Landmark Probate Disputes in Hong Kong

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Preface

This book contains an analysis of some of the most important probate dispute cases in Hong Kong. It shows how serious problems and prolonged litigations could arise from the succession process of some of the wealthiest families in Hong Kong, sometimes despite the assistance of able professionals. Whilst it should not be treated as an exhaustive checklist for successful succession planning, the lessons that could be learned from these cases could surely guide the testator in his or her succession planning, and avoid a lot of angsts amongst the family members expecting to inherit significant wealth.

Ultimately the best way to ensure smooth succession and keep peace and harmony in the family is to nurture the right values amongst the family members. But it is a task easier said than done.

It is hoped that this little book could shed light on how our courts deal with the common issues in probate disputes, and provide guidance on how such disputes could be resolved, and more importantly, avoided.

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1. Estate of Tycoon Teddy Wang: How Nina Kung Triumphed in the Legal Battle against her Father-in-law

The Billionaire Vanishes

- The decade long legal saga began with the mysterious disappearance of Mr Teddy Wang Teh-huei ("Mr Wang"), founder of the Chinachem Group. In 1990, Mr Wang was kidnapped for ransom. It was not his first encounter, but, this time, the 56-year-old billionaire had never been seen since. In 1999, Mr Wang's father ("Father") was granted leave by a judge to swear to his belief that Mr Wang's death had occurred on or since 1990. Mr Wang was legally declared dead.

- Following this development, the Father claimed probate of a will executed in 1968[1] under which he was the sole beneficiary (the "1968 Will"). At the time of the 1968 Will, there were marital difficulties between Mr Wang and his wife, Nina Kung ("Nina"). However, later, by 1970, the couple had reconciled and went on to build a highly successful business empire together.

- In response to the Father's action, Nina counterclaimed for probate of a Chinese, homemade will dated 12 March 1990, under which she was the sole beneficiary (the "1990 Will").

- In his affirmations, Mr Wang's butler (the "Butler") claimed to have signed the 1990 Will as a witness after witnessing Mr Wang himself do so. As the identity of another attesting witness could not be ascertained at all, the Butler was Nina's most valuable witness. However, the Butler passed away before he could give evidence in court. His death before trial must therefore have been "a surprise and a blow" for Nina, and correspondingly, "a surprise and a boon" for the Father.

- The Father accused the 1990 Will of being a forgery, setting the stage for the dramatic legal showdown in history.

Nina's Defeats at the Lower Courts

- Unparalleled in the legal history of Hong Kong, the trial at the first instance was a chimera, devouring a significant part of the judicial capacity and a serpent's

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1 According to Probate and Administration Ordinance (Cap. 10), for estate with a will, a grant of probate must be obtained before the executor of the will can begin to dispose of the estate of the deceased.

tail in the form of a 600-page judgment, extending over a record-breaking 172 days across a 14-month period[2].

- The central issue at trial was whether the 1990 Will purportedly signed by Mr Wang was a forgery. Having heard evidence from handwriting experts and after examining the similarities and differences between the questioned signatures and the known signatures, David Yam J found the purported signatures of both the Butler and Mr Wang to be forgeries:

  (1) He identified 8 significant differences in the character "王", 6 significant differences in the character "德", and 5 significant differences in the character "輝". He said that there was no acceptable explanation for those differences.

  (2) He also identified the unnaturalness of the Butler's signatures, more than 10 significant differences and 6 less conspicuous features that suggested forgery, including incidences of retouching/rewriting, unnatural pen movements, lack of smooth turning, tremors, and slow writing.

- Expressing his sentiments on the issue, the judge said, **"apart from being cogent and strong, they [the evidences] are to the extent that the only conclusion I can draw is that I have no doubt at all these eight signatures are nothing but forgeries."**

- In addition, the judge referred to 9 matters as "suspicious circumstances", which were supportive of the Father's case:

  (1) Mr Wang had no reason to change his mind, having made the Father the sole beneficiary under the 1968 Will.

  (2) Mr Wang was a prudent person who was never slow in engaging the services of lawyers. There was no reason for him to prepare a homemade will.

  (3) If the Butler did go to Mr Wang's office to attest Wang's signatures, his presence would have been noticed.

  (4) The documents were sloppily prepared in Chinese; such sloppiness was inconsistent with Mr Wang's character.

  (5) Some contents of the will documents (those declarations which said Mr Wang was disappointed with his family or the family of Nina) were unreasonable and untrue when there was no reason for Mr Wang to think in that way.

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2 *Wang Din Shin v Nina Kung* (*unreported*, 21 November 2002, HCAP8/1999, Yam J)

(6) The absence of revocation clause was more consistent with the will being forged by someone who did not know the existence of the earlier wills.

(7) The Butler was a talkative person, so Mr Wang would not have liked nor trusted him to witness the execution of his will.

(8) Nina appeared to have prior knowledge of contents on the will documents, when she was not supposed to know the same (as Nina claimed that the will documents were placed in a sealed envelope and she never opened the envelope).

(9) Nina's behaviour was inconsistent with the suggestion that she had been asked by Wang not to open the envelope until after his death.

- As a result, from the handwriting experts' evidence together with the "suspicious circumstances", Yam J concluded that the 1990 Will was forged.
- Nina then appealed to the Court of Appeal. The Court (by a majority) upheld the trial judge's conclusion that Mr Wang's signatures had been forged[3].

Nina Arrested for Forgery

- Nina was initially arrested in December 2002 on suspicion of forgery and had since been in police bail on a HK$5 million surety. Following the Court of Appeal's judgment against her, she was formally charged with forgery[4]. Three charges were laid against her in court: forgery, using a false instrument, and performing acts intended to pervert the course of justice.
- To secure her release, Nina posted a record-breaking HK$55 million in bail, making it the largest bail in Hong Kong's legal history.

Nina's Victory at the Court of Final Appeal

- In Nina's final endeavour to clear her name and obtain her husband's fortune at the Court of Final Appeal, she obtained victory. The Court unanimously allowed the appeal and ordered that the 1990 Will be admitted to probate as Mr Wang's last will[5].
- On the issue of burden of proof, it was held that:

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3 *Wang Din Shin v Nina Kung* (*unreported*, 28 June 2004, CACV460/2002, Yeung, Yuen JJA and Waung J)

4 https://www.scmp.com/article/487442/nina-wang-charged-forgery

5 *Nina Kung v Wang Din Shin* (2005) 8 HKCFAR 387

(1) A person who propounds a will bears the legal or persuasive burden of proving on the balance of probabilities that it was the will of the deceased. The proponent has to prove: (a) there was due execution; (b) the testator was of testamentary capacity; and (c) the testator knew and approved of the contents of the will.

(2) If someone wishes to dispute the validity of a will on the grounds that there is a want of (a), (b) or (c), he bears the evidential burden[6].

- Here, the Father had positively pleaded forgery, so the evidential burden of proving the allegations of forgery and conspiracy fell squarely on him. Where allegations of this character were made, evidence to a very high standard of cogency was necessary before the court could be justified in finding a conspiracy to promote a forged will. In requiring Nina to "dispel suspicious circumstances", the lower courts applied the wrong burden of proof.

- Nina had clearly discharged her persuasive burden in showing, on the balance of probabilities, that the 1990 Will had been signed by Mr Wang:

  (1) The Father did not come near to adducing sufficient evidence to raise a *prima facie* case of forgery or conspiracy.

  (2) Although the Butler could not be cross-examined before the court as he died before the trial, his affirmations clearly and unequivocally stated that he saw Mr Wang signing on the documents.

  (3) There was nothing suspicious in Mr Wang's choice of Nina as his beneficiary; in fact Nina was far more likely to have been the chosen beneficiary.

- While the will documents exhibited unusual features and idiosyncratic language making them bizarre and not readily explicable, the Court considered that the eccentric features cut both ways in the argument. It is equally improbable for a forger to take unnecessary risks of being found out. So it only raised unanswered questions which can be argued to favour in turn the Father or Nina.

- On handwriting evidence, the Court held that the lower courts erred in focusing on matters considered probative of forgery, without giving sufficient weight to countervailing considerations supportive of genuineness. The Court agreed that while the evidence did not impel it to conclude that the signatures were genuine, balancing the evidence for and against genuineness, the handwriting

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6 A party has the "legal or persuasive burden" where the onus is on that party to prove a fact in a case on the balance of probability. This is to be distinguished from "evidential burden", which is the burden placed upon a party to adduce sufficient evidence to show that an issue is a live issue which should be considered in the case.

evidence was simply inconclusive. Therefore, it did not possess much weight to be placed in the balance against the direct evidence of genuineness.

- As a result, the Court unanimously ordered that the 1990 Will be admitted to probate as Mr Wang's last will, which entitled Nina to her tycoon husband's entire estate. Consequently, Nina's criminal charges were dropped by the Prosecution.

The Invisible Hand behind the Financing of Lawsuit

- For such a lengthy and hard-fought litigation, the legal costs were enormous. The Father, who had already expended his own resources, admitted to borrowing a whopping HK$41 million to pay his solicitors.
- As it became clear that the Father would not be able to meet any costs order made against him, the court directed him to disclose to Nina the identity of the alleged funder[7]. The Father publicly responded that he would rather disobey the court order than reveal the identity of the alleged funder who financed him.
- Although the identity of the funder remained secret, Nina ultimately decided not to force the Father in order to maintain family harmony, marking an end to the 8-year battle with her 94-year-old father-in-law.

Legal Takeaway

- A person who propounds a will has the legal or persuasive burden of satisfying the court that it is the will of the testator.
- If someone wishes to dispute the validity of a will on the grounds that there is want of due execution, testamentary capacity, or of the requisite knowledge and approval, that person bears an evidential burden of putting the relevant ground of challenge in issue.
- Where allegations of forgery are made, the court must bear in mind the seriousness of the misconduct alleged. Evidence to a very high standard of cogency is necessary.
- The court generally prefers the direct evidence of witnesses who actually saw and heard what happened to the opinion evidence of an expert, especially in the case of handwriting evidence. At the end of the day, it is for the judge or jury to form their own independent judgment with the assistance of the expert.

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7 *Nina Kung v Wang Din Shin* (2006) 9 HKCFAR 800

2. Battle for Nina Kung's Estate: Billions of Fortune Goes to Charity, Feng Shui Master Goes to Jail

Background: Fortune, Wills and Feng Shui

- Nina Kung ("Nina"), one of the Asia's richest women before her demise, was the chairwoman of the conglomerate Chinachem Group ("Chinachem").
- In 2002, long before the highly contentious probate litigation between Nina and her father-in-law, Nina executed a will (the "2002 Will"). There is no dispute that the 2002 Will was valid. The 2002 Will provided that the whole of Nina's estate was to be bequeathed to Chinachem Charitable Foundation Ltd (the "Foundation").
- In 2004, Nina was diagnosed with cancer. She eventually passed away in 2007. Immediately after her death, Chan Chun Chuen ("Chan") kicked off the legal battle by producing what he said was Nina's last will, which entitled him to Nina's entire estate as sole beneficiary (the "2006 Will").
- As to Chan's background, he ran a Fung Shui school, and was introduced to Nina in 1992 as a Fung Shui master. Chan claimed that he and Nina had been lovers for a very long time and that she treated him like her husband and called him "hubby pig". To prove that their relationship was more than a Feng Shui adviser and client, at trial, he showed the court gifts from Nina, audio recordings, photographs and videos taken by Nina with him.
- As far as the 2006 Will is concerned, Chan said he did not know how it was prepared and executed. He claimed that during a night at Nina's living quarter, Nina gave him the 2006 Will together with an unsigned version (the "Unsigned Document") in an envelope, and told him to keep it secret. He said that he had since kept the document and not shown it to anybody until Nina's death.
- On the face of the 2006 Will, it was witnessed by a solicitor, Mr Wong and by a Mr Ng. While they agreed that they attested to a document on 16 October 2006, they said that the document they witnessed on that occasion was very different from the 2006 Will.

Expert Switch before Trial: Chan's Own Expert Says Signatures Forged

- The main issue was whether the signatures of Nina and the attesting witnesses were genuine or forged. Before the trial, both parties engaged handwriting experts to examine the questioned signatures.
- Initially, Chan retained the service of two forensic document examiners, Dr Giles and Mr Westwood, but decided to use only Dr Giles. However, Dr Giles

reached views unfavourable to Chan – she was of the view that both Mr Wong's and Nina's signatures were not genuine, thus they were simulations.

- Chan, in response, decided not to ask Dr Giles to finalise her report, and instead asked Mr Westwood to prepare a preliminary report. Expectedly, Mr Westwood's report was favourable to Chan.

- As orders for expert witnesses had already been made, Chan made an application to adduce evidence from Mr Westwood at the trial, which was allowed by the court[8]. This application was heavily criticised by the Foundation as a "blatant attempt in expert shopping".

Chan Lost His Claim at the Court of First Instance[9]

- After a much publicised trial which took place between May to September 2009 for a total of 40 days, MH Lam J held in favour of the Foundation and found that the 2006 Will was a forgery.

- In relation to Nina and Chan's relationship, Lam J found that:

  (1) As far as Nina was concerned, she wanted the intimate relationship with Chan to be buried together with her after her death.

  (2) When Nina made the 2002 Will, she placed a higher regard on her charitable objectives, and there was no change in Nina's charitable testamentary intent.

  (3) Their relationship could not be of such depth that Nina was prepared to give Chan her entire estate irrespective of her other commitments and responsibilities (for example, responsibilities of running the Chinachem business empire). Chan was not a suitable candidate for discharging such responsibilities.

- Further, Lam J held that Chan lied and withheld information from the court regarding the circumstances of the preparation of the 2006 Will. In the judge's words, **"I find in many respects his evidence was tailored to suit his convenience. I do not believe what he testified regarding the provenance of the 2006 Will."**

- Importantly, the judge came to the conclusion that the document purportedly attested to by Mr Wong and Mr Ng on 16 October 2006 and put forward by Chan was not the 2006 Will:

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8 *Chinachem Charitable Foundation Ltd v Chan Chun Chuen and Others* [2009] 5 HKC 190

9 *Chinachem Charitable Foundation Ltd v Chan Chun Chuen and Others* (*unreported,* 2 February 2010, HCAP8/2007, Lam J)

(1) The judge accepted Mr Ng and Mr Wong's evidence that there had been only one piece of paper when they witnessed the document on 16 October 2006.

(2) The Electro Static Detection Apparatus[10] evidence established that the signatures and the writings on the 2006 Will were signed and written on top of and together with the Unsigned Document. Assuming there were 2 sheets of paper on that occasion (which the judge did not believe), inevitably there would have been some displacement of the papers during the process. It would have been highly unlikely that 2 pieces of paper could have been kept in exact register when being passed around for signature by 3 different people. But there were no such displacements found in the Unsigned Document as shown by the Electro Static Detection Apparatus.

(3) As a result, the 2006 Will could not have been the document executed and witnessed by Mr Wong and Mr Ng on 16 October 2006.

- Further, in considering the genuineness of the signatures of Nina and the attesting witnesses, Lam J heard expert evidence. The judge ruled that Mr Westwood (Chan's expert) failed to persuade him that there were significant similarities between the questioned signature and the specimens, while there were significant differences which cannot reasonably be explained. Accordingly, he rejected the evidence of Mr Westwood, and accepted the opinions of the Foundation's expert (shared by Dr Giles) that both the signatures are highly skilled simulations.
- Accordingly, the 2006 Will was found to be a forgery. Chan fatally lost his bid to the billionaire lover's fortune.

Another Defeat at the Court of Appeal

- Chan then appealed to the Court of Appeal, but once again, he lost fatally[11].
- On appeal, counsel on behalf of Chan argued, *inter alia*, that the evidence given at trial did not justify the factual conclusion that the 2006 Will was a forgery.
- The Court unanimously held that none of the complaints was made out, and concluded that the trial judge was correct in his assessment that the signatures

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10 An electrostatic detection device, or EDD, is a specialized piece of equipment commonly used in questioned document examination to reveal indentations or impressions in paper that may otherwise go unnoticed.

11 *Chinachem Charitable Foundation Ltd v Chan Chun Chuen and Others* (*unreported*, 14 February 2011, CACV62/2010, Rogers VP, Le Pichon and Kwan JJA)

were forgeries. His application for leave to the Court of Final Appeal was refused.

Chan to Pay Costs on Indemnity Basis[12]

- At first instance, pursuant to Lam J's costs order[13], Chan was ordered to pay costs of the Foundation on indemnity basis. In so ordering, the judge particularly observed that: (i) in order to bolster his case on the authenticity of the 2006 Will, he lied to the court in many respects, and (ii) the engagement of Mr Westwood was another try-on attempt by Chan to deceive the court.
- Again, when the case reached the Court of Appeal, the judges, in their strongly-worded judgment, said, **"[Chan] has persisted in pursuing a thoroughly dishonest case. In doing so, he has abused the process of the court"**. They therefore made an order again that the costs should be on an indemnity basis.
- After Chan's failure to overturn these costs orders, the Foundation filed its bill of costs for a total sizable sum of over HK$140 million.
- In Chan's objections to the bill, he sought discovery of the Foundation's retainer agreement etc., on the grounds of (i) unlawful maintenance and champerty; and (ii) breach of indemnity principle. However, as held by the court, none of these complaints was made out, and Chan's summons was dismissed[14].

Injunction Order against Chan[15]

- Soon after Chan was ordered to pay costs to the estate's administrators at over HK$130 million, the Court granted a worldwide *Mareva* injunction against him from disposing of his assets, and made a disclosure order against him.
- Chan did not make any disclosure. Instead, he took out a summons to discharge the injunction. Poon J, in rejecting his application, found that there was a real risk of dissipation. He strongly reprimanded Chan as a "*thoroughly dishonest and untrustworthy person, who has exhibited extremely low morality and integrity*", and that "*he has no respect for our judicial system at all*".

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12 Indemnity basis means the party needs to pay 80%-90% of the other party's cost. Such order is by nature punitive.

13 *Chinachem Charitable Foundation Ltd v Chan Chun Chuen and Others* (*unreported*, 16 April 2010, HCA 8/2007, Lam J)

14 *Chinachem Charitable Foundation Ltd v Chan Chun Chuen and Others* [2011] 4 HKC 582

15 *Chinachem Charitable Foundation Ltd v Chan Chun Chuen and Others* [2012] 1 HKC 587

Downfall of Chan: From Civil Lawsuit to Criminal Charges

- Shortly after the Court of Appeal's decision, Chan's legal battle took a dramatic turn as he faced the criminal consequences. On 26 May 2011, he was charged with forgery and using a false document.
- On 4 July 2013, after a trial before Macrae J and a jury, Chan was found guilty of forgery of the will, and of using that forged will[16].
- When sentencing Chan, the judge condemned Chan's conduct, speaking of his **"shameless and unparalleled greed"** at the heart of an **"extremely well-executed and planned forgery"**, and **"never once … has there been the slightest remorse"**.
- The judge thus found himself **"driven to the conclusion that if ever there is a case for the application of the maximum sentence for forgery as a starting point, this is the case"**. Accordingly, Chan was sentenced to a total of 12 years' imprisonment. His appeal against conviction and sentence was dismissed by the Court of Appeal[17].

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16 *HKSAR v Chan Chun Chuen* (*unreported*, 5 July 2013, HCCC 182/2012, Macrae J)

17 *HKSAR v Chan Chun Chuen* (*unreported*, 30 October 2015, CACC233/2013, Lunn VP, Poon and Pang JJA)

3. The Chinachem Saga Part III: Is it a Gift or a Trust?

The Government Intervention: Whether Bequest is an Absolute Gift or Charitable Trust

- Despite the conclusion of lawsuit between Chan and the Foundation, the legal saga surrounding Nina's multi-billion-dollar fortune had not yet come to an end. Another round of legal battle was commenced by the Secretary of Justice (the "SJ") as the protector of charity against the Foundation[18].

- In the 2002 Will:

  (1) Whilst Clause 1 stated that Nina shall leave her estate to the Foundation, Clause 2 expressed Nina's "wish to entrust [the Foundation] to the supervision of a managing organization jointly formed by the Secretary General of the United Nations; the Premier of the PRC Government as well as the Chief Executive of the [HKSAR]"; and that "not only must [the Foundation] continue all the projects … it has undertaken … to enable their developments continuously, but … must also continue to achieve the purpose of setting up a fund and a Chinese prize of worldwide significance similar to that of the Nobel Prize".

  (2) Clause 3 related to the Foundation's management of the Group "to ensure the continuous growth of the business empire of the [Foundation] and … to continuously develop the charitable business till eternity".

  (3) Clause 4 required the Foundation to provide support for members of the family of Nina's late husband, staff of Chinachem and their children.

- The 2002 Will is a "homemade" will drafted by Nina with the assistance of her sister rather than legal professionals. Whilst the charitable intention was clear enough, its method of implementation was ambiguous. The main issue that divided the Foundation and the SJ was whether the Foundation should take the properties bequeathed to it (i) as a gift absolutely[19] for the general charitable objects set out in the Foundation's own memorandum of association; or (ii) as a charitable trustee and be obliged to give effect to the directions in clauses of the will. The difference is technical but the practical implication is huge (as explained below).

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18 At common law, the Secretary of Justice (formerly known as the Attorney General) plays the role of protector of charities and could intervene in the management of charitable trusts.

19 An absolute gift means the beneficiary can directly gain the legal title and beneficial interest of the estate.

- Both the Court of First Instance[20] and the Court of Appeal[21] held that the language used in the clauses of the will was imperative in nature and sufficiently clear that the Foundation would hold the estate as a trustee.

- The Court of Final Appeal[22] agreed with the lower courts and held that the Foundation should hold the estate as a trustee but not receiving it as an absolute gift:

  (1) The correct interpretation of Clause 2 was that it imposed a trust for charitable purpose. The performance of the obligations relating to the Chinese Nobel prize and other charitable projects called for fiduciary judgment exercised single-mindedly for common good.

  (2) Clause 3 was declaratory, laying down the most basic obligation of trustees to safeguard the trust property and to exercise skill and prudence in its management.

  (3) The discretions under Clause 4 were powers whose exercise the Foundation was under an obligation to consider from time to time. Each was most naturally characterised as a "power in the nature of a trust".

- The Court of Final Appeal's judgment, in the words of Lord Walker NPJ, represented **"the last stage, or almost the last stage, in protracted and contentious litigation"** concerned with the will of Nina. However, it turns out that further substantial legal proceedings are needed to resolve issues pertaining to the implementation of the will's objectives.

Setting Up the Scheme: Beginning of the Final Stages

- The practical significance of Lord Walker NPJ's ruling was that since the Foundation was now a trustee, an administrative scheme would be necessary for the purpose of implementing and regulating the charitable trusts. Such scheme should encompass detailed machinery and directions for the trust and supplement the will of Nina.

- Pursuant to Clause 2 of the 2002 Will, the trust would be supervised by a supervisory managing organization ("SMO") formed by the Secretary General of the United Nations, the Premier of the State Council of the PRC and the

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20 *The Secretary for Justice v Joseph Lo Kin Ching and Others* (*unreported*, 22 February 2013, HCMP853/2012, Poon J)

21 *The Secretary for Justice v Joseph Lo Kin Ching and Others* (*unreported*, 11 April 2014, CACV44/2013, Lam VP, Cheung and Kwan JJA)

22 *Chinachem Charitable Foundation Ltd v The Secretary for Justice & Others* (2015) 18 HKCFAR 169

Chief Executive of HKSAR. For this reason, the Foundation brought the SMO Summons seeking an order that the SJ should issue formal requests to these dignitaries inviting them to join the SMO. On the other hand, since the parties could not agree on the material terms of the scheme, the SJ also brought the Scheme Summons for the court to settle its terms.

- The scheme proceeding, as described by Court of First Instance[23] per Hon Barma JA, is **"the beginning of the final stages"** of this saga.
- The SJ and the Joint Administrators of Nina's estate ("JA") have agreed with the Foundation on a list of issues which run to 6 pages and contains 8 broad items. Among this long list of issues, the court is of the view that the following issues should be first addressed, leaving the rest of the issues to a later stage:

  (1) principles underlying the court's approach in the settlement of the scheme;

  (2) the court's power to appoint a trustee other than the one named in the 2002 Will in the settlement of the scheme; and

  (3) the court's power to constitute an SMO which is different from that provided for under the 2002 Will.

Principles to be Adopted

- Both the SJ and the JA favored the principle of expediency, that is to say the court may depart from what was stipulated in the Will if to do so would be more expedient to serve the charitable purpose of the trust ("The Expediency Principle").
- The Foundation, however, argued that the court should only depart from the Will if there is some impossibility, impracticality or inexpediency, and the court should only intervene to an extent that is necessary to give effect to the charitable objects of the Will ("The Necessity Principle").
- The court agreed with the SJ and the JA that the correct principle is expediency, not necessity. While the court would give consideration to Nina's Will, it may depart substantially from the Will if it is satisfied that there is some inexpediency in the existing arrangements that warrants intervention, and the course proposed to be adopted must be itself expedient and justified.

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23 *The Secretary for Justice v Wong Tak Wai and Others* [2022] HKCFI 3255

Choice of Trustee

- The SJ and the JA contended that the appointment of the Foundation to be the trustee was only an administrative machinery, so naturally the court may depart from such choice. The Foundation instead argued that such choice went to the heart of the trust as the Foundation is the "bespoke" entity created by Nina to carry out her wishes.

- The Court again sided with the SJ and the JA and held that the identity of the trustee generally only relates to the mode of administration of the trust. While there may be cases where choice of trustee is essential to the charitable purpose, this case is not:

  (1) Evidence suggests that in Nina's mind, the Foundation is only a medium to achieve the charitable purpose so it's a machinery only, not an integral part of her purpose.

  (2) There is insufficient evidence to show that the Foundation is the bespoke entity of Nina.

  (3) Due to changes in the Foundation's governorship, it no longer had particular connection to Nina.

  (4) The Foundation itself has accepted that its status of trustee may be removed later pursuant to relevant law[24]. This suggests that the Foundation is not essential to the charitable purpose.

  (5) The Court of Final Appeal's judgement has already envisaged the possibility that the Foundation might not eventually be appointed as the trustee.

- Since the court may depart from the Will in appointing trustee, it is open for it to impose conditions which the Foundation must fulfil for it to be appointed. Two proposed conditions are that the Foundation must be solvent and its Governors must be fit and proper persons.

- Applying the Expediency Principle and considering the evidence as to questionable financial position of the Foundation, the court imposed the solvency condition.

- Similarly, the court found that the fit and proper condition is not imprecise and is justified based on evidence of questionable transactions involving the current Governors of the Foundation.

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[24] Under section 42 of the Trustee Ordinance (Cap. 29), new trustees can be appointed in addition or in substitution to existing trustees of a trust, if it is expedient to do so, and inexpedient to do so without the assistance of the court.

- As a result, both conditions were imposed. It is for the court to decide at a later stage whether the conditions are met.

The Composition of SMO

- Based on Expediency Principle, it is open for the court to appoint as members of the SMO persons other than the three named dignitaries.
- Further, in determining whether SMO members are fiduciaries, the test is to see whether the SMO carries out fiduciary obligations[25]. Since the SMO in the present case has no personal interest but carries out supervisory role only, they are clearly fiduciaries and answerable to the court.
- Yet, among the named dignitaries, the UN Secretary General and PRC Premier are both immune from Hong Kong courts' jurisdiction. It is thus highly inexpedient to appoint them to the SMO. The appropriate course to take is to establish a differently constituted SMO.

Remaining Matters

- The next step would be to determine whether the Foundation has fulfilled the two conditions so as to be qualified for appointment as trustee of the charitable trusts. Another substantive hearing was anticipated.
- Then, depending on whether the Foundation is appointed as the trustee, the parties and the court would need to settle the remaining issues including the power and control of the trustee as well as the precise composition of the SMO.
- The Court of First Instance acknowledged that there would be some more time before the scheme is finally settled. It seems that this "final stage" of the lengthy proceedings still has some way to go before getting resolved.

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[25] In common law, fiduciaries are bound to act only for the benefit of another in respect of matters covered by his fiduciary obligations.

4. Aftermath of the Chinachem Saga

Introduction

- Following the protracted legal proceedings surrounding the appointment of a trustee for the charitable trusts under the estate of Nina Kung ("Nina"), significant developments have taken place since the Court of First Instance last addressed the matter.
- This chapter serves as a postscript to those earlier proceedings, the Court's approval of the administration scheme for the estate, and the eventual appointment of Nina Wang Charity Management Limited as the trustee.
- These recent developments mark a pivotal step towards fulfilling Nina's testamentary wishes and resolving one of Hong Kong's most high-profile trust disputes.

Conditions for Being a Trustee

- The Court conducted the first stage hearing on matters relating to the trustee of the estate in July 2022. A judgment was delivered on 21 October 2022 (HCMP 853/2012; [2022] HKCFI 3255), addressing key issues concerning the administration scheme and imposing two conditions for Chinachem Charitable Foundation Ltd (the "Foundation") to be appointed as the trustee:

  (1) The Solvency Condition; and

  (2) The Fit and Proper Condition.

- The Court dismissed the Foundation's application to issue formal requests to the Premier of the State Council of the People's Republic of China and the Secretary General of the United Nations to join the Supervisory Managing Organisation ("SMO"). The Court ruled this inappropriate, as these entities are beyond the jurisdiction of the Hong Kong courts.
- Before addressing the detailed provisions of the administration scheme, including the constitution and structure of the SMO, the Court determined it was necessary to assess the Foundation's suitability as the trustee.
- In November 2022, the Court held a directions hearing regarding this suitability. Parties were directed to file documents and evidence concerning the two conditions. Separate substantive hearings were scheduled: the Solvency Condition in July 2023 and the Fit and Proper Condition in December 2023 and February 2024.

- On 4 July 2023, the Court ruled that the Foundation failed to satisfy the Solvency Condition, disqualifying it from being appointed as the trustee. Consequently, the Secretary for Justice (the "**SJ**") and the administrator of the estate were tasked with formulating an administration scheme and recommending a suitable trustee.

Statement by the Department of Justice

- On 6 January 2025, the Department of Justice made a statement on Nina's estate.
- According to the statement, on 16 May 2024, the Court approved the scheme of administration for the estate (the "Scheme") submitted by the SJ. The key points of the Scheme are summarised as below:

  (1) Trustee of the charitable trust: To set up a special purpose vehicle company (the "Company Trustee", namely Nina Wang Charity Management Limited) as the Trustee. As a company limited by guarantee, the Company Trustee's sole member is The Financial Secretary Incorporated or its directly held subsidiary established in accordance with the Financial Secretary Incorporation Ordinance (Cap. 1015).

  (2) SMO: In accordance with Nina's testamentary wishes, an SMO formed by three independent individuals is set up to supervise the operation of the Company Trustee. The appointees, who are appointed by the SJ, must possess unquestionable integrity, experience and judgement.

  (3) Company Trustee: Main responsibilities include (but are not limited to) supervising the business operations of the Chinachem Group, and approving the Group's financial budget and proposed major decisions. In addition, the Company Trustee will devise a budget for its charity-related works, which will be used for charity projects, fundraising and, in accordance with Nina's testamentary wishes, the preparation for setting up a "fund and a Chinese prize of worldwide significance similar to that of the Nobel Prize".

  (4) Board of governors of the Company Trustee: There will be a board of governors for the Company Trustee, akin to a board of directors for a private company. The members of the board of governors shall be appointed pursuant to the Scheme and the articles of association of the Company Trustee, with at least two governors being government officials.

Implementation of the Scheme

- Pursuant to the Scheme, the SJ made an application to the Court to appoint the Company Trustee as the trustee of the charitable trust under Nina's estate.
- On 21 November 2024, the Court formally appointed the Company Trustee as the trustee of Nina's estate's charitable trust.
- The SJ also appointed Mrs Rita Fan Hsu Lai-tai, Mr Joseph Yam Chi-kwong, and Mr Cheng Yan-kee as members of the SMO to oversee the Company Trustee's operations.
- The Company Trustee will, at an appropriate time, release details about the composition of the board of governors, the Scheme, and other related information to the public.
- This appears to mark the aftermath of a long and intricate legal saga. As the Company Trustee begins its work, it remains to be seen how this structure will fulfil its mission of advancing charitable causes in line with Nina's vision.

5. Estate of Superstar Anita Mui: How Anita's Mother Relentlessly Challenges the Discretionary Trust set up by Anita

Background: The Demise of Cantopop Diva

- Anita Mui ("Anita") needs no introduction in Hong Kong. During her brief lifetime, she was a Cantopop superstar as well as an acclaimed movie actress.
- Anita was first diagnosed with cervical cancer in 2001. Notwithstanding her treatment, she held a series of concerts in November 2003 and afterwards, she flew to Japan to shoot a television commercial. While she felt ill upon her return from Japan, she was admitted to the hospital. That, unfortunately, turned out to be her final admission. Despite treatment, her condition deteriorated and she passed away on 30 December 2003, survived by her elderly mother as well as two elder brothers.
- It transpired that shortly before her demise, on 3 December 2003, Anita executed a will (the "Will") in the hospital which essentially left her entire estate to a trust known as the Karen Trust ("Karen Trust"). It is a discretionary trust set up by Anita, with HSBC as the sole executor of the Will and the trustee of the Trust.

The Trust Memorandum

- Anita had previously stated and was adamant that her mother, Madam Tam Mei Kam ("Mother"), should not have any lump sum because she was not good at managing her finances. Anita however wanted to ensure that her Mother could maintain her then lifestyle, with one chauffeur and two domestic helpers. Therefore, under the Trust, her Mother was named as one of the beneficiaries.
- There was a non-binding trust memorandum of wishes under which Anita indicated that she wished to have certain assets distributed to a Mr Eddie Lau, a sum of money to finance the education of her nephews and nieces, and that the balance should be retained for the purpose of paying an allowance of HK$70,000 per month to the Mother during her lifetime, after which the remaining balance should be distributed to a Buddhist organisation.
- Following Anita's death, the Mother challenged the validity of the Will and Karen Trust, leading to a prolonged legal battle.

Mother Lost Claim at First Instance

- At trial, the Mother challenged the validity of the Will for want of due execution, testamentary capacity and knowledge and approval. These common issues in probate dispute cases are collectively called "standard probate issues". She also challenged the validity of Karen Trust on the ground that it contravenes the common law rule against delegation of testamentary power. In essence, Counsel for the Mother argued that a testator must not leave it to others to decide for her how to distribute her estate, but here Anita delegated, via the Will, the power to name beneficiaries to HSBC.
- After an 18-day trial, Andrew Cheung J dismissed the Mother's claim[26].
- On the standard probate issues, the judge held that:

  (1) Due execution was more than sufficiently established.

  (2) On the day of execution, Anita's mental condition was simply normal, so she must be taken to have approved the changes of the Will by agreeing to name Karen Trust as the sole beneficiary.

  (3) Mental capacity to make the trust arrangement was duly established. The evidence did not indicate any lack of mental capacity, rather, it indicated a great degree of foresight and insight of Anita.
- Regarding the "delegation of testamentary power", the judge did not accept that there was a common law rule which existed in Hong Kong against such delegation of power.
- As a result, Cheung J pronounced the force and validity of the Will, ordered that probate be granted to HSBC, and declared the Trust a valid trust.

Decision Upheld at Court of Appeal

- Anita's Mother then appealed to the Court of Appeal, only for her appeal to be dismissed[27]. On appeal, the Mother argued, *inter alia*, that the Trust was void because the beneficiaries had no enforceable rights against the trustee and Clause 33 of the Trust (which provided that HSBC is not obliged to make known to any beneficiaries that the Trust exists) was an "excessive or unnecessary power".
- The Court of Appeal, in dismissing the appeal, held that:

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26 *Tam Mei Kam v HSBC International Trustee Ltd & Ors* (*unreported*, 16 June 2008, HCAP2/2004, Cheung J)

27 *Tam Mei Kam v HSBC International Trustee Ltd & Ors* [2010] 4 HKLRD 69

(1) The Trust was not null and void. HSBC did owe enforceable obligations to the discretionary objects under the Trust, including the Mother, who had a right to require HSBC to account for its trusteeship.

(2) A discretionary trust would not be void if the trustees were not obliged to inform any person that he was a potential beneficiary.

(3) It was not a breach of the rule against delegation of testamentary power to give property by will to the trustees of a valid pre-existing trust.

Mother's Appeal before CFA "Entirely Without Merits"

- Following the defeat at the Court of Appeal, the Mother appealed to the Court of Final Appeal. She argued, *inter alia*, that:

  (1) There was collusion and conspiracy on the part of those who were involved in the preparation and execution of the Will and Trust Deed (a new point).

  (2) There was new evidence concerning the relationship between the Deceased and her brothers relevant to the case which ought to be admitted.

  (3) There were no concurrent findings[28] made against her and in any event, the judges were plainly wrong to have made those findings.

  (4) The lower courts had erred in holding that Clause 33 of the Trust Deed does not vitiate the discretionary trust.

- The Court of Final Appeal held that there was no merit in any of the grounds[29]. In particular, it was held that there were concurrent findings that Anita had knowledge and approval of the contents of the Will and Trust Deed before execution, and that the Trust Deed clearly established a valid trust. The Mather's attempt to raise the new point was also rejected on the basis that it could not properly be raised on appeal[30].

- The Court of Final Appeal unanimously dismissed the appeal, expressing the view that the appeal was **"entirely without merits"** and **"must be regarded as hostile litigation"**.

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28 "Concurrent finding" refers to the finding of facts of the lower court which is affirmed by the Court of Appeal.

29 *Tam Mei Kam v HSBC International Trustee Ltd & Ors* (2011) 14 HKCFRA 512

30 As a general rule, fresh arguments could not be made in an appeal.

Mother Ended Up in Bankruptcy

- In 2011, a bankruptcy petition was presented against Anita's Mother by the solicitors who acted for her in the first instance proceedings, on the basis of a judgment debt based on outstanding legal fees.
- On 25 April 2012, the Court made a bankruptcy order against the Mother, despite her opposition to the petition and allegations of fraud on the part of the solicitors[31]. Her appeal to the Court of Appeal against the same was also dismissed[32].

Relentless Bids for Lump Sum Payment

- During the probate proceedings, as early as in October 2004, the Mother had already applied for reasonable financial provision out of Anita's estate under the Inheritance (Provision for Family and Dependants) Ordinance. Between October 2004 and August 2015, a series of orders were made for interim payments to her. In addition to the monthly maintenance, the court authorised payment to her for all reasonable medical expenses she had incurred, special payments for Chinese New Year, and for contingencies.
- On 23 March 2015, the Mother issued a summons for a lump sum payment. Her application was dismissed by Louis Chan J[33]. Instead, the judge made an order for periodic payments, including payment of $207,000 a month (subject to yearly inflation) as provision for the Mother's living needs, Chinese New Year special payment, all reasonable medical expenses, etc.
- However, the Mother was far from satisfied. She appealed to the Court of Appeal, contending that the judge should have made a lump sum order instead. Her appeal was, without surprise, dismissed, and being criticised again as **"entirely without merit"**[34].
- As Chan J expressed the view that with the monthly periodic payments the Mother received, **"Madam Tam would enjoy a very stable and comfortable life. All her daily needs will be provided for."**

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31 *Re Tam Mei Kam* (*unreported*, 25 April 2012, HCB3777/2011, Brama J)

32 *Re Tam Mei Kam* (*unreported*, 8 May 2013, CACV 87/2012, Cheung, Yuen and Lam JJA)

33 *Tam Mei Kam v HSBC International Trustee Ltd & Ors* (*unreported*, 1 September 2016, HCMP2981/2004, Chan J)

34 *Tam Mei Kam v HSBC International Trustee Ltd & Ors* (*unreported*, 10 February 2017, CACV181/2016, Lam VP, Cheung and Kwan JJA)

6. The Case of Tycoon Chen Din Hwa: Duties amongst Family Members in an Asset Distribution Arrangement

Background: Asset Distribution Arrangement

- A very successful entrepreneur, the late Dr Chen Din Hwa ("Chen") was the founder and chairman of the conglomerate Nan Fung Group, engaging in the business of real estate and property development. He passed away in 2012 at the age of 89, survived by his ex-wife, Yang Foo-Oi ("Madam Yang") and their two daughters Angela Chen ("Angela") and Chen Wai-wai Vivien ("Vivien").

- In 1999, Chen initiated an estate duty saving scheme ("1999 Scheme"). His moneys were transferred to an oversea company fully controlled by Vivien. Vivien caused the company to purchase from Chen the shares of asset-holding companies in Hong Kong. The purchase price was then recirculated by Chen to Vivien's company and the same operation was repeated eight times. As a result, Vivien's company became the owner of HK$3.9 billion of Chen's assets. (Vivien argued that this 1999 Scheme vested the beneficial interest of HK$3.9 billion of Chen's assets on her. But the Court subsequently found that it was a sham. The assets remained owned by Chen and later formed part of the assets distributed under the Distribution Arrangement described below.)

- In 2004, Chen made an assets distribution arrangement. The proposal which is the subject of the legal action was in simple terms. Essentially, Chen would distribute to each of Madam Yang, Angela, and Vivien HK$3 billion worth of his assets. This was done by distributing to Angela and Vivien each HK$4.5 billion worth of assets, out of which they would each transfer HK$1.5 billion worth of assets to Madam Yang ("Distribution Arrangement").

- The properties were valued as at March 2003. Valuations based on that date were used to calculate the amount of assets to make up the HK$4.5 billion. At the time of valuation, Hong Kong was affected by SARS. The property market suffered badly as a result. However, the market quickly recovered later and property prices had significantly appreciated.

Disputed Agreements between Vivien and Madam Yang

- In respect of the HK$1.5 billion assets that Madam Yang was to receive from Vivien, Madam Yang indicated that she only needed HK$300 million. For the rest, she decided that she would allow Vivien to keep them for herself, her children and a charitable trust.

- Following the Distribution Arrangement, agreements were made between Madam Yang and Vivien in 2004 to give effect to Madam Yang's decision ("Disputed Agreements").
- Noticeably, the appreciation in value of one particular property (at around HK$80 million) was added to the HK$300 million so in total Vivien was to pay HK$380 million to Madam Yang under the Disputed Agreements. The appreciation in value of all other assets was not accounted for.
- However, it later transpired that at the time of making the Disputed Agreements, Vivien failed to disclose to Madam Yang that the properties she had received from Chen were actually worth around HK$7 to 8 billion, greatly in excess of the stated worth of HK$ 4.5 billion.
- Therefore, Madam Yang brought the action against Vivien to set aside the Disputed Agreements. Madam Yang's grounds to set aside are (a) breach of fiduciary duty; (b) breach of family arrangement; and (c) undue influence.

The Court of First Instance's Decision[35]

- After a 21-day trial, Anthony Chan J found in favour of Madam Yang in that Vivien had failed to disclose material information to her, namely the increase in the market values of the properties.
- The judge found that the meaning of the Distribution Arrangement was obvious: Vivien had to give to Madam Yang one-third of what she received from Chen. The entitlement of Madam Yang was not confined to HK$1.5 billion but fractional, being 1/3 of what Vivien has received from the Distribution Arrangement.
- The Disputed Agreements were rescinded on all three grounds. Madam Yang was entitled to choose either equitable compensation or accounts for profits as her remedy. Vivien appealed to the Court of Appeal.

Gift Documents Coming to Light

- Pending appeal of Chan J's judgment, Vivien discovered some documents which were previously not known to her at trial, including a Deed of Gift, a Gift Declaration, an Irrevocable Power of Attorney and a Deed of Assignment executed. These documents were subsequently referred to as the "Gift

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35 *Yang Foo-oi By Leung Ping Chiu, Roy Her Next Friend v Wai Wai Chen and Another* (*unreported*, 29 November 2016, HCA1739/2010, Chan J)

Documents". The Gift Documents were executed in 2008 before Madam Yang began to pursue the claims against Vivien in 2010.

- Under the Deed of Gift, while Madam Yang would reserve HK$0.2 billion for her living and other expenses, the remainder of the assets, regardless of their value, would be gifted to Angela. It purported to transfer all "rights and benefits" of Madam Yang under the Distribution Arrangement to Angela.

- Vivien then took out summons to challenge the *locus* of Madam Yang on the basis that it was Angela but not Madam Yang who was being vested with the claims because the locus of the claims had been assigned out pursuant to the Gift Documents[36] (the "Locus Summons"). While Madam Yang did not admit the Gift Documents had the effect of assigning the claims to Angela, she applied to rectify the Gift Documents to the effect that the causes of action did not form part of the gift to Angela (the "Rectification Summons").

- On the issues of the Locus Summons, Chan J held that a reasonable person with knowledge of the relevant background would not have understood the Gift Documents to include the claims as part of the gift to Angela. In any event, he held that the Action were not assignable to Angela because the primary causes of action were personal to Madam Yang. Accordingly, he dismissed the summons.

- Further, on the Rectification Summons, the judge held that discretionary relief of rectification should be granted as it was necessary to do so.

Madam Yang's Incapacity: Disputes over Capacity of Next Friend

- Yang commenced the action against Vivien in 2010. In 2014, unfortunately, having suffered a major stroke, Yang was in a state of incapacity. In 2016, a next friend (the "Next Friend") was appointed to represent her in the proceedings. In light of the Rectification Summons, an application was also made to confirm the Next Friend's power and capacity for issuing the summons[37].

- Vivien challenged the appointment of the Next Friend on ground that Madam Yang had conflict of interest with Angela such that the Next Friend was only pursing the interest of Angela but not Madam Yang by continuing the Rectification Summons and the substantive claims.

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36 Locus means the right to appear in court or to file an action in court. It means before suing someone, the plaintiff must demonstrate some interests belong to him are jeopardized.

37 *Yang Foo-oi By Leung Ping Chiu, Roy Her Next Friend v Wai Wai Chen and Another* [2019] 3 HKLRD 162, [2019] HKCFI 1312

- Chan J noted that, as a general rule, an application for the appointment of a next friend should not concern the opposing party. Further, he held that here, the order which appointed the Next Friend covered his capacity to pursue the Rectification Summons and the substantive claims. The alleged conflict of interest was simply illusionary between Angela and the Next Friend who acted for interest of Madam Yang.
- Accordingly, despite Vivien's objection, Chan J confirmed the Next Friend's appointment.

Court of Appeal Affirming the Lower Court Judgment

- After the interlocutory judgments, Vivien's appeal against the substantive decision of Chan J reached the Court of Appeal. Her appeal was dismissed. Leave to appeal to the Court of Final Appeal was also refused[38].

1999 Scheme: Did Vivien Acquire Beneficial Interest?

- Prior to the Distribution Arrangement, Vivien's company had already become the owner of HK3.9 billion assets due to the 1999 Scheme.
- The Court of Appeal agreed to Chan J that Vivien was holding (through her company) the HK$3.9 billion on trust for Chen.
- Decisive evidence was that both Chen and Vivien had shown clear intention that the assets were held for Chen and under Chen's control despite in the name of Vivien's company. In making the Distribution Arrangement at a later stage, Chen clearly had in mind to include the HK$3.9 billion as part of the HK$4.5 billion given to Vivien.
- It was found that the 1999 Scheme was a "sham". Chen remained the beneficial owner of all this HK$3.9 billion assets until further distribution was made under the Distribution Arrangement.

Legal Effect of the Distribution Arrangement

- Vivien disputed the legal effect of the Distribution Arrangement that it was not intended to be legally binding.

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38 *Leung Ping Chiu, Roy, Appointed By Order Dated 12 May 2020 To Represent the Estate of Yang Foo-oi, Since Deceased v Wai Wai Chen and another* (*unreported*, 23 November 2022, CACV241/2016, Kwan VP, Cheung and Chu JJA) [2022] HKCA 1730

- Yet, Court of Appeal agreed to Chan J's findings that:

  (1) Chen adopted a "Proposal System" in managing his company's and personal financial affairs. Under this system, once Chen approved the proposal, it became ultimate decision to be implemented (until he revoked it). The Distribution Arrangement was proposed in this way so it was intended to be binding.

  (2) Chen had consulted Yang and his daughters before finalising the Proposal. And when signing the Distribution Arrangement, Chen put the notation "approval for immediate action". Clearly he intended it to be binding.

- In assessing the legal effect of family arrangement, the requirements of legal intention and consideration are not as strictly applied as in the commercial context.

- As for the interpretation of the Distribution Arrangement, the Court of Appeal confirmed the interpretation by Chan J that the Distribution Arrangement was a disposition in favour of Madam Yang of 1/3 of assets distributed to Vivien. Madam Yang had the beneficial interest over this 1/3 of assets. Vivien, on the other hand, was under an obligation to transfer the same to Madam Yang.

Breach of Fiduciary Duty

- Based on legal principles laid down by the Court of Final Appeal in *Libertarian Investments Ltd v Hall*[39]*,* fiduciary duty arose in this case in 3 ways: (1) agency relationship, (2) ascendancy relationship; and (3) conditional receipt and retention of property.

- These grounds to establish fiduciary duty complement each other. They all relied on the key finding that Vivien had assumed obligations to pay to Madam Yang in the context of a family arrangement.

(1) Agency Relationship

- In *Libertarian Investments Ltd v Hall,* it was said that a very obvious example of agency type fiduciary duty is that "where a person receives money or other property for and on behalf of or as trustee of another person".

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[39] (2013) 16 HKCFAR 681, §§60-69, per Ribeiro PJ

- Although there had been no formal agency between Madam Yang and Vivien, among HK$4.5 billion received by Vivien from Chen, 1/3 of which were received on behalf of Chen. Their relationship was analogous to a relationship of agency.

(2) Ascendancy Relationship

- The ascendency type of cases has been described as "power-dependency relationships" involving a need for "the protection of one party against abuse of power by another".
- Vivien argued that she had no discretion or power exercisable in the interest of Madam Yang.
- However, the court found that as she had assumed the obligation to pay or transfer assets to Madam Yang, there is then a power or discretion which would affect the interests of Madam Yang in a legal or practical sense. And she had opportunity to exercise the power to Madam Yang's detriment who was vulnerable to abuse by Vivien's position.
- Noticeably, the court was also inclined by the fact that Madam Yang was old and had poor capacity to manage her own financial affairs. She to a large extent was vulnerable to Vivien's influence.
- There was a relationship of ascendency or trust and confidence between Madam Yang and Vivien that gave rise to fiduciary duty.

(3) Conditional Receipt and Retention of Property

- Applying the doctrine laid down in the English Court of Appeal case *de Bruyne v de Bruyne*[40], fiduciary duty is imposed on the trustee who, in a view to acquiring the trust property, has accepted or assumed a fiduciary position in circumstance such that it would be unconscionable for him to deny fiduciary duty.
- Before the Distribution Arrangement, Vivien was a mere trustee holding the assets transferred to her by Chen.
- The distribution by Chen to Vivien carried a condition that she must pay 1/3 of assets to Madam Yang. By accepting the Distribution Arrangement, Vivien has assumed fiduciary position in relation to Madam Yang.
- It is unconscionable for Vivien to deny the fiduciary obligations given the fact that she has received significant benefits under the Distribution Arrangement.

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40 [2010] 2 FCR 251

Material Non-disclosure

- Vivien acted in breach of her duties to Madam Yang, and there was no valid answer to such breach. The breach of duties was on two key respects: (a) she failed to disclose the true market value of properties; (b) she failed to pay or account to Madam Yang the full market value of her entitlements. Vivien acted under a conflict of interest, and she had made unauthorised profits in doing so.

  (1) Vivien was guilty of failing to disclose to Madam Yang very material information. She knew that the properties distributed to her were worth around HK$7-8 billion, but she never told her mother that this was the case.

  (2) Vivien argued that Madam Yang would have known that the market had rebounded after the recovery from SARS. But this cannot be an answer to Vivien's failure to make disclosure. It is fanciful to suggest that the 80 years old Madam Yang would have known that the HK$4.5 billion assets had become HK$7-8 billion.

  (3) Although Madam Yang had agreed to give away most of her entitlements under the Distribution Arrangement to Vivien, her children and charity, this is no answer to Vivien's breach of fiduciary duties. Vivien and her children stood to benefit from Madam Yang's distributions so it is elementary for her as a fiduciary to make full disclosure so that Madam Yang would be in a position to make informed decisions.

Breach of Family Agreement

- In law, a binding family arrangement is "a contract between family members that intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour."

- The Court of Appeal found that the Distribution Arrangement constituted a family agreement, being part and parcel of the arrangement made for the benefit of family peace and harmony. It was not of pecuniary nature but simply for the satisfaction that the members derive from seeing what they believe to be the testamentary wishes being fulfilled.

- In law there is a duty of disclosure under family arrangement. It was concluded that given Vivien's breach of duty of full disclosure, it should follow that Madam Yang is entitled to rescind the Disputed Agreements.

Relief

- As a result, Madam Yang is entitled to set aside the Disputed Agreements.
- She is also entitled to have the Distribution Arrangement specifically enforced. She may elect one of two reliefs: equitable compensation from Vivien or an account for profits.

Subsequent Development: Madam Yang's Demise

- Madam Yang had been in a state of incapacity for many years. Eventually, she passed away in 2020 before the judgment of the Court of Appeal.
- After Madam Yang's demise, a probate action in respect of her estate was commenced by Angela to propound Madam Yang's will in 2008, which left all of her assets to Angela. Vivien challenged the validity of the 2008 Will on the grounds of lack of testamentary capacity; no knowledge and approval; and that it was procured by undue influence, fraud, and/or fraudulent calumny[41] on the part of Angela.
- On the other hand, instead, Vivien sought to propound an earlier will of Madam Yang made in 2004, under which there would be an equal division of her assets between Vivien and Angela.
- While the trial has been set down for September 2025, it remains to be seen whether Vivien could succeed in her bid over Madam Yang's substantial estate.

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41 The basic idea is that if a beneficiary poisons the testator's mind against another person, who would otherwise be a natural beneficiary of the testator's bounty, by casting dishonest aspersions on his character, then the will is liable to be set aside.

7. The Missing Will: Girlfriend Lost Fight over Famed Teahouse Fortune

Background Facts: Disappearance of Will

- The late Yien Chi Ren ("Yien") was the owner of the well-known Chinese restaurant and teahouse, Lin Heung Lau. He passed away in 2008, survived by 6 children ("Yien's Children") and left behind HK$100 million[42].
- Yien's girlfriend of 24 years, Han Yi ("Han") had been cohabitating with him since 1984.
- In 2003, Yien made a will at a solicitors' firm, under which 25% of the net estate is distributed to Han, the remaining 75% is distributed to 3 of Yien's children, with no provisions to the other 3 (the "Will"). The Will was handed by the solicitor to Yien after it was executed.
- After the death of Yien, however, the original copy of the Will could not be found. The parties only had the photocopies of the Will. No witness testified directly about an occasion when Yien destroyed the Will in the presence of such witness.
- Han sought to propound the Will for probate, while Yien's Children counterclaimed for a declaration that the Will had been revoked.

Will Held Destroyed Despite No Direct Evidence

- After an 8-day trial, MH Lam J dismissed Han's claim and held that the Will had been revoked by Yien by destruction. The estate would hence be distributed equally among his six children.
- As there was no direct evidence of revocation, at trial, Yien's Children relied on presumption and circumstantial evidence that the Will had been revoked.
- Lam J found that on evidence, the presumption that Yien had destroyed the Will was strong, and such a presumption had not been rebutted by Han:

  (1) Yien was a meticulous person careful with his documents. He appreciated the importance of keeping a good custody of the original of the Will. It was, therefore, highly unlikely that the Will had been mislaid or destroyed by accident or kept in a place of storage which was so secret that it could not be found.

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42 https://www.scmp.com/article/975482/girlfriend-tycoon-loses-probate-fight

(2) At the same time, there was no basis for suggesting that Yien's Children had deliberately caused the disappearance of the Will.

- As to the reasons to revoke the Will, the judge was of the view that there was much evidence at trial to show that Yien had reason or motive to revoke the Will:

  (1) The relationship between Yien and Han had deteriorated to an extent that he wanted to move away to live separately from her.

  (2) Towards the end, Yien had resolved his doubts about making provisions for all his 6 children as he came to the view that after all, they were all his children.

Han's Appeal Dismissed by Court of Appeal

- Dissatisfied with Lam J's decision, Han appealed to the Court of Appeal. The Court of Appeal agreed with the judge that the Will had been revoked[43].
- The Court was of the view that essentially, this case was decided by the trial judge on the facts he found and inferences he reasonably made, thus there was no ground for the appellate court to interfere with the decision.

Legal Takeaway

- Under section 13 of the Wills Ordinance, a will could be revoked by burning, tearing, or otherwise destroying of it by the testator with the intention of revoking it. If a will, traced to the possession of the deceased, and last seen there, is not forthcoming on his death, it is presumed to have been destroyed by himself; and that presumption must have effect, unless there is sufficient evidence to repel it: *Welch v Phillips*[44] at p.302.
- Despite the above presumption, direct evidence of revocation is more desirable. Here, if there were direct evidence of revocation (e.g. Yien destroying the will in the presence of a witness), it would eliminate the need to rely on presumptions and circumstantial evidence, thus reducing the risk of litigation and ensuring that Yien's children could be entitled to the estate as he so wished.

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43 *Han Yi v Ngan Shun Wai and Others* (unreported, 11 September 2012, CACV168/2011, Tang VP, Cheung and Yuen JJA)

44 [1836] UKPC 24

8. "A Sad Case": Taxi Tycoon's Mistress Gets Multimillion Estate from Seemingly Irrational Will

Background: Taxi Tycoon's Large Family

- Despite his low profile, the late taxi mogul known as "Taxi Chiu" was a very astute businessman. Over the years, he accumulated his abundant wealth through investing in taxi licenses, the property and stock markets.
- However, his success came at a price. With his poor health, he passed away in 2004 at the age of 55, leaving a very sizable estate mainly comprising of 33 flats.
- He had a total of 16 children and a number of mistresses. Nine of the children (the "9 Children") were by his ex-wife, whom he married but separated. After the divorce in about 1990, Taxi Chiu began to live with one of his mistresses, Chiu Chung Kwan Ying ("Madam Chung"), as man and wife.
- Having a large ménage, Taxi Chiu made a will in 1997, under which he bequeathed his entire residuary estate to all his 14 children then alive (the "1997 Will").
- However, later gradually, his relationship with his children began turned sour, with increased tensions within the family. In 1999, a quarrel broke out between his ex-wife and another mistress. After that, Taxi Chiu felt that the 9 Children had become rebellious and treated him with no respect at all. He was upset by the farce.
- What caused the father-child relationship to further deteriorate was Taxi Chiu's ex-wife's suicide in 2003. At the funeral, he was treated by the 9 Children with utmost hostility and disdain. His relationship with the 9 Children became completely shattered. It was apparent that they blamed him for their mother's suicide and saw him as the culprit. Taxi Chiu was extremely infuriated and was deeply insulted by them in public. Consequently, he firmed up his mind to disinherit his 9 Children.

The 2003 Will: Entire Estate Left to Mistress

- Shortly after, Taxi Chiu made another will in 2003, under which he expressly disinherited the 9 Children, made no provision for other children, and left his entire estate to his mistress Madam Chung (the "2003 Will").
- The 2003 Will was prepared by a solicitor, who, like any other sympathetic bystander, felt uncomfortable that Taxi Chiu was to disinherit all his 9 Children.

And so she advised that a doctor should be present to certify the requisite testamentary capacity.

- A medical practitioner, Dr Ng, purported to carry out a mental state examination. However, he did not ask questions related to the will. He "simply did not bother to inquire about the existence of a previous will or question the disinheritance" and did not make any attendance notes of the assessment.
- After the demise of Taxi Chiu, the two diametrically competing wills inevitably excited contention, putting the 9 Children against Madam Chung.

2003 Will Held Valid at First Instance

- After a 34-day trial, Jeremy Poon J dismissed the 9 Children's claim and pronounced for the force and validity of the 2003 Will.
- The focus of the dispute at trial was whether Taxi Chiu was of testamentary capacity at the time of execution of the 2003 Will. The 9 Children alleged that the Deceased did not have the testamentary capacity, relying on, *inter alia*, that (i) the decision to disinherit the children was wholly irrational, and (ii) the examination by Dr Ng was not valid.
- Regarding (i), the judge acknowledged that the Deceased had very peculiar personality traits, and he could easily become biased or prejudiced. While Poon J took the view that the disinheritance was disheartening for the 9 Children, he held that the 2003 Will was not irrational in the sense that it was explicable by his personality traits and his reactions to the events, and not due to unsoundness of mind.
- Regarding (ii), the judge found that the mental state examination by Dr Ng was "materially deficient" and decided to attach no weight to his examination. Dr Ng did not make an attendance note of the details of the examination at the time, so no meaningful and objective evaluation can be carried out. He was also not told of the existence of the earlier will and the disinheritance, meaning that he had no information about the change of the testamentary disposition which would have enabled him to ask appropriate questions.
- However, the judge held that it did not detract from the long-term observations of Dr Ng regarding Taxi Chiu's mental conditions. Throughout 1998 to 2004, no clinical feature suggested that he was suffering from dementia or cognitive impairment. Evidence of three doctors (including Dr Ng) played considerable role for this purpose.
- On the other hand, four independent witnesses (all being persons who worked for Taxi Chiu from 2002 to 2004) testified to similar effect that Taxi Chiu was of sound mind with no mental incapacity during this period.

- Based on strong evidence supporting Taxi Chiu's sound mind, the court held that the 9 Children had failed to adduce evidence to raise the issue of testamentary capacity, or even if they have, there was overwhelming evidence in support of the existence of such capacity.

Validity of 2003 Will Affirmed by the Court of Appeal

- On appeal, the Court of Appeal affirmed Poon J's decision[45].
- In particular, the Court agreed with the trial judge's finding that Taxi Chiu had the requisite knowledge and approval of the contents of the 2003 Will.
- The Court also emphasised that the law does not require a testator to act fairly when he makes a will. A testator may act in a capricious manner or even be moved by bad motives, and make a Will that may appear unfair and unjust to an objective observer, as long as he has the requisite testamentary capacity.
- Concurrently, the Court agreed that no weight should be attached to Dr Ng's deficient medical examination.

Leave to Appeal Refused by the Court of Final Appeal

- The leave to appeal to the Court of Final Appeal was also refused[46], confirming Madam Chung's inheritance of the entire estate.
- As noted by Poon J, **"this is a sad case"** and **"the result of these proceedings is surely something which the plaintiffs [9 Children] find hard to swallow"**. However, in the sympathetic words of Poon J, **"it is however time to move on"**, hopefully **"they will leave this sad episode behind and soldier on with their life."**

Legal Takeaway

- Irrationality, eccentricity, lack of justice, lack of common sense in the disposition is not of itself valid ground to invalidate a will, although in extreme cases, unsoundness of mind could be inferred from irrationality. After all, the law leaves disposition to the testator's unfettered discretion, as long as he had the testamentary capacity.

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45 *Chiu Man Fu* & Ors *v Chiu Chung Kwan Ying* [2013] HKEC 937

46 *Chiu Man Fu* & Ors *v Chiu Chung Kwan Ying* (unreported, 17 December 2013, FAMV42/2013, Ribeiro, Tang and Fok PJJ)

- When obtaining a mental state examination and certificate, solicitors should provide the doctor with relevant information, e.g. a copy of the draft will and information on the existence of previous wills, to enable him to ask appropriate questions.
- During the assessment, solicitors should ensure that the medical practitioner has taken attendance notes documenting the assessment to prevent any future disputes.

9. Ascertaining Testamentary Capacity: The Importance of the "Golden Rule" in Re Estate of Au Kong Tim

Background: The Au Family

- The deceased, Au Kong Tim ("Au"), ran a successful business in construction and real estate development. He passed away in 2009 at the age of 93 and left a substantial estate of over HK$1 billion. He was survived by his wife Madam Leung, two sons, a daughter, and six grandchildren.
- Both sons, Au Wing Lun William and Au Yuk Lun Anthony were qualified solicitors. By a will made in 2002, Au left the whole of his residuary estate to all his six grandchildren in equal shares (the "2002 Will"). The executors appointed were Anthony's wife Po Chun and her two children Chadwick and Charleen.
- William, however, relied on a will made in 2008 under which the whole of the Au's residuary estate was left to William, Anthony, Chadwick and Wilson (son of William) in equal shares (the "2008 Will"). According to William, the 2002 Will was only a gesture of Au to demand change in behaviour of him. After he acted in according to Au's wish, Au decided to make the 2008 Will.
- Po Chun and Chadwick commenced proceeding against William to propound the 2002 Will while William counterclaimed to propound the 2008 Will. Since the validity of the 2002 Will was not in dispute, the sole issue was the validity of the 2008 Will.

Execution of the 2008 Will

- The process of execution of the 2008 Will attracted serious controversy. Two solicitors, Mr Yeung and Mr Lau, were instructed by William on behalf of his father Au. In their evidence, they went to elderly home where Au was residing on 5 September 2008. The solicitors first read out and explained the contents of the prepared will but Au was unable to understand. Then they repeated and Au answered positively as to his understanding of the will.
- When Au was trying to sign on the will, he had difficulty raising his right hand and required help from William. It was William and the solicitors' evidence that he lifted Au's hand and supported him to sign.
- However, as will be explained below, the execution was far from self-evident in proving its validity due to the solicitors' neglect of standardized procedures.

Allegation of Forgery

- Po Chun and Chadwick launched serious accusation that William had forged the signature and that Au had never signed on the 2008 Will.
- The allegation relied on a handwriting expert's evidence that:

  (1) The Chinese signature "區" (Au) on the 2008 Will was "highly probable" to be written by William in forgery; and

  (2) That signature "was not written with the aid of a guiding hand".

- While the expert appeared to be firm with his conclusion, Anderson Chow J in the Court of First Instance was not convinced[47]. He gave more weight to the evidence of the solicitors and refused to follow the expert's opinion. He did so because given that the signature was written with external support, it is normal for the signature in question to exhibit different handwriting characteristics from Au's ordinary signatures.
- The forgery allegation was rejected and was not overturned by the Court of Appeal.

Lack of Testamentary Capacity?

- To propound the 2008 Will, William had burden to prove that Au had the testamentary capacity required. This, however, was not easy due to the failure to comply with the Golden Rule.

Non-Compliance with the "Golden Rule"

- The "Golden Rule"[48] provides that when a solicitor draws up a will for an aged or seriously ill testator, it should be witnessed or approved by a medical practitioner who ought to record his examination of the testator and his findings, and that an earlier will should be examined and any proposed alterations should be discussed with the testator.
- The checklist in "*Assessment of Mental Capacity: A Practical Guide for Doctors and Lawyers*" published by the British Medical Association and the Law Society was designed to ascertain whether the testator satisfied the criteria laid down in *Banks v Goodfellow*[49]. Three criteria are used to ascertain testamentary capacity, namely whether the testator was capable of: (a) understanding the

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47 *Re Estate of Au Kong Tim (Wills: Validity)* [2017] 4 HKLRD 284

48 See *Kenward v Adams* (1975) The Times 29 November 1975, per Templeman J

49 (1869-70) LR 5 QB 549 at p.565

nature of the act and its effect; (b) understanding the extent of the property of which he was disposing; and (c) comprehending and appreciating the claims to which he ought to give effect.

- Meanwhile, it would be wrong to describe the "Golden Rule" and the checklist as strict requirements, instead, as pointed out by Anderson Chow J, they are **"matters of common sense which ought to be observed"**.
- Here, neither the "Golden Rule" nor the said checklist was followed by the solicitors.

Possible Dementia of Au?

- There had been a battle of experts on the factual issue of whether Au was suffering from dementia at the time when he signed the 2008 Will. Po Chun and Chadwick's expert answered affirmatively while William's expert denied. Nevertheless, it was mutually agreed that without interviewing Au alive, it would be hard to reach an accurate conclusion.
- The medical notes were made while Au was alive. They suggested Au was suffering from dementia. Yet, their reliability was in question as they were extremely brief without details of Au's mental condition or doctors' reasoning for such diagnosis.
- On the other hand, weight was again given to evidence of the solicitors who prepared the 2008 Will. During their interactions with Au, clearly he was able to differentiate between "understanding" and "not understanding" the will and was able to express himself.

2008 Will Pronounced Valid at First Instance

- Despite the failure of the solicitors to follow the checklist and the "Golden Rule", Chow J did not consider that it detracted from their evidence as to due execution.
- Chow J concluded that on the totality of evidence, Au had not been suffering from dementia, or even if so, he was not deprived of the required testamentary capacity.
- Although the 2008 Will involved a radical departure from Au's previous testamentary dispositions, it was a simple document, and its dispositions were rational. In the circumstances, the judge was satisfied that the Au knew and approved of its contents.
- As a result, Chow J gave judgment to pronounce the validity of the 2008 Will in solemn form. Po Chun and Chadwick appealed.

Court of Appeal Overturning Lower Court's Judgment

- On appeal, the Court of Appeal overturned the judgment of Chow J and held that William had failed to show sufficient testamentary capacity of Au[50].
- This was a surprising outcome since Po Chun and Chadwick had placed all arguments criticizing the Court of First Instance's factual findings but none was accepted. The Court of Appeal approved Anderson Chow J's approach of favouring the solicitors' evidence thereby avoided any intervention into factual findings.
- While upholding all factual findings, the Court of Appeal found Chow J to have omitted to assess criteria (b) and (c) in *Banks v Goodfellow* – namely whether Au was capable of understanding the extent of the property of which he was disposing and comprehending and appreciating the claims to which he ought to give effect.
- The solicitors gave no evidence from which it could properly be inferred that the two criteria were satisfied – they did not follow the checklist or the "Golden Rule". On the evidence adduced, there was no basis on which to find the two criteria were satisfied. Thus, testamentary capacity to make the 2008 Will was not established.
- As a result, the 2008 Will was held to be invalid and the 2002 Will was propounded.

Legal Takeaway

- The Court of Appeal agreed that in determining the testamentary capacity, the general approach is to attach much significance to the fact that a will was prepared by a solicitor and contents were read to the testator. The Court will be cautious to treat a will executed in this way as invalid.
- As can be seen from this case, Chow J found the first limb of testamentary capacity from the actions of the solicitors, while the Court of Appeal could not find the other limbs due to solicitors' inaction. By failing to follow the "Golden Rule" and the checklist, the solicitors have in effect "avoided" the testamentary capacity that could otherwise be established.
- It is worth reminding again that the party who wish to propound a will has to prove the capacity. Hence, like the Court has stressed, **"the checklist and the Golden Rule contain prudent guidance for solicitors, the observance of**

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50 *Re Estate of Au Kong Tim (Wills: Validity)* [2018] 2 HKLRD 864, [2018] HKCA 210

which would help to ensure that basic requirements for the validity of the will would not be overlooked."

- In practice, the solicitor who wishes to discharge his duty properly is expected to meet the testator personally for the purpose of taking instructions or confirming the instructions. Solicitors are reminded that they should not regard the task as merely a formal act.

- Depending on the circumstances, enquiries to be made at the appointment should include: (1) the age of the testator; (2) his health condition; (3) whether he has a surviving spouse; (4) the number of children and grandchildren he has; (5) whether there is someone other than his immediate family member dependent on him for support; (6) the beneficiaries he would like to provide for in his will; (7) his properties; (8) whether he has made a previous will; (9) whether he understands the new will will revoke the previous will; (10) whether he understands the difference between the new and the previous will.

Comparison between the Two Cases

- There are several similar factual patterns in Au's case and the case of Taxi Chiu[51]. In both cases, the failure of attesting experts to perform their role satisfactorily triggered disputes as to the testator's capacity. In Taxi Chiu's case, although a doctor attested and checked the testator's mind, his assessment was materially deficient and carried no weight.

- It seems in both cases there was no direct evidence to support all limbs of testamentary capacity. And as a matter of law, the party who wish to propound the will has to prove the testamentary capacity. Due to the lack of evidence, as seen above, Au's latest will failed to be valid. Yet, Taxi Chiu's latest will was held to be valid notwithstanding the deficiency of the attesting doctor's assessment.

- Key Distinguishing Feature: It is the circumstantial evidence[52] that played a vital role in establishing testamentary capacity in Taxi Chiu's case. Evidence from witnesses who had been working with Taxi Chiu and the doctors all suggested that he was of sound mind at the time of execution of the will, although none of them attested the will. The solicitors in Au's case had no previous dealing with Au and no evidence to adduce beyond their short interaction with him. Moreover, Taxi Chiu was only 53 when he made the will, so apparently it is much easier to infer that he was having sound mind and

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51 Facts and rulings of Taxi Chiu case was discussed in the above chapter.

52 Circumstantial evidence are those not directly able to prove/disprove a fact, but inference may be drawn from.

capacity, whereas Au was 93 when making the will. Naturally the court requires more proof in relation to Au's capacity.

- Due to the significantly different circumstantial evidence, the Court of Appeal insisted on direct evidence in Au's case that each limb of the testamentary capacity must be strictly established. On the contrary, the court was more willing to make inference that all limbs were proved without demanding specific evidence of each limb.
- The comparison between the two cases demonstrate that while direct evidence from attesting witnesses (who complied with the Golden Rule) is always the most preferable, in the absence of such direct evidence, circumstantial evidence may also play an important role in establishing or disproving testamentary capacity.

10. When Charity Trumps Family: Mother Disinherits Daughter and Leaves Fortune to Charity

Family Background

- Madam Lung Yee Fun ("Mother") and the late Mr Hui Senior ("Father") gave birth to two children, namely Mr Hui ("Son") and Ms Lam Hui Sai Ping Rina ("Daughter").
- The Daughter got married and has since had her own family. The Daughter gave birth to Jason ("Grandson"), who studied in the US and has since remained there. The Daughter therefore spent her time half in the US with him, and half in Hong Kong.
- As far as the Son is concerned, on the other hand, during the Mother's lifetime, he was very close and filial to her. The two always had each other's company residing together at the family property (the "Property").
- Under the Mother's will dated 1996 (the "1996 Will"):

  (1) The Son was appointed as the sole executor and trustee.

  (2) The Property would be bequeathed to the Son absolutely.

  (3) The Son as trustee should hold the residuary estate in 10 equal shares, of which 1 share would go to the Grandson and the remaining 9 shares would go to the Son absolutely.
- Unfortunately in 2013, the Son passed away when the Mother was about 91 years old.

The 2013 Will: Disinheriting the Daughter

- Soon after the premature passing of the Son, the Mother was aware of the need to make a new will to replace the earlier 1996 Will. She therefore made a will in 2013 (the "2013 Will"), which was prepared by solicitors.
- Under the 2013 Will, *inter alia*:

  (1) Mr Wai Kee Shun ("Wai") would be the sole executor and trustee.

  (2) The Grandson would receive a sum of HK$10 million.

  (3) Mr Lung Hak Kau, the Mother's nephew ("Nephew"), would receive the Property and a sum of HK$10 million.

(4) Tung Wah Group of Hospitals ("**TWGH**") would receive the residuary estate. TWGH is one of the most well-known charitable organisations in Hong Kong.

(5) The Mother made no provision for the Daughter.

The Daughter's Claim

- A year after making the 2013 Will, the Mother passed away. Then, the Daughter commenced an action, challenging the validity of the 2013 Will.
- The Daughter's main contention was that her Mother, in view of her advanced age and health condition, (1) did not have the requisite testamentary capacity and/or (2) did not know and approve of its contents.
- By pleading, the Daughter questioned the absence of provision under the 2013 Will for her as her sole surviving child. While a sympathetic observer may initially share the same feeling with the Daughter, as the events unfold, one would eventually understand that there was more to the story.

2013 Will Upheld after Trial

- At trial, TWGH was the major protagonist on the defence side, while the other beneficiaries or the named executor did not contest.
- After an 11-day trial, applying the established legal principles, DHCJ Leung found that the 2013 Will is proved in solemn form, depriving the Daughter of any inheritance and confirming that the Mother's abundant estate would be dedicated to charitable cause[53].

Poor Mother-Daughter Relationship

- Obviously, the mother-daughter relationship was an important issue at trial.
- The Daughter admitted that she was not close with her Mother, that she would not be informed of major matters concerning the Mother. Importantly, she was consistently excluded from inheritance under both the 1996 and 2013 Wills. She did not even attend the funeral service of the Mother. From different sources and to different degrees, various family members reckoned that the mother-daughter relationship was no better, if not worse.

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53 *Lam Hui Sai Ping Rina v Wai Kee Shun and Others* [2024] HKEC 1284, [2024] HKCFI 1025

- Nonetheless, the Daughter tried to counter by saying that the mother-daughter relationship was not as poor as that portrayed. At some point, she suggested that the Mother in fact appreciated her concern and loved her. However, the single, even the best, illustration she managed to recite to the Court was the Mother's request for her assistance to attend to suspected gas leakage at the Property. It transpired that on that occasion, what the Mother did was instructing the domestic helper to write to the Daughter's husband to alert her, who was even referred to by her full name in the note.
- As a result, DHCJ Leung found that any portrait of the relationship between the Mother and Daughter during the former's lifetime as a normal one, not to mention a good one, was most doubtful.
- In light of the poor mother-daughter relationship, the judge found that that the Mother would, as she did, consciously and consistently exclude the Daughter from inheriting her, did not incite surprise.

Rationality of the 2013 Will

- The judge then went on to consider the rationality of the 2013 Will.
- In terms of the choice of executor, although the Daughter attempted to portray a picture that Wai came to be involved out of the blue, she eventually accepted that Wai was not a complete stranger to the Mother. The judge found that there is nothing irrational about such choice of executor.
- In terms of the bequests, the judge found no irrationality.

  (1) The bequest of cash to the Grandson was consistent with the Mother's intention as manifested by the 1996 Will.

  (2) Although the bequests to the Nephew and TWGH were new in the sense that they did not exist in the earlier 1996 Will, there was nothing irrational.

  (3) The Nephew is a family member. He was approached by the Mother for the specific purpose of taking up the Property so that ancestral worship could be retained there.

  (4) TWGH is a well-known charitable organisation.

The "Golden Rule" Not Followed

- Here, despite the Mother's advanced age of over 90, the "Golden Rule" mentioned in the last chapter was not strictly followed by the attesting solicitors, who failed to engage a doctor to witness the execution of the will or enquire the

Mother about the proposed amendments to the previous will. Not surprisingly, the non-compliance with the said rule was attacked by the Daughter.

- Despite the rule not being followed, DHCJ Leung observed that, except for the Mother's old age, the circumstances of the present case surrounding the 2013 Will were remarkably different from the cases where the court has held that the solicitors were reasonably expected to have suspected and considered deferring their judgment to medical certification in respect of the testator's capacity.

  (1) From the outset, it was the Mother who took the initiative to make a new will soon after the death of the Son. She even cared to bring along the 1996 Will to the first meeting with the solicitors.

  (2) The Mother herself gave instruction in respect of the specific bequests and managed to ask for advice at her own volition.

  (3) The rationality of the bequests (discussed above) is apparent, including the clearly consistent intention to exclude the Daughter from inheritance.

  (4) The Mother managed to act in accordance with solicitor's advice to bring further documents to the second meeting with the solicitors.

  (5) The Mother managed to handle the query concerning disposition of assets.

- As a result, the judge found that evidence tends to show that the circumstances surrounding the making of the 2013 Will as apparent to the solicitors did not cause them concern about the mental capacity of the Mother and thus the need to defer their judgment to medical certification contemplated by the "Golden Rule". The judge observed that such a view of the solicitors was nothing short of being professional.

Criteria in Banks v Goodfellow Satisfied

- Finally, the judge turned to consider whether the *Banks v Goodfellow* criteria[54] used to ascertain testamentary capacity were satisfied as a matter of fact. The said criteria include whether the testator was capable of:

  (a) understanding the nature of the act and its effect;

  (b) understanding the extent of the property of which he was disposing; and

  (c) comprehending and appreciating the claims to which he ought to give effect.

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54 (1869-70) LR 5 QB 549 at p.565

- As to (a), DHCJ Leung found that the Mother was conscious of what she was doing, namely to make a new will in place of the 1996 Will in view of the premature passing of the Son. In the course of her instructions, the Mother reacted to the solicitors' advice in respect of the feasibility of some of her initial suggestions, and made changes to her bequests accordingly.

- As to (b), the Daughter argued that no evidence showed that the Mother realised the extent of her residual estate. In response, the judge held that this criterion does not require proof of actual understanding of the exact details of her property at the time of execution of the will. In any event, the dispositions were not complex, and the Mother did realise the extent of her donation forming the bulk of her estate.

- As to (c), the judge observed that there were only a few beneficiaries under the 2013 Will, thus the Mother who named them as such at her initiative must be able to comprehend and appreciate their entitlements to which effect would have to be given.

Mother's Sound Mental Capacity

- Finally, the judge considered whether as a matter of fact (1) the Mother was at the material times suffering from mental incapacity, and (2) the will and its terms were caused or tainted by such incapacity.

- Both sides adduced evidence from neurological and psychiatric experts.

- Having heard medical expert evidence and upon a holistic assessment of the circumstances, DHCJ Leung found although the Mother was not condition-free in terms of her physical and psychiatric state generally, at the same time, the evidence fell short of proof of any mental or psychiatric disorder.

- As a result, the judge was not convinced that the Mother's condition and its degree compromised her testamentary capacity in making and executing the 2013 Will.

Legal Takeaway

- In this case, although the attesting solicitor had not adopted the "Golden Rule" or the checklist procedure mentioned above in view of the Mother's advanced age, the will was upheld.

- It affirms the principle that the question of testamentary capacity is a practical question and the Court has to holistically assess the question by reference to all the evidence. In other words, the question of testamentary capacity does not depend solely on scientific or legal definition or medical evidence. Nor does

compliance or not with the “Golden Rule” serve more to answer the dispute than as a good practice to avoid or minimise dispute in the first place.

- Testamentary capacity is ultimately a practical question of degree to be resolved on the basis of the circumstances of each case. The criteria in *Banks v Goodfellow* are not matters that are directly medical questions, but are matters for common sense and judicial judgment upon a holistic assessment of all the evidence.

11. The Fok Family's Legal Battles: From Litigation to Peaceful Settlement and Back Again

The Demise of a Legendary Figure

- A very successful businessman, prominent politician and generous philanthropist, the late Mr Fok Ying Tung Henry ("Mr Fok") passed away in 2006, survived by 3 families with different wives. The business of Mr Fok was held and run principally through three corporate groups. One of them is headed by Henry Fok Estates Ltd, which held interest in various subsidiaries (the "HFE Group").
- Prior to his demise, he made tremendous contribution to the modernisation of China and the development of Nansha through substantial investment in a development project there (the "Nansha Project").
- By his last will, Mr Fok appointed the following family members to be the co-executors of his vast estate:

  (1) Ms Fok Mo Kan (Mr Fok's sister; due to health reason, she did not perform much role);

  (2) Mr Fok Chun Yue Benjamin ("Ben"); and

  (3) Mr Fok Chun Wan Ian ("Ian").

2012 Settlement Agreement

- In 2011, Ben commenced an action to remove Ian and Fok Mo Kan as co-executors of the estate, complaining that Ian had misappropriated assets while Fok Mo Kan has not performed obligations as an executor ("Removal Proceedings").
- After lengthy and intensive negotiations, and with much assistance from prominent members of the community, including former CE Mr Tung Chee-hwa and former SJ Ms Elsie Leung[55], the family members were able to reach an agreement in 2012 (the "2012 Settlement Agreement") to settle their dispute amicably.
- The interests of the Fok family in the Nansha Project were held in the form of shares in a company called Panyu Development Co Ltd ("Panyu"). Panyu has

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55 https://orientaldaily.on.cc/cnt/news/20160114/00176_110.html

issued only 2 shares, each representing 50% of interests. Hence, each Panyu share represents a value of estimated HK$4.5 billion assets in Nansha Project.

- Originally, the Panyu shares were held by Fok Ying Tung Foundation Ltd ("FYT Foundation") and Yau Wing Co Ltd ("Yau Wing") respectively. Yau Wing is a company under HFE Group while FYT Foundation is the head of Mr Fok's another corporate group distinct from the HFE Group.

- In June 1997, Yau Wing sold its Panyu share for $1 nominal consideration to FYT Foundation, making FYT Foundation the sole owner of assets under the Nansha Project. Yet, FYT Foundation at the same time granted Yau Wing an option exercisable for 10 years that Yau Wing may repurchase the share for $1 ("Yau Wing Option").

- Since FYT Foundation is a charitable corporation with memorandum and articles of association restricting against distribution of its assets to its members. Ben therefore wished to transfer the Panyu shares out from FYT Foundation in a way that he could be benefited.

- In the 2012 Settlement Agreement, the 5 children of Fok First Family[56] agreed that a new company entity would be set up with each of the 5 children holding 1/5 shares and equal voting power. Clause 19(e) provided that Ian should cause HFE Group (which was under his control) to transfer all options held by the HFE Group to the new company entity.

- In consideration of the benefit that Ben would gain from the new company entity, the Removal Proceedings were stayed indefinitely.

Returning to Court

- Soon after the 2012 Settlement Agreement entering into force, there was a serious dispute between the members of the First Family about the Nansha Project.

- The Yau Wing Option was not known to Ben before its expiry. According to Ben, Ian mentioned in 2009 for the first time (and in general terms) that Yau Wing had an option to repurchase some assets from FYT Foundation. It was only in 2011, at a board meeting of FYT Foundation that Ian revealed that the Yau Wing Option had lapsed.

- The First Family was divided into two camps: Ben on the one camp, and Ian on the other. Ben alleged that Ian was in breach of clause 19(e) of the 2012 Settlement Agreement by failing to transfer the Yau Wing Option to the newly

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[56] Fok Ying Tung had, according to old customary law, 1 wife and 2 concubines. The children of Fok's wife are known as the "First Family".

created entity. Ben treated this as repudiatory breach and so he was no longer bound by the 2012 Settlement Agreement. He now applied to the court to restore the Removal Proceedings to remove Ian.

- Ian, however, claimed that since the Yau Wing Option had expired, they were not in a position to transfer the Yau Wing Option to the newly created entity. The construction of clause 19(e) does not include the Yau Wing Option.
- As a result, despite reaching the 2012 Settlement Agreement, the parties returned to the court in 2013.

Ian seeking to stay the Removal Proceedings

- Ian applied to stay the Removal Proceedings on the basis of the 2012 Settlement Agreement being still valid (the "Stay Application").
- After trial, Jeremy Poon J handed down his decision[57] to rule in favour of Ian and allow the Stay Application. The judge found that Ian was not in breach of the 2012 Settlement Agreement. As the 2012 Settlement Agreement was still binding on the parties, Poon J made an order to stay the proceedings.
- Ben appealed to the Court of Appeal. The Court of Appeal[58] observed that, ultimately, whether to order a stay was a matter of discretion. Different considerations may apply between a case where the settlement only covers the subject matter raised in the underlying litigation and a case where the settlement (like the present instance) extends to subject matters beyond those disputes already before the court in the action to be stayed. In other words, the 2012 Settlement Agreement contained matters beyond the Removal Proceedings.
- Given the above, except in very clear cases where the dispute over the settlement agreement could be readily resolved by a summary process, the Court should direct the enforcement of the settlement terms to be pursued by way of fresh actions.
- The proper approach is to allow Ben to bring a fresh action to enforce clause 19(e) of the 2012 Settlement Agreement ("Enforcement Proceedings") in which the Court will closely examine the construction of the clause. Then, the Court will return to the Removal Proceeding to see if it should be stayed.
- As a result, the Court of Appeal granted 28 days for Ben to institute the Enforcement Proceeding and also gave him liberty to apply for extension of

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57 *Fok Chun Yue Benjamin v Fok Chun Wan Ian and Others* (unreported, 3 January 2014, HCA2155/2011, Poon J)

58 *Fok Chun Yue Benjamin v Fok Chun Wan Ian and Others* [2015] 2 HKLRD 212

time, in the hope of the parties reaching "**amicable settlement with the assistance of a senior figure respected by the parties**".

- Unfortunately, despite the Court of Appeal's hope that the matters be resolved amicably, no settlement was reached and the parties proceeded to trial in 2022.

New Settlement Agreement in the Course of Trial

- The trial was scheduled with an estimated length of 60 days. However, on the 13th day of the trial, the case took a surprising twist. After lengthy negotiations, the family members were able to reach a new settlement agreement (the "2022 Settlement Agreement"). The parties agreed that nearly all the claims in the three previous actions (2011 Removal Proceedings, 2013 Stay Application and 2022 Enforcement Proceedings) would be dismissed with no order as to costs[59].
- Upon learning of the amicable 2022 Settlement Agreement in the midst of the trial, Lok J, congratulated the family for overcoming difficulties to conclude this "sad case" with "a happy ending", hoping the outcome would set a positive example and send a good message to society[60].

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59 *Fok Lai Lor Nora v Fok Chun Wan Ian and Others* [2022] HKCFI 2050, at §15

60 https://www.scmp.com/news/hong-kong/law-and-crime/article/3166100/feuding-family-late-hong-kong-tycoon-henry-fok-reach

12. Estate of Casino Tycoon Stanley Ho: Daughters Fight over Choice of Administrator

Family Background of the Casino King

- The "King of Gambling", Dr Stanley Ho ("Dr Ho") was the patriarch of Asia's largest casino empire for more than half a century.
- Apart from his well-known success in building the multibillion gambling empire, Dr Ho is equally known for the fact that he had 17 children with 4 different women he called wives, making for a sprawling and complex family tree.
- The two protagonists in the dispute here are:
  (1) Angela Ho ("Angela"), who is one of the daughters in the First Family.
  (2) Pansy Ho ("Pansy"), who is the eldest daughter of the Second Family.

The Tycoon's Passing

- Dr Ho passed away in 2020 at the age of 98, leaving no will. Under the rule of intestacy, there are in total 18 (or 19) beneficiaries[61] from the 4 branches of family.
- While Dr Ho has undoubtedly left behind substantial estate (the "Estate"), the amount of his assets was not readily known.
  (1) Pansy said, based on preliminary estimation, the Estate would be worth at least HK$1.72 billion.
  (2) According to Angela, however, there was evidence to show that the Estate would be worth more than HK$11 billion.

Family Deed and the Choice of KPMG

- Shortly after Dr Ho's passing, the family members had come together to try to agree on a mechanism for appointing professional administrators to administer the Estate, so as to ensure the smooth and amicable administration of the Estate.

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[61] Angela appears to dispute that Madam Lucina Laam from the Second Family was not a concubine of Dr Ho and thus not a beneficiary. But this was not material to the dispute over the choice of administrator for present purposes.

- After discussions, a mechanism was eventually agreed and recorded in a Family Deed. However, only the Second, Third and Fourth Families signed up to the Family Deed and agreed to the mechanism.

- In the end, pursuant to the mechanism, the family members chose KPMG to be the independent administrators. The choice of KPMG was therefore the result of the collective decision-making process following due-diligence work as to the most appropriate candidates for the administration of the Estate.

Dispute over Choice of Administrator

- In light of the above family discussions, Pansy took out an application for the appointment of independent professional administrators over the Estate, pursuant to section 36 of the Probate and Administration Ordinance. She issued a Summons, seeking to appoint members of KPMG as independent administrators ("KPMG Administrators").

- Angela, in response, also issued her Summons, seeking to appoint members of Alvarez & Marsal ("A&M Administrators") together with the KPMG Administrators.

- In other words, it was undisputed that independent professional administrators should be appointed. It was also undisputed that the KPMG Administrators should be appointed. The only difference between Pansy and Angela was whether the KPMG Administrators alone, or whether the A&M Administrators in addition to the KPMG Administrators, should be appointed.

- In terms of the number of beneficiaries in support (with some of them being content with either application):

  (1) Pansy's application had the support of 15 (or 16) out of the 18 (or 19) beneficiaries. In other words, her proposal was supported by the majority of the other family members.

  (2) Angela's application had the support of 4 out of the 18 (or 19) beneficiaries.

- Essentially, Pansy's position was that there were plainly no reasons for Angela to insist on appointing the A&M Administrators additionally, and that in the best interests of the Estate and the beneficiaries the court should only appoint the KPMG Administrators.

- Angela however contended that there should be a "compromise" between the two proposals because when there are different camps of beneficiaries, a representative from each camp should be appointed. She argued that a compromise would take into account her views in order to minimise friction and mistrust.

The Court's Decision[62]

- The two cross-applications went before the court. The judge, Wilson Chan J, started by observing that the court would in law generally prefer the application supported by the majority of the beneficiaries, noting that Pansy's application had the support of the majority of the beneficiaries of the Estate.
- The judge pointed out the general practice that the choice of the majority would be preferred was especially so when the appointment of independent professionals already addresses the issue of there being different camps of interests. Further, the appointment of independent professionals would, of itself, address the need for each beneficiary to have their representation.
- After a close examination of authorities, Chan J held that the authorities did not suggest that professionals nominated by each branch should be appointed, for that it would not remove the partisan nature of the appointees and would defeat the purpose of appointing independent professionals, as well as against the practice of giving preference to the wishes of the majority.
- Further, as to the suggestion that the two firm proposal would not involve deadlock or duplication, the judge agreed that even if the two firms have no difficulty working together, the very involvement of two firms would necessarily involve duplication and increase administrative costs and inefficiency.
- As a result, the Court allowed Pansy's application, and dismissed Angela's Summons.

Legal Takeaway

- In case of intestacy, in deciding the administrator of estate, the court would usually give preference to the candidate(s) with the support of the majority of the beneficiaries.
- The starting point should be the general practice that the choice of the majority would be preferred by the court. It is wrong to say that the court should reach a "compromise" whenever one minority set of beneficiaries take a different view. This is especially so when the appointment of independent professionals already addresses the issue of there being different camps of interests.

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62 *Ho Chiu King, Pansy Catilina v Ho, Angela and Another* [2022] HKEC 1406, [2022] HKCFI 1111

13. Unfortunate Choice of Words Rifts a Family: What is Meant by Properties "Under My Name"?

Background: Tan Kiam Toen's Family

- Tan Kiam Toen ("Tan") had modest origins and went to work in Indonesia as a labourer at the age of 17. He later prospered greatly and, in 1961, he founded Afro-Asia Shipping Company (Private) Ltd ("AAS"), a Singapore company which traded in tin, tea, coffee, rice, rubber and cement.
- Tan passed away in November 2008 at the age of 87. He was survived by his wife Madam Ng and five children as well as some grandchildren. He left assets in a combination of cash, art collections, properties and most importantly, shares of his companies AAS and Afro-Asia International Enterprises Pte Limited ("AAIE").
- By a Chinese will prepared in February 2008 in Hong Kong ("the Will") with assistance of solicitors, the Deceased bequeathed "all properties under (my) name (wheresoever situate worldwide) (我) 名下所有 (不論在世界任何地方) 的財產" to charities. It was the phrase "under my name" that gave rise to disagreements among his children.

Efforts to Avoid Litigation Collapsed

- After the Will was executed, and shortly before his demise, Tan began to arrange an *inter vivo* distribution[63] of AAIE shares to his children. He wanted his children to sign a Deed of Family Arrangements before receiving the shares so that possible disputes could be avoided. The proposed Deed aimed to settle all details of the purported *inter vivo* distribution.
- Yet, the children were dissatisfied with the distribution as they wanted to have AAS shares also given to them. Due to their disagreement, no deed was signed and no distribution was made until Tan passed away.
- Following Tan's demise, his eldest daughter Tan Choo Suan ("Respondent"), the sole executrix and trustee of the Will, obtained grant of probate over the estate, including the AAIE shares. Her four siblings ("Appellants") sued to remove AAIE shares from the grant of probate.

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63 An *inter vivos* is a type of estate planning document that ensures the distribution of assets during and after a person's lifetime.

Battle Over Interpretation

- The AAIE shares were registered in names of the Respondent and one of the Appellants with 35% each. The remaining shares were owned by a third party. There was a separate dispute in Singapore as to whether the shares were beneficially owned on trust for Tan. For the purpose of the Hong Kong litigation, it was assumed that Tan was the beneficial owner.
- The Appellants contended that by the phrase "under my name", the Will only covered assets which are registered or recorded in Tan's name. The shares, which were registered in others' names, should be excluded. This was the Narrower Meaning.
- On the other hand, the Respondent maintained the Wider Meaning that "under my name" broadly referred to all assets owned by Tan.

Courts Below Favouring the Wider Meaning

- The Court of First Instance found the wordings in question to be all embracing and apt to cover all the assets of Tan[64].
- The Court of Appeal found the same that "under my name" was an ordinary term without technical meaning. Its dictionary meaning simply means assets belonging to a person and so naturally include beneficial interest owned by Tan, even if registered in others' names[65].
- Despite repeated setbacks, the Appellants appealed to the Court of Final Appeal[66].

History of "名下" ("Under my name")

- In order to support the Wider Meaning, the Respondent brought an interesting argument concerning the history of the Chinese phrase "名下" ("under my name").

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64 *Tan Cheng Gay and Others v Tan Choo Suan and Another (unreported*, 6 September 2013, HCMP 246/2013, Deputy High Court Judge Chu)

65 *Tan Cheng Gay and Others v Tan Choo Suan and Another (unreported*, 23 May 2014, CACV 200/2013, Hon Lam VP, Kwan JA and Poon J)

66 [2015] HKCFA 72

- The earliest usage of this phrase could be traced back to 11th century China by a famous poet[67]. The poet used the phrase to denote "properties belonging to me". It was earlier than the first development of the Law of Uses in the 12th century England.
- Apparently no concept of beneficial ownership (in distinction of registered/title ownership) ever existed in traditional China. The Respondent sought to show that by a classical understanding of Chinese, the phrase simply covers all property regardless of legal or beneficial ownership.

An "Iterative" Approach of Interpretation

- Justice Ribeiro PJ highlighted the legal principles of will interpretation that "words must be read and understood in their contexts" and "the will should be read as a whole".
- To reach the true meaning, the Court adopted an "iterative" approach by checking each of the rival meanings against the other provisions of the document and investigating its practical consequences.
- Applying the above principle, Ribeiro PJ examined the assets that would remain in the Will if the Narrower Meaning was taken:

  (1) AAIE shares would be crossed out as they were registered in the Respondent's and one of the Appellants' names.

  (2) AAS shares would also be excluded since they were registered in Madam Ng and the Respondent's names.

  (3) Art collections kept by Tan may also be excluded from the Will as well because in the absence of evidence, there were no suggestion that the artworks were registered in Tan's name.

  (4) The immovable properties (in Hong Kong and Australia) would fall outside the Will due to joint tenants' right of survivorship[68].

  (5) The only property that is held strictly in Deceased's name was a single share in another company called Balmain, which has net assets of US$4.5 million cash. The other shareholders of Balmain were Madam Ng and the Respondent.

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67 宋 蘇軾《論積欠六事並乞檢會應詔所論四事行下狀》：「雖契勘得逐戶名下見欠各只是二百貫以下」

68 In English law, property held on joint tenancy cannot be subject to any will of a joint tenant but would be passed automatically to the survivor.

- Having done such exercise, Ribeiro PJ found it illogical to say that Tan intended to leave the most valuable assets intestate while only attaching a small portion of assets to the Will.
- Moreover, in the same Will Tan expressly left a lifetime income derived from his estate to his widow Madam Ng. If Narrower Meaning is the true meaning, no assets in the Will could generate valuable income for Madam Ng. The provision of lifetime income would then be meaningless.
- For these reasons, the Narrower Meaning could not stand and there was no ambiguity in the Will.

Using Extrinsic Evidence

- Under section 23B of the Wills Ordinance, extrinsic evidence may be admitted to assist interpretation when a will is ambiguous.
- Given the reasons above, the Court of Final Appeal concluded that there was no ambiguity. Nevertheless, both Ribeiro PJ and Tang PJ went on to examine the extrinsic evidence.
- The Appellants relied on Tan's unsuccessful attempt of *inter vivos* distribution of AAIE shares, claiming that as Tan had intended to give the shares to the children, he must have also intended to exclude the shares from the Will by the phrase "under my name".
- However, both judges were not convinced by this argument. They took the view that Tan's intention was only to make distribution through the Deed of Family Arrangement. In case the deed was not signed, there were nothing to suggest that Tan intended to leave the shares excluded from the Will (and hence intestate).
- In a nutshell, the Court of Final Appeal agreed with courts below that even if extrinsic evidence was considered, the Wider Meaning was still to be preferred.

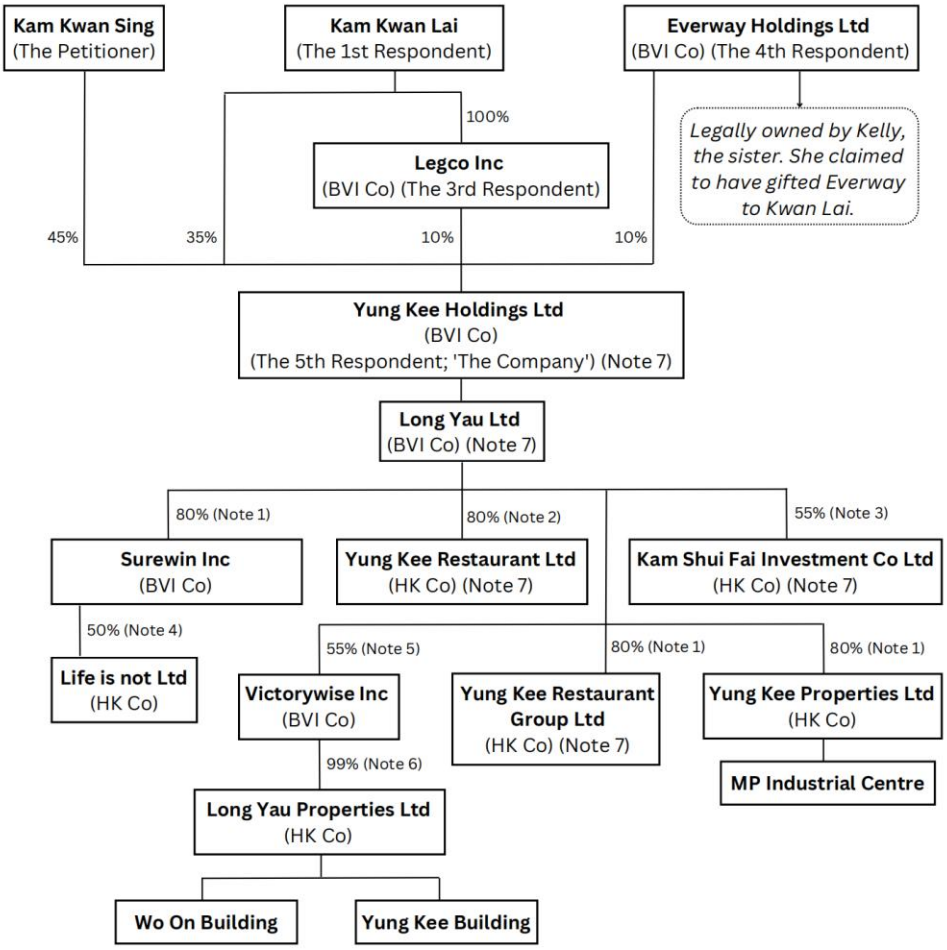
Legal Takeaway

- This case reflected the undesirable consequence of a careless choice of words in legal documents such as wills. Tang PJ expressed regret that lawyers preparing the Will could have avoided the disputes by using the more common and direct phrase "all my properties" instead of "properties under my name", in which case the deceased's wish of avoiding litigation may be better achieved.
- More importantly, this case drew attention to the issue of compatibility between Chinese language and English legal concepts. Ordinary Chinese language may unexpectedly attract multiple understandings in English law context. It bears

reminding that when drafting legal documents in Chinese, standardized wordings are generally preferred to avoid ambiguity.

14. The Yung Kee Saga: Elder Brother Ousted Despite Late Father's Wish

Yung Kee Corporate Structure



Company owned by the Petitioner: Holly Join Ltd

Companies owned by the 1st Respondent: Capital Adex Ltd, Fidelio Fidelity Ltd, Legco Inc

Notes:
(1) Other shareholders: Capital Adex Ltd (10%) & Holly Join Ltd (10%).
(2) Other shareholders: Fidelio Fidelity Ltd (10%) & Holly Join Ltd (10%).
(3) Other shareholders: Fidelio Fidelity Ltd (20%), Holly Join Ltd (20%) & Legco Inc (5%).
(4) Other shareholders: Christian Rhomberg & Chan Yu Chan Maria.
(5) Other shareholders: Capital Adex Ltd (20%), Holly Join Ltd (20%) & Legco Inc (5%).
(6) One share is held in the name of Kam Kwan Sing as nominee for Victorywise Inc.
(7) Directors: Kam Kwan Sing & Kam Kwan Lai.

Background

- The well-known Yung Kee case concerned a shareholder dispute between two brothers, namely Kam Kwan Lai ("Kwan Lai"), and Kam Kwan Sing ("Kwan Sing"), with regard to the operation of the well-known restaurant, Yung Kee.
- The subject company, Yung Kee Holdings Ltd, was incorporated in the BVI. It was the holding company of another BVI company, Long Yau, which in turn operated two Hong Kong subsidiaries carrying on business exclusively in Hong Kong. The restaurant business was started by the late Kam Senior.
- After the death of Kam Senior in December 2004, the two brothers became shareholders of the Company, each holding directly or indirectly 45% of the shares, with the remaining 10% being held by their sister, Kelly. However, Kelly claimed that she had gifted away her 10% shares to Kwan Lai, which made Kwan Lai effectively the majority shareholder.

Jurisdiction

- The two brothers later fell out and Kwan Sing brought proceedings in the Hong Kong Court seeking an order that Kwan Lai buy him out on the ground that the affairs of the Company were being carried on in a manner which was unfairly prejudicial to him, pursuant to section 168A of the predecessor Companies Ordinance (Cap 32)[69]. In the alternative, Kwan Sing sought an order that the Company be wound up on the just and equitable ground under section 327(3)(c) of the Companies (Winding-Up and Miscellaneous Provisions) Ordinance (Cap 32). Apart from the issue of whether Kwan Sing had suffered unfair prejudice as a shareholder, given that the Company is a BVI company, this legal action gave rise to the technical issues of whether the Hong Kong Courts have jurisdiction to grant relief under section 168A of Cap 32 (for Kwan Lai to buy out Kwan Sing's shares) or section 327(3)(c) of Cap 32 for the Company to be wound up by the Court.
- On the evidence, the Court of Final Appeal agreed that the Company had not established a place of business in Hong Kong and therefore affirmed the decision of the courts below that the Hong Kong courts had no jurisdiction to make an order under section 168A.
- However, the Court of Final Appeal found that the connections between the company and Hong Kong were sufficiently strong and concluded that it was open to the court to hear the petition under section 327(3)(c).

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69 Section 168A of the predecessor Companies Ordinance (Cap 32) has now become section 724 of the Companies Ordinance (Cap 622)

Common Understanding

- As regards the common understanding governing the brothers' conduct, at the Court of First Instance, Harris J was not hesitant to hold that it was possible for a common understanding which came into existence among the older generation to continue to bind the subsequent generations. Harris J found that it had always been Kam Senior's intention to have Kwan Sing and Kwan Lai to succeed him and continue to run the family business with equal rights and powers. And this was also the understanding of other family members. On appeal, the Court of Appeal also agreed that a previous course of dealings between two parties before they became shareholders or their predecessors in title could be relevant to the subsistence of a quasi-partnership after they became shareholders.

- Harris J also considered whether the presence of shareholders (such as the sister) who never came to any understanding necessarily prevented equitable considerations applying as between the petitioner and Kwan Lai. It is worthwhile to discuss some of the salient facts of Yung Kee here.

- Kam Senior had 4 wives and 18 children. Madam Mak was his third wife, who had five children, three sons and two daughters but one daughter died young. After the death of Kam Senior, Kwan Sing and Kwan Lai received an equal share of 35% of the Company. Madam Mak, the third son Kwan Ki and the daughter Kelly received 10% of Yung Kee shares respectively. After Kwan Ki died in 2007, his 10% interest in the Company passed to Kwan Lai. In May 2009 Madam Mak transferred her shares to Kwan Sing in order to balance Kwan Lai's shareholding. Kelly asserted that she gave her shares to Kwan Lai and, in any event, treated him as their beneficial owner.

- Kwan Lai argued that Kwan Ki and Kelly were never party to any understanding about how Yung Kee was to be run. Under such circumstances, a quasi-partnership could not have arisen. In this regard, Harris J emphasised that the term quasi-partnership was only a short hand term used to describe the type of circumstances in which the court would apply equitable considerations to the exercise of legal rights.

- Therefore, it did not follow that unless all shareholders have reached a common understanding a "quasi-partnership" could not arise and equitable considerations were not brought into play. In other words, if a particular shareholder had not come to an understanding that had been reached by other shareholders, he could not be held to that understanding and was entitled to exercise his voting rights in any way he wanted. But as long as the interests of passive shareholder are not unlawfully affected, those shareholders who had reached an understanding should be expected to behave in accordance with it. However, Harris J held that because of the corporate legal structure of the group and that the Company was a BVI company, the Hong Kong Courts have no jurisdiction to grant the reliefs sought by Kwan Sing.

The Court of Appeal

- On appeal, the Court of Appeal confirmed that there was no absolute bar to prevent the operation of equity in either situation and whether an equitable restraint arose depended primarily on the facts of the case[70]. However, the Court of Appeal did recognise that, in a particular case, the presence of third party shareholders might militate against the imposition of equitable constraints over the exercise of strict legal rights, due to possible unfairness to the third party shareholders[71]. The Court of Appeal held that there was no unfair prejudice suffered by Kwan Sing. It also held against Kwan Sing on jurisdictional grounds.

The Court of Final Appeal

- The Court of Final Appeal[72] sided with Harris J and took the view that because of their relationship as brothers, and the fact that the business of the Group was a family business, the petitioner and Kwan Lai reposed complete trust and confidence in each other and consulted each other in respect of all major decisions required to be made. Further, the Court found that there was a mutual understanding between the two brothers that the restaurant and group business would be jointly run or managed, but such understanding had been breached by Kwan Lai:

  (1) Kwan Lai's intention was to "dictate" matters to Kwan Sing with which his elder brother disagreed.

  (2) Kwan Lai managed to have his son, Carrel, be appointed as a director of the company as well as of its subsidiaries, in order to control the board of directors of all relevant companies running the restaurant and group business, despite opposition from Kwan Sing.

  (3) Kwan Lai had himself appointed as the authorised representative of the company.

  (4) Despite objections from Kwan Sing, Carrel and his sister Yvonne were given substantial increase in salary.

  (5) Despite objections from Kwan Sing, some industrial property in

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70 *Re Yung Kee Holdings Ltd* [2014] 2 HKC 556, [2014] 2 HKLRD 313 (CA).

71 ibid.

72 By the time the case reached the Court of Final Appeal, Kwan Sing had unfortunately passed away already. The action was continued by his widow Madam Kam Leung Sui Kwan.

Chai Wan owned by a company in the group was used by Carrel and Yvonne for their own business rent-free.

(6) Carrel and Yvonne, with the connivance of Kwan Lai, had taken a confrontational instead of conciliatory approach in their dealings with Kwan Sing.

- In view of the above incidents, the Court of Final Appeal concluded that Kwan Lai had behaved in a manner which was inconsistent with the way in which he and Kwan Sing had previously conducted the business and behaved towards one another. The Court of Final Appeal rejected the argument of Kwan Lai that his majority control as a result of the sister's support allowed him to disregard the alleged common understanding.

- Kwan Lai quite consciously took steps to control the Company and then exercised that control without proper regard to previous understandings. Accordingly, Kwan Sing was found to have suffered unfair prejudice as a shareholder under the hands of Kwan Lai.

- On the jurisdictional issue, the Court of Final Appeal found that the holding BVI company, being two levels above the operating Hong Kong company and did not have any business of its own, had not established a place of business in Hong Kong and hence the Court could not grant relief under section 168A of Cap 32[73]. However, the Court of Final Appeal found that the Company, having all shareholders and directors in Hong Kong and holding a Hong Kong operating company, did have sufficient connections to Hong Kong to satisfy the jurisdictional requirements for the Hong Kong Court to exercise its winding-up power. In all the circumstances, the Court was of the view that the proper order to make in the present case is a winding-up order. Nonetheless, the Court ordered a stay of the winding up order for 28 days, or such longer time as the parties agree to extend, to give the parties an opportunity to agree the terms on which the petitioner's shares in the company should be purchased. No such agreement was reached. A winding-up order eventually came into effect on 17 December 2015, putting an end to the five-year family feud in court.

Legal Takeaway

- Family-run businesses often face unique challenges due to personal relationships intertwined with business operations. In the *Yung Kee* case, the disagreement between the brothers affected the company's stability and decision-making processes.

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73 Relief under section 168A of Cap 32 is dependent on the company having established a place of business in Hong Kong.

- When Kwan Lai took actions that disregarded previous understanding – such as making unilateral decisions and excluding his brother – it breached the expected conduct, leading to legal intervention.
- The Court treated the family-run business as a quasi-partnership, where the mutual trust and expectations between the brothers were crucial. Even without formal agreements, these familial bonds and shared goals were seen as binding.

15. Estate of Chow Yei Ching: The Battle over the Chevalier Empire

The Rise of the Chevalier Group

- Chow Yei Ching ("the Deceased"), a Hong Kong business tycoon and founder of the Chevalier Group, passed away on 29 July 2018 at the age of 82.
- In his lifetime, the Deceased had built an extensive commercial empire. His passing triggered a contentious family dispute over the division of his assets, particularly the Chevalier Group shares, which constituted a substantial portion of his estate.

The 2015 Will and the 2009 Will

- In his 2015 Will, the Deceased named his fifth and sixth daughters, Violet and Vi Vi, along with his widow, as primary beneficiaries and executrixes. The Deceased's 2015 Will allocated key assets in a way that deeply unsettled certain family members. The Chevalier Shares, representing over 62% ownership in the Chevalier Group, were bequeathed entirely to Violet, with Vi Vi as the alternative beneficiary if Violet predeceased her father.
- The Deceased's eldest daughter, Lily, while granted some shares in the residual estate, received none of the Chevalier Shares—a provision that became a focal point of her legal challenge. Lily argued that this arrangement contradicted the Deceased's true intent, citing her belief that he intended to establish a family trust for the benefit of all descendants.
- Then, Lily challenged this arrangement, initiating legal proceedings to contest the 2015 Will.
- Beyond the 2015 Will, several previous testamentary scripts existed, including an unsigned copy of a 2009 will that the Deceased allegedly carried away, with no certainty of its location.
- According to Lily, the 2009 Will better reflected the Deceased's intention by ensuring a family-centered trust arrangement. She argued that, if the 2015 Will were invalidated, the estate should default to the 2009 Will or proceed under intestacy.
- Violet and Vi Vi, however, maintained that the 2015 Will was the Deceased's true and final testament.

Violet's Undertaking: A Bid for Family Harmony

- In response to her siblings' discontent, Violet offered to place the Chevalier Shares in a family trust and transfer part of her residuary share to their brother, Oscar. This "Violet Undertaking" was formalized in writing and announced publicly, and initially seemed to appease the family.
- However, Lily later argued that this undertaking underscored her father's actual intent to distribute assets more equitably among the family, thus contradicting the 2015 Will. The defendants argued that Violet's gesture was solely to maintain peace within the family and did not imply any alteration to the will's validity.

Allegations of Mental Incapacity and Lack of Knowledge

- Lily challenges the validity of the 2015 Will. She averred that the Deceased (1) did not have the requisite mental capacity, (2) did not have knowledge and approval of the terms of the 2015 Will, and (3) did not have the requisite *animus testandi*.
- Violet and Vi Vi countered this argument by presenting testimony from senior Chevalier executives who worked closely with the Deceased during his final years.
- Each of these witnesses maintained that the Deceased had continued to engage actively in the company's operations until his stroke, displaying no evident signs of cognitive decline. One of the executives, for instance, testified that he observed no significant changes in the Deceased's decision-making abilities in 2015, asserting that the Deceased fully comprehended and directed corporate matters up to that point[74].

Appointment of Administrators Pendente Lite

- In 2019, Lily initiated legal proceedings requesting an appointment of administrators *pendente lite* ("***APL***") to manage the estate until the dispute was resolve.
- Lily's APL application included broad powers for administrators to investigate the estate and preserve assets. She argued that urgent action was necessary, citing risks of asset dissipation and potential mismanagement, particularly concerning the Chevalier Shares and other investments.

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74 *Chow Lily v Chow Wai Wai Violet and Anor* [2024] HKCFI 887

- Lily questioned Violet's handling of household funds and other investments managed by the Deceased during his lifetime. Despite records being shared within the family, Lily suspected misappropriation of funds, including dividends from the Chevalier Shares and proceeds from the investment pool, which she alleged were improperly withheld.
- Lily's concerns also extended to "hidden" shares in Chevalier that Violet allegedly controlled through her company, Winful Investments Limited. Violet offered court undertakings not to sell or alter these shares' status pending the case's resolution, which satisfied the Court.

The Court's Decisions for APL Application

- After weighing the evidence, the Court denied the APL application and accepted Violet's and the widow's undertakings to preserve specific assets pending the case's outcome.
- The Court found that Lily's concerns lacked substantiation and did not meet the threshold required for appointing interim administrators.
- Additionally, Lily was ordered to bear the defendants' costs for the application, reflecting the Court's assessment of the speculative nature of her claims.

Supplemental Witness Statement

- On 10 July 2023, Lily sought inter alia leave to file supplemental witness statement in order (1) to provide new factual evidence in response to the Defendants' witness statements, which factual evidence was said to be relevant to the mental state and conditions of the Deceased, (2) to respond to the Defendants' answers to the Plaintiff's interrogatories, (3) to provide factual information to facilitate preparation of further psychiatric evidence, and (4) to clarify certain facts set out in the Plaintiff's witness statements.
- The substantive hearing took place on 10 July 2023. After a contested hearing, Master Leung made inter alia the Expunging Order.
- On 21 July 2023, Lily filed a notice of appeal. She seeks thereby to set aside the Expunging Order.
- Key arguments of Lily involved the credibility and impartiality of various witnesses, including Chevalier executives and the attesting solicitor, Mandy Cheuk.
- Lily alleges that Chevalier's Chairman, Kuok, displayed favouritism toward Violet and Vi Vi, supporting them in key roles within the company, despite what she claims as Vi Vi's lack of competence. She asserts that the favour shown by Kuok

to these sisters cast doubt on his and other executives' testimonies about her father's mental capacity at the time of the will's creation.

- Further, Lily sought to discredit Cheuk by noting her long-standing friendship with Vi Vi, suggesting that this relationship might have compromised her impartiality. Lily argued that this friendship created a potential conflict of interest, which called Cheuk's objectivity into question.

- However, Cheuk refuted these allegations, asserting that her friendship with Vi Vi had no bearing on her professional duties. She maintained that she followed all necessary legal protocols and affirmed her belief that the Deceased was fully aware of his decisions when signing the will.

General Principles

- The Court adopts the following principled approach in deciding this appeal:

  (1) The first step is to identify what facts and imputation the disputed paragraphs concerned seek to establish and support;

  (2) Then, with the pleaded issues in mind, consider whether those identified facts and imputations are relevant to any primary issues;

  (3) If yes, the evidence may be admitted;

  (4) If not, then bearing in mind the "cardinal test of relevance", consider whether the identified facts and imputations are relevant to the collateral issue of credibility, veracity, reliability or objectivity:

    (a) The question is whether the identified facts and imputations materially bear upon the collateral issue;

    (b) If not, the evidence should not be admitted;

    (c) But as relevance in this context is a matter of degree, cases are not always clear cut. Hence other than in clear cut cases, considerations will be given as to whether any probative weight of the identified facts and imputations is insufficient to justify the complexity that they will add to the trial, bearing in mind at all times in particular (hence not exhaustive) the underlying objectives, the need to confine the ambit of a trial within proper limits so as to ensure that the trial is focused on the primary issues, the notion of fairness to both the parties and the witness, procedural economy and cost-effectiveness;

  (5) Evidence at this stage is only expunged in clear cases upon the application of the above.

The Court's Decisions for the Supplemental Statements

- The Court partially upheld and partially dismissed Lily's appeal to include these supplemental statements. It decided to expunge some paragraphs from her statement, ruling that allegations about corporate favouritism and speculative claims would add unnecessary complexity to the trial and could blur the central issue: the validity of the 2015 will.
- However, the Court allowed specific rebuttals relevant to the attesting solicitor's role and Violet's claims about her father's wishes for her role in Chevalier.
- In the final ruling, the Court balanced the admissibility of evidence in the interest of keeping the trial focused on the primary question of will validity, rejecting speculative or irrelevant evidence.

Legal Takeaway

- Appointing APL requires concrete evidence of risk to estate assets, not mere suspicion.
- Challenging a will on grounds of mental incapacity requires substantial evidence; mere allegations are insufficient to invalidate a testamentary document.
- The court's role in probate disputes is to maintain focus on the primary issue of will validity, avoiding unnecessary complications from speculative claims.

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Contact us

For enquiries, please contact members of our Private Clients Department:

Ludwig Ng | Senior Partner

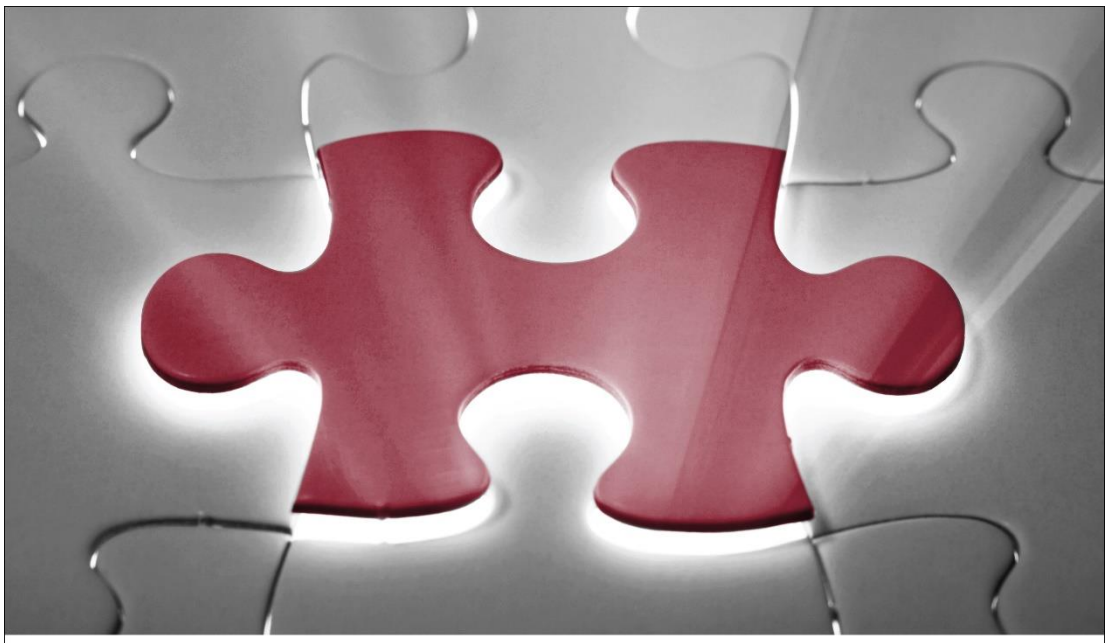
Email: ludwig.ng@onc.hk

Sherman Yan | Managing Partner

Email: sherman.yan@onc.hk

John Li | Partner

Email: john.li@onc.hk



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19th Floor, Three Exchange Square,
8 Connaught Place, Central, Hong Kong
香港中環康樂廣場8號交易廣場第三期19樓

Main 電話 (852) 2810 1212
Fax 傳真 (852) 2804 6311
E-mail 電郵 onc@onc.hk

www.onc.hk