HCA 1255/2005
and HCA 1975/2005
[2020] HKCFI 590

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO 1255 OF 2005 and 1975 OF 2005

BETWEEN

HANLY INTERNATIONAL LIMITED (恆耀國際有限公司) Plaintiff

and

MAURICE CHOY (蔡浩明)
WONG PING YIN DANNY (黃炳賢) Defendants

[Consolidated by Order of Master Levy dated the 9th day of December 2005]

Before: Hon B Chu J in Chambers
Date of Hearing: 4 December 2019
Date of Judgment: 16 April 2020

J U D G M E N T

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A. Introduction

1. Before this Court are two summonses issued by the defendants/Ds, to dismiss the two actions issued by the plaintiff/P against them (collectively "**2 Actions**") for want of prosecution.

2. The summonses were sparked off by a letter dated 1 August 2018 sent to the parties by the Judicial Clerk (Unclaimed Fund) of the High Court at the direction of the Registrar [1] ("**Registrar's Letter**"). In the letter, the parties were informed that the High Court was carrying out a review of pending cases to check whether moneys left in court for a long time should be transferred to the General Revenue, and as there was a sum of US$154,281.31 paid into court on 17 August 2005 by a director of P, Mr Lee Kin Pan Christopher ("**Christopher**"), as guarantee in favour of D1, and no action had been taken by parties since April 2009, the parties were requested by the Registrar to make written submissions, within the deadline imposed, to (i) to show cause why the action should not be dismissed for want of prosecution; and (ii) to take out a summons for payment out/disposal of the monies in court with accrued interest.

3. The parties were further informed that unless cause was shown under (i) or a summons taken out under (ii) by the due date, the court would consider dismissing the action and the monies would then be transferred to the General Revenue without further notice to the parties.

4. Upon joint request, the Registrar granted time extension to the parties for making written submissions to the Court on or before 2 October 2018. Ds' solicitors sent a substantive reply on 2 October 2018 seeking a dismissal of the 2 actions. There was no reply from P's then solicitors, and

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[1] B:341

the Registrar had to send a final reminder, and it was not until 18 October 2018 that P's then solicitors sent a substantive reply.

5. As it appeared that Ds' dismissal of the action for want of prosecution and P's application for payment out would be contested, P and Ds were then directed by the Registrar on 24 October 2018 to issue their respective applications.

6. It was under the above circumstances that on 1 November 2018 Ds issued the present summonses respectively in the 2 Actions to dismiss the actions under the inherent jurisdiction of the High Court ("**Dismissal Summons**"). This was followed by P issuing a summons on 7 November 2018 for payment out of court of the sum paid in by Christopher on behalf of P, and this summons was subsequently ordered by the Registrar on 1 March 2019 to be withdrawn by P.

7. Counsel Mr Adrian Tam appeared for P at the hearing before this Court. At the time of the issue of the summonses, Ds were legally represented but about a month prior to the hearing before this Court, they each filed a notice to act in person.

8. Ds had requested for the hearing to be conducted in Chinese and their request was acceded to. However, Ds have been described as Canadians[2], and D1 now lives in Vancouver in Canada, and further most of the court documents, including D's respective notices to act in person were in English, and also all their affirmations were in English and did not contain any interpretation clause. Having considered this, Ds should be able to read English and this judgment is delivered in English. A copy of the

[2] See G:1635, 1640, 1643-1644

Chinese translation will be made available to any of the parties upon written request.

B. Background leading to P and Ds entering into the SPAs

9. Christopher is the youngest of 3 children born by the same mother. The eldest of the 3 children is called Lee King Yee Annabell ("**Annabell**") and the second is Lee Kin Lond Patrick ("**Patrick**"). Their father is Samuel Tak Lee ("**Father**") and their late mother is Lee Woo Miu Yue Minnie ("**Mother**"). Father controls the Prudential Enterprises Group, which includes Prudential Hotel and Prudential Centre in Hong Kong as well as real estate such as hotels, buildings and shops in other parts of the world.

10. According to Christopher and Annabell, Mother was a devout Christian and the children were brought up with Christian values and beliefs. During her lifetime, Mother was very much involved in charitable and community service, particularly for the elderly, and it was said to be her wish to set up a centre for the elderly in the name of her late father-in law Lee Man Wah, to be named "文華樓敬老中心" ("**Man Wah Elderly Centre**").

11. In about 1995-1996, a Hong Kong company called 寶光國際投資有限公司/Bright Post International Investment Limited ("**Bright Post**") was advertising and promoting on Hong Kong television and other media in relation to a "敬老村"/"Village for the Elderly" called 塘廈湖景敬老渡假村/Tangxia Lakeview Elderly Holiday Resort ("**Lakeview Elderly Resort**"), with facilities for the elderly, including a holiday resort in Tangxia in Dongguan, and Bright Post was selling memberships for this resort, which came with the right to occupy a residential unit in the resort for 50 years. Ds were directors of Bright Post.

12. Bright Post was incorporated on 21 April 1994 with D2 holding 5,500 shares out of 10,000 issued shares of HK$1.00 each and another person holding the remaining 4,500 shares[3]. On 4 October 1995, the 4,500 shares were transferred to a company called Groupland Properties Limited and D1, then became a director of Bright Post. There were various shareholders in Groupland but at all the material times, D1 and D2 were two of its directors. Later, as seen in the Annual Return of Bright Post of 21 April 2001, D2's shares were reduced to 4,900 shares and 600 shares then became held by a company called Yat Tai International Trading Limited. As for this company, it would appear in its Annual Return in 2004, a Lo Kin Wah ("**Lo**") became a 50% shareholder and one of its directors[4].

13. Bright Post had entered into an agreement on 22 July 1995 with (i) Dongguan Tangxia Town Local Government ("**Local Government**"), and (ii) Dongguan Civil Administration Department ("**Civil Administration Department**") for the development of Lakeview Elderly Resort for a period of 50 years from 18 July 1995 to 17 July 2045. The agreement provided, amongst other things, (1) Bright Post would be responsible for all capital for the project and for inviting members and providing all facilities for its members under the project, and for providing 50 units to the Local Government and paying an annual sum to the Local Government for rent and management fees, and an annual sum of RMB 100,000 to the Civil Administration Department for management fees; (2) the Local Government would provide land of 170 acres near a reservoir for the project for the period 50 years; (3) the Civil Administration Department would be responsible for arranging for all formalities[5].

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[3] G:1628-1631

[4] D:775-792

[5] F:1500-1501

14. There was a supplemental agreement of the same date[6], signed by the Local Government and Bright Post, it was stated that, amongst other things, that (1) the consideration for the Local Government to provide the land to Bright Post for 50 years from 18 July 1995 to 17 July 2045 was RMB 5m, RMB 3m to be paid upon signing the agreement and the balance to be paid in full in 5 years; (2) after commencement of the operation of the resort, Bright Post was to pay to the Local Government an annual sum of RMB 300,000 for management fees of the project and for the land, such to be increased by 10% every 5 years, in addition to the annual sum of RMB 100,000 to the Civil Administration Department.

15. According to Christopher, the Lakeview Elderly Resort came to the attention of Mother who then became interested in the project. She contacted the persons in charge of Bright Post, namely Ds, with the intention of purchasing memberships and establishing an investment plan for the setting up of Man Wah Elderly Centre[7].

16. On 19 November 1997, Mother through a company called Wise On Limited ("**Wise On**") entered into an agreement with Bright Post to purchase 8 "diamond" memberships in the Lakeview Elderly Resort for HK$1,843,200[8] ("**1st Purchase Agreement**"). Further, on 10 August 1998, Mother through Wise On entered a further agreement with Bright Post to purchase an additional 14 "diamond" memberships for HK$2,000,000[9]. ("**2nd Purchase Agreement**").

17. Clause 1 of the 2nd Purchase Agreement provided that as Mother was entitled to exclusive occupation under the "diamond" membership to the 14 units, she had the right to select a building to be

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[6] F:1502-1503

[7] See paras 4 & 5, Christopher's supplemental witness statement, D:736

[8] D:795-804

[9] D:806-822

constructed of an area of 950 square meters divided into 14 units, in an area set out in the agreement within the resort. It would appear from Christopher's evidence that it was Mother's intention for this building to be named Man Wah Elderly Centre. Further, Clause 8 provided that upon Mother's payment under the 2nd Purchase Agreement, Bright Post agreed to apply for a direct Hong Kong/Dongguan/Guangzhou vehicle licence for a 8 seat vehicle for the use of Wise On.

18. According to Christopher, the vehicle licence was not provided to Mother/Wise On although after entering into the 2nd Purchase Agreement, Mother had fully participated in the work of the construction of the Man Wan Elderly Centre. Insofar as the cross border vehicle licence, D2 had given his version in his supplemental witness statement. Suffice to say, there was no sufficient evidence that Mother herself had made any complaints in this respect. Further, according to Christopher, due to the lack of funds of Ds and Lo, Bright Post and the Company (as later defined) frequently failed to pay outstanding construction fees and/or bank loan repayments, which resulted in a long delay in the progress of the construction of the project.

19. It was not clear when construction first commenced for the Lakeview Elderly Resort, but it seemed by middle 1997, some part of it had been constructed/completed [10] and further as seen in an Inspection Certificate for Completions of Construction Works produced by Ds ("**Inspection Certificate**"), there were further works which commenced on 8 October 1998 and were completed on 20 November 2000[11]. There were also photographs produced by Ds showing the resort in 1998 and 1999, together with photographs of 2 minibuses purchased for the use of residents

[10] See on the remarks of the Plan (as defined later)

[11] G:1534

to commute between the Lakeview Elderly Resort and Hong Kong, with Mainland and Hong Kong licence plates[12].

20. Anyway Mother had resided in the Lakeview Elderly Resort before she passed away in December 2003. According to Christopher, although he had frequently visited Mother at the resort, and had met Ds and Lo, he did not know them well at the time.

21. After Mother's death, in early 2004, Christopher became the personal representative of Mother's estate, which included Wise On's assets, and according to Christopher, it was only then that he started to get to know Ds and Lo better and that they became friends that they saw each other socially, and that Ds knew that his family owned the Prudential Hotel in Hong Kong. It was Christopher's evidence that in about April or May 2004, D1 approached him for assistance in a development project on the 2 Lots.

22. What was not disputed was that on 22 October 1998, a company called 東莞市塘廈寶光渡假娛樂有限公司 ("**Company**") was set up in Dongguan under Mainland laws, initially with a registered share capital of RMB 500,000 and with 2 shareholders namely D1 and D2, for operating a business of running a restaurant, hiring services for sports ground, sale of daily and sports items etc[13]. D2 was the registered legal representative of the Company. The share capital was later increased to RMB 10m shortly thereafter, on 2 November 1998[14].

23. On 10 September 1999, the Company was formally granted two "Land Use Certificates" and acquired the legal rights to use and occupy the 2 lots of land in Tangxia, respectively of 42,029 square meters and of

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[12] G:1536-1540

[13] See business licences at G:1529, and the Company's articles of association at F:1365-1370

[14] F:1371-1374

63,032 square meters, totaling 105,061 square meters for a term of about 49 years until 24 December 2048[15](collectively "**2 Lots**"). The 2 Lots were where the Lakeview Elderly Resort was situated.

24. It would appear that thereafter, the Company entered into a joint venture with ATV Enterprises Limited ("**ATV**") of Hong Kong, through its subsidiary ATV Education Services Company Limited ("**HK ATV Education**"), in relation to the setting up of an educational institution under the name of "Guangdong ATV Academy for Performing Arts" and a television film studio in Tangxia ("**ATV Joint Venture**").

25. On about 13 August 2000, upon the approval of the Guangdong Province Sino Foreign Trade and Economic Joint Venture Bureau, a joint venture company called (廣東亞視演藝專修學院有限公司)/ The Guangdong ATV Academy for Performing Arts Limited ("**ATV Academy**") was set up with HK ATV Education holding 60% and the Company holding 40%, with a registered share capital of RMB 100,000,000, and the investment capital of RMB 248,000,000[16]. It would appear that subsequently, on 17 May 2001, the name of ATV Academy was changed to Guangdong ATV Education Services Company Limited ("**Guangdong ATV Education**")[17]. The period for this company's business licence was for 48 years from 2 April 2001 to 1 April 2049.

26. The ATV Joint Venture attracted the interest of the Local Government, and on 30 March 2001, Ds and Dongguan City Tangxia Economic Corporation ("**EC**") of the Local Government, reached an agreement for EC to inject further capital of RMB 40m (in fact the injection was only RMB 29m) into the Company, by Ds each transferring respectively

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[15] E:1055

[16] E:1108

[17] As seen in the information about Guangdong ATV Education in its annual audited financial statements for 2006

25% to EC. The balance of 50% shareholding in the Company continued to remain held by Ds equally, namely each 25%.

27. On 19 November 2001, 25 April 2002, 20 September 2004, respectively, the Company then entered into loan agreements with (塘厦農村信用合作社) Tangxia Agricultural Village Credit Co-operative Society ("**Credit Society**") with the 2 Lots as security[18]. As seen in these loan agreements, in 2003, the larger of the 2 Lots of 63,032 sq m was valued to be RMB 59.7m[19] and in 2004[20], the smaller of the 2 Lots of 42,029 sq m was valued to be RMB 25.32m[21].

28. In light of the ATV Joint Venture, it would appear that the facilities at the Lakeview Elderly Resort did not turn out to be in compliance with the provisions in the agreements for sale of memberships and that the Lakeview Elderly Resort was in fact managed and occupied by ATV Academy, and thus gradually from 2002, there were a number of foreign purchasers who started legal actions against Bright Post requesting for refund of their membership fees[22].

29. Thereafter, ATV Joint Venture encountered financial problems. Ds had produced a copy of the minutes of a shareholders' meeting on 17 July 2003 of the Company[23], indicating that it was resolved as the financial situation of ATV Academy was not satisfactory and that the investment of the ATV was not injected in accordance with the joint venture agreement, there was to be a re-structuring of the Company and then through new investor/s, to re-structure the ATV Academy. Further, it was resolved that if a substantial and suitable investor could be found, then EC was prepared

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[18] G:1542-1559
[19] G:1533
[20] G:1553
[21] G:1547
[22] See 1st paragraph, F:1317
[23] G:1560

to withdraw from the Company at the original price paid by EC to acquire its 50%, plus interests, but that the new investor had to bear all liabilities of the Company.

30. It was D1's evidence in his witness statement that one day in May 2004 while he went swimming with Christopher, they talked about the Company and that Christopher saw great prospects in developing the 2 Lots and had expressed interest in participating. Ds had produced a letter dated 11 May 2004 and marked "without prejudice subject to contract" sent by the Pruton Group to the Company stating that following a meeting on 9 May 2004 between D1 and Christopher, Pruton Group was writing to express interest in buying out the shareholding of EC and sought various information including the organisation charts and financial statements of the Company and the ATV Academy[24].

31. Ds had also produced a "Confirmation Letter" signed by Ds as shareholders of the Company as Party A on 24 June 2004, HK ATV Education as Party B and ATV as Party C[25]. There was also a re-structuring agreement attached to the Confirmation Letter. As seen in the re-structuring agreement[26], by then it would seem Bright Post had commenced litigation in Hong Kong against HK ATV Education. Pursuant to the Confirmation Letter, ATV agreed to provide by monthly instalments totalling not more than RMB 2.3m to Guangdong ATV Education and the ATV Academy, depending on operational needs. If the re-structure agreement was signed prior to 31 August 2004, then the amount would be regarded as a portion of those operational needs which ATV had agreed to bear from May to end of August 2004, but if the re-structure agreement failed to be signed prior to 31 August 2004 or the share transfers were not effected prior to that date pursuant to the agreement, then amounts

[24] G:1561

[25] G:1875-1876

[26] See clause 3, G:1877

advanced by ATV would be regarded as loans to the Guangdong ATV Education and the ATC Academy.

32. Ds had also produced a loan agreement entered into by the Company on 1 June 1994, with Lo for a loan of RMB 1,184.092 to the Company, with Ds as guarantors. The loan carried interest rate at 20% per annum and was to be repaid on or before 31 August 2004, failing which Ds agreed that their shareholding in the Company was to be used as security[27].

33. The above was thus the then situation concerning the Company and the ATV Joint Venture at about the time when Pruton Group and Christopher expressed interest in the Company. Ds also produced a letter dated 7 July 2004 attaching a "Brief Introduction to the Pruton Resort City Development Plan" ("**Pruton Resort City Project**") which was faxed to the then Mayor of the Dongguan City People's Government ("**Mayor Liu**")[28]. This was followed by a further letter dated 22 July 2004 to Mayor Liu, after a dinner hosted by the Mayor, and stating that to proceed with the development plan, the Pruton Group would need to resolve with the Local Government its shareholding in the Company which involved the payment of interests and whether this problem could be dealt with flexibility to facilitate the transfer of the shareholding, and inviting Mayor Liu to visit Tangxia to expedite the resolution of the transfer of the shareholding and seeking approval of the attached "Feasibility Study Report of The Pruton Resort City"[29] ("**Feasibility Report**"). Both letters were signed by Christopher, as "General Manager" (總經理) of and on behalf of The Pruton Group (恆豐機構).

34. As seen in the Feasibility Report, although it is stated under Section I the Pruton Resort City Project would consist of (i) an education

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[27] F:1390

[28] F:1397-1400

[29] F:1401-1408

centre reserved for a performing arts academy and an international university; (ii) a conference centre; (iii) a 5 star hotel with about 300 rooms and a recreational club with Chinese and Western restaurants, karaoke lounges, night club, sauna, bowling centre, tennis courts, health club and artificial hot spring spa etc; (iv) a health centre; (v) a retirement community area[30], in Section II of the Feasibility Report, it is clearly stated that the special highlighted features of the project were the conference centre, the hotel resort complex, and the health centre.

35. Section III of the Feasibility Report had set out that the 1st stage of the capital investment would be approximately RMB 120,000,000, and 2nd stage would be approximately RMB 25,000,000, and the capital for the 3rd stage was to be decided later[31]. It was further stated in Section V that the capital would be provided by the Pruton Group and would not involve any loan arrangement.

36. Then on 3 August 2004, Ds as Party A entered into an agreement with Pruton Hotel Limited as Party B, whereby it was stated in the recital that the issued capital of the Company was RMB 80m, of which Ds had each contributed RMB 20m and that each held 25% shareholding thereof and pursuant to the agreement, Ds agreed to engage Pruton Hotel Limited in Hong Kong for services of managing/operating the Company regarding Ds' shareholding at a nominal management fee of HK$1.00 ("**Management Agreement**")[32].

37. Pruton Hotel Limited was a company incorporated in Hong Kong on 2 January 2003[33] and as at 2 January 2005, Leeson Holdings Limited ("**Leeson**") held 9,999 of its 10,000 issued shares of HK$1.00 each,

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[30] F:1404
[31] F:1406
[32] F:1409-1416
[33] F:1451

and Christopher held the remaining 1 share[34]. Leeson was incorporated on 6 May 2002 in Hong Kong and as at 6 May 2005, Christopher held 9,999 shares out of 10,000 issued shares of HK$1.00 each, and the remaining 1 share was held by Annabell, and Christopher and Annabell were its two directors[35]. In short, Christopher was the major shareholder of both Pruton Hotel Limited and Leeson at that time.

38. The Management Agreement was for a period of 2 years expiring at midnight on 2 August 2006, save otherwise provided for early termination. The Management Agreement provided that, amongst other things, (1) an advisory committee was to be formed comprising of 6 members, 3 from Party A and 3 from Party B and any resolutions could only be passed upon consent of at least 4 members and that Party A was not to make any decisions on any issues regarding any of the matters relating to the Company on their motion without having put forth for resolution in the advisory committee; (2) Party A was to make the books and accounts of the Company for examination of Party B upon not less than 7 days' written notice; (3) Party B was to have free access to all of the premises of the Company; (4) If there is any sale/transfer/parting with the Company's assets, Party A to pay Party B 5% being agreed commission on the sale price; (5) in addition, if there is any sale/transfer/parting with the Company's shares, Party A to pay Party B 5% being agreed commission on the Company's total assets value as at the date of the sale/transfer/parting with of the shares of the Company; (5) Party A shall further pay Party B an additional annual remuneration equivalent to 10% of the net profit derived from the Company.

39. On 18 August 2004, the Pruton Group sent a letter to Ds stating that the working committee under the leadership of the CFO of the Pruton Group would be commencing the in-depth research and assessment of the

[34] F:1455

[35] F:1480-1488

present operations, accounts and the future project development of the Company[36]. In short, the Pruton Group was commencing their due diligence of the Company.

40. As seen in a letter dated 23 August 2004 to Mayor Liu[37], Christopher stated that he decided to use a company called 樂福國際有限公司/Lexford International Limited ("**Lexford**"), said by him to be a subsidiary company wholly owned by the Pruton Group, for the purpose of the acquisition of all the assets of the Company that he had sent the draft purchase agreement to the Company seeking a reply from the Company within 14 days. The draft agreement was later sent on 25 August 2004 with a covering letter and the Company was requested to respond within 7 days[38] ("**Lexford Draft Agreement**"). As seen in the Lexford Draft Agreement, the consideration was RMB 70m and the date of completion was end of year 2004 and the acquisition was for the entirety of the assets of the Company.

41. Lexford was incorporated on 8 January 2003 in Hong Kong and later changed its name to Pruton China Investments Limited on 18 June 2005[39] ("**Pruton China**").

42. On 27 August 2004, the Company replied indicating that (i) a Chinese version of the Lexford Draft Agreement should be provided to the Company; and (ii) during the negotiations, the subject matter of the acquisition was EC's shareholding in the Company, and not the entire assets of the Company and this required further discussion among the shareholders of the Company[40]. Subsequently, on 3 September 2004, the Company sent a further letter to Christopher requesting for a Chinese version of the

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[36] F:1417
[37] F:1419
[38] F:1422-1430
[39] F:1462
[40] F:1431

Lexford Draft Agreement and seeking an extension until 15 September 2004 to respond to the terms thereof[41].

43. P then came into the picture. P was incorporated on 9 June 2004 under laws of Hong Kong. On 31 August 2004, P entered into separate but virtually the same agreement with each of Ds to purchase their respectively 25% shareholding in the Company, (collectively the "**SPAs**")[42]. The consideration of 25% of the total shareholding of the Company was a sum of HK$600,000, and Christopher said he had signed a handwritten guarantee for P's obligations to pay Ds the considerations under the SPAs.

44. It was not disputed that in pursuance of the SPAs, P had discharged its obligations and the considerations had been paid in full, in that (i) a deposit of HK$100 was paid to each of Ds on 31 August 2004 and (ii) a sum of HK$1,199,800 was paid to Lo. Clause 4 of each of the SPAs provided that, amongst other things, Ds had respectively agreed to indemnify and pay P a sum of HK$2.5m being liquidated damages if they failed to transfer their respective 25% shareholding to P after expiry of 180 days.

45. According to Christopher, after signing the SPAs, the then Chief Executive Officer of P, Wong Siu Lung ("**SL Wong**"), was assigned to monitor the execution and performance of the SPAs.

C. Events after signing of the SPAs and leading to the commencement of the 2 Actions

46. On 3 September 2004, two draft Sale and Purchase Agreements between Leeson and Ds respectively were faxed to Ds ("**Leeson Draft Agreements**"). It can be seen in the Leeson Draft Agreements that Leeson,

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[41] F:1432

[42] B:322-329, B:331-339

as a shareholder of P, proposed to sell to each of Ds 22% shareholding in P at a consideration of HK$1.5m which was to be paid on or before 28 February 2005[43].

47. Separately, on 6 September 2004, the Pruton Group sent the Chinese translation of the Lexford Draft Agreement to the Company.

48. Ds had produced a letter dated 29 October 2004 sent by EC to the Pruton Group agreeing to sell EC's 50% shareholding in the Company stating that, amongst other things, (i) the sale price was the amount invested by the Local Government in the Company; (ii) the Company and the Pruton Group were to resolve all issues arising out of the ATV Joint Venture and all issues concerning the ATV Academy, including its students and teachers; (iii) the Company was to be responsible for resolving the issues with the purchasers who bought memberships in the Lakeview Elderly Resort and the relocation of the resort; (iv) the Company to be responsible for dealing with the relevant procedures in relation to the business scope on the 2 Lots; (v) as for the use/development of other surrounding Government land, the Pruton Group would have the priority if such land would become available for development[44].

49. It would appear that there was to be held a meeting of the shareholders of P and of the Company on 22 November 2004, and a copy of the agenda was produced by Ds ("**Agenda**")[45]. The matters in the Agenda for discussion were that (i) Ds' shareholding in the Company was to be transferred to the P and that P was to acquire EC's 50% shareholding in the Company, and Ds were to each hold 23% shareholding in P, and all the legal documents were to be signed on or before 31 December 2004 in Hong Kong and to supersede the SPAs signed by P; (ii) the valuation of the

[43] F:1434-1440
[44] F:1445-1446
[45] F:1447-1448

Company's shares after such shares were transferred to P; (iv) a written request to be made to EC for transfer of Ds' 50% shareholding to P at the consideration of RMB 20m, and that EC would have an option to purchase Ds' shareholding at the same consideration; (v) the consideration of RMB 20m had to be transferred through the bank and how P was to deal with this; (vi) how to deal with the taxes payable on the transfer of the shares; (vii) once P joined the Company, the builders could pursue the outstanding invoices of about RMB 20m, and EC could ask P and Ds to be responsible for half of that, ie RMB 10m, and how this sum was to be raised; (viii) when to discuss with EC re purchase of its 50% and at what consideration and how was the consideration going to be raised; (ix) how to resolve the relationship with ATV, whether by settlement or by litigation.

50. Among all the documents produced by Ds in their supplemental list of documents of 14 July 2006 was a without prejudice letter dated 18 January 2005 from Leeson's then solicitors to Ds indicating that Lesson desired to sell the entire shares in P, and Ds were invited to give the first offer to purchase at a proposed price of not lower than HK$4m[46] ("**18.01.05 Letter**"). There appeared to have been no objection to Ds disclosing a copy of the 18.01.05 Letter at the time.

51. It would appear that by the time of the 18.01.05 Letter Leeson and/or Christopher had lost interest in proceeding with the Pruton Resort City Project.

52. On 7 March 2005, P's then solicitors sent letters before action to Ds demanding the transfer of shares to P and the payment of HK$2.5m from each of them within 7 days, failing which legal proceedings would be commenced[47]. On 11 March 2005, Ds' then solicitors replied that the

[46] F:1449

[47] F:1473-1474

agreement that they had with Christopher was that P would purchase EC's 50% shareholding and that Ds would transfer their 50% to P, and Ds would then hold 46% shareholding in P, and it was upon Christopher's undertaking that P would comply with their agreement that on 31 August 2004, Ds agreed to first sign the SPAs to transfer their shareholding in the Company to P and thereafter P and Ds were to proceed with the rest of their agreement, and to complete the purchase of EC's shareholding. Ds denied that they were in breach of the SPAs and that if Christopher did not wish to comply with their agreement, then it would be Christopher and P who were in breach of the agreement[48].

53. Thereafter, the Local Government formally replied to the Company by a letter dated 30 March 2005[49]indicating that, amongst other things, (1) consent would be given for the Company to change the use of the 2 Lots to that for commercial and residential purposes, for a term of 70 years; (2) No consent for the Company's application for use of the land surrounding the 2 Lots due to the area being environmentally protected under the 2002 Tangxia Town Planning Regulations.

54. On 23 April 2005, P's then solicitors wrote to give notice to D2 that the sum of HK$2.5m under Clause 4 of the SPAs was still due and outstanding, and that the debt had been assigned to Chun Chung Yan Atcky on 23 April 2005[50].

55. As Ds did not transfer their respective 25% shareholding in the Company to P, P issued a writ against D1 on 30 June 2005, ie HCA 1255/2005, ("**1st Action**") and a writ against D2 on 7 October 2005, ie HCA 1975/2005 ("**2nd Action**").

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[48] F:1475-1476

[49] E:1184

[50] F:1477-1478

56. P claims that, amongst other things, (i) a declaration that Ds have been holding their respective 25% shareholding in the Company on trust for P; (ii) an order that Ds shall do all acts necessary to convey the legal title of their shareholdings to P; (iii) alternatively, an order for specific performance of the SPAs or damages in lieu; (iv) in addition to specific performance the sum of HK$2.5m as liquidated damages[51]. There were no particulars provided by P as to what damages in lieu were suffered by them.

57. Ds' respective Amended Defences filed on 27 October 2008 were in almost identical terms.

58. Essentially, according to the Ds' pleaded case, Ds had signed their respective SPAs upon Christopher's express undertakings and representations ("**Conditions**") :

(i) that Christopher would use P as a vehicle to acquire EC's 50% shareholding in the Company;

(ii) Upon P acquiring EC's 50% shareholding in the Company, 46% of P's shareholding would be transferred to Ds;

(iii) Christopher would later on prepare an amended agreement by inserting the Conditions; and

(iv) Christopher would first repay a HK$1.2m debt of the Company then owing to Lo and would thereafter credit such payment to the Company account upon acquisition of the Company.

59. It was Ds' case that the Conditions were not performed in that Christopher and/or P failed to acquire 50% shareholding of the Company from EC and also that Ds could not and were prevented from performing their respective obligations under the SPAs as P and/or Christopher failed to obtain the requisite consent of all shareholders of the Company to the

[51] At A:35, and A:43

transfers under the SPAs and such performance would contravene the Articles of the Company and were invalid.

60. It was also Ds' pleaded defence that the SPAs, namely the transfers of the shares of the Company by Ds to P, were governed by the Sino-Foreign Equity Joint Venture Law and the corresponding Implementation Regulation at the time, and as approval by the relevant state authority and consent of the other shareholder of the Company were not obtained, the SPAs were void and/or the performance thereof was illegal by virtue of the Mainland law and/or the Mainland Regulation.

61. In reply, amongst other things, P had denied that the SPAs were void as the Company was at all material times a domestic investment company (內資公司) and not and has never been a sino-foreign joint venture.

D. Relevant events in the Mainland concerning the Company at about the time of the commencement of the 2 Actions and thereafter

62. It would appear that in around June or July 2005, Ds, EC, and a Mr Mi Wei Liang (糜偉良) ("**Mi**") and a Mr Chen Feng (陳峰) ("**Chen**") had formed an intention for the entire shareholding of the Company to be transferred to Mi and Chen[52]. Following this, on 18 July 2005, EC entered into "Shareholding Transfer Agreement" with Mi pursuant to which, EC agreed to transfer all its 50% shareholding to Mi for RMB 29m[53].

63. Thereafter, on 3 August 2005, a "Shareholding Transfer Agreement" ("**Mi Agreement**")[54] and also a "Supplemental Agreement"[55] were entered into by D2 and Mi. Pursuant to the Mi Agreement, D2 was to transfer 20% of his shareholding in the Company to Mi and the

[52] See Dongguan Judgment at F:1312
[53] H:1944-1947
[54] H:1948-1951
[55] H:1999-2000

consideration was RMB 1.00. Pursuant to the Supplemental Agreement, D2 was to, subject to the terms therein, transfer his entire 25% shareholding to Mi at a consideration of RMB 12.5m and that the transfer of 20% shareholding to Mi under the Mi Agreement was only to facilitate Mi to carry out the raising of funds from outsiders. However, according to Ds, on the following day, 4 August 2005, D2 and Mi agreed that the "Supplemental Agreement" was to be cancelled or of no effect.

64. Then, about 4 months later, on 19 January 2006, Ds, Mi and Chen signed (i) a "Framework Agreement for Transfer of the shares of the Company"[56] and (ii) another agreement[57] (the two agreements collectively referred to as "**Framework Agreement**"). The terms of the Framework Agreement included that: (1) Ds agreed to transfer their 30% shareholding in the Company to Mi and Chen at a consideration of RMB 25m but prior to the resolution of the litigation between Ds and P and the discharge of the Injunction Orders, Ds would not take step to effect the change of ownership of the 30% shareholding, and further if P were to succeed in its claims against Ds and to enforce the rights to its 50% shareholding in the Company, then Mi was to transfer back to D2 the 20% shareholding transferred to him by D2 at the original consideration; (2) Upon transfer of the 70% shareholding to Mi and Chen, the new company would be responsible for liabilities including the loans from the Credit Society, (3) Mi and Chen to inject capital to construct a new village for the elderly and to be responsible for the relocation of the Lakeview Elderly Resort and to provide a sum of RMB 27m to resolve all issues in relation to the disputes with the members who had purchased memberships in the Lakeview Elderly Resort; and further (4) Mi and Chen undertook, as majority shareholders, to authorise the 40% shareholding held by the Company in the ATV Academy to continue to be managed by Ds and to guarantee that the Company's 40%

[56] H:1954-1959

[57] H:1960-1962

shareholding would be transferred to Ds or their nominees, but Ds must complete the relocation work of the ATV Academy by 8 March 2007.

65. The Framework Agreement was to supersede all previous agreements save the Mi Agreement.

66. On 30 April 2006, upon the approval of the Dongguan Industry and Commerce Bureau ("**Bureau**"), the Company registered the transfer of 70% of the Company to Mi and further Mi was appointed the "Legal Representative" of the Company.

67. Mi and Chen made 3 payments under the Framework Agreement, the last being on 13 June 2006, totalling RMB 2.35m for the deposit, but had failed to pay the balance. Mi and Chen had paid EC RMB 15 m out of RMB 29m, with RMB 14m outstanding.

68. On 14 August 2006, Ds, Mi and Chen signed another agreement ("**14.08.06 Agreement**") which provided that (1) Mi and Chen were to pay the balance to EC before end of August 2006, in order to obtain the company seal of the Company and within 30 days of receipt of the company seal, to terminate the Company's relationship with the ATV Academy; (2) the transfer of the Company's 40% shareholding in the ATV Academy to be effected at the relevant government departments first; (3) Mi and Chen to pay RMB 160,000 to a Hong Kong resident who had purchased a membership at the Lakeview Elderly Resort; (4) the balance of the deposit was to be paid to Ds before end of August 2006.

69. Thereafter Mi and Chen failed to comply with the provisions of the 14.08.06 Agreement, failed to pay Ds the balance of the deposit and failed to pay EC the balance of the RMB 29m, and all the company seal and certificates and all important agreements, information etc remained being held by EC. Thus, there was no progress in relation to the discharge of the

liabilities of the Company, the relocation of the Lakeview Elderly Resort, the resolution of membership issues, the transfer of the shareholding in the ATV Academy and the relocation of the ATV Academy[58].

70. Eventually, this led to Ds issuing a civil action against Mi and Chen on 16 November 2006 in the Dongguan Intermediate People's Court ("**Intermediate Court**") under Civil Action 4 No 206 of 2006 ("**Dongguan Action**"). In the Dongguan Action, Ds were the plaintiffs, Mi and Chen were the defendants, P was named the 3rd party, and so was the Company. In the Dongguan Action, Ds sought to terminate the Framework Agreement and to seek the re-transfer of the 20% shareholding from Mi to D2.

71. The Dongguan Action eventually led to a judgment delivered by the Intermediate Court on 21 January 2009 ("**Dongguan Judgment**")[59]. I will set out some of the findings in the Dongguan Judgment later. Suffice to say at this stage, Ds' claim against Mi and Chen was dismissed by the Intermediate Court.

72. About 14 months after the Dongguan Judgment, on 13 April 2010, Ds transferred all their remaining shares (ie 30% of the shareholding of the Company) to a Shenzhen company 深圳市君利得商貿有限公司 ("**Shenzhen Company**") which had also acquired Mi's 70% shareholding in the Company.

73. It was Christopher's evidence that it was only in August 2018 that he and P discovered from the registration record of the Bureau of Ds' above transfers[60].

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[58] See 1st paragraph, F:1320

[59] F:1310-1325

[60] At paragraph 96, A:226

E. Procedural steps

74. A chronology of material events was prepared by Mr Tam on behalf of P ("**Chronology**"). As seen in the Chronology, the following procedural events took place, prior to the Registrar's Letter.

75. Upon issuing the 1st Action on 30 June 2015, on 12 August 2005, P obtained an interlocutory injunction against D1, restraining him from disposing of his 25 % shares in the Company and/or proceeds of sale thereof upon Christopher's undertaking to cause the sum of HK$1.2m, or its equivalent in USD, to be paid into Court as guarantee in favour of D1. On 14 October 2005, upon issuing the 2nd Action, P obtained a similar injunction against D2 from disposing of his 25% shares in the Company and/or proceeds of sale thereof (collectively "**Injunction Orders**")[61].

76. On 17 August 2005, Christopher paid a sum of USD 154,281.31 into Court pursuant to P's undertaking in the Injunction Order granted against D1.

77. On 12 August 2005, by consent of the parties, Reyes J ordered a speedy trial for the 1st Action. Later, on 9 December 2005, Master Levy, as she then was, ordered the 1st Action and the 2nd Action be consolidated. On 30 March 2006, by consent, Registrar C Chan ordered a speedy trial for the 2nd Action and gave various directions including filing of lists of documents and witness statements ("**30.03.06 Consent Order**") [62] . In particular, it was provided in paragraph 5 thereof that the matter be restored for further directions on summons day within 14 days of the parties filing and exchange of witness statements.

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[61] A:103-106; and A:116-119

[62] A:124-126

78. Pleadings were closed around 3 January 2006. The 1st round of lists of documents were filed on 17 or 18 October 2005 and the 1st round of witness statements were filed and exchanged on about 6 July 2006.

79. The said discovery by Christopher in August 2006 of D2's transfer of his 20% shareholding in the Company to Mi sparked off a specific discovery application by P in relation to documents concerning that transfer.

80. On 15 September 2006, Ds filed a Notice of Payment into Court giving notice that D2 had paid into Court the sum of RMB 1.00 (or HKD equivalent) being the sale proceeds of his 20% shares in the Company to Mi under the Mi Agreement, pursuant to the Injunction Order granted against him and on the basis that such payment did not constitute any admission of breach of the Injunction Order.

81. On 29 January 2007, Ds filed their expert report on the lawfulness and validity of the SPAs.

82. On 18 April 2007, Registrar C Chan made an order against Ds for specific discovery of an agreement for transfer of shares entered into between Ds, Mi and Chen, and other documents relating to the transaction. The 1st checklist review hearing took place on 24 April 2007, with a 2nd checklist review hearing on 17 October 2007.

83. P then filed further supplemental lists of documents and further witness statements, and on 3 April 2008, P sought an order for specific discovery of all the documents filed in the Dongguan Action. This was complied with by Ds filed their respective affirmations with exhibits on 5 May 2008 and on 25 July 2008. This was followed by Ds filing supplemental list of documents and further witness statements.

84. There was a 3rd checklist review hearing on 2 October 2008 and Ds then filed their respective Amended Defences on 27 October 2008. This was followed by P filing its expert report on Mainland law ("**P's Expert Report**") on 6 November 2008, a witness statement of one of its witnesses on 20 November 2008 and the Amended Reply on 24 November 2008.

85. On 7 January 2009, Ds sent to P a further witness statement of a Mr Yiu Kam Fung ("**Mr Yiu**"). P then filed its 3rd supplemental list of documents and its 4th supplemental list of documents respectively on 12 January 2009 and 1 April 2009. Thereafter, the matter then came to a standstill.

86. The Registrar's Letter, as mentioned earlier, was sent on 1 August 2018. It was 9½ years later, on 2 October 2018, that P's then solicitors filed a Notice of Intention to Proceed on behalf of P. Subsequent events had been set out earlier.

F. Grounds for dismissal

87. In the Dismissal Summonses, the grounds set out for dismissal are:

(i) P has been guilty of prolonged or inordinate and inexcusable delay in proceeding with these actions to the prejudice of Ds;

(ii) P has failed to comply with the 30.03.06 Consent Order, by failing to restore the matter for further directions within 14 days of the parties filing and exchange of witness statements, the last of which took place on 20 November 2008.

G. The legal principles

88. The principles guiding the exercise of discretion of the court to strike out actions for delay have been set out by the Court of Final Appeal in *Wing Fai Construction Co Ltd v Yip Kwong Robert* (2011) 14 HKCFAR 935, which are as follows, as summarised:

(i) Striking out was a remedy of last resort and only where it would be plain and obvious to do so. Greater use should be made of other powers of the court, thus avoiding an "all or nothing" approach to dismissal (paragraphs 33, 47 and 75(1)).

(ii) Abuse of the process of the court was the foundation for the exercise of the jurisdiction to strike out for delay (See paragraphs 66, 68 – 69 and 75(2)).

(iii) Abuse could take many forms. Mere delay would not suffice. When considering the aspect of the delay it was important that it should be both inordinate and inexcusable, and that abuse was shown. It had never been the law that mere delay would be sufficient to justify an order to strike out. Abuse included (*per Birkett v James*) inordinate and inexcusable delay causing prejudice to a defendant or contumelious conduct. It might also take many other forms such as inexcusable non-compliance with or wholesale disregard of an order of the court or the rules of court, litigation anxiety (*Bliss* prejudice) and the existence of an interim injunction pending trial which aggravates the prejudice (paragraphs 75(3) – (6)).

(iv) Where abuse was clearly demonstrated, for example where there was contumelious conduct on the part of the plaintiff, proceedings could be struck out even where prejudice to the defendant could not be shown. However, in the majority of applications, the aspect of prejudice would often be extremely relevant. Prejudice might well be relevant to the overall justice of the case (paragraph 75(7)).

(v) The conduct of the parties remained a relevant consideration. It was relevant both to the critical question of abuse as well as

to the overall justice of the case. Post-CJR where all parties to the proceedings had the obligation to prosecute the proceedings and assist the court in furthering the underlying objectives, it would be highly relevant to consider any failure on the part of the parties. There was no place anymore for defendants to adopt the attitude of "letting sleeping dogs lie". If it was sought to be argued that time had dimmed the memories of witnesses, the court will usually want to know what steps had been taken by the defendant to take instructions, or proof or locate witnesses (paragraphs 47 and 75(8)).

(vi) Post-CJR, the underlying objective of ensuring that the court's resources were distributed fairly (Order 1A rule 1(f) RHC) was referable to the administration of justice (paragraph 75(9)).

89. As further seen from paragraph 80 in *Wing Fai*, the power to strike out for delay is a discretionary power and derived from the court's inherent jurisdiction. In exercising its discretion under its inherent jurisdiction, a court must ultimately ask itself the question whether or not in the circumstances it is just to strike out, and a mechanistic approach of applying the said principles is to be eschewed.

H. Delay

90. P accepts that there was inaction on its part since 1 April 2009. Christopher and Annabell have each filed an affirmation to oppose Ds' Dismissal Summons, and to explain P's inaction. To summarise, their explanations were:

(i) After Father remarried in May 2004, his relationship with Christopher gradually deteriorated;

(ii) In October 2004, Christopher was stripped of all his posts in the companies controlled by Father, and since then Father and

Christopher were not on speaking terms, and Annabell acted as the messenger between them;

(iii) In around 2008, Father became angry with Annabell and reduced his financial support for her, and Annabell became depressed;

(iv) Christopher was deeply upset by the series of events and as a result he walked away from the affairs of P and the present 2 Actions in 2009; Wong, the then CEO mentioned earlier, resigned on about 10 August 2009. Christopher assumed that Annabell being the only director of P, would handle P and the 2 Actions, but the two did not communicate;

(v) In 2008, Li Kin Kan Samathur, half brother of Annabell and Christopher, was undergoing divorce proceedings with his former wife Florence Tsang, and Annabell was busy supporting Samathur;

(vi) In November 2013, Christopher resigned as P's director, and that MW Lee Elderly Care Foundation Limited ("**Foundation Limited**") was appointed as a corporate director of P. According to Christopher, he, Annabell, Patrick and were directors of Foundation Limited[63], and Christopher thought Patrick had taken over the handling of the 2 Actions;

(vii) as time went on, Christopher got over the unhappiness with Annabell and he talked to her again, it was only some time after P's former solicitors' substantive reply on 18 October 2018 to the Registrar's Letter, that they had a more in depth discussion and discovered that they had serious misunderstandings, that Christopher thought Patrick was handling the 2 Actions while Annabell thought Christopher was, and the result was that no one was.

[63] At para 35, A:214

91. Christopher had produced a copy of the Annual Return of the Foundation Limited at 26 March 2014 in his 2nd affidavit [64]. The shareholders as at that date were Mother holding 5 shares out of 10 issued shares of HK$1 each, Annabell holding 3 shares, Christopher and Patrick each holding 1 share. As Mother died in December 2003, it is not quite clear as to why she was still a registered shareholder in March 2014. Christopher and Patrick both provided the same address at No 7 Homantin Road which was also Mother's former address. As seen in that Annual Return, there were only two directors, namely Patrick and Annabell.

92. There was no affirmation filed by Patrick to explain his role in P and/or why he did not proceed with the 2 Actions on behalf of P.

93. In fact, the sole shareholder of P, since its incorporation, was Leeson (later, the name of the company was changed to Pruton Mission Holdings Limited ("**Pruton Mission**") and both P's and Leeson's registered address was at Basement 4, 222 Nathan Road, Kowloon. As mentioned earlier, Christopher was the majority shareholder of Leeson at the time of its incorporation.

94. It is not quite clear as to when Leeson changed its name to Pruton Mission, but as seen in the 6 May 2019 Annual Return of Lesson (Pruton Mission)[65], its registered office had changed to the address of Annabell. There were 2 directors, namely Annabell and Foundation Limited of which the registered address was also the address of Annabell. There were two shareholders, LTZ Family Holdings Limited, of same address of Annabell, holding 9,999 shares and Annabell holding 1 share. The 6 May 2019 Annual Return was filed after the Registrar's Letter and it is not clear when the changes were effected.

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[64] B:430-438

[65] C:612-619

95. On 13 April 2007, Lexford (Pruton China) also with registered address at Basement 4, 222 Nathan Road, Kowloon became P's sole shareholder holding 10,000,000 Class A shares of HK$1.00 each, and on 27 September 2007, a further 5,000,000 Class B shares of HK$1.00 each were allotted to Lexford (Pruton China)[66], but Christopher and Annebell remained the two directors.

96. As seen in the 8 July 2005 Annual Return of Lexford (Pruton China), Leeson (Pruton Mission) held 9,999 shares in Lexford (Pruton China), and the remaining 1 share was held by Leeson Fund Three Limited, both with their address at Basement 4, 222 Nathan Road. Leeson Fund Three Limited and Leeson were its only two corporate directors. It is not clear whether Patrick held any shares in Leeson Fund Three Limited.

97. To summarise, at date of incorporation on 9 June 2004, P's sole shareholder was Leeson (Pruton Mission) and Christopher was a director. By 9 June 2005, Annabell became one of its directors. On 13 April 2007, Lexford (Pruton China) became P's sole shareholder but Christopher and Annabell remained P's only two directors. This appeared to continue to be the structure at least until 27 November 2013 when Christopher ceased to be a director. As for Lexford (Pruton China), as there were no further Annual Returns produced after 2005, it is not clear whether there was any change in this shareholding structure.

98. As seen in a letter of 10 August 2006 from APT Architects Limited to P's former solicitors[67], Patrick did attend a meeting with Christopher and Lo with APT around mid July 2004 and Christopher had advised APT that Patrick was his partner in the Pruton Resort City Project and that Patrick would be responsible for the design matters and APT was

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[66] B:379-397

[67] E:1188-1189

instructed to discuss any design matters with Patrick. Patrick's contact address was given as P&L Express Ltd at Suite 6, 3/F, Biu Wah Fung Group Building in Central[68].

99. Thus, in so far as I can see, there is no sufficient evidence that Patrick held any beneficial interests directly in P, nor was he ever a director save through Foundation Limited in November 2013, notwithstanding that Christopher had described P as being the "corporate vehicles of the family of him, Annabell and Patrick"[69]. Patrick's involvement appeared to be in relation to the design matters. In any event, Christopher's and Annabell's reasons for delay were all because of allegedly their own family and personal emotional issues and their alleged misunderstanding that the other, or Patrick, was handling the 2 Actions.

100. The differences between Father and Christopher and Christopher being stripped of all his posts in Father's companies in October 2004 took place some 8 months prior to P issuing the 1st Action and almost 12 months prior to P issuing the 2nd Action. According to Christopher, Samarthur's divorce proceedings started in 2008, and further Annabell feeling depressed was also in 2008. Yet, as seen in the Chronology, numerous procedural steps were taken in the 2 Actions in 2008 by P which is a company, and there was no sufficient evidence that Samarthur's divorce or Annabell feeling depressed had any effect on the progress of the 2 Actions.

101. SL Wong resigned from P by a letter dated 10 August 2009[70] giving one month notice. Although Christopher said that he had assumed that these 2 Actions would be handled by Annabell, it was also his evidence and Annabell's evidence that since about 2010, she had been spending much

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[68] E:1188-1189

[69] See para 29, A:212

[70] B:419

time in the States as her two daughters were attending university there. Christopher did not resign as a director from P until 27 November 2013 and his argument with Annabell did not take place until October 2013. As a director, Christopher should have been aware that nothing had been done by P between 1 April 2009 when P last filed its 4th supplemental list of documents until October/November 2013.

102. P had throughout instructed solicitors and its solicitors would have the complete files on the 2 Actions. There was no information as to whether another CEO was appointed when SL Wong left, and there was no reason why the board of directors of P could not have employed or appointed another CEO or a management staff to deal with the 2 Actions after SL Wong left.

103. According to Christopher, in August 2018, P re-engaged SL Wong. There was no affidavit of SL Wong supporting P's present case to oppose the Dismissal Summons. There was also no evidence from SL Wong as to whether there was any handing over of the conduct of the 2 Actions to anyone when he resigned. According to Christopher, he has now been re-engaged by P as "Senior Manager", and that he and SL Wong are now tasked with the handling of the 2 Actions.

104. Having considered all the evidence, I do not find that the explanations offered by Christopher and Annabell for P's delay are credible or satisfactory. The delay in the 2 Actions for some 9½ years, in particular when there had been orders for a speedy trial, is in my view, plainly inordinate and inexcusable.

105. Having said this, as seen in *Wing Tai*, mere delay is not sufficient to justify an order to strike out.

I. D's conduct

I.1 "Letting sleeping dogs lie"

106. As seen in the Chronology, the 1st round of witness statements were filed and exchanged on about 6 July 2006. Within 14 days thereafter, the matter should have been restored for further directions by P. There was no explanation why the matter was not restored for directions, save that in August 2006, P said it discovered D2's transfer of his 20 % shareholding in the Company and this sparked off a summons for specific discovery as mentioned earlier. Thereafter, two further checklist review hearings took place. As said earlier, there was also the Dongguan Action in 2006 and there was a further specific discovery order in 2008 followed by Ds' amendment of pleadings. P had filed a total of 5 lists of documents and D, 3 lists.

107. During the period of some 3 years and 8 months between P's commencement of the 1st Action on 26 August 2005 and its filing of the 4th supplemental list of documents on 1 April 2009, notwithstanding that there had be a direction for a speedy trial, there had been no steps taken by P to set the 2 Actions down for trial even though his evidence appeared to be that in the second half of 2009, apart from making a further attempt to find witnesses, the 2 Actions would be ready for trial[71].

108. The Civil Justice Reform (CJR) came into effect on 2 April 2009. The 2 Actions came to a halt just before the CJR. As submitted by Mr Tam, even though Ds were not required by any court order or the pre CJR regime to carry on and expedite these proceedings proactively, they did nothing in the post CJR period to assist the court in furthering the underlying objectives, namely ensuring that the 2 Actions are dealt with as expeditiously as reasonably practicable and securing the just resolution of

[71] See para 92, A:225

disputes under Order 1A rules 1(b) and 2(2) of the Rules of the High Court, and that Ds had adopted the attitude of "letting sleeping dogs lie".

109. I agree with Mr Tam's above submission and Ds' attitude is a matter which I should take into account.

I.2 Ds' Failure to comply with the Injunction Orders

110. Christopher complained that D2 was in breach of the Injunction Order against him by disposing of 20 % of his shares on 30 April 2006 to Mi and that this was only discovered by P upon a search of P's registration record at the Bureau in August 2006. It was further Christopher's evidence that notwithstanding that D2's denial of any breach, D2 eventually agreed to pay into Court the said sum of RMB 1.00, being the consideration under the Mi Agreement[72].

111. D2 had in his 3rd affirmation denied that he had ever been served personally with a copy of the Injunction Order (dated 14 October 2005) against him at the time, and said he was only orally informed by his then solicitors of the same and he said he was never advised of the consequences in the event of any breach at the time.

112. In response, Christopher claimed that P's former solicitors had tried to locate D2 to effect personal service after P had obtained the Injunction Order against D2. Christopher claimed that D2 was staying in Mainland China to avoid personal service, and that P had sought the assistance of Christopher's friend, one (呂文凱) Lu Wenkai, the General Manager of 恒峰貿易有限公司 ("**Lu**") who served a sealed copy of the

[72] See para 102, Christopher's 2nd affidavit, A:229

Injunction Order personally on D2 on 27 October 2005 at a restaurant namely 廣東省東莞市塘廈鎮環市南路東山羊莊.

113. According to Christopher, Lu had made an affirmation on 10 November 2005 regarding the alleged personal service, and a copy of Lu's affirmation was exhibited in Christopher's 3rd affidavit. However, there was no record of Lu's affirmation being filed and the original could not be located, but according to Christopher, a copy of the affirmation was in the file received from P's former solicitors.

114. D2 denied he was evading service and said he had always resided in Mainland China, and further he never knew anyone known as Lu Wenkai and maintained that he, and/or D1 were never served personally with the Injunction Orders. D2 said Christopher's allegations were fabricated, and when his solicitors replied on 22 October 2018 to P's then solicitors letter of 18 October 2018 to the Registrar's Letter[73], it was already pointed out by his then solicitors that the Injunctions Orders were never personally served on Ds, nor were they endorsed with the requisite penal notices and it was not until Christopher's 3rd affidavit that he produced a copy of Lu's affirmation with the missing original.

115. In any event, leaving aside whether such service in Mainland China was permissible under Order 11 of RHC or not, the fact is that the original went missing and was not filed. There was no affirmation filed by P's former solicitors to confirm what Christopher had said and/or to explain what had happened to the original.

116. Upon discovery of the transfer of the 70% shareholding in the Company being registered with the Bureau, and after being provided with a copy of the Mi Agreement, P's former solicitors had written to Ds' then

[73] C:527-528

solicitors complaining of Ds' breach of the Injunction Orders and insisted on the RMB 1.00 being sale proceeds should be paid into Court. However, P merely threatened that committal proceedings might be triggered if Ds failed to pay the RMB 1.00 into Court. Since it was P's allegation that D2 was in breach of the Injunction Order, P could have applied for leave to issue committal proceedings then and there irrespective of whether RMB 1.00 was paid into Court or not. Christopher's explanation was that P did not wish to start a satellite litigation. Hence, it was P's clear decision not to apply for leave to issue committal proceedings notwithstanding its complaints.

117. In any event, whether there had been proper service of the Injunction Order on D2 or not, the transfer of D2's 20% shareholding in the Company was pursuant to the Mi Agreement, which took place one day prior to P obtaining an ex parte injunction against D1 in the 1st Action, and further, 2 months prior to P obtaining the Injunction Order against D2. In fact, the writ against D2 was not issued until 7 October 2005, and there was no evidence that at the time of entering into the Mi Agreement, D2 had any knowledge that there would be an injunction against him. Further, by April 2006, Mi had obtained 70% shareholding in the Company, having acquired EC's 50%. Further, Mi was appointed the legal representative of the Company, and it would appear that the registration of the transfers at the Bureau was effected by Mi or the Company. There was no sufficient evidence that it was D2 or D1 who effected the formal registration at the Bureau. I do not find that there was sufficient evidence that the transfer by D2 to Mi of his 20% shareholding in the Company under the Mi Agreement was a breach of the Injunction Order.

118. On 13th April 2010, Ds transferred all their shares (ie the remaining 30%) in the Company to 深圳市君利得商貿有限公司 ("**Shenzhen Company**") at the consideration of RMB 24,000,000. According to P, the transaction was carried out without P's prior knowledge

or consent or approval or relief from the Court. It was P's evidence that it was only on 12 October 2018 when P's representative obtained a copy of the record from the Bureau that P discovered that Ds had transferred all their shares in the Company.

119. D2's evidence in his affirmation was that as the 2 Actions suddenly came to a standstill in 2009, Ds were left with the impression that P had at last sensibly decided to abandon its frivolous claims.

120. It was also D2's evidence that Christopher had maintained a residence at a place situated on one of the 2 Lots and that Christopher was personally aware of the disposal of the shares by Ds in the Company way back in 2010 but took no action to either enforce the Injunction Orders or to prevent the disposal from taking place and that P had acquiesced in the disposal and P was estopped from relying on the Injunction Orders[74].

121. Christopher had denied D2's allegation that he was personally aware of the disposal of the shares in 2010 and said that although after walking away from P's affairs and the present 2 Actions in 2009, he did visit from time to time the Man Wah Elderly Centre, he did not know of Ds' disposal of their shareholdings.

122. The mere fact that Christopher had maintained a residence on the 2 Lots would not necessarily mean that he would have known there was any internal change on the shareholding structure of the Company, although normally, when there is a change of ownership, there may be a change of management. There were no photographs provided to this Court of the present site, in particular whether there were any changes after the Shenzhen Company acquired all the shares in the Company in 2010 or whether there was any notification to the residents/occupants as to the change of ownership

[74] Para 13, A:177

or change in management at the time or at any time thereafter. As this stage, I do not find sufficient evidence to say that there had been acquiescence on P's part for their sale of Ds' 30% shareholding, as alleged by Ds, or that P should be estopped from relying on the Injunction Orders.

123. D2 in his 2nd affirmation had explained that Ds were approached by the Shenzhen Company in about April 2010 and that by that time the Shenzhen Company had already purchased 70% of the shares in the Company. D2 said at the time Ds' remaining 30% shares in the Company were worth more than RMB 40m as the Company owned the 2 Lots. D2 said they made an offer in excess of RMB 40m to the Shenzhen Company which declined the same, and that eventually Ds agreed to a price of RMB 24m. Ds acknowledged that they should have applied to the Court for the discharge of the Injunction Orders before the disposal of the shares, but said that such a step was never suggested to Ds by their previous legal advisors and that there was no intention on their part to be disrespectful[75].

124. Notwithstanding what Ds had said, and even if P would not have been able to cite them for contempt due to issues over service and/or other issues, Ds were clearly aware of the Injunction Orders, latest by the time they entered into the Framework Agreement with Mi and Chen on 19 January 2006[76].

125. Even though by the time Ds sold their 30% to the Shenzhen Company, there had been no action taken by P in the 2 Actions for about a year, and even though it would appear that the Injunction Orders could not be enforced under Mainland law as seen later in the Dongguan Judgment, they were in breach of the Injunction Orders. This is a conduct I will take into account.

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[75] Para 9, A:191

[76] See clause 1.4, H:1955

J. Any abuse of process

J.1 Material non-disclosure and failure to provide a cross undertaking as to damages in relation to the Injunction Orders

126. Ds had alleged:

(1) there had been material non-disclosure on the part of P in obtaining the ex-parte injunction against D1;

(2) P failed to give a cross undertaking as to damages regarding the Injunction Order against D2;

127. The complaint in (1) above was in relation to SL Wong failing to disclose, at the time when P applied for an ex parte injunction against D1, a letter dated 11 March 2005 from D2's then solicitors to P's former solicitors setting out the Conditions pursuant to which the SPAs were signed, and the same non-disclosure was made again at the time when P applied for an injunction against D2. However, so far as this Court was aware, no step was ever taken by Ds to discharge the Injunction Orders on material non-disclosure. Similarly, for the complaint in (2) above, D2 could have made an application then for fortification of P's undertaking as to damages at the time, but no such application was ever made by D2. As pointed out by Christopher, these complaints made now, about 13 or 14 years later, would not make the Injunction Orders invalid or ineffective.

J.2 Whether the 06.12.18 Letter contained an unwarranted demand

128. Ds had referred to a letter dated 6 December 2018 which was marked "without prejudice subject to contract" ("**06.12.18 Letter**")[77] in that P had demanded Ds to pay RMB 500m to P as settlement of these 2 Actions in view of Ds' "wrongful acts", and that the amount was some 100 times the

[77] B:468-469

amount which P is claiming in these 2 Actions, and that P was also threatening to bring possible new claims both in Hong Kong and in the Mainland, and that P's conduct was tantamount to blackmail or P was using the 2 Actions as an "instrument of extortion".

129. P objected to the production of the 06.12.18 Letter and asked that the letter, as well as the reply from Ds' solicitors of 7 December 2018 and also the relevant paragraphs in D2's affirmation referred to the letters and Ds' complaints of P using these proceedings as an instrument of extortion be expunged and disregarded.

130. The production of the 06.12.18 Letter and the complaints made by D2 were first made in D2's 3rd affirmation of 25 March 2019, later in D2's 4th affirmation of 2 October 2019 and finally again in his 5th affirmation of 6 November 2019. There had been no proper applications taken out by P to expunge the letters or the relevant paragraphs.

131. D2 had said in his affirmation that he was advised by his legal advisers that the case *Family Housing Association (Manchester) Ltd v Michael Hyde and Partners* [1993] WLR 354 is the authority for the proposition that without prejudice correspondence is admissible for the determination of an application to strike out for want of prosecution.

132. The plaintiffs the above case had filed evidence of the contents of without prejudice negotiations in order to resist an application by the defendants to strike out the action for want of prosecution. It was held that those without prejudice communications did not infringe, in those particular circumstances, the public policy in favour of exclusion. Hirst LJ had described the circumstances as a 'narrow context', and had said he was unable to see how exposure to the course of negotiations in that narrow context was in any way harmful to either side, and if the application were to succeed, then the action would be at an end, and if it failed and the case were

to proceed to trial, the material would not be available to the trial judge and the trial judge would not be in any way embarrassed.

133. The decision in the above case established an exception to the "Without Prejudice Rule" where a party seeks to explain the passage of time by reference to without prejudice negotiations. The case was later distinguished in *Ravenscroft v Canal & River Trust* [2016] EWHC 2282 (Ch), where the court held that there is not a general exception which applies whenever without prejudice communications are referred to only for the purposes of an interlocutory hearing.

134. Mr Tam referred to paragraph 24-2 in *Phipson on Evidence* 19th Ed and submitted that P was not relying on ongoing negotiations for settlement as a ground for resisting the Dismissal Summons and therefore the exception to prohibition of production of without prejudice or ongoing negotiations for settlement was not triggered.

135. I accept Mr Tam's above submission that the present case is different from the *Family Housing Association* case in that P was not relying on any ongoing negotiations to explain the delay or inaction in the 2 Actions.

136. In my view, the question is really whether the letter was issued for genuine negotiations or whether it was an unwarranted demand to "blackmail" as alleged by Ds.

137. The 06.12.18 Letter read[78] :

> "……
>
> We have our client's instructions that it is determined to pursue the claim to its conclusion (not limited to appeal, final appeal, and possible new claims both in Hong Kong and China) and that it has evidence against your client of the wrongful acts that they

[78] B:468-469

> have being complained of in and related to these proceedings (sic).
>
> To avoid unpleasant consequences our client instructs us that it will be willing to settle the entire claim on the following basis:
>
> 1. That your clients will pay the sum of RMB 500 million ("Settlement Sum");
>
> 2. After deduction of our client's legal costs and initial investment that our client paid for the subject shares, the balance of the Settlement Sum will be donated to the Chinese Communist Party for their use for betterment of China and humanity.
>
> The above offer will remain open for acceptance for 7 days after that it will be withdrawn.
>
> ……"

138. The following day, Ds' solicitors replied, amongst other things, that (1) P's bare allegation that Ds had committed wrongful acts was groundless and P was requested to give full particulars within 7 days; (2) the amount of RMB 500m was far in excess of what P was claiming in these proceedings and P was requested to supply full particulars justifying the amount of RMB 500m within 7 days[79].

139. It was further stated in Ds' above reply that they did not consider P's letter to be a genuine attempt to resolve this matter and even though it was marked "without prejudice" the same should not be regarded as privileged and Ds reserved the right to produce the 06.12.18 Letter to the Court.

140. There was no response from P to Ds' above letter.

141. The answers/explanations to Ds' requests for explanations were only provided by Christopher on behalf of P, some 9 months later, in his 3rd affidavit sworn on 9 September 2019, re-sworn on 29 October 2019

[79] B:471

and filed on 30 October 2019[80]. No reasons were provided by Christopher or P as to why explanations to the 06.12.18 Letter as requested by Ds could not have been provided earlier, save that Ds' reply letter was regarded by P to be "unequivocal rejection" of P's settlement offer of RMB 500 million.

142. I find that Ds' reply letter was reasonable and the rejection was to pay P RMB 500m, but there was no indication that Ds were not willing to negotiate if there was a more realistic proposal from P.

143. As for the "Settlement Sum" of RMB 500 million, Christopher 1st explanation in paragraph 26(3) of his 3rd affidavit was that, referring to the sale price on 23 October 2018 of a plot of land in the same town where the 2 Lots are situated, which was sold at around RMB 48,323 per square metre, as the 2 Lots covered a total area of about 110,000 square metres within the urban area of the said town, P verily believed that the net value of Ds' total 50% shareholding in the Company would be not less than RMB 500,000,000[81].

144. However, as pointed out by D2, Christopher's calculations were wrong, since assuming the alleged average unit price of RMB 48,323 per square metre (which was not admitted by D2), the 2 Lots should come to RMB 5,319,930,000 and Ds' 50% interest should have been RMB 2,569,965,000, which would far exceed RMB 500 million by a huge margin.

145. Then, in his 5th affidavit and realising his miscalculations, Christopher attempted to explain that there were many other factors which might affect the values of the 2 Lots or of the Company, but P was confident

[80] At para 26 Christopher's 3rd affidavit, B:264-265

[81] B:265-266

that the net value of Ds' total 50% shareholding in the Company should not be less than such a low figure of RMB 500 million.

146. Christopher did not elaborate on what other factors there were. What was said by Christopher in relation to the value of Ds' shares had also to be seen in the light of P's own case that the consideration for Ds' shares in the SPAs was only a total of HK$1.2 million. This also had to be seen in the light of the without prejudice 18.01.05 Letter referred to earlier when Leeson offered to sell to D, Leeson's entire shareholding in P for no lower than HK$4 million. There was clearly no basis as to how Christopher or P came up with an amount of RMB 500 million in the 06.12.18 Letter. Further, P had failed to respond at all to Ds' reply letter seeking a "more realistic offer".

147. It was submitted on behalf of Christopher that since the "Settlement Sum", after deduction of P's legal costs and initial investment for the shares, would be donated to the Chinese Communist Party and therefore it was clear that P did not use the 2 Actions as an "Instrument of Extortion". I have to say I do not quite follow this submission. Even if the payment was made to another, it would not mean that there would be no benefit to Christopher or P, and also, even if a payment was made to another under threat, this would still mean there was extortion.

148. Having considered the 06.12.18 Letter, the impression one gets is that P would not hesitate to continue to litigate unless Ds were to pay him RMB 500m and since P failed to provide any reasonable explanations at the time, on the face of that letter, it did appear that P, allegedly being in possession of evidence of Ds' wrongful acts, was trying to use the 2 Actions to demand an unrealistic settlement sum out of Ds.

149. Further, on one hand, it was said by P that the 2 Actions had reached an advanced state where rounds of discovery had been made and

witness statements and expert reports on the Mainland law had been exchanged, on the other hand, the directions proposed by him now seems to include that further time be allowed to him to obtain Counsel's advice and to take out all outstanding interlocutory injunctions as soon as possible, proposing 56 days after the expiry of the time allowed for lodging an appeal, and further directions for, eg the preparation of an expert report on the valuation of the shares of the Company for P's claim for damages in lieu of specific performance and further to file a further witness statement giving an account of the events which took place since the inaction including D's "blatant breaches" of the Injunction Orders[82] ("**Proposed Directions**").

150. The Registrar's Letter was sent in August 2018, and even though there was a joint request for extension of time to 2 October 2018, yet P's solicitors failed to send a substantive reply until 18 October 2018. Further, the Notice of Intention to Proceed was only filed by P on 2 October 2018, 2 months after the Registrar's Letter, and it was only after Ds issued the Dismissal Summons on 1 November 2018 that P issued its Payment Out Summons. In any event, by the time of the hearing, it was more than a year down the road, and yet P proposed another 56 days after the expiry of the time allowed for lodging an appeal to obtain Counsel's advice and to take out all outstanding interlocutory injunctions. Even though the Proposed Directions will be subject to this Court' approval if the 2 Actions are not struck out, those directions proposed by P seemed, in my view, to indicate P's attitude was not one seeking a speedy end to this litigation.

151. Having considered all the above, I have come to the view the 06.12.18 Letter was not a genuine attempt by P to resolve or settle its disputes with Ds and in my view, it contained an unwarranted demand and a threat to string out the litigation and there was "unambiguous impropriety" and P should not be allowed to rely on the "without prejudice' privilege.

[82] See para 60 of P's Skeleton Submissions

In any event, I am not prepared to disregard the 06.12.18 Letter or to order any of the relevant paragraphs in D2's affirmations to be expunged.

J.3 Inconsistences in P's evidence

152. I have said earlier that I do not find that the explanations of Christopher and Annabell for P's delay and inaction to be credible or satisfactory. I also find that there were inconsistencies in their evidence in relation to Christopher's or P's intention to honour Mother's wish in maintaining the Man Wah Elderly Centre ("**Mother's Wish**").

153. It was Christopher's evidence in his 2nd affidavit filed in opposition to the Dismissal Summons that (i) to honour Mother's Wish, he maintained the Man Wah Elderly Centre and eventually caused P to enter into the SPAs with Ds[83]; (ii) he was deeply upset by the series of events which happened to his family and the maintenance of the Man Wah Elderly Centre and the 2 Actions became his "Achilles' heel" since his intention had been to honour Mother's Wish and treasure the harmonious family life brought about by Christian values and beliefs[84]; (iii) as the share acquisition was a business investment of P, and given the desire to honour Mother's Wish, it had always been P's intention to proceed with the 2 Actions to the end[85].

154. In Annabell's evidence 2nd affidavit , she repeated what was said by Christopher in (i) and (iii) above, in almost identical wording[86].

155. Mother's Wish or honouring Mother's Wish was never pleaded in P's statement of claim against either of Ds.

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[83] At para 28, A:211

[84] At para 32, A:213

[85] At para 38, A:216

[86] In para 4, A:194 and para 13: 198

156. More importantly, Mother's Wish or honouring Mother's Wish was never mentioned in Christopher's 1st witness statement. All he said was Mother was a member of Lakeview Elderly Resort which was situated on the 2 Lots and that since about 2004, Ds, Lo and him would meet up socially[87]. As said earlier, it was Christopher's evidence that it was D1 who approached him in April or May 2004 for assistance in a project on the 2 Lots. According to Christopher, D1 revealed that he and his partners had plans to upgrade the current resort on the 2 Lots to a 5-star resort complex and possibly changed the name from "Lakeview Resort" to "Pruton Resort", and it was under such circumstances that Christopher referred Ds to the senior manager of Pruton Hotel Limited to discuss directly, and that Christopher claimed he was not too involved in the dealings between Pruton Hotel Limited and Ds regarding the project.

157. It was only in Christopher's supplemental witness statement that he mentioned Mother's Wish and that after the 2nd Purchase Agreement that Mother had participated in the construction work for the Man Wah Elderly Centre and according to Christopher, as the progress was slow, and when Mother passed away in December 2003, the plan had not yet completely been implemented and that before she passed away, she had told Christopher to continue the family's career for the elderly[88].

158. It was not actually clear from Christopher's evidence as to which part of Mother's plan was not completely implemented, since the evidence, as seen earlier in the Inspection Certificate, indicated that the construction of the buildings on the 2 Lots had been completed by November 2000. In fact, this was also stated in the BDO accountant report dated 4 April 2005 which was produced by P in its 3rd supplemental list of documents[89] ("**BDO Report**"). Further, according to D2's evidence in his

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[87] In para 2, C:621, Christopher's witness statement of 5 July 2006

[88] See par 12, D:738

[89] At F:1303

supplemental witness statement that all along the building mentioned in the 2nd Purchase Agreement was on completion in 2000 named "文華樓" / "Man Wah Building" by Mother herself and was changed to the name "Man Wah Elderly Centre" by Christopher only in 2007[90]. In any event, to summarise, Christopher's evidence on honouring Mother's Wish appeared only in Christopher's supplemental witness statement dated 30 October 2007.

159. As said, it was Christopher's evidence that it was D1 who proposed to him about the plan in developing a hotel project and that D1 had provided him with a development plan dated May 2004[91] ("**D1's Plan**"). Christopher was of the view that if the project went well, then the management of the Lakeview Elderly Resort could be upgraded and the Man Wah Elderly Centre could be developed to honour Mother's Wish[92]. However, in D1's Plan, there was no mention of the Man Wah Elderly Centre, or any reference to the Lakeview Elderly Resort, and D1's Plan in fact reflected the ATV Joint Venture and the area of the Lakeview Elderly Resort seemed to have been described to be the dormitories of employees, students and teachers and the teaching building (presumably of the ATV Academy). There was no reference to the Man Wah Elderly Centre or even the Lakeview Elderly Resort in D1's Plan.

160. Anyway, Christopher's evidence was that it was Ds who continued to persuade him to invest as otherwise the 2 Lots would be seized and the Company would be liquidated, and that they repeatedly told Christopher if he failed to invest, then Mother's Wish and her work would have been wasted[93].

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[90] See para 19, D:957

[91] D:832-836

[92] See para 15, D:739

[93] At para 21, DL741

161. Hence, Christopher's then evidence was that it was Ds who approached him first in relation to a 5-star hotel resort complex project and that *they were persuading him to invest in the project to honour Mother's Wish.*

162. In SL Wong's 1st witness statement, he also said according to Christopher, it was Ds who approached Christopher first[94] as the Company was in severe financial difficulties and there was no mention of Christopher wanting to invest because of Mother's witness.

163. In his witness statements, although Christopher seemed to downplay his role in the Pruton Resort City Project, but as seen earlier, the letters to Mayor Liu with the Development Plan and the Feasibility Report in relation to the Pruton Resort City Project were both signed by him, and he had attended dinner with Mayor Liu and participated in various meetings.

164. It is not quite clear as to what has happened to the building named "Man Wah Lau" or "Man Wah Elderly Centre" or whether it is now the same building referred to as the "Christian mission house" in P's former solicitors' substantive reply of 18 October 2018 to the Registrar's Letter.

165. Further, it was Christopher's own evidence that after Mother signed the 2nd Purchase Agreement, the Company was in financial difficulties and that it was not able to pay the builders' outstanding invoices and the bank loan interests, and that the Man Wah Elderly Centre's future was unsettled as it faced possible eviction if the 2 Lots were seized by the builders and the bank[95]. In any event, by about 2001, the ATV Academy was set up on the 2 Lots, and as said earlier, from about 2002, there were complaints from purchasers of memberships of the Lakeview Elderly Resort. As Mother was residing there prior to her death and Christopher was often

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[94] At para 5, C:629

[95] See para 11, D:738

visited Mother, all of this must have been known to Mother and Christopher even prior to Mother's death. If Mother's Wish was to maintain the Man Wah Elderly Centre, then it appeared that Mother and/or Christopher could have approached Ds during her lifetime, or if Christopher's intention was to honour Mother's Wish after her death, one would have thought he would approach Ds first, rather than the other way round.

166. Anyway, irrespective of who approached whom first, the evidence as seen in SL Wong's witness statements was that the Pruton Resort City Project was a commercial investment. As seen in the Development Plan and the Feasibility Report, and also the plan from APT Architects[96], the elderly resort occupied only one part of the entire development area in the Pruton Resort City Project and the main focus in the Feasibility Report, as mentioned earlier, was the 5 star hotel development including all the entertainment centres and health centre which appeared to be on the frontage of the "artificial lake" or "artificial reservoir".

167. Further, in the statement of claim, P has sought an order that Ds to transfer to P their 50% shares in the Company, or specific performance. It would thus appear that P had wanted to enforce the SPAs in having Ds' shares transferred to P. However, shortly thereafter, Leeson then sent the 18.01.05 Letter, indicating to Ds that Leeson was interested in selling the entirety of P's shares to Ds for HK$4m, and as said earlier, it would appear that by then, Christopher and/or P had lost interest in the Company or the Pruton Resort City Project. There was no mention of maintaining the Man Wah Elderly Resort on the 2 Lots in the 18.01.05 Letter.

168. Thus, Annabell's and Christopher's statement in their present affirmations that it has always been P's intention to proceed with these 2 Actions to the end, *given the desire to honour Mother's Wish*, has to be

[96] F:1514-1515

seen against the above background and evidence, which in my view, do not appear to really support their statement.

169. It was D2's evidence that P had lost the financial support to fulfil the Conditions, namely to acquire the 50% shareholding of EC in October 2004 when Christopher was stripped of his posts in the companies controlled by Father. Christopher denied he was financially tight after the deterioration of his relationship with Father.

170. Since Christopher's own evidence was that the Company was in financial problems and full of debts and was unable to pay the outstanding invoices to the builders and loan interests, with the risk of the builders and the bank seizing the 2 Lots, and Man Wah Elderly Centre being evicted, and as further seen in the BDO Report, as at end of 2004, the Company suffered losses of RMB 11,390,000 and if depreciation and the unrecoverable receivables were taken into account, as at end of 2004, there would be negative equity in the shares in the Company[97]. Thus on Christopher's own evidence, as a commercial investment, Ds' 50% shareholding would not seem to be worth anything, without P acquiring EC's 50% shareholding and without further capital injected into the Company for the Pruton Resort City Project.

171. In P's letters before action dated 7 March 2005 to Ds[98], it was stated that P had suffered "serious loss and damage" as a consequence of Ds' breach of the SPAs. It was also stated that P had arranged and reserved substantial funds for the Pruton Resort City Project and that the funds were tied up and the cost of finance for such tie-up was estimated to be about HK$34m per annum, and besides the costs of finance, P had also incurred other costs including but not limited to planning and development costs, and

[97] F:1303

[98] C:599

that P would suffer serious loss and damage as a result of Ds' continuous breach ,which at that time was estimated to be more than HK$3m per month. The letters ended by demanding transfers of Ds' shares immediately and the sum of HK$2.5m be paid within 7 days, otherwise legal proceedings would be commenced by P without further notice, with P claiming further remedies including but without limitation *further damages at the rate of HK$3m per month.*

172. D2's then solicitors replied on 11 March 2005[99]. In this letter, apart from setting out the Conditions upon which the SPAs were signed and denying any breach of the SPAs, D2 had asked P to provide relevant documentary evidence to support its allegation that funds were tied up with cost of finance of HK$34m per annum as alleged by P, and D2 had stated that he would not accept such unreasonable allegation.

173. There was no evidence of any response from P to D2's above letter. There were also no particulars set out in P's statement of claim as to what damages P had suffered. Insofar this Court could see, there were no documents in P's 5 lists of documents to support a sum of HK$34m being cost of finance or the alleged HK$3m per month. In fact, the letter before action seemed to also contain an unwarranted demand, which was not dissimilar to the 06.12.18 Letter.

174. Under Clause 5 of the SPAs, it was provided that upon payment of the HK$600,000 to each of Ds, P was to forthwith acquire all the rights and power of Ds as a stakeholder in the Company as if the transfers of Ds' shareholdings had been completed, and that prior to the transfers, Ds were to act as P's agent and/or trustee of their shares[100]. The entire Clause 5 was set out in a letter dated 10 March 2005 from P's then solicitors to D1 and it

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[99] C:604-605

[100] At B:323

was stated therein that by that letter P gave notice to D1 any agency/trustee relationship as provided under Clause 5 had been terminated and that D1 was not to hold himself out as P's agent or trustee[101].

175. Thus, on its own case, P appeared to have terminated all rights pertaining to Ds' shares under Clause 5 afforded to P prior to the formal transfer of the shares, if a similar letter had been sent to D2 (which was not produced).

176. Anyway, it is not quite clear as to how P was to operate the Company without acquiring EC's 50%, and with D2 continuing to be the legal representative. Further, as seen in the Dongguan Judgment, all along the company seal of the Company was held by EC.

177. Ds had disclosed a letter dated 23 April 2005 from P's former solicitors to D2[102]. In this letter, the sum of HK$2,500,000 payable by D2 was stated to be a "Debt" due and outstanding from D2, and that the "Debt" had been assigned to one Chan Chung Yan Atcky on 23 April 2005, and a copy of the assignment of the "Debt" was attached to the letter[103]. If this were the case, then it is not clear why in the subsequent statement of claim, P is claiming the sum as "liquidated damages". There seemed to have been no explanation as to what happened to the assignment of the debt and.

178. On 13 April 2007, Leeson (Pruton Mission) had transferred all its shares in P to Lexford (Pruton China) who then became the sole shareholder in P and the then paid up capital was HK$10,000,000. By June 2008, the capital of P was increased to HK $15,000,000 with a further 5 million shares of HK$1 being allotted to Pruton China[104].

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[101] C:601
[102] F:1338
[103] F:1339
[104] B:379-408

Thus, after its incorporation in June 2004 until at least 9 June 2006, the capital of P remained at only HK$10,000.

179. The Pruton Resort City Project required quite substantial investment, namely RMB 120,000,000 even at the 1st stage which was to be provided by the Pruton Group, as seen in the Feasibility Report, and further the project was to commence in January 2005 and was estimated to take 18 months. It was only after P sent its letters before action that the Local Government formally replied to the Company indicating there was no consent for the extra land sought by the Company for the Pruton Resort City Project. Anyway, there was no sufficient evidence in Christopher's witness statements as to how he was to meet this investment after the deterioration of his relationship with Father in October 2004.

180. In light of all that was said above, I am of the view that there were unexplained inconsistencies in Christopher's evidence and P's case.

J.4 Conclusion on whether there was any abuse

181. It was not quite clear why P had to commence separate actions against D1 and D2. As set out earlier, in the 1st Action, Reyes J ordered a speedy trial as early as August 2005 and in the 2nd Action, Mr Registrar C Chan again ordered a speedy trial after the consolidation of the 2 Actions. This was about 9 months after the commencement of the 1st Action and about 7 months after the 2nd Action. As said earlier, pursuant to the 30.03.06 Consent Order, the 2 Actions were to be restored for further directions on summons day within 14 days of the parties filing and exchange of witness statements.

182. As seen in the Chronology, P last filed a witness statement on 20 November 2008 and thereafter, P could have restored the 2 Actions for further directions by early December 2008 since there was no evidence that

he would know then as to Ds' intention to file a further witness statement of Mr Yiu on 7 January 2009. Even if P knew, then latest by 21 January 2009, P should have restored the 2 Actions for directions and to proceed to trial.

183. Christopher's evidence that he walked away from the affairs of P and the present 2 Actions in 2009 would appear to be after the Dongguan Judgment. P was named as a "Third Party" in the Dongguan Action, and P should have been aware of what was going on in the Dongguan Action. In any event, as P was the party who produced a copy of the Dongguan Judgment in its 4th supplemental list of documents, which was the last document filed before the 2 Actions came to a standstill, by 1 April 2009, P should be fully aware of the effect and the contents of the Dongguan Judgment.

184. Neither P's expert nor Ds' expert seemed to have referred to the then State Council Regulation which stipulated that Hong Kong residents could not be shareholders of Mainland domestic companies, mentioned in the Dongguan Judgment. P's expert had checked with the Bureau and found that the Company had not applied to establish a foreign investment enterprise and was thus an ordinary domestic investment enterprise/limited company. P's expert had also made enquiries from the Bureau as to why a "domestic investment enterprise" could have Hong Kong residents as shareholders, and the reply was there were some special policies at the time. P's expert had also made enquiries from the Dongguan People's Court but the response she received was if the evidence showed it was a "domestic investment enterprise" then the laws and regulations governing "domestic investment enterprise" should apply[105]. Anyway, P's

[105] At E:1034

expert concluded that the Company was a "domestic investment enterprise" and that the PRC Company Law should apply[106].

185. Ds' expert had referred to the Company as a "Sino-Foreign Equity Joint Venture"[107]. There was no sufficient evidence that there was some special policy of the Local Government or the Dongguan officials at the time, as seemed to have alleged by Ds to encourage foreign/Hong Kong investment in Dongguan domestic companies.

186. That the Company was a "domestic investment enterprise" was in fact confirmed by the Intermediate Court in the Dongguan Judgment[108]. The Intermediate Court had stated that, after investigation, on 12 November 2005, the Bureau had issued a notice to the Company to change the shareholding structure before the deadline of 30 days. In short, as Ds were Hong Kong residents, the shareholding structure of the Company was in breach of State Council Letter No 66 of 1997, namely "Regulation in relation to HKSAR Chinese residents investing in Mainland", Ds should within the deadline imposed transfer their shareholding to a Mainland entity and to arrange for the registration of shareholders to be changed, or the Company's business registration would be cancelled[109] ("**12.11.05 Bureau Notice**"). On 9 August 2007, the Bureau had also issued a notice for annual capital examination to the Company that the Company should within the deadline imposed arrange for capital examination otherwise, the business licence would be cancelled ("**09. 08.07 Bureau Notice**")[110].

187. In the Dongguan Judgment, the Intermediate Court had also mentioned that on 27 March 2007, the Credit Society had issued a claim against the Company for repayment of the outstanding mortgage loans, and

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[106] At 1st sentence and 2nd sentence, E:1034

[107] See para 5.1-5.3, E:1022-1023

[108] At 2nd paragraph, F:1316

[109] See last paragraph, the Dongguan Judgment, F:1320-1321

[110] F:1321

that on 8 June 2007 there was a settlement agreement before the Court. However, it was also mentioned by the Court that at the time then (which would seem to mean around the time of the Dongguan Judgment on 21 January 2009), the Credit Society had already applied for enforcement of the mortgaged property, and that the assessment work had been completed, and the Shenzhen Bao An District Court had applied to seize the land concerned[111]. It thus appeared from what was said by the Intermediate Court was that the 2 Lots would be seized to meet the outstanding loan.

188. The Intermediate Court summarised in its judgment that there were two issues to be determined, namely (1) whether the Framework Agreement was valid and enforceable; and (2) whether Mi and Chen were in breach of those agreements.

189. What was held by the Intermediate Court under Issue (1) was that (i) the Framework Agreement was legal and valid, namely as Ds could not have been shareholders of a domestic investment company and the shareholding structure of the Company being defective, the transfers under the Framework Agreement would cure the defect and would enable the Company to comply with the 12.11.05 Bureau Notice; (ii) *Notwithstanding Ds' transfers to P, such transfers had not been registered and further, the Injunction Orders were not enforceable in the Mainland, and therefore Ds had maintained the right to deal with their shares legally*; and further although Ds' conduct tantamount to "selling the same property twice" but the legality of the transactions between P and Ds had yet to be determined, and as Mi and Chen were fully aware of the transactions between P and Ds and the Injunction Orders, there was no deception on the part of Ds; (iii) as the transfer of the 30% shareholding of Ds under the Framework Agreement was subject to the discharge of the Injunction Orders, as there was no decision by Hong Kong Court and the Injunction Orders were not yet

[111] At penultimate paragraph, the Dongguan Judgment, F:1320

discharged, the transfer clause had not yet taken effect, *but the other clauses or in the two agreements regarding the Company's liabilities, the relocation of the Lakeview Elderly Resort and the resolution of the membership issues, the transfer of the shares in the ATV Academy and the relocation thereof, all these had taken effect*.

190. The Intermediate Court ultimately dismissed Ds' claims to terminate the Framework Agreement and to seek the re-transfer of the 20% shareholding from Mi to D2.

191. What was held by the Intermediate Court could have an effect on the 2 Actions, and this would have been a matter which P and its lawyers would be aware of. It was also clear that under the Framework Agreement the Man Wah Elderly Centre, as part of the Lakeview Elderly Resort, was to be relocated.

192. In particular, in light of what was said in the Dongguan Judgment, P must be aware that as P is a Hong Kong company, specific performance of the SPAs would mean seeking transfers by Ds of their 50% shareholding in the Company to P and this could similarly be in contravention of the State Council Regulation and could lead to the cancellation of the Company's business licence/registration. Further, P must also be aware that the Injunction Orders were unenforceable in the Mainland and that Ds had maintained their right to deal with their shares under Mainland Law.

193. Although P or Christopher might not know of all those events concerning the Company mentioned earlier in this judgement under Sections B, C and D, those events were summarised in the Dongguan Judgement and would have come to the knowledge of P during the Dongguan Action or latest, in the Dongguan Judgment. After P's production of the Dongguan Judgment, P then took no further steps for 9½ years. At that time,

SL Wong had not yet resigned and there was no sufficient evidence that P was trying to find witnesses as Christopher now claims[112]. In my view, it would appear more likely than not that at the time, there was a decision on the part of P not to proceed with setting the 2 Actions for trial.

194. In light of all said above, culminating in the 06.12.18 Letter and with the Proposed Directions, it would appear to this Court there was no intention on P's part to bring the 2 Actions to a speedy conclusion, and that P was only trying to use the 2 Actions to demand a settlement sum which was not supported by evidence. In my view, there was abuse of process on P's part. As said by our Chief Justice in *Wing Tai*, the courts exist to assist parties to resolve disputes and they should not be used by litigants for other purposes[113].

K. Prejudice to Ds

195. In a letter dated 2 October 2018 from Ds' former solicitors to P's former solicitors, Ds alleged that their key witness Madam Chan Yin Fong ("**Madam Chan**") could no longer be contacted and Lo had refused to give oral testimony as his memory had faded out.

196. D2's evidence in his 1st affirmation filed in support of the Dismissal Summons was:

(i) there being no steps taken by P since 1 April 2009 until 2 October 2018 when P filed a Notice of Intention to Proceed, they were left with the impression that P had abandoned the claims in these 2 Actions;

(ii) One of Ds' witnesses Mr Yiu can no longer be located;

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[112] Para 92, A:225

[113] See para 75(4)

(iii) It is unrealistic to expect the other witnesses to be able to recall clearly what actually happened some 14 years ago;

(iv) D1 had suffered from two stroke attacks and is now recuperating in Canada and was suffering from partial loss of memory;

197. D1 in his affirmation stated that he suffered his 1st stroke in 1997 when he was in the Mainland and it was a minor stroke and he was advised to lead a more healthy lifestyle but that in 2016, he suffered from another stroke, and he had produced copies of his medical report and/or CT scan. Thereafter, he quit all his business activities and retired to live in Vancouver. In 2017, he had problems with his voice and he produced copies of two reports of 3 October 2017 and 9 November 2017 which indicated he had a red polyp on his right vocal fold[114]. He said in his affirmation that he felt a dull pain on his chest and saw a family doctor on 13 March 2019 and then was recommended to consult a specialist of his heart condition. Further, according to D1, whenever he tried to recall the events in this case in 2004 and 2005, he started to feel dizzy and that he could no longer recall a lot of details. He was present at the hearing before this Court and told the Court he was 68 years old at the time and in bad health.

198. D2 was 69 years old at the time of the hearing. According to D2, Lo is living in Hong Kong and is now 63 years old, but Madam Chan is now 85 years old and in failing health and she lives in Beijing and it is uncertain whether she can readily travel to Hong Kong to give oral evidence. As for Mr Yiu, Ds had lost contact with him.

199. Mr Yiu's witness statement was sent to P's solicitors on 7 January 2009 with a covering letter from Ds' then solicitors asking

[114] B:462-463

whether there was agreement to Ds filing that statement[115]. There seemed to be no response from P's solicitors thereafter and no further action seemed to have been taken by Ds' solicitors.

200. Mr Yiu gave his address to be in Guangzhou, and his evidence was that he met Christopher through the introduction of Lo in 2004. Mr Yiu said he recalled that he went to Hong Kong on 30 and 31 August 2004 staying at the Pruton Prudential Hotel, and that he and his friends and Lo attended a boat trip arranged by Christopher and the evening of 31 August 2004, Mr Yiu had dinner with Christopher and Lo and others, but Christopher and Lo left the dinner early at about 7:30pm as they had matters to attend to.

201. Insofar as Mr Yiu's evidence was concerned, D2's evidence was that Mr Yiu's evidence was intended to show the Court how P through its director Christopher managed to trick Ds into signing the SPAs in 2004, and that without his evidence, the Court would be deprived of the opportunity of assessing the available evidence in full.

202. However, Mr Yiu was not present at the time of the signing of the SPAs, nor was there any evidence that he was present during any discussions of the Conditions alleged by Ds or at any material times.

203. As for Madam Chan, although Ds had nitially said Madam Chan could no longer be contacted, they had managed to contact her. Madam Chan gave a witness statement dated 17 June 2006[116]. She lives in Beijing. It was she who arranged a dinner with Major Liu with D1, Lo and Christopher and that she was present during the dinner. Further, she and Lo were both present when Christopher had a meeting with Ds and that she had given advice to the Christopher's initial development plan for the Pruton

[115] B:454-457

[116] C:699-707

Resort City Project. Madam Chan said she was present together with Lo during various meetings from early July 2004 to mid July 2004, one on about 21 July 2004, one in the morning of 12 August 2004.

204. In particular, Madam Chan also referred to two telephone calls she received in the morning and around noon on 13 July 2004 from the secretary of Major Liu, and also a discussion between her and Christopher in the morning of 7 August 2004. Further, it was her evidence that on 31 August 2004, she was informed by D1 that he and D2 and Lo were going to Hong Kong to discuss with Christopher the repayment to Lo of the loan from him to the Company and when they returned, they told her that Christopher would complete the purchase of the shares from EC and that they were asked to first sign an agreement to transfer Ds' shares to a company belonging to Christopher and that several days later, they would sign another agreement in relation to the shares in Christopher's company being transferred to Ds. Later on around 11 September 2004, she and Lo and Ds went to Hong Kong to Christopher's office to discuss the agreement in relation to the transfer of Christopher's company's shares to Ds, but as they were not able to agree to the details, the agreement was not signed.

205. Although for some of the meetings attended by Madam Chan, Lo and Ds were also present, she did refer to telephone calls from Major Liu's secretary and direct discussions with Christopher.

206. Madam Chen worked as a French teacher at the Capital Teachers' College in Beijing before she retired, and she had participated in the work for the elderly at the Lakeview Elderly Resort and she met Ds through her work. She had also met Mother. In my view, she is an important witness for Ds. According to D2, she was about 85 years old at the time of the hearing. Although there is no medical evidence to indicate her present condition, if she is now 85 years old, with the Proposed Directions, and the reference to appeal, the trial could only be set down

earliest towards end of this year/early next year, and in light of the High Court's diary position, the trial dates would be at least another 2 years down the road. By the time of the trial, Madam Chan would have been 87 years old. Although Madam Chan's evidence may be preserved by taking her evidence by deposition or by electronic means, her memory of events in 2004 is very likely to be affected by the long passage of time.

207. Even though there seems to be documentary evidence supporting Ds' case as pointed out by Mr Tam, such as the Agenda, the Lexford Draft Agreement and the Leeson Draft Agreements, I find there has been real prejudice to Ds due to the inaction, in that witnesses' recollection of what happened in 2004 must have been affected by the long delay.

L. Exercise of discretion

208. As said by our Chief Justice in *Wing Fai*, striking out is a remedy of last resort and only where it is plain and obvious to do so.

209. The circumstances in each case are different, but in the present case, as said earlier, I do not find the explanations on behalf of P for the its inaction/delay credible or satisfactory and that there had been inordinate and inexcusable delay. This is not a case that P decided to revive the 2 Actions of its own accord. It only filed a notice of intention to proceed 2 months after the Registrar's Letter.

210. In the present case, there has been non-compliance by P of the 30.03.06 Consent Order, notwithstanding there were orders for a speedy trial. On the other hand, there has been non-compliance by Ds of the Injunction Orders and that they had adopted the attitude of "letting sleeping dogs lie". However, as said earlier, I am of the view that the evidence indicated that there was/is no intention on the part of P to bring the 2 Actions to a speedy conclusion and that there has been abuse of process on part of P.

211. Having considered all the circumstances and the inaction and delay and also P's abuse of process had and/or has resulted in real prejudice to Ds, and even though P would be deprived of the opportunity to go to trial and that striking out is a remedy of last resort, in the overall administration of justice and the underlying objectives in Order 1A of the Rule of the High Court, I have come to the view that it is plain and obvious, and just, to strike out the 2 Actions.

M. Orders

212. The effect of my orders are :

(i) the 2 Actions be dismissed with costs of the 2 Actions, including any reserved costs, be paid by P to Ds, to be taxed if not agreed, on party and party basis with certificate for one counsel;

(ii) the Injunction Orders be discharged.

213. As for costs of the Dismissal Summons, such costs to be paid by P to Ds, to be taxed on party and party basis with certificate for counsel, if applicable.

214. The costs orders are orders nisi, and shall be made final after 28 days.

(Bebe Pui Ying Chu)
Judge of the Court of First Instance
High Court

Mr Aidan Tam, instructed by Lee Chan Cheng, for the plaintiff

The defendants appeared in person