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Connect Plus Ltd v Lau Wing Yan & Ors

HCMP2263/2018, [2019] HKCFI 70, [2019] 1 HKJR 101, [2019] HKCLC 1
Court of First Instance
Hon Queeny Au-Yeung J
Date of Reasons for Decision: 7 January 2019

B *Company law — Directors — Breach of fiduciary duties by directors — Misfeasance or a wrongful act — Application for injunction restraining defendants from being appointed as chairman at upcoming EGM — Urgency — Strong case on the merits — Irreparable prejudice if an order was not granted — Companies Ordinance (Cap 622) ss 728 –730*

C 公司法 — 董事違反信託義務 — 瀆職或不法行為 — 申請禁制令禁止在來臨的臨時股東大會上任命被告為董事長 — 緊急情況 — 案情重大 — 如未下禁制令將產生不可彌補的損害 — 公司條例（第622章）第728至730條

The Company was to hold an extraordinary general meeting (EGM) in January 2019 to decide whether the 1st to 3rd Defendants should be
D removed as directors (Jan EGM). Three clear days after the issue of an originating summons, the Plaintiff (P) applied for a final order on an urgent basis that the 1st to 4th Defendants (and another director of the Company, Mr Yang) should not be appointed chairman at the EGM. The 1st to 4th Defendants opposed to the application on the basis of lack of urgency.

E P belonged to one camp holding 45% beneficial shareholding in the Company whereas the 1st defendant's camp held another 45% beneficial shareholding. The remaining 10% was held by Mr Yang. A series of EGM had been held whereby each camp wanted to entrench control on the Company's board. The day before an EGM held on 29 August 2018, the 4th Defendant and Mr Yang appointed the 1st to 3rd Defendants
F as new directors of the Company. There had been cross allegations of interruption from each Camp in relation to the meeting.
In respect of the Jan EGM, the validity of its notice was disputed by P's camp in another set of proceedings. P in the present application on the grounds of conflict of interest and abuse of powers of the 1st to 3rd Defendants.

G *Held*, refusing to make a final order on an urgent basis and adjourning the originating summons for directions:

1. If the court was satisfied that a director was about to commit a misfeasance or that a wrongful act was imminent, the court had jurisdiction and power to grant a *quia timet* injunction to restrain the wrongful act or misfeasance, if it was necessary and just to do so. (See paras 36-37.)

H 2. Since P was not seeking interim relief but a final order on the originating summons upon three clear days' notice, which deprived the Defendants of the right to file affirmations in opposition under O 28 r

1A(4), P had to show (i) urgency, (ii) a strong case on the merits; and (iii) irreparable prejudice if an order was not granted. (See paras 28-31.)

3. The notice here was not sufficient. Although there were only five working days before the event said to trigger the issue of the originating summons, each case turned on its own facts. The application was only a simple one, and the urgency was self-induced by P. The lateness deprived the court and other parties of the time to consider the application. (See paras 18, 33-36.)

4. As to the merits of the application, the case was not appropriate for summary disposal:

(1) The court should not dictate who should be a director or chairman of a company. That was entirely a matter of internal management of the Company. It might be otherwise if there was a convincing case that the directors had acted in breach of their duties. If P was to challenge the 2nd Defendant's decision in the earlier EGM in December as depriving it of its proprietary right as a shareholder, it had to show fraud or bad faith on the part of the 2nd Defendant. There was no such allegation until the present hearing. (*Kwok Ping Sheung Walter v Sun Hung Kai Properties Ltd* [2009] 2 HKLRD 11; *Re Tysan Holdings Ltd* [2013] HKCFI 929; *Kwok Hiu Kwan v Johnny Chen* [2018] HKCFI 2112 applied.) (See paras 37-42.)

(2) Showing that a chairman had interest in the outcome of any EGM or had conflict of interest with another camp of directors or shareholders was not enough to bar him/her from becoming a chairman. In accordance with Art 57 of the Articles of Association of the Company, a chairman could only be elected among the directors. There was no such thing as an "independent third party" who could be a chairman. In any event, the concern of conflict did not apply to the 4th Defendant who was not one of the directors to be removed at the Jan EGM. (*So Kuen Kwok v Pearl Oriental Oil Ltd* [2018] HKCFI 2559 distinguished.) (See paras 43-45.)

(3) In the case of Mr Yang, it was arguable that the order should not be granted against him since he was not a party to the originating summons. (See para 48.)

(4) Making such order would mean giving chairmanship to P's Camp and excluding the Defendants' Camp before the fundamental issues as to (i) the beneficial shareholding in the Company; (ii) validity of appointment of P's Camp of directors; and (iii) the validity of the Jan EGM notice, were resolved. The court could not form a provisional view on which Camp had stronger merits in view of the dispute over facts. (See para 49.)

5. P's prejudice, taken at the highest, was that its Camp would be excluded from the board. As the Company had been dormant for years, exclusion from the board would only create difficulty for the plaintiff in terms of investigate the Company's affairs or misconduct of the Defendants' camp. However, P could always go to court for redress, such as derivative action or discovery applications. While some prejudice was

A shown, P had not begun to show that the prejudice would be irreparable. (See paras 51-55.)

[Headnote by Brian Fan]

The following cases referred to in this decision:

- *Canton Plus Enterprise Ltd v Tong Zhenjun & Ors* HCA227/2017, [2018] HKCFI 1402, [2018] 6 HKJR 72
- *Kwok Hiu Kwan v Johnny Chen & Ors* HCMP41/2018, [2018] HKCFI 2112, [2018] 9 HKJR 26, [2018] 6 HKC 394
- *Kwok Ping Sheung Walter v Sun Hung Kai Properties Ltd* CACV145/2008, [2008] HKCA 192, [2008] 5 HKJR 2, [2009] 2 HKLRD 11, [2008] 3 HKC 465
- *Lee Chi Yuen Arctic v Lau Siu Ming* HCMP 778/2016, [2016] HKCFI 769, [2016] 5 HKJR 11
- *Li Ming & Ors v Zhang Caikui & Anor* HCA 1282/2017, [2018] HKCFI 1042, [2018] 5 HKJR 32
- *So Kuen Kwok v Pearl Oriental Oil Ltd* HCMP1912/2018, [2018] HKCFI 2559
- *Re Tysan Holdings Ltd* HCMP2892/2012, [2013] HKCFI 929, [2013] HKCLC 371, [2013] 4 HKC 425

Mr William Wong SC, leading Miss Jasmine Cheung, instructed by Sit, Fung, Kwong & Shum, for the Plaintiff

Mr Anson Wong SC, leading Mr Martin Kok, instructed by DLA Piper Hong Kong, for the 1st to 3rd Defendants

Mr Gary Yin, of Reynolds Porter Chamberlain, for the 4th Defendant

The 5th Defendant was not represented and did not appear

Hon Au-Yeung J handed down the following decision of the Court of First Instance:

Introduction

1. D5 ("**the Company**") was to hold an EGM at 3:00 pm on 4 January 2019 ("**the Jan EGM**") to decide whether or not D1 – D3 should be removed as directors. The Plaintiff took out an originating summons ("**OS**") for an order that D1 – D4 and one **Mr Yang**, being the directors of the Company, should not be appointed as chairman at the Jan EGM. Three clear days after service of the OS, the Plaintiff sought a final order under the OS, on an urgent basis.

2. D1 – D4 opposed the application on the ground that there was no urgency. There were various disputes as to facts. It would be breach of natural justice to deprive the Defendants of a fair opportunity to put forth evidence properly in opposition. Further, the application lacked merits. There would be no irreparable prejudice to the Plaintiff even if a final order was not made. The Plaintiff could always go to court for redress even after the EGM. Moreover, the court should not make an order affecting Mr Yang, who was not a party to the OS.

3. After hearing submissions, I declined to make a final order on urgent basis and adjourned the OS to 12 March 2019 for directions. The OS will be heard with the Defendants' summons seeking an order for converting the OS into a writ action ("**the Conversion Summons**"). Here are my reasons.

The facts

4. Mr Chu Kong together with his nominees (collectively "**Mr Chu's Camp**") held 45% beneficial shareholding in the Company. The nominees included the Plaintiff (being 30% registered shareholder) and Eagle Valour.

5. Similarly, Mr Lau Wing Yan (D1) together with his nominees (collectively "**Mr Lau's Camp**") held a total of 45% beneficial shareholding of the Company.

6. The rest of the 10% shareholding in the Company was held by Mr Yang (ie Mr Yang Haitao).

7. The background to the parties' dispute was complicated and this court was informed that there are 4 sets of related proceedings.

8. In brief, Mr Lau was the founder of a business engaged in shipping and logistic operations which, since 2000, has been operated through a group of companies known as **the PB Group**.

9. In 2004, Mr Chu and Mr Lau became joint owners of all of the shares and interests of the companies (including the Company) within the PB Group. The beneficial ownership was as aforesaid.

10. In late 2009, Mr Chu and Mr Lau jointly invested into a joint venture business then known as Bohai Gulf Ocean Shipping which operated through **the BBG Group**.

11. Since late 2013, serious conflicts had arisen between Mr Chu and Mr Lau in relation to, amongst others, the PB Group and BBG Group. The relationship irretrievably broke down in 2014.

12. By a **PB Restructuring Agreement** between Mr Chu and Mr Lau in early 2014, Mr Chu agreed to, amongst others, withdraw from management and assign his interests in the PB Group to Mr Lau with effect from 1 January 2014. The price was to be decided by reference to the total audited net asset value of the PB Group as at 31 December 2013.

13. At the same time, Mr Lau entered into a mirror arrangement as regards the BBG Group pursuant to a BBG Group Restructuring Agreement.

14. Performance of the 2 Restructuring Agreements encountered difficulties when there were cross allegations of unlawful transfer of funds to the other Camp's nominees. Mr Chu also refused to carry out a joint audit of the PB Group in order to determine the value of the shares. He wanted to investigate into the affairs of the Company.

15. Meanwhile, from early 2014, the shipping business of the PB Group began to be operated by Mr Lau. On the other hand, Mr Chu moved out of the PB Group offices and established a shipping business in competition with the PB Group.

16. What followed were a series of litigation and holding of EGMs whereby each Camp wanted to entrench control on the Company's board.

A 17. The litigation includes **HCA** 227/2017 and **HCA** 228/2017, of which the core issue was whether or not Mr Chu had an interest as shareholder of the Company in view of the PB Restructuring Agreement. There are hotly disputed issues of fact.

18. The relevant EGMs were held on 29 August 2018 ("**the Aug EGM**"), 19 December 2018 ("**the Dec EGM**") and 4 January 2019 ("**the** B **Jan EGM**").

19. The day before the Aug EGM, the Company (then comprising D4 and Mr Yang) appointed D1 – D3 as new directors. The resolution was undated, which became dated when the Plaintiff queried the resolution.

20. At the Aug EGM, Ms Sun was elected as chairman. There were cross allegations of interruptions from each Camp in relation to the C meeting. Mr Chu purported to (i) elect himself and people from his Camp as directors; and (ii) resolve for the provision of books and accounts by the directors. Despite resolution no (ii), Mr Chu had been unable to obtain the books and records of the Company and had to apply to the court pursuant to his statutory right as a director. The validity of these appointments formed the subject matter of **HCMP 1939/2018**.

D 21. The **Dec EGM** was held at the request of the Plaintiff; with notice given by D3 on behalf of the Company. Again, Ms Sun was elected as Chairman. The Plaintiff and Eagle Valour's proxies were barred from voting. Following voting, the proposals to remove D1 – D3 were not carried. Further, the Company's shareholders passed a resolution stating that no legal or valid resolutions were passed at the Aug EGM.

E 22. In relation to the subject **Jan EGM**, the validity of its notice was disputed by Mr Lau's Camp in **HCMP** 2267/2018. That Camp's case was that the Plaintiff's purported notice to convene the EGM was invalid. This was because members' power to call a general meeting under s 568 of the Companies Ordinance, Cap 622, could only be exercised if the directors failed to do so under s 567. As the directors had duly convened the Dec EGM, the Plaintiff's purported notice of the Jan EGM must be F invalid.

23. To "ensure that the meeting could be conducted in a lawful, fair and open manner", the Plaintiff took out the present OS to bar the Defendant Directors and Mr Yang from being the chairman. The bases of the application were:

G (1) Conflict of interest if the Defendant Directors, who were the directors subject to removal resolutions at the Jan EGM, were to take the chair;

(2) A history of events which demonstrated that the Defendant Directors, if allowed to be chairman, would quite certainly abuse the powers of a chairman. These included frustrating the Plaintiff's proper voting at the Aug EGM and Dec EGM. In particular, Ms Sun invoked the wide-ranging powers H of a Chairman to carry out such frustration. The Defendant Directors had also obstructed the legitimate rights of Mr Chu's Camp, whether as director or shareholder, to investigate the suspicious financial affairs of the Company and to remove D1 – D3 (all of Mr Lau's Camp).

24. Before issuing the OS, the Plaintiff had tried to elicit an undertaking from the Defendant Directors and Mr Yang not to take the chair in the Jan EGM and to agree to appoint an independent third party solicitor to take the chair instead, but to no avail. On the other hand, the Plaintiff has undertaken to this court that if the order sought was granted, it would undertake to allow every shareholder and validly appointed proxies to vote.

25. The Defendant Directors opposed the OS on the grounds set out in paragraph 2 above. Having regard to the disputes of facts, D1 – D3 had issued the Conversion Summons, which would be heard on 12 March 2019 as directed by Harris J.

Legal principles

26. The court has power, on application by a member of a company, to grant an injunction to restrain breaches of fiduciary duties by directors: *Butterworths Hong Kong Company Law Handbook*, 20th ed, §§728.05, 729.02 and 729.03.

27. If the court is satisfied that a director is about to commit a misfeasance or that a wrongful act is imminent, the court has jurisdiction and power to grant a *quia timet* injunction to restrain the wrongful act or misfeasance, if it is necessary and just to do so: *Lee Chi Yuen Arctic v Lau Siu Ming* HCMP 778/2016, 6 May 2016, §9.

28. Here, the Plaintiff *was not* seeking interim relief but a final order on the OS upon 3 clear days' notice that deprived the Defendant Directors of the right to file and serve affirmations in opposition within 28 days of service, ie by 25 January 2019: Order 28, rule 1A(4).

29. In my view, the Plaintiff had to show (i) urgency, (ii) a strong case on the merits; and (iii) irreparable prejudice if an order was not granted.

30. In *Li Ming v Zhang Caikui* HCA 1282/2017, 7 May 2018, G Lam J has this to say on the need to show urgency and irreparable prejudice:

> " To justify applying with such urgency it is usually necessary to show some irreparable prejudice. But there is none suggested. All that Mr Mok said was the reconstitution of the board should be done on a proper basis. But there can be EGMs after EGMs, and directors appointed can be removed, and those removed, re-appointed. The EGM to be held tomorrow, if not adjourned, will not render Chen HQ's application for receivership or injunction nugatory."

31. With regard to the merits, the court has to have a high degree of assurance that the plaintiff has a strong case to justify a summary disposal of the OS, without full evidence from the Defendant Directors.

32. I would deal with the elements in paragraph 29 one by one.

Urgency

33. Mr William Wong SC, counsel for the Plaintiff, explained that the Dec EGM was the event that triggered the issue of the OS. Ms Sun, as chairman, had denied the Plaintiff and Eagle Valour the right to vote

because of typo in the name of one proxy and alleged false address of the other, despite no ambiguity as to identity of the proxies. She also claimed that the proxy had not obtained the consent of the beneficial shareholder to appear, when in fact the Plaintiff was the registered shareholder and had the right to vote in law. Mr William Wong SC submitted that those were invalid reasons. I shall assume that he was right for present purposes.

34. Mr William Wong SC pointed out that there were only 5 working days between 19 and 28 December 2018 when the OS was issued.

35. Each case turned on its own facts. However, with respect, the notice here was not sufficient. If something was so urgent as claimed, the Plaintiff should have prepared its case expeditiously and given notice to the Defendant Directors earlier, especially since Mr William Wong SC submitted that this OS involved only a simple application. In So *Kuen Kwok v Pearl Oriental Oil Ltd* [2018] HKCFI 2559, 19 November 2018, the defendants had had 14 days to prepare before the OS was heard.

36. This lateness on the Plaintiff's part had deprived the court and other parties of the time to consider the application together with relevant evidence: *Li Ming*, §14. Any urgency was self-induced by the Plaintiff. The court should not accommodate the Plaintiff's request for an expedited hearing.

Merits of the OS

37. I just wish to make some preliminary observations on the merits (which should not bind the trial judge) in order to explain why I decided to adjourn the OS for substantive arguments instead of summarily disposing of it.

38. Firstly, the court should not dictate who should be a director or chairman of a company. That was entirely a matter of internal management of the Company: *Kwok Ping Sheung Walter v Sun Hung Kai Properties Ltd* [2009] 2 HKLRD 11, §§19 – 21.

39. It may be otherwise if there was a convincing case that the directors had acted in breach of their duties: *Re Tysan Holdings Ltd* [2013] 4 HKC 425, §§35 – 36, Mimmie Chan J.

40. In the present case, the order sought was not about election of directors but a chairman. The concern was abuse of a chairman's power and frustration of shareholders' rights.

41. Secondly, if the Plaintiff were to challenge Ms Sun's decision as depriving it of its proprietary right as a shareholder, the Plaintiff had to show fraud or bad faith on the part of Ms Sun: *Kwok Hiu Kwan v Johnny Chen & ors* [2018] HKCFI 2112, §§33, 50 and 53, 29 August 2018, Harris J.

42. However, it was not even alleged that Ms Sun's conduct amounted to fraud or bad faith. Till this hearing there had been no application to overturn her decision at the Dec EGM.

43. Thirdly, showing that a chairman had interest in the outcome of any EGM or had conflict of interest with another camp of directors or shareholders was not enough to bar him/her from becoming a chairman: *Briggs, N, Modern Law of Meetings*, 3rd ed, §7.30:

> " The fact that the Chairman has an interest in the outcome of a decision does not, in itself, impugn the integrity of the process at a meeting. No company contemplates that the Chairman will be totally disinterested in every matter, and he is presumed to act in good faith unless it is proven otherwise."

44. In the present case, Mr William Wong SC accepted that in accordance with Article 57 of the Articles of Association of the Company, a chairman could only be elected among the directors. There was no such thing as an "independent third party" who could be a chairman. The Articles of Association did not require the chairman to be neutral.

45. Mr William Wong SC relied on the authority of *So Kuen Kwok* wherein the directors faced a similar proposal for removal. A similar order was made to restrain them from being a chairman because there was potential conflict of interest between the directors and the interest of the Company, breach of fiduciary duty and sweeping powers of the chairman which may potentially influence the voting results (838).

46. With respect, that case could be distinguished on the facts. There, Recorder Stewart Wong SC found that (i) the directors had evaded service of the originating summons; (ii) there was a prior board resolution that the chairman would not be selected from the current directors but, rather, the board would appoint an independent third party to act as the chairman; and (iii) there was a probability that one of the directors might seek to act as a chairman, contrary to the prior board resolution.

47. In any case, the concern of conflict would not apply to D4, who was not one of the directors to be removed at the Jan EGM.

48. Fourthly, Mr Anson Wong SC leading Mr Martin Kok (counsel for D1 – D3) pointed out that the order sought was also to restrain Mr Yang from taking the chair. The court should not grant the order that would affect Mr Yang's rights when he was not a party to the OS. I agree that this was arguable even though Mr Yang had indicated in correspondence that he would not attend the Jan EGM and had taken sides with Mr Lau's Camp as regards the legal validity of the PB Restructuring Agreement.

49. Fifthly, since 28 August 2018, there have been 5 directors on the board of the Company—D1 to D3, Mr Yang and Mr Yan. Making an order in terms of the OS would mean giving chairmanship to Mr Chu's Camp and excluding Mr Lau's Camp before the fundamental issues as to (i) Mr Chu's beneficial shareholding in the Company; (ii) validity of appointment of Mr Chu's Camp of directors; and (iii) the validity of the Jan EGM notice, were resolved. The court could not form a provisional view on which Camp had stronger merits in view of the dispute over facts.

50. Sixthly, the Defendant Directors accused the Plaintiff of material non-disclosure and asserted how the Plaintiff had failed in many past applications. I do not need to go into them since the Plaintiff had not had the opportunity to answer them by evidence. This point would not have affected my overall view of this application. The first 5 points were enough for me to find that the Plaintiff did not have a strong case on the merits to justify summary disposal of the OS.

A *Irreparable damage to the Plaintiff*

51. If this court were to refuse the relief, what prejudice would that cause to the Plaintiff? The prejudice, taken at the highest, would be that the Plaintiff's concerns in paragraph 23 above would come true. The Plaintiff's Camp would likely be excluded from the board.

52. There was no dispute that the Company has been dormant for
B years since 2014. The "substantive benefit" which the Plaintiff sought to obtain from the Company was to investigate the Company's affairs following suspicions of misappropriation of assets.

53. Exclusion from the board would create more difficulty for the Plaintiff in terms of gaining access to documents or information that might assist in investigation of misconduct in Mr Lau's Camp. However,
C the Plaintiff could always go to court for redress, such as by derivative action or discovery applications. In fact DHCJ Saunders had devised an elaborate mechanism whereby documents of companies jointly owned by Mr Chu and Mr Lau would be preserved and both Camps could apply to the court for disclosure of documents: *Canton Plus Enterprise Limited v Tong Zhenjun & ors* [2018] HKCFI 1402, §72. It would also be entirely
D open to the Plaintiff to subsequently challenge any resolution reached at the Jan EGM.

54. Mr William Wong SC queried what prejudice would be caused to the Defendant Directors if an order in terms of the OS was made, especially since the Plaintiff had undertaken to let Mr Lau's Camp vote at the Jan EGM. With respect, that question of balancing of convenience
E would only come into play if the Plaintiff had shown a strong case on the merits.

55. Applying *Li Ming*, whilst some prejudice was shown, the Plaintiff had not begun to show that the prejudice would be irreparable.

Conclusion

56. Given the self-induced urgency, lack of strong merits and lack
F of irreparable prejudice, this was not a case where the court could have a high degree of assurance that making an order summarily was a just result. I therefore made the order as I did.

57. On costs, as the Plaintiff had insisted on proceeding on an urgent basis but failed, it should bear costs of the hearing. I make an order nisi that the Plaintiff do pay costs of D1 – D3, summarily assessed (according
G to items D2 – 4 and E in the statement of costs) at $283,600; and of D4, summarily assessed at $50,000.

58. I thank counsel and Mr Gary Yin for their assistance.

(Queeny Au-Yeung)
Judge of the Court of First Instance
High Court

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Cardomon International Ltd v Longview Corp Ltd

HCCW85/2018, [2019] HKCFI 239, [2019] 1 HKJR 113, [2019] HKCLC 11
Court of First Instance
Hon Jonathan Harris J
Date of Decision: 9 January 2019

B

Company law — Winding up — Insolvency — Unsatisfied statutory demand — Defence — Bona fide dispute on substantial grounds in respect of the debt — Promissory estoppel — Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32)

C

公司法 — 清盤 — 破產 — 未遵從法定要求償債書 — 就債務有實質上的真正爭議 — 容反悔 — 公司（清盤及雜項條文）條例（第32章）

The Petitioner (P) issued a petition for the winding up of the Company on the grounds of insolvency. There was no dispute that two loans were made to the Company, which were the alleged debt relied on by P. While the Company did not oppose the petition, it was opposed by Mr Ong, one of the two shareholders of the Company on two bases:

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(i) both P and Mr Ong had agreed that the Company did not have to repay the loans; or

(ii) alternatively, P was estopped from claiming repayment.

Held, granting a winding-up order

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1. In order to defeat a winding-up petition, it was necessary for a party opposing it to demonstrate that the company had a *bona fide* dispute on substantial grounds in respect of the alleged debt. (See para 4.)

2. In respect of the first ground, Mr Ong had not been able to tell the court details of the circumstances in which the alleged agreement came to be made. Further, the auditors' explanation of why the notes were included in the audited financial statements rendered Mr Ong's suggestion that he entered into an agreement with the petitioner which restricted their ability to require repayment until such time as the financial position of the Company improved from that wholly unconvincing. No bona fide defence on substantial grounds had been established in respect of this ground. (See paras 5, 7, 10.)

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3. In respect of the second ground, the defence of estoppel was said to arise from a sentence in a note in the 2009 financial statements, namely that "*the shareholders…will not call for repayment of the loan account until the financial position of the company permits*". However, it was not credible to suggest that the inclusion of the statement alone constituted a clear and unequivocal promise not years later to request repayment of the loan that the petitioner had made. No bona fide defence on substantial grounds had been established in respect of this ground either. (See paras 12, 14-15.)

H

[Headnote by Jonathan Lee]

The following cases referred to in this decision:

- *Luo Xing Juan v Estate of Hui Shui See* FACV32/2007, [2008] HKCFA 64
- *Re Hong Kong Construction (Works) Ltd* HCCW670/2002, [2003] HKCFI 101, [2003] 1 HKJR 10
- *Re ICS Computer Distribution Ltd (No 1)* HCCW615/1995, [1996] HKCFI 820, [1996] 4 HKJR 2, [1996] 1 HKLRD 181, [1996] 3 HKC 440
- *Re Safe Rich Industries Ltd* CACV 81/1994, [1994] HKCA 417
- *Re Yueshou Environmental Holdings Ltd* HCCW142/2013, [2014] HKCFI 1253, [2014] 7 HKJR 10

Mr Patrick Chong, instructed by Howse Williams Bowers, for the petitioner

Mr Tom Ng, instructed by Robertsons, for the opposing contributory

Hon Jonathan Harris J handed down the following decision of the Court of First Instance.

1. On 29 March 2018, the petitioner Cardomon International Limited issued a petition for the winding up of the Company on the grounds of insolvency. The alleged debts relied on by the petitioner are two loans for HK$895,000 and HK$250,000 respectively which were advanced to the Company on 12 September 2007 and 18 January 2013. There is no dispute that these loans were made to the Company and they are recorded in audit confirmations dated 14 April 2014 and are recorded in various of the Company's audited financial statements, most recently in that for the year ending 30 June 2016.

2. A statutory demand was served and dated 7 March 2018. The Company itself does not oppose the petition. It is opposed by one of the two shareholders of the Company, Mr Ong Han San. He owns 50% of the issued shares and is one of its directors. Mr Ong has filed two affirmations setting out the grounds on which he contends that there is a defence to the petitioner's claims for recovery of its loans.

3. Before turning to consider Mr Ong's evidence and the arguments advanced on his behalf by Mr Tom Ng, it is helpful to set out briefly the relevant legal principles by reference to which the Companies Court determines disputes of this sort.

4. It is well known that it is necessary in order to defeat a winding-up petition for a party opposing it to demonstrate that the company has a bona fide dispute on substantial grounds in respect of the alleged debt. In *Re Yueshou Environmental Holdings Ltd* 1 I summarised the relevant principles in [8] in which I state as follows:

> "8. It is well established that a winding-up Petition should only be issued if a creditor is clearly owed a liquidated sum and the debtor company does not have any valid ground for refusing payment. If the company has a bona fide defence on substantial grounds to the debt a petition should not be brought and if the court concludes either on the hearing of a strike out application

A or on the hearing of the petition that the company does have such a defence, the Petition will be dismissed. Many cases consider what constitutes a bona fide defence on substantial grounds and how the court should approach determining whether such a defence has been demonstrated. I will cite three commonly cited authorities which together explain the established principles.

B (1) The onus is on the Company to show that it disputes the debt on substantial grounds:

'*Importantly for this case there is a distinction between a consideration of whether the company has established a defence on substantial grounds and a consideration of whether the evidence is believable. Taken to the ultimate, the difference is between whether there is evidence and whether that evidence is believable. It seems to me that the onus must be on the company against which a petition is presented to adduce sufficiently precise factual evidence to satisfy the court it has a bona fide dispute on substantial grounds*.'

Re ICS Computer Distribution Ltd [1996] 3 HKC, 440 at 444B

(2) I have to be satisfied that the Company's assertions are believable. The test

'*... is indeed as simple as whether the defendant's assertions are believable. But it must be recognised – because failure to recognise it would create a debt dodgers' charter – that whether the defendant's assertions are believable is a question to be answered not by taking those assertions in isolation but rather by taking them in the context of so much of the background as is either undisputed or beyond reasonable dispute*.'

Re Safe Rich Industries Ltd (Unreported) CA 81/94, 3 November 1994, Bokhary JA, §13

(3) The relevant principles were summarised as follows by Kwan J (as she then was) at paragraph 6 of her Ladyship's judgment in *Re Hong Kong Construction (Works) Limited* (unreported) HCCW 670/2002, 7 January 2003:

'(1) *The burden is on the company to establish that there is a genuine dispute of the debt on substantial grounds. In this context, "substantial" means having substance and not frivolous. An honest belief in an insubstantial ground of defence is not sufficient to avoid a winding-up order.*

(2) *The court should look at the company's evidence against so much of the background and evidence that is not disputed or not capable of being disputed*

in good faith; in other words, the evidence is not to be approached with a wholly uncritical eye.

(3) *The court would caution itself against unsubstantiated and unparticularised assertions, especially where particulars and information have been sought by the other side. It is incumbent on the company to put forward "sufficiently precise factual evidence" to substantiate its allegations.*

(4) *The court does not try the dispute on affidavit but is to determine whether a substantial dispute exists. In so doing, the court necessarily has to take a view on the evidence, to see if the company is merely "raising a cloud of objections on affidavits" or whether there really is substance in the dispute raised by the company. Even where the company has obtained unconditional leave to defend in an application for summary judgment, the Companies Court is not precluded from examining the evidence and taking a view on whether the debt is disputed on substantial grounds.'*"

5. Mr Ng contended that there are two arguably *bona fide* and substantial defences to the claims. The first is that both the petitioner and himself had agreed that the Company did not have to repay the loans that both of them had made as shareholders until the financial position of the Company permitted. The second is that even if the court does not accept that there is a *bona fide* defence on substantial grounds in respect of that defence, for reasons which I will explain in more detail later the petitioner is estopped from claiming repayment. I shall deal with the first suggested defence.

6. It is convenient to set out Mr Ong's evidence in full rather than summarise it because it is succinct. In [10(1)]–[10(2)] of his 1st affirmation, he says as follows:

"(1) The Company and its shareholders (i.e. the Petitioner and myself) agreed that the Company does not have to repay any sum due to the Petitioner or me, until the financial position of the company permits, to the effect that no directors'/shareholders' loan will be repaid unless and until the Company has sufficient funds to pay off outstanding loans owed to other creditors as well to the directors and shareholders. The Company accepted the loans on this basis.

(2) This is supported by the audited accounts, recording that 'the shareholders consent to provide adequate financial support to the company and will not call for any repayment of the loan amount until the financial position of the company permits'. There is now produced and shown to me marked 'OHS-8' copy of the audited accounts of the Company for 2009, 2010, 2011, 2013 and 2014, recording this arrangement. To the best of my knowledge,

these accounts were also signed and approved by the Petitioner. Notwithstanding that the audited accounts of the Company for 2015 and 2016 have not recorded such arrangement, I have never agreed to and/or accepted any variation to such arrangement."

In his reply affirmation in response to evidence filed by the Company and given by Mr Wesley George Fraser, he says this in [3] and [4]:

"3. The Company and its shareholders (i.e. the Petitioner and myself) agreed that the Company does not become obliged to repay any sum due to me or to the Petitioner, until the financial position of the company permits, to the effect that no directors'/ shareholders' loan or debt will be repaid unless and until the Company has sufficient funds to pay off outstanding loans or debt owed to other creditors as well to the directors and shareholders. The Company accepted the loans on this basis.

4. The parties' (i.e. the Company, the Petitioner and myself) understanding is that the 'debt' would not come into existence unless the contingency is satisfied. Further, the condition is a continuing one: in other words, the 'debt' does not exist, and/ or does not have to be repaid, if the condition/contingency is not satisfied at the time when repayment is demanded. The fact (which is denied, as explained below) that the condition/ contingency was once satisfied previously does not matter."

7. As can be seen from the paragraphs that I have quoted, Mr Ong has not been able to tell the court details of the circumstances in which the alleged agreement came to be made. It is not suggested, for example, that it is recorded in an exchange of correspondence or emails, or that it is resulted from an oral agreement made at a particular meeting, the dates and circumstances of which he is able to recall. On its face, therefore, his affirmation evidence does not appear to satisfy the tests summarised in the passages quoted by me from *Re Yueshou* earlier in this decision.

8. In Mr Fraser's 1st affidavit in support of the petition, he also makes reference to the notes in the audited financial statements (which I will quote later) and explains his recollection of the circumstances in which they came to be included, at least initially it would appear, in the audited financial statements for the 2008 and 2009 financial years. His recollection in his affidavit, which was dated 8 June 2018, was that they were included at the request of the Company's auditors. He does go on in [7] to suggest that the reason the notes subsequently came to be changed was that after a period of sustained profit, all the parties concerned, in about 2015, came to an agreement that the statement is no longer necessary and that the notes that were included in the accounts could be changed.

9. Subsequent to that affidavit having been made, the petitioner obtained a letter from the auditors, Cheung & Cheung, dated 21 August 2018, which explains their recollection of the circumstances in which the notes came to be included in the audited finance statement. The letter is comprehensive. In [3], Cheung & Cheung explain their recollection of the circumstances as follows:

> "The financial support from its directors/shareholders came in the form of loans to the company to enable it to acquire capital assets for the manufacture of plastic parts for sale to its customer to generate cash flows to cover the operating costs and expenses. The thin capital arrangement requires both of its directors/shareholders to agree their continued financial support to the company. Financial support is considered not necessary when Longview has accumulated sufficient reserves which would enable it to continue in business as a going concern. At the end of each reporting period, we have made an assessment of whether to include the Statement/Note based on the net current assets and accumulated profit or loss on Longview and facts known to us at the time right up to the date that the audited financial statements were signed off. The directors/shareholders would then confirm their agreement to our assessment by signing the audited financial statements containing the Statement/Note. There were no correspondence with the directors/shareholders regarding (i) the inclusion of the Statement/Note in the 2009, 2010, 2011, 2012, 2013 and 2014 audited financial statements and (ii) the removal of the Statement/Note from the 2015 and 2016 audited financial statements as the inclusion/removal was based on our assessment of the company's financial position."

Later in the letter, they deal with the financial years ending 30 June 2015 and 2016 respectively in which the notes were changed simply to refer to the fact that the loans were interest free and not for any specified tenor:

> "Based on the above facts, Longview was in a strong financial position with both net current assets and accumulated profit being almost three times the amount of loans advanced from its directors/shareholders. Although it was noted that cash balances decrease and cash alone would not be sufficient enough to repay loans from its directors/shareholders, Longview had significant trade receivables and that there were no indications that receivables would became irrecoverable up to the date of the reports were signed off. Cash balances and trade receivables together were sufficiently large enough to cover all current financial obligations and loans from directors/shareholders. Therefore financial support would not be required based on the above facts. Longview could continue its existence and business as a going concern without any financial support from its directors/shareholders even after repaying the loans from its directors/shareholders."

10. It seems to me that Cheung & Cheung's explanation is consistent with [6] of Mr Frasier's 1st affidavit, and inconsistent with the apparent suggestion of Mr Ong that the notes reflected some agreement entered into between him and the petitioner, which was consciously intended to restrict the circumstances in which repayment could be requested. The notes were of course included in audited financial statements prepared

A after that relevant accounting period had expired, and therefore served the primary purpose of allowing the auditors to audit the financial statements on a going-concern basis, at a time when their review of the accounts suggested that the solvency of the Company might be questionable absent the kind of undertaking that is recorded in the notes. It seems to me that in these circumstances the suggestion of Mr Ong, that he entered into
B an agreement with the petitioner which restricted their ability to require repayment until such time as the financial position of the Company improved from that, which presumably existed round about the time the agreement must have been made which given the date of the first loan would appear to be around about 2007, is wholly unconvincing. I am not satisfied that a bona fide defence on substantial grounds has been
C established in respect of that argument.

11. The second suggested defence is estoppel. This is said to arise from the inclusion of a note in the 2009 financial statements. The note is Note 11, and the relevant part of that note is [3] which reads:

> "The entity is owned by the directors with share capital of HK$10,000.00 only. Instead of increasing its share capital, the
D company's operation is mainly sourced from the directors'/ shareholders' loan of HK$1,790,000 which is interest free and has no fixed repayment term. In addition, the shareholders consent to provide adequate financial support to the company and will not call for repayment of the loan account until the financial position of the company permits."

E The particular part of that paragraph which is said to give rise to the relevant representation is the final sentence.

12. Mr Ng argued that it is at least arguable that that sentence contains a representation with no time limit that the shareholders would not call for repayment during a period in which the Company required financial support. As a consequence, even if in 2015 and 2016 the financial
F position of the Company had changed, and the restriction recorded in the note which I have quoted was no longer necessary, if, as he argued, the evidence indicates the financial position changed by the time statutory demand was served, the representation was engaged and the petitioner was estopped from seeking repayment.

13. Mr Ng in his written submissions referred me to the decision
G of the Court of Final Appeal in *Luo Xing Juan v Estate of Hui Shui See* [2009] HKCFAR 1. In that decision, the Court of Final Appeal set out the principles relating to promissory estoppel. Mr Ng has summarised these in the following terms which I quote, as I understand them not to be contentious:

> "(a) A promissory estoppel may arise where (i) the parties are in a relationship involving enforceable or exercisable
H rights, duties or powers; (ii) one party (the promisor), by words or conduct, conveys or is reasonably understood to convey a clear and unequivocal promise or assurance to the other (the promisee) that the promisor will not enforce

or exercise some of those rights, duties or powers; and (iii) the promisee reasonably relies upon that promise and is induced to alter his or her position on the faith of it, so that it would be inequitable or unconscionable for the promisor to act inconsistently with the promise.

(b) While it is necessary for the purposes of exposition to identify the separate elements of the doctrine, it should be borne in mind that when applying them to the facts, each element does not exist in its own watertight compartment to be kept separate from the others.

(c) Thus, the meaning of the words or conduct constituting the promise or assurance has to be understood in the light of the parties' particular relationship and especially in the light of the legal rights or powers exercisable, and known to be exercisable, by the promisor."

14. Given the fact that (i) for the purposes of assessing this suggested defence one has to assume the representation is there not because of an express agreement between Mr Ong and the representative of the petitioner, but because of a request of the auditors made for the reasons explained in their letter, I do not think it is credible to suggest that the inclusion of the statement alone constituted a clear and unequivocal promise not years later to request repayment of the loan that the petitioner had made. Precisely what was intended may be unclear, but what does seem to me to be certain is that the sentence in the note, to which I have referred, included simply to facilitate the auditors in auditing the financial statement on a going concern basis, is too vague and uncertain to satisfy the criteria identified and explained by the Court of Final Appeal.

15. I am not, therefore, persuaded that Mr Ong has demonstrated that there is a *bona fide* defence on substantial grounds to the petition and I will, therefore, make the normal winding-up order unless the parties wish me to make some different order, and I will now hear them.

(Submissions by counsel)

16. I will make a normal winding-up order but order that the petitioner's costs are paid on a party-and-party basis by Mr Ong, such costs to be taxed if not agreed.

(Jonathan Harris)
Judge of the Court of First Instance
High Court

[1] Unrep, HCCW 142/2013, [2014] HKEC 1178, 16 July 2014.

A

The Joint And Several Liquidators Of China Medical Technologies, Inc v Christopher Barry Abbiss & Ors

HCMP2590/2017, [2019] HKCFI 67, [2019] 1 HKJR 3, [2019] HKCLC 19
Court of First Instance
Hon Jonathan Harris J
B Date of Decision: 9 January 2019

Company law — Liquidation — Order for production pursuant to sec 221 of the former Companies Ordinance (Cap 32) or s 286B of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) — Actions against partnership — Construction of "Cause of
C *action" in O 81 r 1 — Whether Order for production is binding on all individual partners — Rules of the High Court (Cap 4A) O 81 r 1*

公司法 — 清算 — 根據舊公司條例（第32章）第221條或公司（清盤及雜項條文）條例（第32章）第286B條藉命令要求提供資料 — 針對合夥提出的訴訟 — 第81號命令第1條規則中"诉讼因由"的釋義 — 提供資料令是否對所有單個合夥人都具有約束力 — 高
D 等法院規則（第4A章）第81號命令第1條規則

The Defendants (Ds) sought to strike out as against certain other defendants in the present contempt proceedings. The strike out application was based on the premise that there were two categories of defendants who should not be joined as parties to the contempt proceedings. Ds then sought the determination of a preliminary issue in respect of the
E contempt proceedings. The parties had tried unsuccessfully to agree the formulation of the point of law to be decided. The question appeared to be whether O 81 of the *Rules of High Court (Cap 4A)* applied to an application under s 221 of the former *Companies Ordinance (Cap 32)* (or pursuant to s 286B of the present *Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32)*) when an order was
F made against a partnership such that the respondent could be the name of the firm, rather than each partner in the partnership at the relevant time, namely, when the claim arose.

Held, the question posed to be answered in the affirmative:

1. While the drafter of O 81 r 1 seemed to have been focused on
G partnerships, which either as plaintiffs or defendants became parties to writ actions or other proceedings, which required acknowledgement of service and commonly produce final judgments, it did seem strange that what was a procedural device intended to avoid the necessity of listing all the partners in the firm in the court documents, did not apply to all applications in the High Court in which an order was sought against a partnership. (See para 15.)

H 2. O 81 r 1 referred to claims in respect of a cause of action. This was wide enough to cover a liquidator seeking an order for production pursuant to s 221. To read the order as applying only to partnerships suing or being sued seemed to be unnecessarily restrictive. (See paras 19-20.)

3. Given the agreement to delete various partners, it would appear that defendants were no longer the partnership as a whole, but the remaining individual partners. Whether or not orders against particular partners should be made in the event that contempt was proved, as opposed to an order against the partnership, would depend on whether or not O 45 r 7(2)(a) of the *Rules of High Court (Cap 4A)* had been complied with. The effect of the Orders was to require KPMG to do certain things. Any individual partner of KPMG served in accordance with r 7(2)(a) became under a personal obligation to take steps to facilitate compliance. (See para 21.)

[Headnote by Jonathan Lee]

The following cases referred to in this decision:

- *Citybase Property Management Ltd v Kam Kyun Tak* HCA9676/2000, [2002] HKCFI 31, [2003] 2 HKC 98
- *Grand Union Insurance Co Ltd v Clyde & Co (A Firm)* HCMP2110/1987, [1988] HKCFI 421, [1988] HKC 464
- *Lee & Yip v Koo Donald* [1995] 1 HKLR 248
- *Letang v Cooper* 1964 EWCA Civ 5
- *Official Receiver v Wadge Rapps & Hunt (A Firm) & Anor* [2003] UKHL 49
- *Pricewaterhouse Coopers v Saad Investments Co Ltd* [2014] 1 WLR 4482
- *Re A Solicitor (Disclosure of Confidential Records)* [1997] 1 FLR 101
- *Re British & Commonwealth Holdings plc (No 2)* [1993] AC 426
- *Re China Medical Technologies Inc* CACV65/2017, [2017] 2 HKLRD 1091, [2017] HKCLC 77
- *Re Pantmaenog Timber Co Ltd* [2004] 1 AC 158
- *Singularis Holdings Ltd v Pricewaterhouse Coopers* [2015] AC 1675
- *The Joint and Several Liquidators of China Medical Technologies, Inc v KPMG (A Firm) & Ors* HCCW435/2012, [2017] HKCFI 1324, [2017] 7 HKJR 17

Mr Charles Manzoni SC, instructed by Lipman Karas, for the plaintiffs

Mr Victor Joffe and Mr Wilson Leung, instructed by Reynolds Porter Chamberlain, for the 1st to 91st defendants

Hon Jonathan Harris J handed down the following decision of the Court of First Instance.

1. By summonses dated 11 December 2017 and 16 April 2018 the Defendants seek to strike out as against certain Defendants the present contempt proceedings. By further summonses dated 9 March 2018 and 16 April 2018 the Defendants seek the determination of a preliminary issue in respect of the contempt proceedings.

2. The contempt proceedings arise from orders made pursuant to section 221 of the Companies (Winding Up and Miscellaneous

A Provisions) Ordinance, ("**Orders**"). These Orders were obtained by the Plaintiffs who are the Joint and Several Liquidators of China Medical Technologies Inc. The Respondents to the Orders were KPMG (1st Respondent) and 16 individuals at the time assumed to be partners in KPMG (2nd to 17th Respondents). The precise terms of the Orders and the circumstances in which they came to be made and varied do not
B matter for present purposes, but are described in detail in my decisions in HCCW 435/2012 and in one decision of the Court of Appeal in CACV 65/2017. For present purposes what is relevant is who the Orders were made against and, arguably, the persons named as the Respondents to the Orders. Each of the Orders directed the 1st Respondent, KPMG, to do what was specified in the Orders. None of the Orders required the 2nd
C to 17th Respondents to do anything although it did provide for them to return to court in the event that they believed that there was a problem which inhibited compliance with the Orders.

3. The originating summons dated 22 November 2017 commencing the contempt proceedings, which was amended on 21 December 2017, names 91 Defendants, who are listed in the schedule to the originating summons. The 91 Defendants are said in the heading to the schedule to be
D partners of KPMG at all times from 5 February 2015. Paragraph 6 of the originating summons asserts that KPMG is a partnership under the laws of Hong Kong (which is not in dispute) and comprises of or is owned by the Defendants each of whom was a partner of KPMG throughout the section 221 proceedings and remains so at the date of the statement dated 25 October 2017 in support of the application for leave to commence the
E contempt proceedings.

4. The strike out application is based on the premise that there are two categories of Defendants who should not be joined as parties to the contempt proceedings. The 1st category consists of eight partners who had retired at the date of issue of the contempt proceedings: 22 November 2017. An order has been agreed in respect of this application except costs.

F 5. The 2nd category are those Defendants who were not named as Respondents to the Orders, did not file evidence in the section 221 proceedings and have filed evidence stating that they had no involvement in, nor knowledge of, the section 221 proceedings. In the period prior to the hearing of the application, the parties managed to agree amendments to the Defendants to the amended originating summons deleting partners
G who the Liquidators are prepared to agree should not be defendants to the contempt proceedings. However, costs remain in issue.

6. It seems to me that in respect of both categories the Liquidators should pay the costs. There was never any realistic prospect of the court making substantive orders, including adverse costs orders, against partners who were not Respondents to the Orders and in respect of whom there was no reason to believe they were in some way culpable for any
H contempt that is established. The Liquidators in deciding to commence the contempt proceedings against all KPMG's partners took the risk of facing the kind of objections that led to the strike out application.

7. The claims against the category 2 Defendants were always likely to be problematic. In respect of the category 1 Defendants only two

partners were Respondents to the Orders, Edwin Fung (D28) and Isaac Yan (D87), who were respectively the 13th and 10th Respondents. The other six also fell within category 2. It seems to me that it was perfectly reasonable for the relevant Defendants to seek to have themselves removed as Defendants, and the fact that to do so the applications were structured depending on the precise circumstances of each Defendant in one of the two ways that I have described is immaterial. The applications were properly brought and successful and it cannot in my view sensibly be said that the way they have behaved has in some way resulted in them being joined, as it turns out, unnecessarily.

8. The more substantive matter for my determination is the preliminary issue. The parties have tried unsuccessfully to agree the formulation of the point of law to be decided without success.

9. The Defendants argue that the following is the appropriate formulation: Whether the Rules of the High Court (Cap 4A) O 81, r 1 is applicable to an order made pursuant to section 221 of the former Companies Ordinance, Cap 32 (or pursuant to section 286B of the present Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap 32), such that the Court can make an order pursuant to the said section 221 (or pursuant to the said section 286B) binding on all the individual partners of a firm by merely naming the firm, but without naming any of the partners, in the order.

10. The Liquidators argue that it should be formulated as follows:

(1) Is an order pursuant to section 221 (now repealed) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap 32 made in the name of a firm valid and enforceable?

(2) If such an order is enforceable, may such an order by enforced by an application for committal for contempt pursuant to O 52 of the Rules of the High Court in the name of the partners of the firm, subject to the obligation to obtain leave to commence proceedings against those partners, or is such application to be brought against the firm itself?

11. The inability to agree the formulation of the preliminary issue arises in large part I suspect, because the Defendants have not made it clear what they say the consequence would be if I answer their formulation of it, as the Defendants argue I should, in the negative. The argument itself is straightforward. The Defendants do not argue that an order pursuant to section 221 cannot be made against a partnership. The Defendants argue that if an order is made against a partnership the respondents, for reasons explained below, should be each partner in the partnership at the relevant time, namely, when the claim arose. RHC O 81 does not apply to an application under section 221 and, therefore the Respondent cannot be the name of the firm as is the case in the relevant proceedings.

12. Section 221(1) is in the following terms:

> "**221. Power to summon persons suspected of having property of company**

A (1) The court may, at any time after the appointment of a provisional liquidator or the making of a winding-up order, summon before it any officer of the company or person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or any person whom the court deems capable of
B giving information concerning the promotion, formation, trade, dealings, affairs, or property of the company."

13. "*Person*" is defined in section 3 of the Interpretation and General Clauses Ordinance, Cap 1, as including "*any body of persons, corporate or unincorporated*...." An order can, therefore, be made against a partnership and this, as I have already noted, is uncontroversial.

C 14. Mr Joffe argued that a partnership is not a separate legal entity and, therefore, a partnership can only be sued in the name of individual partners. RHC O 81 is a procedural device which avoids the necessity of naming all partners and permits the partnership to be sued in the firm's name. It does not alter substantive partnership law. The Defendants argue, O 81 does not apply to all applications brought against a partnership
D in the High Court. Order 81, r 1 is in the following terms:

> "**1. Actions by and against firms within jurisdiction (O. 81, r. 1)**
>
> Subject to the provisions of any written law, any 2 or more persons claiming to be entitled or alleged to be liable, as partners
E in respect of a cause of action and carrying on business within the jurisdiction may sue, or be sued, in the name of the firm (if any) of which they were partners at the time when the cause of action accrued."

15. The reminder of the order is framed in such language, says Mr Joffe, as to be only apposite to writ actions, which is consistent with the
F reference to causes of action and parties being sued being sued in r 1. I accept that the drafter seems to have been focused on partnerships, which either as plaintiffs or defendants become parties to writ actions or other proceedings, which require acknowledgement of service and commonly produce final judgments. It does, however, seem strange that what, as Mr Joffe accepts, is a procedural device intended to avoid the necessity of
G listing all the partners in the firm in the court documents, does not apply to all applications in the High Court in which an order is sought against a partnership. Mr Manzoni cited a number of final appellate authorities in which it would appear that section 221 type orders had been made against partnerships in the firm's name in various jurisdictions with similar rules to O 81 without this point ever being raised.2

16. Counsel did not cite any authorities in which contempt
H proceedings has been brought against a partnership in a firm's name. My own research has identified two. The first is *Re A Solicitor (Disclosure of Confidential Records)*3 in which a firm of solicitors was held liable for contempt of court. The court said "*I impose a fine upon the firm of solicitors collectively of £1,000. I order the firm to pay the costs of the*

Official Solicitor of the committal proceedings, those costs, if not agreed, to be taxed on an indemnity basis." The consequence for individual partners was that they became liable to contribute to the payment of the fine.

17. In *Grand Union Insurance Co Ltd v Clyde & Co (A Firm),*4 there was an application for contempt of court against Clyde & Co. Although the court found that the applicant had failed to prove beyond a reasonable doubt that the firm was guilty of contempt, there is nothing in the report to indicate that the defendants or the court doubted that Clyde & Co as a partnership could be liable for contempt of court.

18. These authorities do not consider whether O 81 or its foreign equivalent applied to the proceedings before the court and are not authorities for the construction advanced by Mr Manzoni, although they do appear to demonstrate that in various cases it has been assumed that applications, including contempt proceedings, which are not commenced by writ or involve proceedings that might conventionally described as "suits", can be issued with the partnership being described by the use of the firm's name rather than listing each partner.

19. It seems to me that the answer to the question is this. Order 81, r 1 refers to claims in respect of a cause of action. As Diplock LJ explained in the Court of Appeal in *Letang v Cooper*5 a cause of action can be defined as "*simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.*" This is wide enough to cover a liquidator seeking an order for production pursuant to section 221. This being the case is there any particular reason why the rule should be read as restrictively as Mr Joffe contends? Mr Joffe's argument for so doing turns on the assumption that O 81, r 1 is to be read as applying only to partnerships suing or being sued; a reading which is supported he says by the tenor of the subsequent rules. This seems to be unnecessarily restrictive. I note that r 8, which was introduced after a similar amendment in England in 1962, provides that rr 2–7 apply to actions commenced by actions begun by originating summons. This is relevant in two ways. First, it indicates that r 1 applies to claims against a partnership that can be begun by originating summons such as an application for an order under section 221. Secondly, all that r 8 does is to apply the procedures in rr2–7 to originating summons proceedings, which indicates in my view that r 1 applied to applications begun by originating summons even before the introduction of r 8. It follows that rr 2–7 are not to be read as defining what kind of action r1 applies to.

20. It seems to me that there is no reason to read O 81, r 1 in the restrictive way in which the Defendants contend. I, therefore, answer the question posed in the summons in the affirmative.

21. This would seem to leave open the question of who, given the agreement to delete various partners, are the defendants. It would appear that it is no longer the partnership as a whole, but the remaining individual partners. Whether or not orders against particular partners should be made in the event that contempt is proved, as opposed to an order against the partnership, will depend on whether or not RHC O 45, r 7(2)(a) has been complied with.6 The effect of the Orders was to require

KPMG to do certain things. Any individual partner of KPMG served in accordance with r 7(2)(a) became under a personal obligation to takes steps to facilitate compliance. This is a consequence of the characteristics of a partnership, which imposes joint liability for the obligations on the partnership on each partner.7 Precisely what has happened in terms of service and its consequences are not matters I have to consider at this stage.

22. I will make a costs order nisi that the Defendants pay the Liquidators costs of the preliminary issues, such costs to be taxed if not agreed, and paid forthwith.

(Jonathan Harris)
Judge of the Court of First Instance
High Court

Schedule

Defendants

Partners of KPMG who were Partners at all times from 5 February 2015

Defendant No.	Name (English)	Name (Chinese)	ID Card No.	Address
1st	ABBISS, CHRISTOPHER BARRY		[REDACTED]	[REDACTED]
2nd	AU, YAT FO	區日科		
3rd	BARBER, VAUGHN CARLYLE			
4th	BOWDERN, DARREN RAYMOND			
5th	BOWRA, MARK WILLIAM			
6th	CHAMBERLAIN, RUPERT JOSEPH			
7th	CHAN, KIM TAK*DANIEL	陳儉德		
8th	CHAN, SIU TUNG	陳少東		
9th	CHATTOCK, JOHN PAUL			
10th	CHENG, PUI NGAR	鄭沛雅		
11th	CHENG, WING HAN	鄭詠嫻		
12th	CHEUNG, CHO TUNG*TONY	張楚東		
13th	CHEUNG, WAI YU*JANET	張慧如		
14th	CHEUNG, WING HAN	張潁嫻		

15th	CHIU, MUN WAI	招敏慧		
16th	CHOI, CHUNG CHUEN	蔡忠銓		
17th	CHU, NGAR YEE	朱雅儀		
18th	CHU, PING FAI	朱炳輝		
19th	CHUI, MING WAI	徐明慧		
20th	CHUNG, KAI MING	鍾啟明		
21st	CHUNG, WAI YIN*CHRISTINE	鍾慧賢		
22nd	CROWE, WILLIAM ANDREW		[REDACTED]	[REDACTED]
23rd	DEBNAM, NICHOLAS JAMES			
24th	DONOWHO, SIMON CHRISTOPHER			
25th	FONG, HOI WAN	方海雲		
26th	FONG, KWIN	房炅		
27th	FUNG, PING KWONG	馮炳光		
28th	FUNG, TING HO*EDWIN	馮定豪		
29th	FUNG, YUEN MAN*CHERYL	馮婉文		
30th	GLEAVE, SIMON JOHN EDWARD			
31st	GRASSICK, ALUN CLARK			
32nd	GU, JOHN JUNHUA	古軍華		
33rd	GUEN, KIN SHING	姜健成		
34th	HO, KEGON MING			
35th	HO, WAI MING	何偉明		
36th	HO, YING MAN*SIMON	何應文		
37th	JAMIESON, GRANT ANDREW			
38th	KO, CHEE WAI*DAVID	高智緯		
39th	KUNG, PETER	龔永德		
40th	LAI, CHI YIN	黎志賢		
41st	LAI, CHUN MAN	黎俊文		
42nd	LAM, KAI WA	林啟華		
43rd	LAU, KWOK YIN*PAUL	劉國賢		
44th	LEE, KA NANG	李家能		

A	45th	LEE, KWO HANG*FELIX	李果行		
	46th	LEE, LING TAK*MAGGIE	李令德		
	47th	LEE, LOK MAN	李樂文		
B	48th	LEE, WAI SHUN WILSON	李威信	[REDACTED]	[REDACTED]
	49th	LEE, YUEN MEI*MARIA	李婉薇		
	50th	LEUNG, SUET NGOR	梁雪娥		
	51st	LEUNG, SZE KIT	梁思傑		
C	52nd	LEUNG, TAT MING	梁達明		
	53rd	LI, KA LAM	李嘉林		
	54th	LI, SHUK YIN	李淑賢		
	55th	LIU, TSZ BUN*BENNETT	廖子彬		
D	56th	LIU, YUN BONN	廖潤邦		
	57th	MACPHERSON, AYESHA ABBAS			
	58th	MCSHEAFFREY, PAUL KEVIN			
E	59th	MERCER, STEPHEN GEORGE			
	60th	MORLEY, CATHERINE SUSANNA			
	61st	NG, KAP LING*JOHNNY	吳嘉寧		
F	62nd	NG, KWOK KEUNG*RAYMOND	吳國強		
	63rd	NG, YIU FAI	伍耀輝		
	64th	NIKZAD ABBAS ABADI, BABAK			
G	65th	O'BRIEN, IAN CHARLES			
	66th	PANG, SHING CHOR*ERIC	彭成初		
	67th	PARKER, STEVEN ROY			
H	68th	PHILLIPS, WARREN PETER			
	69th	SHUM, MAN KWONG*ALEX	岑文光		

70th	SIU, CHI HUNG	蕭志雄		
71st	SZE, CHIN FONG*RONALD	施展芳		
72nd	TANG, YUEN YEE*LOREN GERTRUD	鄧苑儀		
73rd	TO, HONSON	陶匡淳		
74th	TSE, WONG PUI	謝旺培	[REDACTED]	[REDACTED]
75th	WAI, KA LUN	韋家倫		
76th	WAN, CHI YAU*CHARLES	温梓佑		
77th	WEIR, ANDREW WALTER BOUGOURD ROSS			
78th	WONG, JACQUELINE	黃潔雲		
79th	WONG, MAN KAI*RICKY	黃文楷		
80th	WONG, MAN YEE KATY	黃文怡		
81st	WONG, PO SHAN	黃寶珊		
82nd	WONG, SAU LING	王秀玲		
83rd	WONG, WING SZE*TIFFANY	黃詠詩		
84th	WONG, YUEN SHAN ELISE	黃婉珊		
85th	WU, MAO CHIN			
86th	XING, CHRISTOPHER GUO			
87th	YAN, YAP KEI*ISAAC	殷立基		
88th	YEUNG, KA CHUN	楊家俊		
89th	YEUNG, KA YIN KARMEN	楊嘉燕		
90th	YIP, KA MING*ALICE	葉嘉明		
91st	ZIRLEN, BRUCE			

[1] Mr Joffe cited a large number of authorities to support this proposition. The law is conveniently summarised in *Kao, Lee & Yip v Koo Donald* [1995] 1 HKLR 248, per Godfrey JA at 250 (10–15). See also *Lindley & Banks on Partnership*, 20th ed, §§14-06 to 14-07.

[2] *Re British & Commonwealth Holdings plc (No. 2)* [1993] AC 426; *In re Pantmaenog Timber Co Ltd* [2004] 1 AC 158; *Pricewaterhouse Coopers v Saad Investments Co Ltd* [2014] 1 WLR 4482; *Singularis Holdings Ltd v Pricewaterhouse Coopers* [2015] AC 1675.

[3] 1997 1 FLR 101.

A [4] [1988] HKC 464.

[5] [1965] 1 QB 232 at 242–3; applied in *Chan Cheuk-Ting v Analogue Engineering Co Ltd* [1986] HKLR 935.

[6] This does not necessarily require personal service. See *Citybase Property Management Ltd v Kam Kyun Tak* [2003] 2 HKC 98.

B [7] Section 11 of the *Partnership Ordinance*, Cap 38.

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