HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Instructions to candidates for the practical assessment

Introduction

This document and its attachments comprise your instructions for the two parts of the practical assessment. The following are attached:

1. Instructions in relation to the Interim Application (including copy case law)
2. Instructions in relation to the Mini-Trial
3. Trial bundle for Mini-Trial

In the accompanying email you have been advised which party you are representing.

Dress

You will be expected to dress appropriately, that is, as a solicitor would dress when appearing in open court in the High Court: you should therefore wear a gown and bands.

Getting to the heart of the matter

It is important to note that, with each candidate given only a limited time span to complete each allocated exercise, it is important to adhere strictly to the following guidelines:

- Addresses to the court or to the jury must be structured and succinct, getting to the heart of the matter without delay.

- It is to be assumed that the court or jury have a very good understanding of the background facts and accordingly, while arguments must of course be put into factual context, there is no need for long, time-consuming recitations of the background facts.

- Remember, in addressing the jury it is not the role of a solicitor-advocate to instruct them on the law, that is the function of the judge.

Analysis and structure

Candidates are expected to demonstrate a structured and analytical approach in all of the exercises required of them. The Examining Panels are required to pay special attention to whether or not a structured approach has been clearly evidenced, that is, a presentation which demonstrates that it is based on careful analysis and a choice of approach best suited in the limited time available to advancing the case that is advocated.

HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Candidate Instructions for the Interim Application

The Morgan International Bank Limited (the "**Bank**"), has instituted a High Court action by an Originating Summons under Order 88 Rules of the High Court in the Court of First Instance, Hong Kong, on 20 February 2018 namely HCMP 188/2018. The 1st to 3rd defendants in the High Court action are respectively Mr. Lau Chi-Chung ("**D1**"), Madam Hong Sum-Yee ("**D2**") and Brilliant Win Limited ("**D3**"). D1 is the son of the D2 whilst D1 is also the sole director and shareholder of D3, a private company incorporated under the laws of the Hong Kong SAR.

In a nutshell, the Bank commenced the aforesaid mortgagee action against the D1 to D3 for, *inter alia*, payment of all money due and owing by Ds to the Bank under a mortgage (the "**Mortgage**") dated 9th November 2012 made between D1 and D2 as mortgagors, D3 as the borrower and the plaintiff as the mortgagee Bank, whereby D1 and D2 mortgaged their property situate at Unit 12B, Oak Tree Mansion, 28 Taikoo Wan Road, Taikoo Shing, Quarry Bay, Hong Kong (the "**Property**") to the Bank to secure the repayment of all moneys repayable by D3 to the plaintiff Bank.

The Bank's case is that D3 had defaulted in repayment of the mortgage instalment to the Bank and in light of D3's default, the Bank now seeks delivery of vacant possession of the Property and further, payment of all moneys due and owing by D1 to the plaintiff Bank under a guarantee (the "**Guarantee**") dated 23th April 2014 executed by D1 in favour of the Bank, whereby D1 has agreed to guarantee to the Bank payment on demand of all money due and owing to the Bank from D3.

The main defence of D2 is that she entered into the Mortgage under the undue influence of her son D1 and that when signing the Mortgage, D2 claims that the Bank and the handling solicitor had never explained to her the risks of entering into the Mortgage and the legal consequences of losing her home i.e. the Property upon default of payment by D3.

As will further appear from the evidential material below, in fact, before the Bank commenced the above-mentioned mortgagee action against D1 to D3, in 2017, the mother namely Madam Hong above had issued a *pre-action* discovery application against the Bank for an order for pre-action discovery and production of all recordings of telephone

conversations, interview records and attendance notes/records between the Bank's representatives and Madam Hong from 2012 to 2015. (the "Pre-action Discovery Application")

As advised by its leading counsel, the Bank's instructions to her legal team are to oppose Madam Hong's Pre-Action Discovery Application.

For the purposes of this interim application assessment exercise, you are to assume that the mortgagee action set out above had not yet commenced and that the date of the hearing is in 2017 where the parties are arguing substantively the merits of this Pre-action Discovery Application issued by Madam Hong against the Bank in the High Court.

The Registrar has directed that the Pre-Action Discovery Application be scheduled for argument (with 3 hours reserved) before Deputy High Court Judge A. Twigger QC in the High Court at 10:00am on 12 May 2017.

For the purpose of this contested interlocutory application, you may refer to the following evidential material which is to be used in this application only and should not be used in the mini trial:

1. *Inter partes* summons for the Pre-action Discovery Application issued pursuant to section 41 of the High Court Ordinance and Order 24 rule 7A(1) of the Rules of the High Court returnable before Deputy High Court Judge A. Twigger QC;

2. Supporting affidavit of Madam Hong Sum-Yee, the applicant of the Pre-action discovery application; and

3. Opposing affirmation of Mr. Melvin Wong, relationship manager of the Bank.

For the purpose of this application, you may refer to the following, all of which will be available to the Judge and your opponent at the hearing:

1. Evidential material set out below for the purpose of this Pre-action Discovery Application;

2. The following case authorities, copies of which are attached:

   a. *Zhang Shouen & Anr v. Standard Chartered Bank (Hong Kong) Limited,* HCMP 682/2015, G Lam J.; and

   b. *VTB DC LLC v Top Fuel Corporation Limited,* HCMP 1543/2013, Zervos J.

3. Hong Kong Civil Procedure (the Hong Kong White Book).

Evidential Material

A. Summons for pre-action discovery of documents against the Bank

HCMP 126 / 2017

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO. 126 OF 2017

IN THE MATTER of Section 41 of the High Court Ordinance (Cap. 4)

And

IN THE MATTER of Order 24 rules 7A(1) and 11A of the Rules of the High Court (Cap. 4A)

BETWEEN

HONG SUM YEE *Plaintiff*

and

MORGAN INTERNATIONAL BANK LIMITED *Defendant*

ORIGINATING SUMMONS

Order 24 rule 7A of the R.H.C; Inherent Jurisdiction

Let the Defendant THE MORGAN INTERNATIONAL BANK LIMITED of 32nd floor, Central Building, 18 Chater Road, Central, Hong Kong attend before the Honourable Deputy High Court Judge A. Twigger QC in Chambers (open to the public) sitting at the High Court of Hong Kong, 38 Queensway, Hong Kong on day, the day of 2017, at o'clock in the fore-noon on the hearing of an application on the part of the Plaintiff Hong Sum Yee of 23E, Block 3, Rivera Mansion, No. 51 Paterson Street, Causeway Bay, Hong Kong for an Order that:

1. *The Defendant herein, do within 7 days from the date of the Order to be made herein make and serve on the Plaintiff's solicitors an affirmation/affidavit stating whether any of the following documents or classes of documents are, or at any time have been, in its possession, custody or power and, if not then in its possession, custody or power, when it parted with them and what has become of them:-*

   (a) All telephone recordings of the conversation between the Plaintiff and the Defendant's representatives, staff and/or agent from 13th May 2012 until 2015;

   (b) Any written communications between different staff members of the Defendant discussing the Mortgage to be entered by the Plaintiff;

   (c) All interview records and attendance notes in relation to all meetings between the Plaintiff and the Defendant's staff and representatives which took place between 13th May 2012 and 2015;

   (d) All practice manuals, internal guidance and procedures and written policies to be followed and adopted by the Defendant's staff when attending to the execution of the Mortgage by the Plaintiff;

2. *The Defendant do produce copies of those documents enumerated in the above which are in its possession, custody or power to the Plaintiff's solicitors within 3 days after the service of the affirmation / affidavit required under paragraph 1 above;*

3. *Costs of and occasioned by this application be paid by the Defendant to the Plaintiff in any event, to be taxed if not agreed; and*

4. *Such further and other and/or consequential relief as may be just and expedient.*

And let the Defendant within 14 days after service of this Originating Summons on it counting on the day of service, return the accompanying Acknowledgment of Service to the Registry of the High Court.

Dated the 1st day of February 2017.

Registrar

B. Supporting affidavit of Madam Hong Sum-yee in support of the Pre-action Discovery Application issued by the applicant

AFFIDAVIT OF HONG SUM-YEE

I, HONG SUM-YEE, of [Hong Kong address], do make oath and say as follows:-

1. *I am the applicant in these proceedings. I make this affidavit in support of the Plaintiff's summons issued on 1st February 2017 for pre-action discovery of documents against the Defendant.*

2. *Unless otherwise stated, all matters deposed to in this affidavit are within my personal knowledge and true. Regarding those matters, I come to know such matters from the sources of information specifically identified below in this affidavit and such matters are true to the best of my knowledge, information and belief.*

3. *Under s.41 of the High Court Ordinance (Cap. 4A), a person who appears to the Court to be likely to be a party to subsequent proceedings may apply to the Court for an order for discovery of documents against a person who is likely to be party to the proceedings and who has in his possession, custody or power documents directly relevant to an issue arising out of the claim.*

4. *As will be elaborated in this affidavit below, I intend to commence proceedings in the High Court against the defendant bank in this present case for declarations and orders that the Mortgage which I had signed in my capacity as a mortgagor be set aside and declared null and void by this Court on the ground that I signed the said Mortgage under the undue influence and misrepresentation of my son and that upon being put on notice the relationship between me and my son, the defendant bank in this case has failed to advise me properly in respect of the legal consequences of entering into the said Mortgage and in particular, failed to advise me to seek independent legal advice. To the contrary, the defendant's staff only rushed and hurried me into signing the Mortgage without explaining to me the nature and contents thereof and simply said it was a standard document and asked me to sign on it because my son had already signed on the documents. I am advised that the failure on the part of the defendant bank to take reasonable steps upon being put on inquiry renders the Mortgage liable to set aside and be invalidated by the court.*

5. *Further, I would like to inform that the Court that owing to the financial difficulties that my son's company had experienced, his company had defaulted in repayment of the monthly mortgage instalments to the Bank. I am advised and I can anticipate that*

it is likely that the Bank will commence legal proceedings to enforce the terms of the Mortgage against me and my son as the mortgagors of the Property and seek recourse and legal remedies against my son as guarantor the said Mortgage. Given that the mortgaged property is my only home and my matrimonial home, I will not give up my home easily. This is especially so when I was not aware of my son pledging my property to secure the indebtedness of his private company owed to the Bank.

6. *In the passages below, I will be explaining to the Court why the documents sought in the Pre-Action Discovery Application issued by my lawyers are directly relevant to the issues of the likely subsequent proceedings and the basis of my belief that they are currently in the Bank's possession, custody, or within its power of access.*

7. *First, I am advised that the document sought in the summons (the "Documents") are presently in the Bank's possession, custody and control. This is because by a letter dated 1st December 2016, my solicitors had written to the Bank's legal representatives and requested for the production and copies of the Documents now pursued by me in this Pre-action Discovery Application. On 15th December 2016, the Bank responded and stated that although the Documents are in existence, the same may not be readily available because some of them are currently stored in their back offices and that some of these Documents may have been converted into electronic forms and stored in their computer database. There are now produced and shown to me marked "HSY-1" copies of the letters dated 1st December 2016 and 15th December 2016 respectively.*

8. *Next, I would like to explain to the Court my basis for saying that the Documents sought are directly relevant to the issues in the subsequent proceedings and that they are necessary before the commencement of subsequent legal action. I honestly believe that the Documents sought are directly relevant to the issue whether or not the Mortgage should be set aside and declared null and void because as I have explained below, on the day of signing and execution of the Mortgage, I do recall that the process took no more than 5 minutes in the office of the bank manager. Neither did the bank manager or any of the Bank's staff explained to me the contents and nature of the Mortgage document which I had signed. I remember that the document was all in English which is a language that I do not understand at all and alien to me. I am advised that in light of the fact that I have no interest in the private company of my son (the borrower) and that my only residential property had be used as security to secure the facility advanced to my son's company, the Bank manager should have taken reasonable steps by advising me the legal consequences as a mortgagor and the need for me to seek independent legal advice before signing any of the documents there. I confirm that the Bank or any of its staff had never asked me to seek independent legal advice. They only told me that the document was similar to those bank documents which I had signed for me son before. The Bank manager then hurried me and my son to sign the document in front of him. The Bank had never given me a copy of the Mortgage that I had signed in his office. I remember that he left in a hurry because there were other customers waiting for him at the reception and he said to his assistant that they were big clients and make sure that those big clients be treated and welcome at the VIP room of their*

bank headquarters. In the premises, I verily believe that the Documents such as interview records, attendance notes and meeting minutes will certainly show that the Bank had never advised me of my right to seek independent legal advice and never properly interpreted and explained to me in Cantonese or Chinese language the nature and terms of the Mortgage and other related bank documents that I had signed.

9. *Further, I believe that the Documents that I now seek in the Pre-Action Discovery Application are necessary before I commence the subsequent legal action because both myself and my legal team will need to know the number of interview, meetings and conversation that took place between me and the Bank, the dates and particulars of those meetings and interviews, the attending officers and staff of the Bank who were present at those meetings and the Bank's records as to what was being explained and related to me as the mortgagor in this case.*

10. *Lastly, I have been advised that the present Pre-Action Discovery Application commenced by me is necessary for fair disposal of the issues and for saving costs for the following reasons. With the production of the Documents, I believe that both parties the Bank and me would be able to narrow down the issues and our disputes. For instance, the parties can focus on the one or two important meetings which took place at the office of the Bank during which the Mortgage was signed. I also believe that with the Documents before the Court, time will saved so that my lawyers may dispense with the need to seek further and better particulars of the pleadings of the Bank and/or that by placing all the cards before the table, the parties may also save time in dispensing the need to seek specific discovery of the Bank documents at the later stage of the subsequent legal action.*

11. *By reason of the matters stated above, I respectfully ask this Honourable Court to make an order in terms of the Originating Summons herein with costs to the applicant.*

***SWORN** at the office of Messrs. Ng & Ng of Suites 3208, One Island East, Taikoo Place, 2 Hoi Wan Street, Quarry Bay, Hong Kong this 1st day of February 2017.*)
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)

Before me,

C. The opposing affirmation of Melvin Wong for and on behalf of the Bank in respect of the Pre-Action Discovery Application issued by Madam Hong Sum-Yee

AFFIRMATION OF MELVIN WONG

I, MELVIN WONG, of [Hong Kong address], do say and affirm as follows:-

1. *I am the customer relationship manager of the Bank, the defendant in these proceedings. I have been duly authorized by the Bank to make this affirmation in opposition of the Plaintiff's Pre-Action Discovery Application taken out by summons dated 1st February 2017.*

2. *For the sake of convenience (and without more), I would respectfully adopt the abbreviations and definitions used by Madam Hong Sum Yee ("Madam Hong") in her affidavit filed on the 1st February 2017. In this opposing affirmation, I would respond to the main allegations of Madam Hong set out in her supporting affidavit. No admission is made to any other allegations of Madam Hong not specifically dealt with in this opposing affirmation.*

3. *First, I am advised that the Pre-Action Discovery Application is oppressive and fishing. In respect of all telephone recordings between the Applicant Madam Hong and the Bank's representatives and staff from 2012 until 2015, I would like to inform the Court that the Bank has taken time to retrieve and verify its records and until to date, given that there were about at least 260 recordings between Madam Hong and the Banks' representatives spanning between 2012 and 2015.*

    (a) *If the Bank is to retrieve all these telephone recordings, the Bank will have to listen to each day of the telephone recordings of the extension numbers used by each of the customer service manager, relations manager and other staff who might have spoken to the Applicant Madam Hong over a period of 3 years in order to identify the dates, nature and contents of those telephone conversations between the Applicant and the Bank's representatives.*

(b) *I honestly believe that a majority of those telephone conversations and recordings would not be relevant and necessary for any subsequent proceedings to be commenced because according to our records, Madam Hong also maintains other sorts of accounts with us including securities accounts, foreign currencies account and/or fixed deposit accounts.*

(c) *In addition, she is a member of the Prestige club of our Bank. Accordingly, it is very likely that many these recorded telephone conversations between her and the Bank were to deal with her other investment in the stock market in Hong Kong and overseas, her other saving in foreign deposit bank accounts and her giving of instructions to the relevant bank personnel to deal with these securities accounts and/or online and daily trading activities etc., as opposed to the relevant to the signing of the Mortgage in question.*

4. *Second, the Bank would want to emphasize that in respect of items b and c sought in the Originating Summons, the Bank does not have readily available documents in respect of these items sought. This is because the Bank may have records of these items in hard copy form or records in its electronic system. The particular documents sought under items b and c are therefore not readily available to the Applicant Madam Hong.*

5. *Third, in respect of item d sought in the Originating Summons ie. the standard procedures and internal practice manual to be adopted by the bank customer service manager or relationship manager when attending to the execution of facility letters and mortgage documents, I wish to confirm with the Court that the Bank's "General Banking Facility Operations Procedure" Handbook version 1 was only issued and published in 2016 (the "2016 Handbook").*

(a) *As such, there was no written manual or handbook readily available to customer or relationships manager when attending to the execution and signing of the Mortgage in question in 2012.*

(b) *Nonetheless, I would like to confirm that the steps and procedure set out in the 2016 Handbook of the Bank was drafted in accordance with the then existing practice of the Bank well before the issuance of the same. In any event, the said*

2016 Handbook is available for access and for public downloading at the Bank's website.

(c) *By a letter dated 15th December 2016, the Bank's solicitors have duly explained to Madam Hong the Bank's position above and attached and provided a copy of the 2016 Handbook for Madam Hong's reference and retention and in the circumstances, I believe that there is no room for Madam Hong to further pursue item d as stated in the Originating Summons. There is now produced and shown to me marked "MW-1" a copy of the letter dated 15th December 2016 issued by the bank's solicitors to the Madam Hong's solicitors.*

6. *For the reasons stated above, I respectively invite this Honourable Court to dismiss the Plaintiff's Pre-action Discovery Application with costs to the Defendant.*

***SWORN** at the office of Messrs. SC Ho & Lawyers of Suites 1710, IFFC Tower II, 388 Stock Exchange Road, Central, Hong Kong this 3rd March 2017.*)
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Before me,

BEFORE the Interim Application

You must prepare a skeleton argument in relation to the application supporting the positing of the party you are representing. You will have been advised separately which party this is.

The skeleton should be typed. It should not exceed 4 pages (A4, one-sided, 12 font, single spaced).

You may refer to the attached case authority as you think appropriate. You do not need to attach it to the skeleton; the Judge will have a copy of it at the hearing. You may also refer to the White Book as you think appropriate.

Please note that for the purpose of this assessment, your arguments must be limited to the case authorities attached and the White Book only

It is very important that you email your skeleton argument in MS Word format to the Secretariat of the Higher Rights Assessment Board at info@hrab.org.hk by no later than 3:00 p.m. of the Wednesday prior to the day of the assessment. Upon receipt, the Secretariat will ensure that the party opposing you in the interim application is given a copy of your skeleton argument. The members of your Examining Panel will also receive copies so that they can be considered before the assessment itself takes place. You will therefore understand that, if you submit your skeleton late, it will not be marked and will place you at real risk of failing the assessment.

THE CONDUCT of the Interim Application

1. You will argue the application from the perspective of the role you have been assigned. You will have a maximum of 15 minutes to make your submissions.

2. No reply submissions will be conducted.

3. You should be prepared to deal with the Judge's interventions and questions in relation to your submissions.

4. You should be prepared to address the court on the issue of costs as a matter of principle.

HCMP 682/2015

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO 682 OF 2015

IN THE MATTER of Section 41 of the High Court Ordinance (Cap 4)

and

IN THE MATTER of Order 24 rules 7A(1) and 11A of the Rules of the High Court (Cap 4A)

BETWEEN

ZHANG SHOUEN (张守恩)	1st Applicant
ZHANG CHAO (张超)	2nd Applicant

and

STANDARD CHARTERED BANK (HONG KONG) LIMITED	Respondent

Before: Hon G Lam J in Court

Date of Hearing: 16 July 2015

Date of Decision: 15 October 2015

DECISION

Background

1. This is an application by originating summons for pre-action discovery of documents pursuant to section 41 of the High Court Ordinance (Cap 4).

2. The applicants are a couple who are the customers of the respondent bank ("the bank"). The applicants opened a joint account with Standard Chartered Bank Singapore Branch in March 2010 ("the Account"). The Account is booked in the Singapore Branch but has been serviced by representatives of the bank in Hong Kong since its opening.

3. The representatives of the bank who acted as relationship managers to service the Account were Mr S Chen from 17 May to 27 December 2010, Ms T Wong from 28 December 2010 to 10 January 2012, Mr S Chen again from 11 January 2012 to 23 December 2013, and Ms V Tung from 24 December 2013 onwards.

4. Over the period from 10 June 2010 to 30 April 2014, the applicants deposited a total of US$48.8 million into and withdrew a total of US$12.6 million from the Account, with a total net deposit of US$36.2 million.

5. The applicants state that until December 2013, all the bank statements of the Account were in English, which they could not read.

They used the hold mail service of the bank which meant that all statements, advices and other correspondence concerning the Account were delivered to a hold mail custodian address in Singapore. In place of those statements, they requested their relationship manager, Chen, to provide them with Chinese versions of the statements of the Account. The first of these was sent to the applicants in April 2011. All together ten such Chinese statements had been sent by Chen or his assistants via their official email accounts with the bank, or in one case delivered by Chen in person, to the applicants between April 2011 and October 2013.

6. The 1st applicant alleges that, in addition, he had personal meetings with Chen and another representative of the bank called Mr T Jiang once every quarter, in which they would inform him of the net asset value of the Account, which the 1st applicant recalls to be in line with the figures indicated in the Chinese statements.

7. The applicants allege that they made their investment and banking decisions in respect of the Account on the basis of the information contained in those Chinese statements.

8. According to the bank, there were active trades in investment and financial products in the Account between June 2010 and April 2014, with about 270 transactions involving different types of securities and financial products such as equities, mutual funds, structured products including equity-linked notes, premium currency investment and decumulators. The applicants also applied to the Singapore Branch for loan facilities in around October 2010 and had successively signed a total of three facility letters. The bank also

contends that in the documents provided by Chen to the applicants, there were references to loan interest being charged against the Account which should have alerted the applicants to the existence of loan drawdowns.

9. The applicants do not dispute that they signed two facility letters dated October 2010 and August 2011 respectively, but they deny having signed a third facility letter dated June 2012. They also say that they had not become aware of any loan drawdown since the Account was opened.

10. The applicants say that the Chinese statements show that the Account had a total investment value of over US$41 million as of 27 December 2013, but they were informed by the bank in around April 2014 that there were bank loans of some US$23.8 million in the Account as at 19 March 2014 and that the net asset value of the Account was approximately US$12.3 million. It is the applicants' case that only then did they realise the Chinese statements provided by Chen were inaccurate. They have since engaged forensic accountants to produce a summary of the discrepancies between the Chinese statements and the official bank statements. The summary states that apart from the first of the Chinese statements, there has consistently been an overstatement of the net asset value of the Account in the Chinese statements. In the last three Chinese statements dated July, August and October 2013 respectively, the net assets were overstated to the tune of more than US$20 million.

11. The applicants allege that the Chinese statements were inaccurate in that they did not indicate there were any bank loans, did not indicate there were overdrafts, inaccurately reported the amounts of cash

and shares in the Account, and sought to portray the net asset value of the Account as lying within a relatively close range of the net amount deposited.

12. The applicants contend that the acts and omissions of Chen and his assistants were performed in the course of their employment by the bank, for which the bank is vicariously liable. As I understand the applicants' case there is no allegation of misappropriation of funds as such, and the bank has stated that there was no transfer of funds from the Account to any unrelated third party.

13. From May 2014 onwards the applicants' solicitors have written to the bank and its solicitors requesting for documents as well as all telephone recordings relating to the Account between 2010 and 2014. The bank has provided a large amount of documents to the applicants including bank statements, contract notes, product summaries and loan confirmations. There was some argument between the parties in correspondence about the applicants' entitlement to have copies of the telephone recordings. The final position was that the bank had, pursuant to the requests of the applicants for recordings relating to equity trading, decumulator trading, foreign exchange linked investment and equity linked investment, retrieved 130 telephone recordings and agreed to allow the applicants to listen to those recordings together with two advisers or friends per visit (which, the bank says, is more generous than provided by the guidelines issued by the Hong Kong Monetary Authority). The bank has required the applicants and their accompanying visitors to sign a non-disclosure agreement. The bank has also refused to make copies of the recordings for the applicants. For reasons that I need not go into, the

applicants have not to date listened to the recordings at the bank's office as offered by the bank.

14. Dissatisfied with the stance taken by the bank, the applicants seek, by the originating summons herein issued on 25 March 2015, an order for discovery and production of all recordings of telephone conversations between the bank's representatives and the applicants from 24 March 2010 to April 2014.

15. The bank has since filed an affirmation stating, among other things, that the exact date and time of all telephone calls between the applicants and all of the bank's representatives are not known, and that

> "…if the Bank is asked to retrieve all telephone recordings between the Bank's representatives and the Applicants, the Bank will have to listen to each day of the telephone recordings of the extension numbers used by each of the relevant Relationship Managers, Customer Service Managers and other staff of the Bank who might have talked to the Applicants over a period of 4 years from 24 March 2010 to April 2014 so as to identify whether, and if so, on what dates and at what time there were telephone conversations with the Applicants."

16. In response, the applicants have in an open letter dated 16 June 2015 narrowed down their application to discovery of the 130 recordings already retrieved by the bank pursuant to requests previously made.

17. For present purposes, Mr Bernard Man SC who appeared for the applicants accepted that the recordings are the property of the bank. Clause 9.3 of the General Terms and Conditions (July 2014 version) which govern the Account provides:

> "9.3 Subject to any applicable law, you consent to us recording and/or monitoring our telephone conversations with you (and you confirm you are authorised to, and do provide consent on behalf of all account signatories or authorised persons). … You agree that the recorded conversations remain our property and we may dispose of them after such period as we may determine. Not all telephone conversations will be recorded."

I proceed therefore on the basis that the applicants do not have any proprietary right to the recordings. Nor have they contended that they have any enforceable right to have possession of the recordings or a copy of them either pursuant to the Personal Data (Privacy) Ordinance (Cap 486) or as an implied term of the banking contract. The sole basis on which the applicants have sought an order for disclosure and production of the recordings in question is pre-action discovery under s. 41 of the High Court Ordinance and Order 24 rule 7A of the Rules of the High Court. It is therefore to these provisions that I now turn.

The statutory provisions

18. S. 41 of the High Court Ordinance provides as follows:

> "(1) On the application, in accordance with rules of court, of a person who appears to the Court of First Instance to be likely to be a party to subsequent proceedings in that Court in which a claim is likely to be made, the Court of First Instance shall, in such circumstances as may be specified in the rules, have power to order a person who appears to the Court of First Instance to be likely to be a party to the proceedings and to be likely to have or to have had in his possession, custody or power any documents which are directly relevant to an issue arising or likely to arise out of that claim-
>
> (a) to disclose whether those documents are in his possession, custody or power; and
>
> (b) to produce such of those documents as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order-

(i) to the applicant's legal advisers;

(ii) to the applicant's legal advisers and any medical or other professional adviser of the applicant; or

(iii) if the applicant has no legal adviser, to any medical or other professional adviser of the applicant.

(2) For the purposes of subsection (1), a document is only to be regarded as directly relevant to an issue arising or likely to arise out of a claim in the anticipated proceedings if—

(a) the document would be likely to be relied on in evidence by any party in the proceedings; or

(b) the document supports or adversely affects any party's case."

19. RHC Order 24 rule 7A relevantly provides as follows:

"(1) An application for an order under section 41 of the Ordinance for the disclosure of documents before the commencement of proceedings shall be made by originating summons (in Form No. 10 in Appendix A) and the person against whom the order is sought shall be made defendant to the summons.

…

(3) A summons under paragraph (1) or (2) shall be supported by an affidavit which must-

(a) in the case of a summons under paragraph (1), state the grounds on which it is alleged that the applicant and the person against whom the order is sought are likely to be parties to subsequent proceedings in the Court of First Instance;

(b) in any case, specify or describe the documents in respect of which the order is sought and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are relevant to an issue arising or likely to arise in the proceedings and that the person against whom the order is sought is likely to have or have had them in his possession, custody or power.

(3A) In the case of a summons under paragraph (1), paragraph (3)(b) shall be construed as if for the word "relevant",

there were substituted the words "directly relevant (within the meaning of section 41 of the Ordinance)".

…

(6) No person shall be compelled by virtue of such an order to produce any documents which he could not be compelled to produce-

(a) in the case of a summons under paragraph (1), if the subsequent proceedings had already been begun; or

(b) in the case of a summons under paragraph (2), if he had been served with a writ of subpoena duces tecum to produce the documents at the trial."

20. Further, Order 24 rule 8(2) provides:

"No order for the disclosure of documents shall be made under section 41 or 42 of the Ordinance, unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs."

The principles

21. The relevant statutory provisions have been carefully examined by Zervos J in *VTB Debt Centre LLC v Top Fuel Corporation Ltd* (unreported, HCMP 1543/2013, 16 April 2014), although the focus of the inquiry in that case was different, which was whether there was a likely claim and who were likely parties to it. In paragraph 44 of his decision, Zervos J set out the conditions for exercising the court's power to order pre-action discovery. Splitting the third condition identified by his Lordship into two, the requirements may be stated as follows:

(1) The applicant appears to be likely to be a party to subsequent proceedings in the court[1] in which a claim is likely to be

[1] In an application to the Court of First Instance for discovery, the "court" here means the Court of First Instance. The District Court Ordinance contains a similar provision (see s. 47A of Cap. 336), in which the "court" means the District Court.

made. In order to satisfy the requirement that a claim is likely to be made, the applicant must show a claim "may" or "may well" be made if discovery is granted.

(2) The respondent appears likely to be a party to such proceedings.

(3) The respondent appears likely to have or to have had in his possession, custody or power the document requested.

(4) The requested document is "directly relevant" to an issue arising or likely to arise out of that claim. "Direct relevance" is shown only if:

(a) the document would be likely to be relied on in evidence by any party in the proceedings; or

(b) the document supports or adversely affects any party's case.

(5) The applicant must satisfy the court that the order for pre-action discovery is necessary either for disposing fairly of the cause or matter or for saving costs.[2]

22. The first four requirements as stated above are jurisdictional conditions. Unless they are satisfied, the jurisdiction to order pre-action discovery does not arise. If they are satisfied, the court has a "power" – in my view a discretionary power – to order pre-action discovery of the document in question. The fifth requirement means that the court will not exercise its power to make an order unless discovery is necessary either for disposing fairly of the cause or matter or for saving costs. Subject to

[2] Order 24 rule 8(2), and see below on burden of proof.

this, however, the discretion seems to me to be an unfettered one to be exercised in all the circumstances of the case.

23. There are in addition important requirements imposed by Order 24 rule 7A including, in particular, the need for an affidavit that satisfies the requirements of rule 7A(3) as modified by rule 7A(3A). This means that the affidavit must:

(1) state the grounds on which it is alleged that the applicant and the respondent are likely to be parties to subsequent proceedings in the court;

(2) specify or describe the document in respect of which pre-action discovery is sought;

(3) show, if practicable by reference to any pleading intended to be served in the proceedings, that

(a) the document is "directly relevant"[3] to an issue arising or likely to arise in the proceedings, in the sense that

(i) the document would be likely to be relied on in evidence by any party in the proceedings; or

(ii) the document supports or adversely affects any party's case; and

(b) the respondent is likely to have or have had the document in his possession, custody or power.

(4) Where there is relevant evidence to meet the requirement in rule 8(2) that discovery is necessary either for disposing

[3] within the meaning of s. 41 of the Ordinance

fairly of the cause or matter or for saving costs, the affidavit should of course also cover those matters.

24. While s. 41 and rule 7A both refer simply to "document" without express mention of "class of document" (as there is in Order 24 rule 7 which concerns specific discovery), I do not think this precludes the court from compendiously ordering pre-action discovery of a class of documents as such (see by analogy *Cheung Kai Wing v Mok Sheung Shum t/a Mok Sum Kee* [1993] 2 HKC 113, 120), provided it is shown that all the documents in the class meet the jurisdictional requirements including, in particular, that of direct relevance. As Mr Man SC accepted, it is not enough to show that some only of the documents in the class meet the threshold condition, for the court has no jurisdiction to order discovery of documents only because some other documents belonging to the same class fall within the statutory provisions. The applicant has to show that each document in the class is a document that falls within s. 41 and rule 7A. The wider the class is drawn, the more difficult it will be for the applicant to show that the documents within it all pass the threshold. A similar principle applies in relation to specific discovery, in that where a claim for specific discovery of a class of documents is made, the class must not be described so widely as to include documents which are not relevant to the issue: *Molnlycke AB v Procter & Gamble Ltd (No. 3)* [1990] RPC 498; see also *Tullett Prebon (Hong Kong) Ltd v Chan Yeung Fong Nick* (unreported, HCA 2197/2009, 9 June 2011) at §§77-84 in the context of discovery from third parties.

25. It is however important to bear in mind two significant differences between specific discovery pursuant to rule 7 and pre-action

discovery pursuant to s. 41 and rule 7A, quite apart from the stage at which the application may be made.

26. First, the test of relevance for specific discovery under rule 7 is that the document or class of document "relates to one or more of the matters in question in the cause or matter". This has, since at least the decision in *Compagnie Financière et Commerciale du Pacifique v The Peruvian Guano Co* (1882) 11 QBD 55, 62-63,[4] been taken to mean that a document is relevant if it "contained information either directly or indirectly enabling the party seeking discovery either to advance his own case or to damage that of his adversary, or which might fairly lead to a train of inquiry which might have either of those consequences".[5]

27. In the case of pre-action discovery under s. 41 and rule 7A, in contrast, the legislation has made a deliberate departure from that generous test of relevance. A document is susceptible to pre-action discovery under those provisions only if it is "directly relevant to an issue arising or likely to arise out of [the] claim", and it is only to be so regarded if "(a) the document would be likely to be relied on in evidence by any party in the proceedings; or (b) the document supports or adversely affects any party's case". The first limb of this two-pronged test imports a condition of likelihood. "Likely" is used in a number of places in s. 41 and it seems to me that the word "likely" in s. 41(2)(a) has the same meaning as it has in s. 41(1), that is to say, "may well" or "reasonable prospect": see *VTB Debt Centre LLC v Top Fuel Corporation*

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[4] See the decision of Deputy Judge Marlene Ng in *Melvin Waxman v Li Fei Yu* (HCA 1973/2012; 30 January 2015) §§49-53 for a discussion of the applicability of the *Peruvian Guano* test in Hong Kong.

[5] *Astra-National Production Ltd. v Neo-Art Productions Ltd* [1928] W.N.218, 219, *per* Tomlin J.

Ltd, *supra*, at §37. The applicant has to show that the document may well be relied upon in evidence by a party in the proceedings. In contrast, the second limb of s. 41(2) is that the document supports or adversely affects a party's case, not merely that it is likely to do so. That said, in a case where the applicant has not seen the document in question, he can only reasonably be expected to prove this on a balance of probabilities.

28. Pre-action discovery is thus decidedly not intended to be simply general discovery or specific discovery taking place before commencement of an action. It is not intended to extend to "background" documents or documents simply leading to a possible "train of inquiry", but is confined to documents that are "directly relevant" within the meaning of s. 41.

29. Direct relevance must be demonstrated by the affidavit supporting the application, "if practicable by reference to any pleading served or intended to be served in the proceedings" (rule 7A(3)). The reference in the rule to pleading and the requirement of a draft pleading "if practicable" underlines the particularity required of the allegation of relevance. In any event the affidavit should explain in sufficient detail what the intended claim is, what issues arise or are likely to arise out of it, and how the document sought is directly relevant to such issues in the sense defined in s. 41(2). As Zervos J stated in *VTB* at §37:

> "An applicant, therefore, is expected to have some understanding of and justification for the case he has against a potential defendant when applying for pre-action disclosure, and this needs to be sufficiently particularized to avoid any unwarranted or fishing applications. The burden of persuasion rests with the applicant to show the nature of the claim that he intends to make, that he and the potential defendant are likely to be parties to the claim and that the potential defendant is

> likely to have documents that are directly relevant to issues in the claim. This will depend on the clarity and particularization of the issues submitted by the applicant that are likely to arise out of the claim that may be made."

30. It needs to be emphasised that because the jurisdiction to order pre-action discovery does not arise unless the documents in question are directly relevant to an issue arising or likely to arise, it is important that the issues be identified by the applicant. As Waller LJ said in *Bermuda International Securities Ltd v KPMG* [2001] Lloyd's Rep PN 392 at §26 (cited with approval in *Black v Sumitomo Corporation* [2002] 1 WLR 1562 at §76):

> "The new rule allows the court in certain circumstances to order pre-action disclosure. … The circumstances spelt out by the rule show that it will 'only' be ordered where the court can say that the documents asked for will be documents that will have to be produced at the standard disclosure stage. It follows from that, that the court must be clear what the issues in the litigation are likely to be i.e. what case the claimant is likely to be making and what defence is likely to be being run so as to make sure the documents being asked for are ones which will adversely affect the case of one side or the other, or support the case of one side or the other." [6]

31. The second difference is that in an application for specific discovery, rule 8(1) means that no order for discovery will be made if discovery is not necessary either for disposing fairly of the cause or matter or for saving costs. The burden lies on the party resisting discovery (as opposed to production) to show that discovery is not so necessary: *Innovisions Ltd v Chan Sing Chuk & ors* [1992] 1 HKC 348, 351.

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[6] "Standard disclosure" is governed by the English CPR rule 31.6 and requires a party to disclose: "(a) the documents on which he relies; and (b) the documents which – (i) adversely affect his own case; (ii) adversely affect another party's case; or (iii) support another party's case; and (c) the documents which he is required to disclose by a relevant practice direction."

32. In the case of pre-action discovery, the onus is reversed. Order 24 rule 8(2) provides that no order is to be made under s. 41 "unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs". This clause, found also in rule 13(1) which concerns the production of documents generally, places the burden squarely on the applicant to satisfy the court that the order is necessary in the manner described, not only that the document is relevant or that discovery is desirable: *In re Au Shui-yuen Alick* [1991] 1 HKLR 525, 531; *Dolling-Baker v Merrett* [1990] 1 WLR 1205, 1209.

33. In the context of pre-action discovery, if the documents can be shown to be "directly relevant" in the sense defined in s. 41, they will also necessarily be relevant in the *Peruvian Guano* sense, and can therefore be expected to be disclosed in the ordinary course of the action after proceedings have been commenced. It is in my view therefore incumbent upon an applicant for an order for pre-action discovery to show, not only that discovery of the document in question is necessary, but that discovery of the document *before commencement of the action* is necessary. The precise justification will vary from case to case, but an obvious reason would be where a key document is needed by the plaintiff before he can properly plead a potentially good claim. As was recognised in the Final Report of the Chief Justice's Working Party on Civil Justice Reform (2004) at §487, the pre-action discovery regime is intended to strike

> "a reasonable balance between the need to protect against harassment and fishing applications on the one hand and the need to enable a potentially meritorious plaintiff to bring a claim which could not effectively otherwise be brought".

34. It should be noted that in determining whether there is power to order pre-action discovery as well as whether to exercise the power under s. 41 of the Ordinance, modern English authorities are likely to be of limited direct assistance and care must be taken in relying on them because of the different regimes adopted in the two jurisdictions. One significant difference is immediately apparent on a reading of the rules. Rule 31.16(3)(d) of the (English) Civil Procedural Rules provides there is power to order pre-action disclosure only where, *inter alia*, such disclosure is "desirable" in order to "(i) dispose fairly of the anticipated proceedings; (ii) assist the dispute to be resolved without proceedings; or (iii) save costs". This is to be contrasted with RHC rule 8(2) which uses the word "necessary" instead of "desirable". Further, as Zervos J pointed out in *VTB Debt Centre LLC v Top Fuel Corporation Ltd*, *supra*, at §34, the English system is marked by the presence of pre-action protocols (as well as a practice direction on pre-action conduct where no pre-action protocol applies), which require the pre-action disclosure of key documents relevant to the issues in dispute. Neither such protocols nor that practice direction have been adopted in Hong Kong. In this jurisdiction, so far as the use of pre-action discovery to promote settlement is concerned, the Final Report on Civil Justice Reform expressly stated (at §488):

> "Since pre-action protocols have not been recommended for general adoption in Hong Kong, it is not proposed to specify as a discretionary factor, the desirability of pre-action disclosure in aid of early settlement."

The present case

35. Although the Account was opened with the Singapore Branch whereas the respondent here is the bank in Hong Kong,

Mr Dawes SC who appeared for the bank did not dispute that the first three of the five requirements referred to in paragraph 21 above are met in this case. On the evidence it is clear that a claim is likely to be made by the applicants against the bank, and it is accepted that the telephone recordings are in the bank's possession.

36. The crucial question is whether the fourth requirement is satisfied. Unless there is sufficient evidence that the documents sought are directly relevant to an issue arising or likely to arise in the intended proceedings, the jurisdiction to make the order does not arise. The evidence in this case, however, provides scant information of the intended claim or the issues that may arise. In the supporting affirmation, the 1st applicant stated:

> "8. My wife and I will seek relief against the Bank for … Chen's failure to follow our instructions in respect of the operation of the Account, and for forgery and misrepresentations in respect of Facility Letters. But we have been advised and believe that it is not necessary to detail all such claims in this affirmation.
>
> 9. We have been advised and believe that it would suffice for us to set out, as we do below, the false portfolios … Chen and his assistant had sent to us. It would be obvious that we have a good claim against the Bank, and hence the Bank is a likely party in subsequent proceedings in the High Court."

37. After referring to the circumstances in which they obtained the Chinese statements, how those statements were inaccurate and when they discovered the true position of the Account, the 1st applicant continued:

> "20. I have been advised and verily believe that the Telephone Records are directly relevant to an issue arising or likely to arise out of our claim in the anticipated proceedings. They would evidence precisely what representations had been made

> to us by … Chen and other officers of the Bank, and also whether they made the misrepresentations negligently or fraudulently. They would also be relevant to whether, and if so what, explanation had been given by the Bank to us as to the risk, return and performance of various investment products."

"Telephone Records", in that affirmation, meant all recordings of telephone conversations between the bank's personnel and the applicants from 24 March 2010 to April 2014.

38. I have to say that the affirmation is as confusing as it is inadequate. First, it is said that the applicants will seek relief against the bank for Chen's failure to follow instructions, but there is nothing in the two affirmations filed by the applicants suggesting that Chen had failed to follow their instructions in respect of the operation of the Account, or identifying what instructions Chen is alleged to have failed to follow. The applicants explained at length how the Chinese statements were given to them and in what ways they transpired to be inaccurate, but said nothing other than the bare assertion quoted above that could show any conceivable basis for alleging that Chen had failed to follow their instructions.

39. Then it is said that the applicants will seek relief for forgery and misrepresentations in respect of facility letters. It seems to be alleged that the clients' signature on the third facility letter was forged. It is entirely unclear, however, what the alleged misrepresentations were. It is simply impossible to discern from the evidence or otherwise how the Telephone Recordings would be directly relevant to any issues in these claims.

40. There is an assertion that the Telephone Recordings would be relevant to the explanations (if any) given by the bank to the applicants of the risk, return and performance of various investment products, but there is no hint whatsoever in the evidence that the applicants wish to complain, or have any *prima facie* grounds for complaining, of any mis-selling of products or negligent advice given about investment products. The request for documents for this purpose seems to me plainly to be a fishing exercise.

41. The affirmation also asserted that the Telephone Recordings would show precisely what representations had been made to the applicants by Chen and other bank officers. It is wholly unclear what kind of representations the applicants were referring to. There is simply no evidence that Chen or others made any oral misrepresentations causing loss and giving rise to a likely claim. Since the applicants were themselves party to the telephone conversations, it should not be overly onerous to expect them at least to give an idea of what they were looking for.

42. Narrowing the request down to the 130 recordings already retrieved by the bank does not, in my view, address the problem. The 130 recordings relate to the placing of orders for the investment transactions entered into for the Account and fall within the period from 22 June 2010 to 18 June 2014. The applicants have not in any way described the nature of the contents of these recordings, what they think they are likely to contain and what in particular they consider to be useful and necessary for them to obtain prior to instituting a claim against the bank. The applicants have in my opinion failed to show what the likely

issues in question are in the claim that they are going to bring against the bank and how each of the 130 recordings is directly relevant to the issues.

43. A disciplined and highly focussed approach is in my view necessary in pre-action discovery. The jurisdiction was never meant to provide pre-action general discovery of documents or even pre-action specific discovery of background or "train of inquiry" documents. The primary legislation limits pre-action discovery to documents directly relevant to the issues, and the rules require direct relevance to be shown by evidence. The rules also require a draft pleading, if practicable. That gives one a sense of the level of particularity in the evidence expected. In ordinary discovery, relevance is of course generally determined with reference to the pleadings: see eg *Re Estate of Ng Chan Wah* (unreported, HCAP 5/2003, 5 March 2003).

44. In the present case no draft pleading in whole or in part has been produced. No explanation has been given why it was impracticable to supply it. Had the issues likely to arise been detailed in the affirmation itself, the lack of an exhibited draft pleading need not in my view be fatal. But the affirmation itself neither provided sufficient particulars of the intended claim nor showed what issues are likely to arise and how the documents sought are directly relevant to the issues. In my judgment the applicants have signally failed to establish the direct relevance of the documents sought to any issues likely to arise in the claim.

45. Mr Man SC said it would be difficult to imagine that a heavily litigated US$24 million claim would not somehow involve the telephone recordings in the evidence. I do not think this is the correct

approach to the question at hand. One has to start with the nature of the intended claim, the constituent elements of the cause of action, the allegations being made by the intended plaintiff, and the issues that are likely to arise. This requires an applicant to supply meaningful details of the intended claim, so that the potential defendant can properly respond to the application and evidence, and so that the court can see from the combined evidence of the parties the likely issues and assess, by reference to the issues, the direct relevance, if any, of the documents sought. The applicants' failure to establish direct relevance in this way is in my view fatal to the application.

The requirement of rule 8(2)

46. It is therefore unnecessary to consider the further question whether the applicants have demonstrated that the order sought is necessary either for disposing fairly of the cause or matter or for saving costs. Mr Man SC acknowledged that he could already plead a non-demurrable statement of claim in relation to the allegedly inaccurate Chinese bank statements on the basis of the materials in the applicants' possession. He further submitted that the falsity of the Chinese statements had not been disputed by the bank, that on that basis the applicants have a strong *prima facie* cause of action, and that the telephone recordings were sought for "refinement" of the pleading, to "dot the i's and cross the t's". I have some doubt whether in these circumstances pre-action discovery can be said to be necessary for either of the two purposes specified in rule 8(2). If it is said that pre-action discovery should be ordered simply because it would save costs by avoiding the need for amendment (however minor) of pleadings after

discovery in the ordinary way, this might mean an order for pre-action discovery should be made in a great many cases, perhaps even almost as a matter of course. This would have the potential of generating a great deal of expensive and time-consuming satellite litigation even before the actions proper have been commenced. I very much doubt that was the legislative intention behind s. 41 and rule 7A. As it is, however, I need not express any concluded view on the requirement of rule 8(2) in this case.

Disposition

47. For the above reasons, the application is dismissed. There will be a costs order *nisi* in favour of the bank.

(Godfrey Lam)
Judge of the Court of First Instance
High Court

Mr Bernard Man SC and Ms Deanna Law, instructed by Phillips Solicitors, for the 1st and 2nd applicants

Mr Victor Dawes SC and Mr Jacky Lam, instructed by Deacons, for the respondent

HCMP 1543/2013

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO 1543 OF 2013

IN THE MATTER OF an application against Top Fuel Corporation Limited and Infinity Gain Limited for discovery of certain specified documentation.

BETWEEN

VTB DC LLC	Initial Plaintiff
VTB BANK JSC	Substituted Plaintiff

and

TOP FUEL CORPORATION LIMITED	1st Defendant
INFINITY GAIN LIMITED	2nd Defendant

Before: Hon Zervos J in Chambers
Date of Hearing: 12 March and 4 April 2014
Date of Written Submissions: 2 April 2014
Date of Judgment: 16 April 2014

J U D G M E N T

Introduction

1. This is an application for pre-action disclosure. It arises in the context of allegations against a Russian corporate conglomeration that it

fraudulently obtained loans from a Russian bank and siphoned off its assets to nominees and associates to the prejudice of its creditors.

Legislative provisions

2. The power to order pre-action disclosure arises out of s 41 of the High Court Ordinance, Cap 4.

3. Section 41 provides:

> "(1) On the application, in accordance with rules of court, of a person who appears to the Court of First Instance to be likely to be a party to subsequent proceedings in that Court in which a claim is likely to be made, the Court of First Instance shall, in such circumstances as may be specified in the rules, have power to order a person who appears to the Court of First Instance to be likely to be a party to the proceedings and to be likely to have or to have had in his possession, custody or power any documents which are directly relevant to an issue arising or likely to arise out of that claim-
>
> (a) to disclose whether those documents are in his possession, custody or power; and
>
> (b) to produce such of those documents as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order-
>
> (i) to the applicant's legal advisers;
>
> (ii) to the applicant's legal advisers and any medical or other professional adviser of the applicant; or
>
> (iii) if the applicant has no legal adviser, to any medical or other professional adviser of the applicant.
>
> (2) For the purposes of subsection (1), a document is only to be regarded as directly relevant to an issue arising or likely to arise out of a claim in the anticipated proceedings if—
>
> (a) the document would be likely to be relied on in evidence by any party in the proceedings; or
>
> (b) the document supports or adversely affects any party's case."

4. The section refers to the rules of court. They are contained in O 24, r 7A and r 8(2) of the Rules of the High Court which prescribe the procedure to be followed.

5. So far as material O 24 r 7A provides:

> "(1) An application for an order under section 41 of the Ordinance for the disclosure of documents before the commencement of proceedings shall be made by originating summons (in Form No. 10 in Appendix A) and the person against whom the order is sought shall be made defendant to the summons.
>
> (2) …
>
> (3) A summons under paragraph (1) or (2) shall be supported by an affidavit which must-
>
> (a) in the case of a summons under paragraph (1), state the grounds on which it is alleged that the applicant and the person against whom the order is sought are likely to be parties to subsequent proceedings in the Court of First Instance;
>
> (b) in any case, specify or describe the documents in respect of which the order is sought and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are relevant to an issue arising or likely to arise in the proceedings and that the person against whom the order is sought is likely to have or have had them in his possession, custody or power.
>
> (3A) In the case of a summons under paragraph (1), paragraph (3)(b) shall be construed as if for the word "relevant", there were substituted the words "directly relevant (within the meaning of section 41 of the Ordinance)".
>
> (4) A copy of the supporting affidavit shall be served with the summons on every person on whom the summons is required to be served.
>
> (5) An order under section 41 or 42(1) for the disclosure of documents may be made conditional on the applicant's giving security for the costs of the person against whom it is made or on such other terms, if any, as the Court thinks just, and shall require the person against whom the order is made to make an affidavit stating whether any documents specified or described in the order are, or at any time have been, in his possession,

> custody or power and, if not then in his possession, custody or power, when he parted with them and what has become of them.
>
> (6) No person shall be compelled by virtue of such an order to produce any documents which he could not be compelled to produce-
>
> (a) in the case of a summons under paragraph (1), if the subsequent proceedings had already been begun; or
>
> (b) in the case of a summons under paragraph (2), if he had been served with a writ of subpoena duces tecum to produce the documents at the trial.
>
> (8) For the purposes of rules 10 and 11 an application for an order under section 41 or 42(1) shall be treated as a cause or matter between the applicant and the person against whom the order is sought."

6. Order 24 r 8(2) provides:

> "No order for the disclosure of documents shall be made under section 41 or 42 of the Ordinance, unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs."

Procedural history

7. Before I commence my discussion on this case, I need to briefly explain the types of corporate entities that can be established in Russia. Under Russian law a limited liability company can be established by a maximum of 50 shareholders with a minimum share capital of 10,000 rubles. It is usually signified by the initials of "limited liability company" in Russian "OOO" or in English "LLC". Under Russian commercial law there are two forms of joint stock company, one is an open joint stock company where the shares are freely transferrable to the public and the minimum share capital required is 100,000 rubles, and the other is a closed joint stock company where the shares are transferrable only between the shareholders in the company and the required minimum share capital is

10,000 rubles. A limited liability company with a number of shareholders above 50 is recognized as a joint stock company. It is usually signified by the initials "JSC".

8. By way of originating summons dated 21 June 2013, the then plaintiff, VTB DC LLC (its full name is VTB Debt Centre LLC but I will refer to it as "VTB DC"), made application for pre-action disclosure against the 1st and 2nd defendants. The affidavit dated 16 July 2013 in support of the application was from Ms Yee Ling Wan, a consultant to the solicitors for the plaintiff. The hearing of the application was fixed for 31 July 2013. The two defendants had acknowledged service of the summons through their solicitors.

9. At the hearing on 31 July 2013, the application was adjourned to 18 December 2013. In the meantime on 8 October 2013 both defendants sought and obtained leave to file evidence in opposition. At the adjourned hearing on 18 December 2013, both the 1st and 2nd defendants sought and were given an extension until 24 January 2014 and 4 February 2014 respectively to file any evidence. The application was adjourned to 12 March 2014.

10. On 17 January 2014, upon an order of the court the solicitors for the 2nd defendant ceased to act, and no evidence has been filed by the 2nd defendant. On 25 January 2014, the 1st defendant filed an affirmation by its attorney Mr Pushkin Nikolay Mikhailovich.

11. Ms Yee for the plaintiff filed a 2nd affidavit on 5 November 2013 and a 3rd affidavit on 7 February 2014.

12. At the third adjourned hearing of the application on 12 March 2014, there was no appearance by the 2nd defendant. The 1st defendant on the other hand was legally represented and took a last minute issue on whether the plaintiff had standing to bring the present proceedings. Mr Laurence L K Ngai, counsel for the 1st defendant, questioned the legal capacity of the plaintiff to make a claim with respect to the loans made by another corporate entity. The loans were made by the open joint-stock company VTB Bank and VTB North-West Bank which on a restructuring in March 2011 acceded to VTB Bank ("VTB Bank"). VTB DC is the collecting agency of VTB Bank. An agency agreement dated 1 February 2009 was executed between them and later supplemented but depending on the terms of the agency agreement, there was an issue as to whether VTB DC had the legal capacity to sue in relation to the loan agreements in question. The application was adjourned to 4 April 2014 for the plaintiff to address this preliminary issue.

4 April hearing

13. At the resumed hearing on 4 April 2014, there was still no appearance by the 2nd defendant. The plaintiff made application for it to be substituted by VTB Bank. Ms Yee filed a 4th affidavit dated 24 March 2014 in which she confirmed her instructions to substitute the plaintiff with VTB Bank. This application was made under O 15, r 6 (2) of the Rules of the High Court. I granted the application and gave leave to substitute VTB DC with VTB Bank as the plaintiff in the action. I also gave leave to the plaintiff to amend the originating summons in the action to reflect the substitution and I ordered that service of the amended originating summons on the 1st and 2nd defendants be dispensed with and that the original acknowledgments of service by the 1st and 2nd defendants stand.

I made these orders as there was clearly no prejudice to the defendants and the substitution was a matter of formality.

14. The 1st defendant raised three points in opposition to the application. The first was whether VTB Bank had any interest in the matter. I found this an odd argument considering the 1st defendant raised the point in the first place that VTB DC may not have an interest in any future claim against the 1st defendant as it was the collecting agency of the bank and that any claim in relation to the loans lay with the bank itself. It was clear on the material before me that VTB Bank would be the proper plaintiff to an action in relation to the default of the loans and by making the substitution this would "ensure that all matters in dispute in the cause or matter may be effectively and completely determined and adjudicated upon."[1]

15. The second was that VTB Bank had to consent to be the plaintiff. This requirement could and was satisfied by the solicitor for the bank confirming in writing that the bank consented.[2] An affidavit to this effect had been filed by a solicitor for the bank.

16. The third was a rather technical point and sought to make an issue out of the fact that affidavits previously filed were done so on behalf of VTB DC, and that as it was no longer the plaintiff, there was no affidavit in support of the present proceedings by the new plaintiff. The argument stemmed from the requirement in s 41 that the applicant is a person who appears to be likely to be a party to subsequent proceedings in which a

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[1] O 15, r 6(2)(b), RHC.
[2] See O15, r 6(4), RHC and Hong Kong Civil Procedure, 2014, para 15/6/4. See also *Wong Kam Hong v Triangle Motors Ltd* [1998] 2 HKLRD 330 at 339 F-G per Cheung J.

claim is likely to be made and in O 24, r 7A that an affidavit addressing this requirement be filed in support. Ms Yee in her 4th affidavit stated she had been authorized by both VTB DC and VTB Bank to make the substitution and that it had been previously deposed that the creditor of the loan agreements was the bank. It was clear from the contents of the affidavits of Ms Yee that she was representing the interest of the VTB Bank and that VTB DC was its subsidiary. I considered it appropriate in the circumstances of this case to make the order of substitution where the agent is replaced by the principal and there is no prejudice to the parties.

Background facts

17. From 2007 to 2009, the plaintiff entered into a number of loan agreements with various affiliated companies under the Faeton Group for a sum of about 1 billion rubles. The Faeton Group was one of the largest fuel operators in various regions of Russia. The ultimate beneficial owners of the group were Mr Sergei Ivanovich Snopok and Mr Mikhail Ivanovich Snopok. All the borrowers failed to comply with the terms of the loan agreements and to repay the loans, and thereafter the Faeton Group and its entities progressively went into liquidation.

18. The documents sought by this application cover the period of the loan agreements from 2007 to 2013. They encompass internal company records and dealings or transactions with any subsidiary or associated company or officers of the 1st and 2nd defendants.

19. The plaintiff entered into eight loan agreements [3] with various affiliated companies under the Faeton Group, including the limited

[3] The list of loans was set out at B1/10/286.

liability companies, Faeton-Aero ("Faeton Aero"), Faeton Set Nomer 1 ("Faeton Set Nomer 1") and Ostrogovitsy. The loan agreements amounted to 987 million rubles which were purportedly secured by real estate and equipment of the companies.

20. According to Ms Yee's evidence for the plaintiff,[4] all of the borrowers failed to comply with the terms of the loan agreements and to repay the loans in question, and Faeton Aero, described as the major holding company of the Faeton Group, entered into voluntary liquidation on 3 June 2009 at the St Petersburg Commercial Court ("the Russian Court").

21. The plaintiff successfully obtained judgment from the Russian Court on 30 October 2009 against Faeton Aero in relation to two loan agreements dated 19 July 2007 and 21 August 2008.[5] The ruling recorded that Faeton Aero was due to repay the loans in January and February 2009 but only a very small portion of the amount due was repaid. The plaintiff also made claims against the surety of the loans and was registered as a creditor against two limited liability companies, Faeton Development Group and Faeton Holding Company.[6]

22. On 28 July 2010, the Russian Court upheld the plaintiff's claims in relation to four loan agreements against Faeton Set Nomer 1.[7] This company applied to the Russian Court for voluntary liquidation which was granted on 4 March 2011. The plaintiff's claims under the four loan

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[4] At A/2/9 paragraph 6.
[5] Credit Agreement ("CA") No.00357 and CA No. 00415.
[6] CA No. 00357 and CA No. 00415.
[7] CA No. 312/08, CA No. 41/08, CA No. 61/08 and CA No. 17/B/07.

agreements, together with an additional claim under a 5th agreement,[8] were registered as claims of creditors against Faeton Set Nomer 1 on 2 September 2011. Prior to this on 14 February 2011, the Russian Court registered a claim by the plaintiff against Faeton Aero as the surety of the loans.

23. On 13 December 2011, the Russian Court registered the plaintiff's claim against Ostrogovitsy in relation to a loan agreement dated 26 June 2008 [9] and against three other companies as sureties, Udarnik, Faeton Agro and Faeton Aero on 30 May 2013, 5 July 2013 and 14 November 2011 respectively.

24. The plaintiff now alleges that the Faeton entities entered into the loan agreements fraudulently and have siphoned off their ongoing business proceeds to the prejudice of creditors, including the plaintiff. The plaintiff makes this application to ascertain whether any such proceeds were siphoned off and transferred to the defendants and, depending on the documents disclosed, to institute recovery proceedings against the defendants. This suggests that the plaintiff is making this application more for the purpose of inquiry, rather than pursuing a likely claim through the disclosure of documents. I will comment more about this later.

25. It is not in dispute that the 1st defendant owns a 99% shareholding of a Russian company named Faeton-Toplivnaya Set Nomer 1 ("FTS No1") which it has held since its incorporation on 10 June 2010. In the present application, the plaintiff primarily relies on three links between the 1st defendant and the Faeton entities through FTS No1.

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[8] CA No. 12/B/07.
[9] CA No. 156/08.

26. First, FTS No1 is the sole shareholder of a limited liability company named Piligrim-II ("Piligrim-II"). Mr Sergei Snopok had owned 49% of Piligrim-II's shareholding until sometime between November 2002 and July 2003[10] when Faeton Aero became the sole shareholder of it. Piligrim-II was further transferred to Faeton-Invest and Faeton Set Nomer 1 as the sole shareholder on 26 March 2009 and 24 December 2010 respectively before it was later transferred to FTS No 1. These dates were taken from a company search which was somewhat confusing, as the date mentioned may be the date of the event or of the update, and in the case of an appointment of an officer it would not necessarily provide the dates of duration of office.[11]

27. Secondly, FTS No 1 is also the sole shareholder of a limited liability company known as Sekret Zdorovya ("Sekret Zdorovya"). Sekret Zdorvya was owned by Faeton Aero and Faeton Set Nomer 1 on 26 March 2009 and 24 December 2010 respectively before it was later transferred to FTS No 1. Again, these dates were taken from a company search which was somewhat confusing.[12] Mr Alexey Igorevich Dreyzin is the common general director of FTS No 1 and Sekret Zdorovya, and Mr Mikhail Snopok was the former general director of Sekret Zdorovya from 30 June 2009 to a date that I have not been able to ascertain clearly.

28. I should point out that in relation to the transfer to FTS No 1 of Piligrim-II and Sekret Zdorovya on the material before me it is unclear as to when this occurred but it seems it would have been on a date after 24 December 2010.

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[10] B2/28/530.
[11] B2/28/530.
[12] B2/28/540.

29. Thirdly, under a Russian police report entitled "order for opening of a criminal case" dated 6 February 2013,[13] a company named Faeton-Fuel Network No1 LLC is being investigated for the receipt of payables in the amount of 600 million rubles from Faeton Aero during its insolvency. Ms Yee has exhibited newspaper reports of a criminal investigation into the collapse of Faeton Aero and its default of loans with VTB Bank. Mr Julian Lam, for the plaintiff, sought to illustrate, by referring to their identical Russian name, that "Faeton-Fuel Network No 1 LLC" and "Faeton-Toplivnaya Set Nomer 1" are the different English translations of the same company owned by the 1st defendant. It seems clear to me that appears to be the case. However, the police report and the newspaper articles say no more than there is a criminal investigation into the collapse of the Faeton Group entities.

30. As I have already mentioned, Mr Mikhailovich has filed an affirmation on behalf of the 1st defendant. He does so in the capacity as its attorney under a general power of attorney. He stated, amongst other things, that:

> "Since the incorporation of Top Fuel [the 1st defendant],
>
> (a) The only asset held by Top Fuel has been the 99% shareholding of a limited liability company in Russia in the name of "Faeton-Toplivnaya Set Nomer 1". Top Fuel became the owner of the aforesaid 99% shareholding on 10th June 2010, the date when "Faeton-Toplivnaya Set Nomer 1" was established;
>
> (b) Top Fuel has not opened, maintained, or closed any bank accounts, whether in Hong Kong or elsewhere;
>
> (c) Top Fuel has not entered into any transaction with any other person or entity, whether in Hong Kong or elsewhere, whereby any asset, whether in Hong Kong

[13] At B3/33/769.

or elsewhere, is purchased, received, or acquired howsoever by Top Fuel;

(d) Top Fuel has not entered into any transaction with any other person or entity, whether in Hong Kong or elsewhere, whereby any asset, whether in Hong Kong or elsewhere, is sold, parted with, or disposed of howsoever by Top Fuel; and

(e) Top Fuel has not entered into any loan transaction, where in Hong Kong or elsewhere, with any other person or entity, whether in Hong Kong or elsewhere."[14]

31. In response to this affirmation, the plaintiff submits that it is inconceivable that the 1st defendant would own a 99% shareholding in FTS No 1 and not have any bank account or conduct any business. It is pointed out by the plaintiff that the 1st defendant was incorporated on 14 May 2009 and given its shareholding in FTS No1 there must have been transactions between them, including the acquisition by the 1st defendant of the shareholding in FTS No1. It is also pointed out by the plaintiff that there should have been a payment from the 1st defendant to acquire FTS No 1 which has a share capital of 495,000 rubles. The plaintiff notes that the sole director of the 1st defendant is a professional service provider and that the address of the 1st defendant is not that of the service provider. This, it is submitted, would indicate in both instances that fees or costs are being incurred for which the 1st defendant would be liable to pay. The plaintiff further notes that FTS No 1 would have had substantial revenue from Faeton Aero and observes that it would be most unlikely that the 1st defendant as a shareholder did not receive any dividend or profit. It is finally submitted by the plaintiff that this all stands in stark contradiction with the assertions made by Mr Mikhailovich in his affirmation.

[14] At paragraph 8.

32. It appears from about May or June 2009, the 2nd defendant was the sole shareholder of Faeton Set Nomer 1.[15] The date is not precise because of the nature of the company search updates that have been obtained. According to the search, its former general director was Mr Mikhail Snopok, from 30 June 2009 to 6 August 2010, and the former owners were Faeton Aero and Faeton Invest. Its business was in petroleum chemicals. It was a party to five loan agreements with VTB Bank and defaulted on all of them. It went into voluntary liquidation on 4 March 2011. It was at this time it was being pursued by the plaintiff through the Russian courts for default of the five loans. The share capital of Faeton Set Nomer 1 was 295,104,126 rubles (the equivalent of nearly $63 million Hong Kong currency).

The legal principles

33. Whilst this application may appear to be fairly straightforward on its face, there is a difficulty as to how the merits of the potential cause of action should be established on an application for pre-action disclosure. It is a fundamental principle that discovery in litigation should only be allowed in appropriate circumstances. With that in mind, it is also important to appreciate that pre-action disclosure provides a means by which an applicant with a potentially meritorious claim can access documents to assist in determining the nature and terms of such a claim.

34. Whilst the current provision in England and Wales is at variance with the provision in Hong Kong, English authority does provide a useful discussion on pre-action disclosure and the interpretation of

[15] B2/28/553.

common phrases. I should stress, however, that the English caselaw has followed a different course because of the differences in the language and application of the provision. The English provision is also governed by pre-action protocols which have not been adopted in Hong Kong.[16] As part of the Civil Justice Reform, s 41 was amended to extend the power from cases in respect of personal injury or death to all cases and for such jurisdiction to be exercised where it is shown that the plaintiff and the potential defendant are both likely to be parties to anticipated proceedings and that disclosure before the proceedings have been started is necessary to dispose fairly of the proceedings or to save costs.[17] It was also required that an order granted should relate to disclosure and production of documents which are directly relevant to the issues in the proceedings.

35. When the original English provision was enacted, the English Court of Appeal in *Dunning v United Liverpool Hospitals' Board of Governors* [1973] 1 WLR 586 had to consider what was meant by the phrase "likely to be made". Whilst this phrase has been removed from the current English provision, it remains in the Hong Kong provision and the decision in *Dunning* is of relevance. Lord Denning MR in his analysis of the provision said: *"...I think that we should construe "likely to be made" as meaning "may" or "may well be made" dependent on the outcome of the discovery. One of the objects of the section is to enable a plaintiff to find out – before he starts proceedings – whether he has good cause of action or not. This object would be defeated if he had to show – in advance – that he had already got a good cause of action before he saw the*

[16] See English Civil Procedure Rules, rule 31.16.
[17] Subsection (1) was amended and subsection (2) added by s 14 of the Civil Justice (Miscellaneous Amendments) Ordinance (3 of 2008), commencing 2 April 2009.

documents."[18] James LJ thought that a claim was "likely" if there was a "reasonable prospect" of one and he stressed that: *"In order to take advantage of the section the applicant for relief must disclose the nature of the claim he intends to make and show not only the intention of making it but also that there is reasonable basis for making it. Ill-founded, irresponsible and speculative allegations or allegations based merely on hope would not provide a reasonable basis for an intended claim in subsequent proceedings."* Even though, Stamp LJ dissented, he did on factual grounds, and he added that "hope or suspicion" is not enough to support an application under this provision.

36. The origins of the English equivalent provision of s 41 were considered by Rix LJ in *Black and Ors v Sumitomo Corpn and Ors* [2002] 1 WLR 1562 and he examined the construction of the phrase "likely to be made". He noted the construction given by Lord Denning MR in *Dunning's* case who thought that "likely to be made" merely meant "may" or "may well be" dependent on the outcome of the disclosure and compared it to the construction given by Stuart-Smith LJ (with the approval of the other members of the court) in *Burns v Shuttlehurst Ltd* [1999] 1 WLR 1449 who held that in deciding whether a claim was "likely to be made", the question is whether there is "a worthwhile action or a reasonable basis for the intended action". Rix LJ agreed with the interpretation given by Lord Denning MR and disagreed with the one given by Stuart-Smith LJ. Rix LJ in his judgment placed emphasis on the distinction between the jurisdictional thresholds that had to be satisfied and a statement of principle as to the exercise of the court's discretion. He considered Lord Denning MR's interpretation to be the correct

[18] At 590 E-F.

jurisdictional test whereas he considered Stuart-Smith LJ's interpretation to be a statement of principle as to the exercise of the court's discretion. These comments were made in the context of an analysis on the English authorities on the unamended s 32(2) of the Supreme Court Act 1981.

37. I think it is important, for the purpose of this analysis, to focus more on the requirements of the provision, in particular on the need to show that a claim may well be made. I agree with the decision in *Dunning* that the word "likely" in the phrase "likely to be made" meant "may" or "may well" or "reasonable prospect" if disclosure was granted. The level and extent to which an applicant needs to satisfy the court that a claim is likely to be made is a vexed issue. The whole purpose of the provision is for an applicant to have another party disclose and produce documents in order to ascertain the nature and ambit of any claim he may have against such party. It is therefore a means by which a plaintiff can access documents in order to assist him in mounting a potentially meritorious claim. However, to borrow the words of James LJ in *Dunning's* case, there must be a reasonable basis for an intended claim in subsequent proceedings and ill founded, irresponsible and speculative allegations or allegations based merely on hope will not suffice. This brings us to the question as to what an applicant needs to provide to satisfy this requirement. Under O 24 r 7A an affidavit in support of an application must, amongst other things, specify or describe the documents in respect of which the order is sought, and show "if practicable by reference to any pleading served or intended to be served in the proceedings, that the documents are relevant to an issue arising or likely to arise in the proceedings".[19] An applicant, therefore, is expected to have some understanding of and justification for the case he

[19] O 24 r 7A(3) (b), RHC.

has against a potential defendant when applying for pre-action disclosure, and this needs to be sufficiently particularized to avoid any unwarranted or fishing applications. The burden of persuasion rests with the applicant to show the nature of the claim that he intends to make, that he and the potential defendant are likely to be parties to the claim and that the potential defendant is likely to have documents that are directly relevant to issues in the claim. This will depend on the clarity and particularization of the issues submitted by the applicant that are likely to arise out of the claim that may be made.

38. Accordingly, an applicant should set out the nature of the claim he intends to make and show not only the intention of making it but also that there is a reasonable basis for making it, and specify the document or class of documents for which pre-action disclosure is sought and as much as practicable detail the grounds and facts relied on in the supporting evidence.

39. In *Black's* case Rix LJ had to deal with an application for pre-action disclosure in a case based on various allegations including fraud. On this issue he observed that:

> "At a general level, there are clearly concerns that allegations of dishonesty are not lightly made, that a defendant to an allegation of dishonesty knows plainly what it is that is alleged against him, and also that dishonesty does not spread its cloak over the means by which it can be detected and revealed. It is not plain how these concerns are to be reconciled in any particular case in the context of pre-action disclosure, but it would seem to me that a court which is asked to grant such disclosure should be careful to pay proper regard to each of them. In any event it cannot be right that an allegation of fraud should assist the potential claimant to obtain pre-action disclosure, unless his allegations carry both

> some specificity and some conviction and his request for disclosure is appropriately focused."[20]

40. He went on to further explain that:

> "…, unless there is some real evidence of dishonesty or abuse which only early disclosure can properly reveal and which may, in the absence of such disclosure, escape the probing eye of the litigation process and thus possibly all detection, I think that the court should be slow to allow a merely prospective litigant to conduct a review of the documents of another party, replacing focused allegation by a roving inquisition." [21]

41. This highlights the problems that may arise for both a plaintiff and a potential defendant in an application for pre-action disclosure where the likely claim is based on fraud. To some extent, it also highlights why a court should pay particular regard to the nature of the claim in evaluating the application. In a case where allegations of fraud are being mounted, and there is a reasonable basis for such allegations, a court should bear in mind that the alleged dishonesty against the potential defendant is the principal issue of the claim and is a factor to be taken into account when considering the application and the documents or class of documents to be disclosed if the application is granted. In such a case, it would not be unsurprising that the task of a plaintiff in making good his claim would be fraught with difficulties which may not be overcome without pre-action disclosure. The nature of the claim likely to be made is a matter that needs appropriate regard when considering the requirements under this provision. I tend to think that in cases involving allegations of fraud, a degree of inquiry should be permitted to a prospective plaintiff where they show a reasonable basis for the allegations against the potential defendant.

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[20] At 1578H –1579 B.
[21] At 1588H-1589A.

42. As provided under s 41 an application must be made in accordance with the rules of court. The relevant rules are contained in O 24, r 7A and r 8(2) which I have set out in full at the commencement of my judgment. Under O 24 r 7A it is required that an application for pre-action disclosure be made by originating summons with an affidavit in support. The supporting affidavit must address the following requirements:

(1) state the grounds on which it is alleged that the applicant and the person against whom the order is sought are likely to be parties to subsequent proceedings in the Court of First Instance (r 7A(3)(a));

(2) in any case, specify or describe the documents in respect of which the order is sought and show, if practicable by reference to any pleading served or intended to be served in the proceedings, that:

(a) the documents are relevant to an issue arising or likely to arise in the proceedings; and

(b) the person against whom the order is sought is likely to have or have had them in his possession, custody or power. (r 7A(3)(b)).

('Relevant' means 'directly relevant' within the meaning of s 41 (r 7A(3A).)

43. The rules also impose additional limitations to the power to order pre-action disclosure:

(1) Under O 24, r 7A(6), no person shall be compelled by virtue a s 41 order to produce any documents which he could not be compelled to produce if the subsequent proceedings had already been begun.

(2) Under O 24, r 8(2), no order for the disclosure of documents shall be made under s 41 unless the court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.

44. To summarise, a court has power to make an order for pre-action disclosure where the following conditions are satisfied:

(a) The applicant appears likely to be a party to subsequent proceedings in the Court of First Instance in which a claim is likely to be made. In order to satisfy the requirement that a claim is likely to be made, the applicant must show a claim "may" or "may well" be made if discovery is granted. [22]

(b) The respondent appears likely to be a party to such proceedings.

(c) The respondent appears likely to have or have had documents in his possession which are directly relevant to an issue arising or likely to arise out of such claim in that the documents would be likely to be relied on in evidence by any party in such proceedings or support or adversely affect any party's case.

(d) No order shall be made unless the court is of the opinion that it is necessary either for disposing fairly of the cause or matter or for saving costs.[23]

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[22] See *Dunning v United Liverpool Hospitals' Board of Governors* [1973] 1 WLR 586, 590E-F per Lord Denning MR; *Black v Sumitomo Corpn* [2002] 1 WLR 1562, paras 66-68 per Rix LJ.
[23] O 24 r 8(2), RHC.

The likely claim

45. With the principles as stated above in mind, it is necessary to stand back and look to see what is the likely claim and who are likely parties to it. The bank claims it has been the victim of a massive fraud. It is claimed that loans were obtained from the bank with the intention of never repaying them and that the assets of the borrowers were then siphoned off to nominees and associates of the fraudsters in order to defeat creditors.

46. The plaintiff may have a claim against the 1st and 2nd defendants if it can be shown that they received monies from the Faeton entities in circumstances where it appears there was no underlying commercial transaction and the object was to defeat the creditors of the Faeton entities. It is argued that the 1st and 2nd defendants are likely to have or have had documents relating to their dealings and association with the Faeton entities which would be directly relevant to an issue or likely issue in a claim of fraud.

47. Under the originating summons, the plaintiff seeks discovery of (a) statutory records, (b) minutes of all general meetings and directors meetings, (c) books of accounts, (d) all contractual documents and correspondence in relation to any transactions between the defendants and any of their subsidiaries, holding companies or any other companies within their group of companies or any shareholders or directors of those companies, and (e) all loan documentation of the defendants for the period from 2007 to 2013.

48. The plaintiff submits that the documents sought are all restricted to the period from 2007 to 2013 when the loan agreements were

entered into. That is not entirely correct. The loan agreements were entered into from 2007 to 2009 and soon thereafter the borrowers began to default. It appears that this period has been selected by the plaintiff to cover the occasions when the loan advances were made and the subsequent dealings of the Faeton entities. From an examination of the description of the documents sought, it is clear that they are general and broad. This immediately raises concern that the documents requested are too wide and lack appropriate specificity as required by the rule.

49. The plaintiff submits that it satisfies the requirements of the rule. The first requirement is that the plaintiff may well bring an action against the defendants if the documents are disclosed. The first observation I make is that the documents sought to be disclosed are fairly general and do not relate specifically to commercial or financial dealings or transactions. The plaintiff argues that if the documents show that the defendants received monies from the Faeton entities during the period from 2007 to 2013, it may well bring an action to set aside the transfer of the funds. But this is based on the assumption that there has been a transfer of funds with no genuine commercial transaction underlying it. Whilst the plaintiff points to a number of causes of action relating to the recovery of fraudulently obtained monies, it must be specifically shown that there has been or likely to have been dealings between the Faeton entities and the defendants during the relevant time, involving the transfer of funds, to have at least the basis of a claim. This may be evidenced by the interrelationship between them through cross-ownership or past dealings. The plaintiff's submissions place considerable emphasis on the loans having been fraudulently obtained by Faeton entities and that assets having been deliberately siphoned off, but the question is whether sufficient

information or material has been provided to show dealings or a connection between the defendants and the Faeton entities that would have resulted in the defendants having received funds or assets from Faeton entities in order to cheat their creditors.

Application against the 1st defendant

50. In the case of the 1st defendant, I am not satisfied that VTB Bank may well bring an action against the 1st defendant if the documents sought are disclosed. The plaintiff's application relies solely on the fact that the 1st defendant owns 99% of FTS No 1 which it acquired on 10 June 2010, after the default of the loans. That is simply not enough. There must be a likelihood of proceedings and that the 1st defendant is likely to be a party to such proceedings. As required, the plaintiff should not only set out the nature of the claim it intends to make and show an intention to make it, but also that there is a reasonable basis for doing so. An application relying on hope or speculation will not suffice. I agree with the observation of Rix LJ in *Black's* case where he said: *"... the more focused the complaint and the more limited the disclosure sought in that connection, the easier it is for the court to exercise its discretion in favour of pre-action disclosure, even where the complaint might seem somewhat speculative or the request might be argued to constitute a mere fishing exercise. In appropriate circumstances, where the jurisdictional thresholds have been crossed, the court might be entitled to take the view that transparency was what the interests of justice and proportionality most required. The more diffuse the allegations, however, and the wider the disclosure sought, the more sceptical the court is entitled to be about the merit of the exercise."* [24]

[24] At 1590C-E.

51. The next requirement is that the defendants are likely to have or have had the documents sought. As already noted the documents sought are general and broad even though they are the type of documents a company would be expected to have in its possession. Again the plaintiff's submission relies on an assumption that there had been dealings between the Faeton entities and the defendants. The plaintiff has expressed incredulity in relation to the statements made by the attorney of the 1st defendant in his affirmation. I can understand the plaintiff's reaction and find it extraordinary that the 1st defendant which owns a corporate entity in Russia has no bank accounts and has never transacted or had any dealings. It is also stated on behalf of the 1st defendant that it does not have, nor has had, any documents whatsoever which are related to or concerned with the Faeton entities. The plaintiff submits that the contents of the affirmation are unbelievable and should not be treated as conclusive. Whilst there are good grounds to doubt the contents of the affirmation, the suspicion it elicits is not enough at this stage to satisfy the conditions that must be met.

52. I am not convinced that if the documents sought were disclosed that VTB Bank may well bring an action against the 1st defendant. The documents sought are general and broad, and the basis of the claim lacks specificity and substance. The plaintiff relies on the fact that the 1st defendant owns FTS No1 which owns two companies that were previously connected to failed Faeton companies. Two points are made by the 1st defendant in response. The first point is that the 1st defendant owned FTS No1 since its incorporation on 10 June 2010. This was after the Faeton Group entities had defaulted on their loans and gone into liquidation. In other words, the 1st defendant submits that there is no

connection with individuals or entities of the Faeton Group during the period it defaulted under the loans with VTB Bank. The second point is that the 1st defendant has not engaged in any commercial or financial transaction and in particular with Faeton Group entities. Mr Mikhailovich in his affirmation states: *"…Top Fuel does not have, and has not had, in its possession, power or custody any documents whatsoever which are howsoever related to or concerned with, any assets whatsoever of the Faeton Entities and/or the Plaintiff. Besides, Top Fuel does not have, and has not had, in its possession, power or custody any documents whatsoever which are howsoever related to or concerned with, any transaction whatsoever between Top Fuel and the Faeton Entities."*[25]

53. It is not clear whether any action has been instituted by VTB Bank against FTS No1 in Russia in relation to the claim it has suggested it will make against the 1st defendant here in Hong Kong. It seems to me that the plaintiff has initiated this application, not for the purpose of making a claim against the 1st defendant but for the purpose of finding out if there were any dealings between Faeton Group entities and the 1st defendant which involved the transfer of funds in circumstances where there was no supporting commercial transaction.

54. I am not unsympathetic to the plaintiff, and whilst there is an element of suspicion in the information and material submitted of possible dealings between Faeton entities and the 1st defendant, it falls short at this stage of satisfying the conditions under s 41.

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[25] Affirmation of Mr Pushkin Nikolay Mikhailovich, para 10.

Application against the 2nd defendant

55. The 2nd defendant owns one of the entities of the Faeton Group that took out loans with the VTB Bank. That entity Faeton Set Nomer 1 was an active petroleum chemicals company operated by Faeton-Aero until it was transferred to the 2nd defendant in about May or June 2009.[26] Faeton Set Nomer 1 had a very substantial share capital and there would be documentary records evidencing the transfer of ownership to the 2nd defendant. The 2nd defendant occupies substantial office premises in Hong Kong where it appears to be operating and conducting business. It has not resisted this application even though it was initially legally represented in the proceedings.

56. Given that the 2nd defendant owns Faeton Set Nomer 1 which was one of the entities that defaulted in its loans with the VTB Bank and that the 2nd defendant is incurring expenses and conducting business in Hong Kong, I am satisfied that a claim may well be made by the VTB Bank against the 2nd defendant on the grounds of fraud and conspiracy in relation to the loans to Faeton Set Nomer 1 and the non payment of them to the bank and the receipt of monies or property from Faeton Set Nomer 1 to it in order to defeat any claim by creditors of Faeton Set Nomer 1. There is clearly a close connection between the two. The 2nd defendant owned Faeton Set Nomer 1 during the time that it took out the loans with VTB Bank and defaulted under them. There is a high likelihood there would have been transactions between them during this relevant time. It appears that the 2nd defendant is a company of reasonable financial standing and that it may have derived funds or profit from its ownership of Faeton Set

[26] B2/28/553.

Nomer 1. I am also satisfied that the 2nd defendant may have or have had in its possession documents which are directly relevant to any issue arising or likely to arise out of a claim by the plaintiff. It seems to me therefore that the disclosure of documents is necessary in order to dispose fairly of any subsequent proceedings between the parties. There is one qualification to my decision. I am of the view that the documents sought are too general and broad. They need to be more specific and tailored to the terms and scope of the likely claim by the plaintiff.

Conclusion

57. For the foregoing reasons, I refuse the plaintiff's application against the 1st defendant and make an order *nisi* that the plaintiff pay the 1st defendant costs, to be taxed if not agreed, and I grant the plaintiff's application against the 2nd defendant but I wish to be addressed on the terms and scope of the order as currently framed. I make no order as to costs. I should explain that normally in an application for pre-action disclosure costs will be awarded to the person against whom the order is made.[27]

(Kevin Zervos)
Judge of the Court of First Instance
High Court

Mr Julian Lam, instructed by Stephenson Harwood, for the plaintiff

Mr Lawrence L K Ngai, instructed by C T Chan & Co, for the 1st defendant

The 2nd defendant was not represented and did not appear

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[27] See s 42(2), O 62 r 3(12), RHC and also O24 r 7A (5).

HIGHER RIGHTS OF AUDIENCE ASSESSMENT

IN RESPECT OF CIVIL PROCEEDINGS

THE PRACTICAL ASSESSMENT

Candidate Instructions for the Mini-Trial

These instructions ask you to make certain assumptions about the witnesses who will appear at trial. Please note that, for the mini trial conducted at the assessment, only 1 witness for each party will actually be physically present for examination purposes.

NOTE: Please ignore ALL of the facts and information contained in the Instructions for the Interim Application for the purposes of the Mini-Trial.

The following background facts are undisputed:

1. Morgan International Bank Limited (the "**Bank**"), the Plaintiff, has instituted a High Court action in the Court of First Instance, Hong Kong, on 20 February 2018 under action number HCMP 188 of 2018.

2. By order of the Court, the matter has been converted into a writ action and pleadings were also ordered.

3. The 1st to 3rd Defendants in the action are, respectively, Mr. Lau Chi-Chung ("**D1**"), Madam Hong Sum-Yee ("**D2**") and Brilliant Win Limited ("**D3**"). D1 is the son of the D2. D1 is also the sole director and shareholder of D3, a private company incorporated under the laws of Hong Kong.

4. The Bank commenced this action against D1 to D3 for, *inter alia*, payment of all money due and owing by Ds to the Bank under a mortgage (the "**Mortgage**") dated 9 November 2012 made between D1 and D2 as mortgagors, D3 as the borrower and the Bank as the mortgagee bank.

5. Under the Mortgage, D1 and D2 mortgaged their property situate at Unit 12B, Oak Tree Mansion, 28 Taikoo Wan Road, Taikoo Shing, Quarry Bay, Hong Kong (the "**Property**") to the Bank to secure the repayment of all moneys repayable by D3 to the Bank.

6. The Bank's case is that D3 had defaulted in repayment of a mortgage instalment to the Bank and in light of D3's default, the Bank now seeks delivery of vacant possession of the Property.

7. The main defences of D2 are that she entered into the Mortgage under the undue influence of her son (D1), and that when signing the Mortgage, D2 claims that there was misrepresentation on the part of the Bank and the handling solicitor who had never explained to her the risks of entering into those documents and that she might lose her home i.e. the Property upon default of payment by D3.

8. In the Statement of Claim for the Bank, the Bank relied upon and pleaded the following terms of the Mortgage and the Facility Letters (as defined below).

   (1) By the Mortgage entered between P and Ds, D1 and D2 mortgaged their Property (held as joint-tenants) to secure repayment of all moneys payable by D3 to P in respect of the general banking facilities granted by P to D3;

   (2) The Mortgage stipulated that D1, D2 and D3 jointly and severally covenanted with P that on demand by P, D1 to D3 shall be liable for all sums due under the Mortgage by D3 to P and in default of payment under the Mortgage, P shall enter into possession of the Property;

   (3) By a facility letter dated 9 November 2012 ("**1st Facility Letter**"), P granted to D3 a revolving loan facility of HK$8,000,000;

   (4) By a facility letter dated 1 December 2015 ("**2nd Facility Letter**"), P further granted an overdraft facility of HK$4,000,000 to D3;

   (5) By demand letters dated 29 January 2018 to D1 to D3, P's solicitors demanded repayment of the then outstanding amount due and owing by Ds to P;

   (6) Despite the said demands, D1 to D3 have failed to settle the outstanding amount due or any part thereof;

   (7) As at the date of the Writ, the amount due under the Mortgage is HK$7,720,454.

9. According to the D2's Defence and Counterclaim, it is clear that she does not dispute or challenge the terms of the Mortgage or the Facility Letters. Neither does she dispute the calculation of the remaining amount due and/or computation of interest etc.

10. The only factual disputes between P and D2 are limited to the factual circumstances under which the Mortgage was executed.

11. D2's case is that she "was mispresented and unduly influenced by her son D1 when she executed the Mortgage". D2 therefore wants to set aside the Mortgage.

12. In brief, D2 alleges that:

    (1) When the Bank Manager Melvin Wong produced to her the Mortgage, she did not fully understand Mr. Wong's explanations. The process took no more than 5 to 10 minutes.

    (2) She signed the Mortgage because her son i.e. D1 asked her to sign them.

    (3) She "is close" to D1 and she placed her trust in D1 for all of her financial affairs because D1 was her only son and that D1 has a wealth of experience in financial matters and is presently a vice-president in an international bank in Hong Kong.

    (4) She was only educated to Form 5 and has been a full-time homemaker since married; she has no experience in any of these financial matters and/or investment products of the Bank.

    (5) D2 said she was reluctant and felt pressured when she signed the Mortgage because it was in English and she "did not understand it". She relied on her son and believed in him.

    (6) Prior to and at the time of the signing of the Mortgage, D2 said she did not receive any legal advice on her legal position, nor did Mr. Wong advise her to seek independent legal advice.

    (7) After signing the Mortgage, D2 complained that she did not even receive a copy of it.

13. In Reply, the above allegations of D2 are denied by the Bank. The Bank in particular contends that it had instructed a solicitor, Mr. Cyrus Yung of Messrs. Leung & Lee to advise D2.

For the purpose of the exercise, please assume that:

1. The only documents disclosed by the parties are the Mortgage, the Facility Letters, and the Bank's General Banking Facility Operation Procedure (version 1) issued in 2011.

2. All the material terms of the Mortgage and the Facility Letters have been described in the background facts above.

3. The only material part of the Bank's General Banking Facility Operation Procedure (version 1) provides that for all transactions involving a mortgage executed by a surety, the bank manager must ensure that a solicitor and the surety sign the following documents: the Warning Notice; the Third Party's Acknowledgment and Security Provider Acknowledgment.

4. You also have a copy of the Law Society of Hong Kong on Solicitors' Duties in relation to Security Transactions with Potentially Unduly Influenced Party dated 19 May 2003 (attached).

5. The case is being defended by D2. D1 has admitted liability but he is giving evidence on behalf of D2. D3 has also admitted liability.

6. There is no dispute that the terms of the Mortgage mean that it covers all loans made under both the 1st and 2nd Facility Letters.

7. The only defences raised by D2 are those mentioned in the background facts above.

8. It is not disputed that the Bank was put on inquiry.

9. The original executed version of Madam Hong's witness statement was written in Chinese, but it has been translated for the purpose of the trial. She will give her evidence through a translator.

10. The agreed factual issues are whether:

    (1) D1 unduly influenced D2.

    (2) The Bank took reasonable steps to ensure that D2 had voluntarily entered into the Mortgage with knowledge of legal consequences.

Witnesses

The witnesses for the Plaintiff and the 2nd Defendant are described below.

You will be informed which two witnesses (one witness for the plaintiff and one witness for the defendant) will appear at the mini trial on the day of assessment itself when you arrive and register.

Plaintiff's witnesses

The following witnesses will appear at trial to give oral evidence on behalf of the Plaintiff:

1. Mr Melvin Wong

2. Mr Cyrus Yung

You can assume:

i. the witnesses will give evidence at trial in the order listed above

ii. the witnesses who will not appear 'live' at the mini trial have given/ will give evidence in the terms of their statements and that nothing additional or contrary came out/will come out during cross-examination.

2nd Defendant's witnesses

The following witnesses will appear at trial to give oral evidence on behalf of the 2nd Defendant:

1. Madam Hong Sum-Yee

2. Mr. Lau Chi-Chung

You can assume:

i. the witnesses will give evidence at trial in the order listed above

ii. the witnesses who will not appear 'live' at the mini trial have given/ will give evidence in the terms of their statements and that nothing additional or contrary came out/will come out during cross-examination.

DURING the Mini-Trial

You will be required to:

- Make an opening speech (max 5 minutes).
- Examine in chief (max 10 minutes) the witness who will give 'live' oral evidence at trial on behalf of your client. You should conduct a full examination-in-chief of the witness on the basis that their statement does not stand as evidence in chief.
- Cross-examine (max 15 minutes) the opponent's witness who is attending at trial to give 'live' oral evidence. Please note that the opponent's witness may be un-cooperative at times. The witness' statement does not stand as evidence in chief.
- Deal with any interventions made by the advocate representing the opposing party.
- Make any interventions, as you think appropriate, to the questioning of witnesses by the advocate representing the opposing party.
- Deal with any Judicial interventions/questions as and when they arise.

THE LAW SOCIETY OF HONG KONG
香 港 律 師 會

Index Reference:
Property

CIRCULAR 03-160 (PA) **19 May 2003**

PROPERTY
LAW SOCIETY GUIDANCE NOTE
Solicitors' Duties in Relation to Security Transactions with Potentially Unduly Influenced Party
Revised 19 May 2003

1. Members were advised on 24 March 2003 that the Property Committee, with the assistance of Leading Counsel, has prepared a set of Guidelines to assist members to fulfil their professional obligations in the conduct of *"3-party"* security transactions, which are susceptible to claims of *"undue influence"*.
2. Whilst these Guidelines are not meant to be exhaustive, members should familiarize themselves with the same as well as all relevant judgments and should also carefully consider their position when conducting such transactions in order to prevent exposure to claims and an adverse impact on the Professional Indemnity Scheme.
3. Members' attention has been particularly drawn to the requirements below which are highlighted in response to the criticism by the House of Lords in *Royal Bank of Scotland v. Etridge (No.2) [2001] 3 WLR 1021* that the potentially unduly influenced parties have not been given sufficient time to consider their legal representation arrangements before executing the documents:
    a. **when only acting for the lender, a solicitor should not proceed with the signing of the documents unless he has either received a warning notice from the lender containing terms similar to the one attached as Appendix B to the Guidelines or has arranged for one to be signed (see paragraphs 19 and 20 of the Guidelines).**
    b. **when acting for both the lender and the potentially unduly influenced party, a solicitor should only proceed with execution of the documents if he has received a warning notice containing terms similar to the one attached to the Guidelines as Appendix C or has arranged for one to be signed at least one working day before execution of the documents (see paragraphs 25 and 26 of the Guidelines).**
4. The Society considers that the best practice is for the lenders to arrange for these warning notices to be signed and has liaised with the Hong Kong Association of Banks ("HKAB") in this regard. The HKAB has revised the Circular to its members and re-issued the same on 28 April 2003, which is now in Appendix A.
5.

Given HKAB's revision of its Circular, the definition of *"HKAB"s Circular"* in the Guidelines has been amended to refer to the revised Circular. Save for this amendment, the Guidelines and the Appendices remain the same.

6. Circular 03-144(PA) is superseded.

Please click the following links for the relevant documents:-

The Guidelines

Appendix A –	**A Circular issued by the Hong Kong Association of Bank dated 28 April 2003.**
Appendix B –	Warning Notice where acting for the lenders only [**English version**] [**Chinese version**]
Appendix C –	Warning Notice where acting for the lenders and the surety [**English version**] [**Chinese version**]
Appendix D –	Written Confirmation Letter [**English version**] [**Chinese version**]

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GUIDELINES ON SOLICITORS' DUTIES IN RELATION TO SECURITY TRANSACTIONS WITH POTENTIALLY UNDULY INFLUENCED PARTY

A. PURPOSE AND SCOPE

1. The Law Society has prepared these Guidelines to assist members to fulfil their professional obligations in the conduct of **3-party security transactions**, i.e. transactions between lenders, borrowers and sureties. These transactions are susceptible to claims of "undue influence" resulting in the subsequent failure of the security.
2. These Guidelines do **not** deal with 2-party loan transactions between lenders and borrowers.
3. These Guidelines are **not** meant to be **exhaustive**. There may be additional requirements and each transaction should be considered on its own facts. Members are reminded to familiarise themselves with all relevant judgments, including *O'Brien*, *Pitt*, *Etridge* and *Fung Chin Kan*.
4. Members should carefully consider their position when conducting such transactions in order to prevent exposure to claims and an adverse impact on the Professional Indemnity Scheme.
5. These Guidelines supercede Circular 01-290 (PA) dated 22 October 2001.

B. ABBREVIATIONS

6. In these Guidelines, unless the context otherwise requires, words and expressions importing the masculine gender include the feminine gender, and:

"borrower"	includes a debtor or a principal debtor,
"*Etridge*"	means the House of Lords decision in *Royal Bank of Scotland v. Etridge (No. 2)* [2001] 3 WLR 1021,
"*Fung Chin Kan*"	means the Court of Final Appeal decision in *Bank of China (Hong Kong) Ltd v Fung Chin Kan and another*, [2003] 1 HKLRD 181,
"HKAB"	means The Hong Kong Association of Banks,
"HKAB's circular"	means HKAB's circular dated 28 April 2003,
"member"	means a member of the Law Society, and, where appropriate, includes his clerks,
"*O'Brien*"	means the House of Lords decision in *Barclays Bank plc v O'Brien* [1994] 1 AC 180,
"*Pitt*"	means the House of Lords decision in *CIBC Mortgages plc v Pitt* [1994] 1 AC 200,
"surety"	includes a third party surety, a guarantor, a co-guarantor, a mortgagor and a person who assumes liability as a borrower under the loan documentation,
"the Guide"	means The Hong Kong Solicitors' Guide to Professional Conduct, Volume 1,

"undue influence" includes misrepresentation or other legal wrong.

C. THE LAW ON UNDUE INFLUENCE

7. Members will recall that the House of Lords held that whether a transaction was brought about by the exercise of undue influence is a question of fact. The general rule is that the burden of proving an allegation of undue influence rests upon the person who claims to have been wronged. Proof that the complainant placed trust and confidence in the other party in relation to the management of the complainant's financial affairs, coupled with a transaction which calls for explanation, will normally be sufficient, failing satisfactory evidence to the contrary, to discharge the burden of proof. On proof of these two matters there is a rebuttable evidential presumption of undue influence (*Etridge* at paragraphs 13 – 16).

8. In every case where the relationship between the surety and the borrower is non-commercial:

- the surety obligation will be valid and enforceable by the lender unless the suretyship was procured by the undue influence of the borrower;
- if there has been undue influence by the borrower, unless the lender has taken reasonable steps to satisfy himself that the surety entered into the obligation freely and in knowledge of the true facts, the lender will be unable to enforce the surety obligation because the lender will be fixed with constructive notice of the surety's right to set aside the transaction. (*Etridge* at paragraph 87. See <u>also</u> *Pitt*, *O'Brien* at p. 198, *Etridge* at paragraphs 47 – 49; and *Fung Chin Kan* at paragraphs 42, 60 & 61.)

D. IDENTIFY THE CLIENT AND SCOPE OF THE RETAINER

9. In 3-party security transactions, the client can be one or more of the following parties:

   - the lender,
   - the borrower,
   - the surety.

10. Members should ascertain the identity of their client or clients and the precise scope of their retainer in respect of each client.

11. This is an important step in trying to avoid any misunderstanding or complications in enforcement by the lender. It is apparent from recent judgments that someone has to discharge the obligation to bring home to the surety the risks of the transaction and to ensure that his agreement to stand surety has been properly obtained. Where instructions are given by a lender to a solicitor, the solicitor should make sure that there is no misunderstanding between the solicitor and the lender on who is to discharge the obligation.

12. The instructions provided by many banking/financial institutions are unclear on the legal representation arrangements. Some banks may instruct solicitors to do a combination of the following instructions: either act "*exclusively*" for them, whilst also requiring solicitors to explain the documentation, and/or provide legal advice to the other parties.

13. HKAB has been asked by the Law Society and has issued HKAB's circular (Appendix A) to urge HKAB members to clarify the scope of the instructions to solicitors. In case of doubt on the scope of a solicitor's retainer in relation to 3-party security transactions, the

solicitor should clarify his instructions with the banks before agreeing to act.

E. WHETHER TO ACCEPT INSTRUCTIONS

14. Generally speaking, a solicitor should follow his client's instructions, provided that by doing so, he will not be involved in unlawful activity or be in breach of the principles of professional conduct.

15. In deciding whether to accept instructions to act also for the surety or for more than one party, members should have regard to, inter alia, the following provisions in *the Guide*:

- a solicitor **must not** accept instructions to act for two or more clients where there is a conflict, or a significant risk of conflict between the interests of those clients (Chapter 9, in particular Principle 9.01);
- a solicitor **must not** accept instructions where he suspects that those instructions have been given by a client under duress or undue influence (Principle 5.04);
- where instructions are received not from a client but from a third party purporting to represent that client, a solicitor should obtain written instructions from the client that he wishes the solicitor to act. In any case of doubt, the solicitor should see the client or take other appropriate steps to confirm instructions (Principle 5.06).

16. Members should take note that avoiding conflicts of interest is a fundamental requirement for all solicitors. Given the potentially vulnerable position of a surety, the solicitor will have to consider carefully whether he can and should accept instructions from the lender to act for the surety or whether he can or should act for both borrower

and surety. In every case the solicitor must consider carefully whether there is any conflict of duty or interest and, more widely, whether it would be in the best interests of the surety for him to accept instructions to act for the surety.

17. Only if the solicitor is satisfied that there is no conflict of interest, or where he can resolve the conflict of interest should he proceed to act for the surety. If the solicitor is not satisfied, he **must** decline to act.

18. If the solicitor decides to accept instructions, he assumes legal and professional responsibilities to the surety and ought to give the requisite advice fully, carefully and conscientiously. If at any stage the solicitor becomes concerned that there is a real risk that other interests or duties may inhibit his advice to the surety he **must cease** to act for the surety (*Etridge* at paragraph 74).

F. ACTING FOR THE LENDER ONLY

19. Where a solicitor receives specific instructions to act only for the lender but is instructed to explain the character and legal effect of a document, the solicitor should:

- satisfy himself that the instructions from the lender were given on the basis of Case 3 in HKAB's circular, i.e. the lender will give information and advice to the potentially unduly influenced party;
- satisfy himself that the lender knows that the solicitor will **not** concern himself at all with the interests of the surety or whether the surety is accepting the obligations freely and with knowledge of the true facts;
- not proceed with the signing of the documents unless either the solicitor has received a Warning Notice from the lender similar to the sample attached to these Guidelines as Appendix B duly

signed by the parties to the security documents or has arranged for a Warning Notice to be signed; and

- if it has become apparent to the solicitor that neither the lender nor the solicitor will be giving the requisite information and advice to the potentially unduly influenced party, warn the lender that the security may be set aside in future.

20. One purpose of this Warning Notice is to obtain the surety's acknowledgment in writing that he knows that the solicitor acts for the lender, not the surety. This Warning Notice is **no** substitute for the requisite personal interview by the lender with the surety, in the absence of the borrower, warning the surety of the amount of his potential liability and of the risks involved and advising him to take independent legal advice (*O'Brien* at p. 199).

G. ACTING FOR THE LENDER AND THE SURETY

21. Where the lender instructs the solicitor to also act for the surety, the solicitor must first be satisfied that he may properly so act under Section E above on "Whether to accept instructions".

22. In deciding whether to accept instructions, the solicitor must bear in mind that the lender is likely to have a much better picture of the borrower's financial affairs than the solicitor and consider whether to invite the lender to proceed on the basis of Case 3, instead of Case 2, in HKAB's circular.

23. If the solicitor decides to accept instructions, the solicitor should then ascertain whether the lender intends to rely on the solicitor's role in acting for the surety.

24. If the lender intends to rely on the solicitor's role in acting for the surety, the solicitor's role in acting for the lender must be essentially

administrative, e.g. seeing to the security document being validly executed, and, if necessary, seeing to its registration, and obtaining documents of title and holding them to the lender's order (*Etridge* at paragraphs 167 and173).

25. Where a solicitor receives instructions from the lender to act for the surety, the solicitor should:

- ensure that a Warning Notice containing terms similar to the one attached to this Guidelines as Appendix C has been signed by the surety at least one working day prior to the date of execution of documents (see paragraph 26 below);
- obtain confirmation from the surety that he wishes the solicitor to act for him (see paragraph 27 below);
- obtain financial information from the lender (see paragraphs 28 – 31 below);
- advise the surety in a face-to-face meeting in the absence of the borrower (see paragraphs 32 – 36 below);
- make and keep a sufficiently comprehensive and contemporaneous note of the face-to-face meeting (see paragraph 37 below);
- obtain signed written confirmation by the surety on the detailed advice given (see paragraph 38 below);
- where authorised by the surety, give written confirmation to the lender (see paragraphs 39 – 41 below).

Warning Notice

26. The solicitor should ensure that a Warning Notice containing terms similar to the one attached to these Guidelines as Appendix C be received by the solicitor from the lender at least one working day prior to the execution of the documents or arrange for a Warning Notice to be

signed at least one working day before execution of the documents. If the solicitor receives no Warning Notice from the lender or where the lender requires the solicitor to arrange for the same to be signed by the surety at the solicitor's office, the surety must be given at least one working day after the signing of the Warning Notice at the solicitor's office to consider the matter, including whether to instruct his own solicitor, before the face-to-face meeting. In case of doubt, the solicitor should insist on the surety seeking separate representation, notwithstanding the lender's instructions.

Obtaining the surety's instructions

27. In addition to obtaining a Warning Notice, the solicitor must explain and confirm his instructions from the surety, by explaining to the surety the purpose for which he has become involved at all and that, should it ever become necessary, the lender will rely upon his involvement to counter any suggestion that the surety was influenced by the borrower or that the surety did not properly understand the implications of the transaction. The solicitor must obtain confirmation from the surety that the surety wishes him to act for the surety in the matter and to advise the surety on the legal and practical implications of the proposed transaction (*Etridge* at paragraph 64).

Obtaining financial information from the lender

28. The lender must provide the solicitor with the financial information he needs for this purpose. What is required must depend on the facts of the case. Ordinarily this will include:

- the purpose of the proposed new facility,
- the current amount of the borrower's indebtedness,
- the amount of the borrower's current overdraft facility,
- the amount and terms of any new facility,

- a copy of the written application (if any) by the borrower for a facility,
- any belief or suspicion that the surety has been misled by the borrower or is not entering into the transaction of his own free will (*Etridge* at paragraph 79).
- the market value of any mortgaged property.

29. The solicitor **must** be satisfied that he has the expertise to interpret or advise on the detailed financial information to the surety.

30. If the lender fails for any reason to provide information requested by the solicitor, the solicitor **must decline** to provide the confirmation sought by the lender (*Etridge* at paragraph 67).

31. If the borrower is an existing client of the firm, or where the solicitor has financial information by virtue of the other transactions that he may have previously acted for the borrower, the solicitor may not disclose such information without the borrower's authority. If there is a real risk of any conflict of interest, the solicitor **must cease** to act for the surety.

Advising in a face-to-face meeting

32. In advising the surety, the solicitor assumes responsibilities directly to the surety, both at law and professionally, is acting for the surety **alone** and is concerned **only** with his interests, and should give the requisite advice fully, carefully and conscientiously (*Etridge* at paragraph 74).

33. The advice which a solicitor is expected to give depends on the particular facts of each transaction including the solicitor's retainer.

34. The solicitor's discussion with the surety should take place at a face-to-face meeting, in the absence of the borrower, couched in suitably non-technical language (*Etridge* at paragraph 66).

35. Members should take note of the following "*core minimum*" advice that should be given, as outlined by Lord Nicholls in paragraphs 64 and 65 of his judgment in *Etridge*:

(a) **explain the nature of the document and practical consequence of signing**, i.e. the risk that the surety will lose the home and even the possibility that the surety could be made bankrupt;

(b) **point out the seriousness of the risk involved** by reference to:

- the purpose, amount and principal terms of the new facility;
- the fact that the lender may increase the amount of the facility, or change its terms, or grant a new facility, without reference to the surety;
- the amount of the surety's liability under the security transaction;
- by discussing the surety's financial means including his understanding of the value of the security being provided;
- by discussing whether there are any other assets out of which repayment could be made if the borrower's business should fail;

(c) **state clearly to the surety that the surety has a choice and the decision is** his **and** his **alone as to whether or not to proceed with the transactions**. This would involve some discussion of the present financial position, including the amount of the borrower's indebtedness, and the amount of the borrower's current facility;

(d) **ascertain whether the surety wishes to proceed**. The solicitor should ask whether the surety is content for the solicitor to write to the lender confirming that the solicitor has explained the nature of the documents to the surety and the practical implications they may have for the surety, or whether, for instance, the surety

would prefer the solicitor to negotiate with the lender on the terms of the transaction which could include the sequence in which the various securities will be called upon or a specific or lower limit to his liabilities. Members are reminded that Lord Hobhouse questioned whether anyone who had a proper regard to the surety's interest would ask a surety to sign an unlimited guarantee or charge (*Etridge* at paragraph 112).

36. Members should also bear in mind the general requirements of the explanation in the normal case as stated in Lord Scott's speech (*Etridge* at paragraph 169) and any new case law development.

Proper attendance note

37. The solicitor must make and keep a sufficiently comprehensive and contemporaneous note of the face-to-face meeting so that if the need should arise, he may use the note to refresh his memory of the meeting and the advice which he in fact gave. Where the solicitor is satisfied that the signed written confirmation by the surety on the advice given is a sufficiently comprehensive and contemporaneous note of the face-to-face meeting, he may adopt it as his attendance note. Where the solicitor makes and keeps an attendance note, he must check the note with the signed written confirmation by the surety on the advice given for accuracy and consistency.

Signed written confirmation by the surety on the advice given

38. The solicitor should obtain written confirmation, in the appropriate language, signed by the surety on the detailed advice given. A sample written confirmation letter is attached to these Guidelines at Appendix D. The sample is not intended to be exhaustive and a solicitor is required to apply his professional judgment having regard to the facts and the

documentation in each case in preparing the written confirmation by the surety.

Written confirmation to the lender

39. The solicitor **must not** give any confirmation to the lender without the surety's authority.

40. The solicitor's confirmation to the lender will depend on the terms of his retainer but should generally include:

- the surety instructs him to advise on the transaction;
- he has fully explained the nature and effect of the documents and the practical implications they will have for the surety;
- he has also explained that the confirmation would have the effect that the surety should not be able to dispute the surety's binding obligation under the document; and
- he has authority from the surety to issue the confirmation to the lender.

41. A solicitor should not accept instructions to confirm to the lender that the solicitor has satisfied himself that the surety's consent has not been procured by undue influence (*Etridge* at paragraph 53).

H. ACTING ONLY FOR THE SURETY

42. As stated above, a solicitor must **not** accept instructions where he suspects the instructions have been given by a client under duress or undue influence (Principle 5.04 of the *Guide*).

43. Solicitors acting for the surety alone should follow the Guidelines under Section G above on "Acting for the Lender and the Surety" and will have to obtain the necessary financial information from the lender's solicitors rather than the lender.

I. ACTING FOR THE BORROWER AND THE SURETY

44. A solicitor may act for both the borrower and the surety provided that the solicitor is satisfied that this is in the surety's interests and that this will not give rise to any conflicts of interests (*Etridge* at paragraphs 72 – 74).

45. The solicitor must be satisfied that he may properly so act under Section E above on "Whether to accept instructions".

46. The solicitor should follow the Guidelines under Section G above on "Acting for the Lender and the Surety".

Circular S/03/085 28 April 2003

All Member Banks
The Hong Kong Association of Banks

Dear Sirs,

Legal Representation in Transactions Involving Guarantees or Security Provided by Third Parties

This Circular supersedes our Circular S/02/237 dated 12 October 2002.

Members will no doubt be aware of the UK House of Lords decision in *Royal Bank of Scotland & Etridge (No.2) and other appeals [2001] 4 All ER 499.* This case has now been followed in a number of Hong Kong cases.

These cases involve the situation where a person providing a guarantee or security for the borrowing of another party is under undue influence from the borrower.

The cases deal with the situation where a person providing a guarantee or security for the borrowing of another party (the "borrower") is able to show that he or she was unduly influenced by the borrower at the time of the execution of the guarantee or security. In cases where undue influence is established the Courts have set aside the guarantee or security. The most common case of undue influence is where the party providing the guarantee or security is the wife of the borrower although undue influence can also arise in other circumstances. The other cases are cases where the relationship between the party providing the guarantee or security and the borrower is non-commercial, for example, the relationship between parents and children or grandchildren, client and solicitor, doctor and patient, trustee and beneficiary.

The significance of the Etridge case is that it lays down the principles to be applied in relation to:

(a) Whether the transaction was affected by undue influence;
(b) If so, whether the bank was put on enquiry; and
(c) If so, did the bank take reasonable steps to ensure that there was no undue influence.

In cases where the transaction is potentially affected by undue influence the Etridge case sets out the steps to be taken to ensure that there was no undue influence. Basically these steps require the provision of information and advice to the potentially unduly influenced party prior to the execution of the guarantee and security and a recommendation for that party to obtain independent legal advice.

This information, advice and recommendation can be given by the bank or the bank's solicitor and in providing the information, advice and recommendation, the bank or the bank's solicitor should be careful to follow the guidelines set out in the Etridge case.

If members are not already aware of the Etridge case or its implication, they should consult their legal advisers as the purpose of this circular is not to advise members of the detailed requirements of the case.

Rather the purpose of this circular is to deal with a problem raised by The Law Society of Hong Kong in relation to the giving by banks of instructions to solicitors for the handling of transactions where the possibility of undue influence arises.

The difficulty is that in giving instructions to solicitors to handle transactions, where the possibility of undue influence arises, the instructions to the solicitor do not clearly state whether or not there is a party who may be the subject of undue influence and if there is, whether it is the responsibility of the solicitor or the bank to handle the procedures recommended in the Etridge case to ensure that there is no undue influence.

The difficulty which potentially arises in these cases is that the solicitor may think that the bank is taking the necessary steps and the bank may think that the solicitor is dealing with this, with the result that neither the solicitor nor

the bank takes the necessary steps and ultimately the guarantee or security is at risk of being set aside.

To avoid this situation arising, we would recommend that standard letters of instruction to solicitors in cases where a third party is providing a guarantee or security should contain a paragraph along the lines of the following:

Case 1

[Where the bank believes that there is no potentially unduly influenced party.]
"There is no potentially unduly influenced party in relation to this matter and accordingly, there is no need to provide information and advice to any other party".

OR

Case 2

[Where the bank believes there is a potentially unduly influenced party and requests the solicitor to give information and advice to the potentially unduly influenced party.]
"We would request that you provide the necessary information and advice to [potentially unduly influenced party] and follow the relevant procedures to ensure that the [guarantee/security] provided by [potentially unduly influenced party] is not liable to be set aside on grounds of undue influence. Accordingly, you are hereby requested to act for the potentially unduly influenced party in addition to acting for the bank. "

OR

Case 3

[Where the bank believes there is a potentially unduly influenced party and decides that it (and not the solicitor) will give information and advice to the potentially unduly influenced party.]

"Please note that you are hereby requested to act for the bank only and the bank will be responsible for providing the necessary information and advice to [potentially unduly influenced party] and follow the relevant procedures to ensure that the [guarantee/security] provided by [potentially unduly influenced party] is not liable to be set aside on grounds of undue influence."

If none of these statements are included in a letter of instruction in a case where a guarantee or security is provided by a third party, the solicitor will revert to the bank to obtain specific instructions on the matter with a view to clarifying how he should proceed.

In the event of Case 1, the solicitor may revert to the bank if he considers that there is a potentially unduly influenced party, in which case it will be necessary for the bank to give instructions either in the form of Case 2 or Case 3.

In the event of Case 2, the bank will need to supply the solicitor with information regarding the borrower's accounts to enable the solicitor to pass the necessary information on to the potentially unduly influenced party. Failure to provide the requisite information to the solicitor in the first instance would involve additional workload for both the bank and solicitor, and would cause unnecessary delay in the solicitor carrying out the instructions for the bank in a timely manner.

Also in the event of Case 2, instruction letters to solicitors should avoid using wording to the effect that the solicitor is to act exclusively for the bank because in giving information and advice to the unduly influenced party, the solicitor will need to act for that party and so it will not be possible for the solicitor to act exclusively for the bank.

If these procedures are followed, we believe that there will be no misunderstanding regarding the proper allocation of responsibility between the solicitor and the bank as to providing the necessary information or advice to the potentially unduly influenced party, with the result that the incidence of security being set aside by reason of undue influence will be kept to a minimum.

Members should also note that the Law Society has now issued detailed Guidelines to solicitors dealing with how to handle transactions where the possibility of undue influence may arise. These Guidelines broadly require either that (i) the solicitor has received a duly signed warning notice from the bank; or (ii) the solicitor has arranged for a warning notice to be duly signed by the potentially unduly influenced party.

In cases where the solicitor is acting for both the bank and the potentially unduly influenced party, the bank shall ensure that the warning notice is received by the solicitor at least one working day prior to the execution of the loan and security documentation by the potentially unduly influenced party.

In order to avoid the risk that the potentially unduly influenced persons may challenge the validity of the security on the basis that the relevant persons did not have sufficient time to seek independent advice, members are encouraged to arrange for the relevant warning notices to be signed at the earliest possible time and to have the duly signed warning notices sent to the solicitor together with the instructions letter. Alternatively members may arrange for their solicitors to handle execution of the warning notice. There are two forms, respectively for (i) when solicitor is acting for lender only (Appendix B) and (ii) when solicitor is acting for lender and the potentially unduly influenced party (Appendix C). Specimens of the forms of warning notices (both in English and Chinese) (which can be varied to reflect the particular circumstance of the case) are annexed for members' information.

Yours faithfully

Rona Morgan
Secretary

Enc

Appendix B

WARNING NOTICE

TO : [the Borrower [and]/ Guarantor [and]/ Mortgagor (depending on who act in the position as the third party surety regarding the proposed borrowing]

Mortgagor	**:**	
Borrower	**:**	**[ ]**
Guarantor	**:**	**[ ]**
Property	**:**	
Lender	**:**	

1. The Mortgagor [and the Borrower]* have applied to the Lender for banking facilities /mortgage loan to an extent of HK $ [ ] to be granted to the Mortgagor [and the Borrower]* on the security of a mortgage to be taken out on the Property and [on the security of the Deed of Guarantee ("the Guarantee") to be executed by the Guarantor]*.

2. Before you sign the mortgage and the other security documents [including the Guarantee]* which you have to sign if you go on with the transaction you should instruct a solicitor to protect your interests and to ensure that your rights and liabilities under the security documents are properly protected.

3. YOU ARE RECOMMENDED TO INSTRUCT YOUR OWN SOLICITOR who will be able at every stage of the transaction to protect your interest and to give you independent legal advice.

4. If you do not instruct your own solicitor, you will be required to attend the office of the solicitors acting for the lender solely to sign and execute the security documents and the solicitors will only be instructed by the Lender to explain and to witness your signing and execution of the security documents. They do not act as your solicitor and will not be giving you any legal advice regarding the security documents.

5. YOU ARE STRONGLY ADVISED to obtain the financial information of the Borrower, the Mortgagor, the Guarantor and any co-Borrower, co-Mortgagor and co-Guarantor* and engage your own financial adviser to give you advice on such financial information before signing and executing the security documents.

6. Your liability under the Mortgage and the Guarantee* will be unlimited / limited to an amount of HK$[ ] if you decide to go on with the transaction and sign and execute the Mortgage and the Guarantee*

7. You also have the choice not to proceed with the transaction in connection with the banking facilities/ mortgage loan to be granted to the Mortgagor/ Borrower*.

8. Please think carefully before deciding whether to proceed with the transaction. You are free to choose whichever option you prefer.

I/We acknowledge receipt of a copy of this warning and fully understand the contents thereof.

Dated this day of 20 .

* Delete if applicable

Appendix C

WARNING NOTICE

TO : [the Borrower [and]/ Guarantor [and]/ Mortgagor (depending on who act in the position as the third party surety regarding the proposed borrowing]*

Mortgagor	**:**	
Borrower	**:**	**[ ]**
Guarantor	**:**	**[ ]**
Property	**:**	
Lender	**:**	

1. The Mortgagor [and the Borrower]* have applied to the Lender for banking facilities /mortgage loan to an extent of HK $ [ ] to be granted to the Mortgagor [and the Borrower]* on the security of a mortgage to be taken out on the Property and [on the security of the Deed of Guarantee ("the Guarantee") to be executed by the Guarantor]*.

2. Before you sign the mortgage and the other security documents [including the Guarantee]* which you have to sign if you go on with the transaction you should instruct a solicitor to protect your interests and to ensure that your rights and liabilities under the security documents are properly protected.

3. YOU ARE RECOMMENDED TO INSTRUCT YOUR OWN SOLICITOR who will be able at every stage of the transaction to protect your interest and to give you independent legal advice.

4. You may also instruct the Lender's solicitors to advise you in this transaction. But if a conflict arises between you and the Lender and the other party to the transaction, the Lender's solicitors will not be able to protect your interests and you will then have to instruct your own solicitor, in which case the total fees you will have to pay may be higher than the fees which you would have paid had you instructed your own solicitor in the first place.

5. Although the Lender's solicitors will be providing you with the financial information of the Borrower, the Mortgagor, the Guarantor and any co-Borrower, co-Mortgagor and co-Guarantor* provided by the Lender, YOU ARE STRONGLY ADVISED to obtain the financial information of the Borrower, the Mortgagor, the Guarantor and any co-Borrower, co-Mortgagor and co-Guarantor* and engage your own financial adviser to advise you on such financial information before signing and executing the security documents.

6. Your liability under the Mortgage and the Guarantee* will be unlimited / limited to an amount of HK$[ ] if you decide to go on with the transaction by signing and executing the Mortgage and the Guarantee*

7. You also have the choice not to proceed with the transaction in connection with the banking facilities/ mortgage loan to be granted to the Mortgagor/ Borrower*.

8. Please think carefully before deciding whether to instruct your own independent solicitor, or the Lender's solicitors to protect your interests and whether to proceed with the transaction. You are free to choose whichever option you prefer.

I/We acknowledge receipt of a copy of this warning and fully understand the contents thereof.

Dated this day of 20 .

* Delete if applicable

Appendix D

Model letter by surety to solicitor where charging property

to secure loan to borrower or his/her business

(to be amended as necessary)

From: [name[s] of third party mortgagor[s]]

To: [name of the Solicitors' Firm] (the "Solicitors' Firm")

[Date]

Before I/we executed the mortgage of the Property [and] ("the Security Document(s)") to secure a loan/facility from [name of the mortgagee bank] ("the Lender") to [name of the borrower] (the "Borrower"), I/we attended a meeting with [name of the solicitor/solicitor's representative] at the offices of the Solicitors' Firm. The Solicitors' Firm has acted as my/our solicitors in connection with the Security Document(s). The only persons present at the meeting were [name of the solicitor/solicitor's representative] and myself/ourselves. The Borrower was not present at the meeting. At the meeting [name of the solicitor/solicitor's representative] confirmed the following things to me/us:

(1) The Lender requires that I am/we are given the advice as stated below so that, if I/we sign the Security Document(s) I/we will not be able to claim afterwards that I am/we are not legally bound by the Security Document(s).

(2) The main purpose of the meeting was to explain to me/us my/our liability under the Security Document(s) and to obtain my/our confirmation that I/we instruct the Solicitors' Firm to act for me/us in connection with the Security Document(s). I/We have been told that I/we did not have to instruct the Solicitors' Firm to act for me/us. I was/We were free to instruct another firm of solicitors if I/we wished.

(3) The Property is owned /will on completion of the sale and purchase be owned [in my/our sole name(s)] [in the Borrower's sole name] [in the joint names of

myself/ourselves and [names of the other owners]] and I am/we are required to sign the Security Document(s) in favour of the Lender.

(4) The Lender had given to the Solicitors' Firm the following information:-

(a) The Lender has extended a [loan/ facility or facilities to the Borrower amounting to [HK$]. This means that the Borrower can borrow up to this amount from the Lender upon execution of the Security Document(s).

(b) The purpose of the loan / facility or facilities is [ ].

(c) [On [ ], the Borrower was indebted to the Lender in the amount of [HK$] [As at the date of the meeting, the Borrower did not owe any money to the Lender].

(d) The market value of the Property as at [ ] was [HK$].

The Solicitors' Firm had not independently verified the information. If I/we had any doubts or further enquiries about the information, I/we should approach the Lender directly or through the Solicitors' Firm

(5) A copy of the Security Document(s) was produced at the meeting. I/We have been asked to read them carefully and to ask any questions that I/we may have. [Name of solicitor/solicitor's representative] has explained that the following is a summary of the main provisions and implications of the mortgage, but does not cover everything:-

(a) The mortgage is [initially] required to give the Lender security for the loan/facility or facilities mentioned in Clause (4)(a) above to be provided to the Borrower.

However, [the mortgage will be on "all monies" terms and my/our liability under the Security Document(s) will be unlimited and] the mortgage will also give the Lender security over the Property for:

(i) any further loan or increased facility that the Borrower (individually or jointly with me/us or anyone else) may in future obtain from the Lender while the mortgage remains in existence, even if this is done without my/our knowledge or consent;

(ii) any existing loans from the Lender to the Borrower (individually or jointly with me/us or anyone else), even if I/we do not know about them;

(iii) any existing or future loans that I/we may obtain (individually or jointly with anyone else) from the Lender while the mortgage remains in existence;

(iv) any sums owing to the Lender, at any time while the mortgage remains in existence, by any other person or company if I/we or the Borrower has already given, or shall in future give, a guarantee for those sums to the Lender, and even if the Borrower has given or shall give such a guarantee without my/our knowledge and consent;

(v) interest on all such sums as charged by the Lender;

(vi) [anything else]

(b) According to the terms of the loan / facility or facilities, the Lender can demand repayment at [any time,] [on fixed dates,] [by instalments,] *[set out repayment requirement*s].

(c) During the subsistence of the mortgage, [I/we] [the Borrower] must:

(i) keep the Property insured in accordance with the Lender's requirements;

(ii) keep the Property in good repair;

(iii) not make any structural alterations or changes of use without the Lender's consent;

(iv) not let the Property or take in lodgers without the Lender's consent;

(v) comply with all covenants and restrictions affecting the Property;

(vi) [anything else].

(d) The mortgage will give the Lender a [first] charge over the Property as security for all the sums mentioned in paragraph 5(a) above. [In addition, the mortgage will contain a covenant by me/us to pay all sums [without limit/up to a maximum of HK$[ ] plus interest charged by the Lender] falling within paragraph (a) above if the Borrower fails to pay them. This means that [without limit/up to the level referred to in paragraph (a) above] I/we will be a guarantor for the liabilities of the Borrower to the Lender, I/we will be personally liable for those sums, and I/we could be sued by the Lender for them. I/We could lose the Property [if the Borrower's business does not prosper], or if the Borrower fails to repay the Lender or if the borrowing is increased. This is because, if any loan repayment or interest charge is not paid on time, the Lender would be entitled to enforce the mortgage by taking court proceedings to evict me/us and any other occupiers from the Property and sell the Property in order to obtain repayment. If the value of the Property and my/our other assets is insufficient to meet those sums, I/we could be made bankrupt as well as losing the Property. The Lender could also appoint a receiver to take possession of the Property from me/us and any other occupiers.

(e) [The Lender reserves the right to transfer the benefit of the mortgage to another lender.]

(f) [Any other features of the mortgage needing comment?]

(6) I/We can only be released from our obligations if the Lender consents.

(7) It is not advisable for me/us to make myself/ourselves liable for an unlimited amount as described in Clause (5)(a) above.

(8) I/We shall consider whether I/we have the financial ability to repay the Lender taking into account all relevant matters including my/our assets, liabilities and cash flow.

(9) The above legal advice relates to the effect of the proposed Security Document(s) and the types of risks that may arise. [However, the Solicitors' Firm is not qualified to assess the likelihood of those risks actually materialising. That depends largely on the financial standing and prospects of the Borrower [and his business], although I/we should also consider whether the sums secured could be repaid from the sale value of the Property and my/our other assets. Therefore, before I/we decide whether to agree to sign, [the Security Document(s)], I/we should get help on assessing the risks by taking advice on those important financial aspects from a certified public accountant or other qualified professional financial adviser who should be independent of the Borrower].

(10) I/We do not have to agree to these arrangements at all if I/we consider that the risks are too great or if I/we think that these arrangements are of no advantage to me/us. If I am/we are generally willing but find particular terms unacceptable, it may be possible to negotiate variations of those terms with the Lender in order to make them acceptable to me/us. These decisions are mine/ours and mine/ours alone.

(11) The Solicitors' Firm is also acting for the [Borrower] [and also for the Lender in an administrative capacity] but the Solicitors' Firm has given me/us this advice independently. Nevertheless I/we should consider whether I/we want further legal advice from a completely separate solicitor before I/we make a final decision in connection with the Security Document(s).

I/We in signing this letter

(a) acknowledge that I/we have been given, and have understood, this advice.

(b) confirm that I/we have decided, of my/our own free will, to enter into the mortgage and to execute the Security Document(s), I/we do not require the Lender to vary any of the terms, [I/we do not require any further legal advice], and I/we agree that the Lender may be told that I/we have received the advice in this letter, and

(c) confirm to the Lender that I/we have received this advice.

_____

Countersigned by person giving the advice

I confirm that the above contains a comprehensive, correct and contemporaneous record of the meeting which took place between myself and [name of mortgagor[s]].

Signed

_____

[Name of solicitor/solicitor's representative]

at [address of the Solicitors' Firm]