

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
ACTION NO 2741 OF 2018**

BETWEEN

LAI CHIK KUN MICHAEL 1st Plaintiff

KOO MING KOWN 2nd Plaintiff

CHIENG SAI YUNG WILSON 3rd Plaintiff

WOO HON YUE and KO JACK LUM 4th Plaintiffs
(suing on behalf of themselves and 李君聰;
李斌倫; 陳毓棠; 馬秋南; 楊如松; 李子超;
黃惠民; 翁仕求; and 黃阜崖, who are all
alumni of “誠社” of Pui Ching Primary School)

CHAN TAK WAH 5th Plaintiff

and

THE BAPTIST CONVENTION OF HONG KONG Defendant

Before: Hon Wilson Chan J in Chambers

Dates of Hearing: 9 and 10 November 2021

Date of Judgment: 11 March 2022

J U D G M E N T

A. INTRODUCTION

1. This is the hearing of the following 2 summonses:

(1) The plaintiffs' application by summons dated 12 May 2021 ("**Ps' Amendment Summons**") for:

(a) Leave to withdraw the representative claims brought by the 4th plaintiffs ("**Withdrawal Application**");

(b) Joinder of the Secretary for Justice (the "**SJ**") as the 2nd defendant in this action ("**Joinder Application**");
and

(c) Leave to amend (i) the Re-Amended Statement of Claim ("**RASOC**"), (ii) the Amended Writ of Summons ("**Amended Writ**") and (iii) the Answer to Request for Further and Better Particulars of the Statement of Claim ("**Answer to FBP**") ("**Amendment Application**").

(2) The defendant ("**BCHK**")'s application by summons dated 22 July 2021 ("**D's Strike-Out Summons**") to strike out §§28-42 of the RASOC and all related prayers for relief as being (i) scandalous, frivolous or vexatious, (ii) an abuse of process of the court and/or (iii) disclosing no reasonable cause of action ("**Strike-Out Application**").

2. In summary, BCHK's stance on Ps' Amendment Summons is as follows:

(1) BCHK opposes the Amendment Application in part. The plaintiffs' proposed amendments fall into three categories: the Charitable Trust Amendments, the Misrepresentation

Amendments, and the Inspection Amendments (as defined in the 3rd Affirmation of Koo Ming Kown (“**Koo 3rd”**)) §4). BCHK does not oppose the Misrepresentation Amendments or the Inspection Amendments.

(2) BCHK however opposes the Charitable Trust Amendments,¹ on the bases that these (a) are bound to fail, there being no Alleged Charitable Trust, and in any event the plaintiffs lack *locus standi* to sue, (b) go nowhere, since even if the Alleged Charitable Trust exists, there was no breach of trust, (c) are an abuse of process and lack practical utility, and (d) occasion substantial prejudice to BCHK which cannot be compensated by costs.

(3) Given the fundamental defects in the Charitable Trust Amendments, BCHK opposes the Joinder Application, which is contingent on the plaintiffs’ proposed new charitable trust claim. If however the Charitable Trusts Amendments are allowed, BCHK takes a neutral stance on the Joinder Application.

(4) Lastly, BCHK does not oppose the Withdrawal Application.

3. Regarding the Strike-Out Application, in summary, BCHK submits that the target paragraphs of the RASOC (the “**Subject Paragraphs**”) should be struck out because:

¹ Where the plaintiffs plead that BCHK holds the funds in the accounts of the School on charitable trust, and that BCHK breached its trustee duties by misapplying the School’s funds to discharge various liabilities which ought not to be borne by the School, ie §§7B, 7C, 31A, 33A, 34, 36, 37A, 37B, 38, 42A of the draft RRASOC; §13 of the draft Amended Answers to Request for Further and Better Particulars of the Statement of Claim annexed to the summons.

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(1) The plaintiffs have no *locus* to claim the relevant declaratory orders in prayers (1)-(6). They have no real interest in the subject-matter of the desired declarations, which go to questions of BCHK’s internal management and administration of the School’s accounts, and to hypothetical issues which have simply not arisen. As mere donors to the School (as defined below), they also have no real interest in obtaining the pleaded declarations.

(2) The inclusion of RASOC §§28-29, 31-31A and prayer for relief (1) is an abuse of process, there being a substantial overlap between the relief and the 2nd plaintiff’s application in HCA 1339/2014 for payment directions (see below) which was heard on 1 November 2021 with judgment reserved.

(3) There is no identifiable cause of action in RASOC §§28-41 entitling the plaintiffs to the consequential relief sought in prayers (7)-(9), which naturally fall away once prayers (1)-(6) are struck out (prayers (1)-(9) are hereinafter collectively referred to as the “**Subject Declaratory Reliefs**”).

4. BCHK further submits that the defectiveness of the Subject Paragraphs is highlighted by the fact that the plaintiffs felt compelled to take out Ps’ Amendment Summons on 12 May 2021 to amend pleadings, at a late stage of the proceedings, in an attempt to drastically change the legal basis for the Subject Paragraphs - from a purely private claim to a public charitable trust claim, where the plaintiffs seek to sue on behalf of the School which they now claim is a public charitable trust. In other words, Ps’ Amendment Summons implicitly recognises that the plaintiffs’ original claim is legally unviable.

5. The position of the SJ is that:

(1) Since the plaintiffs' Joinder Application is based on their proposed Charitable Trust Amendments being allowed (see Koo 3rd), the SJ would not oppose the Joinder Application if leave is granted to the plaintiffs to make such amendments to the RASOC.

(2) As to the plaintiffs' Amendment Application itself, the SJ adopts a neutral position as to whether the application should be allowed.

(3) Apart from the above applications, the SJ takes no position in relation to all other matters, including particularly the defendant's Strike-Out Application which does not concern the SJ.

B. BACKGROUND

B1. The plaintiffs

6. The plaintiffs are all alumni of the Pui Ching Primary School (the "School") and the Pui Ching Middle School (the "Middle School") (collectively, the "Pui Ching Schools").

7. The connection between each of the plaintiffs and the Pui Ching Schools is set out in the table below:

Name	Connection
Lai Chik Kun Michael ("Mr Lai") (the 1 st plaintiff)	<ul style="list-style-type: none">• Alumnus of the Pui Ching Schools• Permanent Honorary President of the Hong Kong Pui Ching Alumni Association Limited ("PCAA") since 2004

	<ul style="list-style-type: none">• Vice President of PCAA since 2008 and President of PCAA from 2012-2016• School manager of the Pui Ching Schools and member of the Management Committee of the School from 2012-2016
Koo Ming Kown (“ Mr Koo ”) (the 2 nd plaintiff)	<ul style="list-style-type: none">• Alumnus of the Pui Ching Schools• Held various honorary positions with the Pui Ching Schools until 2014, including being a distinguished manager of the School and an honorary manager of the Middle School• Permanent Honorary President of PCAA• A frequent contributor of funds to the Pui Ching Schools
Chieng Sai Yung Wilson (“ Mr Chieng ”) (the 3 rd plaintiff)	<ul style="list-style-type: none">• Alumnus of the Pui Ching Schools• Donated HK\$12,000,000 to the School in November 2007
Woo Hon Yue (“ Mr Woo ”) (the 4 th plaintiff)	<ul style="list-style-type: none">• Alumnus of the Pui Ching Schools• Member and representative of 誠社• Former vice president of PCAA from 2006-2008
Ko Jack Lum (“ Mr Ko ”) (the 4 th plaintiff)	<ul style="list-style-type: none">• Alumnus of the Pui Ching Schools• Member and president of 誠社• Permanent honorary president of PCAA
Chan Tak Wah (“ Mr Chan ”) (the 5 th plaintiff)	<ul style="list-style-type: none">• Alumnus of the Pui Ching Schools• Member and representative of 皓社• Former school manager of the School• Former president and permanent honorary president of PCAA

8. Both Mr Woo and Mr Ko are currently suing in a representative capacity. They seek to represent other members of 誠社 in this action, namely 李君聰; 李斌倫; 陳毓棠; 馬秋南; 楊如松; 李子超; 黃惠民; 翁仕求 and 黃阜崖. By the Withdrawal Application, which is not opposed by BCHK, Mr Woo and Mr Ko seek (i) to withdraw the representative claims brought on behalf of the members of 誠社 and (ii) to be re-joined to these proceedings in their personal capacity.

B2. The defendant

9. BCHK is a company limited by guarantee and a charitable institution under section 88 of the Inland Revenue Ordinance, Cap 112. It is the sponsoring body of the School under the Education Ordinance, Cap 279 and exercises overarching management over the School.

10. The School was first established in Hong Kong in 1933. It is not a legal entity and is not capable of holding assets. Since the 1950s, BCHK has been entrusted with the administration of the School and its tangible and intangible assets. There is no dispute that BCHK and the School maintain separate bank accounts in their respective names, and funds in those accounts are used for their respective purposes without any intermingling.

11. BCHK is also the operator of a tertiary education institute known as the Pui Ching Academy (the “Academy”) (formerly known as the Pui Ching Education Centre (the “PCEC”)). It is common ground that the School, the Middle School, and the PCEC/Academy are separate institutions with different school registration numbers.

B3. The Redevelopment Project & BCHK's fundraising campaign

12. In or around 2006, the School undertook a large-scale project (“**Redevelopment Project**”) to re-develop its then school hall into a multi-storey building (“**New Education Building**”).

13. To fund the Redevelopment Project, BCHK conducted a fundraising campaign to solicit donations from parents, alumni and other interested parties. As part of the fundraising campaign, BCHK circulated various materials, including brochures, pamphlets and alumni newsletters, to the plaintiffs and other prospective donors.

14. It is the plaintiffs’ case that, through the fundraising materials, BCHK had represented to the plaintiffs that:

(1) The donations shall be used for the demolition of the then school hall as well as for the development and construction of the New Education Building, in order to expand and increase the teaching resources of the School. The New Education Building would be exclusively occupied and used by the School for the benefit of its students.

(2) Without further donations, the School would experience financial difficulty in continuing or completing the Redevelopment Project.

(Collectively, the “**Representations**”)

15. BCHK denied that it had ever represented to the School’s alumni that the New Education Building would be used exclusively by the School. BCHK’s case is that it had made clear in the fundraising materials

that (i) only the lower portion (1/F-6/F) of the New Education Building would be used by the School, whereas (ii) the upper portion (8/F-15/F) of the New Education Building would be used by the PCEC/Academy.

16. In reliance on the Representations, the plaintiffs made the following donations to the School:

Name	Date	Amount
Mr Lai (the 1 st plaintiff)	March 2008	HK\$8,000
Mr Koo (the 2 nd plaintiff)	December 2007	HK\$20,000,000
Mr Chieng (the 3 rd plaintiff)	November 2007	HK\$12,000,000
Mr Woo (the 4 th plaintiff)	December 2007	HK\$2,000
Mr Ko (the 4 th plaintiff)	May 2011	HK\$20,000
	November 2011	HK\$10,000
	June 2012	HK\$60,000
Mr Chan (the 5 th plaintiff)	January 2012	HK\$20,000

B4. Controversy regarding the New Education Building

17. In or around mid-2014, the plaintiffs discovered that the Representations were false and misleading when they heard of concerns raised by other alumni regarding the use of the New Education Building:

- (1) The upper floors of the New Education Building were constructed for the use and benefit of the PCEC/Academy, rather than the School. The construction of the New Education Building had completely departed from its intended purpose as stated in the fundraising materials, ie to improve the teaching facilities of the School for the benefit of its students.
- (2) Pursuant to Regulation 7 of the Education Regulations, no part of any primary school premises shall be situated at a height of

more than 24 metres above ground level. As the 7/F-15/F of the New Education Building are over 24 metres above ground level, those floors (“**Unused Floors**”) could not be used by the students of the School. Although the School obtained no or very minimal benefit from the Unused Floors, the construction cost of the Unused Floors had been borne by the School, rather than by the PCEC/Academy.

- (3) According to the accounts of the School, the School has a credit balance in the sum of HK\$71,303,588.46 and HK\$86,233,558.46 in its Building Construction and Renovation Reserve Fund as at 31 August 2006 and 31 August 2007 respectively. BCHK and the School had sufficient financial resources to complete the Redevelopment Project even without any donations from alumni.

18. Due to the strong opposition from the School’s alumni, BCHK decided not to relocate the PCEC/Academy’s campus to the upper portion (8/F to 15/F) of the New Education Building. The Unused Floors were believed to have remained largely vacant since late 2014. However, the funds in the School’s account continue to be utilised by BCHK to pay the government rate, utilities bills, insurance fees, maintenance fees and other expenses of the Unused Floors.

B5. HCA 1339/2014

19. In July 2014, Mr Koo commenced HCA 1339/2014 against, *inter alios*, BCHK for the recovery of his HK\$20,000,000 donation to the School, on the basis of, *inter alia*, misrepresentation.

20. By an order dated 13 July 2016 (subsequently amended on 14 June 2017) (“**13 July 2016 Order**”), DHCJ Seagroatt granted default judgment in favour of Mr Koo and made the following orders:

- (1) BCHK shall hold the donation of HK\$20,000,000 on constructive trust for Mr Koo;
- (2) BCHK shall repay HK\$20,000,000 to Mr Koo (“**Judgment Debt**”);
- (3) BCHK shall pay damages to Mr Koo for misrepresentation;
- (4) BCHK shall pay interest at the judgment rate on the Judgment Debt (“**Interest**”); and
- (5) BCHK shall pay (i) Mr Koo’s costs in the action and (ii) the costs of Mr Koo’s summons filed on 5 February 2016 (“**Costs**”).

21. By a letter dated 21 September 2016, BCHK’s solicitors sent a cashier’s order in the sum of HK\$20,000,000 to Mr Koo’s solicitors, in purported settlement of the Judgment Debt.

22. Subsequently, Mr Koo discovered that the HK\$20,000,000 repaid to him by BCHK came from the funds of the School (and not BCHK). By a summons dated 14 September 2017 (“**Sept 2017 Summons**”), Mr Koo applied for, *inter alia*, a direction that BCHK shall be the entity bearing personal responsibility for the Judgment Debt, Interest and Costs.

23. The hearing of the Sept 2017 Summons took place before DHCJ Seagroatt on 9 November 2017, resulting in the order that BCHK should bear personal responsibility for costs of the Sept 2017 Summons, but

omitted to include a direction requiring BCHK to bear personal responsibility for the Judgment Debt and Interest (ie §2 of the Sept 2017 Summons).

24. Hence, on 10 May 2021, Mr Koo took out a summons in HCA 1339/2014 to apply for an amendment of the 9 November 2017 Order under the “slip rule”, to include such direction. BCHK opposed the application on the purported basis that such direction was not within the ambit of the litigation in HCA 1339/2014. The substantive hearing of such application took place on 1 November 2021 before DHCJ Winnie Tsui (decision has been reserved by the Judge).

C. CURRENT PLEADINGS AND PROPOSED AMENDMENTS

C1. The plaintiffs’ pleaded case in the RASOC

25. The plaintiffs’ claims against BCHK (as currently pleaded under the RASOC) fall into 2 categories.

26. The first category of claims concerns the recovery of the donations made by the plaintiffs. The plaintiffs (save for Mr Koo, who had already recovered his HK\$20,000,000 donation in HCA 1339/2014) seek, *inter alia*, the following reliefs:

- (1) Damages for the misrepresentations made by BCHK in the fundraising materials;
- (2) Restitution of their donations on the grounds of (i) mistake or (ii) total failure of consideration; and
- (3) Rescission of their donations on the basis of fundamental mistake.

27. The second category of claims concerns various sums, costs and expenses incurred by the School, which the plaintiffs say should properly be borne by BCHK. On behalf of the School, the plaintiffs seek, *inter alia*, the following declaratory reliefs against BCHK:

(1) A declaration that the Interest and the Costs from the 13 July 2016 Order ought properly be borne by BCHK and not out of the funds in the accounts of the School;

(2) A declaration that BCHK is liable to reimburse the School's accounts for the construction costs (together with interest) referable to the construction of the Unused Floors;

(3) A declaration that BCHK is liable to reimburse the School's account for the demolition costs of the Unused Floors in the event that the Unused Floors are to be demolished in future (by reason of their inability to be used for the benefit of the School);

(4) A declaration that BCHK is liable to reimburse the School's accounts of all other expenses, including government rates, utilities bills, management fees, insurance fees and maintenance fees, paid out of the School's account in relation to the Unused Floors;

(5) A declaration that BCHK is responsible for all costs and expenses in relation to the Unused Floors and is not entitled to utilise the funds in the accounts of the School for such costs and expenses; and

(6) A declaration that BCHK is liable to reimburse the School's accounts for a proportion of the legal costs incurred by the School in defending and settling the arbitration proceedings

against Chinney Construction Co (“CCC”) (ie the building contractor for the Redevelopment Project).

C2. BCHK’s pleaded case in the Amended Defence

28. In respect of the first category of claims, BCHK contends that there is no basis for the plaintiffs to seek the return of their donations because:

- (1) The plaintiffs did not make their donations as a result of any misrepresentations or mistake. BCHK never made any misrepresentations in the fundraising materials.
- (2) According to BCHK, the plaintiffs all along knew (or ought to have known) that part of the New Education Building would be used by the PCEC/Academy.
- (3) In any event, BCHK had *bona fide* changed its position after receiving the donations from the plaintiffs, since the donations had already been paid to third parties such as CCC.

29. As to the second category of claims, BCHK’s main defence is that Mr Koo had no *locus* to seek declaratory reliefs from the court. BCHK contends that the plaintiffs are not entitled to seek any relief on behalf of the School.

C3. The proposed amendments

30. The proposed amendments are set out in (i) the draft Re-Amended Writ of Summons (“**Draft Re-Amended Writ**”); (ii) the draft Re-Re-Amended Statement of Claim (“**Draft RRASOC**”) and (iii) the draft

Amended Answer to Request for Further and Better Particulars of the Statement of Claim (“**Draft Amended Answer to FBP**”).

31. The Proposed Amendments can be divided into 3 main categories:

- (1) Amendments which plead that (i) BCHK holds the funds in the School’s accounts on charitable trust; (ii) BCHK had breached its trustee duties by misapplying the School’s funds; and (iii) BCHK is liable to pay equitable compensation for breach of trust (ie the Charitable Trust Amendments): see §§7B, 7C, 31A, 33A, 34, 36, 37A, 37B, Prayers (1)-(3) of the Draft RRASOC, Answer 13 of Draft Amended Answer to FBP.
- (2) Amendments which explain in further detail how each of the plaintiffs (i) received and relied upon the fundraising circulars and pamphlets published by BCHK and (ii) discovered the falsity of the representations made by BCHK (ie the Misrepresentation Amendments): see §§14A and 14B of the Draft RRASOC and Answers 3(iii) & 12(i)-(vi) of the Draft Amended Answer to FBP.
- (3) Amendments which provide further information regarding the current usage of the 8/F-15/F of the New Education Building based on the findings and observations made during an inspection which took place on 30 March 2021 (ie the Inspection Amendments): see §§37AA to 37AC of the Draft RRASOC.

D. AMENDMENT APPLICATION

D1. Relevant principles

32. The only proposed amendments opposed by BCHK are the Charitable Trust Amendments.

33. The general principles governing applications for amendment of pleadings have been summarised in *Hsu Ming Chi v Lam Shu Chit*, HCCL 8/2013 (unreported, 22/10/2014) §§13-18:

(1) It is a guiding principle of cardinal importance that, generally speaking, all such amendments ought to be made “for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in the proceedings”.

(2) Leave is “readily granted” to amend before trial unless it can be shown that the new claim based on the proposed amendments is bound to fail. Whilst the court is entitled to have regard to the merits of the case, it should only do so when the merits are readily apparent, and are so apparent as not to require prolonged investigation.

(3) If the proposed amendments are bound to fail, no leave to amend should be granted. In this regard, the court will take the applicant’s proposed pleaded case to the highest.

(4) Absent any real prejudice, an application to amend (even if late) must be decided on the general principle that the court seeks to adjudicate on the real issues and disputes between the parties; if possible, technical and procedural rules should not stand in

the way of allowing the parties to raise their real claims or defences for adjudication.

(5) Where prejudice is claimed, the burden is on the party opposing amendment to show prejudice. There is no injustice to the opposing party if he can be compensated by costs.

(6) In giving effect to the underlying objectives, the court should always recognise that the primary aim in exercising its power is to “secure the just resolution of disputes in accordance with the substantive rights of the parties”.

34. Where a party seeks to contend that he would be prejudiced by reason of the unavailability of a witness, it is incumbent upon that party to (i) condescend onto particulars as to what evidence the witness is expected to give and (ii) why such evidence would be relevant to any identifiable issues in the trial of the action: see *Tang Hing Kwong v John David Andrew Ip*, HCA 7927 & 7928/2000 (unreported, 7/03/2013) §53; *Tan Kah Eng v Tan Eng Khiam*, HCA 9640/1999 (unreported, 15/01/2009) §40.

D2. Charitable Trust Amendments

35. The Charitable Trust Amendments pleads that BCHK (i) holds the funds in the School’s accounts on charitable trust; (ii) owe trustee duties in relation to such trust; (iii) breached its trustee duties by misapplying the School’s funds; and (iv) is liable to pay equitable compensation for such breach: see §§7B, 7C, 33A, 34, 36, 37A, 37B, Prayers (1)-(3) of the Draft RRASOC, Answer 13 of Draft Amended Answer to FBP.

36. The acts of BCHK constituting the breaches of duties have all along been part of the plaintiffs' pleaded case and are not new: see §§31A, 34, 36, 37A(1)-(5) Draft RRASOC.

37. BCHK opposes the Charitable Trust Amendments on the purported basis that they are "bound to fail" by reason that:

(1) BCHK denies that there is any trust over the funds in the School's account. BCHK alleges that (i) the only reason why BCHK and the School maintain separate bank accounts is to comply with the recommended guidelines of the Education Bureau; (ii) the mere fact that the BCHK's funds and the School's funds are segregated does not point towards the existence of a charitable trust.

(2) BCHK also challenges the plaintiffs' *locus standi* to sue on behalf of the trust. Under section 57A of the Trustee Ordinance ("TO"), a party can commence litigation on behalf of a charitable trust if he possesses an interest in securing the due administration of the trust which is materially greater than an ordinary member of the public. BCHK contends none of the plaintiffs possesses such an interest in this case.

38. For the reasons set out below, I agree BCHK's contentions are devoid of merit.

39. First, insofar as BCHK disputes the existence of a charitable trust over the funds in the School's account, this factual dispute is a matter for trial, and not a ground for opposing the Charitable Trust Amendments.

40. It is well-established that the essential requirements of a charitable trust are as follows:

- (1) Certainty of intention: There must be certainty on the part of the settlor to impose a trust.
- (2) Certainty of exclusive charitable intention: It must be clear that the trustees are bound to apply the funds to charitable purposes and not to non-charitable purposes.
- (3) Certainty as to subject matter of the trust: The trust property must be clearly identified.

See: *SJ v Joseph Lo Kin Ching*, HCMP 853/2012 (unreported, 22/02/2013) §37; *Li Kim Sang Victor v Chen Chi Hsia* [2016] 1 HKLRD 1153 §84; Picarda, *The Law Relating to Charities* (4th Ed) pp 319-327.

41. In the present case, it is certainly arguable that all the above 3 requirements are satisfied both on the facts pleaded at §7B Draft RRASOC and on the undisputable evidence.

42. Certainty of intention: The intention for BCHK to hold the funds in the School's accounts on trust can be inferred from the following matters (see Draft RRASOC §7B(1)):

- (1) The assets of the School and the Middle School have been entrusted to BCHK for management since 1950s. As trustee, BCHK merely administers, but does not beneficially own, the assets of the School. This is evidenced by an indenture dated 25 July 1952, which shows that BCHK had agreed to hold

various plots of land on trust for the School Committee of Pui Ching Middle School. The fact that BCHK held these plots of land on trust was also acknowledged by BCHK in its letter dated 7 July 2015.

(2) It is common ground that (i) BCHK and the School maintain separate bank accounts in their respective names and that (ii) the funds in the School's accounts were used exclusively for the School's purposes. The fact that the funds belonging to BCHK and the School were segregated was acknowledged by or on behalf of BCHK in various letters dated 7 July 2015, 30 September 2015 and 30 July 2014. Segregation of funds in separate bank accounts could be an indicator of intent to create a trust: see *Re Kayford Ltd* [1975] 1 WLR 279.

(3) Although there is no written trust instrument setting out the terms upon which BCHK holds the funds in the School's account on trust, it is well-established that the existence of a charitable trust may be evidenced by usage alone: see Picarda, *The Law Relating to Charities* (4th Ed) pp 316-317.

43. In this regard, BCHK relies on §14 of *Re Wedgwood Museum Trust Ltd* [2013] BCC 281 to contend that certainty of intention to create a trust can only be "implied from a course of conduct and dealing which is consistent only with the existence of a charitable trust".

44. The correctness of such a proposition is questionable:

(1) No authority was cited by the judge in §14 of *Re Wedgwood Museum Trust Ltd* to support this novel proposition.

(2) §14 of *Re Wedgwood Museum Trust Ltd* has never been approved or applied by the Hong Kong Courts.

45. The proper approach for determining whether an intention to create a trust could be inferred from conduct is explained by G Lam J (as he then was) in §80 of *張才奎所託管中國山水投資有限公司股份相關員工 v Zhang Caikui* [2018] HKCFI 195:

“... [A] trust may also in my view be inferred from conduct, the transaction and the whole of the circumstances...The matter is one of intention, and it is the intention collected from an objective approach that is material. What is required is evidence in the nature of an outward manifestation of an intention to create a relationship that the law recognises as one of trust. The unexpressed subjective intentions of the settlor are irrelevant...”.

46. In the context of trust over bank accounts, it has been stated that:

(1) “If it can be shown that either party intended that the recipient should not have the free disposal of the money and that it should be applied solely for a specified purpose then it may be impressed with a trust. An intention that the recipient was to hold the money unmixed as a separate fund is strong evidence to this effect”: see Snell’s Equity (34th Ed) §22-015.

(2) In *Henry v Hammond* [1913] 2 KB 515, Channell J stated that “it is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank account or elsewhere and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his *cestui que trust*” (at 521).

(3) In *Re Kayford Ltd (In Liquidation)* [1975] 1 WLR 279, Megarry J stated that “[p]ayment into a separate bank account is a useful (though by no means conclusive) indication of an intention to create a trust” (at 282).

47. Furthermore, as pointed out by the SJ, that BCHK did not intend to take the funds in the School’s accounts on trust at the outset is immaterial. As long as there is sufficient evidence to show that BCHK did at some point later intend to hold them on trust (ie for the School’s purposes), BCHK could still be regarded as intending to hold such funds on trust: *Li Kim Sang Victor v Chen Chi Hsia* [2016] 1 HKLRD 1153 at §§87-88.

48. Even if the plaintiffs are ultimately unable to precisely identify the origin of the trust (noting that the School was, according to the plaintiffs, founded back in 1933), if they are able to show, on the evidence, that the funds in the School’s accounts had, in fact, been applied exclusively for the object to “secure the education and welfare of the students at the School” for a long time, the “presumption of legal origin” (albeit a rebuttable one) could operate to presume an intention on BCHK’s part to hold such funds upon the trust: *Tudor on Charities* (10th Ed) at §6-004.

49. Applying the above principles to the present case:

(1) It is an undisputed fact that (i) BCHK maintains separate bank accounts in the School’s name and (ii) the funds in the School’s accounts are applied only for the School’s purposes. This is “strong evidence” that the funds in the School’s accounts are impressed with a trust.

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- (2) BCHK claims that the segregation of the School’s funds from its own funds does not point towards the existence of a trust. According to BCHK, BCHK maintains different bank accounts purely as “*a matter of organisational necessity*”, in line with the practice recommended by the School Administration Guide.
- (3) However, the mere fact that BCHK does not have any “subjective intention” to create a trust over the funds in the School’s account is neither here nor there. As emphasised by G Lam J in *Zhang Caikui* (supra), the test is purely an objective one, and the question is whether the outward conduct of BCHK manifests an intention to create a relationship which the law regards as one of trust.
- (4) Here, the segregation of funds must be viewed in the context of the fact that BCHK has been entrusted the administration of the School and its tangible and intangible assets since the 1950s. BCHK also openly acknowledged that it held various plots of land on trust for the School Committee of the Middle School: see BCHK’s letter dated 7 July 2015. These surrounding historical circumstances strongly suggest BCHK may be holding other assets of the School on trust as well.
- (5) BCHK sought to downplay the relevance on the Indenture, stating that the object of the trust was the School Committee of the Pui Ching Middle School rather than the School. However, as explained in Mr Koo’s witness statement filed herein (“**Koo WS**”) §12, the original “Pui Ching Middle School” comprised both the primary and secondary sections - the secondary section was separately registered as a

government subsidised school in 1985, whereas the original “Pui Ching Middle School” later changed its name to “Pui Ching Primary School”.

(6) At the end of the day, it is well-established that, in deciding whether to grant leave to amend, the court should only have regard to the merits of the case where the merits are “so apparent as not to require prolonged investigation”. In this case, whether there is certainty of intention to create a trust is plainly question of fact which should be left for trial. The court should not attempt to resolve the conflicts in the parties’ affirmation evidence at the interlocutory stage.

50. Certainty of exclusive charitable intention: The purpose of the funds in the School’s accounts is to secure the education and welfare of the students at the School, and BCHK is obliged to apply such funds exclusively towards the School’s purpose (see Draft RRASOC §7B(2)). Trusts for the “advancement of education” and “maintenance and upkeep of schools” have long been considered to be charitable: *HSBC v Incorporated Trustees of the Islamic Community Fund of Hong Kong*, HCMP 631/1981 (unreported, 5/03/1984) pp 5, 7.

51. In this regard, BCHK contends that the plaintiffs have failed to show that the charitable trust is “for the benefit of the public”, since the funds in the School’s account only privately benefit the “students at the School”.

52. BCHK’s contention arguably is premised upon a misapprehension of the law:

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(1) As pointed out in SJ’s Skeleton Submissions, a trust would be considered as being of “public benefit” if (i) the possible beneficiaries are not numerically negligible; (ii) the quality which distinguishes them from other members of the community does not depend on their relationship with a particular individual or particular individuals: *Li Kim Sang Victor* (supra) at §75. These requirements are plainly satisfied in the present case.

(2) Further, it is well-established that a trust for benefit of “pupils at a particular school” constitutes “a sufficient section of the public” for the purposes of the “public benefit” requirement: see Halsbury’s Law of England (5th Ed) Vol 8 (Charities) §6 at p 15, citing *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297:

(a) Lord Simonds at 306: “...the establishment of a college or university is beyond doubt a charity. “Schools of learning and free schools and scholars of universities” are the very words of the preamble to the Statute of Elizabeth. So also the endowment of a college, university or school by the creation of scholarships or bursaries is a charity...”

(b) Lord Normand at 309: “It is not obvious a priori that a trust for the education of persons having the common qualification that they have already had part of their education at a named school is public. Yet there is no doubt that such trusts are charitable trusts and are among the most securely established trusts known to the law...”

53. Certainty of subject matter: The trust property (ie the funds held in the School’s bank accounts) is clearly identifiable. To the best of the plaintiffs’ knowledge, BCHK maintained at least four bank accounts under the School’s name, including two accounts with China CITIC Bank International and two accounts with Hang Seng Bank (see Draft RRASOC §7B(3)).

54. It certainly cannot be said that the Charitable Trust Amendments are bound to fail. For the purpose of deciding whether leave to amend should be granted, the court will take the plaintiffs’ proposed pleaded case to the highest (see paragraph 33(3) above).

55. Second, the plaintiffs plainly have *locus standi* to sue BCHK for breach of trustee’s duties, as persons interested in the trust under section 57A of the TO.

56. It has been held that the expression “persons otherwise interested in the trust” under section 57A(a)(iii) of the TO ought to be construed liberally. In *Sik Chiu Yuet v SJ* [2018] 4 HKLRD 194, the Court of Appeal noted that:

- (1) Hong Kong is lagging far behind in terms of effective public supervision and accountability for charities. Though the role of the SJ as *parens patriae* to safeguard public interest in respect of charities is well-established under common law, this cannot provide an adequate answer to the practical problems in terms of effective public supervision and accountability of charities. The stark reality is that, under the present system,

there are significant gaps in the fulfilment of the role of SJ in protecting public interest in respect of charities (§§20-34).

- (2) Against such background and context, a liberal interpretation of section 57A(a)(iii) of the TO should be adopted to encourage public supervision and accountability for charities. If a person has an interest in securing the due administration of a trust materially greater than, or different from, that possessed by ordinary members of the public, that interest may qualify him as a person interested in the trust under TO section 57A(a)(iii). The interest in question need not be a legal interest or duty (§§36-40).

57. In the present case, the plaintiffs clearly arguably have a greater interest than ordinary members of the public in ensuring that the funds in the School's accounts are properly administered by BCHK:

- (1) All of the plaintiffs are committed alumni of the School. Many of them held important positions within the School and its alumni associations.
- (2) All of the plaintiffs have also donated to the School's accounts. In particular, Mr Koo is a frequent contributor of funds to the School.

58. Accordingly, at least arguably, the plaintiffs are entitled to claim reliance on section 57A of the TO to seek all necessary reliefs, orders or directions to rectify any breaches of trust by BCHK.

59. Third, the use of the School’s funds for the purposes of the Academy is clearly arguably a breach of trust:

(1) As pleaded in the Draft RRASOC §7C(1), BCHK owes a duty to apply the funds in the School’s account exclusively for the purposes of the School.

(2) The Unused Floors were constructed for the exclusive use and benefit of the Academy, a separate and distinct education institution which was wholly unrelated to the School: Draft RRASOC §§8, 34.

(3) It was a breach of trustee duties for BCHK to use the School’s funds to pay for the construction costs in relation to the Unused Floors when the Unused Floors were intended only for the use of the Academy: Draft RRASOC §34.

(4) On the facts as pleaded in the Draft RRASOC, the plaintiffs clearly have a viable claim for breach of trust against BCHK.

D3. No prejudice to BCHK

60. BCHK suggests that the Amendment Application would cause “substantial prejudice” to it because (i) one of its witnesses, Mr Young Kwok Hung Clement (“**Mr Young**”) (supervisor of the School from 1989-2004), had recently passed away on 1 September 2021 after a spate of illnesses; and (ii) the action will be further delayed and lead to extra costs. I agree that such contentions have no substance.

61. First, insofar as delay is concerned, this is not in itself a reason to oppose an application to amend, particularly as this action is yet to be set

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B down for trial. Further, the defendant has no reason to oppose the
C proposed amendments if any prejudice can be compensated in costs.

D 62. In any event, leave to amend is readily granted before trial.
E Absent real prejudice, an application to amend (even if late) must be decided
F on the general principle that the court seeks to adjudicate on the real issues
G and disputes between the parties. Technical and procedural rules should
not stand in the way: see paragraph 33(4) above.

H 63. Second, with respect to Mr Young's recent passing, this is also
I not a valid reason to oppose the proposed amendments:

J (1) Mr Young's unavailability as a witness is not a result of the
K proposed amendments. Even without the Amendment
L Application, Mr Young's recent passing would have meant that
he would not be available as a witness for the trial of this action
in any event.

M (2) Further, to substantiate any alleged prejudice, BCHK must
N (i) condescend to particulars as to what precise evidence
O Mr Young could be expected to give; and (ii) explain why such
P evidence is relevant to the issues in question: see paragraph 34
Q above. However, BCHK has not provided any explanation as
R to what evidence Mr Young could have provided in respect of
the proposed amendments (in particular, the Charitable Trust
Amendments which BCHK opposes).

S (3) Mr Chang Kwong Tak (principal of the School from
T September 2011 to August 2020) and Mr Ho Kin Chung
U (supervisor of the School and the Middle School from
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September 2004 to August 2010) are also witnesses for BCHK in this action who have filed witness statements, and can no doubt provide evidence with respect to the Charitable Trust Amendments. The same goes for Mr Chan Pui Fai (acting president of BCHK) who has filed two affirmations herein.

- (4) BCHK claims that Mr Young was one of the key witnesses who attended a meeting in November 2007 (“**November 2007 Meeting**”). It is Mr Koo’s case that BCHK’s representatives told him at that meeting that the New Education Building would be exclusively occupied and used by the School. BCHK suggested that it will suffer severe prejudice because Mr Young is now unable to give evidence on this issue. It is difficult to understand, however, how this is relevant to the Amendment Application at all, since the allegation regarding the November 2007 Meeting is pleaded in the current RASOC and has nothing to do with any of the proposed amendments which the plaintiffs are seeking to introduce.

64. As to BCHK’s suggestion that the Charitable Trust Amendments would “substantially broaden the scope of the case” and cause “considerable financial strain to BCHK, which is a religious and charitable organization”:

- (1) As pointed out by the plaintiffs, the acts of BCHK constituting the breaches of trustee duties are not new and have all along been part of the plaintiffs’ pleaded case. The Charitable Trust Amendments are only intended to add an additional legal basis for seeking redress for the School based on the same

underlying facts on BCHK’s misuse of the School’s funds which have all along been pleaded.

(2) Evidence regarding BCHK’s use of the funds in the School’s accounts should be readily available, given that the School’s accounts were audited annually by independent accountants.

(3) Any prejudice that can be compensated in costs is not relevant prejudice to oppose the amendments.

65. In giving effect to the underlying objectives of the Rules of the High Court, the court shall always recognise that the primary aim is to “secure the just resolution of disputes in accordance with the substantive rights of the parties”: *Hsu Ming Chi v Lam Shu Chit* (supra) §18. In the present case, this primary objective is best achieved by allowing the plaintiffs to amend its pleadings, so that all relevant issues can be brought to the fore.

E. JOINDER APPLICATION

66. As a general rule, in all actions concerning charities, the SJ is a proper and necessary party and ought to be joined so that she could, if she so wishes, take part: *Wan Hoi Yan & Anor v Ho Chi Hung & Ors* [2019] HKCFI 2161 at §2; *Leung Siu Wan Iris v Tin Kwong Shin Tong* [2020] HKDC 1066 at §§12-14.

67. Amongst the SJ’s duties as *parens patriae* include: (i) to represent all the objects of the charity, (ii) to protect property devoted to charitable uses and (iii) to provide assistance to the court in the administration of charitable trust: see Tudor on Charities (10th Ed) §13-016.

68. It follows that, as the court is minded to grant leave for the plaintiffs to introduce the Charitable Trust Amendments, the SJ ought to be joined as a party to the proceedings (in her capacity as *parens patriae*) so that she can (if considered appropriate) make submissions to the court on how the interest of the charitable trust can best be protected.

F. STRIKE-OUT APPLICATION

69. BCHK's contentions on the Strike-Out Application have been set out at paragraphs 3 and 4 above.

70. The plaintiffs submit that D's Strike-Out Summons ought to be dismissed for the following reasons:

(1) First, there is no basis for BCHK to suggest that the plaintiffs lack *locus standi* to seek the Subject Declaratory Reliefs on behalf of the School:

(a) As was held by DHCJ To in *Koo Ming Kown v Mok Kong Ting & Ors* [2018] HKCFI 967, Mr Koo has *locus* to seek declaratory reliefs on behalf of the School in relation to its affairs, by reason, *inter alia*, that Mr Koo (as an alumnus and donor to the School) had a real interest in the proper administration of the School and the well-being and education of its students.

(b) The same reasoning applies with full force in this case, where the plaintiffs (all of whom are also alumni and donors to the School) are seeking declaratory reliefs to ensure that the funds in the School's accounts are properly managed and administered by BCHK.

(c) Further, as the Charitable Trust Amendments are allowed by this court, the plaintiffs' *locus standi* to seek the Subject Declaratory Reliefs stems also from section 57A of the TO, being "persons otherwise interested in the trust" over the funds in the School's accounts.

(2) Second, there is no abuse of process by the plaintiffs in advancing the claims in the Subject Paragraphs to seek the Subject Declaratory Reliefs:

(a) The alleged overlap with HCA 1339/2014 only concerns the plaintiffs' claim for §(1) of the Subject Declaratory Reliefs ie in relation to the Interest and Costs (see paragraph 27 above). The plaintiffs' claims to §§(2)-(9) of the Subject Declaratory Reliefs are wholly unrelated to HCA 1339/2014.

(b) In HCA 1339/2014, BCHK also contended that it was an abuse of process for Mr Koo to seek declaratory relief in relation to the Judgment Debt, Interest and Costs because the matter did not fall within the ambit of those proceedings. In other words, BCHK is attempting to shut out any claim for such declaratory relief altogether (whether in these proceedings or in HCA 1339/2014).

(c) In any event, in this action, Mr Koo is acting in a different capacity, ie as an interested party to obtain the Subject Declaratory Reliefs for the benefit of the School, whereas in HCA 1339/2014, he was suing for reliefs in his own personal capacity.

(d) Further, the other plaintiffs (other than Mr Koo) in these proceedings are not parties to HCA 1339/2014 at all and any allegation of abuse raised against them cannot even get off the ground.

Fl. Applicable principles for striking out

71. The principles on strike-out are well-established:

(1) The court will only strike out a pleading when the applicant has shown that it is plain and obvious that the other party's claim is bound to fail (the burden of which is on the applicant to show).

(2) The claim must be obviously unsustainable, the pleadings unarguably bad and it must be impossible, not just improbable, for the claim to succeed before the court will strike it out. The mere fact that the case is weak, and not likely to succeed, is no ground for striking out.

(3) If the court does not think that the matter is clear beyond doubt or if it fails to be satisfied that there is no reasonable cause of action or that the proceedings are frivolous or vexatious, there should be no striking out.

(4) Disputed facts are to be taken in favour of the party sought to be struck out.

See: Hong Kong Civil Procedure 2022, Practice Note 18/19/4; *K&L Gates v Navin Kumar Aggarwal*, HCA 1061/2011 (unreported, 20/05/2016) §20.

72. In respect of the “frivolous or vexatious” and the “abuse of process” ground:

(1) The term “abuse of process” connotes that the process of the court must be used *bona fide* and properly and must not be abused. The categories of conduct rendering a claim an abuse of process are not closed but depend on all the relevant circumstances.

(2) A proceeding is “frivolous” when it is not capable of reasoned argument, without foundation or where it cannot possibly succeed. A proceeding is “vexatious” when it is oppressive and/or lack *bona fides*.

(3) To decide that a litigant has been frivolous or vexatious and abused the process of the court is a serious finding to make, since it will generally involve bad faith and one would expect the discretion to be exercised sparingly.

See: Hong Kong Civil Procedure 2022, Practice Notes 18/19/7 and 18/19/9; *Yifung Properties Ltd v Manchester Securities Corp*, HCA 1341 & 1359/2014 (unreported, 19/10/2015) §§12-14.

F2. The plaintiffs’ locus to seek the Subject Declaratory Reliefs

Relevant Principles

73. The legal principles governing the court’s jurisdiction to grant declaratory reliefs have been summarised by DHCJ To in *Koo Ming Kown v Mok Kong Ting* (supra) (which was applied by the Court of Appeal in *Convoy Global Holdings Ltd v Kwok Hiu Kwan* [2021] HKCA 1594 at §30).

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- (1) The court’s jurisdiction to grant declaratory relief is extremely wide. The jurisdiction may be invoked by an applicant who does not have any cause of action against the adverse party (§§15-16).
- (2) In exercising its jurisdiction to grant declaratory reliefs, the court shall adopt a “practical utility approach” and will not impose “nice tests” to determine the precise legal standing of the applicant (§§17-18).
- (3) In summary, an applicant seeking declaratory reliefs from the court needs to show that (§20):
- (a) He has a real interest in the subject matter of the declaration (§16) (the “**real issue requirement**”);
- (b) He has a real interest in obtaining a declaration from the court against an adverse party (§19) (the “**real interest requirement**”); and
- (c) The adverse party is a proper contradictor, ie someone presently existing who has a true interest to oppose the declaration sought (§19) (the “**proper contradictor requirement**”).

74. As regard the real issue requirement, Coleman J in *Convoy Global Holdings Ltd v Kwok Hiu Kwan* [2020] 4 HKLRD 222 at §55 held that a “real interest in the subject matter of the declaration” means a real interest of a material character to be enforced or protected as opposed to a merely academic or hypothetical question or one raised out of curiosity. Whether a plaintiff has shown an interest in the outcome of the proceedings is a question of fact.

75. The situation in *Koo Ming Kown v Mok Kong Ting* (supra) bears close resemblance to the instant case:

(1) In that case, Mr Koo (ie the 2nd plaintiff herein) sought declaratory relief against, *inter alios*, BCHK that (i) Chan Chi Mong Hopkins (“**Hopkins Chan**”) was not a “fit and proper person” to serve as the supervisor of the School and (ii) his appointment as the supervisor of the School ought to be revoked with immediate effect.

(2) Rev Mr Mok Kong Ting (ie the President of BCHK) and Rev Mr Lam Sau Kwong (ie the Executive Secretary of BCHK) applied to strike out Mr Koo’s claim, challenging Mr Koo’s *locus* to seek the declaratory reliefs on behalf of the School. Amongst other things, it was argued that:

(a) Any damage to the goodwill and reputation of the School caused by Hopkins Chan for not being a “fit and proper person” will not cause any loss or damage to Mr Koo (§22);

(b) Mr Koo was merely a busybody and had no real interest in the outcome of the proceedings (§24); and

(c) BCHK was not the proper contradictor to Mr Koo’s claim (§36).

(3) These arguments were rejected by DHCJ To, who held that Mr Koo had *locus* to seek the declaratory reliefs on the bases, *inter alia*, that:

(a) Mr Koo (as an alumnus and former Honorary Manager of the Pui Ching Schools) had a real interest in protecting

and maintaining the good name and reputation of the School (§26);

(b) As a frequent contributor of funds to the School, Mr Koo had a real interest in seeing that his donations would be applied for the proper administration of the School and the well-being and education of its students (§§26-27);

(c) The students of the School were in no position to challenge the propriety of the appointment of the supervisor. They need a “guardian” like Mr Koo to protect their interest insofar as the quality of the education they received in the School is concerned (§28); and

(d) BCHK has a duty to ensure that its nominee for appointment as supervisor is a fit and proper person. If a declaration to the effect that Hopkins Chan is not a “fit and proper person” is made, BCHK should take appropriate steps to give effect to the declaration. BCHK is therefore an appropriate contradictor (§47).

76. It is noteworthy that nearly all of the authorities referred to in BCHK’s Skeleton Submissions on this subject cited DHCJ To’s decision in *Koo Ming Kown v Mok Kong Ting* (supra) with approval.

77. Applying DHCJ To’s reasoning to the present case, it must be at least arguable that the plaintiffs have *locus* to seek the Subject Declaratory Reliefs on behalf of the School in this action.

Real Interest Requirement

78. As to the real interest requirement, all of the plaintiffs have a real interest in obtaining a decision from the court against BCHK on the subject matter of the declarations sought:

(1) The Subject Declaratory Reliefs concern various sums, costs and expenses paid from the School's accounts which the plaintiffs say should properly be borne by BCHK.

(2) As recognised by DHCJ To in *Koo Ming Kown v Mok Kong Ting* (supra), Mr Koo is a committed alumnus and donor who has a real interest in the proper administration of the School and the well-being and education of its students: see RASOC §32.

(3) Such reasoning applies, *mutandis mutatis*, to the other plaintiffs herein ie Mr Lai, Mr Chieng, Mr Woo, Mr Ko and Mr Chan, all of whom are also alumni of the School and donors of money to the School, and who have a real interest in ensuring the proper administration of the School protecting the School just like Mr Koo: see RASOC §§1, 2, 4, 4A, 4B, 4D, 16, 32A.

(4) It is wrong for BCHK to argue that the return of the HK\$20 million donation to Mr Koo would prevent him from satisfying the "real interest" requirement. As pleaded in §3(4) of the RASOC, Mr Koo has made substantial donations to the Pui Ching Schools over a long period of time, and the return of one single donation cannot affect Mr Koo's standing to seek relief in this case.

(5) Contrary to BCHK’s submission, the Subject Declaratory Reliefs clearly have a direct nexus with Mr Koo’s interest in “seeing that his donation be continued to be applied for the proper administration of the School for the well-being of its students”, since the declarations sought by the plaintiffs require BCHK to reimburse the School of any funds which had been misapplied for purposes unrelated to the School.

79. BCHK argues that whether or not the Subject Declaratory Reliefs are granted would not affect the plaintiffs’ interest one way or the other, and that the declarations sought are concerned only with the School’s “finances and internal administration”.

80. It should be noted that a similar argument was rejected by DHCJ To in *Koo Ming Kown v Mok Kong Ting* (supra), who held that, since BCHK is operating the School in Hong Kong subject to the provisions of the Education Ordinance, there is a public interest in ensuring that BCHK “discharges its duties in the management of the business and affairs of the Schools in a fair, accountable and transparent way” (§§21(4), 53).

81. DHCJ To’s remarks are equally apposite in the present context, where BCHK is alleged to have misused the School’s funds for purposes which are unrelated to the School. In contending that neither the plaintiffs nor the SJ have *locus* to seek reliefs in these proceedings, BCHK is effectively arguing that no one should have oversight as to how the School’s funds are used or managed. This runs directly contrary to DHCJ’s ruling in *Koo Ming Kown v Mok Kong Ting* (supra).

Real Issue Requirement

82. As to the real issue requirement, it is clearly arguable that the plaintiffs have a real interest in the subject matter of the Subject Declaratory Reliefs sought against BCHK:

(1) As stated in paragraph 74 above, a real interest in the subject matter of the declaration means “a real interest of material character to be enforced or protected as opposed to merely academic or hypothetical question or one raised out of curiosity. Whether a plaintiff has shown an interest in the outcome of the proceedings is a question of fact”.

(2) All the Subject Declaratory Reliefs concern the legality of BCHK’s use of the School’s funds for purposes other than for the benefit of the School and/or for its own purposes (to satisfy its own liabilities). This is a genuine legal issue (as opposed to a hypothetical one) which needs to be resolved by the court.

(3) The Subject Declaratory Reliefs require BCHK to bear personal liability for, *inter alia*, the following sums:

(a) The Judgment Debt, the Interest and the Costs from the 13 July 2016 Order (§(1));²

(b) The construction costs referable to the construction of the Unused Floors (§(2));

(c) The demolition costs of the Unused Floors (in the event that they are to be demolished in future) (§(3));

² In the RASOC, the plaintiffs only sought a declaration that BCHK bears liability for the Interest and the Costs. In the Draft RRASOC, the plaintiff now seeks a declaration which requires BCHK to bear liability for the Judgment Debt as well.

- (d) All costs and expenses, including government rates, utilities bills, management fees, insurance fees and maintenance fees, referable to the Unused Floors (§§(4)-(4A)); and
- (e) A proportion of the legal costs incurred by the School in defending the arbitration proceedings against CCC (§(5)).

83. In *Koo Ming Kown v Mok Kong Ting* (supra), DHCJ To considered that Mr Koo has demonstrated “a real interest in the subject matter of the declaratory relief and a real interest in the outcome of these proceedings” (§29). In that case, at the heart of the case was Mr Koo’s “fight for the good name and reputation of the Schools by ensuring that the Primary School is not subject to the control of [Hopkins Chan], whose integrity [Mr Koo] considered highly questionable” (§7).

84. The present case must be *a fortiori*, the plaintiffs arguably have interest in seeing that their donations be continued to be applied for the proper administration of the School and the well-being and education of its students.

85. In his oral reply submissions on the Strike-Out Application, Mr Abraham Chan, SC on behalf of BCHK contended that, like the question of a plaintiff’s authority to sue, the threshold question of the plaintiffs’ *locus* to seek the Subject Declaratory Reliefs should be resolved first before the case shall be allowed to proceed any further.

86. He cited Coleman J’s decision in *Convoy Global Holdings Ltd v Kwok Hiu Kwan* (supra) as an example of a claim for declaratory relief being struck out for failing to meet the real issue and the real interest requirements, without the need to wait for a trial.

87. At paragraph 83 of *Convoy Global Holdings Ltd v Kwok Hiu Kwan*, Coleman J stated that: “... *I think it is plain and obvious that neither Convoy nor CSL can satisfy the ‘real issue requirement’ in the test summarised in the Koo Ming Kown case at [20]. I decide against them the factual question as to whether they have an interest in the outcome of the proceedings.*” (Emphasis supplied)

88. Thus clearly, Coleman J was able to decide a “factual question” because it was a “plain and obvious” case. This must be the right test on a striking out application.

89. In the present case, for the reasons set out above, this is clearly not a “plain and obvious” case that the plaintiffs’ claim for the Subject Declaratory Reliefs should be struck out.

The plaintiffs’ locus under section 57A TO

90. Finally, as the Charitable Trust Amendments are allowed, section 57A of the TO would provide an additional basis for the plaintiffs to seek the Subject Declaratory Reliefs. In this regard, I refer to paragraphs 55 to 58 above.

F3. No abuse of process

91. Issue estoppel arises where a particular issue has been litigated and decided in earlier proceedings, and in subsequent proceedings between the same parties, one of the parties seek to re-open that issue: see *Ho Wai Sang v Fok Kai*, CACV 3883/2001 (unreported, 27/06/2002) §11.

92. Abuse of process (sometimes called the *Henderson v Henderson* abuse or *res judicata* in the wider sense) arises where a party raises claims or issues in subsequent proceedings which could and should have been raised in earlier proceedings: see *Ko Hon Yue v Chiu Pik Yuk* (2012) 15 HKCFAR 72 §82; *Yifung Properties v James Nicholas Barrie Smith* [2019] 1 HKLRD 36 §16.

93. Someone who litigates in different capacities is a different party in each capacity. *Res judicata* estoppels binding a person in one capacity may not bind him in another capacity, and *vice versa*: see Spencer Bower and Handley, *Res Judicata* (5th Ed) §9.21.

94. The onus is on the party alleging abuse to establish that the subsequent litigation is an abuse. The abuse can take a number of forms, including (i) oppression, vexation or unjust harassment of that party or his privy; (ii) the administration of justice being brought into disrepute and (iii) manifest unfairness to that party or his privy: see *Ko Hon Yue* §83(3)-(4); *Yifung* §§17-18.

95. The issue of whether there is abuse is a fact-sensitive one which calls for a broad-merits-based assessment in which the court is concerned with balancing the interests of not just the litigants before it, but

also other interests involved in the administration of justice: see *Ko Hon Yue* §83(5); *Yifung* §14.

96. I agree that BCHK's objections are entirely misplaced for the following reasons.

97. First, as mentioned above, of the various claims for declarations advanced by the plaintiffs, only one of such claims (namely, the claim for §(1) of the Subject Declaratory Reliefs) concerning Interest and Costs relates to the proceedings in HCA 1339/2014.

98. The other claims for declarations advanced by the plaintiffs (relating to the Unused Floors and legal costs for the arbitration against CCC) have nothing to do with the dispute in HCA 1339/2014 at all. It follows that, even if BCHK's complaint of abuse of process is made out, there is no basis for BCHK to seek to strike out all of the claims pleaded in the Subject Paragraphs and all of the Subject Declaratory Reliefs.

99. Second, although Mr Koo is a party to both HCA 1339/2014 and this action, he is litigating in different capacities, and no *res judicata* estoppel can arise (see paragraph 93 above):

(1) In HCA 1339/2014, Mr Koo sued in his personal capacity to recover his HK\$20 million donation made to BCHK.

(2) In this action, Mr Koo is suing on behalf of the School for declaratory relief that certain sums, costs and expenses paid from the School's accounts should properly be borne by BCHK.

100. Third, as regards the other plaintiffs (excluding Mr Koo), they are not parties to HCA 1339/2014 and have no involvement in that action. Hence, any allegation of abuse against them is wholly without basis.

101. Finally, in any event, as the Charitable Trust Amendments are allowed, there is no basis for BCHK to seek to strike out the Subject Paragraphs or the Subject Declaratory Reliefs, as (i) the Subject Paragraphs form the basis of the plaintiffs' claim that BCHK has breached its trustee duties, and is liable to the School for equitable compensation (see Draft RRASOC §37B, Prayers (1)-(2)); and (ii) the Subject Declaratory Reliefs are proper reliefs which the plaintiffs are entitled to seek based on the existence of a charitable trust over the funds in the School's accounts: see section 57A of the TO.

G. CONCLUSION AND DISPOSITION

102. For all the reasons set out above:

- (1) I allow the Amendment Application, the Joinder Application and the Withdrawal Application (in terms of paragraphs 1 to 7 of Ps' Amendment Summons).
- (2) I dismiss D's Strike-Out Summons.

103. I make the following order as to costs:

- (1) Regarding the Ps' Amendment Summons, I order that:
 - (a) The costs of and occasioned by the amendments and of the application be paid by the plaintiffs to the defendant in any event; and

(b) The costs of the hearing before the court on 9 and 10 November 2021 be paid by the defendant to the plaintiffs (with a Certificate for 2 Counsel) and to the Secretary for Justice.

(2) Regarding the D's Strike-Out Summons, I order that the costs of the application be paid by the defendant to the plaintiffs (with a Certificate for 2 Counsel).

104. The above order as to costs is *nisi* and shall become absolute in the absence of any application within 21 days to vary the same.

105. Lastly, I express my gratitude to counsel for their helpful assistance in this matter.

(Wilson Chan)

Judge of the Court of First Instance
High Court

Ms Sara Tong and Mr Eugene Kwan, instructed by Messrs V Hau & Chow,
for the 1st to 5th plaintiffs

Mr Abraham Chan, SC, leading Mr Jason Ko and Mr John Leung, instructed
by Messrs Or & Partners for the defendant

Mr Benny Lo, instructed by the Department of Justice for the Secretary for
Justice