special resolution altering certain articles by existing company	90(8)	Summary/level 3/ HK$300 daily
Company failure to incorporate alteration into articles	93(2)	Summary/level 3
Company contravening s 94(2)(a)	94(3)	Summary/level 3/ HK$300 daily
Company contravening s 94(2)(b)	94(4)	Summary/level 5/ HK$1,000 daily

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Company failing to deliver to the Registrar for registration, following alteration of a public company's articles such that the company ceases to be a public company, a notice of the change of the company's status in the specified form within the prescribed time.	95(3)	Summary/level 3/ HK$300 daily
Company failing to deliver to the Registrar for registration, following alteration of the company's articles by an order of the Court, a notice of the alteration of the company's articles in the specified form within the prescribed time; or Company failing to deliver to the Registrar for registration an office copy of the court order for such alteration and a copy of the articles as altered by the court order (accompanying the notice of alteration mentioned above) within the prescribed time.	96(4)	Summary/level 3/ HK$300 daily
Failure to provide copies of articles to members	97(2)	Summary/level 3/ HK$300 daily
Failure to deliver to the Registrar for registration a notice in the specified form of the change of company name	107(6)	Summary/level 3/ HK$300 daily
Company failing to comply with a direction within the period specified in the notice	108(5)	Summary/level 6/ HK$2,000 daily
Company failing to comply with a direction within the period of 6 weeks after the date of the direction	109(5)	Summary/level 6/ HK$200 daily
Failure to notifying the Registrar of increase in number of members of company limited by guarantee	114(2)	Summary/level 3/ HK$300 daily

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Share Capital		
Director knowingly and wilfully allotting shares without the company's prior approval in general meeting under s140(4)	140(5)	Summary/level 5 and 6 months
Company failing to deliver return of allotments to the Registrar of Companies under s 142(1)	142(3)	Summary/level 4/ HK$700 daily
Company failing to register an allotment of shares within 2 months after the date of the allotment	143(2)	Summary/level 4/ HK$700 daily
Company failing to complete the certificates for the shares and have the certificates ready for delivery within 2 months after an allotment of shares	144(3)	Summary/level 4/ HK$700 daily
Company failing to deliver to the Registrar of Companies the specified form disclosing the amount or rate of permitted commission	148(4)	Summary/level 4/
Company failing to either (a) register the transfer; or (b) send the transferee and the transferor notice of refusal to register the transfer	151(5)	Summary/level 4/ HK$700 daily
Company failing to complete the certificates for any of its shares that are transferred and have the certificates ready for delivery	155(4)	Summary/level 4/ HK$700 daily
Company failing to either (a) register the person as a member of the company in respect of the shares; or (b) send the person notice of refusal of registration	158(5)	Summary/level 4/ HK$700 daily

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
A listed company that issues a new certificate failing to (a) publish a notice in the specified form in accordance with this section; and (b) deliver a copy of the notice to the recognized exchange company that operates the stock market on which the shares concerned are listed within 14 days after the date of issue	166(5)	Summary/level 3/ HK$300 daily
Company failing to deliver a notice to the Registrar for registration in relation to the alteration of share capital	171(4)	Summary/level 4/ HK$700 daily
Company failing to deliver a notice in the specified form to the Registrar for registration in relation to the redenomination within one month after passing a resolution	173(3)	Summary/level 4/ HK$700 daily
Company failing to deliver a notice in the specified form to the Registrar for registration in relation to the reconversion of stock within one month after passing a resolution	175(3)	Summary/level 4/ HK$700 daily
A share certificate issued by a company that has different classes of shares failing to contain in a prominent position a statement (a) stating that the company's share capital is divided into different classes of shares; and (b) specifying the voting rights attached to shares in each class	179(4)	Summary/level 4/ HK$700 daily
Company failing to give written notice of the variation to each holder of shares in that class within 14 days after the date on which the variation is made	181(2)	Summary/level 4/ HK$700 daily

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Company failing to deliver an office copy of the order to the Registrar for registration within 15 days after it is made	183(2)	Summary/level 4/ HK$700 daily
Company failing to deliver to the Registrar for registration, within one month after the date on which the variation takes effect	184(3)	Summary/level 4/ HK$700 daily
Company failing to give written notice of the variation to each member in that class within 14 days after the date on which the variation is made	189(2)	Summary/level 4/ HK$700 daily
Company failing to deliver an office copy of the order to the Registrar for registration within 15 days after it is made	191(2)	Summary/level 4/ HK$700 daily
Company failing to deliver to the Registrar for registration, within one month after the date on which the variation takes effect (a) a copy of the resolution or other document that authorised the variation; and (b) a notice in the specified form	192(3)	Summary/level 4/ HK$700 daily
Transactions in relation to Share Capital		
Company issuing, circulating or distributing an official document in Hong Kong that does not comply with subsection	202(2)	Summary/level 3
Company making a solvency statement without having reasonable grounds for the opinion expressed in it	207	On indictment/ HK$150,000 and 2 years
		Summary/level 6 and 6 months
Company failing to publish a notice in the Gazette on or before the date specified in s 218(2)	218(4)	Summary/level 3

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Company failing to deliver to the Registrar for registration a copy of the solvency statement no later than the day on which the company (a) publishes the notice under s218(1); or (b) if earlier, first publishes the notice or gives notice to creditors under s 218(3).	218(5)	Summary/level 5/ HK$1,000 daily
Company failing to ensure that the special resolution for reduction of share capital and the solvency statement made in relation to it are kept at its registered office or at a place prescribed by regulations made under s 657 for the period— (a) beginning on the day on which the company— (i) publishes the notice under s 218(1); or (ii) if earlier, first publishes the notice or gives notice to creditors under s 218(3); and (b) ending 5 weeks after the date of the special resolution.	219(3)	Summary/level 5/ HK$1,000 daily
Company failing to give the Registrar notice in the specified form of the application within 7 days after the day on which the application is served on the company	220(5)	Summary/level 3/ HK$300 daily
Company failing to deliver an office copy of the order to the Registrar for registration within 15 days after the making of an order by the Court under s 222, or within any longer period ordered by the Court,	223(2)	Summary/level 3/ HK$300 daily
Offence in connection with creditors list	228(2)	On indictment/ HK$150,000 and 2 years
		Summary/level 6 and 6 months

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Company failing to keep at its registered office or at a place prescribed by regulations made under s 657 (a) a copy of the contract or agreement if it is in writing; and (b) if not, a memorandum of its terms	237(6)	Summary/level 5/ HK$1,000 daily
Company failing to publish a notice in the Gazette on or before the date specified in s 261(2)	261(4)	Summary/level 3
Company failing to deliver to the Registrar for registration a copy of the solvency statement no later than the day on which the company (a) publishes the notice under subsection (1); or (b) if earlier, first publishes the notice or gives notice to creditors under subsection (3)	261(6)	Summary/level 5/ HK$1,000 daily
Company failing to ensure that the special resolution for payment out of capital and the solvency statement made in relation to it are kept at its registered office or at a place prescribed by regulations made under s 657 for the period (a) beginning on the day on which the company publishes the notice under s 261(1), or if earlier, first publishes the notice or gives notice to creditors under s 261(3); and (b) ending 5 weeks after the date of the special resolution.	262(3)	Summary/level 5/ HK$1,000 daily
Company failing to give the Registrar notice in the specified form of the application within 7 days after the day on which the application is served on the company	263(5)	Summary/level 3/ HK$300 daily

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Company failing to deliver an office copy of the order to the Registrar for registration within 15 days after the making of an order by the Court under s 265, or within any longer period ordered by the Court,	266(2)	Summary/level 3/ HK$300 daily
Company failing to deliver a return to the Registrar for registration within 15 days after the date on which the shares are delivered to the company	270(4)	Summary/level 6/ HK$2,000 daily
Company failing to send to each member of the company a copy of the solvency statement made under s 283(1)(b) and a notice containing the following information (a) the class and number of shares in respect of which the assistance was given; (b) the consideration paid or payable for those shares; (c) the name of the person receiving the assistance and, if a different person, the name of the beneficial owner of those shares; (d) the nature, the terms and the amount of the assistance	283(4)	Summary/level 3/ HK$300 daily
Company failing to give the Registrar notice in the specified form of the application within 7 days after the day on which the application is served on the company	286(6)	Summary/level 3/ HK$300 daily
Company failing to deliver an office copy of the order to the Registrar for registration within 15 days after the making of an order by the Court under s 288, or within any longer period ordered by the Court	289(2)	Summary/level 3/ HK$300 daily

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Debentures		
Company failing to keep in the English or Chinese language a register of the holders of the debentures or debenture stock	308(3)	Summary/level 4/ HK$700 daily
Company failing to keep its register of debenture holders at (a) the company's registered office; or (b) a place prescribed by regulations made under s 657	309(5)	Summary/level 4/ HK$700 daily
Company failing to provide any person seeking to inspect a register or part of a register that is closed under this section with a certificate signed by the company secretary of the company stating the period for which, and by whose authority, it is closed	311(6)	Summary/level 3
Company failing to deliver to the Registrar for registration a notice in the specified form of any change in the address where the branch register is kept, within 15 days after the change	312(4)	Summary/level 4/ HK$700 daily
Company failing to cause a duplicate of it to be kept at the place at which the company's principal register is kept; or failing to, within 15 days after an entry is made in the branch register (i) transmit a copy of the entry to its registered office; and (ii) update the duplicate of the branch register.	313(6)	Summary/level 4/ HK$700 daily
Company failing to deliver to the Registrar for registration a notice in the specified form informing the Registrar of (a) the discontinuance; and (b) the register to which the entries have been transferred, within 15 days after the discontinuance,	315(4)	Summary/level 4/ HK$700 daily

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Company failing to deliver to the Registrar for registration a return of the allotment that complies with s 316(2) within one month after an allotment of debentures or debenture stock	316(3)	Summary/level 4/ HK$700 daily
Company failing to register an allotment of debentures or debenture stock within 2 months after the date of the allotment	317(2)	Summary/level 4/ HK$700 daily
Company failing to complete the debentures and have them ready for delivery, or to complete the certificates for the debenture stock and have them ready for delivery, within 2 months after an allotment of debentures or debenture stock	318(3)	Summary/level 4/ HK$700 daily
Company failing to register the transfer or send the transferee and the transferor notice of refusal to register the transfer, within 2 months after the transfer is lodged	321(3)	Summary/level 4/ HK$700 daily
Company failing to complete the debentures and have them ready for delivery or complete the certificates for the debenture stock and have them ready for delivery, within the period specified	323(4)	Summary/level 4/ HK$700 daily
Registration of Charges		
Person who commits an offence under subsection (2)	337(3)	Summary/level 5/ HK$1,000 daily
Person who commits an offence under subsection (5)	338(6)	Summary/level 5/ HK$1,000 daily
Person who commits an offence under subsection (6)	339(7)	Summary/level 5/ HK$1,000 daily

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Person who commits an offence under subsection (7)	340(8)	Summary/level 5/ HK$1,000 daily
Person who commits an offence under subsection (7)	341(8)	Summary/level 5/ HK$1,000 daily
Person who commits an offence under subsection (1)	343(2)	Summary/level 5/ HK$1,000 daily
Person failing to deliver a statement of that fact to the Registrar for registration, within 7 days after the date of the order or of the appointment under those powers	348(4)	Summary/level 3/ HK$300 daily
Person failing to deliver a statement of that fact to the Registrar for registration, within 7 days after the date of entering into possession	349(4)	Summary/level 3/ HK$300 daily
Person failing to deliver a statement of the cessation to the Registrar for registration, within 7 days after the date of the cessation	350(7)	Summary/level 3/ HK$300 daily
Company failing to keep copies of instruments creating charge	351(7)	Summary/level 4/ HK$700 daily
Company failing to keep register of charges	352(3)	Summary/level 4/ HK$700 daily
An officer of the company knowingly and wilfully authorising or permitting the omission of an entry required to be made under subsection (2)	352(4)	Summary/level 5
Registered non-Hong Kong company failing to keep register of charges	353(4)	Summary/level 4/ HK$700 daily
Registered non-Hong Kong company knowingly and wilfully authorising or permitting the omission of an entry required to be made under subsection (2)	353(5)	Summary/level 5
Company failing to notify the Registrar of the place at which the register of charges is kept	354(4)	Summary/level 4/ HK$700 daily

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Accounts and Audit		
Company failing to deliver a notice, in the specified form, of that new date to the Registrar for registration, within 15 days after the date of the directors' resolution specifying the new accounting reference date	371(8)	Summary/level 3/ HK$300 daily
A director of a company failing to take all reasonable steps to secure compliance with subsection (1) or (2)	375(6)	Summary/level 5/ HK$1,000 daily
The information contained in a company's accounting records is not adequately recorded such that they are available for future reference.	376(5)	Summary/level 3/ HK$300 daily
If a company's accounting records are kept in electronic form, the company failing to ensure that those records are capable of being reproduced in hard copy form	376(6)	Summary/level 3
Person who is, or has been during the preceding 5 years, a director or shadow director of a company fails to give notice to the company of any matter that (a) is prescribed by the Regulation; (b) relates to the person; and (c) is necessary for the purposes of subsection (1).	383(6)	Summary/level 5
Company failing to keep the particulars in the register for at least 10 years after the date on which the particulars are entered	384(3)	Summary/level 4
Company failing to keep the register mentioned in s 384 at (a) the company's registered office; or (b) a place prescribed by regulations made under s 657	385(5)	Summary/level 4/ HK$700 daily
Statement of financial position not approved and signed	387(3)	Summary/level 4

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Copy of a statement of financial position failing to state the name of the person who signed the statement on the directors' behalf	387(4)	Summary/level 4
Directors' report not approved and signed	391(3)	Summary/level 4
Copy of a directors' report failing to state the name of the person who signed the statement on the directors' behalf	391(4)	Summary/level 4
Auditor's reports not signed	409(4)	Summary/level 4
Failing to provide the information or explanation as soon as practicable after being required to provide any information or explanation under subsection (2)	413(1)	Summary/level 4/ HK$700 daily
Person who commits an offence under subsection (3)	413(4)	On indictment/ HK$150,000 and 2 years
		Summary/level 5 and 6 months
Company failing to take all reasonable steps to obtain the information or explanation as soon as practicable after being required	413(5)	Summary/level 4/ HK$700 daily
Company failing to deliver a notification in the specified form of that fact to the Registrar for registration, within 15 days beginning on the date on which a company receives a notice of resignation	417(3)	Summary/level 5/ HK$1,000 daily/ imprisonment 6 months
Person failing to notify the company of the cessation in writing within 14 days from the date of the cessation of office	418(2)	Summary/level 4

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Company failing to deliver a notice in the specified form of that fact to the Registrar for registration within 15 days beginning on the date on which it is passed	419(5)	Summary/level 3
Directors failing to convene a general meeting for a date falling within 28 days after the date on which the notice convening the meeting is given, within 21 days beginning on the date on which the company receives that other notice	421(3)	On indictment/ HK$150,000 and 2 years
		Summary/level 5 and 6 months
Company failing to comply with a request made under subsection (1)(b), (2)(b) or (3)(b)	422(8)	Summary/level 5
Person who contravenes subsection (1) or (2)	425(4)	Summary/level 3/ HK$300 daily
Company failing to send a copy of the statement to every member of the company; or apply to the Court for an order directing that copies of the statement are not to be sent, within 14 days beginning on the date on which it receives the statement	426(6)	On indictment/ HK$150,000 and 2 years
		Summary/level 5 and 6 months
Person failing to deliver a copy of the statement to the Registrar for registration within the next 7 days	426(7)	Summary/level 3/ HK$300 daily
Company failing to give notice of the decision to the person who has given the statement of circumstances to the company, or send a copy of the statement of circumstances to every member of the company and to that person, within 15 days beginning on the date on which the decision is made or on which the proceedings are discontinued for any reason	428(1)	On indictment/ HK$150,000 and 2 years
		Summary/level 5 and 6 months

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Person failing to deliver a copy of the statement of circumstances to the Registrar for registration, within 7 days beginning on the date on which a person receives a notice under subsection (4)(a)	428(2)	Summary/level 3/ HK$300 daily
Company contravening s 430(1)	433(1)	Summary/level 5
Company contravening s 430(3)	433(2)	Summary/ HK$300,000
Company willfully contravening s 430(3)	433(3)	On indictment/ HK$300,000 and 12 months
Company failing to send to non-voting members other documents	434(2)	Summary/level 5
Company failing to send copies of financial statements etc. to members and others on demand	435(3)	Summary/level 5/ HK$1,000 daily
Summary financial report not approved and signed	440(3)	Summary/level 4
Copy of a summary financial report sent to a member under this Division or otherwise circulated, published or issued by the company fails to state the name of the director who signed the report on the directors' behalf	440(4)	Summary/level 4
Company failing to send additional copy of reports etc upon request	445(6)	Summary/ HK$1,000 daily
Company failing to send summary financial report under some circumstances	446(3)	Summary/level 5
Company failing to, within 7 days after the decision, deliver to the Registrar for registration a warning statement, in the specified form, that the financial statements will be so revised	449(4)	Summary/level 5/ HK$1,000 daily
Company failing to comply with a direction under s 458	458(6)	Summary/level 6/ HK$2,000 daily

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Company failing to keep a copy of the permitted indemnity provision, or if the provision is not in writing, a written memorandum setting out the terms of the provision, at its registered office or at a place prescribed by regulations made under s 657	471(5)	Summary/level 3
Company failing to notify the Registrar of the place, or any change in the place, at which the copy or memorandum is kept	471(6)	Summary/level 3/ HK$300 daily
Directors and Company Secretaries		
Company failing to comply with a direction under s 476	476(6)	Summary/level 6/ HK$2,000 daily
Company failing to keep the records under subsection (1) for at least 10 years from the date of the meeting	481(3)	Summary/level 5/ HK$1,000 daily
Person who commits an offence under s 483(4)	483(6)	Summary/level 3
Person who commits an offence under s 483(5)	483(7)	Summary/ HK$1,000 daily
Fair Dealings by Directors		
Company failing to send general notices to other directors	541(2)	Summary/level 6
A director or shadow director who contravenes s 536(1), (2) or (3)	542(1)	Summary/level 6
Company failing to keep management contract at its registered office or at a place prescribed by regulations made under s 657	543(6)	Summary/level 3
Company failing to deliver to the Registrar for registration a notice, in the specified form, of the place, or any change in the place, at which the copy or memorandum is kept	543(7)	Summary/level 3/ HK$300 daily

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Company failing to ensure that (a) the terms of the contract are set out in a written memorandum within 15 days from the entering into of the contract; and (b) the memorandum is kept at the place at which the books containing the minutes of the directors' meetings are kept	545(3)	Summary/level 3
Company Administration and Procedure		
Company failing to send a written resolution at its own expense to every eligible member and every other member (if any) who is not an eligible member	553(7)	Summary/level 3
Company failing to notify auditor of proposed written resolution	555(3)	Summary/level 3
Company failing to notify members and auditor that written resolution has been passed	559(2)	Summary/level 3
Company failing to give notice of general meeting to auditor	575(2)	Summary/level 3
Company failing to include notice of the resolution or (where the company is not a wholly owned subsidiary) include or is accompanied by a statement containing the information and explanation, if any, that is reasonably necessary to indicate the purpose of the resolution	576(4)	Summary/level 3
Company failing to circulate members' statement	581(3)	Summary/level 5
Company failing to record result of poll in minutes of general meeting	594(2)	Summary/level 3

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Company failing to ensure that in a notice calling a general meeting of the company, there must appear, with reasonable prominence, a statement informing the member of (a) the rights under s 596(1) and (3); and (b) the requirement under s 596(2)	597(2)	Summary/level 3
For the purposes of a general meeting of the company, Company issuing at its expense invitations to members to appoint as proxy a specified person or a number of specified persons unless the invitations are issued to all members entitled to be sent a notice of the meeting and to vote at the meeting by proxy	600(3)	Summary/level 3
Company-sponsored proxy failing to vote in the way specified in appointment of proxy	603(4)	Summary/level 3
Company failing to comply the requirement to hold annual general meeting	610(9)	Summary/level 5
Company failing to circulate resolution for annual general meeting	616(4)	Summary/level 5
Failure to provide the company with a written record of that decision within 7 days after the decision is made	617(3)	Summary/level 3
Company failing to keep the records of resolutions and meetings etc.	618(3)	Summary/level 5/$1000 daily
Company failing to keep the records mentioned in s 618 at (a) the company's registered office; or (b) a prescribed place	619(5)	Summary/level 5/ HK$1,000 daily
Company failing to deliver a copy of the order under s 622(1)(k), resolution or agreement to the Registrar for registration within 15 days after it is made or passed	622(7)	Summary/HK$300 daily

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Company contravening s 622(3) or (5)	622(8)	Summary/level 3
Company failing to keep in the English or Chinese language a register of members	627(7)	Summary/level 4/ HK$700 daily
Company failing to keep its register of members at (a) the company's registered office; or (b) a prescribed place	628(5)	Summary/level 4/ HK$700 daily
Company contravening s 629(1) or (2)	629(3)	Summary/level 4/ HK$700 daily
Company failing to keep an index of the names of the members of the company	630(5)	Summary/level 4/ HK$700 daily
Company failing to provide any person seeking to inspect a register or part of a register that is closed under this section with a certificate signed by the company secretary of the company stating the period for which, and by whose authority, it is closed	632(6)	Summary/level 3
Company contravening s 636(2) or (3)	636(4)	Summary/level 4/ HK$700 daily
Company failing to keep a branch register	637(6)	Summary/level 4/ HK$700 daily
Company failing to deliver to the Registrar for registration a notice in the specified form informing the Registrar of (a) the discontinuance; and (b) the register to which all the entries have been transferred, within 15 days after the discontinuance	639(4)	Summary/level 4/ HK$700 daily
Company contravening s 641(1), (2), (3), (4) or (5)	641(7)	Summary/level 4/ HK$700 daily
Company failing to notify Registrar of appointment and change	645(6)	Summary/level 4/ HK$700 daily
Director failing to make disclosure	646(3)	Summary/level 4

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Company failing to keep a register of company secretaries	648(7)	Summary/level 4/ HK$700 daily
Company failing to notify Registrar of appointment and change	652(3)	Summary/level 4/ HK$700 daily
Company secretary failing to make disclosure	653(2)	Summary/level 4
Company failing to adequately record for future reference the information required to be contained in any company records	655(5)	Summary/level 3/ HK$300 daily
Company failing to ensure that company records are capable of being reproduced in hard copy form	655(6)	Summary/level 3
Company failing to take precautions against falsification	656(2)	Summary/level 3
Person committing an offence mentioned in the Regulations about keeping and inspection of company records and provision of copies	657(4)(b)	Summary/level 5/ HK$1,000 daily
Company having no registered office of company in Hong Kong	658(5)	Summary/level 5/ HK$1,000 daily
Person failing to make required disclosures	660(c)	Summary/level 3
Company failing to comply the requirement to deliver annual return	662(6), (8)	Summary/level 5/ HK$1,000 daily
Arrangements, Amalgamation, and Compulsory Share Acquisition in Takeover and Share Buy-Back		
Explanatory statements not issued or not made available to creditors or members	671(6)	Summary/level 5
Directors and trustees failing to notify company of interests under arrangement or compromise etc	672(2)	Summary/level 5
Company contravening s 673(7)	673(8)	Summary/level 3
Company contravening s 675(7)	675(8)	Summary/level 3

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Company's articles not accompanied by order of Court	677(2)	Summary/level 3
Directors of amalgamating company failing to notify secured creditors of proposed amalgamation	682(3)	Summary/level 3
Director of amalgamating company failing to issue certificate on solvency statement	683(4)	On indictment/ HK$150,000 and 2 years
		Summary/level 5 and 6 months
Company contravening s 686(6)	686(7)	Summary/level 3/ HK$300 daily
Offeror failing to notify minority shareholders of right to be bought out	701(3)	Summary/level 5
Offeror failing to give notice to minority shareholders	702(6)	Summary/level 4
Repurchasing company failing to notify minority shareholders of right to be bought out	719(3)	Summary/level 5
Repurchasing company failing to notify minority shareholders in the specified form and within one month after the first day on which the holder of the shares is entitled under s 718 to require the repurchasing company to buy back those shares	720(6)	Summary/level 4
Remedies for Protection of Companies' or Members' Interests		
Company failing to deliver an office copy of the order to the Registrar for registration	726(5)	Summary/level 3/ HK$300 daily
Person contravening s 741(2) or (4)	741(5)	On indictment/ HK$150,000 and 2 years
		Summary/level 5 and 6 months

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Dissolution by Striking off or Deregistration		
Person who knowingly or recklessly gives any information to the Registrar that is false or misleading	750(6)	On indictment/ HK$300,000 and 2 years
		Summary/level 6 and 6 months
Former director failing to keep dissolved company's books and papers for 6 years	758(3)	Summary/level 3
Company failing to change prohibited name	770(6)	Summary/level 3/ HK$300 daily
Company failing to comply with a direction within the period specified in the notice or extended under s 771(3)	771(4)	Summary/level 6/ HK$2,000 daily
Non-Hong Kong Companies		
Certain non-Hong Kong companies failing to apply for registration	776(6)	Summary/level 5/ HK$1,000 daily
Company failing to notify Registrar of addition, change or cessation of name or translation of name	778(10)	Summary/level 3/ HK$300 daily
Person who commits an offence under s 781(2)	781(3)	Summary/level 6/ HK$2,000 daily
Company failing to keep authorised representative's required details registered in Companies Register	786(5)	Summary/level 5/ HK$1,000 daily
Company failing to deliver annual return for registration	788(3), (5)	Summary/level 5/ HK$1,000 daily
Company failing to deliver accounts for registration	789(5)	Summary/level 5/ HK$1,000 daily
Company failing to, within 15 days after the decision, deliver to the Registrar for registration a warning statement, in the specified form, that the accounts will be so revised	790(5)	Summary/level 5/ HK$1,000 daily

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Company failing to deliver return for registration in case of change of certain particulars	791(7)	Summary/level 5/ HK$1,000 daily
Non-Hong Kong company failing to state names, place of incorporation etc.	792(6)	Summary/level 3
Registered non-Hong Kong company failing to notify Registrar of commencement of liquidation etc.	793(7)	Summary/level 3/ HK$300 daily
Registered non-Hong Kong company failing to notify Registrar of cessation of place of business in Hong Kong	794(4)	Summary/level 3/ HK$300 daily
Authorised representative of registered non-Hong Kong company failing to notify Registrar of dissolution	795(4)	Summary/level 3/ HK$300 daily
A non-Hong Kong company contravening s 798(4)	798(6)	Summary/level 5/ HK$1,000 daily
Companies not Formed, but Registrable, under this Ordinance		
Company failing to send or supply to the member or holder the document or information in hard copy form, free of charge (a) within 21 days after the date of receiving the request; or (b) if the document or information requires an action to be taken by the member or holder, within 7 days after the date of receiving the request	837(3)	Summary/level 3
Investigation and Enquiries		
Offences for failing to comply with requirements under Subdivision 4 etc.	863(9)	On indictment/ HK$200,000 and 1 years
		Summary/level 5 and 6 months

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Offences for failing to comply with requirements under s 869 etc.	871(8)	On indictment/ HK$200,000 and 1 years
		Summary/level 5 and 6 months
Offences for failing to comply with requirements under s 873 etc.	875(8)	On indictment/ HK$200,000 and 1 years
		Summary/level 5 and 6 months
Person who commits an offence under subsection (9)	877(10)	On indictment/ HK$100,000 and 2 years
		Summary/level 6 and 6 months
Offences on breach of secrecy	882(3)	On indictment/ HK$100,000 and 2 years
		Summary/level 6 and 6 months
Destruction of documents	890(2)	On indictment/ HK$100,000 and 2 years
		Summary/level 6 and 6 months
Miscellaneous		
Offence for false statement	895(2)	On indictment/ HK$300,000 and 2 years
		Summary/level 6 and 6 months
Offence for improper use of "Limited" or "有限公司" etc.	896(3)	Summary/level 3/ HK$300 daily
Offence for false statement	915(3)	Summary/level 6 and 6 months

General description of the offence under Cap 32	*Section provision in Cap 32*	*Penalty Mode of prosecution/ punishment / daily default fine (if applicable)*
Offences relating to the Registers of Significant Controllers		
Failing to establish and keep a of Significant Controller Register	653H(4)	level 4/$700 daily
Failing to enter and maintain the contents of the register	653I(3)	level 4/$700 daily
Failing to enter particulars of registrable persons	653J(3)	level 4/$700 daily
Failing to enter the registrable legal entity in the register on time	653K(2)	level 4/$700 daily
Failing to maintain the register at the designated place	653M (4)	level 4/$700 daily
Failing to notify change of venue of the register	653N(4)	level 4/$700 daily
Failing to investigate and obtain information (Cf s 653S)	653P(4)	level 4
Failing to keep information up to date –subject to s 653V	653T(3)	level 4
Giving false information	653ZE	on indictment $300,000 /2 years
		summary level 6 and 6 months

***Wolters Kluwer Note:** Penalty levels, prescribed under the *Criminal Procedure Ordinance* (Cap 221), Sch 8, are as follows:

Level of fines for offences:

Level 1	HK$2,000
Level 2	HK$5,000
Level 3	HK$10,000
Level 4	HK$25,000
Level 5	HK$50,000
Level 6	HK$100,000