

Commercial litigation newsletter – April 2022



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Statutory Demands: The Basics

Statutory Demands vs Demand Letters

Creditors in pursuit of debts may issue a statutory demand or a normal demand letter to the debtors asking for repayment of the debts.

The major difference between a statutory demand and a normal demand letter is that a statutory demand carries an important legal implication – if the debtor fails to repay the debts in full within 21 days after the statutory demand is served on him/her, the creditor shall be entitled to commence winding up (if the debtor is a company) or bankruptcy (if the debtor is an individual) proceedings against the debtor.

It is however important to note that statutory demands are only applicable to debts of HK\$10,000 or higher.

Accordingly, a statutory demand is a more powerful tool as compared to a normal demand letter from debt recovery perspective.



Form and Contents of Statutory Demands

Creditors should use the form prescribed for statutory demands under the Companies (Winding Up) Rules (Cap. 32H) and the Bankruptcy (Forms) Rules (Cap. 6B), where appropriate. Generally speaking, the following information should be included in the statutory demands:

- Names and addresses of the creditor and debtor;
- When did the debt incur;

- Description of the debt;
- Amount of the debt as at the date of the statutory demand (including interests, if any, which amount should be shown separately);
- Details of the original creditor if the creditor is entitled to the debt by way of assignment.

It is important to ensure that information contained in the statutory demand is accurate, otherwise the statutory demand may be invalidated by reason of its defects (although minor errors which cause no prejudice to the debtor will unlikely invalidate the statutory demand). In **Re Pacific Cultural Hospitality Development (HK) Ltd** [2022] HKCFI 905, Linda Chan J explained how the Court would approach defects in statutory demands:

"25. The principles governing statutory demand and petition are well established:

(1) A statutory demand is an important document. It serves to inform the debtor of the way in which the debt arose so that he would know what course he should take in the light of the information given. It is "the straight and narrow gateway" through which a creditor must pass in order to establish the debtor's apparent inability to pay the debt demanded in order for a bankruptcy petition to be presented (TSB Bank plc v Platts (No 2) [1998] BPIR 284 at 288H-290A, applied in Re Leung Cherng Jiunn [2016] 1 HKLRD 850, at §13).

(2) Whilst the statutory code affords the Court a degree of flexibility in dealing with an application to set aside a statutory demand for defects, this is not to be taken as a charter for slipshod in preparation of statutory demands. If a statutory demand is defective, the Court will be alert to see whether those mistakes have caused or will cause any prejudice to the debtor. Where the debt in issue was not a large sum, it could not be said the defect would have made no difference in that the debtor would not have paid anyway and no prejudice would have been suffered (Re Leung Cherng Jiunn, §§15-16, citing In re A Debtor (No 1 of 1987) [1989] 1 WLR 271 at 280D-E, per Nicholls LJ). The same principle applies to a statutory demand issued by a petitioner to a company."

Service of Statutory Demands

Given that statutory demands are important documents, the Court would adopt a strict approach on service. In the case where the debtor is an individual, the statutory demand must be personally served on the debtor; where the debtor is a company, the statutory demand would be deemed duly served if it is served on the debtor company by leaving at its registered office.

However, it is not uncommon for debtors to evade service. Where it is impracticable to personally serve the statutory demand on the debtor, creditors can effect service of the same by way of substituted service, namely by advertisement. Nevertheless, the Court may still be unsatisfied that the statutory demand has been properly served by advertisement.

In **Re Li Xiaoming** [2020] HKCFI 361, the creditor had attempted to serve a statutory demand on the debtor at his last known addresses in Hong Kong and Hebei but was unsuccessful, for the creditor was told that the debtor was no longer residing at those addresses. The creditor therefore advertised the statutory demand in Hong Kong and in Hebei. The Court ruled that the statutory demand had not been properly served for the following reasons:

- The creditor had not done all that was reasonable to bring the statutory demand to the attention of the debtor, as it had advertised for only one day in Hong Kong and Hebei, and had no factual basis to support its belief that the debtor was in Hong Kong or Hebei.
- The creditor must satisfy the Court that it is impracticable to personally serve the statutory demand on the debtor and that he has already done all that was reasonable to bring the statutory demand to the attention of the debtor in the circumstances of the case – it is insufficient for the creditor to blindly follow the steps prescribed in the Practice Direction.

When should Statutory Demand be used?

The creditor should only use the statutory demand procedure (and hence winding up/bankruptcy proceedings) if there can be no genuine dispute over the debt by the debtor. Otherwise, the Court may consider that it is an abuse of process on the part of

the creditor and penalise the creditor by indemnity costs.



In **Madison Lab Ltd v Pu Yan & Ors** [2020] HKCFI 382, following issuance of a statutory demand by the creditor, the debtor applied to the Court for an injunction restraining the creditor from presenting a winding up petition against it, on the basis that it has bona fide dispute over the debt. The Court considered the following legal principles:

1. The Court will grant an injunction to prevent the presentation of a winding-up petition which it considers would be an abuse of process.
2. For the purposes of the Court's power to grant an injunction to prevent abuses of the winding-up procedure, the presentation of a petition where there is a triable defence is generally a clear case of abuse.
3. Petitions are not meant for debt collection purposes and the winding-up jurisdiction will be exercised only in clear cases. Where oral evidence is required to decide a real and substantial dispute of fact, the Court will generally dismiss the petition.
4. The central question is whether the company can show a "bona fide dispute on substantial grounds" for trial.

In the event, the Court considered that the debtor does have bona fide dispute over the debt, and that the creditor is unable to support the view that on the information available to them, the asserted defence of the debtor is insubstantial and unmeritorious. The Court also said that creditor must decide whether to use winding up petition with all due care, given that a petition presented against a company with ongoing business would cause considerable disruption. The

Court therefore ordered indemnity costs to be paid by the creditor.

Conclusion

Creditors are advised to take extra care in considering whether a statutory demand should be used for debt recovery purpose, and should only use it where the debtors cannot have any real defence to the debt – otherwise, creditors are expected to be penalised on costs by the Court.

Extra attention should also be given to service of statutory demands – given the serious consequence that it may bring to debtors, the Court would normally adopt a strict approach on service. Creditors should consider the unique facts and circumstances of their own cases in deciding what reasonable steps should be taken when serving them statutory demand with a view to bring it to the attention of the debtors.

What to do OR can we do anything if we win in gambling but people don't pay?

It is usual for friends to gather together to play a game or two for fun. But things may get more complicated when the stakes are high and people start to get serious about it. **Chris Au v Steve Yoon Soo Kim** [2022] HKCFI 148 gives us a live example of the same.



In this case, the Plaintiff claimed against the Defendant for HK\$7,208,550 arising from 33 sessions of poker games that took place back in 2008. Throughout the games, the players kept a ledger on the results of each game. Opposing such claims, the Defendant argued, amongst the others, that there were no legally binding and enforceable contracts between the parties because there was a lack of intention to create legal relations. Further, even if there were valid gaming contracts, the contracts were unenforceable on the ground of illegality and/or contrary to public policy. The Defendant accordingly raised the following grounds in relation to the Gambling Ordinance, Cap. 148 (the "**Ordinance**"):-

- (i) The gambling in the present case amounted to contravention of section 3(1) of the Ordinance;
- (ii) The sole or predominant purpose of the games was to gamble at high stakes and win money from each other, i.e. not on a "social occasion" under s. 3(2) of the Ordinance;
- (iii) At least one or more games was not played at "private premises" under s. 3(2) of the Ordinance etc.

The Judge eventually decided in favor of the Defendant, i.e. the gambling contracts were

unenforceable in law under the principle of illegality. See below for a quick summary of the Judge's reasoning:-

- (a) There was obviously an intention for the losers to meet payment, as a ledger was created to record the results of each game and it was circulated for approval every time.
- (b) It was undisputable that the playing of the said 33 game sessions amounted to "gambling" within the meaning of the Ordinance, which is *prima facie* illegal under the law.
- (c) It was first the Defendant's burden to prove that the poker games satisfied the meaning of gambling under the Ordinance, then the burden would be shifted to the Plaintiff to prove that the present case falls within any of the statutory exceptions (e.g. the games were played on a "social occasion" and in "private premises; and were not promoted or conducted by way of trade or business or for the private gain of any person etc.).
- (d) To decide if the gambling occurred on a "social occasion", one needs to see if the predominant purpose of the games was the hope of winning money from the game played, or was merely recreational in nature. In the present case, the Judge found that the games were not played on a "social occasion".
- (e) The Honourable Court also found it against public policy to allow gaming contracts with extremely high stakes, which the Court



regarded as encouraging people to engage in such activities.

- (f) The Court also did not regard a VIP room, which is subjected to a minimum charge, as a "private premises".

Hence, when we all get a chance to gather together once the COVID restrictions are lifted, it would be helpful to remember the above legal principles and aware of the significant risks of getting ourselves involved in any high stake gambling in Hong Kong.

Is the term "gweilo" discriminatory under the Race Discrimination Ordinance ("RDO")

Cantonese slang is frequently used in Hong Kong to refer to ethnic minorities.

Gweilo/Gweipoh is used for Caucasian men/women, Bun Mui for Filipino domestic helpers and A Cha for Indians, Pakistanis, Nepalis, Sri Lankans and Bangladeshis.

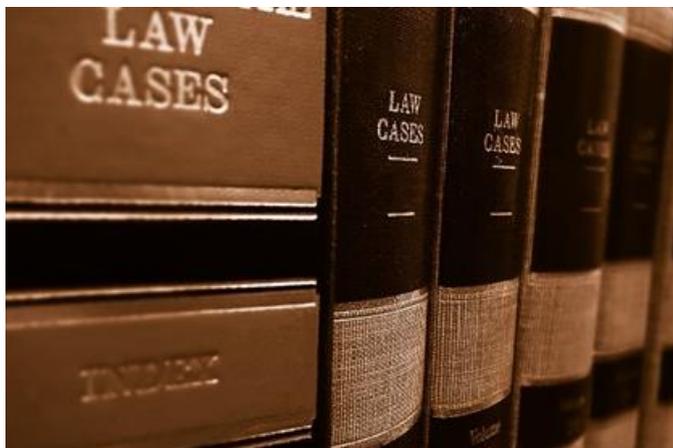
Are these racist or discriminatory? Can they be used at work? We all have our opinions about answers to these questions no doubt...

Recently in **Francis William Haden ("H") v Leighton Contractors (Asia) Limited ("Leighton")** Hong Kong's Equal Opportunities Court was asked to consider whether being called "gweilo" led to an inference of race discrimination contrary to the RDO.

In summary of this article, while the Court accepted "gweilo" was widely used in society, it was unable to find it carried a derogatory meaning, even when used in the work place. Context of use is key of course and here Leighton was able to justify H's termination from his employment by virtue of numerous reasons unconnected to H's race. His claims were dismissed.

Law

Race is defined in the RDO as the race, colour, descent, national or ethnic origin of a person. It is unlawful to treat someone less favourably on the grounds of their race, such discrimination could be direct or indirect.



Background

- (i) H, a Caucasian, was an employee of Leighton's since 2010 becoming a team leader of a joint venture with China State Construction Engineering (Hong Kong) Limited in 2015 and during which he asserted: While he was very good at his job he was bypassed, usurped in his role and excluded from emails;
- (ii) The term "gweilo" was said about him;
- (iii) The team had a lack of engagement; and
- (iv) A colleague was told his lack of Chinese linguistic ability meant he had no future and accordingly this was evidence of a hostile working environment that he faced.



H's employment was terminated in 2017. He said the above showed the reason for this was his race. Leighton considered he had communication and relationship difficulties with his team, many of whom were Chinese, so there were performance grounds to dismiss him for. H claimed damages of over HK\$1 million.

Approach of the Court

The Court stated race discrimination was often covert with little direct evidence, so inferences needed to be drawn from proven facts disclosing a possibility of race discrimination.

With respect to direct discrimination, which H alleged he was a victim of, the Court stated the test was twofold, as follows:

- (i) Did the respondent treat the claimant less favourably than others were treated ("**Comparator Question**"); and
- (ii) Whether the less favourable treatment was because of the claimant's race ("**Causation Question**").

As opposed to identifying a neutral comparator against whom to judge whether there were any differences in treatment based on race, in certain cases, including this one, the Court stated it was appropriate for the Causation Question to ask why the claimant was treated as they were.

For the Causation Question, the Court adopted the more stringent "*real cause*" instead of "*but for*" test meaning race must be the real and effective cause of the complaint and not merely its background.



Findings

H's allegations were considered in detail, the Court held:

- (i) While technically proficient, H could not maintain good working relationships with others;
- (ii) It did not agree H was bypassed or usurped. Any exclusion from emails was not to do with his race as other non-Chinese people were not left out;

- (iii) The non-engagement was not about H's race but because staff were from two companies with different cultures;
- (iv) H failed to show use of the term "gweilo" was about him and further that it demonstrated there was racial hostility at work. The fact that the management at Leighton who'd made the decision to terminate H were all non-Chinese suggested otherwise; and
- (v) Linguistic ability was not race.

Comments

It will be interesting to see if future direct discrimination cases under the RDO (or other anti-discrimination Ordinances) will apply the Comparator and Causation Questions in the same way as here.

The case is useful as it shows the Court's approach to determine if there was discrimination and furthermore the quality of evidence needed to succeed with a RDO claim. At the end of the day, Leighton had a good paper trail of evidence to rebut H's allegations and we take the opportunity to remind clients it is always important to create and keep written records supporting their employment decisions.

News update

Webinar

We will be hosting our next commercial litigation webinar in May 2022, with details to follow. Stay tuned and please feel free to contact us if you wish to receive an invitation of the webinar.

Please also contact us if you would like to view our recent commercial litigation webinars:

Date	Speakers	Topic
12 May 2022	Emily Li (Litigation Senior associate) and Henry Zhu (Partner, Wei Tu Law Firm*)	Commercial litigation Greater Bay Area series
28 January 2021	KT Fung (Banking Partner) and Emily Li (Litigation Senior associate)	Practical advice on debt recovery and credit risk mitigation (exclusive webinar tailor-made for a client)
16 December 2021	Stephanie Poon (Litigation Senior associate) and Karies Lam (Private Wealth Associate)	Legal regime for mental incapacitated person and enduring power of attorney
20 October 2021	Karis Yip (Senior associate, Stephenson Harwood) and Sanjay A. Sakhrani (Barrister-at-law and accredited mediator)	Current employment issues and trends
5 August 2021	Emily Li (Senior associate, Stephenson Harwood) and Alexander Tang (Counsel of Des Voeux Chambers)	Exclusive or non-exclusive jurisdiction clause

Articles

Date	Author	Title
17 January 2022	Emily Li, Karis Yip, Stephanie Poon	Commercial litigation newsletter - January 2022
9 November 2021	Ian Childs	Hong Kong to end its 'fraud exception rule'
29 October 2021	Emily Li, Karis Yip, Stephanie Poon	Commercial litigation newsletter – October 2021
31 August 2021	Emily Li, Karis Yip, Stephanie Poon	Commercial litigation newsletter – August 2021

16 July 2021	Ian Childs	Hong Kong employment law update
21 June 2021	Emily Li	Is an exclusive jurisdiction clause conclusive? (English) 排他性管辖权条款是否一锤定音? (Chinese)

Publications

Ivan Ng and Emily Li have authored the Hong Kong chapter in the latest edition of The Legal 500's Litigation Country Comparative Guide. Ivan and Emily answered a set of country-specific questions to provide an overview of litigation laws and regulations applicable in Hong Kong. Click [here](#) to read the chapter.



Corporate and Commercial Disputes Hub

Please visit the [Stephenson Harwood Corporate and Commercial Disputes Hub](#) to see latest updates from our team.

Office news

The Hong Kong office recently celebrated Earth Hour 2022.

The annual campaign, which is organised by the World Wildlife Fund, seeks to bring worldwide social awareness to the environment, by encouraging individuals, communities, and businesses to turn off non-essential electric lights, for one hour, as a symbol of commitment to the planet.

* Wei Tu (a PRC law firm registered in Guangzhou) and Stephenson Harwood (a law firm registered in Hong Kong) are in a CEPA association under the name "Stephenson Harwood - Wei Tu (China) Association". CEPA (Closer Economic Partnership Arrangement) is a free trade agreement concluded between Mainland China and Hong Kong. Under CEPA, Hong Kong based law firms are permitted to operate in association with Mainland Chinese law firms to provide comprehensive legal services in Mainland China governed by Chinese and non-Chinese laws.

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