Common Pitfalls in Modern Commercial Drafting (Module 1)

Course Presenter:

Ms. Judith Sihombing
Adjunct Associate Professor
The Chinese University of Hong Kong

Hong Kong Academy of Law

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(2:30 pm – 5:45 pm)

About the Presenter:

Ms. Judith Sihombing is a Barrister-at-law and a Solicitor of the Supreme Court of Victoria and of the High Court of Australia. Formerly, she was an Associate Professor in the Faculty of Law, The University of Hong Kong where she lectured in commercial and property law subjects in the LLB, LLM and PCLL programmes at the University, and later she was the Training/Professional Support Manager at Simmons & Simmons. She is now an Adjunct Associate Professor at the Chinese University of Hong Kong.

COMMON PITFALLS in Modern Commercial Drafting: Module 1

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Adjunct Assoc Professor, CUHK
For Academy of Law
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BACKGROUND MATTERS TO CONSIDER

- THE CLIENT

- Corporate client – the representative : consider
  - attribution to the company
  - apparent authority and ostensible authority
  - the other party to the transaction can consider
    - dishonest or irrational behaviour — including turning a blind eye and being reckless in this regard
  - *Akai Holdings v Kasikornbank* [2011]1 HKC 357, CFA
  - *PT Asuransi Tugu etc v Citibank NA* [2023] HKCU 494, CFA

- Sole shareholder company
  - *Prest v Petrodel [2013]* the company as a *resulting trustee* where
  - Lord Sumption said
    - '"[64] piercing the corporate veil" is a metaphor that is liable to obscure more than it illuminates and is an expression 'rather indiscriminately used to describe a number of different things. Properly speaking, it means disregarding the separate personality of the company."

- Correct identification of the "other party"
  - see *Playboy Club v Banca Nazionale Del Lavora SPA* [2018] SC
  - No liability on the bank for a credit reference given to party A (which unknown to the bank was for Party B)
  - Party A could not sue as there had been no loss on its part
  - Party B could not sue as it was unknown to the bank
  - however, the Court referred to possible action in tort by Party B

- a company - is it in the process of - or has it been - wound up?

- is it trading whilst insolvent??

- SOME things to LOOK-OUT FOR

- **interpretation of documents** - start with the modern A*rnold v Britton* [2015] SC that updates decisions since 1971 [*Prenn v Simmons*]; "commercial common sense" now very much a last resort concept: now textualism - contextualism - holistic: *Da Shing Group v Rich Promise Ltd* [2021] HKCU 3092, CA

- **[23]** The relevant principles of contractual interpretation are not in dispute. We consider the guidance given by Lord Hodge JSC in *Wood v Capita Insurance Services Ltd* [2017] AC 1173"11. … Interpretation is, as Lord Clarke JSC stated in the *Rainy Sky* case22 (para 21) a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the *Rainy Sky* case, para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299, paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the *Arnold* case23, paras 20, 77. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.>>>>

12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the *Arnold* case, para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571, para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. >>>>>>

The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type.

The iterative process, of which Lord Mance JSC spoke in *Sigma Finance Corpn* [2010] 1 All ER 571, para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions."

- computerisation of assets — electrification of registers – e.g. land titles systems overseas
  - registers and ledgers and clouds etc.
- the role of incorporation of the law firm [on the way for HK?]
  - the solicitor as director : see *Harcus Sinclair LLP v Your Lawyers Ltd [2021] SC*
  - especially on conveyancing aspects of the *undertaking - where the undertaking given there was merely a restraint of trade not a solicitor's undertaking*
- **timing** — this has become a matter to be watched carefully – **e.g.** CICTs – e.g. bare trusts and doctrine of conversion - purchaser selling on before completion – e.g. interest of the lender — and so on; remember *Wong v Cheng* and the resulting trust [it came out of the blue!] unable to be registered - but the P took with constructive notice of the resulting trust
- and in construction type contracts consider the new

- Who will execute company documents: - as documents or as a deed?
  - s 127 Cap 622 execution of documents on behalf of the company
  - s 128 execution of deeds on behalf of the company - requires (a) compliance sec 127 (b) the document is expressed to be a deed and (c) it is delivered as a deed

- is there a Power of Attorney?
  - s 2 – irrevocable until revoked in writing and
  - s 4 – security P/A – irrevocable by the donor - given to the lender - so maybe more likely a commercial transaction

- "beneficial owner of the company"
  - note the *Significant Controller Register:* ss 653A to 653ZK and Schedule 5A (Cap 622)
  - check that the company has complied with these provisions

- Is there an existing contract?
  - consider the steps in an M&A — before the formal SPA or APA is signed

  - is it to be varied? - what form is required for variation?
  - is it to be terminated by consent of both parties?
  - is it to continue with amendments - are those amendments capable of interfering with the original contract?
  - or does the new contract - the formal SPA or APA contain an 'entire agreement clause" or a "non-reliance clause"?

  - did the existing contract follow the formal four-factor formula - OAIC?
  - was writing/deed needed? *or*
  - *where there was no OAIC was there* certainty of terms and a promissory statement
    - so the contract can be presumed based on estoppel?

- in other words - is it your job to clean up the earlier 'agreement" and to draft a formal contract?

- see the documents overleaf

a. Letter of Offer or Intent

- from the purchaser to the target in which the subject matter (shares: or the business) of the target is set out, as well he consideration being offered. Any special aspects of the transaction important to the purchaser should be inserted; these usually contain specific obligations on completion, including service agreements with key management or employees. The Letter will also contain instructions to the vendor as to how the Offer is to be accepted. The Letter should also refer to the timing in which the offer is to be kept open.

b. A Term Sheet

- this can vary in size and details from very short or lengthy. It is used to identify the key issues including details of the parties, the subject matter of the contract, and consideration. Often it contains a statement that the document is legally binding; and it can provide a confidentiality statement that it linked to any agreement [see below] already made. and

c. A Memorandum of Understanding [MOU] [and sometimes referred to as Heads of Agreement ("HOA)"]

- which is not legally binding, unless the MOU, or HOA, otherwise provides. This contains the terms relating to the details of the target company: conditions to be satisfied: warranties and an indemnity: confidentiality: the manner in which due diligence is to be conducted: announcements: the relevant law and jurisdiction: and actions to be taken following signing of the MOU.

- At the same time, there are three areas of concern that are usually considered to be binding at this time: they are:

- 1. ***Confidentiality*** — the P agrees to hold confidential any commercial information received from the target in negotiations; **query** whether good faith is relevant. A further confidentiality clause will be in the formal agreement reflecting matters dealt with in the formal documentation.

- 2. ***Exclusivity*** — the lock-in/lock-out situation where the absence of consideration is relevant: *Pitt v PHH Asset Management Ltd* [1993], CA (Eng) where a "lock-in and lock-out agreement" was legally binding in promising to negotiate only with the plaintiff and not with anyone else; this was "mutual consideration", but a "lock-in" promise simply to negotiate was not legally binding. >>>>>

- 3. ***Non-compete*** *(*sometimes *non-solicitation)* which act as restraints of trade –

- **query** reasonableness of the restraint as to
  - i. geography:
  - ii. duration. and
  - iii scope.

- a restraint of trade clause is "void" unless fair to these three things — to the party concerned and *the public*

- also check to be if liability can be based on a corresponding benefit and burden;
  - *Halsall v Brizell*

- or although perhaps *primarily as an instance of relief*, by the "assumption of liability" (see possible negligent misstatement) or where a purported contract does not meet requirements for a formal contract: see various examples including:

  - *Lee Yuk Shing v Dianoor International Ltd (In liq)* [2016] 4 HKC 535, CA: and *De Monsa Investments Ltd v Richly Bright International Ltd* [2015] 3 HKC 583, CFA.

  - The draftsman should ensure that there are no grounds for the Court to impose liability simply on the basis of "assumption of liability" or of estoppel or any other informal way

- also check for estoppel — proprietary and promissory

- Exclusion - limitation clauses
  - See for example *Control of Exemption Clauses Ordinance Unconscionable Contracts Ordinance* [this one is exclusively for consumers]

- force majeure clause

- the bankers' *Risk Disclosure Statement*
  - *and general banker/customer relationship*
    - "banking practice could influence the construction of a contract with a customer even where the customer was unaware of it and it was not reasonably available to the customer, if to construe it otherwise flout commercial sense"

  - *Barclays Bank plc v Quincecare [1992]*
  - *Gorgeous Investment Group v Industrial Bank etc. [2021] HKCU 3322, CFI*
  - *JP Morgan Chase v Springwell Navigation* [2010] EWCA Civ 1221
  - *Chang Pui Yin v Bank of Singapore Ltd* [2017] HKCU 1817, CA >>>>

- *Tidal Energy* [2016] CA (UK)

  - Which of two innocent parties is to suffer from the customer's lack of knowledge of banking practice ?
  - A 3P had given incorrect information about the payee – the customer informed the bank of that payee – the bank paid – the payee was a rogue
  - The customer lost

- The customer was a commercial party
  - What if the customer is a consumer and first time user of a particular banking practice?

- the Himalaya clause
  - *Zhang Hong Li & Ors v DBS Bank (Hong Kong) Ltd & Ors* [2018] CA allowing third party to the contract to sue on the contract
  - so now - ensure there has been contracting out of the *Contracts (Rights of Third Parties) Ordinance* and ensure that any Himalaya type clause is not effected in the hands of a third party
  - if the doctrine of privity has gone - the third party could sue without mention in the contract
  - ensure that only the draftsman has control on who may and may not sue

  - *Contracts (Rights of Third Parties) Ordinance*
    - Has this ordinance been expressly excluded?
    - if not, any third party mentioned in the contract may sue on the contract: "4 (2)The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description."

- The modern contract
- The substance of the transaction
  - What is the subject matter?
  - What is sought to be achieved?
    - A loan – a sale – a security – others - see recent cases, articles etc. on crypto assets (and varied forms) - see shams
- The form of property involved — identification of its identity and nature
    - Chose in action – chose in possession – chattels real
    - A "fourth type of personal property" for intangible and immovable assets?
- Developments in relation to novel assets
- Certainty as an important element in the draft
- Drafting skill — referred to in many recent decisions on interpretation

- **The contract**
  - Is the form of the contract being drafted really a sham
    - e.g. sale and resale:
      - which is used to defeat unsecured creditors, and disguises that there was really a security transaction for which it is too close to insolvency for the lender would not be able to create a secured interest.
        - a. is the right to “re-sell” an option for the seller
        - b. or is an obligation on the buyer – hence a security , i.e. the equity of redemption
  - a sham is “a device… a mask which the defendant holds before his face in an attempt to avoid recognition by the eye of equity”; or
  - “A provision or agreement which parties do not intend to be effective but have merely entered into for the purpose of leading a court or a third party to believe that it is effective. A finding that it is a sham carried with it a judgment of dishonesty.”

- Reclassification of the nature of the contract - or transaction to achieve the purpose sought regardless of the relevance of the reclassified asset/transaction
- It can occur where the court interferes and changes the intention of the parties – thereby losing commercial certainty
- Or the parties may have been mistaken in the terms of the contract
- Or a more efficacious remedy is available if the nature of the contract is reclassified
- The use of trusts – all types
- e.g. Barclays *Bank v Quistclose* -"a trust for a purpose”: not a loan of money to a company about to become insolvent
- e.g. the bare passive trust - the *Hotung* series of cases
- e.g. the common intention constructive trust - now sometimes referred to as proprietary estoppel

- Technology and terminology changes
  - register in a ledger
    - the ledger as a blockchain
    - the blockchain “an immutable register on a network of computers”
    - who is in control of the ledger?

- Clouds - electronic database

- Cryptocurrency - cryptoassets - cryptographic
  - cryptocurrency is a “new trading financial product” “it goes beyond shares
  - there is also another chain of titles here
  - “payment token” i.e. the means of paying for goods and services - or as money or value
  - “utility token - access to digitally tokens as a service by means of a blockchain-based infrastructure
  - “asset token” a debt or equity claim on the issuer or another type of contractual or proprietary claim on assets which underpin the tokens >>>>

- public and private keys
- “minting” the asset – i.e. computer validation of the information to create a new block which then records that information into the blockchain
- *Gatecoin Ltd v BD Multimedia HK Ltd* - [2019] HKCU 3191, CFI concerning application for an injunction where

- **[12]** The Plaintiff is a company incorporated in Hong Kong and now in liquidation. Prior to its liquidation, it operated a crypto-assets exchange platform, whereby its customers would deposit funds for the purpose of buying or selling crypto-assets, such as Bitcoin and Ethereum.

- **[13]** Reading the Terms and Conditions of the Plaintiff’s customer contract in its context, the funds deposited by customers into their respective accounts with the Plaintiff on the platform (i.e. legal tender described as *fiat* currency) were within the power and control of the Plaintiff (see Clause 10.1 as read with Clause 13.1 of the Terms and Conditions). It can be likened to a customer depositing money into a bank account, which is a debt owed by the bank to the customer

- **[14]** Prior to 2017, the Plaintiff operated its business using its own bank accounts with various licensed banks in Hong Kong. Since 2017, due to the tightening of regulatory control over crypto-asset business, it became impossible for the Plaintiff to maintain and operate bank accounts in its own name for the purpose of the exchange platform. Further, a certain bank account maintained by the Plaintiff with China CITIC Bank (“CITIC”) had been frozen by the relevant authority.

Some recent decisions:

- it is said that Cryptocurrency has no issuer and there is no obvious counter-party, so it is hard to see it as a chose in action.
  - *AA v Persons Unknown* [2020] 4 WLR 35 at [55];
  - *Colonial Bank v Whinney* (1885) 30 Ch D 261);
  - *Ruscoe v Cryptopia Ltd* [2020] NZHC 728; *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 02; *AA v Persons Unknown* [2019] EWHC 3556 (Comm);
  - *National Provincial Bank v Ainsworth* [1965] 1 AC 1175
  - *Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch) on EUAs

- **Interests created by the P before completion**
- What interest does the P have on signing the PA/SPA?
  - the old rule on bare trusts - the doctrine of conversion - said that the P became the beneficial owner of the land on entry into a valid, enforceable contract - and that the V became a trustee for the P at that time
  - if the timing for the bare trust is altered — as it seems it is nowadays to the point at which the P may approach a court of equity to seek Specific performance - then some of the old rules may go
- Often the problem is not between V and P but between the P and a third party with whom the P has dealt - implying that the P had power to deal with the land on entry into the SPA

- *Scott v Southern Pacific [2014] SC*
- the P induced a number of Vs to sell on the ground that the Vs could remain in possession for a number of years rent free - in effect rent was from the P price - to buy the land the P had to borrow from a mortgagee [legal chargee]
- the P borrowed but defaulted on the loan - the legal charge sold on the new P sought vacant possession — the original Vs refused to leave
- the SC said that **even if** the Vs was a bare trustee on exchange of contracts [contrary to the current view], the P does not have any proprietary rights able to bind third parties
- the P cannot create proprietary rights in the land - to take priority over the rights of the mortgagee ,- until completion
  - thus the original Vs had only a contractual right [i.e. personal] right from the original purchaser [now the V]
- the person with proprietary rights was the chargee who had financed the purchaser >>>>

- the interest purportedly created for the Vs was not registrable - even if in writing it did not concern land [only a contractual interest in relation to land]
- so any interest created by the original P for the original Vs was unable to take priority over the lender who had registered its charge
- the Vs had no proprietary interest before completion
- if there is a large gap – e.g. 8 or 9 months - in HK between entry into the SPA and completion — what if any rights does the P have to deal with the land
  - any interest sold by the P will be only a personal interest in contract
  - the P could seek specific performance if ready willing and able to complete
- some reference in England to an indivisible transaction [contract plus completion plus charge] disentitling any interest until all three have been completed >>>

- SC said sorry - innocent occupiers v innocent lender; the occupier loses
- even if the right of Scott against the original P was accepted - it was merely because at the time the offer was made the P had no legal estate in the land - he was merely holding under an incomplete contract and the proprietary right claimed required “to be fed by the acquisition of the original P of the legal estate”
- in other words it was created before the P had the legal estate and disappeared into the ether as a result; this was not a new principal
- see re-setting of time for doctrine of conversion [bare trust]
- timing of the taking effect of trusts

- a series of decisions has been considering **anti-assignment clauses** [often found in commercial leases] - the main decision has been that of *Linden Gardens Trust Ltd v Lenesta Sludge Disposal Ltd [*1994] 1 AC 85: - from HK and overseas when privity was in force — but the abolition of privity has not allowed the prohibition to be rendered useless in some cases
- recent cases seek to indicate that a change in policy could be desirable: most decisions on this point are from England and Australia
- The usual decision involving “an attempted assignment of contractual rights in breach of a contractual prohibition” usually is not successful: It is not a matter of a breach of contract but that the prohibition prevents the assignment: a trust has often been used to seek to get around this or the giving of an indemnity by the assignee could work in some cases
- some of this comes from Sir Roy Goode in a 2009 article entitled “Contractual prohibitions against assignment” [2009] LMCLQ 300

- that view was that the anti-assignment clause only affected the parties to the assignment - so that third parties could take interests under the original assignment

- the question of privity - and its abolition should now be re-considered in relation to this clause
- The (E) Court of Appeal in *First Abu Dhabi Bank PJSC v BP Oil International Limited [2018] EWCA Civ 14* expressed an inclination for a contrary view , On this Gloster LJ said

- (28)"Speaking for myself, and if this Court were not constrained by authority, I can see strong arguments in favour of Professor Goode's proposition that "it is necessary to keep in mind the central principle: bars to assignment or other dealing are relevant only to the relationship with the debtor, not to the relationship between the parties to the dealing in question"; and that, accordingly, it is not competent for the debtor to exclude by contract the proprietary effects of an assignment as between assignor and assignee, or the creation of a trust as between trustee and beneficiary; and that "all he can do is to insist that he will not recognise the title of the beneficiary or the ability of the beneficiary to bring proceedings in his own right." But with "considerable degree of intellectual disappointment" [para 30] this was done because of the prior decision being of the HL.

- **Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait) [2**022] UKSC 48 SC on Assignment and novation

[66] An analogy can be drawn with clauses which *prohibit the assignment of contractual rights without the other party's consent* . It is well established that a purported assignment made in breach of such a prohibition will be ineffective: see *Linden Gardens Trust* … that an attempted assignment of contractual rights in breach of a contractual prohibition is ineffective to transfer such contractual rights … If the law were otherwise, it would defeat the legitimate commercial reason for inserting the contractual prohibition, viz, to ensure that the original parties to the contract are not brought into direct contractual relations with third parties

[69] For all these reasons, as a matter of English law, the No Oral Modification clauses are an insuperable obstacle to the claimant's case of novation by addition, quite apart from the difficulty of establishing the terms of any such novation and when and how it was purportedly made.

Updating your drafting Manual

considering particular assets - ancient and modern

- Matters to be considered include
- questions of ESG - diversity - inclusion - and so on >>>
  - that may be relevant by reference to the nature of the contract or the parties involved
- for construction contracts see in particular, since 23 May 2023, the "Hot Weather Warning"(and Cold Weather Warning): see for hot weather, the *Guidance Notes on prevention of Heat Stroke at Work* from the Labour Department
- force majeure clauses - precision in drafting
  - the absence of a FMC allows the parties to ask the court to find frustration - the presence of a FMC clause if it is not successful, means there is no other source of assistance in the situation in which one party wants to exist the contract without be liable for damages

- ESG [environment, social and governance] or corporate social responsibility or corporate culture - modern consideration of these factors may require D's compliance: see eg Sch 5 D's report
- diversity - very modern approach requiring companies to recognise and avoid ant discriminatory actions in failing to deal with diversity in the Board, and in business generally
- the D as an entrepreneur - where the D may be required in the interests of the company to involve the company in speculative business activities and such indicating that he has duties in enhancing the value of the company assets
- consider attribution
- dishonest assistance - from trusts to tort to criminal liability
  - where a third party assists the D in breaching his trust obligations [i.e. his fiduciary duty] or in breaching other obligations and duties — the 3P does not have to receive a benefit from his assistance to make him liable

- Discrimination is negative diversity as the factor that differentiates processes, work methods, joint activities and such, and prevents progress.
- Positive diversity is treating differences as positive elements, either by ignoring the differences or employing them to enhance the activities and value of the Board.
- There has been an increasing interest in making the boards of companies, especially large listed companies, more gender diversity. The last few years after the financial crisis have seen a focus on gender diversity along with a lot of talk about the possibility of the crisis being averted had there been more women on company boards. For this kind of talk to have any credibility however what is necessary is evidence of gender diverse boards positively impacting corporate governance. The problem here is that of "equal pay or equal work"
- The penalties for non-compliance range from dissolution of the company, to pecuniary sanctions, to name and shame measures, to no set remedy

- Diversity in relation to companies can cover a broad area of concern, and to prevent the absence of diversity, there are relevant matters to be considered by those in charge of the company. These include corporate governance, corporate social responsibility and the social licence, the role of directors as gatekeepers, questions of corporate culture, self-regulation, and the alphabetical group o concepts of CG; ESG: and CSR.

- Diversity becomes relevant in the sale of the target company when the vendor seeks to ensure that the company, in the hands of the buyer, will not adversely interfere with the company's current approach to diversity in Board membership, in the attitudes and approach to diversity in the general management, and in relation to the principles of corporate governance that are identified with the target company. A clause to preserve these attitudes of the target can take several different forms.

- see the nature of the classification of the type of transaction and of the assets - or product to be obtained

- in loan contracts - see either the Bank and its usual terms - or the money lender under the Ord (Cap 163). for the money lender the interest rate cap is at 48% [from 301 Dec 2022 down from 60%] and the exterminate rate is 36% down from 48% [31-12-22]; monthly interest on pawns under the Ord (Cap 161) is *3.5% per lunar month:* for banks perhaps *prime rate*

- see also *Anti-Money Laundering and Counter-Terrorist Financing Ordinance* (Cap 615) especially sections 5A and Schedule 2 for e.g. solicitors dealing with client's assets - the Designated Non Financial Businesses and Professions see also section 53ZR to 53ZUM of Cap 615for activities involving virtual assets and dealings in precious metals and stones. >>>>>

- **new language**
- **non-fungible tokens**
  - "NFTs are a line of code, letters and numbers that are locked into the blockchain"
  - cryptographic representation of something unique
    - not mutually interchangeable
  - on the blockchain the asset has a unique identification code and metadata
  - it can be traded or exchanged - there is a secondary market to fit - but it does not need to be exhibited
    - cf cryptocurrency - fungible
    - each token is identical to each other and all can be used for commercial transactions

- identification of the **res in a blockchain**
  - it has no physical identity able to be inspected
  - it must be vindicated through legal action
    - but what is the remedy?
      - proprietary restitution for some
    - how is it enforced?
  - seemingly the remedy for abuse is based on 'unconscionability' and thus restitution is the remedy

- Equity and trusts
  - all types of trusts available for commercial as well as domestic parties
  - equity granting relief more generously [for a generous court] than before
  - check also "negotiating damages" - hypothetical assessment by the court in lieu of the desired remedy

- then also consider the role of implied terms — do Courts still like them?

- Modern drafting starts with *Arnold v Britton 2015 SC*
  - "the Court should not invoke reliance on common sense and surrounding circumstances to undervalue the importance of the language of the clause"

- The SC refused
  - to find an implied term and
  - to change the plain words of a service charge clause **even though** in the context the clause was "commercially improbable"

- *United Bright Ltd v Secretary for Justice* [2016] HKCU the CFA refused leave to appeal to that court on a question 'of great general or public importance'

- The CFA noted that the interpretation
  - 'is plainly correct simply as a matter of language.' [paragraph 10].
  - "we do not see any potential for injustice in allowing evidence of relevant factual matrix to be admitted in accordance with the general law as set out in *Jumbo King Ltd v Faithful Properties Ltd*" [para 41]

- *Tan Cheng Gay & Ors v Tan Choo Suan & Anor* [2016] CFA
  - "The two all-important principles of construction were that the words must be read and understood in their context and that the will must be read as a whole. This required the court to adopt an iterative process, checking each of the rival meanings against the other provisions of the document and investigating its practical consequences".

- Some types of contracts may require "topical" rules also
  - e.g.: conveyancing – plus practice
  - e.g.: guarantees – *contra proferentem* where the modern rule – especially in a commercial contracts – stresses that it is used to resolve ambiguity
  - E.g.: standard form contract – was it "voluntary"

- **A sham:** *Snook V West Riding Investments Ltd [*1967] 1 All ER 518, CA
- " a device… a mask which the defendant holds before his face in an attempt to avoid recognition by the eye of equity"
- "A provision or agreement which parties do not intend to be effective but have merely entered into for the purpose of leading a court or a third party to believe that it is effective. A finding that it is a sham carried with it a judgment of dishonesty."
  - e.g.: *sale and resale* which is used to defeat unsecured creditors, and disguises that there was really a security transaction for which it is too close to insolvency for the lender would not be able to create a secured interest.
    - a. is the right to "re-sell" an option for the buyer or
    - b. is there an obligation on the seller so it is a security, i.e. the equity of redemption
- Reclassification –
  - It can occur where the court interferes and changes the intention of the parties – thereby losing commercial certainty
  - Or the parties may have been mistaken in what the contract provided
  - The use of trusts – all types
  - e.g. Barclay*s Bank v Quistclose*

- C*athay Pacific Airways Ltd v Lufthansa Technik AG* [2020] EWHC 1789 (Ch

  - b. The Court should focus on the meaning of the relevant words in their *documentary, factual and commercial context.* That meaning has to be assessed in the light of **(i)** the natural and ordinary meaning of the clause **(ii)** any other relevant provisions of the lease **(iii)** the overall purpose of the clause and the lease (**iv)** the facts and circumstances known or assumed by the parties at the time that the document was executed and **(v)** commercial common sense, but **(vi)** disregarding subjective evidence of any party's intentions (*Arnold* at [15])

  - c. Commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. (*Arnold* at [19])

  - d. While commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. … Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party (*Arnold* at [19]).>>>>>>

- e. The court is required to undertake an iterative approach. This involves checking each of the rival suggested interpretations against other provisions of the document and investigating its commercial consequences (*Wood* per Lord Hodge at [12] *Sigma* per Lord Mance at [12] and Lord Collins at [37], and *Rainy Sky* per Lord Clarke [28])

- 96. More recently, the following principles were identified by the Chancellor in *Deutsche Trustee v Duchess & Others* [2019] EWHC 778 (Ch) at [29] – [30]. They were subsequently approved by the Court of Appeal [2020] EWCA Civ 521 as an accurate summary of legal principles which can be derived from the cases referred to above:

- On interpretation generally see *Maeda Kensetsu Kogyo Kaisha & Anor v Bauer Hong Kong Ltd* [2020] HKCU 544, CA , para [29]

- Kwan VP, where it was said on interpretation of technical terms — but as general; principles

  1. the meaning to be given to words is that of reasonable person understanding of what the words mean a. their natural and ordinary meanings and b. ignoring subjective evidence of any party's intention

  2. background knowledge reasonable available to other parties

  3. that the importance of the language is not undervalued;

  4. interpretation is a unitary process; if there are two possible interpretations the unitary exercise involves an iterative process by which each suggested interpretation is tested against the terms of the contract whilst investigating the commercial consequences

- a successful claim of frustration will terminate the contract immediately and automatically - stopping performance of all future obligations - sometimes needed reliance on ss16 to 18 / restitution for money paid without benefit as 'money had and received' [*Fibrosa*] now usually in Equity as restitution to prevent unconscionable conduct

- but if the only excuse for the defaulting party is reliance on the FMC in the contract and the *court accepts it carries out its function*/ it does excuse the defaulting party/ then probably it by-passes liability; does it matter that the contract is part of a two-part transaction – e.g. a L/T?

  - the successful FMC excuses non-performance - it does not terminate the contract unless less that it the result of the operation of the FMC: it's purpose is to excuse

    - the presence of a FMC in the contract it prevents reliance on frustration — because the event that happened is certainly not 'unforeseeable"; by contrast, successful frustration terminates the contract:

  - the success of the FMC depends on its drafting — and in some cases on the commercial practice of the type of contract — see e.g. T*he Financial Conduct Authority v Arch Insurance (UK) Ltd & Ors* [2021] UKSC 1 - a test case on the "business interruption clause" in commercial contracts.

- general principles applied by the courts in reviewing a FMC : these apply generally to all contracts; they include:

- the circumstances and the extent that failure to perform is to be excused

- is the clause suspensory during the relevant time of concern - does it provide for giving of notice to resume the terms after that time?

- what does the clause intend?

- would alternatives such as undue influence/ economic duress/unconscionability/ situational or constitutional disadvantages/ ascendancy help? they usually require the exercise of equity's discretion

- is this suitable for seeking to imply "good faith" into the transaction? >>>>>

- can the clause cover events not listed eg “any other causes beyond our control”?
- can “sweeper” words give larger and natural meaning not limited to e*jusdem generis* [relating to the specific type]
- does the clause restrict expressly what is to be covered?
- can a general clause release a party from performance that has become economically more burdensome- or does it require express terms?
- can the clause be expressed to work only if the event is unforeseeable/ unavaoidable? — these are “frustration” words
- must the event actually occur/ has it prevented or hindered performance/ are the circumstances beyond the control of the L/T?

- It has been suggested that in future contracts — when the parties seek to insert a FMC in relation to totally unexpected events that the following points are relevant
  - 1. set out in detail the factors that constitute a FM event
  - 2. what details are required to invoke the FMC
  - 3.outline relief and remedies available to the parties in the event of FM — considering here a suspensory clause/ termination
  - 4. what can mitigate the FM — what notice is required to be given to the other party to rely on mitigation
  - 5.does the FMC have effect of other contracts
  - 6. ascertain the financial and *reputational effects of* relying on FM

- Miscellany
  - use of "*counterfactual*" in tort but also counterfactual [used in several ways and for several areas of the law] so moving out of its box and travelling around various areas of law
  - Be wary of punctuation – too many *commas* or not enough
    - Canada – *Rogers Communications of Tortonto v Bell Aliant* [2006]
    - "the agreement[lease] shall continue in force for a period of five years from the date it is made, and thereafter for successive five year terms, unless and until terminated by one year prior notice in writing by either party"
    - It was held notice could be served on entry into the lease – and thereby terminated – within one year after entry.
    - The problem was the positioning of the comma
    - The Court said that "based on the rules of punctuation", the comma allows for the termination of the contract at any time, without cause, upon one-year's written notice
  - be wary of the word *"any"* – considered to have various meanings – but prima facie the word excludes limitation: Is that the meaning you want?

- *"all"* used in a negative context can be ambiguous: he phrase "if all…have not" sometimes means "if not all…have"; the court added that "all" can mean less than a totality in an appropriate context: sometimes it could mean "some only"

  - *"anti-disparagement"* - this is linked to confidentiality - requiring the recipient of compensation for breach the payer to promise not to speak ill of the payer
  - e.g. an active disparagement of the current owners of the company he had formerly owned — this was "gross misconduct"

  - e.g. the HKMC guarantee/indemnity makes the third party a *"principal debtor"* thereby changing the traditional interpretation of the surety as an accessory to the debt

  - "termination for convenience" in a long-term contract - to allowance party to avoid the contract because of changes to public policy over time

- Ascertain the objective meaning of the contractual language
- Consider the clause in the context of the whole contract
- Give more or less weight to the language depending on the nature of the contract – and on the quality of the drafting
- The "wider commercial context" is a rule of last resort
- Where there is ambiguity or different meanings then each possible interpretation:
  - should be checked against the other provisions of the contract
  - And the practical consequences of each approach should be found

So that only then can "business common sense" be considered;

- The court is not there to save a party from a bad bargain
- The court stressed the importance of precise and careful drafting to avoid ambiguity

- PERSONAL PROPERTY — see below also
  - Chose in action [intangible, immovable] and chose in possession [tangible, movable] and chattels real [leasehold not "real" property]
  - and in some legislation Is there a "some other form of property"

- Eg for intangible assets that have in-built marketable value – and on interference with these assets, the remedy is not damages for conversion [no tangible asset despite documentary evidence] but **restitution** to prevent unjust enrichment of the person who deals improperly with the asset? *Armstrong v Winnington Networks* [2012] 3 All ER 425 the **"proprietary restitutionary claim"**

- How is the "property" to be described in the contract?
  - electronic and environmental types of rights: carbon sequestration or sinks: and other environmental type interests:
  - crypto assets of all sorts:
  - new financial products involving computerised "interests" and old financial products with new names
  - cultural, and similar rights that can be quantified as a financial asset
- and New language >>>>>

- 53ZRA.Meaning of VA or *virtual asset* (1)In this Ordinance— ***VA*** or ***virtual asset*** (虛擬資產), subject to subsection (2), means— (a)a cryptographically secured digital representation of value that—(i)is expressed as a unit of account or a store of economic value;(ii)either— **(A)**is used, or is intended to be used, as a medium of exchange accepted by the public, for any one or more of the following purposes— (I)payment for goods or services; (II)discharge of a debt; (III)investment; or**(B**)provides rights, eligibility or access to vote on the management, administration or governance of the affairs in connection with, or to vote on any change of the terms of any arrangement applicable to, any cryptographically secured digital representation of value; (iii)can be transferred, stored or traded electronically; and (iv)satisfies other characteristics prescribed by the Commission under subsection (3)(a); or (b)a digital representation of value prescribed as a virtual asset by notice published under subsection (4)(a). >>>>>>

- (2)A digital representation of value is excluded from the definition of ***VA*** in subsection (1) if—

(a)it—(i)is—**(A**)issued by a central bank or by an entity that performs the functions of a central bank or by an entity authorized by a central bank on its behalf; or **(B)**issued by a government of a jurisdiction, or by an entity authorized by the government of a jurisdiction and acting pursuant to an authority to issue currency in that jurisdiction; (ii)is a limited purpose digital token; (iii)constitutes securities or a futures contract; (iv)constitutes any float or SVF deposit of a stored value facility as defined by section 2 of the *Payment Systems and Stored Value Facilities Ordinance* (Cap. 584); or (v)satisfies other characteristics prescribed by the Commission under subsection (3)(b); or(b)it is a digital representation of value prescribed not to be a virtual asset by notice published under subsection (4)(b).

- if the contract relates in some way to property —start at the beginning
- personal property has three categories as we know them
- the chose in action - intangible - immovable - *vindicated only by court action* - this last element causes most problems with crypto etc
- old legislation - eg sec 5 *Theft Ordinance* and quotas - referring to the "some other form of property" - and how the Courts treat them — the quota for a licence o export textiles
- the crypto assets - assets of value - not really within traditional chose in action
- plus various other forms of interests - carbon sequestration - environmental - indigenous etc

- **what is personal property?**
- the 3 traditional types of personal property in HK ie choses in action - choses in possession - chattels real
- mercantile law from earliest Cs expanded some areas of "property" - banking etc — covering things [res] "owned' - such as goods - and C19th several codification of mercantile law - eg SOGO:
- non-real [ie not real property ie land] writs of Debt (owing a precise amount) and Covenant (owing under a contract under seal) carried through to C16th assumpsit and the beginnings of the rest of our other areas of law
- modern problem involves novel interests - financial - environmental - indigenous etc — what are they? how are they defined? where are they kept?

- property "is a relationship" involving a "bundle of rights" with various elements such as assignability
- Roman law considered that a "relationship" was the best way to describe owners and their assets
  - a right *in rem* for loss or damage to the asset - a right to assign it to a third party - it is then enforceable by and against the third party - it is *in rem* or i*n personam* - *i*t is capable of being owned - and its owner must ensure it causes no injury
  - another definition refers to — possession - use - management - income - capital - security - transmissibility - absence of a negative term against it - liable for execution - residuary
- **contract** is the result of *consensus ad idem* of parties intending to deal with each other on the terms of their agreement: it is also one of the core elements of **obligations**

- in HCtA, in *Yanner v Eaton* [1999] it was said that;
  - 'The word 'property' is often used to refer to something that belongs to another. But 'property' does not refer to a thing: it is a description of a legal relationship with a thing. It refers to a degree of power that is recognized in law as power permissibly exercised over the thing. The concept of 'property' may be elusive. Usually it is treated as a 'bundle of rights'".
- on the enhancement of contract into obligations see
  - *Errington v Errington* [1952] of which it was said that Lord Denning
  - "managed **to leap the chasm between property and contract** and hold that because Equity would have restrained the licensor from breaking the contract, it would also enforce the licensee's right against successors in title to the licensor including purchaser with notice"
  - did this then convert the person equity of a licensee into a proprietary interest?

- *National Provincial Bank Ltd v Ainsworth* - 1965 HL Lord Wilberforce — often quoted statement: *"before a right or an interest can be admitted into the category of property, or a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree if permanence or stability"*

- this statement is constantly referred to in relation to deciding whether or not there is a "property" interest

- *Colonial Bank v Whinney* [1886] - a comment on the decision which is still looked at as "principled"" *In the Court of Appeal Fry LJ dissented from the other 2 judges. because 'all personal things are either in possession or in action. The law knows no tertium quid between the two". Thus shares were choses in action when the case went to the HL, Fry LJ views were accepted. As there had always been a difference between personal property, which was capable of being stolen, taken, and carried away, and thus the subject of larceny at common law, and other kinds of personal property which could not be the subject of larceny or be taken in execution, because they could not be seized.*

CHOSE IN ACTION - are the novel *current* interests under the "chose in action" classification?

Ownership

A chose in action is an item of personal property which is classified as an intangible. The chose represents a "thing" or "the res" recoverable by taking action in court. In property terms the chose in action is incorporeal property which is not in possession, so that it cannot be claimed by taking physical possession. By contrast a chose in possession is a tangible item of person property over which one can have not only ownership (as can be held over a chose in action) but also possession due to the physical nature of the property.

- Torkington v Magee [1902] 2 KB 427;
- Colonial Bank v Whinney (1886) 11 App Cas 426 HL.

However, it is possible for a chose in action to be the subject matter of theft.
See for example section 5, *Theft Ordinanc*e:

- Att Gen of Hong Kong v Nai Keung [1987] 1 WLR 1339, PC;
- Chan Man-sin v Att Gen of Hong Kong [1988] 1 All ER 1, PC.

- Amongst the forms of property able to be owned as chose in action are
- *(a)* shares; *(b)* bonds; *(c)* bills of exchange; and *(d)* debts
- A chose in action can be legal or equitable.
- The classification of property is influential in the type of security employed.
- The prime right is that of ownership. The rights of an owner are treated as being all possible legal rights by reference to principles, relating to that particular type of property, and subject only to relevant common law or statutory principles.

Possession

It is assumed generally that a person in possession of personal property or land is not only entitled to the right to occupy or possess it but that he also owns or has title to or property in that asset; thus " it will hardly be denied that a man is in possession in fact, as well as possessor in law, of his own goods in the house which he occupies." See also *nemo dat quod non habet* where the person in possession of personality is merely a buyer in possession or holding under some contractual but non-proprietary right. Possession is illustrated by reference to two factors : 1. physical control over the asset, directly or through others; for example through an agent or an employee; and 2. intention to asset exclusive control of the property possessed

- ***Assignability*** Rights can be incapable of assignment because
  - ***a.*** *they arise under a contract which declares it is not able to be assigned;*
  - ***b.*** of statutory provisions; and
  - ***c.*** of public policy.

- The assignment may be ineffective if it is considered to be maintenance or if the contract is considered to be personal.
- An equitable assignment is valid and allows the assignee to sue for the chose in the name of the assignor.

- A statutory assignment of a debt or other legal thing in action includes equitable things in action and legal which are "enforceable in a court of justice".
- A statutory, i.e. a legal and absolute, assignment may be by way of traditional mortgage which consists of the Assignment plus a proviso for redemption, whether express or implied.
- Section 9 LARCO which requires precise compliance

The Law Commission (UK) published recommendations for reform of the law on digital assets: June 2023

1. **Legislation to confirm the existence of a distinct third** [*** for HK it would be a 4th category as we have only 3 types of personal property and no real property] **category of personal property** under the law which can better recognise, accommodate and protect the unique features of digital assets. The report does not set out clear boundaries for this third category, arguing instead that common law is the best vehicle to determine which objects can fit within it. This will allow for a nuanced approach to recognising that things such as crypto-tokens, export quotas or different types of carbon emissions allowance can be objects of personal property rights.

2. **Creation of a panel of industry-specific technical experts, legal practitioners, academics and judges** to provide non-binding advice to courts on complex legal issues relating to digital assets.

3. **Creation of a bespoke legal framework** that better facilitates the entering into, operation and enforcement of **collateral arrangements relating to crypto-tokens and crypto-assets.**

- dealing with

- Digital asset is a broad term which covers a variety of non-tangible assets in digital form. These can include digital files, email accounts, domain names, and crypto-tokens, including cryptocurrencies and non-fungible tokens (NFTs).

- The technology used to create these assets and the characteristics of each asset can vary greatly.

- A crypto-token is a type of digital asset that uses cryptography – the process of coding information so that it can be transferred securely. Crypto-tokens are digital tokens that can be traded, used to record, embody or link to another asset or legal right, or used as a store of value.

- One type of crypto-token is a **non-fungible token (NFT)**, which is a crypto-token that is unique or capable of being differentiated from other crypto-tokens >>>>>

- NFTs are often linked to data, such as data representing digital artwork, but they can also be used to link to a wide range of assets and rights.

- The term “crypto-token” is sometimes used interchangeably with “**cryptocurrency**”. While they have many overlapping features, cryptocurrency is a term that generally refers to crypto-tokens that are largely intended to be used for making payments as digital currencies, while crypto-tokens are used for this and a number of additional purposes, outlined above.

- The law treats crypto-tokens, NFTs and cryptocurrency as things that exist through the combination of the active operation of software by a network of participants and specific data used by that software and network.

- The Hong Kong Monetary Authority (HKMA) (31 January) issued the consultation conclusion to the discussion paper on crypto-assets and stable coins (the “Consultation Conclusion”), summarising the feedback received in relation to the paper and the HKMA’s response. In the Consultation Conclusion, the HKMA proposes to bring certain activities relating to Stablecoins into the regulatory perimeter, and indicates the expected regulatory scope and key regulatory requirements. January 2023

- Standard form contract - commercial parties - often in maritime and construction contracts: beware of uncertainty - *will Equity help out if the parties are commercial?*
- usually involve high degree of collaboration between participants in networks or alliances - so often core principles
  - difficulty in drafting where the contract is long term
  - usually the agreement is traded as “take it or leave it’ - it is non-negotiable
  - the Battle of the Forms — the old problem with *Butler Machine Tools v ex-Cello Corpn* [1979]
  - the court accepted the “last shot” even though in contract terms there had been rejection of the offer - a counter-offer - no apparent acceptance of the counter-offer - and the court allowed the contract to proceed >>>

- Cf: *Manohar Chugh v Electronic Industries* [1991] 2 HKC 1, CA a question of unequivocal notification that the amended terms are not to be relied on– instead see the Intention of the parties
- *Tekdata Interconnections Tekdata Interconnections v Amphenol* [2012] CA (Eng): ot a matter of the form but really a matter of formation of the contract
  - Was the last in line a counter-offer?
  - Was it accepted by the offeree [originally the offeror]?
  - Was there a contract?
  - What was the common intention of the parties as to the terms of the contract?
- The traditional O and A analysis should be applied in “battle of the forms” cases unless the documents and conduct showed that some other terms are to prevail [e.g. the amended terms]
- If the amendments are to act as counter-offers then attention of the original offeror must be drawn to the rejection of his offer
- What did the parties decide?
- Was there sufficient certainty for the court to interpret the purported agreement?

- **IMPLICATION OF TERMS**
- The old *The Moorcock* has undergone a change

- The modern version
  - 1. implication seeks to promote the reasonable expectations of the parties from their agreement
  - 2. the 4 groups of terms remain active : eg by reference to trade, custom and usage, or to statute:
  - 3. the implication of terms seeks to achieve a reasonable and fair framework for the contract, according to the intentions of the parties
  - 4. the attempt to imply terms may be defeated by reference *to BP Refinery v Hastings* [1978] HCtA which now means

  - i. be necessary to give business efficacy to the contract so no term will be implied if the contract is effective without it
  - ii. it must be capable of clear expression
  - iii. it must not contract any express term of the contract
  - iv. It must be reasonable and equitable

- Can **good faith** be implied into a commercial agreement?
  - GF is linked to "reasonableness" in commercial contracts
  - the language of the contract may expressly exclude the possibility of GF or reasonableness
  - for a commercial contract in particular, the Court considers
    - The language used by the parties
    - The circumstances addressed by the contract and the objects intended to secure
    - Understanding of the genesis of the transaction – its background – and the market
  - Generally the Court is reluctant to imply GF into a commercial contract
    - But see prevention of "abusive calling of a Performance Bond"
    - In international trade: *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB)
    - For particular duties of cleaning and catering in a hospital: *Mid-Essex Hospital Services v Compass Group* [2013] EWCA Civ 200, CA (Eng
    - In construction contracts

- "GF may simply be shorthand for the court acting to ensure that parties honour their obligations and do not exhibit sharp practices when observing the terms of a binding contract: *Lac Minerals v International Corona* [1989] 2 ACR 574
- but it may be
  - contrary to the particular type of contract:
  - contrary to common law conceptions of economic freedom and
  - inconsistent with the law developed in relation to implied terms into written contracts which the parties have omitted to include

- **Illegality** — is *Tinsley* still good law?

- The Supreme Court in *Patel v Mirza* [2016] UKSC 42:
  - An illegal transaction where an investor gave money to the other party to invest in securities with 'insider information' from a third party. The transaction did not go ahead, and the investor sought to recover of his money. The Court looked at *Tinsley v Milligan* and said it should no longer be followed. Restitution was allowed
  - Instead a more flexible regime should operate when a court considers the effect of illegality. Thus:
    - "The essential rationale of the illegality doctrine was that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system. In assessing whether the public interest would be harmed in that way, it was necessary to consider: (i) the underlying purpose of the prohibition which had been transgressed and whether that purpose would be enhanced by denial of the claim; (ii) any other relevant public policy on which the denial of the claim might have an impact; and (iii) whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment was a matter for the criminal court

- *Monat Investment Ltd v All Persons etc [*2023] HKCU 1425, CA from the judgment of Yuen JA,52.2.
- 52.1 Since the common law on the defence of illegality is now expounded by the UKSC in *Patel,* applying the same *stare decisis* rule, it would only be logical that *Patel* is followed in the absence of any local circumstances that render it inappropriate. 52.3. This conclusion accords with the declaratory theory of the common law, but also makes practical sense generally. When a UKSC decision on a point concerning the common law is given, there might or might not happen to be a case involving that point being processed through the Hong Kong courts. Even if there happens to be a case involving that point, and even if one of the parties decides to appeal to the CFA, there may be a time lag before the case can reach the final court. >>>>

- 52.4. In my view, it would be surprising if the common law as expounded by the highest authority in the UK (which the CFA has said should be accorded the greatest respect) is not to be regarded as the common law in Hong Kong simply because randomly, there may or may not happen to be a case involving the point being processed through the Hong Kong courts, which may or may not happen to reach the CFA. 52.5. Of course, when such a case does reach the CFA, it would be free to follow the UKSC decision or not, in accordance with the *stare decisis* rule in *Solicitor (24/07),* but until the CFA pronounces on it, the courts in Hong Kong should not regard themselves as being “hide-bound” to adhere to an old common law rule. The common law is an integral part of the law governing global commercial activities. Adherence to an old rule (while hoping or waiting for a case to reach the CFA) would only lead to a disconnect with other common law jurisdictions, and misunderstanding or confusion of parties engaged in commercial transactions.

- Estoppel: can result in a contract or **at least a remedy**

- recent "difference" between different benches of the PC

- A "receipt" clause in a deed
  - "I have received full payment"
    - even though both parties know the assumption is not true
  - In fact none has been made

- The Court accepts this "untruth" –
  - therefore there is common law estoppel that the price had in fact been paid.
  - The court will not reopen the deed because anyway a deed does not need consideration
  - *Prime Sight v Lavarello* [2013] PC but cf *Chen v Ng [2017] PC*

- *Chen v Ng* [2017] PC
- *Who owned the shares?*
- The Ds had approved a transfer – the share certificate was then in the name of the purchaser
- No money had changed hands
- The company's register was altered to show the new P
- Later the V sought a declaration that
  - the transfer was void and for rectification of the company's register
- The J said "as there had been no consideration paid – then the presumption of a resulting trust applied so that the purchaser held the shares on trust for the vendor
- The PC set aside the order that the shares were beneficially owned by the V and remitted the matter to a different trail judge

- The substance of the document or transaction
- What interests are to be created or need protection?
  - Is there any system of protection for interests that are not yet – or not intended to be legal? Egs
- For land – see *Land Registration Ordinance* – if in writing
  - Is not in writing then see general law of priorities from 1991
- For shares - if the company refuses to register a charge
- If there is a trust

- Is there already a contract before the solicitor is involved?
- This is common in conveyancing – where there is a Provisional Agreement prepared and executed by vendor – purchaser and agent
  - Is there a conflict of interest here – because the PA has 3 possible "get out" clauses for the V and none for the P
  - *Fullwood's* case on the fiduciary and agency question
  - By the time the P's solicitor sees the formal SPA, the P is already bound

- Background matters to be considered for each draft
  - the information to be listed in **your** drafting manual
  - and updated as necessary - thereby requiring YOU to keep up-to-date with the following matters.
- **1st**
  - *Language* — formal, traditional or modern Plain English?
  - if the asset under consideration is novel then [see later] langauge and concepts have changed
- **2nd**
  - i. here modern language and concepts seem to be taking over the "old forms" — as the old "forms of action at common law" went so too have many traditional/common interpretation elements been amended
  - ii. start with *Prenn v Simmons* [commercial document] where the Court talked about "factual matrix"

- Per Curiam. Although in construing a written agreement the court is entitled to take account of the surrounding circumstances with reference to which the words of the agreement were used and the object, appearing from those circumstances, which the person using them had in view, the court ought not to look at the prior negotiations of the parties as an aid to the construction of the written contract resulting from those negotiations. Evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and, objectively, the 'aim' of the transaction
- then progress through to *Arnold v Britton* [2015] SC
- *then Eminent Investments (Asia Pacific) Ltd v DIO Corporation* [2020] HKCU 4202, CFA

- **iii.** the vocabulary of interpretation
- contextual and textual [very "in" now in Courts HK: Au NZ: Sga; UK; Mal
- holistic approach
- counterfactual [used in several ways and for several areas of the law] so moving out of its box and travelling around various areas of law
- what now of SAAMCO - apparently still good law but varied

- for specific areas -
    - re-interpretation of 'property" generally - conveyancing
    - competition - very strong use of specific language - see the Competition Ordinance (Cap 619) and the Competition Tribunal [a CFI court]
    - guarantee — proportionality — "principal debtor" -

- The language of the document
    - Plain English or plain legal language?
    - Other types of language
        - e.g. Banker's language –
            - e.g. a "pledge" of a share certificate – which is contrary to legal principles
- Commercial lawyer's language – probably based on the old law merchant
- "computer" language and computer "creation" of interests and rights:

- Where the classification of the interest or right is troublesome under the existing categories of personal property in HK

- A*rnold v Britton [2015] SC*
  - [literal approach to interpretation] changing from imposition of greater commercial interest
- So now
  - Ascertain the objective meaning of the contractual language
  - Consider the clause in the context of the whole contract
  - Give more or less weight to the language depending on the nature of the contract – and on the quality of the drafting
    - The "wider commercial context" is a rule of last resort
  - Where there is ambiguity or different meanings then each possible interpretation:
    - should be checked against the other provisions of the contract
    - And the practical consequences of each approach should be found

  So that only then can "business common sense" be considered;
- The court is not there to save a party from a bad bargain
- The court stressed the importance of precise and careful drafting to avoid ambiguity
- commercial common sense — last resort

- *United Bright Ltd v Secretary for Justice* [2016] HKCU the CFA refused leave to appeal to that court on a question 'of great general or public importance'
- The CFA noted that the interpretation
  - 'is plainly correct simply as a matter of language.' [paragraph 10].
  - "we do not see any potential for injustice in allowing evidence of relevant factual matrix to be admitted in accordance with the general law as set out in *Jumbo King Ltd v Faithful Properties Ltd*" [para 41]

- *Guo Jianjun & Anor v Dragon Fame Investments Ltd* [2016] CA
  - "the modern approach on construction of contractual provisions was not in dispute. The provisions must be construed by having regard to the agreement as a whole. The object of the exercise was to find out what a reasonable person would have understood the parties to mean having regard to the relevant factual matrix and context."

- **3rd - Equity fixing problems of all sorts -**
  - restitution - proprietary restitution - abolition of quasi-contract - and so on
  - surfeit of trust — but query timing and certainty for trusts created by operation of law
  - proprietary remedies expanded to non-proprietary interests
- **4th -**
  - perhaps this should be 1st — preparation for drafting - regardless of the type of transaction or documentation

  a. check updates in the area of the law - but go next door on either side - because "self-interpreting logistics" [i.e. "this is what the topic means to me — so preparation of collateral possibilities

  b. ensure YOUR drafting file is up to date: e.g. *Patel v Mirza* — is the "reliance" view of *Tinsley v Milligan* [1996] still valid? see *Monat*

  c. beware multiplicity – e.g. *Akai v Kasikornbank*

  - Director without permission binding the company - bank lending without doing due diligence - blind eye knowledge - should the bank pay interest? and so on
  - thus recent judgments may need to be read with a broad view of what is in the judgment

- **5th**
  - in light of the subject matter of the documentation - what is required?
- ***i.*** drafting a debenture -
  - what are the "contents" of the usual form?
  - are additional non-usual terms required?
  - is some form of registration or public recognition required?
  - what if any are the remedies on default?
- these 4 queries can be the *basics for most documentation*

- ***ii.*** drafting an assignment of a chose in action
  - a pure? documentary? virtual? chose
  - what terms are required in the definition of the "asset"?
  - is it the benefit or the burden?
  - what is the effect of the "right way" or an error?

- **6th Parties**
  - a. check legislation such as Cap 622: Cap 32: Cap 615?
  - b. check registration or formality legislation - eg LRO (128): CO (622)
  - query failure to comply with the legislation
  - effect of the interest on third parties
  - check *Contracts (Rights of Third Parties) Ordinance* Cap 623 — w.e.f 01.12.2016
- In recent years, it is common to consider the corporate social responsibility of a company to various ***stakeholders***: in Schedule 5 to the *Companies Ordinance* (Cap 622) these are referred to as:

[2] **(i)** the company's environmental policies and performance; and **(ii)** the company's compliance with the relevant laws and regulations that have a significant impact on the company; and **(iii)** an account of the company's key relationships with its employees, customers and suppliers and others that have a significant impact on the company and on which the company's success depends. Schedule 5 is the Annual Business report a director is required to file under section 388 of Cap 622. The bank as a company is subject to Schedule 5; the business review is made annually by the directors.

- **7th**
  - a modern problem - trusts are all around us - already in some form in Outer space - certainly with “”computerized” novel interests
    - modern problems are —
    - i. effect on third parties who do not know about the trust
      - there is no registry
    - ii the timing - so when is the third party adversely affected by it
    - iii. how does severance of a joint tenancy operate here?
    - iv. is there certainty (if so can the Court be convinced?)
    - v. revenue problems

- **8th** how do we handle "new" law that arrives in recent decisions
  - obligations v property — the main divisions
  - OAIC (and in some cases Form) very 'old hat" — now estoppel and assumption of responsibility expanding outwards tort- contract (obligations) - equity
  - novel interests — crossing so many boundaries of traditional principles that have been applied "diligently" in the past
  - elevation of remedies — unexpectedly
    - resulting for relief where perhaps none before
    - and where it is impossible to come within traditional boundaries - eg "property" then new law such as
  - ascendancy — ie the merger of undue influence and economic duress — to achieve equitable relief preventing the contract going ahead — vitiating factors
  - lawful act duress — duress but no relief for **frustration etc**
  - **frustration** — clearly Covid does not come in here — but what are the new elements?

Now preparation for drafting

Arnold v Britton [2015] SC

- "the Court should not invoke reliance on common sense and surrounding circumstances to undervalue the importance of the language of the clause"

- The Structure
  - Language
  - Clarity and precision in writing
  - Clarity and precision in style
  - Construction of sentences
- Other matters including:
  - The “do” and “do not” rules of drafting commercial documents
  - The use of precedents
  - Construction by the Courts
- Are you using “plain legal/English language?
  - Or jargon? Or Latin ? Or older constructs from old precedents?
- Are you up-to-date with the law?A **“do” and “do not”** list for legal drafting
- Are you using the “usual” legal language, or plain English, or plain legal language
  - what about the language of the virtual interests and assets/

- Strive to make the document
  - Clear
  - concise and precise
  - Consistent
  - Comprehensible

- The document should be
  - Simple
  - Brief
  - orderly
    - i.e. it should have “structure, composition, placement”
- Avoid
  - Ambiguity – fringe meanings – uncertainty – verbosity – doublets and triplets – negative drafting - use of uncommon words

- The basic **structure** of a commercial contract
  - Commonly used " stands the test of time"?
- There are *no contractual terms thus no liability* [absent fraud] at the beginning of the contract until the document says:
  - "This Agreement provides or The Parties Agree or similar
    - Followed by Clause one
  - The Recitals or Background merely set the stage
  - Clause one has much of the useful information required by the reader including definitions, what to do with Schedules, what to do with legislative clauses, etc
  - Clause two should have the "meat" of the contract – the "commercial terms" for which the agreement is being effected
- Ultimately comes the Boilerplate

- Drafting queries for the boilerplate
- Are the provisions of the boilerplate to operate automatically without any discussion being required – "hair-trigger"
  - Eg: an event of default occurs – is the contract immediately terminated?
- does the boilerplate provide adequately for the consequences of any such default?
- what form will these terms take
  - Will the innocent party want a chance to re-negotiate on default?

- Schedules
- If it is before, the rule is that they do not form part of the contract – unless expressly reserved to be so in a clause in the contract

Changes in focus over the last decades

- from the language used
- to considerations of 'commercial common sense' or 'established business practices'
- And now back to language, unless there is difficulty in interpreting the document

o Where does HK stand on these changes?

o Several "interpretation" decisions deal with implication of terms as the main feature – see AG of Belize where the interpretation of the contract was closely allied to the possible implication of terms

Current view seems to be

- If the clause is unambiguous, precisely drafted that would produce a result where that outcome was intended (or cannot be said not to have been intended) then

o The court will not select a meaning more commercially sensible

o And will interpret the words inserted at the time of contracting no matter what the outcome

o *United Bright Ltd v Secretary for Justice* [2015] CA

o *Fully Profit (Asia) Ltd v Secretary for Justice* [2013] CFA

- The PC in *AG of Belize v Belize Telecom* [2009]
  - "what was the document as a whole, against the relevant background, reasonably understood to mean"?

o Terms will be implied only to give business efficacy to this contract

- "the question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual reference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so".

o Can you exclude the possibility of implied terms?

o Some courts see this decision as being about 'construction and interpretation' not about the content of the contract

- Lord Hoffmann suggested that the process of implying terms into a contract was part of the exercise of the construction, or interpretation, of the contract.
  - he said that
    - "[t]here is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?"..
  - Reasonableness alone is not a sufficient for implying a term.
- See *Marks & Spencer v BNP Paribas* [2015] SC
- **(1)** Judicial observations on implied terms represented a clear, consistent and principled approach: in summary, for a term to be implied it had to be reasonable and equitable, it had to be necessary to give business efficacy to the contract so that no term would be implied if the contract was effective without it, it had to be so obvious that it went without saying; it had to be capable of clear expression, and it had not to contradict any express term of the contract. To that summary the court would add the following comments: **(i)** the implication of a term was not critically dependent on proof of an actual intention of the parties when negotiating the contract; **(ii)** a term should not be implied into a detailed commercial contract merely because it appeared fair or merely because one considered that the parties would have agreed it if it had been suggested to them; those were necessary but not sufficient grounds for including a term;

- **(iii)** it was questionable whether the first requirement, reasonableness and equitableness, would usually, if ever, add anything: if a term satisfied the other requirements, it was hard to think that it would not be reasonable and equitable;
- **(iv)** although the requirements were otherwise cumulative, the second and third requirements, business necessity and obviousness, could be alternatives in the sense that only one of them needed to be satisfied, although in practice it would be a rare case where only one of those two requirements would be satisfied;
- **(v)** if the issue was approached by reference to the officious bystander, it was vital to formulate the question to be posed by him with the utmost care;
- **(vi)** necessity for business efficacy involved a value judgment; a more helpful way of putting the second requirement was that a term could only be implied if, without the term, the contract would lack commercial or practical coherence >>>>

- Further, the notion that a term would be implied if a reasonable reader of the contract, knowing all its provisions and the surrounding circumstances, would understand it to be implied was acceptable, provided that (a) the reasonable reader was treated as reading the contract at the time it was made and (b) he would consider the term to be so obvious as to go without saying or to be necessary for business efficacy.

- Moreover, whilst it was accepted that both the process of construing the words used in a contract and the process of implying terms into the contract involved determining the scope and meaning of the contract and on that basis could properly be said to be part of construction of the contract in a broad sense, they were different processes governed by different rules. The express terms of a contract had to be interpreted before any question of implication could be considered

Basic "do" rules

- Eliminate archaic language – e.g. no "whences" no "aforesaid"
- Use good grammar : see Sir Ernest Gowers' books: e.g. "*The Complete Plain Words*"
- Draft in the active voice – avoid the passive voice
- Sparingly use negatives: Unless essential
- Avoid compound constructions – e.g. "by reason of"
- Be very aware of "provisos
  - There are 3 possible meanings for a proviso
    1. a condition subsequent; or
    2. an exception; or
    3. a covenant
- Consider the old "canons of construction"

- prefer the singular over the plural: the usual provision on interpretation is that
  - "the singular includes the plural: the plural includes the singular"
  - So instead of phrases such as "people may not…"
    - Use "No person may …"
- If in doubt about including clauses in the contract – do a quick and brief summary of what is already there to see if the additional clauses are necessary
  - Do a brief "term sheet" as a summary – to see if more needed?

- Risk Management
- *Anti-Money Laundering and Counter Terrorist Financing Ordinance* (Cap 615)
    - identification
    - disclosure
    - keeping records
- Practice Direction P and the same three requirements
- however non-compliance with Cap 615 is a criminal offence
- practitioners who are bound by Cap 615 as DNFBPs i.e. - the Designated Non-financial Businesses and Professions [the licence required by the *Trust Company Service Providers* [TCSPs]] are subject to Cap 615
- Check
    - The Guide – noting *Practice Direction P*
    - Engagement agreement
    - Cf: different consequences from breach PDP and AMLO

- *drafting the force majure clause*
- recent decisions have resulted in a list of six factors to be considered in drafting this clause to cover totally unexpected events in the hope that the clause will be enforceable

1. The factors considered by the parties as relevant should be set out clearly in the FMC - bearing in mind that the event to produce the problem should be "totally unexpected" - so it is the background to the event that is referred to here

2. The requirements for the operation of the clause should also be clarified and set out in a form thought tot be acceptable to the court - bearing in mind the effect of a successful clause will be the termination of the contract with no fault on either party - and adjustment of the position of the parties under sections 16 to 18 of LARCO (Cap 23)

3. The clause should outline the desired relief and/or remedies that should available to the parties in the event of FM coming into effect

- would a suspensory clause rather than termination be suitable?
- would this be something the Court would be prepared to grant

4. What can mitigate the events/ actions of concern in applying the FMC

- does mitigation allow consideration by the Court as to whether the contract is frustrated

5. How does a successful FMC affect (if at all) other contracts?

- would the fact that there is a chain of contracts, cause the Court to interpret the FMC clause harshly contracts?

6. Ascertain the financial and reputational *effects* of relying on FM

- does the offeror require the good will of performance of a binding contract [where it has becomes somewhat different from that as entered into]?

- the structure and contents of the FMC usually seek to cover the situation resulting from the “event’ - this requires the clause to be analysed covering factors such as
- is it to cover a pandemic - social restrictions - Government action - etc?
- is the language general or specific?
    - as the contract is, generally, a commercial contract, does the language reflect that used by commercial parties?
- have the parties identified the possible obligation(s) to be affected, or is the clause to the relevant to the entire contract?
- what is the consequence of the clause successfully operating?>>>>

- what does the clause intend to achieve?
    - avoidance of events interfering with performance or those that present performance
    - in other words, is the FMC to modify the terms of the contract or is it to destroy further performance of the contract?
    - so what are the consequences? discharge/ termination in future? allow damages?
- must notice be given before the FMC clause is effective? if so, to whom? In what form? what of the timing?
- does the clause require an attempt to overcome the frustrating event?