

The Faculty of Law, University of Hong Kong, on behalf of Hong Kong Law Journal Ltd, in association with The Law Society of Hong Kong

LAW LECTURES FOR PRACTITIONERS 2003

27 June 2003 (Friday)
The Ritz-Carlton, Central

Programme

Morning Session (9:30-12:45 pm) (3 CPD Points)

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|----------------|--|
| 9:10–9:30 am | Registration |
| 9:30–10:30 am | “Charge over Book Debts – What Security Do We Have?”
Ms Jessica Y. K. Young, Assistant Professor, Department of Professional Legal Education, the University of Hong Kong |
| 10:30–10:45 am | Break |
| 10:45-11:45 am | “The Challenges of Biotechnology Patenting in Hong Kong”
Ms Li Yahong, Senior Research Fellow, Department of Law, the University of Hong Kong |
| 11:45-12:45 pm | “The Latest in Conveyancing”
Ms. Judith Sihombing, Training and Professional Support Manager, Simmons and Simmons |
| 12:45-2:00 pm | Lunch |

Afternoon Session (2:00-5:15 pm) (3 CPD Points)

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|--------------|--|
| 2:00-3:00 pm | “Conduct Unbefitting of a Solicitor – a Review and Update on Solicitors’ Disciplinary Proceedings”
Mr. Colin Cohen, Solicitor and Partner of Boase Cohen & Collins |
| 3:00-4:00 pm | “Offering Securities in Hong Kong: Some Practical Issues”
Ms Alice Chan, Lecturer, Department of Professional Legal Education, the University of Hong Kong |
| 4:00-4:15 pm | Break |
| 4:15-5:15 pm | “Solicitors, Confidentiality and Legal Professional Privilege in a Criminal World”
Professor Michael Wilkinson, Reader, Department of Professional Legal Education, the University of Hong Kong |

LAW LECTURES FOR PRACTITIONERS 2003

Charges over Book Debts - What security do we have?

Jessica Young
The University of Hong Kong



Charges over Book Debts – What security do we have?

Jessica Young
Assistant Professor
University of Hong Kong



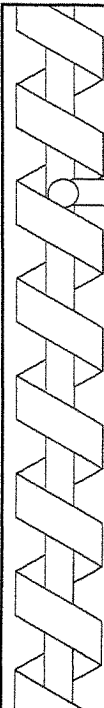
Outline of Talk

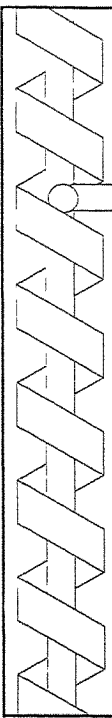
- **What are “book debts”?**
- **Fixed charge vs. Floating charge**
- **Taking security over book debts – the leading cases.**
- **Unresolved issues.**

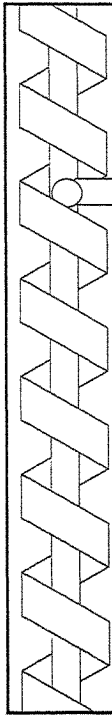


What are “book debts”?

- **“a debt connected with and growing out of the plaintiff’s trade”.**
- **“debts accruing in the ordinary course of trade and entered in the book”.**
- **“a debt arising in due course of a business ... [which] would or could in the ordinary course of such a business be entered in well kept books relating to that business”.**

- 
- **Arising out of the ordinary course of business.**
 - **Of the type which would be kept in the books of such a business.**
 - **Important source of security which can be offered by SMEs to their bankers.**

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- **Credit balance at bank?**
 - ***Re Brightlife* – Hoffmann J: No, because NOT natural usage for businessmen or accountants to describe it as a “debt”, but rather as “cash at bank”.**

- 
- **Value of book debts can be realized by:**
 - 1. Sale – factoring of uncollected debts.**
 - 2. Collection – payment by debtors.**
- **Proceeds.**
- **Cash / bank balance.**

Fixed Charge vs. Floating Charge


Lord Macnaghten:

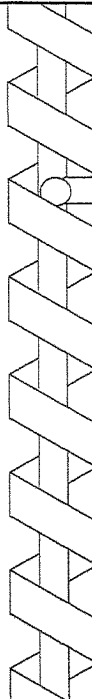
- **Fixed charge – fastens on ascertained and definite property.**
- **Floating charge – “ambulatory and shifting in nature”, “hovering over and... floating with the property which it is entitled to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.”**

Three characteristics of a typical floating charge, as described by Romer LJ in Re Yorkshire Woolcombers Assn:

(descriptive rather than definitive)

- 1. Over a class of assets present and future.**

	
	<p>2. The class of charged assets is one which in the company's ordinary course of business would change from time to time. (<i>ambulatory</i>)</p>
	<p>3. The company is free to carry on its business in the ordinary way (including dealing with the assets in a way inconsistent with the chargee's security interest) until the chargee intervenes. (<i>control</i>)</p>

	<p>Why is the distinction important?</p>
	<ul style="list-style-type: none">• Floating charge ranks behind preferential creditors.• S. 267 of Companies Ordinance invalidates a floating charge in respect of "old monies" secured thereby, if created within 12 months of liquidation, unless company was solvent at the time.• When the charged assets are disposed of to a third party.

Taking Security over Book Debts

- **Can present and future book debts be subject to a fixed charge?**
- **Charge over fluctuating assets does NOT have to be a floating charge.**
- **Siebe Gorman v. Barclays Bank – possible to create a fixed charge over present and future book debts.**
- **Crucial question is whether the company is at liberty to dispose of the charged assets free from the charge -- ie. “control” test.**

The Leading Cases:

- **Siebe Gorman v. Barclays Bank**
- **Re Keenan Brothers**
- **Re Brightlife**
- **Re New Bullas Trading**
- **Re Brumark Investments**

Siebe Gorman:

Facts:

- **Debenture purported to create fixed charge over present and future book debts.**
- **Company prohibited from assigning or charging the debts without chargee's consent, + must pay proceeds into account with chargee. (NB. Debenture contained NO express prohibition against withdrawal.)**

Held: Effective as a fixed charge.

- **Chargor's freedom to deal with charged assets removed because:**
 - 1. Restriction on assignment.**
 - 2. Requirement to pay proceeds to an account opened with chargee.**
 - 3. Bank could assert lien on proceeds if it chose to do so.**
- **Slade J would have held otherwise if chargor had unrestricted right to use the proceeds in the account.**

Re Keenan Bros:

- **Irish Supreme Court case but approved and followed in many cases on book debts.**
- **Debenture required proceeds to be paid into a special account + restriction against withdrawals.**
- **Held: fixed charge.**

Re Brightlife:

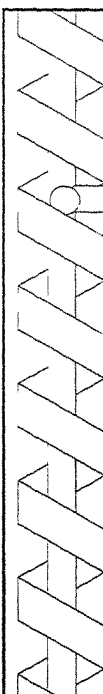
- **Facts: Debenture contained a restriction on the chargor selling, factoring or discounting the debts, but allowed the chargor to get in the debt and pay the proceeds into its own account where they remained at the free disposal of the chargor.**
- **Held: floating charge only, despite the restriction. Crucial element – chargor's freedom to deal with charged asset – by collecting the debts for its own use and benefit.**

Re New Bullas Trading:

Facts:

- **Chargor granted 1st charge over book debts in favour of Lloyds Bank, and a 2nd charge in favour of 3i Plc.**
- **Debenture purported to create fixed charge over uncollected book debts. Upon collection, released and proceeds to be subject to a floating charge.**

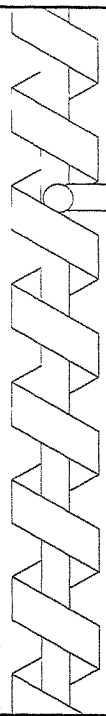
- **Debenture contained a provision which prohibited chargor from alienating the book debts.**
- **In the absence of contrary direction by 3i, debts were to be collected by chargor and proceeds to be paid into chargor's account with Lloyds.**
- **Whilst in account, proceeds subject only to floating charge.**
- **3i never gave any direction concerning the proceeds.**

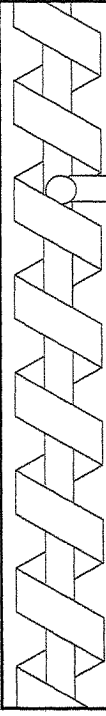
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- **CA held: freedom of contract -- up to the contracting parties to provide.**
 - **Fixed charge over book debts whilst uncollected + floating charge over proceeds.**
 - **Best of both worlds – chargee has security of a fixed charge, whilst chargor retains access to its essential cashflow.**



Brumark:

- **Facts: New Bullas-type “split” charge created in favour of Westpac.**
- **PC adopted a 2-stage enquiry:**
 - 1. Construe the Debenture to ascertain nature of the rights and obligations intended by the parties.**
 - 2. Categorise the charge according to legal principles – parties’ intention irrelevant here. (Re New Bullas was wrongly decided.)**

- 
- **Held: Floating charge only, because the charge failed the “control” test – it allowed the chargor to deal with the charged assets and thereby removed them from the charge -- extinguished the debts by collection and turned them into proceeds which the chargor was free to use.**
- **Control over proceeds is vital to fixed charge over book debts.**

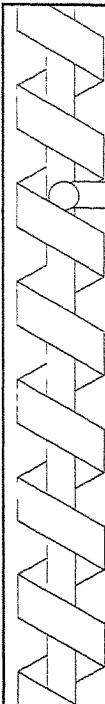
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- **Three-fold control test for fixed charge:**
 1. **Control of uncollected debts – prohibition against alienation.**
 2. **Control of mode of collection – as agent for benefit of the chargee.**
 3. **Control of collected proceeds – chargor not free to use them in ordinary course of business – “blocked account” arrangement.**

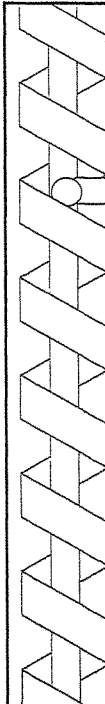
Unresolved Issues

- ***Re New Bullas*** heavily criticised.
- ***Brumark*** likely to be followed. (HL in ***Cosslett*** referred to it as established law.)
- Clear return to the orthodox “control” test for floating charge.
- However, still many issues yet to be resolved.

1. Is a debt divisible from its proceeds?

- **Goode: indivisible** – “single, continuous security interest”. (~ Art. 9 of Uniform Commercial Code.)
- **cf. Berg: two distinct assets.**
- **Armstrong: 3rd possibility** – “An uncollected book debt and its proceeds are technically different assets, but economically they are so intrinsically linked that it would be unrealistic and impossible to regard them as separate assets”.

- 
- **PC in *Brumark* dodged the issue, but Lord Millett -- though conceptually possible to separate proceeds from debt, it “makes no commercial sense” to do so. Chargor’s freedom to use the collected proceeds for its own benefit is inconsistent with a fixed charge over book debts.**



2. Is it possible to have a floating charge over uncollected book debts and a fixed charge over the proceeds of collected debts?

- **Goode’s argument → No, “single, continuous security interest”.**
- ***Cf. Worthington*: Yes, because divisible. Only look at proceeds to ascertain whether chargor free to deal with debts, ie. only relevant if fixed charge over book debts.**
- **Will *Brumark* be so limited in its application?**
- **Not uncommon in practice.**

3. What if the charge is expressly limited to *uncollected* book debts, ie. excludes proceeds?

- **McLauchlan: value of book debt NOT dependent on realised proceeds. Eg. Value in assigning the debt, or to prevent disposal to third parties. Valid reasons exist to justify treating book debts and proceeds separately.**
- **Why prevent parties from confining fixed charge to debts insofar as they remain uncollected?**
- **Is it still possible after Brumark?**

- **If allows fixed charge on debts whilst uncollected, then why can't there be a separate charge (in favour of same or different chargee) over the collected proceeds (perhaps in the form of charge over bank balance)?**
- **Any difference from New Bullas?**

4. What is the extent of control needed? Is it sufficient to merely have the *ability* to control?

- **Authority of Siebe Gorman?**
- **In Siebe Gorman, Debenture NO restriction against the chargor drawing on the account. Slade J found “implied restriction” where chargee is account-holding bank – practical ability to refuse withdrawals.**
- **By asserting lien under the charge.**
- **Implied restriction or mere power to intervene?**

- **PC in Brumark seemed to endorse Siebe Gorman, but Lord Millett stressed that the blocked account must be in fact operated as such.**
- **Cork Report suggested statutory reversal of Siebe Gorman to clarify that significant liberty to use charged asset → floating charge.**
- **Most commentators believe a Siebe Gorman-type charge will NOT suffice after Brumark.**
- **Express restriction advisable.**

5. Is Re Atlantic Computers still good law?

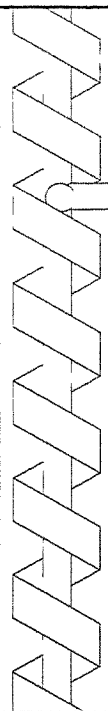
- **Facts:** Purported fixed charge over certain *existing* sub-leases of chattels and their rentals.
- **Held:** Company's freedom to use rental income when collected is **NOT** prejudicial to existence of fixed charge. (Nicholls LJ drew analogy from mortgagor's entitlement to retain income from mortgaged land.)
- **Focused on the *ambulatory* characteristic of the floating charge – here, **NOT** cover *future***

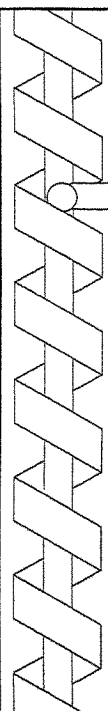
- **No mention of this case by PC in Brumark.**
- **One argument -- distinction between: (a) chattel lease and its rental, and (b) book debt and its proceeds.**
- **Latter: a book debt is necessarily *extinguished* by collection (turned into proceeds).**
- **Valid basis for distinction?**

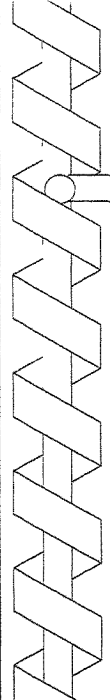
6. Relevance of post-contract conduct of the parties?

- ***Brumark*** suggests that nature of a charge depends on *post-contract* conduct of the parties (whether blocked account operated as such in practice).
- Contrary to basic rule in interpretation of contract -- ***Whitworth Street Estates v. Miller***.
- Usually, will only look to post-contract conduct to determine whether a sham/variation/estoppel.

- **Example: Blocked account arrangement in place for 3 months after the creation of the charge. Then the chargee suspended the restriction or gave blanket consent to withdrawals.**
- **Is the charge still a fixed charge?**
- **Did the charge start off as a fixed charge, but is now converted into a floating charge by the parties' post-contract conduct?**

- 
- **Cf. No – Irish Supreme Court in *Re Wogan*. Subsequent relaxation in operation of account does NOT prejudice fixed charge.**
 - **Is the converted floater “created as a floating charge”? If not, easy to get round s. 267? (better than crystallizing a floater!)**
 - **What about registration as a charge?**
 - **What if chargor is to ask for consent each time, but *understanding* that chargee will consent?**

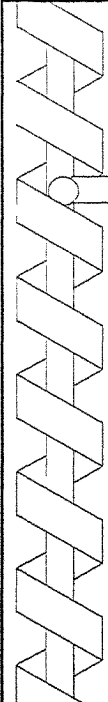
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- **Do subsequent events serve to *indicate* the parties’ intention when creating the charge?**
 - **Oditah: Parties’ post-contract conduct is “relevant as a material background” to the construction of the charge document – shows whether parties intended the restriction to operate at all.**
 - **Subsequent events may also amount to release/variation/estoppel – *Marathon Electrical v. Mashreqbank*.**

- 
- **Brumark** criticised for failure to uphold the parties' express intention, as well as for looking to post-contract conduct to explain the meaning of a contract → no commercial certainty.
 - Also criticised for increasing borrowing costs and cutting borrowers off from their cashflow.



7. Is it now practicable for a 2nd or non-bank chargee to take fixed charge over book debts?

- In **New Bullas**, 3i did every thing it could to control the book debts. It designated an account with Lloyds, the 1st chargee. Till release of Lloyd's charge, no point in 3i issuing any direction on the account.
- This point was not addressed by PC in **Brumark**.

- 
- **What must a 2nd/non-bank chargee do to ensure fixed charge? – need to exercise similar control? How?**
 - **Policy consideration – main “chargeable” asset of a SME may be its book debts. If credit refused by bank, can SME then offer cashflow to non-bank as security for borrowing?**
- **Gradual shift away from o/d or working capital loan financing to debt factoring?**



8. How can project financiers take security over major revenue-producing contracts?

- **Brumark’s reasoning not limited to book debts. Problem if extended to other choses in action?**
- **Example: power plant project financing – bank takes assignment of offtake agreement + charge over revenue account – borrower (SPV) has to withdraw \$ from account (only source of income) to pay operating expenses and debt service.**
- **Is a “waterfall” clause sufficient?**

	<ul style="list-style-type: none"> • Bank's choice – administrative costs and hassle of ad hoc consent or blanket consent in advance? • Possible solution? – Sealy suggests maintaining a separate unencumbered Opex Account + regularly “sweep” the (charged) Revenue Account into the Opex Account + chargee's power to terminate the sweeping arrangement. • Is periodic budget review necessary?

	<p>Points to consider in drafting a debenture:</p> <ul style="list-style-type: none"> • Fixed charge over <i>specific</i> non-ordinary course debts – eg. bank account, insurance claim, user fees under specific contracts, etc. + Separate charge over <i>each</i> of these debts – avoid all or nothing result. • Query – whether necessary to have a blocked account arrangement for the proceeds of these debts?

LAW LECTURES FOR PRACTITIONERS 2003

**The Challenges of Biotechnology Patenting
in Hong Kong**

**Li Yahong
The University of Hong Kong**

The Challenges of Biotechnology Patenting in Hong Kong

"Law lecture", 27 June 2003

**LI Yahong
Department of Law
The University of
Hong Kong**

Structure of the lecture

1. Biotech development: research, infrastructure, commercialization and funding
2. Biotech patenting: int'l perspectives, HK biotech patenting, problems and solutions

Background

- Biotechnology offers great potential for improving health and food production.
- Patent protection directly affects flow of financial investment that is crucial for the R&D in biotech, and allows earlier disclosure that facilitates dissemination of the newest technologies.
- Nations as the US have benefited from well designed patent systems to promote innovation in biotech.
- HK has been lagging behind in biotech patenting, which has contributed to low output in biotech.
- Hong Kong has depended heavily on real estate and financial transactions, it is crucial to make the transition to a science and technology-based economy, in which biotech plays an important role.

Biotechnology defined

- Biotechnology is the use of biological processes to solve problems or make useful products. Specifically
 - it uses genetically-based characteristics in microorganisms and animals to create drugs and drug therapies;
 - It produces genetically engineered agricultural products that are more tastier and attractive;
 - It uses genetically altered microorganisms for environmental solutions such as eating oil spills.
- Biotechnology is *a collection of technologies that capitalized on the attributes of cells and biological molecules, such as DNA and proteins.*
- For more information, see Guide to Biotechnology <http://www.bio.org/er/timeline.asp>

Why do we need biotech?

- Healthcare applications
- Agricultural production and food supply
- Industrial and environmental applications
- Defense and national security

Biotech in monetary term

- In the year 2001, there were 1,457 biotech firms in the US, of which 342 were publicly held.
- The industry has tripled in size since 1992, with revenues increasing from \$8 billion in 1992 to \$28.5 billion in 2001.
- The US biotech industry employs over 191,000 people.
- Biotech is one of the most research-intensive industries, e.g, the US biotech industry spent \$15.7 billion on R&D in 2001; the top five biotech firms spent an average of \$89,400 per employee on R&D in 2000.
- In the US, the total value of publicly traded biotech companies at market price was US\$224 billion as of early May 2002.

Biotech in HK – an overview

- Late comer:
 - From 1995 to 2002, only about HK\$800 million has been invested in biotech-related projects.
- Steady improvements:
 - In 1999, 200 companies, employing about 2,500 people. The gross output of the sector reached HK\$1.6 billion in 1997. Domestic exports of medical and pharmaceutical products were HK\$787 million in 1998.
- Drugs and medicines (including Chinese medicine) are the most promising biotech industries.
 - 10-year plan to become a “world center” for the Chinese medicine-based health food and pharmaceuticals.

Research

- Life science academics in SAR published more papers in international medical journals on a per capita basis than their counterparts in other Asian countries.
- Hong Kong has the potential to become the region’s biotech center if it capitalize on its medical universities and biotech companies.
- Problems:
 - Lack of coordination between research institutes.
 - Lack of private investment.

Infrastructure

- Hong Kong Institute of Biotechnology
 - Best-equipped manufacturing technology center for vaccines and biopharmaceuticals
- Universities
 - HKU: Genome Center, Lab of Cancer Genetics, Clinical Trials Center, Human Research Institute
 - HKUST: Biotechnology Research Institute
- Applied Science and Technology Research Institute (ASTRI)

Commercialization

- Traditionally researchers lack the sense and knowledge in commercialization and patenting.
- Recently they have become more aggressive in commercializing their innovations in the rapid diagnostic tests, hepatitis vaccines, plasma DNA based diagnostic technology, genechips, and high throughput screening arrays for expeditious drug discovery processes.
 - E.g. Yeung Sun Tong (养心堂) has bought a patent from HKU to develop vaccine and diagnostic equipment for hepatitis E.
 - HKU's Clinic Trials Center is the 4th largest in the world to do contracting work.

Funding

- The SAR government has identified biotech as a significant industry and committed considerable funds for its capitalization.
- HKITC has established Innovation and Technology Fund (ITF) under which biotech industry is one of the major recipients.

Why does biotech need patent?

- The benefits of patent
 - Monopoly right for biotech developers
 - Incentive for further development
 - Recoup investment
 - Realizing full potential
 - Attracting investors
 - Early disclosure of newest biotech
 - Provide basis for more innovation and development

Biotech patenting in US

- "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor." (35 USC 101)
- Prior to 1980, patent on life form not allowed under "products of nature" (*Funk Brothers Seed Co. v. Kalo Inoculant Co.*).
- *Diamond v. Chakrabarty*, 447 U.S. 303 (1980): "anything under the sun that is made by man" is patentable.
- Other major cases: *Ex parte Hibberd*, *Ex parte Allen*, *Roche Products v. Bolar Pharm.Co.*, *Harvard Mouse*.
- Permits the commercialization of federally funded research;
- Established the Biotech Unit at the USPTO.

Biotech patenting in EU

- EPC art 53(b) provides that plant or animal varieties or essentially biological processes for the production of plants or animals are not patentable.
- Directive 98/44/EC (incorporated into EPC) allows patent for plants or animals under certain conditions
 - Excludes the inventions that against "ordre public" and morality.
 - Human body at the various stages of formation is not patentable except that an element of the body is isolated by technical process.
- Two important cases: Harvard mouse and Dolly the Sheep ("Edinburg Patent" for an invention of "isolation, selection and propagation of animal transgenic stem cells").

Biotech patenting in PRC

- Similar to EC Directives
- The material that is a discovery of nature is not patentable except when it has been isolated from its natural state.
- Medical and pharmaceuticals: allowed but certain methods of treatment are still excluded.
- Gene: patentable as chemical substances when it is isolated or purified.
- Animal and plant: excluded (including transgenic), except the methods of breeding and products derived from animal and plant.
 - Plant varieties receive *sui generis* protection.

HK patent system


- HK patent law is territorial.
- The HK patent system is separate from the system in mainland.
- The new Patents Ordinance (Cap 514) came into effect on June 27 1997, replacing the old Registration of Patents Ordinance.
- Under the new law, a patent application must first be filed in one of the three designated patented offices (DPO): Chinese SIPO, EPO and UKPO.
- The published applications must be recorded within 6 months with the HK Patent Registry; the granted patents shall also be registered with the Registry within 6 months.

Two kinds of patents

- Standard patent:
 - Filed with the DPO and registered with the HK Patent Registry
 - Substantial examination
 - Term of 20 years
- Short term patent:
 - Apply to HK Patent Registry
 - Granted based on search report of int'l searching authority or a DPO.
 - Formality examination only.


Biotech-related patent law

- A patentable subject matter is "susceptible of industrial application, is new and involves an inventive step." (art. 93)
- Excluded subject matter:
 - A discovery, scientific theory or mathematical method "as such";
 - a method for treatment of the human or animal body by surgery or therapy and a diagnostic method practiced on the human or animal body except product (particularly a substance or composition for use in any such method);
 - An invention the publication or working of which would be contrary to public order or morality;
 - A plant or animal variety or an essentially biological process for the production of plants or animals, other than a microbiological process or the products of such a process.



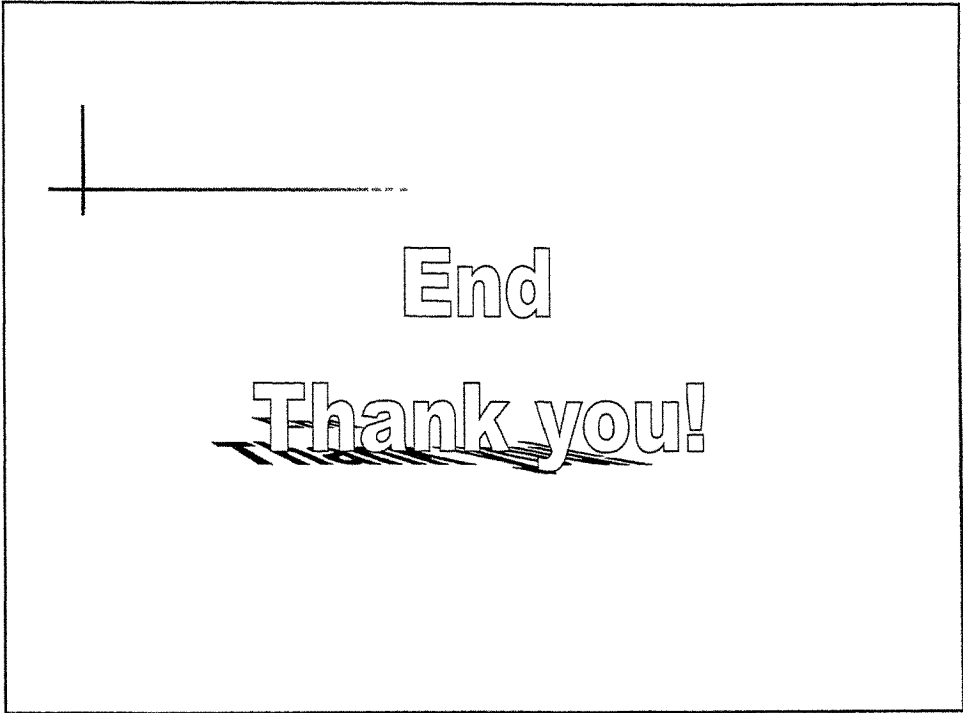
Problems

- The importance not been addressed enough
- Outdated and ambiguous legislation
- Lack of case law
- Morality issue
- TCM patentability
- Low filing rate
- Complicated and inconvenient application procedures
- Confusion over HKSAR and the Mainland patent systems



Solutions

- Legislative amendment
- Reform of application and examination procedures, e.g. merger the systems of HK and the Mainland?
- Government initiatives and support, e.g. the special fund for patent application under ITC.
- Technology transfer or legal office at local universities and research institutes can be instrumental in promoting biotech patenting, e.g. patent for SARS filed by HKU.



LAW LECTURES FOR PRACTITIONERS 2003

The Latest in Conveyancing








**Judith Sihombing
Simmons & Simmons**

THE LATEST IN
CONVEYANCING

Law Lectures for
Practitioners 2003

Judith Sihombing

Simmons & Simmons

-  The contract
-  Execution of documents
-  Trusts
-  Quistclose and bare
-  Landlord and tenant
-  Title
-  DMCs and MSBs

Simmons & Simmons

The contract: intention to perform

- So long as there **is** a contract the court may try to save it
- what is the subject matter of the contract?
- what of sec 12 CPO?
- will implied terms help?
- the court must
 - ‘do the best it can if the parties will not say: we had no binding agreement’.

“When the parties entered into the agreement, their intention, objectively viewed, was to carry the contract through to completion.”

Polyset v Panhandat

Simmons & Simmons

3 / LiveLink number

Subject matter (2): what *is* being sold?

- *Nation Group v New Pacific, CFA*
 - “the entire first floor and its canopy”
 - the illegal structure was on the soffit of the canopy
 - No reference in the DMC to the canopy as common property
- “prima facie the V did not seek to restrict such rights of enjoyment to the canopy’s top”

The crucial question for requisitions and for title was: what was the precise identity and scope of the property contracted to be sold?

Simmons & Simmons

4 / LiveLink number

The subject matter (3)

- Unauthorised structural extension
- no waiver by P
- CFA the V could **NOT** introduce a 'subject matter' defence at CFA level to define what was being sold

Flywin v Strong & Associates [2002]
CFA

V said the subject matter of the contract was such as to prevent the P **objecting** to patent or irremovable defects

Simmons & Simmons

5 / LiveLink number

The subject matter (4)

- The V was selling
 - shares
 - exclusive right to the unit
 - exclusive right to utility rooms and the roof
- CFA the rooms and roof had never been common property
 - the lack of documentation was irrelevant

Jumbo King v Faithful Properties [1999]
CFA

Simmons & Simmons

6 / LiveLink number

The contract: implied terms

- “a fourth shade on a continuous spectrum” requiring the court to imply a term to establish what the contract is because the parties had failed to do so
- the term must
 - go without saying
 - be capable of clear expression
 - be required for business efficacy
 - not contradict express terms; and
 - be reasonable and equitable

**BP Refinery v
Council of
Hastings?**

**What of Liverpool
Council v Irwin and
like cases?**

Simmons & Simmons

7 / LiveLink number

Read the contract carefully

- Title deeds delivered: 24 October
 - completion date: 31 October
 - the V
 - “shall be at liberty on giving 3 working days notice to annul the sale”
 - both had legal advice prior to contracting
 - there were no title defects
- Cond 7(1) provides: “requisitions ‘as soon as practicable after delivery of the title deeds and not later than 14 days prior to completion”

**Requisitions
to be
“delivered as
soon as
practicable
within 7
working days
after the
receipt of the
title deeds”**

***First Shanghai
v Dahlia***

Simmons & Simmons

8 / LiveLink number

Execution of documents

- If signatories could have been authorised by AA to sign then
 - presumed FOR THE PURPOSE OF TITLE to have been executed with authority
 - if executed 15 years prior then CONCLUSIVELY PRESUMED
 - as between the parties to the contract
 - in favour of the purchaser
 - to have been validly executed

Sec 23A CPO
from 09 May 2003

Forget **Grand Trade?**
Forget LS Opinion?
Forget Circular 105/90?

Simmons & Simmons

9 / LiveLink number

Trusts

- **Quistclose**
 - defeats insolvency!
 - adopts C19th principles on the advancement of money for a purpose: **Toovey v Milne**
- **Typhoon 8** and rental deposit
- Lord Millett in **Twinsectra**
- borrower does not 'own' the money till the purpose is met

Barclays Bank v Quistclose

primary and secondary trusts

Simmons & Simmons

10 / LiveLink number

The bare trust

- The doctrine of conversion
 - converts an interest in rem into an interest in personam
 - from land to money

- but what are the duties and obligations of the trustee?
 - Fiduciary?
 - What duties?

Hotung v Ho
an express trust
in the form of a bare
or passive trust

a **novel** question: can the beneficiary (through an attorney under power) require the Trustee to perform certain functions?

Simmons & Simmons

11 / LiveLink number

The demise of the protected demise?

- Amendments cover
 - timing for notices CR 101 to Cr 104
 - the right to seek information from Commissioner of Rating and Valuation
 - new timing for distress
 - increase in harassment penalties
 - tightening up of actions for forfeiture

Amendments to the
Landlord and Tenant
(Consolidation)
Ordinance: 27 Dec
2002
AND NOW
SOON TO BE the
demise of
protected tenancies

Simmons & Simmons

12 / LiveLink number

Title: secondary evidence

- Secondary evidence
 - stat dec from solicitor of the existence and contents of a PA
 - PRESUMPTION: it had been duly executed
 - Leung Kwai Lin v Wu Wing Kuen
- BGL destroyed
 - proof from deed of surrender of part of the lot
 - minutes from intra-departmental Government files
 - Government notices
 - Well Coins v King's Fortune

Proof:

**the document
existed
the contents of
the document
had been
executed**

Simmons & Simmons

13 / LiveLink number

Title: illegal and dangerous structures

- Illegal or dangerous structures
 - who says they are structures?
 - are they covered by "as is"?
 - does the P waive them by seeing them when inspecting?
 - Is there a real risk or possibility of enforcement?
- *Flywin v Strong Associates*
 - V said a waiver clause operated to bind the P
 - the Court said NO: such a clause must be clear and cogent

**Same
considerations
sections 24 and
section 26 BO**

**All Ports v
Grandfix**

Simmons & Simmons

14 / LiveLink number

Title: Illegal and dangerous structures

- 40 year old breach: height restrictions;
 - Jumbo Gold v Leung [2001] CFA
- "it is simply not in the nature of good government to harm innocent people unnecessary ... it is safe to proceed on the basis that the Gov would never do so"
- "concrete proof of the Gov's knowledge and attitude is not easy to find so the court must look at the larger picture"

Billion Best v Amity

"due diligence" is not part of HK practice

Simmons & Simmons

15 / LiveLink number

Title:

- Chi Ki v Lucky Health CFA
 - contribution to management fees to pay a judgment
 - was not a conveyancing incumbrance BUT a title defect
- "so extraordinary having regards to matters such as its nature or magnitude as wholly outside the contemplation of a reasonable purchaser"
- the P may have had to pay the whole amount: sec 18 BMO

A money incumbrance becomes a title defect

Simmons & Simmons

16 / LiveLink number

DMCs and MSBs

- Who owns the outer walls, utility rooms, roof etc?
- Can there be adverse possession of common property?

Is the DMC a form of Power of Attorney?

Kantta v Regency

Simmons & Simmons

17 / LiveLink number

The latest in conveyancing

27 June 2003

Judith Sihombing

Simmons & Simmons

18 / LiveLink number

LAW LECTURES FOR PRACTITIONERS 2003

Conduct Unbefitting of a Solicitor A Review and Update on Solicitors' Disciplinary Proceedings

**Colin Cohen
Boase Cohen & Collins, Solicitors & Notaries**

**CONDUCT UNBEPFITTING OF A SOLICITOR
A REVIEW AND UPDATE ON SOLICITORS' DISCIPLINARY
PROCEEDINGS**

LECTURE OUTLINE

1 Introduction

- (a) Legal Practitioners Ordinance (Cap.159) (“LPO”), Solicitors
Practice Rules, etc.
- (b) Self monitoring
- (c) Tribunal Convenor
- (d) The constitution of the Tribunal

2 Policing – Law Society

- (a) Standing Committee on Compliance (12 members, 8 Law Society
Council members)

- (b) Investigation Committees
- (c) Law Society Secretariat:-
 - (i) Director of Compliance
 - (ii) Assistant Director of Compliance
 - (iii) Investigation Officers
- (d) 375 complaints lodged in 2002 (319 in 2001) by members of public. 227 complaints from members of profession
- (e) Complaints:-

(i)	Breach of Conduct Guide Principles	49.17%
(ii)	Court Attendance Forms	8.75%
(iii)	Breach of Solicitors Practice Rules	7.24%
(iv)	Dishonesty	1.06%

(f) Areas of Practice:-

- | | | |
|------|--------------|--------|
| (i) | Conveyancing | 12.4% |
| (ii) | Litigation | 17.35% |

(g) Of the complaints investigated:-

- (i) 19.35% - Unsubstantiated
- (ii) 19.07% - No further action
- (iii) 14.2% - Letters of Disapproval
- (iv) 10.5% - Letters of Regret
- (v) 5.65% - Referred to the Tribunal Convenor
- (vi) Others, i.e. pending, resolved amicably, etc.

(h) Proceedings

- (i) 21 cases determined by the Tribunals in 2002 (24 in 2001)
- (ii) 19 cases were referred to the Convenor (27 in 2001)

- (1) Inspections
 - (i) 30 resolutions to inspect firms
 - (ii) 55 inspections were conducted into 32 firms
 - (iii) Monitoring Accountant, 135 visits to 99 firms

3. Professional Misconduct

- (a) No stated definition
- (b) Closest definition – Rule 2, Solicitors Practice Rules, Principle

1.01 of The Hong Kong Solicitors' Guide to Professional Conduct ("the Guide"), Volume 1, 2nd Edition

"A Solicitor shall not, in the course of practicing as a solicitor, do or permit to be done on his behalf anything which compromises or impairs or is likely to compromise or impair –

- (a) his independence or integrity;

- (b) the freedom of any person to instruct a solicitor of his choice;
- (c) his duty to act in the best interests of his client;
- (d) his own reputation or the reputation of the profession;
- (e) a proper standard of work; or
- (f) his duty to the court.”

(c) Law Society Circular 03-106(1A), Paragraph 10: Family Court

Judges complained that practitioners fail to be punctual when attending court

- (d) The Guide, Volume 1, 2nd Edition, Principle 1.02 - Conduct

subject to Discipline:-

“A solicitor is an officer of the Court, and should conduct himself appropriately in professional and private matters.”

breaches of which will be considered grounds for disciplinary proceedings

- (e) England and Wales, Decisions published in Law Society

Gazette:-

- (i) Sir Gerrard Antony Neil 29th November, 2002

Professional misconduct is described as unbecoming
conduct

(f) The Guide, Volume 1, 2nd Edition, Principle 1.03, sets out

Sources:-

(i) Statute, LPO

(ii) Non-statutory:

- Common Law
- Law Society – Guidance
- Circulars
- Practice Directions
- Decisions of the Tribunal

(g) Section 10(1) – LPO

“Powers of a Solicitors Disciplinary Tribunal

(1) *A Solicitors Disciplinary Tribunal shall have power to inquire into and investigate the conduct of any person in respect of which it was appointed.”*

- (h) (i) Re A Solicitor, ex-parte Law Society (1912) 1KB 302 –

conduct which would be regarded as disgraceful and

dishonourable by solicitors of good repute and

competency
- (ii) Myers v. Elman (1940) AC 282
- (iii) Cordery's Law relating to solicitors, 8th Edition describes

professional misconduct as simply conduct which the

Tribunal and judges from time to time regard it to be
- (i) Australia, NSW Bar Association v. Cummins 2001 NSW CA 284
- (j) Law Society of Upper Canada's Rules of Professional Conduct
- (k) Bolton v. The Law Society (1994) 2 ALL ER 486

4. Hong Kong Solicitors' Disciplinary Tribunal Decisions

- (a) Tang Kwok Wah, Dixon, 22nd February, 2003

- (b) Lam Siu Yiu Peter, 13th January, 2002
- (c) Ha Kai Cheong, 14th December, 2002
- (d) Hwang Nang, Michael, 9th March, 2000
- (e) Lau Wan Fu, John, 14th April, 1999
- (f) Lui Cho Hung, Boris, 5th January, 2002
- (g) Chung Yee Fong, Helen, 21st May, 2001
- (h) Wong Ka Hing, 4th August, 1999
- (j) David William Gunson, 20th March, 2002

Colin Cohen

27th June, 2003

LAW LECTURES FOR PRACTITIONERS 2003

Offering Securities in Hong Kong: Some Practical Issues

**Alice Chan
The University of Hong Kong**

University of Hong Kong
Faculty of Law

Offering Securities in Hong Kong: Some Practical Issues

Alice Chan
27 June 2003

11466 Achan/vv

1

Introduction

- overview of current prospectus regime
- overview of liabilities in connection with offering securities
- some practical problems
- Companies (Amendment) Bill 2003
 - gazetted on 28 March 2003
- “securities”: focus on shares and debentures (*cf.* collective investment schemes etc.)

2

I. Current Prospectus Regime

- broadly speaking, two types of offering:
 - public offerings
 - private placings
- public offerings have to comply with onerous “prospectus requirements” in Companies Ordinance (“CO”)
- what is a prospectus?
 - “any prospectus, notice, circular, brochure, advertisement, or other document: (a) offering any shares or debentures to the public for subscription or purchase or (b) calculated to invite offers by the public to subscribe for or purchase any shares or debentures” (s.2)
- prospectus requirements as to:
 - contents (s. 38, s.38C and Third Schedule)
 - registration (s. 38D)

3

- *Content requirements*
 - in both English and Chinese language
 - overall standard: sufficient particulars and information to enable a reasonable person to form as a result thereof a valid and justifiable opinion of the share or debentures and the financial condition and profitability of the company at the time of the issue of the prospectus
- *Examples of Third Schedule requirements*
 - summary of material contracts - contracts entered into other than in the ordinary course of the issuer’s business within 2 years before the issue of the prospectus
 - auditors’ report for past three financial years
 - valuation report with respect to all interests in land and buildings if that represent more than 10% of total assets or if a value of \$3 m or more is placed on them
 - a valuation report “shall not be made by a company which . has either a paid up capital of less than \$1m or the assets of which do not exceed liabilities by \$1m or more as shown in the company’s last balance sheet” (paragraph 46, Third Schedule)

4

Fine print dogs MTRC valuer

Brooke International as the valuer of its Mass Transit Railway Corp. But the hiccup failed to derail the Government's first privatisation exercise.

The dispute about the qualification of Brooke as the independent property valuer in the initial public offering (IPO) centres on an interpretation of a paragraph in the Companies Ordinance.

The argument is whether both sets of conditions – regarding a company's paid up capital and a company's assets compared to its liabilities – need to be met or just one of them.

According to Schedule 3, Part III of the Ordinance, any valuation report shall not be made by a company which has either a paid up capital of less than HK\$1,000,000 or the assets of which do not exceed liabilities by HK\$1,000,000 or more.

Brooke International reportedly has only a paid up capital of HK\$30 million. The Government asserted the valuer had net assets in excess of HK\$1 million at the end of March, which satisfied the requirement set in the ordinance.

However Brooke was still in the process of finalising its audited accounts for the year to March '01.

Vincent Wong, senior group director at Hill & Knowlton – the spokesman for the government in the share offer – said the valuer only had to meet one of the conditions according to legal opinion it received.

The Government argued further that it had checked the appropriateness of all parties in the HK\$9.28 billion offer before the share sale.

However Mr Wong did not say if the firm's paid up capital and net asset value had been verified in advance.

The government also said it, the MTRC and the three joint global coordinators Goldman Sachs, HSBC, and UBS Warburg, considered Brooke had the relevant experience to prepare the valuation report in the prospectus.

Amalgamates over the clause and its interpretation threw mixed views from the industry. Some people familiar with IPO property valuation procedures charged the qualification of Brooke International as its paid up capital was below HK\$1 million.

They claimed, based on their lawyers' opinion, that both the share capital and the net asset value of the firm should exceed HK\$1 million as required by the Company Ordinance.

But solicitor Daniel Wong Kwok-tung said, according to his interpretation of the ordinance, Brooke International should be qualified to prepare the valuation report if its net asset value exceeded HK\$1 million.

He said it would be qualified if either its share capital or net assets satisfied the requirement.

However he criticised the "clearly

oversight in the IPO process as the audited accounts of Brooke International for the year to March '01 were not finalised before the completion of the MTRC valuation process this month.

Even if the audited accounts showed afterwards that the net asset value was more than HK\$1 million, the procedure seemed inappropriate, he said.

Brooke's revaluation of the MTRC development projects gave a major boost to its asset value.

It put the former's value at the end of July at HK\$1.6 billion which lifted the asset value of the transport company by 66 per cent to HK\$7.4 billion or HK\$15.88 a share.

The investment community was annoyed by the dispute, and investors said their decision would not be affected as they did not judge the company only by valuation.

any company making company's assets shall not be made by a company which:

(c) shall not be made by a company which:

(i) is the company's subsidiary or holding company or a subsidiary of the company's holding company; or

(ii) has either a paid up capital of less than \$1,000,000 or the assets of which do not exceed liabilities by \$1,000,000 or more as shown in the company's last balance sheet.

From the Companies Ordinance.

• Registration requirements

- prospectus must be signed by all directors and proposed directors
 - original experts' consent letters attached
 - material contracts attached (together with certified translations into English or Chinese)
 - authorised by the Securities and Futures Commission ("SFC")
 - Requirements for Documents Guidelines 2001 issued by Registrar of Companies on 1 November 2001
-
- unlawful to issue any form of application for shares or debentures unless the form is issued with a prospectus which complies with the CO prospectus requirements (s.38(3))
 - unlawful to publish by way of advertisement any extract from or abridged version of prospectus unless authorised by the SFC (s. 38B)

Exceptions and exemptions:

- s. 38 does not apply to issue of prospectus/form of application to existing members or debenture holders of the company or where the shares or debentures are in all respects uniform with existing shares or debentures which are listed on the Hong Kong stock exchange (s. 38(5))
- SFC may exempt compliance with requirements on the ground that compliance is either irrelevant or unduly burdensome (s. 38A). Requirements which may be exempted are s. 38(1) & (3), s. 42 (1) & (4) (allotment may not be made if minimum subscription not received) and s. 44A(2) (shares must be issued within 30 days of issue of prospectus)
- Companies Ordinance (Exemption of Companies and Prospectuses from Compliance with Provisions) Notice 2001 (amended in 2002 and 2003)
- SFC issued Guidelines on application for a relaxation from the procedural formalities to be fulfilled upon registration of a prospectus under the Companies Ordinance (February 2003)

7

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ANNOUNCEMENT

BOC Hong Kong (Holdings) Limited (the "Company") has noted that various press articles (the "Articles") have appeared regarding the Company's proposed initial public offering (the "Offering") which refer to information stated to be contained in research reports concerning the Company issued by investment banks or brokers and to comments made at a press conference held on 26 June 2002, at which Bank of China (Hong Kong) Limited, the Company's direct wholly-owned subsidiary, announced its 2001 results. The research reports referred to in the Articles are stated to contain certain opinions, projections, valuations and other forward looking information, including, for example, levels of non-performing loans and projections for future financial years in relation to the Company.

At the request of the Securities and Futures Commission and The Stock Exchange of Hong Kong Limited, the Company wishes to correct any impression that the Articles were approved by or may have included information issued or approved by the Company.

The Company strongly cautions potential investors not to place any reliance on any information contained or referred to in the Articles, including in particular any projections, valuations or other forward looking information. The Company wishes to emphasize to potential investors that the Company accepts no responsibility for the accuracy or completeness of the Articles or any research reports and that neither the Articles nor any research reports were prepared, authorized or approved by the Company. The Company makes no representation as to whether any of the projections, valuations or other forward looking information included or referred to in the Articles may be achieved or whether the assumptions on which they were based were appropriate. Although the Company has not identified any material inaccuracy in the historical facts reported in the Articles, the Company has not made, and in the future does not intend to make, public financial projections and it does not intend to comment on projections made by others.

8

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9

The Company wishes to emphasize to investors that the Company accepts no responsibility for the accuracy or completeness of any such research reports and that the reports were not prepared, authorized or approved by the Company.

Further Media Coverage

10

- a prospectus is:
 - a selling document
 - a compliance document
 - a listing document (if listing is sought)
- what may be deemed to be a prospectus?
 - roadshow materials
 - connected brokers' research reports
 - general press releases by company
 - press articles
 - if a company allots or agrees to allot any shares/debentures with a view to those shares/debentures being offered for sale to the public, any document by which the offer for sale is made is deemed to be a prospectus issued by company (*s. 41*)
 - presumption that any allotment or agreement to allot was made with a view to the shares/debentures being offered for sale to the public if (a) the offer to public was made within 6 months of the allotment or agreement to allot; or (b) the company had not received the whole consideration to be received by it at the date of the offer to public

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II. Liabilities in connection with offering securities

Under the CO

- issuing a prospectus which does not comply with s. 38(1) & (1A) (*s. 38(1B)/s. 342(3)*) - fine/company and every person knowingly a party to the issue of the prospectus
- issuing application forms for securities without prospectus (*s. 38(3)*) - fine/any person acting in contravention
- publishing advertisement containing extract from or abridged version of a prospectus (*s. 38B*) - fine/any person acting in contravention
- issuing a prospectus with expert's statement without expert's consent and a statement as to expert's consent (*s. 38C*) - fine/company and every person knowingly a party to the issue of the prospectus
- issuing a prospectus without registration or without attaching the required documents (*s. 38D/s. 342C*) - daily default fine/company and every person knowingly a party to the issue of the prospectus

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- civil liability for misstatements in prospectus (*s. 40*)
 - persons liable: every director, every person named in prospectus as director (and agreed to become one), every promoter, every person who has authorised the issue of the prospectus
 - liable to all persons who subscribe for any shares or debentures on the faith of the prospectus
 - liable to pay compensation for loss or damage sustained by reason of any untrue statement included in the prospectus
 - expert only liable in respect of any untrue statement purporting to be made by him as an expert
 - some defences to liability
 - statement deemed to be untrue if it is misleading in the form and context in which it is included (*s. 41A(a)*)
 - statement deemed to be included in a prospectus if it is contained in any report or memorandum (i) appearing on the face thereof; (ii) incorporated therein by reference; or (iii) issued therewith (*s. 41A (b)*)

13

- criminal liability for misstatements in prospectus (*s. 40A*)
 - persons liable: any person who authorised the issue of the prospectus
 - liable for any untrue statements in prospectus
 - penalty: imprisonment and fine
 - defence: accused proves that (i) statement was immaterial or (ii) he had reasonable grounds to believe and did up to the time of issue of the prospectus believe that the statement was true
- a person is not prevented from obtaining damages or other compensation from the issuer by reason only of (a) his holding or having held shares in the issuer; or (b) his having the right to apply or subscribe for shares or to be included in the shareholders' register (*s. 40B*)

14

Under the Securities and Futures Ordinance (“SFO”)

- Offence to issue advertisements, invitations to invest in securities (*s. 103(1) SFO*)
 - a person issue or has in his possession for the purpose of issue
 - an advertisement, invitation or document which is or contains an invitation to the public to enter into, or offer to enter into, an agreement to acquire, dispose of, subscribe for or underwrite securities
 - unless authorised by the SFC or falls under one of the exceptions
 - certain documents deemed to contain invitation to invest (*s. 103(10) SFO*)
 - relevant exceptions include issues of invitations, documents etc.:
 - made by a corporation to its employees, creditors or existing holders of securities in respect of securities of that corporation or of a related corporation
 - made by a trustee to the beneficiaries under the trust (other than a collective investment scheme)

15

- in respect of certificates of deposit issued by an authorised financial institution
- in respect of securities which are listed, or have been approved for listing, on a recognised stock exchange and the documents complies with the relevant listing rules
- in respect of securities which are or are intended to be disposed of only to **professional investors**
- in respect of securities which are or are intended to be disposed of only to persons outside Hong Kong
- made in good faith in connection with an invitation to enter into an underwriting agreement
- which is a prospectus that complies with the CO requirements or is exempt from compliance therefrom
- defences for broadcasters in the ordinary course of business and businesses whose principal purpose is receiving and issuing materials provided by others
- general defence: accused has taken all reasonable steps and exercised all due diligence to avoid the commission of the offence

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- penalty: (i) on indictment: imprisonment for 3 years, fine of \$500,000 and daily fine of \$20,000 for continuing offence or (ii) on summary conviction: imprisonment for 6 months, fine at level 6 (currently \$100,000) and daily fine of HK\$10,000 for continuing offence
- Offence to fraudulently or recklessly induce others to invest in securities (*s. 107 SFO*)
 - a person makes any fraudulent misrepresentation or reckless misrepresentation
 - for the purpose of inducing another person to enter into, or offer to enter into, an agreement to acquire, dispose of, subscribe for or underwrite securities
 - “fraudulent misrepresentation” means:
 - any statement which the maker knows is false, misleading or deceptive when made
 - any promise which (i) the maker has no intention of fulfilling or (ii) the maker knows is not capable of being fulfilled
 - any forecast which the maker knows is not justified on the facts then known to him

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- any statement or forecast from which the maker intentionally omits a material fact with the result that the statement/forecast is rendered false, misleading or deceptive
- “reckless misrepresentation” – similar definition to fraudulent misrepresentation except that knowledge or intention of the maker is replaced by recklessness
- penalty: (i) on indictment: imprisonment for 7 years and fine of \$1m; or (ii) on summary conviction: imprisonment for 6 months and fine at level 6
- Civil liability for inducing others to invest in securities (*s. 108 SFO*)
 - a person makes any fraudulent misrepresentation, reckless misrepresentation or negligent misrepresentation
 - another person is induced by such misrepresentation to enter into, or offer to enter into, an agreement to acquire, dispose of, subscribe for or underwrite securities

18

- “negligent misrepresentation” - similar definition to fraudulent misrepresentation except that (i) knowledge is replaced by failure to take reasonable care to ensure accuracy of statement or to ensure that forecast can be fulfilled; and (ii) intentional omission of a material fact is replaced by negligent omission
- liable to pay damages for any pecuniary loss that the other person has sustained as a result of his reliance on the misrepresentation
- court may also grant injunction in addition to or in substitution for damages
- where misrepresentation is made by a company, a director of that company is presumed to also have made the misrepresentation unless it is proved that he did not authorise the making of it
- cannot be used if s. 40 CO applies
- does not affect, limit or diminish any right or liability under common law or other enactments

19

- Market misconduct – disclosure of false or misleading information inducing transactions (*s. 277 SFO*)
 - a person discloses, circulates or disseminates, or authorises or is concerned in the disclosure, circulation or dissemination of, information that is likely, *inter alia*, to (a) induce another person to subscribe for securities in Hong Kong or (b) induce the sale and purchase in Hong Kong of securities by another person
 - that information is false or misleading as to a material fact or false or misleading through the omission of a material fact
 - the person knows that, or is reckless or negligent as to whether, the information is false or misleading
 - includes assisting, counselling or procuring another person to engage in any of the prohibited conduct (*s. 245 SFO, definition of “market misconduct”*)
 - defences for broadcasters, businesses the principal purpose of which was issuing and reproducing materials provided by others and businesses the normal conduct of which involved the re-transmission of information

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- Financial Secretary may institute proceedings before Market Misconduct Tribunal which has wide powers (s. 253, 254, 257-264). Examples:
 - order not to act as director or take part in the management of a listed company for up to 5 years
 - order not to acquire, dispose of or otherwise deal in any securities for up to 5 years
 - order to pay to the government the amount of profit gained or loss avoided as a result of the market misconduct
- Civil liability for market misconduct (s. 281 SFO)
 - liable to pay damages for any pecuniary loss sustained by any person as a result of the market misconduct, whether or not the loss arises from the other person having entered into a transaction affected by the market misconduct
 - only liable if it is fair, just and reasonable in the circumstances of the case

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- persons liable include: (a) person who perpetrated the market misconduct; (b) any person who assisted or connived with the perpetrator of the market misconduct with the knowledge that such conduct constitutes or might constitute market misconduct; and (c) where a company committed market misconduct, an officer of that company who consented to or connived at the occurrence

Under common law

- contract
 - misrepresentation (note Misrepresentation Ordinance)
 - breach of warranty
- tort
 - negligent mis-statement or omission
 - disclaimer of negligence only effective if reasonable (Control of Exemption Clauses Ordinance)
 - deceit/fraud

22

III. Some Practical Problems

Problem 1: Who is “the public”?

- “... offering shares or debentures to the public shall... be construed as including a reference to offering them to any section of the public, whether selected as members or debenture holders of the company concerned or as clients of the person issuing the prospectus or in any other manner....” (s. 48A(1))
- “the public of Hong Kong, and includes any class of that public” (s. 1, Part 1 Schedule 1, SFO)
- excludes any offer or invitation (i) which is a domestic concern of the persons making and receiving it or (ii) which is not calculated to result, directly or indirectly, in the shares/debenture becoming available to persons other than those receiving the offer or invitation (s. 48A(2))

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- practitioners have used 50 as the maximum number of persons who may be approached without the invitation or offer being treated as made to the public
- “‘The public’... is of course a general word. No particular numbers are prescribed. Anything from two to infinity may serve; perhaps even one, if he is intended to be the first of a series of subscribers, but makes further proceedings needless by himself subscribing the whole.” (*per* Viscount Sumner, *Nash v Lynde* [1929] AC 158 at p. 169)

Under the 2003 Bill

- exclude from the definition of “prospectus” in s. 2 documents relating to certain types of offer specified in Part 1 of a new Seventeenth Schedule
 - an offer to not more than 50 persons
 - an offer under which the total consideration payable for the shares/debentures offered does not exceed \$5m

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- an offer where (in the case of shares) the minimum denomination or the minimum consideration payable by any person is not less than \$500,000 or (in the case of debentures) the minimum principal amount to be subscribed or purchased is not less than \$500,000

Note: apart from the above two grounds, the other grounds may be combined

- an offer in connection with an invitation in good faith to enter into an underwriting agreement
- an offer in connection with a takeover, merger or share repurchase which is in compliance with the Codes on Takeovers and Mergers and Share Repurchases
- an offer of bonus shares or scrip dividend to **holders of shares**
- an offer of shares or debentures in a company made by that company (or a group company) to current and former directors, employees, officers or **consultants** of that company (or of a group company) or their **dependents** on terms that only such persons can acquire the shares or debentures
- an offer made by a charitable institution or trust of a public character or an educational establishment

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- an offer to members of a club or association where the proceeds of the offer are to be applied for the affairs of that club/association
- an offer in respect of (i) an exchange of shares in the same company which does not result in an increase in share capital; or (ii) an exchange of debentures of the same company which does not result in an increase in the aggregate principal amount outstanding
- an offer in connection with a collective investment scheme authorised under the SFO
- an offer to “professional investors” as defined in s. 1, Part 1, Schedule 1 SFO), which include:
 - any intermediary or any other person carrying on the business of provision of investment services and regulated outside Hong Kong
 - any authorised financial institution or any bank regulated outside Hong Kong
 - any authorised insurer or any other person carrying on insurance business and regulated outside Hong Kong

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- any authorised collective investment scheme or any other scheme which is similarly constituted and regulated outside Hong Kong
- any person of a class prescribed by rules made by the SFC under s. 397(1) SFO - the Securities and Futures (Professional Investor) Rules
 - any trust corporation with total trust assets of not less than \$40 m
 - any individual, either alone or jointly with his spouse and children, with a portfolio of not less than \$8m (portfolio means securities, certificates of deposit issued by banks and cash)
 - any corporation or partnership with either (i) a portfolio of not less than \$8m; or (ii) total assets of not less than \$40m
 - a pure investment holding company wholly-owned by an individual who is himself a professional investor
- restrictions on sale to the public of shares/debentures acquired pursuant to an exempted offer and SFC may publish guidelines (*new s. 38A/s. 342AB*)

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Problem 2: Status of “supplemental” prospectus

- a company may on its own initiative, or may be required by relevant securities regulations or stock exchange listing rules (such as Rule 11.13 of the Hong Kong stock exchange listing rules) to, publish a supplemental prospectus setting out further information or clarifying or amending information contained in a prospectus already issued
- no provision in the CO for the issue or registration of a supplement which on its own does not comply with all CO prospectus requirements

Under the 2003 Bill

- new s. 39A/342CA/Twentieth Schedule permitting amendment of a prospectus by an addendum to the prospectus or by replacing the prospectus with a new prospectus (and permitting amendment of an addendum)
- “amend” defined in s. 2

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If you are in doubt about the supplements prospectus you should consult your intermediary, bank manager, broker or professional accountant or other professional advice.

This is a supplemental prospectus issued by China Telecom Corporation Limited which supplements the prospectus issued by it on October 23, 2002 (the "Prospectus") in connection with a public offering and listing of its shares on The Stock Exchange of Hong Kong Limited. A part of this supplemental prospectus having remained in a certified copy of a certificate in the required manner as to the accuracy of the Chinese translation of this supplemental prospectus and the original and certified copy of a certificate in the required manner as to the consistency of the Chinese translation in its form by the Joint Sponsors have been registered with the Registrar of Companies in Hong Kong as required by Section 147C of the Companies Ordinance (Chapter 32 of the Laws of Hong Kong). The Director and Finance Committee and the Registrar of Companies in Hong Kong take no responsibility as to the contents of this supplemental prospectus or any other document referred to herein.

The Board of Directors of Hong Kong Securities Clearing Company Limited take no responsibility for the contents of this document, make no representation as to its accuracy or completeness and expressly disclaim any liability whatsoever for any loss howsoever arising from or in reliance upon the whole or any part of the contents of this document.

Unless otherwise indicated, capitalized terms used in this supplemental prospectus have the same meaning ascribed to them as in our prospectus dated October 23, 2002.



(A joint stock limited company incorporated in the People's Republic of China with limited liability)

SUPPLEMENTAL PROSPECTUS

On October 24, 2002, subsequent to the printing of the Prospectus, we held a press conference to launch our Hong Kong Public Offering. At that press conference, in response to questions from the press, we made certain statements that were not included in our Prospectus. Accordingly, we are setting out such additional information in this supplemental prospectus so that all potential investors may have the benefit of such information.

We are issuing this supplemental prospectus pursuant to Rule 11.13 of the Hong Kong Listing Rules to provide information on the statements we made at the press conference. This document supplements the Prospectus, should be read in conjunction with the Prospectus and is required to be distributed with the Prospectus. Some of the statements referred to herein were already been set out in our press announcements dated October 23, 2002 appearing on the South China Morning Post and the Hong Kong Economic Times on October 24 and 25, 2002.

The statements we made are described below.

Statements relating to historical benchmarking:

At the press conference, we provided targeted annual average growth rates for revenues and profits over the three financial years of 2002 to 2004. Subsequent to the press conference, we issued a press announcement that clarified that these figures are only internal benchmarks that we have set for ourselves, a gauge of financial performance, and that they should not be interpreted as projections of our future revenues or earnings. These internal benchmarks were established by taking into account many factors and assumptions that are subject to significant risks, uncertainties and contingencies, many of which are beyond our control. In addition, these internal benchmarks reflect our current targets with respect to future events and are not a guarantee of future performance. The actual financial benchmarks provided were an average annual growth rate in revenues of approximately 18% over the three year period of 2002 to 2004 and an average annual growth rate in net profit in the range of 8% to 11% over the same three year period. The internal benchmark growth rate in net profit for 2002 is based upon our 2001 net profit after adding back a revaluation deficit charge of RMB1,100 million, net of related income tax of approximately RMB1,937 million.

On October 28, 2002, subsequent to the printing of the Prospectus, we were required by the US Securities and Exchange Commission to make certain statements in the prospectus to be issued in connection with the US Offering that were not included in our Prospectus. Accordingly, we are setting out such additional information in this second supplemental prospectus so that all potential investors may have the benefit of such information.

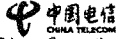
We are issuing this second supplemental prospectus pursuant to Rule 11.13 of the Hong Kong Listing Rules to provide information on these statements. This document supplements the Prospectus, should be read in conjunction with the Prospectus and is required to be distributed with the Prospectus.

If you are in doubt about the second supplemental prospectus, you should consult your stockbroker, bank manager, or other professional and accountants or other professional adviser.

This is a second supplemental prospectus issued by China Telecom Corporation Limited which supplements the prospectus issued by it on October 22, 2002 and the supplemental prospectus issued by it on October 28, 2002 (together the "Prospectus") in connection with a global offering and listing of its shares on The Stock Exchange of Hong Kong Limited. A copy of this second supplemental prospectus having attached thereto a certified copy of a certificate of the appropriate manner as to the accuracy of the Chinese translation of this second supplemental prospectus and the original and certified copy of a certificate in the appropriate manner as to the accuracy of the Chinese translation to be given by the Joint Prospectus have been registered with the Registrar of Companies in Hong Kong as required by Section 343C of the Companies Ordinance (Chapter 32 of the Laws of Hong Kong). The Securities and Futures Commission and the Registrar of Companies in Hong Kong take no responsibility as to the contents of this second supplemental prospectus or any other documents referred to herein.

The Stock Exchange of Hong Kong Limited and Hong Kong Securities Clearing Company Limited take no responsibility for the contents of this document, make no representation as to its accuracy or completeness and expressly disclaim any liability whatsoever for any loss howsoever arising from or in reliance upon the whole or any part of the contents of this document.

Unless otherwise indicated, capitalized terms used in this second supplemental prospectus have the same meanings ascribed to them as in our prospectus dated October 22, 2002.



China Telecom Corporation Limited
中國電信股份有限公司

(A joint stock limited company incorporated in the People's Republic of China with limited liability)

SECOND SUPPLEMENTAL PROSPECTUS

On October 21, 2002, subsequent to the printing of the Prospectus, we were required by the US Securities and Exchange Commission to make certain statements in the prospectus to be issued in connection with the US Offering that were not included in our Prospectus. Accordingly, we are setting out such additional information in this second supplemental prospectus so that all potential investors may have the benefit of such information.

We are issuing this second supplemental prospectus pursuant to Rule 15.13 of the Hong Kong Listing Rules to provide information on these statements. This document supplements the Prospectus, should be read in conjunction with the Prospectus and is required to be distributed with the Prospectus.

These statements are described below:

Additional Statement to the Risk Factor Section of Prospectus relating to Competition

We, through China Telecommunications Corporation, are actively seeking the issuance of a license for mobile communications. However, we can provide no assurance, however, as to whether or when we may be able to receive any benefit of any license for mobile communications.

Additional Statement to the Risk Factor Section of Prospectus relating to Universal Services

Although the Ministry of Information Industry has undertaken that we will be compensated to the extent that universal service obligations are imposed on us, such compensation may not be adequate and we may not be able to realize adequate return on investments for expanding networks to and providing telecommunications services in, those economically less developed areas due to potentially higher capital expenditure requirements, lower usage by customers and lack of feasibility in setting our tariffs.

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Problem 3: Discrepancies in treatment between Hong Kong incorporated and foreign companies

- s. 155C requires a copy of a prospectus to be delivered to all shareholders of a Hong Kong company within 3 weeks from the date of registration thereof, but no equivalent requirement for a foreign company
- for a foreign company s. 342E imposes civil liability for misstatements in a prospectus relating to an offer for subscription only, but for Hong Kong companies statutory civil liability covers offers for sale
- s. 342B (1A) (6) exempts a prospectus offering debentures in a foreign company from the requirements of s. 44A and s. 44B but those sections apply to Hong Kong companies with respect to both shares and debentures
- s. 343(2) expressly provides that an offer by foreign ordinary of shares/debentures to persons whose ordinary business is to buy or sell shares/debentures, whether as principal or agent, is deemed not to be an offer to the public (the "professionals exemption"), but no equivalent provision for Hong Kong companies

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Under the 2003 Bill

- s. 155C is amended to provide that a Hong Kong company whose shares are listed on the Hong Kong stock exchange is not required to send a copy of a prospectus to all of its shareholders
- s. 342E is amended so that it applies to a prospectus relating to an offer for sale in addition to an offer for subscription
- s. 342B (1A) is repealed and s. 342B(1) is amended so that s. 44A and s. 44B will apply to both offers for subscription and offers for purchase of debentures in a foreign company
- the “professionals exemption” is made available to Hong Kong companies through the 2001 exemption notice referred to above and through the excluded offers in the amended definition of “prospectus”

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Problem 4: Prospectus regime not conducive to programme offers

- each time an offer is made under the programme a prospectus which complies with CO prospectus requirements is required and the prospectus must be authorised and registered. Such onerous requirements hinders the making of timely offer in response to market conditions and results in increased compliance cost

Under the 2003 Bill

- new s. 39B/s. 342CB and Twenty-first Schedule allow a prospectus to consist of a programme prospectus and an issue prospectus (each of which may be updated/amended by an addendum)
- the programme prospectus is valid for 12 months from the date of issue or until publication of the next annual report and accounts of the issuer, whichever is the earlier

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- the programme prospectus, issue prospectus and any addendum read together must comply with the content requirements under CO unless exempted
- if an expert has issued a consent letter for information in the programme prospectus he does not need to issue a fresh consent letter for that information at the time of issue of the issue prospectus
- SFC may publish guidelines relating to prospectus consisting of more than one document - SFC issued Guidelines on using a “dual prospectus” structure to conduct programme offers of shares or debentures requiring a prospectus under the Companies Ordinance (February 2003)

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IV. Other major changes under the 2003 Bill

- SFC exemption and amendment powers broadened
 - s. 38A amended to give the SFC wider powers to exempt from the CO prospectus requirements a particular prospectus, a class of companies and a class of prospectuses
 - additional ground: the exemption will not prejudice the interest of the investing public (*existing grounds: compliance with the requirement(s) would be irrelevant or unduly burdensome*)
 - more requirements may be exempted: s. 38(1), (1A), (3) and (7); s. 38AA (1); s. 38D(3), (3A) and (4); s. 42(1) and (4); s. 44A (1), (2) and (6); s. 44B (1) and (2); Part 1 of 20th Schedule; Part 1 of 21st Schedule (*existing exemptible requirements: s. 38(1) and (3); s. 42(1) and (4); s. 44A (2)*)
 - SFC may amend the list of exemptible requirements by order published in the Gazette
 - in granting the exemption SCF may impose conditions

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- s.360 amended to give SFC power to amend the 3rd, 17th, 18th, 19th, 20th, 21st and 22nd Schedules by order published in the Gazette
- Offer awareness advertisements permitted
 - s. 38B amended to permit the publication of an “offer awareness advertisement” which complies with the new Nineteenth Schedule
 - sets out basic factual and procedural information relating to an offer
 - purposes: enhance investors’ awareness of the offer and allow them more time to arrange their financial and other affairs in anticipation of the public offer
 - must warning statements
 - may contain the following prescribed particulars only
 - name of issuer and its place of incorporation
 - description of the shares/debentures proposed to be offered
 - dates on which and places at which the prospectus will be available

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- details of the administrative procedures relevant to investors that are likely to assist their participation in the offer
- (where applicable) statement that the issuer is seeking a listing of the shares/debentures on a stock exchange
- legends designed to clarify the legal nature of the advertisement
- SFC may publish guidelines in respect of publications under s. 38B (*new s. 38BA*) - SFC published Guidelines on use of offer awareness and summary disclosure materials in offerings of shares and debentures under the Companies Ordinance (March 2003)
- for listed shares/debentures, Hong Kong stock exchange listing rules require all “publicity material released in Hong Kong relating to an issue of securities” to be pre-vetted by the Stock Exchange
- Prospectus liability provisions clarified
 - s. 41A/s.40A amended to extend statutory liability to advertisements and extracts from or abridged versions of prospectus issued pursuant to s. 38B (2) .

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Applications for Notes will be made only by Bank of Communications (Hong Kong Branch) ("Bank of Communications"), The Bank of East Asia, Limited ("The Bank of East Asia"), Dah Sing Bank, Limited ("Dah Sing Bank"), Dao Heng Bank Limited ("Dao Heng Bank"), HSBC, Hang Seng Bank Limited ("Hang Seng Bank"), International Bank of Asia Limited ("International Bank of Asia"), Shanghai Commercial Bank Limited ("Shanghai Commercial Bank"), Standard Chartered Bank and Wing Lung Bank Limited ("Wing Lung Bank"), each a "Placing Bank" and together, the "Placing Banks". In order to instruct a Placing Bank to apply for Notes on your behalf, you must already have, or you must open, a bank account and also an investment account with the Placing Bank you intend to instruct. No application form is being issued for the Notes; you must instruct one of the Placing Banks to apply for Notes on your behalf. See the section headed "Custody Arrangements with Placing Banks" in this Offering Memorandum.

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- Prospectus content requirements
 - general standard (*paragraph 3, Third Schedule*) amended to read:
"any prospectus, notice, circular, brochure, advertisement, or other document: (a) offering any shares or debentures to the public for subscription or purchase or (b) calculated to invite offers by the public to subscribe for or purchase any shares or debentures, taking into account the nature of the shares or debentures being offered and the nature of the company, and the nature of the persons likely to consider acquiring them"
- Prospectus registration requirements
 - s.38D/s.342C amended so that material contracts do not have to be registered with the Registrar and only have to be made available for inspection by the public for not less than 14 days from the issue of the prospectus at the issuer's registered office in Hong Kong
 - issuer has to provide copies of documents on display on request on payment of reasonable expenses unless the documents are posted on a readily accessible web page on the Internet in a format which can be readily printed

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- new s.38D (10) added to clarify what qualifies as a certified translation of a material contract
- new s. 39C/s. 342CC added to permit submission of certified true copies of documents (instead of the originals) to the Registrar where such documents are required under s. 37 to s. 44B

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Questions and Answers

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LAW LECTURES FOR PRACTITIONERS 2003

Legal Professional Privilege in a Criminal World

**Michael Wilkinson
The University of Hong Kong**

LEGAL PROFESSIONAL PRIVILEGE IN A CRIMINAL WORLD

Anne Carver, Kimberley Mohan and Michael Wilkinson

1. Introduction

The conception of this lecture came from the convergence of three related issues. First, the recent legislation enacted to counter money laundering and terrorism¹. Secondly, the recent case of barrister Robert Pang, which highlighted the interface between lawyers' statutory duties and the principles of confidentiality and legal professional privilege; and finally, the case of English solicitor Robert Duff who was sent to prison for failing to report his suspicions that his client was involved in money laundering.

This paper looks, therefore, at the degree to which legal professional privilege has been undermined by legislation enacted to make our society a safer place in which to live.

A tension has, of necessity, arisen between increased measures to ensure national security and the preservation of long established civil liberties. One view maintains that, to uphold the values of confidentiality and legal professional privilege, must be to uphold the values of the *Basic Law* and the *Bill of Rights*; to deny it must erode the rule of law itself. The contrary view maintains that the paramount needs of security must, of necessity, override even such fundamental liberties.

The lawyer's duty of confidentiality and the doctrine of legal professional privilege have long constituted a fundamental element in the relationship of lawyer and client. They exist in the interests of justice² and have been recognised and enforced both by the common law and the solicitors' rules of professional conduct. However, the protection they afford to clients and lawyers is not absolute; rather they are subject both to common law and statutory limitations. Of late, the extent of the protection has been brought into debate by its apparent erosion by the enactment of those statutes aimed at protecting society from serious criminal harm in the form of money laundering, drug trafficking and terrorism. The most recent of these has been a direct response to the horrific terrorist activities of September 11, 2001, as a consequence of which many countries have enacted stringent measures to restrict terrorist activities and the laundering of terrorist funds. It is interesting to note that, in the context of such enactments, the doctrine of legal professional privilege is also increasingly being recognised as a fundamental human right.

In the first part of this article, we shall consider the solicitor's retainer, the scope of the solicitor's duty of confidentiality and the doctrine of legal professional privilege. Secondly, we identify the common law and statutory limitations upon them and highlight the effects of the recent legislation on confidentiality and legal professional privilege. This trend of apparently restricting the scope of the duty of confidentiality and the doctrine of legal professional privilege is not confined to Hong

¹. Hong Kong now has three major anti-money laundering, anti-organized crime and anti-terrorist statutes, namely *The Drug Trafficking (Recovery of Proceeds) Ordinance* (cap 405), enacted in 1989, the *The Organized and Serious Crimes Ordinance* (cap 455), enacted in 1994 and *The United Nations (Anti-Terrorism Measures) Ordinance* (cap 575), recently enacted in 2002.

². Per Lord Brougham LC in *Greenough v Gaskell* (1833) 1 My & K 618, 620.

Kong, but has been seen in other common law jurisdictions. We will then examine developments in the United Kingdom and Canada in order to ascertain, by way of comparison, the position in Hong Kong. Finally we will state our conclusions.

2. The solicitor's retainer, the duty of confidentiality and legal professional privilege

(a) *The solicitor's retainer*

The ethical position of a solicitor who is approached by a potential client whom he suspects of being involved in criminal activities is clear; he must refuse to accept the retainer. Thus the Solicitors' Guide provides that a solicitor must not act or must cease to act, where to do so would involve him in a breach of the law or professional misconduct³. If the solicitor accepts the retainer without suspicion that he will later be involved in criminal activities, but subsequently becomes suspicious that his services are being used, for example, to further criminal activities such as drug trafficking or terrorism or to conceal or invest funds to be used for such criminal purposes by way of money laundering, then he must immediately cease to act⁴. This means that, in deciding whether or not to accept a retainer, the solicitor cannot simply shut his eyes to the apparent purpose of the retainer and should pay careful attention to the nature of the instructions, the circumstances surrounding the instructions and the demeanour of the potential client. As we shall see, failure to do so could lead, not only to disciplinary consequences, but to criminal conviction.

An instructive illustration of the considerations involved can be found in *Re a Solicitor* (2000) CACV No 117 of 2000. A solicitor was retained by a client to draft a mortgage in respect of property purchased from the Housing Authority. The execution of such a mortgage was, however, illegal under section 27A of the *Housing Ordinance* unless it had the prior approval of the Housing Authority, which it did not. The solicitor was charged with professional misconduct in that he had aided and abetted the client in the commission of the criminal offence by drafting the mortgage. Keith JA, when considering the duty of the solicitor to ascertain whether his client was giving instructions to carry out an illegal act said:

We appreciate that there are grey areas of the law in which the law is uncertain. But that is precisely where solicitors must be particularly circumspect...it may be entirely appropriate for the solicitor to be charged with professional misconduct if he carried out his instructions recklessly or imprudently ie without giving any thought to whether they might involve a breach of the law.

(b) *The solicitor's duty of confidentiality*

A solicitor has a duty at law to keep confidential information passing between solicitor and client in the course of their relationship and this duty exists by reason, express or implied, of the terms of the contractual retainer⁵ and by reason of the common law⁶. A solicitor also has an ethical duty

³. Principle 5.02, Solicitors' Guide.

⁴. Commentary 2 of Principle 5.02, Solicitors' Guide.

⁵. See Diplock LJ in *Parry-Jones v Law Society* [1968] 1 All ER 177, CA, where the learned judge said at 180,

to hold in strict confidence all information concerning the business and affairs of his client acquired in the course of the professional relationship. He must not divulge such information unless disclosure is, expressly or impliedly authorised by the client or required by law, or expressly or impliedly waived by the client⁷. The rationale for the existence of the duty is that a solicitor could not render effective professional service unless there exists full and unreserved communication between them⁸. Breach of this duty could lead to disciplinary proceedings against the solicitor⁹.

(c) The doctrine of legal professional privilege

Legal professional privilege exists in two different circumstances. The first is in respect of communications between client and solicitor for the purpose of giving or receiving legal advice. The true scope of this first branch of the rule was explained by Taylor LJ in *Balabel v Air India* [1988] Ch 317 at 330:

Although originally confined to advice regarding litigation the privilege was extended to non-litigious business. Nevertheless, despite that extension, the purpose and scope of the privilege is still to enable legal advice to be sought and given in confidence. In my judgment, therefore, the test is whether the communication or other document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or be appropriate on matters great or small at various stages. There will be a continuum of communications between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach ... Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.

The second branch of legal professional privilege embraces communications between third persons and the solicitor or the client where the dominant purpose of such communications is the

“What we are concerned with here is the contractual duty of confidence, generally implied though sometimes expressed, between a solicitor and client”.

⁶. See, for example, *China Light & Power Co Ltd v Michael Ford* (1994) HCA No A6382/93, where a barrister disclosed confidential instructions given to him by the instructing solicitor to another law firm, so as to commence proceedings against the company on whose behalf he had been originally instructed. Sears J awarded damages against the barrister for breach of confidentiality.

⁷. Principle 8.01, Solicitors’ Guide.

⁸. Commentary 2 of Principle 8.01, Solicitors’ Guide.

⁹. Commentary 5 of Principle 8.01, Solicitors’ Guide.

furtherance of litigation that is either pending or anticipated. The scope of legal professional privilege was clearly explained by Lord Denning MR in *Buttes Gas and Oil Co v Hammer (No 3)* [1981] QB 223 at 243-4:

Privilege in aid of litigation can be divided into two distinct classes: the first is legal professional privilege properly so called. It extends to all communications between the client and his legal adviser for the purpose of obtaining legal advice. It exists whether litigation is anticipated or not. The second only attaches to communications which at their inception come into existence with the dominant purpose of being used in aid of pending or contemplated litigation. That was settled by the House of Lords in *Waugh v British Railways Board* [1980] AC 521. It is not necessary that they should have come into existence at the instance of the lawyer. It is sufficient if they have come into existence at the instance of the party himself - with the dominant purpose of being used in the anticipated litigation.

It was also made clear by Lord Denning MR in *Attorney-General v Mulholland* [1963] 2 QB 477 at 489, that privilege is that of the client, not the lawyer, but the solicitor has a duty to assert the privilege¹⁰.

Legal professional privilege has also been recognised in the Solicitors' Guide¹¹.

It can be readily seen, therefore, that the scope of confidentiality is considerably wider than the scope of legal professional privilege and much information passing from a client to his solicitor will be confidential, but not protected from disclosure by legal professional privilege. This distinction is significant since many statutes exclude from their ambit communications that are privileged; matters that are merely confidential but which cannot be said to be privileged are not protected from disclosure.

3. Limitations upon confidentiality and legal professional privilege under the common law and the Solicitors' Guide

We have already noted that the duty of confidentiality and the scope of legal professional privilege are not absolute. The common law has identified several important situations in which a solicitor is released from his duty of confidentiality and may be compelled to testify by way of revealing privileged information. These exceptions have been recognised by the Solicitors' Guide.

(a) Waiver: express, implied and imputed

¹⁰. See Commentary 8 of Principle 8.01 of the Solicitors' Guide.

¹¹. Commentary 8 of Principle 8.01 states that a client has the right to refuse to disclose, even to a court, confidential communications with his lawyer made for the purpose of obtaining legal advice. This right to resist disclosure is a privilege granted to a client and so may be abandoned only by him. A solicitor is bound to assert this privilege on behalf of his client. A solicitor has no authority unilaterally to waive a client's privilege; consent of the client or a court order must be obtained.

The duty to keep information confidential and the right to claim legal professional privilege may be waived by the client¹². Waiver may either be express or be implied from conduct. It may also be imputed from the relevant circumstances.

(b) No duty of confidentiality or protection by way of legal professional privilege where communication made in furtherance of a future or continuing criminal act

A second very important limitation upon the duty of confidentiality and the doctrine of legal professional privilege is that the duty and privilege do not extend to any communication made in furtherance of a future or continuing crime or fraud. Thus Stephen J has said in *R v Cox and Railton* (1884) 14 QBD 153, 167:

The reason on which the rule [of confidentiality and legal professional privilege] is said to rest cannot include the case of communications, criminal in themselves, or intended to further any criminal purpose, for the protection of such communications cannot possibly be otherwise than injurious to the interests of justice, and to those of the administration of justice. Nor do such communications fall within the terms of the rule. A communication made in furtherance of a criminal purpose does not 'come within the ordinary scope of professional employment'¹³.

The scope of this exception was recently confirmed in *C v C* [2001] 3 WLR 446, CA, where the English Court of Appeal concluded that legal professional privilege did not extend to communications which are either "criminal in themselves or intended to further any criminal purpose".

The Solicitors' Guide also provides that communications made by a client to his solicitor before the commission of a crime or during the commission of a continuing crime for the purpose of being guided or helped in the commission of it are not confidential, since such communications do not come within the scope of the professional retainer¹⁴. The Guide further provides that the solicitor may, in exceptional circumstances, breach his duty of confidentiality to the extent of revealing information that he believes necessary to prevent his client or any other person from committing or continuing a criminal act that the solicitor believes on reasonable grounds involves or is likely to result in serious violence to a person¹⁵. Even then, the solicitor must exercise his professional

¹². See commentary 8 of Principle 8.01 of the Solicitors' Guide.

¹³. Further, on the position at common law, Templeman LJ said in *Gamlem Chemical Co (UK) Ltd v Rochem Ltd* [1979] CA Transcript 777: "In the present case the plaintiffs seek discovery and disclosure of communications between the defendants and their solicitors. In the light of the existing evidence and without knowing if, at the trial, that evidence will be disproved, we must ... determine whether it seems probable that the defendants may have consulted their legal advisers before the commission of fraud and for the purpose of being guided and helped wittingly or unwittingly in committing the fraud. A fortiori, if the defendants embarked upon a fraudulent activity, communications between the defendants and the solicitors, made in the course of that activity, cannot be entitled to privilege and must be disclosed."

¹⁴. Commentary 16 of Principle 8.01 of the Solicitors' Guide.

¹⁵. Commentary 15 of Principle 8.01, Solicitors' Guide.

judgment and decide whether there are any other means of preventing the crime and, if not, whether the public interest in protecting persons at risk from serious harm outweighs his duty to his client¹⁶. No similar exception exists, however, either at common law or in the Solicitors' Code, in respect of *past* crimes committed by a client¹⁷. These must remain confidential.

It is important to note that the provisions of the common law and Solicitors' Guide cited above do not place a *positive* obligation upon solicitors to inform on their clients. They merely provide that the solicitor *may* take such a course of action without rendering himself or herself liable to civil or disciplinary action at the hands of the profession. As we shall see below, recent statutory provisions have imposed upon solicitors a *positive* duty to inform upon clients in a variety of situations.

4. The construction of statutory provisions excluding or limiting confidentiality and legal professional privilege; legal professional privilege as a fundamental human right —

(a) The position in England

Considerable assistance as to the proper approach of the courts in construing statutory provisions involving confidentiality and legal professional privilege has been afforded by the House of Lords in its recent judgment in *R v Special Commissioner, ex parte Morgan Grenfell* [2002] 2 WLR 1299, HL. This case involved section 20(1) of the *Taxes Management Act, 1970*, which empowers an inspector, by notice in writing, to require a person to deliver to him such documents as are in his possession or power and as contain information relevant to any tax liability. An inspector had issued such a notice to Morgan Grenfell asking to see documents relating to the advice that Morgan Grenfell had obtained from counsel and solicitors concerning a particular tax avoidance scheme. Morgan Grenfell objected on the grounds that such documents were protected from disclosure by legal professional privilege and sought judicial review of the notice on the grounds that it was ultra vires. There was no provision in the Act that excluded from its purview documents that were subject to legal professional privilege. Their Lordships first concluded that legal professional privilege was a fundamental human right (or basic tenet of the law¹⁸) long established by the common law. It was a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice could not be effectively obtained unless the client was able to put all the facts before his adviser without fear that they might afterwards be disclosed and used to his prejudice¹⁹.

¹⁶. Ibid.

¹⁷. Thus Lord Sumner said in *O'Rourke v Darbyshire* [1920] AC 581, HL, "To consult a solicitor about an intended course of action, in order to be advised whether it is legitimate or not, or to lay before a solicitor the facts relating to a charge of fraud, actually made or anticipated, and make a clean breast of it with the object of being advised about the best way to meet it, is a very different thing from consulting him in order to learn how to plan, execute or stifle an action for fraud".

¹⁸. Per Lord Hobhouse.

¹⁹. See *R v Derby Magistrates Court, ex p B* [1996] AC 487, CA, per Lord Taylor of Gosforth; *Campbell v United Kingdom* (1992) EHRR 137 (legal professional privilege is part of the right of privacy guaranteed by article 8 of the *Convention on Human Rights*); *Foxley v United Kingdom* (2000) 31 EHRR 637.

An intention to override such rights had to be expressly stated in primary legislation²⁰ or appear by necessary implication²¹. Since that section of the Act contained no express reference to legal professional privilege, the question was whether its exclusion had necessarily to be implied.

Their Lordships, having noted that there was an express provision in the Act preserving legal professional privilege in respect of documents in the possession of lawyers, questioned whether it would be rational to have such protection for documents in the hands of a taxpayer's lawyers where such protection would not apply to the same documents in the hands of the taxpayer himself. Their Lordships concluded that the exclusion of legal professional privilege was not necessarily to be implied and, notwithstanding the absence of any express statutory provision to that effect, the documents in question were protected from disclosure by legal professional privilege.

Lord Hoffmann went on to consider what the position would be if there had been an express exclusion of legal professional privilege. The learned judge noted that it could be argued that such exclusion would be incompatible with the right to privacy established by article 8 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*²². It had been held in *Foxley v United Kingdom* (2001) 31 EHRR 25, at 647 that legal professional privilege was a fundamental human right which could only be invaded in exceptional circumstances. Such exclusion would only be legitimate where its exclusion could be shown to be necessary in a democratic society.

In the recent case of *R v Duff* [2002] EWCA Crim 2117, CA, solicitor Jonathan Duff was imprisoned for 6 months for not reporting a suspicion of money laundering contrary to section 52(1) of the *Drug Trafficking Act*, 1994. Section 52(1) of the Act stated that it was not an offence for a legal adviser to fail to disclose information under privileged circumstances. Mr. Duff had received on behalf of his firm money from a client who was subsequently convicted of drug trafficking. The fact that the money involved was not received in connection with the giving or receiving of legal advice or in contemplation of legal proceedings despite the fact that a retainer existed excludes legal professional privilege as an adequate defence. The publicity surrounding this case created a considerable degree of uncertainty into the law relating to lawyers' duties to their clients and the obligations of lawyers to report suspicious transactions. However, it is clear from this judgement that the disclosure of information protected by legal professional is not at issue. Other than to say that this recent conviction makes it essential for solicitors to study the relevant legislation carefully and ensure that they comply, the position in England would, therefore, appear to be:

- (i) Legal professional privilege has been recognised as a fundamental human right.
- (ii) Legal professional privilege can only be excluded by express provision in primary

²⁰. See *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, HL, per Lord Hoffmann: 'Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights ... in the absence of express language or necessary implication to the contrary, the courts ... presume that even the most general words were intended to be subject to the basic rights of the individual'.

²¹. See *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, HL.

²². (1953) Cmd 8969.

legislation or by necessary implication.

(iii) Even where legal professional privilege has been excluded either expressly or by necessary implication, the courts would only give effect to such exclusion where it could be shown to be necessary in a democratic society.

(b) *The position in Canada*

The courts in Canada have also taken the position that legal professional privilege is a fundamental constitutional right. It was referred to by Gonthier J in *Law Society (British Columbia) v Mangat* 2001 SCC 67 as ‘a principle of fundamental justice’ and, recently in *Lavallee, Rackel & Heintz v Canada (Attorney General)* 2002 SC 61 the Supreme Court confirmed that solicitor-client privilege is a principle of fundamental justice and a civil right of supreme importance in Canadian law²³.

An interesting series of judicial determinations in Canada has been taking place in response to the issue: where a statute imposes a *positive* obligation upon lawyers to report certain illegal activities of their clients, but the statute nonetheless expressly excludes matters covered by legal professional privilege, should that provision imposing the duty still be struck down as impairing lawyers’ independence. The issue had been considered by way of interlocutory application in four cases: *Law Society (British Columbia) v Canada (Attorney General)* [2002] 3 WWR 455 (British Columbia Supreme Court), *Federation of Law Societies of Canada v Canada (Attorney General)* [2001] AJ No 1697 (Alberta QB), *Federation of Law Societies of Canada v Canada (Attorney General)* 57 OR (3d) 383 (Ontario Superior Court) and *Federation of Law Societies of Canada v Canada (Attorney General)* 2002 NSSC 95 (Nova Scotia Supreme Court). They all involved the *Proceeds of Crime (Money Laundering) Act*, enacted in 2000, which requires all persons, including lawyers, to report suspicious transactions to the authorities²⁴. Section 11 of the Act provides that nothing in the Act requires a legal counsel to disclose any communication that is subject to solicitor-client privilege’. The petitioner Law Societies sought a declaration that such provisions were inconsistent with the Canadian Constitution. They also applied for interlocutory injunctions. The petitioners contended that the requirements of the Acts to pro-actively report suspicious transactions put lawyers in a dilemma. A lawyer who failed to report a suspicious transaction because of concerns of breaching solicitor-client privilege could be charged under the legislation; alternatively, a lawyer who believed (as it turned out subsequently wrongly) that a transaction with a client did fall within the description and who duly reported the transaction, relying wrongly on the apparent protection afforded by section 11 of the Act, might be disciplined by the Law Society for a breach of his professional duties and be liable to his client in damages. The provisions also placed lawyers in a profound conflict of interest between their duty to their clients to maintain confidentiality and their duty to report that client to the authorities. Further, public confidence in

23. For a more detailed consideration of this case please refer to Footnote 72 on page 24.

24. The Criminal Code was amended in a similar manner to require individuals, including lawyers, to disclose to the appropriate authorities any property that they might have in their possession or control that they believe may be linked to terrorist activities. The purpose of this legislation, which was enacted following the events of September 11, 2001, is to cut-off the supply of funds to terrorist organisations. See further ‘A Note on the Terrorism Financing Offences’, Unice Machado, *University of Toronto Faculty of Law Review*, Vol 60, No 1, 2002.

the bar would be shaken and lawyer-client relationships irreparably damaged. Cullity J (in giving his judgment in the Ontario case) observed:

In imposing a duty on legal practitioners to give secret reports of their clients' transactions to a government agency, the legislation clearly impinges on, or alters, the traditional relationship between solicitors, or counsel, and their clients. It does not merely override a lawyer's ethical duty of confidentiality - something that has always been possible in legal proceedings with respect to matters not subject to solicitor-client privilege - it strikes at the lawyer's duty of loyalty and the client's privilege of self-incrimination as well as the principle that lawyers should be independent of the government. The duty of loyalty is affected not only by the obligation to make secret reports to government about a client's transactions and personal details, but also because of the inevitable involvement of the lawyer's personal interests and potential liability to severe penalties when decisions whether to report are made.

In all the above cases the applications for a declaration were stayed pending the outcome of a test case set down for hearing in the British Columbia Supreme Court²⁵. We will, unfortunately, not receive the judicial response because the Canadian Federal Government on 25 March 2003 announced that lawyers would be exempted from these statutory provisions.

In conclusion, the position in Canada is that legal professional privilege has been recognised as a principle of fundamental civil justice.

(c) *The position in Hong Kong*

It is only recently that judicial consideration has been given to this issue in the judgment of Hartmann J in *Pang Yiu Hung Robert v Commissioner of Police* [2002] 4 HKC 579. This case concerned the duties of a barrister, but it is suggested that the principles set out in the judgment apply with equal force to solicitors. Robert Pang (the applicant) was a barrister who had been instructed by a firm of solicitors to advise one of their clients in the sale of certain securities valued at around HK\$9 million. He was subsequently arrested by members of the Organized Crime and Triad Bureau on the grounds that he had committed an offence under section 25A of the *Organized and Serious Crimes Ordinance*. Section 25A provides that:

- (1) Where a person knows or suspects that any property
 - (a) in whole or in part directly or indirectly represents any person's proceeds of;
 - (b) was used in connection with; or
 - (c) is intended to be used in connection with,an indictable offence, he shall as soon as it is reasonable for him to do so disclose that knowledge or suspicion, together with any matter on which that knowledge or suspicion is based, to an authorized officer.

²⁵. The case was to be heard by Supreme Court Chief Justice Donald Brenner, but is now likely to be either adjourned by consent or dismissed as academic. Ther decision undermines the prior refusal of former Chief Minister Anne McLennan to narrow the law because it would create 'a gaping ... and unacceptable loophole' in the enforcement of the anti-money laundering legislation.

(2) ...

(3) A disclosure referred to in section (1) -

(a) shall not be treated as a breach of any restriction upon the disclosure of information imposed by contract or by any enactment, rule of conduct or other provision

(b) ...

Subsection (1) is intended to inhibit, inter alia, money laundering. Legal practitioners are not exempted from the provision, nor does the Ordinance expressly make this particular provision subject to the doctrine of legal professional privilege, although other sections of the Ordinance are expressly made subject to the doctrine²⁶. Subsection (3)(a) does, however, provide some protection to lawyers who provide the required information. The applicant applied for judicial review contesting the lawfulness of his arrest. He also sought a declaration that section 25A did not extend to communications that were covered by legal professional privilege.

By way of decision the judge concluded that the arrest of the applicant had been unlawful since the arresting officer had no reasonable grounds for suspecting that the applicant had committed an offence under section 25A of the Ordinance. The learned judge also considered whether section 25A of the Ordinance was subject to legal professional privilege. He first noted that legal professional privilege had been recognised as a fundamental human right. In reaching this conclusion he noted the judgment of the House of Lords in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] 2 WLR 1299, HL (see above). He also noted that article 35 of the *Basic Law* guaranteed that 'Hong Kong residents shall have the right to confidential legal advice ...'. Further legal professional privilege, which had been central to the administration of justice in Hong Kong prior to the change of sovereignty in July 1997, had been preserved by article 87 of the *Basic Law*, which provided that 'in criminal and civil proceedings in the Hong Kong Special Administrative Region, the principles previously applied in Hong Kong and the rights previously enjoyed by parties to proceedings shall be maintained'. He concluded by saying 'Legal professional privilege is an ancient rule of common law, a rule which reflects a fundamental right of confidentiality between a client and his legal advisor, a right protected by the *Basic Law*. It is a rule recognised as constituting one of the pillars upon which the administration of justice rests in an open society'.

The learned judge then went on to consider whether such a fundamental right could be taken away or restricted by common law or statute. He noted that the doctrine had long been limited by common law in that it did not extend to communications involving future criminal or fraudulent purposes²⁷. A mere suspicion of such purposes did not, however, strip communications of this nature of the duty of confidentiality²⁸.

²⁶. This will soon be changed since the *Drug Trafficking and Organized Crimes (Amendment) Ordinance*, Ordinance No 26 of 2002, which is expected to take effect in 2003, provides in section 2 that nothing in the Ordinance shall require the disclosure of any items subject to legal professional privilege.

²⁷. Citing *R v Cox and Raulton* [1884] 1 QB 153, *Banque Keyser Ullman SA v Skandia (UK) Insurance Co Ltd* [1986] 1 Lloyd's Rep 336, CA, *R v Derby Magistrates Court, ex parte B* [1996] 1 AC 487, CA.

²⁸. *Bullivant v Attorney General for Victoria* [1901] AC 196.

Finally, Hartmann J considered whether section 25A overrode legal professional privilege. As we have seen, the Ordinance did not expressly provide that section 25A was subject to legal professional privilege. He concluded, following the decision of the House of Lords in *R (Morgan Grenfell) v Special Commissioner of Income Tax*, that legal professional privilege could only be limited statutorily by express provision or necessary implication. The same conclusion had been reached in New Zealand in *Auckland District Law Society v B* [2002] 1 WLR 721. Here there was no express exclusion of legal professional privilege nor had it been excluded by necessary implication. Further, it had not been included in section 25A(3)(a), since it did not fall within the description ‘contract’, ‘enactment’ or ‘rule of conduct’. If section 25A had been intended by necessary implication to abrogate legal professional privilege, it would surely have been included in section 25A(3)(a) as giving rise to possible liability for a lawyer.

In summary Hartmann J held that:

- (i) Legal professional privilege is a fundamental human right protected both by the common law and the *Basic Law*.
- (ii) Legal professional privilege can only be excluded by express statutory provision or by necessary implication. Neither was applicable on the facts.

5. The legislation

We must now look briefly at those Hong Kong statutes which impinge upon solicitors’ duties of confidentiality and legal professional privilege.

The Prevention of Bribery Ordinance (Cap 201)

The *Prevention of Bribery Ordinance* was enacted in 1971 and is perhaps the first Ordinance that makes significant inroads into the solicitor’s duty of confidentiality. The original purpose of the Ordinance was to prevent bribery, but its terms have been extended in an attempt to stamp out money laundering.

(a) Duty to produce documents and to disclose information

By way of facilitating the investigation of bribery and money laundering, the Ordinance makes provision for all persons, including lawyers, to produce documents and disclose information to authorised officers.

In particular, section 13(1) of the Ordinance provides that, where the Commissioner is satisfied that there is reasonable cause to believe that an offence under the Ordinance might have been committed by a particular person and that certain materials are likely to be relevant for the purpose of investigating that offence, he may require for the purposes of investigation any person to produce to an authorised officer any accounts, books, documents and other articles for inspection. Section 13(2) provides further for an authorised officer to require any person to provide certain information relating to the location of documents etc.

Section 14(1) permits the Commissioner to apply to the High Court *ex parte* for an order that a

person suspected of having committed an offence provide specified information to the Commissioner as to his property, expenditure and liabilities. Additionally, under section 14(1)(d), the court may grant leave for the Commissioner to require any other person to provide to the investigating officers all information in his possession relevant to the investigation. The extent to which this provision affects solicitors is discussed below.

Finally, under section 14(2), the Commissioner, acting in pursuance of a court order, may require any person who has acted for or is acting for any party to a property transaction to provide the names and addresses of clients, how they are to be located, the consideration and fees paid and the terms and conditions linked to the sale or purchase of land or property.

The obligations laid down in sections 13 and 14 apply to all persons including solicitors. Do these provisions override the solicitor's duty of confidentiality and legal professional privilege? Section 15(1) says that, save as is provided in section 15, nothing in this Ordinance shall require the disclosure by a legal adviser of any privileged information, communication, book, document or other article. The answer, therefore, is that legal professional privilege will generally be a reason for refusing production and disclosure as required under section 13(1) and section 14(1). Special considerations, however, apply to the giving of information by solicitors under section 14(1)(d) and these are discussed separately below.

Special (and rather complex) provisions apply to the supply of confidential information under sections 13(2) and 14(2). Section 15(2) provides that, subject to subsection (4), the information referred to in section 13(2) and in section 14(2) may be required from a legal adviser²⁹ as from any other person, notwithstanding that the effect of compliance with such a requirement would be to disclose any privileged information or communication. Section 15(4), however, provides:

(4) Nothing in subsection (2) or (3) shall require a legal adviser to comply with any such requirement to the extent to which such compliance would disclose any privileged information or communication which came to his knowledge for the purpose of any proceedings, begun or in contemplation, before a court or to enable him to give legal advice to his client.

The outcome is, therefore, that legal professional privilege does still apply to information to be supplied under sections 13(2) and 14(2), but only to the extent identified in section 15(4). It follows, for example, that information communicated by a client in a context other than the giving and receiving of legal advice or for the purpose of legal proceedings will not be protected by privilege. Of course, if the information or documents sought constitute a communication made in furtherance of the commission of a crime, legal professional privilege will always be inapplicable. Information that is merely confidential is not so protected.

(b) Special duties upon lawyers

Section 15(3) of the Ordinance imposes particularly onerous duties upon lawyers. It provides:

²⁹. 'Legal adviser' is defined in section 15(5) as meaning counsel or a solicitor.

(3) Subject to subsection (4), a legal adviser may be required by notice under section 14(1)(d) -

(a) to state whether, at any time during such period as is specified in the notice, he has acted on behalf of any person named or otherwise identified in the notice in connection with -

(i) the transfer by such person of any moneys out of Hong Kong; or

(ii) the investment by such a person within or outside Hong Kong of any moneys; and

(b) if so, to furnish information in his possession with respect thereto, being information as to -

(i) the date of the transfer or investment;

(ii) the amount of the transfer or investment;

(iii) in the case of a transfer, the name and address of the bank and the name and number (if any) of the account to which the money was transferred;

(iv) in the case of an investment, the nature of the investment

notwithstanding that the effect of compliance with such a requirement would be to disclose any privileged information or communication.

It can be seen that section 15(3) appears to make considerable inroads into client confidentiality and legal professional privilege. The provision is, however, subject to subsection (4), which has been set out in full above. Legal professional privilege has, therefore, been preserved to the extent identified in section 15(4).

The Inland Revenue Ordinance (Cap 112)

(a) The duty of disclosure

A further inroad into the solicitor's duty of confidentiality and legal professional privilege has been made by the *Inland Revenue Ordinance*. Section 51(4) provides that, in order to obtain full information affecting a taxpayer's liability, an assessor or inspector may require any person whom he considers to be in possession of relevant documents to produce them for examination³⁰. This provision applies to solicitors³¹. It is further provided in section 51(4A) that the powers conferred by section 4 include the power to require information from any person who acted for any party to a land transaction or has received a fee in connection with any such transaction. The information required is as to the names of parties to any land transaction, information as to how to locate them, the consideration received and the terms of the transaction.

(b) Applicability of legal professional privilege

Section 51(4A) of the Ordinance deals with the question whether such information when provided

³⁰. *Inland Revenue Ordinance*, s 51(4),

³¹. According to the proviso to s 51(4)(a), *Inland Revenue Ordinance*, where the production by a solicitor is required of any account kept by the solicitor relating to the affairs of his clients, the solicitor may produce a certified copy of all such entries.

by a solicitor is protected by legal professional privilege. The section says:

[T]he existence in respect of any communication, whether oral or written, of privilege from disclosure shall not constitute any excuse for the non-disclosure of information as to any of matters specified ... where disclosure thereof is required ... but except as aforesaid nothing in subsection (4) shall require disclosure by counsel or solicitor of any privileged information or communication given or made to him in that capacity.

It can be seen, therefore, that legal professional privilege has been expressly excluded to the limited extent identified in section 51(4A).

The Legal Practitioners Ordinance (Cap 159)

The *Legal Practitioners Ordinance* governs, inter alia, the conduct of solicitors and provides for the manner in which solicitors' conduct is regulated and monitored by the Council of the Law Society. Such regulation inevitably involves interference in matters that are confidential and protected by legal professional privilege. Such interference, however, is clearly in the interests of the community, the legal profession and clients.

(i) *Intervention by the Council and an inspector appointed by the Council where suspicion that solicitor unfit to practise or has failed to comply with his professional obligations*

There are several provisions in the *Legal Practitioners Ordinance* which make inroads into a solicitor's duty of confidentiality and the scope of legal professional privilege by way of empowering the Council of the Law Society to intervene in a solicitor's practice and call for and inspect his records and documents. For example, the Council is empowered to examine all the documents in the possession of a solicitor in any case where it considers that the solicitor may be unfit to practise³². Further, the Council may appoint an inspector to check whether a solicitor has complied with his obligations under the *Legal Practitioners Ordinance* or any Practice Direction issued by the Law Society and the inspector may require the production of all documents in the possession of the solicitor³³. In both the above cases the documents must be produced notwithstanding any claim to confidentiality or legal professional privilege, although these documents may only be used for the purposes of the investigation³⁴.

This is a case where legal professional privilege has clearly been excluded by statute. Documents that are merely confidential will similarly not be protected from production.

(b) *Disciplinary proceedings*

Further, when conducting disciplinary proceedings, the Solicitors' Disciplinary Tribunal is

³². *Legal Practitioners Ordinance*, s 8A.

³³. *Ibid*, s 8AA.

³⁴. *Legal Practitioners Ordinance*, s 8B(2).

empowered to compel the production of documents³⁵.

(c) Powers of Council where solicitor suspected of acting dishonestly or with undue delay

Finally, where the Council of the Law Society has, inter alia, reason to suspect that a solicitor has been guilty of dishonesty³⁶, has become bankrupt³⁷, has been committed to prison³⁸ or been guilty of undue delay in connection with his practice³⁹, the powers set out in Schedule 2 to the Ordinance become exercisable. Under those powers it may, inter alia, require the production of the solicitor's documents and books of account⁴⁰ and, in the case of an investigation into dishonesty, in accordance with an order of the court, take possession of the solicitor's mail⁴¹.

It is noteworthy that, whereas section 8B(2) overrides legal professional privilege so far as the inspectors' powers under section 8A and section 8AA extend, there is no such exclusion with regard to the Disciplinary Tribunal's and the Council's powers set out in (b) and (c) above. It is suggested that recent judicial pronouncements - in particular the House of Lords' decision in *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] 2 WLR 1299, HL and the Hong Kong decision in *Pang Yiu Hung Robert v Commissioner of Police* [2002] 4 HKC 579 - show that, to be effective, the overriding of the privilege must be effected expressly or by necessary implication. Is there such a necessary implication here? It can be argued that there must be such a necessary implication where the purpose of the legislation is unequivocally directed at requiring that such privileged material be revealed. It is suggested that the powers of investigation and production expressly granted to the Disciplinary Tribunal and the Council in respect of a solicitor's practice necessarily by inference override the privilege. The legislation could not be effective otherwise. This conclusion is supported by *Inland Revenue Commissioners, ex parte Taylor (No 2)* [1989] 3 All ER 353. In that case objections to disclosure on grounds of privilege were rejected where statute authorised the Revenue to issue a notice requiring a taxpayer, who was a solicitor, to deliver all documents relating to his business and private accounts. Lord Denning MR held that the particular rule was valid and that it "overrides any privilege or confidence which might otherwise subsist ...". Here the legislation mandates the Law Society to regulate solicitors' conduct and, if legal professional privilege were to constitute a ground for resisting disclosure, the purpose of the legislation would be rendered nugatory. Documents that are merely confidential will similarly not be protected from disclosure.

³⁵. *Legal Practitioners Ordinance*, s 11(1) (b).

³⁶. *Legal Practitioners Ordinance*, s 26A(1)(a).

³⁷. *Legal Practitioners Ordinance*, s 26A(1)(d).

³⁸. *Legal Practitioners Ordinance*, s 26A(1)(e).

³⁹. *Legal Practitioners Ordinance*, s 26C.

⁴⁰. Schedule 2, para 7(1).

⁴¹. Schedule 2, para 8.

Search warrants

Compliance with search warrants provides a further aspect of a lawyer's life in which there might be an erosion of confidentiality and legal professional privilege. We will deal with this topic in the written version of this paper, but shortage of time prevents analysis today.

The Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405)

This Ordinance was enacted in 1989 for the purpose of providing for the tracing, confiscation and recovery of the proceeds of drug trafficking.

(a) Duty to disclose knowledge or suspicion

Perhaps the provision in the Ordinance that most affects solicitors is section 25A, which provides that:

- (1) Where a person knows or suspects that any property
 - (a) in whole or in part directly or indirectly represents any person's proceeds of;
 - (b) was used in connection with; or
 - (c) is intended to be used in connection with,drug trafficking, he shall as soon as is reasonable for him to do so disclose that knowledge or suspicion, together with any matter on which that knowledge or suspicion is based, to an authorised officer.
- (2) ...
- (3) A disclosure referred to in section (1) -
 - (a) shall not be treated as a breach of any restriction upon the disclosure of information imposed by contract or by any enactment, rule of conduct or other provision;
 - (b) shall not render the person who made it liable in damages for any loss arising out of:
 - (i) the disclosure;
 - (ii) any act done or omitted to be done in relation to the property concerned in consequence of the disclosure.

There is, however, no express provision in the Ordinance that the duty to disclose, when falling upon a solicitor, is subject to the doctrine of legal professional privilege. Applying the reasoning of Hartmann J in *Pang Yiu Hung Robert v Commissioner of Police* [2002] 4 HKC 579, legal professional privilege will still apply and thereby restrict the duty to disclose, unless it has been excluded either by express provision or necessary implication. There is certainly no express exclusion and it is difficult to see why the implication must necessarily be made. It is suggested, therefore, that solicitors have no duty to make disclosure under this provision if the information was obtained in circumstances giving rise to the application of the doctrine of legal professional privilege. It must be borne in mind, however, that the doctrine will be inapplicable where the information was passed by way of furthering the commission of the crime of drug trafficking or concealing or laundering the proceeds thereof.

It is instructive here to note the only case in England - *R v Duff* [2002] EWCA Crim 2117 - where a solicitor has to date been convicted under similar (but far from identical) English provisions. A solicitor, Mr. Duff, received on behalf of his firm sums of money from a client. The client was subsequently convicted of drug trafficking. Following the conviction the solicitor became suspicious as to the origin of the sums of money he had received, but concluded that there was no duty to disclose those sums to the police because, the legislation related to present and continuing drug related activities and not to past activities. He was arrested and charged with failing to disclose knowledge or suspicion of money laundering contrary to section 52(1) of the *Drug Trafficking Act* 1994. That provision stated that a person was guilty of an offence if he knows or suspects that another person is engaged in drug money laundering. The information came to him in the course of his profession or employment and he had not disclosed it to a police officer as soon as reasonably practicable after it came to his attention. Section 52(2) of the Act (unlike the statutory provision in Hong Kong) further provided that it was not an offence for a legal adviser to fail to disclose information under privileged circumstances. 'Privileged circumstances' are defined in the Act as follows:

- ... if [the information] is communicated or given to him
 - (a) by, or by a representative of, a client of his in connection with the giving by the adviser of legal advice to the client;
 - (b) by, or by a representative of, a person seeking legal advice from the adviser; or
 - (c) by any person
 - (i) in contemplation of, or in connection with, legal proceedings; and
 - (ii) for the purpose of those legal proceedings.

The defendant pleaded guilty, contending in mitigation that he had innocently misunderstood the effect of the law. He was sentenced to six months' imprisonment and the sentence was upheld on appeal⁴².

It is clear from this judgment that the mere fact that a retainer exists will not provide a defence to a solicitor unless the sum of money involved is handed over in connection with the giving or receiving of legal advice or in contemplation of legal proceedings. This was, apparently, not the case here. This reasoning is equally applicable in Hong Kong.

(b) Powers of search and seizure

A further provision in the Ordinance affects solicitors. Section 21 empowers an authorised officer to search private premises to facilitate his investigation into drug trafficking. Section 21(5), however, provides that, where an authorised officer has entered premises in the execution of a warrant issued under section 21, he may seize and retain any material, other than items subject to legal professional privilege, which is likely to be of substantial value to the investigation. 'Items subject to legal privilege' are defined in section 22(2) as follows:

⁴². It should be noted that the solicitor, inter alia, acted as a conduit for the sale of his client's cars under rather suspicious circumstances since the cars were all sold at a loss! For example, he sold one of his client's cars, a Chrysler viver, which the client had bought for £120,000 for a mere £89,000!

‘items subject to legal privilege’ means:

- (a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;
- (b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purpose of such proceedings; and
- (c) items enclosed with or referred to in such communications and made:
 - (i) in connection with the giving of legal advice; or
 - (ii) in connection with or in contemplation of legal proceedings and for the purpose of such proceedings,when they are in the possession of a person who is entitled to possession of them, but excluding, in any case, any such communications or items held with the intention of furthering a criminal purpose.

Clearly items held for the purpose of furthering a criminal purpose or held other than in connection with giving or receiving legal advice or in connection with actual or contemplated legal proceedings will not be protected from seizure. Nor will documents that are merely confidential and fall outside the ambit of privilege.

The Organized and Serious Crimes Ordinance (Cap 455)

The *Organized and Serious Crimes Ordinance* was enacted in 1994 to create new powers of investigation into organised crimes and to provide a mechanism for the confiscation of the proceeds of serious crimes.

(a) The duty to furnish information and produce material

In accordance with the Ordinance, by way of facilitating the investigation of organised crime, the court may make an order that a particular person furnishes specified information or produces specified material to officers of the legal department⁴³. This requirement will apply to solicitors. Section 3(9) of the Ordinance, however, provides that:

- (9) A person shall not be required under this section to furnish any information or produce any document relating to items subject to legal privilege⁴⁴, except that a lawyer may be required to furnish the name and address of his client.

It is clear, therefore, that the doctrine of legal professional privilege has not been excluded by the Ordinance and will still apply to solicitors who are required to furnish information as to their

⁴³. *Organized and Serious Crimes Ordinance*, s 3.

⁴⁴. The meaning of the expression ‘items subject to legal privilege’ is stated in section 2(1) of the Ordinance. This is the same definition as provided in the *Organized and Serious Crimes Ordinance* which has been set out in full beginning on page 28.

clients. The only exception relates to the name and address of the client. It is well established that, although clients' addresses should be kept confidential⁴⁵, they are not generally privileged information unless the client specifically instructs his solicitor to keep this information confidential⁴⁶ and it seems very unlikely that the courts might strike out this exception as running contrary to articles 35 and 87 of the *Basic Law*.

An authorised officer's right to search lawyer's offices⁴⁷ is also similarly circumscribed, since section 5(5) of the Ordinance provides that where an authorised officer has entered premises in the execution of a warrant, he may seize and retain any material other than items subject to legal privilege. Material that is merely confidential and fall outside the ambit of privilege will not be similarly protected from seizure.

(b) *The duty to inform*

Perhaps the most important section of the Ordinance from the point of view of lawyers' duties is section 25A that provides that:

- (1) Where a person knows or suspects that any property
 - (a) in whole or in part directly or indirectly represents any person's proceeds of;
 - (b) was used in connection with; or
 - (c) is intended to be used in connection with,an indictable offence, he shall as soon as it is reasonable for him to do so disclose that knowledge or suspicion, together with any matter on which that knowledge or suspicion is based, to an authorized officer.
- (2) ...
- (3) A disclosure referred to in section (1) -
 - (a) shall not be treated as a breach of any restriction upon the disclosure of information imposed by contract or by any enactment, rule of conduct or other provision;
 - (b) shall not render the person who made it liable in damages for any loss arising out of:
 - (i) the disclosure;
 - (ii) any act done or omitted to be done in relation to the property concerned in consequence of the disclosure.

As we have seen above, subsection (1) is intended to inhibit, inter alia, money laundering. Legal practitioners are not exempted from the provision, nor does the Ordinance expressly make this particular provision subject to the doctrine of legal professional privilege, although other sections

⁴⁵. See Solicitors' Guide, commentary 28 of Principle 8.01.

⁴⁶. *Re Bell, ex parte Lees* (1980) 146 CLR 141 (Austr Hct); *Re an Application by Messrs Ip and Willis* [1990] 1 HKLR 154, 163, per Sears J. See also *International Credit and Investment Co (Overseas) Ltd v Adham* (1997) Times 10 February, where the court held that it enjoyed exceptional inherent jurisdiction to order a solicitor, as an officer of the court, to disclose the name and address of his client.

⁴⁷. *Organized and Serious Crimes Ordinance*, s 5.

of the Ordinance are expressly made subject to the doctrine⁴⁸. Subsection (3)(a) and (b) does, however, provide some protection to lawyers who provide the required information. As we noted earlier, the duties of solicitors under section 25A were considered by Hartmann J in *Pang Yiu Hung Robert v Commissioner of Police* [2002] 4 HKC 579. The applicant barrister, who had been arrested and charged with an offence under section 25A, applied for judicial review contesting the lawfulness of his arrest. He also sought a declaration that section 25A did not extend to communications that were covered by legal professional privilege. Although the learned judge concluded that the arrest of the applicant had been unlawful since the arresting officer had no reasonable grounds for suspecting that the applicant had committed an offence under section 25A of the Ordinance, he went on to consider the effect of the section on legal professional privilege.

Was the barrister protected from criminal liability if the communication fell within the doctrine of legal professional privilege? As we have seen, the Ordinance did not expressly provide that section 25A was subject to legal professional privilege. Hartmann J concluded, following the decision of the House of Lords in *R (Morgan Grenfell) v Special Commissioner of Income Tax*, that legal professional privilege could only be excluded statutorily by express provision or necessary implication. Here there was no express exclusion of legal professional privilege, nor had it been excluded by necessary implication. This conclusion was supported by the fact that it had not been included in section 25A(3)(a), since it did not fall within the description ‘contract’, ‘enactment’ or ‘rule of conduct’. If section 25A had been intended by necessary implication to abrogate legal professional privilege, it would surely have been included in section 25A(3)(a) as giving rise to possible liability for a lawyer. The learned judge, therefore, concluded that legal professional privilege would still govern a lawyer’s duty under section 25A since it had neither been excluded expressly or by necessary implication.

The amendment to the Ordinance providing that the duty to report is subject to legal professional privilege will not, therefore, alter the present duty of solicitors. Communications that are merely confidential and fall outside the ambit of privilege will not be similarly protected.

A further point to note is that section 25A of the Ordinance imposes a positive duty on solicitors to report certain confidential information to an authorised officer. Whether this provision offends articles 35 and 87 of the *Basic Law* remains to be seen. The outcome of the Canadian litigation on this point will certainly be instructive.

(c) Duty not to inform client that disclosure made

A further statutory obligations rests upon the person making the disclosure in that the person must not disclose to another person any matter which is likely to prejudice any investigation which might be conducted following the disclosure⁴⁹. It is further provided that it is a defence to a breach of this duty to establish that the person did not know or suspect that the disclosure concerned was

⁴⁸. This will soon be changed since the *Drug Trafficking and Organized Crimes (Amendment) Ordinance*, Ordinance No 26 of 2002, which is expected to take effect in 2003, provides in section 2 that nothing in the Ordinance shall require the disclosure of any items subject to legal professional privilege.

⁴⁹. *Organized and Serious Crimes Ordinance*, s 25A(5).

likely to be prejudicial or that he had lawful authority or reasonable excuse for making the disclosure⁵⁰. This provision, of course, runs counter to a solicitor's normal contractual and ethical duty to pass on all information to his client which is material to the subject matter of the retainer regardless of the source of that information⁵¹. It is suggested that the existence of such a contractual and ethical duty would not constitute a defence to a charge of having breached the statutory duty.

The consequence of this provision is that, once a solicitor has informed on a client, he may feel unable to continue with the retainer since a conflict of interest has resulted and the relationship of trust and loyalty, which constitutes an essential element of the retainer, has broken down. Helpful guidance as to what the solicitor should do in such circumstances has been given by way of a Guidance Note issued by the Law Society.

The United Nations (Anti-Terrorism) Ordinance (Cap 575)

This Ordinance was enacted in 2002, its purpose being to implement a decision of the United Nations Security Council to promulgate measures to prevent terrorist activities. It provides for the designation of certain persons as terrorists, the freezing of terrorist funds, the prevention of supply of funds and weapons to terrorist organisations and a duty to report any knowledge or suspicion that property is terrorist property. Several provisions of the Ordinance significantly affect the duty of solicitors in Hong Kong.

(i) Acting for terrorists

The Ordinance provides that a person shall not begin to serve in any capacity with any person who has been specified by the Chief Executive as a terrorist⁵² and this prohibition clearly encompasses a solicitor serving a terrorist client. On its face this prohibition would seem to extend to prohibiting a person who is charged with a terrorist offence from retaining legal representation by way of his defence, but such a ridiculous effect could not possibly be intended. Presumably the purpose of this prohibition is to prohibit a solicitor from serving a terrorist client in a way that such service may further the ends of terrorism.

(ii) The duty to inform as to terrorist property

Secondly, under the Ordinance a statutory duty falls upon all persons, including solicitors, to disclose to an authorised officer, as soon as practicable, information where the solicitor knows or suspects that any property is terrorist property⁵³. The solicitor is required to disclose the

⁵⁰. Ibid, s 25A(6)(a), (b).

⁵¹. Principle 8.03 of the Solicitors' Guide.

⁵². *United Nations (Anti-Terrorism Measures) Ordinance*, s 10(1)(b). A person may be specified as a terrorist by the Chief Executive where that person has been designated as a terrorist by a Committee of the United Nations: see section 4(1) and section 2(1) (definition of 'Committee').

⁵³. *United Nations (Anti-Terrorism Measures) Ordinance*, s 12(1)(a), (b).

information or matter on which the knowledge or suspicion is based⁵⁴. This obligation might be potentially activated, for example, where the solicitor is asked by a client, whom he suspects may be involved in terrorist activities, to pay client's money into the law firm's account or where the solicitor is asked by a 'suspicious' client to incorporate a company or chain of companies, either in Hong Kong or offshore, into whose name the client's property (or the property of others) will be transferred.

Does this mean that a solicitor, who harbours suspicions that the property that forms the subject matter of the retainer is terrorist property, has an immediate obligation to pick up the telephone and inform the relevant authorities of these suspicions? Such a course of action would, on its face, breach the solicitor's duty of confidentiality and his retainer as well as the solicitor's professional duties. Of course, it must be born in mind that the duty of confidentiality is not absolute and the duty at common law does not extend to any communication made in furtherance of a future or continuing crime or fraud⁵⁵. For this purpose the pursuit of terrorist activities clearly falls within a 'criminal purpose'.

Notwithstanding the provisions of the common law and the Solicitors' Guide, which permit a solicitor to breach confidentiality in relation to communications from clients made in furtherance of a criminal purpose, the Ordinance provides additional statutory protection to solicitors who 'inform' on such clients. Section 12(3) of the Ordinance further provides that:

- (3) a disclosure referred to in sub-section (1)
 - (a) shall not be treated as a breach of any restriction upon the disclosure of information imposed by contract or by any enactment, rule of conduct or other provision;
 - (b) shall render the person who made it liable in damages for any loss arising out of:
 - (i) the disclosure; or
 - (ii) any act done or omitted to be done in relation to the property concerned in consequence of the disclosure.

The effect of this provision is that a solicitor, who makes a disclosure as to suspected terrorist property, will not be liable for any consequential breach of contract, breach of his ethical code of conduct or for common law damages.

A further important provision (section 2(5)) makes it clear that legal professional privilege will continue to apply:

- (5) Nothing in this Ordinance shall -
 - (a) require the disclosure of any items subject to legal privilege⁵⁶;
 - (b) authorise the search or seizure of any items subject to legal privilege; or

⁵⁴. Ibid.

⁵⁵. See *R v Cox and Railton* (1884) 14 QBD 153, 167, above.

⁵⁶. For the meaning of 'items subject to legal privilege' see page 28 above.

(c) restrict the privilege against self-incrimination⁵⁷.

Of course, just as in the case of confidentiality, this privilege is inapplicable to communications made for the purpose of furthering illegal or fraudulent activities. This same position has now been given statutory recognition in the Ordinance⁵⁸. No similar protection is given in respect of documents that are merely confidential and fall outside the ambit of privilege.

(iii) Duty not to inform client that disclosure made

A further statutory obligations rests upon the person making the disclosure in that the person must not disclose to another person any information which is likely to prejudice any investigation which might be conducted following the disclosure⁵⁹. This provision, of course, runs counter to a solicitor's normal contractual and ethical duty to pass on all information to his client which is material to the subject matter of the retainer regardless of the source of that information. The consequence of this provision is that, once a solicitor has informed on a client, he may feel unable to continue with the retainer since a conflict of interest has resulted and the relationship of trust and loyalty, which constitutes an essential element of the retainer, has broken down.

As in the case of other legislative provisions considered above, a positive duty is imposed upon solicitors to report certain confidential information to an authorised officer. Whether this provision offends articles 35 and 87 of the *Basic Law* remains to be seen.

6. Conclusions

(a) The duty of confidentiality owed by a solicitor to his client and the doctrine of legal professional privilege are deeply entrenched in the common law and form an important part of every retainer. Their observance also constitutes a significant professional duty falling upon solicitors.

(b) It can be readily ascertained from the case law that the scope of confidentiality is considerably wider than the scope of legal professional privilege and much information passing from a client to his solicitor will be confidential but not protected from disclosure by legal professional privilege. This distinction is significant, since many statutes exclude from their ambit communications that are privileged; matters that are confidential but fall outside the ambit of privilege are not, however, protected from disclosure.

(c) The courts in England, Canada and Hong Kong have confirmed in no uncertain terms that the doctrine of legal professional privilege is a fundamental human right that must be protected by the courts. Whilst recognising that increased terrorist and drug related activities have necessitated

⁵⁷. *United Nations (Anti-Terrorism Measures) Ordinance*, s 2(5).

⁵⁸. See the definition of 'items subject to legal privilege' in s 2(1) of the *Organized and Serious Crimes Ordinance* set out above.

⁵⁹. *United Nations (Anti-Terrorism Measures) Ordinance*, s 12(5).

draconian legislation, they have made it clear that such considerations must not be permitted to override this well established fundamental right.

(d) The scope of legal professional privilege must not, however, be exaggerated. It applies only in two situations: first, as between client and legal adviser, in circumstances where a solicitor is giving and the client is receiving legal advice; secondly, as between a solicitor or client and a third party where the dominant purpose of the communication is the furtherance of actual or contemplated litigation.

(e) The doctrine of legal professional privilege is not, however, absolute and has been modified from time to time by the common law and the professional codes of lawyers. It does not extend, for example, to communications made in furtherance of criminal activities.

(f) Several statutes have been enacted which expressly exclude or modify confidentiality and legal professional privilege. Their purpose is very varied. They fall in the areas of tax collection, regulation of the conduct of solicitors and the prevention of bribery, drug trafficking and organised and serious crimes. More recently, such provisions have been enacted in legislation aimed at the prevention of money laundering. They also constitute a significant aspect of the global measures to combat terrorism. Unfortunately, many of the provisions are far from clear and, at times, it is difficult for solicitors to understand the extent of their duties. Other statutes make no mention of whether legal professional privilege is excluded. This calls for a judgment by solicitors as to whether privilege is excluded by necessary implication. For solicitors to have to make this judgment is far from satisfactory. It is suggested that draftsmen should never leave such an important matter for individual construction, but should always expressly exclude privilege when this is intended.

(g) In construing statutory provisions affecting legal professional privilege several clear principles have emerged:

(i) As a general principle legal professional privilege will continue to apply where a statute is silent as to whether it continues to apply or does not apply. Legal professional privilege can only be excluded by express provision in primary legislation or by necessary implication.

(ii) Even where legal professional privilege has been excluded by statute either expressly or by necessary implication, the courts will only give effect to such exclusion where it can be shown to be necessary in a democratic society.

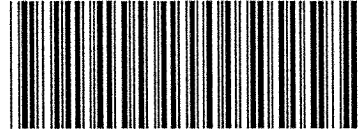
(iii) Where statute imposes a positive duty to inform authorities of matters affecting clients that fall within the proper scope of legal professional privilege, such provisions may offend basic constitutional rights. This issue is not yet finally resolved.

(h) Where statute does impose a positive duty upon solicitors to inform upon their clients, this inevitably presents considerable difficulty for solicitors. Most legislation of this nature further prohibits the solicitor from informing his client as to the action he has taken. This combination of events will almost certainly give rise to a conflict of interest between the solicitor and the client

requiring him to withdraw from further representation. Clearly the duty of loyalty owed by solicitors to clients has been fundamentally breached.

(i) Finally, the recent conviction of an English solicitor, Mr. Jonathan Duff, for failing to report on his client in a case involving money laundering of drug money and the sentence of six months' imprisonment imposed on him makes it essential for solicitors to study the relevant legislation carefully and ensure that they comply.

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