FACV No. 8 of 2011

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 8 OF 2011 (CIVIL)
(ON APPEAL FROM CACV NO. 294 OF 2008)

BETWEEN

KO HON YUE (高翰儒)	**Plaintiff (Respondent)**
And	
(1) CHIU PIK YUK, the wife and intended adminstratrix of LIU CHING LEUNG (廖正亮), deceased **(2) LIU POON KEUNG (廖本強)** **(3) CHEUNG FO TAI (張伙泰)** **(4) CHONG KAM LING (莊金寧)** **(5) LAI KIM HUNG (賴劍虹)** **(6) LIU LAI KEUNG (廖勵強)** **(7) LIU WAI KI (廖惠其)** **(8) LIU GUN SUN (廖更新)** **(9) LIU KIT MING (廖傑明)** **(10) LIU MAN FUK (廖萬福)** **(11) LIU TIM WAN (廖添穩)** **(12) YAN CHUEK NING (甄灼寧)** **(13) LEE TAK CHING (李德貞)** **(sued collectively as the Management Committee of Fung Kai No. 1 Secondary School for the year 2001)**	**1st Defendants (Appellants)**
FUNG KAI NO. 1 SECONDARY SCHOOL	**2nd Defendant**

Before: Chief Justice Ma, Mr Justice Bokhary PJ,Mr. Justice Chan PJ, Mr Justice Ribeiro PJ and Sir Anthony Mason NPJ

Date of Hearing: 1 February 2012

Date of Judgment: 23 February 2012

J U D G M E N T

Chief Justice Ma:

1. The present appeal concerns the construction of the terms of a contract of employment – in this case, the employment of a teacher (the plaintiff) at a secondary school – and the main issue before this Court is how the plaintiff's employment could lawfully be terminated under the contract. There are, we understand, a number of contracts of employment regarding teachers in aided schools in Hong Kong that bear similarity to the present contract that is before us for determination. It was for this reason that leave to appeal was given by the Appeal Committee on 16 June 2011 to appeal from the Judgment of the Court of Appeal dated 19 November 2010, which had allowed an appeal from the judgment (after trial) of Chu J (as she then was) dated 4 August 2008.

2. Leave to appeal was also given on another ground in relation to abuse of process, that is, the abuse in raising issues in subsequent proceedings that could and should have been litigated in earlier proceedings

between the parties. Over the years, this form of abuse has been known variously as *Henderson v Henderson* abuse (named after the decision in *Henderson v Henderson* (1843) 3 Hare 100), or *res judicata* in the wider sense, or *Yat Tung* abuse (named after the decision of the Judicial Committee of the Privy Council in *Yat Tung Investment Co. Ltd. v Dao Heng Bank* [1975] AC 581).

A The plaintiff's employment with the defendants: the contractual documentation

3. At all times material to the present case, the Fung Kai No. 1 Secondary School ("the School") at Sheung Shui, in the New Territories, was an aided school within the meaning of s 3(1) of the Education Ordinance Cap 279. As defined in that provision, this meant that it received subsidies from the Government in accordance with the Code of Aid for Secondary Schools as amended from time to time ("the COA"). The COA and its terms are critical to the resolution of the issue of lawful termination in the present appeal.

4. The plaintiff started his career as a full time teacher in 1984, but it was in 1990 when he began his employment as a teacher at the School. He taught at the School until 31 August 2000 and then taught for one more year (until 31 August 2001) at an associated school, the Fung Kai Liu Man Shek Tong School ("the FK-LMST School"). Both the School and the FK-LMST School have the same sponsoring body (the Fung Kai Public School). Contractually, as we shall presently see, for these 11 years when the plaintiff taught at these two schools, his employers were the same. In the contractual

documentation, the employers were stated to be the Management Committee of the School. These are the defendants. Originally, the defendants were named as the first defendants, with the School as the second defendant, but the School ceased to be a party early in the proceedings when the plaintiff agreed that the School was not a legal entity capable of being sued in its own name. In this judgment, I shall refer to the plaintiff's employers as either the defendants or the School.

A.1 *The letter of offer and the letter of acceptance*

5. The plaintiff began his employment as a teacher in the School for the 1990/1991 academic year (which began in September 1990). By a "Letter Offering Employment" dated 20 June 1990, the plaintiff was offered an appointment as a teacher at the School. The offer was made subject to the Conditions of Service which were attached to the letter, and the plaintiff was asked to sign copies of these Conditions as well as a letter of acceptance.

6. The letter of acceptance stated that the plaintiff accepted the appointment in accordance with the Conditions of Service, the Education Ordinance and its subsidiary legislation and also the applicable COA.

A.2 *The Conditions of Service*

7. The Conditions of Service for the first academic year contained the following terms:-

(1) A probationary period of two years was specified with effect from the date of appointment.

(2) There was a termination of employment clause headed "Termination of Appointment of Service and Period of Notice" (for convenience, I shall, like the Court of Appeal, refer to this clause as the Termination Clause). I will set out this clause in full when I come to deal with the crucial issue of the termination of employment under the contract between the plaintiff and the School. As we shall see when looking at the terms of the COA, the Termination Clause reproduced in part the terms of the termination provisions contained in the COA. Under the terms of that document, every contract of employment had to specify the minimum periods of notice required to terminate the contract in accordance with and to follow the termination provisions in the COA.

(3) The Conditions of Service also dealt with a number of different aspects of the employment, such as provident fund, sick leave, maternity leave etc. However, the last clause in the Conditions referred to other applicable provisions (under the heading "Other Conditions") (I shall refer to this clause as "the Other Conditions clause"):-

> "Conditions other than what are listed above are provided in the Education Ordinance and the subsidiary legislation and the relevant Code of Aid."

Two observations should be made at this point in relation to this clause:-

(a) One of the important effects of this clause was that the terms of the COA were incorporated as contractual terms in the plaintiff's contract of employment. Even without this clause, however, this was the effect of the plaintiff signing the letter of acceptance (which referred specifically to the COA): see para 6 above.

(b) The defendants place emphasis on the words at the beginning of this clause ("Conditions other than …") to argue that the express terms of the contract set out in the Conditions of Service will override any inconsistent provisions contained in the COA. I shall deal with this submission later in this judgment when discussing the issue of termination.

A.3 ***The renewals***

8. For the 1991/1992 academic year (beginning September 1991), the plaintiff was again required to sign a letter of acceptance following an offer letter from the School. The period of his probation was stated to be two years from 1 September 1990. The COA remained incorporated into the contract.

9. Save for the changes about to be highlighted, it can be taken for present purposes that the Conditions of Service remained the same. The most notable changes in the Conditions of Service for this academic year were in relation to the Termination Clause (relating to the notice required to

be given by the School to terminate a contract) and to the Other Conditions clause (the material amendments are underlined):-

(1) I shall set out in full the amendments made to the Termination Clause when dealing with the issue of termination.

(2) The amended "Other Conditions" clause now read as follows:-

> "Conditions other than what are listed above are provided in the Education Ordinance, the Employment Ordinance and their subsidiary legislations [sic], the relevant Code of Aid, <u>and the instructions as the Director of Education may from time to time issue</u>."

10. The same pattern of annual renewals continued for each academic year up to the 1999/2000 academic year, with offer letters given to the plaintiff and his being required to sign letters of acceptance. Again, it can be taken that the terms of the various documents remained the same, except for the following changes to the Conditions of Service:-

(1) In the Conditions of Service for the 1993/1994, 1994/1995 and 1995/1996 academic years, the probationary period was deleted (for the simple reason that by then the plaintiff had completed his two years probationary period).

(2) However, for the academic year 1996/1997, there was inserted for the first time as part of the Conditions of Service a specified period of employment. The period was expressly stated to be from 1 September 1996 to 31 August 1997. The contractual documentation for the 1997/1998, 1998/1999 and 1999/2000 academic years each contained a similar one year term dating from 1 September to 31 August for those years. The defendants place great reliance on this stated term in support of their

argument that termination of the plaintiff's employment with the School could take place simply by effluxion of time. I shall deal with this argument later.

(3) Earlier, I referred to the amendments made to the Termination Clause in the contractual documentation for the 1991/1992 academic year (see para 9(1) above). The amendments were themselves, however, deleted from the Conditions of Service for the 1999/2000 year. I shall further deal with the significance of this when analyzing the termination of employment issue.

11. As mentioned earlier, the plaintiff changed schools for what turned out to be his final year of teaching. For this final year, he was transferred to the FK-LMST School. I shall in the next section of this judgment describe the circumstances of the transfer, but wish to deal for the time being only with the contractual position.

12. For this final year, both courts below proceeded on the basis that the plaintiff was transferred to teach at the FK-LMST School for the school year beginning September 2000, but he remained employed, albeit at a different school, by the defendants. The terms and conditions (insofar as they are material to the present appeal) remained the same as those contained in the contractual documentation for the 1999/2000 school year (although some additional terms, not material for present purposes, were also agreed: see para 21 below). Neither party before us contended otherwise. I therefore proceed (for the purpose of determining the issue of

the termination of the plaintiff's employment) on the basis that the relevant terms of contract are those contained in the contractual documentation I have described in this section, namely, the offer letter, the letter of acceptance, the Conditions of Service and the COA. Of particular relevance here is of course the contractual documentation for the 1999/2000 year.

A.4 *The Code ofAid*

13. I have already made several references to this document. It is, in my view, a crucial document in the ascertainment of the relevant terms of the contract of employment between the plaintiff and the defendants. Chu J described the COA as being of "pivotal importance" and with respect, I agree with this view. In the present case, the terms of the COA were expressly incorporated into the contract between the plaintiff and the defendants (see paras 6 and 7(3)(a) above). In *Lau Chi Fai v Secretary for Justice* [1999] 2 HKLRD 494 (a decision of Keith J in the Court of First Instance) and the Court of Appeal's decision in *Chan Chi Loi v Cheng For and others*, unreported, CACV 243 of 2003, 17 December 2004, the courts had to deal with the issue whether the terms of the COA, as a matter of contract, did apply to the contract between the teacher and the school in those cases. In the latter case, the Court of Appeal had to consider whether, notwithstanding the absence of any clause expressly incorporating the COA, its terms could be implied. The majority (Yeung JA and Yuen JA) thought not, Cheung JA was of the view they could. This issue does not arise in the present case owing to the express incorporation of the COA into the contract between the plaintiff and the defendants.

14. Chu J held that the terms of the COA were incorporated into the contract between the plaintiff and the defendants but only inasmuch as they set out the plaintiff's obligations (rather than the defendants') as stated in the letter of acceptance (see para 6 above) and no more. I agree with the Court of Appeal's judgment that this view was too narrow. Clearly, with regard to the contractual documentation as a whole, the terms of the COA (as they affected both parties) were incorporated into the contract between the plaintiff and the defendants (subject of course to the defendants' argument that where there was any conflict, the express terms of the Conditions of Service would prevail over the terms of the COA: see para 7(3)(b) above).

15. As mentioned (para 3 above), s 3 of the Education Ordinance makes specific reference to the COA in the context of aided schools in Hong Kong. The overriding importance of the document can be seen from clauses 1(a) and 3 of the Introduction to the Code:-

> "1(a) This Code of Aid prescribes the rules and conditions in accordance with which the Government of Hong Kong promotes education by means of grants to such secondary schools as may be approved for this purpose by the Director of Education."
>
> ….
>
> "3. A school in receipt of aid under the terms of this Code of Aid shall be managed and conducted in accordance with the provisions of the Education Ordinance and of subsidiary legislation made under that Ordinance, and in compliance with the provisions of the Code of Aid and such instructions concerning aided schools as the Director may from time to time issue. An administrative guide for aided schools is in Appendix 1."

16. The COA is in 3 parts. Part I is the Introduction, Part II sets out detailed provisions relating to the grant of aid and Part III deals with the

administration of aided schools. We are in this appeal concerned with the issue of how the plaintiff's employment with the defendants could lawfully be terminated. This will involve an examination of the relevant terms of contract contained in the contractual documentation referred to, the COA and the Employment Ordinance. I will in due course set out all the relevant terms. For the time being, in introducing the COA, I would merely emphasize its importance in the context of aided schools.

17. Apart from the grant of aid, the admission of students into aided schools and the role of the Director of Education in overseeing the management and running of these schools, the Code also contains extensive provisions regarding the staffing of schools, and in particular, the position of teaching staff. As we shall see, many important provisions regarding teachers are contained in Part III of the Code. Part II, however, also deals with teachers in that reference is made to supply teachers and temporary replacements: see clauses 29 and 30 of the Code. The position of these teachers is to be contrasted with the position of more permanent teaching staff. I shall deal further with this distinction later.

B The disputes between the parties leading to the present proceedings

18. The details of the disputes between the parties are contained in the judgments of the Court of Appeal and the trial judge. I am content merely to provide the gist of the disputes between the parties that have led to the present proceedings.

19. The plaintiff started teaching at the School on 3 September 1990, his subjects being English and EPA (Economics and Public Affairs). Following the plaintiff's unsuccessful application for promotion to the post of Senior Graduate Master in 1994, according to the trial judge, the plaintiff's relationship with the School began to sour. Between 1995 and 1999, the plaintiff received four formal warnings arising out of a number of incidents relating to what the Judge described as school administration. In March and April 2000, complaints were received from students at the School concerning the plaintiff's teaching performance and behaviour, and a committee comprising 5 teachers was appointed to investigate these complaints.

20. There was an unresolved issue at trial as to whether, following the intervention of the Education Department, the School agreed to cancel all previous warnings made to the plaintiff (the defendants deny this although an officer from the Education Department maintained in correspondence that there had been an agreement to this effect). On 4 July 2000, the defendants decided at a meeting of the School Management Committee that the plaintiff's employment should be terminated. By a letter dated 20 July 2000 from the defendants' solicitors, the plaintiff was informed that his contract would not be renewed upon expiry on 31 August 2000. The letter also said (rather oddly and inconsistently) that notwithstanding that the plaintiff was liable to be dismissed summarily, he would be paid one month's salary in lieu of three months' notice.

21. It was through the intervention again of the Education Department that the School agreed to suspend the termination of the plaintiff's employment and he was transferred to teach at the FK-LMST School for a year. This followed a meeting on 8 August 2000 attended by the plaintiff, representatives of the School and of the Education Department. The plaintiff agreed to the Minutes of this meeting insofar as they recorded an agreement that:-

(1) He would be transferred to teach at the FK-LMST School for the school year beginning September 2000.

(2) His performance at this School would be monitored by both the School and the Education Department.

(3) He undertook to perform satisfactorily.

The plaintiff disagreed with that part of the Minutes recording that the School only temporarily suspended the earlier termination of his employment and it was for this reason that he refused to sign the Minutes. The failure to sign the Minutes was relied upon by Mr Edward Chan SC (who represented the defendants in this appeal) for the purposes of an argument based on the Employment Ordinance Cap 57, to which I shall return in due course (see Section E.3 below).

22. Matters did not improve at the new school. The plaintiff's work was regarded as unsatisfactory, and complaints were received from students and parents alike (although it has to be pointed out that the plaintiff did not accept the criticisms made about his work and performance).

23. By a letter dated 23 May 2001, the principal of FK-LMST School informed the Education Department that the School wanted to terminate the plaintiff's employment at the end of the school year. The Education Department replied on 16 July 2001 stating its having no objection to this course.

24. By another letter from the defendants' solicitors to the plaintiff dated 13 July 2001, reference was made to the plaintiff not having made any satisfactory improvement and to numerous complaints having been received from students and parents. The plaintiff was informed that his employment would be terminated "with immediate effect" and a cheque representing one month's salary in lieu of notice was enclosed.

25. The plaintiff took the view he had been unfairly and unlawfully dismissed. In other words, the termination of his employment contract with the defendants was unlawful. The defendants took the opposite view. This was (and remains) the main dispute between the parties.

C The proceedings in the present action

C.1 *The Labour Tribunal proceedings*

26. After attempts to settle the disputes between them, the plaintiff eventually commenced proceedings against the School in the Labour Tribunal on 7 September 2002 ("the First Proceedings") claiming only arrears of wages from 13 July 2001 (the date of the letter from the

defendants' solicitors) to 31 August 2001 (the end of the academic year). After three callover hearings, the claim was settled when the School agreed to pay the full amount claimed by the plaintiff ($76,758.00) in full and final settlement of his claim. This was recorded in an Order of the Tribunal made on 20 December 2002.

27. Notwithstanding this settlement, on 30 June 2003, the plaintiff commenced a second set of proceedings in the Labour Tribunal against the School, this time for unearned salaries from 1 September 2001 to 31 August 2017, loss of provident fund and loss of mortgage interest. In all, the amount claimed was $14,024,190.90.

28. On 4 September 2003, the Labour Tribunal transferred these proceedings to the Court of First Instance (pursuant to s 10 of the Labour Tribunal Ordinance Cap 25). These proceedings became the present action.

C.2 *The decision of Chu J and the Court of Appeal*

29. As the somewhat voluminous pleadings in this action demonstrate, numerous issues had to be determined in the trial, and subsequently, following the dismissal of the plaintiff's claim by Chu J, on appeal to the Court of Appeal. The dispute between the parties as I have identified in para 25 above, remained however in substance the real controversy between the parties.

30. Chu J, in para 52 of her judgment, identified the following eight issues that the Court had to resolve:-

> "52. Accordingly, the broad issues that require determination are:
> (1) Whether the present action amounts to an abuse of court process.
> (2) Whether the 1st defendants are correctly sued in this action.
> (3) Whether the Code of Aid formed part of the employment contract.
> (4) Whether the employment contract was continuous until the plaintiff's retirement.
> (5) Whether the termination of the plaintiff's employment was wrongful and whether there was constructive dismissal.
> (6) Whether the implied term as pleaded by the plaintiff exists in law and whether there was any breach of it.
> (7) If the plaintiff succeeds in his claim, what is the quantum of damages.
> (8) What is the appropriate costs order consequent upon the order that the 2nd defendant ceased to be a party to the action."

31. The learned judge largely resolved each of these issues in favour of the defendants and dismissed the plaintiff's claim. Her decision was reversed by the Court of Appeal, which held that the plaintiff's employment with the defendants was not lawfully terminated, with the consequence that damages for wrongful termination should be awarded to the plaintiff. It was ordered that the assessment of such damages should be remitted to Chu J.

32. For the purposes of the present appeal, of those issues before the trial judge, only issues (1), (3), (4) and (5) are relevant for this Court's determination. Issue (1) concerns the contention of the defendants that the present proceedings constitute an abuse of the process of the Court on the basis that the issues raised in the present action could and should have been raised in the first proceedings. Issues (3), (4) and (5) are relevant to the critical issue of how the contract of employment between the plaintiff and

the defendants could lawfully be terminated and whether in the present case, it was so terminated.

33. I shall in due course be referring to the reasoning of both Chu J and the Court of Appeal in relation to these issues when dealing with the matters for determination before this Court.

D The issues for determination

34. There are two issues for determination by this Court which can be summarized in the following way:-

(1) Issue 1: How can the contract of employment between the plaintiff and the defendants be lawfully terminated as far as the School is concerned? This, in my view, reflects the essential dispute between the parties.

(2) Issue 2: Does the prosecution of the present action constitute an abuse of the process of the Court?

35. On 16 June 2011, the Appeal Committee gave leave to appeal to the defendants on these two issues of law. Mr Justice Chan PJ stated the questions for determination as follows:-

> "(a) Accepting that those provisions of the Code of Aid which touch on the relationship between schools and teachers were incorporated into the contract of employment; on the true construction of those provisions read in conjunction with the letters of offer and acceptance and the Conditions of Service entered into by the parties, and taking the Employment Ordinance into account; what powers, if any, did the defendants have to terminate the plaintiff's employment by notice or payment of salary in lieu?
>
> (b) Was the Court of Appeal in principle entitled to reverse the Judge's conclusion that in the circumstances, bringing the second claim amounted

> to an abuse of process since it could have been raised at the same time as the first claim?"

E Issue 1: How can the contract of employment between the plaintiff and the defendants be lawfully terminated as far as the School is concerned?

36. In the resolution of this issue, it is necessary to analyze the effect of the relevant contractual provisions contained in the Conditions of Service and the COA. It will also be necessary to refer to the Employment Ordinance, Cap 57.

E.1 *The Conditions of Service*

37. As we have seen, a major amendment was made for the 1996/1997 year when, for the first time, a specified period of employment was set out in the Conditions of Service (see para 10(2) above). The defendants placed great emphasis on this amendment to contend that the plaintiff's employment was clearly an annual one, which had to be (and was) renewed annually. For the final year (2000/2001) they contended that the period of employment was from 1 September 2000 to 31 August 2001.

38. Chu J accepted this submission, finding that the plaintiff's contract of employment with the defendants was only for a fixed period of one year's duration. However, for reasons that will be apparent presently, the learned judge did not hold that the contract of employment was terminated by effluxion of time. She was of the view that the provisions of the Employment Ordinance were decisive to enable the defendants to give

one month's notice to terminate (which they had done by their solicitors' letter dated 13 July 2001: para 24 above).

39. The Court of Appeal disagreed with the learned judge's finding that the period of employment was one of fixed duration. Tang Ag CJHC (with whose judgment Cheung JA and Yeung JA agreed) was of the view that the plaintiff's employment with the defendants was a permanent one to last until he reached retirement age (60 years of age). He did so by relying on clauses 54, 55 and 57 of the COA. Tang Ag CJHC also referred to the Termination Clause in the Conditions of Service, which I now examine.

40. The applicable Conditions of Service for the first academic year of the plaintiff's employment (1990/1991) contained a Termination Clause in the following terms insofar as termination by the School was concerned (it also contained termination provisions insofar as the teacher giving notice was concerned as well):-

> "Termination of Appointment of Service and Period of Notice
>
> ….
>
> (b) By School Management Committee Where a school management committee considers that the service of a teacher is unsatisfactory one month's notice shall normally be given to the teacher to terminate his service during the probationary period. Subsequently, three months' notice shall normally be given by the employer after the completion of the probationary period. A teacher shall be liable to summary dismissal if he has been convicted of a criminal offence or if it appears to the management committee that he has committed a grave breach of duty."

41. Read on its own, this Termination Clause would appear to entitle the School to terminate in two situations:-

(1) First, where a teacher's service was unsatisfactory, one month's notice of termination of contract was to be given where a teacher was still under probation; thereafter three months' notice would be required.

(2) Secondly, summary dismissal was an option if the teacher was convicted of a criminal offence or if the teacher had committed a "grave breach of duty".

42. In respect of the 1991/1992 academic year, some changes were made to the applicable terms of contract (see para 9 above). Notable changes were made to the Termination Clause in the Conditions of Service insofar as termination by the School was concerned (the changes are again underlined for convenience):-

> "By School Management Committee Where a school management committee considers that the service of a teacher is unsatisfactory, even after due warnings, both oral and written, have been given, one month's notice shall be given to the teacher to terminate his service during the probationary period. Subsequently, three months' notice shall be given by the employer after the completion of the probationary period. Where it is considered necessary to terminate a teacher's appointment for causes other than unsatisfactory service the fore-going period of notice should apply. In the case of teachers with more than five years' service every effort should be made to give a longer period of notice. A teacher shall be liable to summary dismissal if he has been convicted of a criminal offence or if it appears to the management committee that he has committed a grave breach of duty."

43. The first change was to make a reference to oral and written warnings in the case of unsatisfactory service. The Conditions of Service, however, make no other reference to warnings, but the COA does. In my view, those added words reinforce the conclusion that the provisions in the Conditions of Service regarding termination of contract must be read

together with the applicable provisions in the COA. I shall expand on this conclusion below (see para 63 below).

44. The second change was to make provision for another situation (on top of the two set out in para 41 above) in which the School could terminate a teacher's employment: where it was considered necessary to terminate the employment for a reason other than unsatisfactory service, the same periods of notice would be applicable. On its own, this change at first sight appears to have odd consequences. While ostensibly providing a third situation in which the contract of employment could be terminated by the School, it nevertheless gave the School exactly the same right to terminate as in the situation where there was unsatisfactory service. In other words, it had the consequence of making the unsatisfactory service ground otiose: whether or not there was unsatisfactory service, the School could still terminate as long as the requisite notice was given. Given the odd consequences (as I have described it), one may question the intention behind these changes. I believe it is yet another example of the intention to bring in provisions contained in the COA and again provides further support for the conclusion that it is necessary for the Conditions of Service here to be read alongside the provisions in the COA (see also para 63 below).

45. The third change was to provide that where a teacher had completed over five years of service, every effort should be made to provide a longer period of notice.

46. This amended Termination Clause (with the added words) remained in the Conditions of Service until the 1999/2000 academic year when (again for reasons never explained), the reference to termination for causes other than unsatisfactory service were deleted (that is, the words "Where it is considered necessary to terminate a teacher's appointment for causes other than unsatisfactory service the fore-going period of notice should apply"). The Termination Clause for the 1999/2000 year therefore read as follows:

> "By School Management Committee Where school management committee considers that the service of a teacher is unsatisfactory, even after due warnings, both oral and written, have been given, one month's notice shall be given to the teacher to terminate his service during the probationary period. Subsequently three months' notice shall be given to the teacher after the completion of the probationary period. In the case of teachers with more than five years' service, every effort should be made to give a longer period of notice. A teacher shall be liable to summary dismissal if he has been convicted of a criminal offence or if it appears to the management committee that he has committed a grave breach of duty."

47. Regarding the Termination Clause as a whole, in view of her finding that only one month's notice needed to be given by the defendants to terminate the plaintiff's employment, Chu J did not find it necessary to make any findings with regard to this (or indeed any other) possible means of terminating the contract. The Court of Appeal, on the other hand, regarded the Termination Clause to be of some importance and the deletion of the words (providing for what I have called the second change: para 44 above), critical.

48. Tang Ag CJHC was of the view that the Termination Clause effectively overrode the terms of the COA, so that unless there was a

termination of employment by the defendants under that clause, the plaintiff's contract would remain in force until he reached the retirement age of 60. The Court of Appeal was of the view that the contract remained in force in this way since, as Tang Ag CJHC noted, there was no finding by the trial judge that the plaintiff's employment in fact had been terminated under the Termination Clause (whether as a result of unsatisfactory service or a summary dismissal).

49. The Court of Appeal regarded the deletion of the additional words for the 1999/2000 year as critical in demonstrating that the parties thereby intended that the provisions in the COA regarding termination would not be incorporated into their contract. In para 56 of the judgment of the Court of Appeal, Tang Ag CJHC said this:-

> "56. The additional sentence was omitted for the year 1999/2000. The learned judge's conclusion that there was no provision for termination without cause was based on the termination clause in the Conditions of Service of 1999/2000 which did not contain the additional sentence. In such circumstances, should I regard clause 56(c) as having been incorporated into the plaintiff's contract of service? I believe its omission from the 1999/2000 conditions is significant, and is inconsistent with the incorporation of clause 56(c) into the Conditions of Service."

50. This conclusion of the Court of Appeal (that the terms of the COA dealing with termination of employment were not incorporated into the contract between the plaintiff and the defendants) is one with which I am unable to agree. It is therefore necessary now to deal with the COA in this regard.

E.2 ***The COA***

51. I start by reiterating the importance of this document in the overall context of aided schools in Hong Kong, of which the School was one. Aided schools must comply with the Code in the way they are managed and conducted.

52. I accept, however, that in order for the COA to apply to the contract between the plaintiff and the defendants, its terms must as a matter of the law of contract be incorporated into that contract. In the present case, as we have seen, this does not cause any difficulties: see paras 6 and 7(3)(a) above. The more pertinent inquiry is a common one when terms of a document are incorporated into a contract: how are such terms to be construed when they are seen against the other terms expressly agreed by the parties?

53. Mr Edward Chan SC (for the defendants) referred to two authorities (both based essentially on *Adamastos Shipping Co. Ltd. v Anglo-Saxon Petroleum Co. Ltd.* [1959] AC 133) for the proposition that where the terms of an incorporated document contain provisions which conflict with the terms of a written document, the terms of the latter are to prevail. This, accordingly to Mr Chan SC, is also supported by the terms of the Other Conditions Clause: see para 7(3) above. As we have seen, that clause begins "Conditions other than what is listed above …".

54. I accept of course this general principle of construction, providing there is actual inconsistency between clauses. Where the exercise of construction becomes more problematic, however, is where there is no

outright conflict between the contractual terms written into a contract and those in the incorporated document. Here, the exercise confronting the Court is one of ascertaining the intention of the parties by looking at the language of the terms agreed by them and all relevant (and permissible) circumstances. To start with, a court should not readily be predisposed to finding inconsistencies between clauses. Instead, the first task of the court ought to be to see whether effect can be given to every clause in an agreement and to see whether clauses can be read together; only if the court cannot do this and there is actual inconsistency should there arise any question of whether a particular clause should prevail over another: see *Pagnan SpA v Tradax Ocean Transportation SA* [1987] 2 Lloyds Rep 342, at 353(2) (per Dillon LJ); Chilty on Contracts (30th ed) Vol 1 at para 12-078.

55. I now deal with the terms of the COA relating to the termination of a teacher's contract of employment. In considering this, it is important to place properly in context the relationship between the COA and a contract of employment entered into by the Management Committee of a school and a teacher. Although the COA does not have legislative force, as we have seen, it is a code which prescribes the conditions on which Government aid continues to be provided to an aided school. These conditions regulate aspects of teachers' employment contracts such as duration and termination (including dismissal). The parties to such a contract are aware of the COA when the contract is made and enter into it with the provisions of COA in mind. This is part of its factual setting. It therefore makes sense to read such a contract as if it was entered into so as to give effect to the provisions of the COA so far as that is possible. As Bingham LJ (as he then was) observed in *Pagnan (*referred to in the

previous paragraph) at 348(1) : "The task of the Court plainly is to construe the special condition fairly in the context of the contract as a whole and in its factual setting in order to ascertain the true intention of the parties".

56. The COA contains detailed provisions regarding both the appointment of a teacher and the termination of employment. Clause 46(a) of the Code is in the following terms:-

> "Appointment and Dismissal of Staff
>
> 46.(a) Appointment and dismissal of staff shall be in accordance with regulations 76, 77 and 78 of the Education Regulations 1971, in conformity with this Code of Aid and in accordance with such instructions as the Director [of Education] may from time to time issue."

We have not been provided with Regulations 76, 77 and 78 of the Education Regulations nor any instructions issued by the Director of Education. We are told that they do not feature in the present case.

57. In relation to the specification of a period of employment of a teacher, as we shall see below, the COA does not in my view forbid it as such. In the present case, however, on the basis of the contractual documents, this may not matter, for what is at issue is not whether the contract of employment can or cannot be one of a specified period, but more importantly, how that contract can lawfully be terminated.

58. The plaintiff places much reliance on clauses 54(b) and 55 of the COA to support his submission (which found favour with the Court of Appeal) that the contract was a permanent one:-

> "Contract of service; letter of appointment
>
> 54. (a) A teacher shall, on appointment to an aided school, be furnished with a contract of service and, in addition, or alternatively, a letter of appointment. Such contract of service or letter of appointment shall be signed by the Supervisor of the school or other member of the Management Committee authorized to sign on its behalf, and shall be countersigned by the teacher on appointment.
>
> (b) Such contract of service or letter of appointment shall not be subject to annual renewal, but may specify a period of time to which its terms and conditions shall refer.
>
> ….
>
> 55. A teacher on first appointment to an aided school shall serve a probationary period of two years, after which the employment of such teacher shall be permanent, subject to such provisions regarding termination of employment as may be contained in such teacher's contract of service or letter of appointment."

It is to be noted that the Appendix 18 of the COA (headed "Teaching Staff's Contracts in Aided Schools") repeats the term that a contract "shall not be subject to annual renewal".

59. For their part, the defendants emphasize the following:-

(1) The period of employment specified in the Conditions of Service, which, for the final year of the plaintiff's employment, can be taken as from 1 September 2000 to 31 August 2001.

(2) Reference was also made to clause 56(d) of the COA which assumes that a contract for a fixed term is possible. Clause 56(d) states:-

> "A teacher employed for a period of not less than two years as specified in a contract of service or letter of appointment shall, at least three months before the expiry of such specified period, inform the Management Committee of the school whether or not he wishes to seek a renewal of the contract of service. The Management Committee of an aided school shall similarly, at least three months before the expiry of such specified period, inform the teacher whether or not it intends to propose renewal of the contract of service relating to his employment."

60. Both sides have respectable arguments in support of their position as to whether or not it is possible to have a contract of employment for a stated period. As will presently become clear, it is not strictly necessary to resolve the differences because it does not matter in the present case, but, as this aspect of the case has been dealt with by both courts below, I feel it incumbent on me to state my own views:-

(1) Clause 56(d) is, in my view, clear in the assumption that a period of employment can be specified in a teacher's contract. This was after all the point of using the words in the Conditions of Service "Period of Employment". These words on their face could not be clearer.

(2) I accept that there are two references in the COA to contracts not being "subject to annual renewal". However, clause 54(b) does not just contain those words but continues with "but may specify a period of time to which its terms and conditions shall refer".

(3) The Court of Appeal was of the view that these words only had the effect of specifying the time during which terms or certain terms of the contract would be applicable. In this way, the period of employment stated in the Conditions of Service "might be a reference to the period during which those conditions would apply" (para 42 of Tang Ag CJHC's judgment).

(4) For my part, I can see the attraction of this argument but I think a more likely meaning to be placed on clause 54(b) is that it was intended that contracts of employment of teachers would not necessarily be subject to annual renewal but that would not prevent the parties agreeing a specific period of employment. After all, it may be that the teacher himself (whatever the position as far as a school being able to terminate the employment was concerned) may wish to have only a limited duration to his employment. It will be recalled that under clause 56(d) of the COA (see para 59(2) above), it is expressly envisaged a teacher may wish not to renew his contract of employment.

(5) The Court of Appeal also referred to Clause 55. The word "permanent" is of course important but it is clear that it cannot literally have this meaning:-

(a) First, even on the plaintiff's own case, the contract could only last until he reached retirement age. Clause 57 of the Code stipulates that a teacher must retire at 60.

(b) Secondly, Clause 55 also contains qualifying words, namely, "subject to such provisions regarding termination of employment as may be contained in such teacher's contract of service or letter of appointment". These words are of crucial importance in that it qualifies the word "permanent" by subjecting it to the terms of contract regarding termination of employment. This aspect, of course, is the crucial issue. As we shall see, the termination of the contract of employment can be by several means, including the giving of notice or the non-renewal of a contract. The latter situation (contained in clause 56(d) of the COA), as we have seen, assumes that a contract can be of a fixed duration.

61. Clause 56, together with Appendices 17 and 18 to which it refers, is the principal provision in the COA dealing with termination of contract. These provisions should be set out in full:-

"56. (a) The employment of a teacher who is serving a period of probation shall be terminable by the giving of one month's notice either by the Management Committee of the school at which such teacher is employed, or by the teacher.

(b) The employment of an unqualified teacher under the terms of Section 53 of this Code of Aid shall be terminable by the giving of one month's notice either by the Management Committee of the school or by the teacher, subject to such provisions regarding termination of employment as may be contained in such teacher's contract of service or letter of appointment.

(c) The employment of a teacher who has satisfactorily completed a probationary period, shall be terminable by the giving of three months' notice in writing by the Management Committee of the school or by the teacher.

(d) A teacher employed for a period of not less than two years as specified in a contract of service or letter of appointment shall, at least three months

before the expiry of such specified period, inform the Management Committee of the school whether or not he wishes to seek a renewal of the contract of service. The Management Committee of an aided school shall similarly, at least three months before the expiry of such specified period, inform the teacher whether or not it intends to propose renewal of the contract of service relating to his employment.

(e) A teacher who terminates his employment without having given such notice of intention so to terminate as may be required by the terms of this Code of Aid or of the contract of service or letter of appointment relating to his employment, shall be liable to pay one month's salary in lieu of notice to be credited to the school's Salaries Grant Account. Nevertheless, the Management Committee may waive the said payment if the teacher's explanation is justified and inform the Director of such a waiver and the reasons thereof.

(f) A school Management Committee may, subject to the approval of the Director, suspend a teacher from his normal duties on half pay for a period of not exceeding 14 days under the following circumstances : -

(i) in cases where criminal proceedings of a serious nature have been, or are likely to be instituted;

(ii) in cases where the teacher's serious misconduct is under investigation and it would be against the interest of the school for him to continue to teach in the classroom.

In case of (i), where the criminal proceedings are not concluded within 14 days, the period of suspension on half pay may be extended till the end of such proceedings.

(g) A school Management Committee shall only dismiss a teacher for good and sufficient reasons (see Appendices 17 and 18). A teacher shall be liable to summary dismissal if it appears to the Management Committee that he has been convicted of a criminal offence or has committed a grave breach of duty."

….

"Appendix 17

Procedure to be followed in case of Dismissal or Termination of Appointment of a Teacher

The procedure to be followed by the School Management Committee should be as follows :

(a) The teacher concerned should be given a warning, or warnings that his work is unsatisfactory. This should be recorded in the school of files.

(b) If no improvement in the teacher's work is noticeable after an appropriate period then a formal written warning embodying relevant criticisms should be given to the teacher, and a copy of this letter should be forwarded to the Director for information. This should be recorded in the school files.

(c) On receipt of this letter the Director of Education shall investigate the circumstances.
(d) If the teacher after receiving the warning letter still shows no improvement after an appropriate period, normally not less than one month, and the Management Committee intends to dismiss him or not to renew his contract after the date of expiry, the Supervisor shall so inform the Director.
(e) In each case of dismissal of a teacher, a sufficient period of notice of termination of employment must be given in accordance with Section 56."

"Appendix 18

Teaching Staff's Contracts in Aided Schools

1. School's entering into a contract with a teacher immediately after probation.
   The school should enter into a contract with a teacher immediately after his two years of probationary period. The contract shall not be subject to annual renewal.
2. Dismissal/Termination of appointment of a teacher after probation
   The procedures relating to Dismissal or Termination of Appointment of a teacher as spelt out in Appendix 17 should be observed strictly.
3. Dismissal/Termination of Appointment of a teacher in the middle of the academic year during probationary period
   The procedures relating to Dismissal or Termination of Appointment of a teacher as spelt out in Appendix 17 should be observed strictly.
4. Dismissal/Termination of Appointment of a teacher at the end of the first and second academic year during probationary period
   If a teacher is still found by the school Management Committee to be performing his duties in an unsatisfactory manner (including personality, character and philosophy of education), and showing no improvement in his work after being advised, the school can opt for any one of the following three measures :
   either
   (a) To follow the procedures with regard to Dismissal or Termination of Appointment of a teacher as spelt out in Appendix 17.
   or
   (b) A verbal warning can be given to the teacher by the Principal. The content of the warning should be noted down in the school record for future reference. The teacher, to whom the warning is given, may note down the content of the warning for his own reference and improvement.
   or
   (c) After informing verbally the teacher of his shortcomings , the Principal may serve the teacher a written letter, listing the weaknesses

mentioned in their discussion, and may ask the teacher to sign in acknowledgement of the letter.

For schools opting for (b) or (c), the following points should be observed :

(i) It is unnecessary for the school to notify the Director of Education of such verbal warning(s). However, the record(s) should be made available for inspection by the officers of the Education Department, if and when required.
(ii) The written letter should be copied to the Education Department for record purposes. The Director of education may investigate at the request of the teacher concerned.
(iii) If the teacher concerned takes no notice of the verbal warning(s), the school Management Committee may terminate the appointment of the teacher by giving one month's notice at the end of the school year."

62. Although the side margin of clause 56 states "Termination of employment", this clause deals not only with termination but also with renewals of contract (clause 56(d) and (e)) and suspension (clause 56(f)). This clause is a pivotal one in the present case as it deals with how a contract of employment can be terminated, the precise matter to be determined under Issue 1.

63. Before dealing with the meaning of clause 56, I ought first to deal with how this clause can be reconciled with the Termination Clause earlier discussed. It will be recalled the Court of Appeal decided that the Termination Clause in the Conditions of Service somehow overrode the provisions in the COA (the Court of Appeal was addressing specifically only clause 56(c) of the COA) and this was by reason of the deletion of the additional words in the 1999/2000 renewal: see paras 47 to 49 above. An argument in support of this view might also be made on the basis of the "Other Conditions" clause in the Conditions of Service: see para 7(3)(b)

above. In my judgment, however, as a matter of construction, this is not the position:-

(1) Far from the Termination Clause in the Conditions of Service overriding the termination terms of the COA (or even excluding them as the Court of Appeal held), the position is quite the contrary.

(2) Clause 54(c) of the COA requires certain matters to be specified in the contract of employment between the teacher and the school:-

"54 (c) Such contract of service or letter of appointment shall specify :-

(i) the name of the school and of the employer, this being the Management Committee or, if any school has only one manager, that manager;
(ii) the date from which the appointment is to have effect;
(iii) requirements, if any, relating to probation;
(iv) the salary to be paid on commencement of the appointment, and any salary scale relating to the post including the annual incremental date;
(v) whether such teacher is to contribute to a provident fund; and if so, what such contribution shall be;
(vi) the entitlement of such teacher to paid sick leave or maternity leave;
(vii) the minimum period of notice of termination of the contract to be given by either party wishing to terminate such contract as specified under Section 56;
(viii) the conditions relating to payment of salary on the resignation or dismissal of such teacher as specified under Section 56 and in the case of a teacher recruited overseas, conditions relating to recovery of cost of passage;
(ix) that such teacher shall act in accordance with the terms of the Education Ordinance and of subsidiary legislation made under that Ordinance, of this Code of Aid and of such instructions as the Director may from time to time issue regarding the conduct of aided schools."

(3) Of particular note is the requirement in clause 54(c)(vii) to state the minimum period of notice "as specified in clause 56 of the COA".

(4) In my view, all that the Termination Clause seeks to do (whether in its original form or as amended) is to repeat (albeit in abbreviated form) the notice of termination requirements in clause 56 of the COA. It is an attempt to comply with clause 54(c)(vii) of the COA and was not intended to be inconsistent with it. Thus, the references to unsatisfactory service, warnings (both oral and written), the period of notice and summary dismissal are all referable to the corresponding sub-paragraphs in clause 56: see clauses 56(c), 56(g) and Appendices 17 and 18 of the COA.

(5) Accordingly, as a matter of construction, the Termination Clause in the Conditions of Service ought to be read together with clause 56 of the COA. It is clear that clause 56 is more extensive than the Termination Clause; there is no reason for the provision in clause 56 to be cut down. Moreover, it is difficult to understand the Termination Clause without reference to clause 56: for example, the reference in the Termination Clause to *both* oral and written warnings is put properly into context (and given meaning) when one looks at the procedures involving oral and written warnings contained in Appendix 17 of the COA. As stated earlier (para 43), the Conditions of Service do not contain any other references to a system of both oral and written warnings.

(6) The Court of Appeal did not deal with the question whether or not the Termination Clause should be construed together with clause 56. It is doubtful whether the parties addressed this matter before the Court of Appeal (neither counsel really

addressed this before us either). The Court of Appeal focused on clause 56(c) and held that owing to the deletion of the additional words for the 1999/2000 year (which referred specifically to the giving of three months' notice), this was inconsistent with the incorporation of clause 56(c) as a term of contract. Had the Court of Appeal been invited to consider the relationship between the Termination Clause and clause 56 in the way analyzed above, they may well have come to a different conclusion. It is to be noted that Tang Ag CJHC said in para 57 of his judgment that he arrived at his conclusion (that clause 56(c) had not been incorporated into the contract between the parties) "with hesitation".

(7) I accept it remains a mystery why the additional words were deleted in the Conditions of Service for the 1999/2000 academic year. This is little point, however, in speculating. The main exercise for the Court is to construe the terms that remain.

64. I now come to the effect of clause 56.

65. In my view, this clause in the COA has the following effect:- where the School wishes to terminate the employment of a teacher (whether on probation or after the teacher has served the two year probationary period or in the case of an unqualified teacher), except where the summary dismissal provisions apply, it can *only* do so for "good and sufficient reasons" in accordance with clause 56(g) and Appendices 17 or 18 (as the

case may be). There can, accordingly, as far as the School is concerned, be no termination of a teacher's contract either by effluxion of time or simply by the giving of a period of notice (these two methods being those submitted to be applicable by the defendants):-

(1) Clauses 56(a) to (c) set out the requisite periods of notice to be given in the case of teachers on probation, unqualified teachers and teachers who have satisfactorily completed their two year probationary period (such as the plaintiff). The defendants rely in particular on clause 56(c) for the simple proposition that it means what it says: once a teacher has completed his probationary period, he can be dismissed by the School merely by giving three months' notice. No reason is needed. This, according to the defendants, is perfectly consistent with clauses 46(a), 54(b) and 55.

(2) The defendants' position is also of course that by reason of the period of employment provisions contained in the Conditions of Service (having the effect of stipulating a one year period), the contract of employment in any event automatically terminated after that one year had elapsed by effluxion of time.

(3) Clause 56(d), although not directly relevant in that it is not relied on by the plaintiff or the defendants in the present case, states that where a teacher is employed for a period of not less than two years, the teacher or the School (as the case may be) must give at least three months' notice before the expiry of the contract of employment of whether a renewal of the contract will be sought. Clause 56(e) deals with the situation where a teacher wishes to terminate but fails to give the requisite notice.

(4) So far, if confined only to these sub-clauses, I would be prepared to accept that the position under clauses 56(a) to (e) seems straightforward. However, when one comes to examine clause 56(g), the position under these clauses is put properly in context and a radically different complexion is then put on a school's ability to terminate a contract of employment.

(5) Clause 56(g) must be read together with Appendices 17 and 18 when ascertaining how the school may dismiss a teacher (it also deals with summary dismissal but, as stated above, we are not concerned with this at the moment). The sub-clause itself refers to dismissal for "good and sufficient reasons", but by reference only to Appendices 17 and 18.

(6) Appendix 17 is headed "Procedure to be followed in the case of Dismissal or Termination of Appointment of a Teacher". It is clear therefore that the procedure set out in that Appendix applies not only in the case of dismissal but also the termination of a teacher's appointment. This is important and makes clear the ambit of the application of that Appendix.

(7) Another clear indication of the ambit of the application of the procedures set out in Appendix 17 is given by sub-para (d) thereof. The reference in that provision not only to a dismissal situation but also to the non-renewal of a contract is a clear statement that the procedures are applicable in both these situations. In order to make sense of the reference to non-renewal, it can only be assumed the parties must have intended that, as far as a school is concerned, but for the application of the procedures in that Appendix (resulting from unsatisfactory

work), a contract of employment would be automatically renewable. I say that this is only as far as the school is concerned because Appendix 17 only applies where a school wishes to dismiss or terminate a teacher's employment (and not when a teacher wishes to terminate). In my view, this is the only sensible way in which some meaning can be given to the reference to non-renewal. If, as the defendants contend, the contract of employment could be terminated by simple effluxion of time, why then (rhetorically speaking) would there be a need to refer to non-renewal in this sub-paragraph? It would simply not make any sense.

(8) Accordingly, the Scheme of Appendix 17 must be as follows:-

(a) As the title of the Appendix states, it is applicable whenever a school wishes to dismiss a teacher or terminate his employment.

(b) Termination of employment includes the situation where the school does not wish to renew a teacher's contract.

(c) Dismissal or termination (including non-renewal) can only take place where a teacher's work is unsatisfactory, in the context of Appendices 17 and 18. Apart from the circumstances which justify a summary dismissal, this then is the only reason that can be used by a school. It does not permit a dismissal or termination without cause.

(d) After the various warnings (referred to in sub-paras (a) and (b)) have been given to the teacher concerned and the teacher still shows no improvement after an appropriate

period, the school may dismiss him or terminate his employment. Should the school decide to do this, then a sufficient period of notice of termination of employment must be given in accordance with clause 56.

(e) This latter requirement (to give notice) puts into proper context the periods of notice identified in clause 56:- as far as a school wishing to dismiss or terminate a teacher's employment is concerned, they are not self-standing but come into play only when the Appendix 17 procedures have been complied with.

(f) I draw attention again to the decision of the Court of Appeal in *Chan Chi Loi v Cheng For and others*, in which there were some discussion over the effect of clause 56(g) of the COA. As we have seen (para 13 above) one of the issues in the appeal was whether the COA was incorporated into the contract between the parties. Although the court, by a majority, held that the COA was not incorporated (so that the fixed period contract in that case expired by effluxion of time), all three members of the court went on to consider the position under the COA. The court unanimously concluded that if clause 56(g) applied, the school in that case had complied with it, thereby providing an additional reason enabling the school in that case to terminate the contract. The school had also relied on clause 56(c) (the three months' notice provision) to justify a termination without cause. Cheung JA (at

para 10 of the judgment) was of the view that clause 56(c) had to be read subject to clause 56(g), and could only be invoked in circumstances other than unsatisfactory work. Yuen JA, while not deciding the issue, nevertheless observed (in para 103) that if clause 56(c) could effectively be self-standing (in that three months' notice need only be given to terminate), then clause 56(g) would be "practically ineffectual", since Appendix 17 (which is brought in by clause 56(g)) required the notice previously referred to in the rest of the clause 56 to be given only after the other steps in the Appendix had been complied with. In other words, put bluntly: what would be the point of clause 56(g) if all that a school had to do to dismiss or terminate was to invoke clause 56(c) by giving three months' notice? On the whole, I respectfully agree with these observations. Where I differ is the view of Cheung JA that clause 56(c) can apply where unsatisfactory work is not involved. As seen from my analysis above, unsatisfactory work is the *only* reason permitted under the COA for a school to dismiss or terminate an employment (other than the summary dismissal provisions). Cheung JA referred to the example of where a school wished to terminate an employment owing to a drop in student enrolment. In my view, this is not a ground on which a school can simply use clause 56(c) to terminate. It may be that in these circumstances, the Director of Education may have to

issue instructions under clause 46(a) of the COA (see para 56 above).

(9) I should also make an observation about the role of the Director of Education in Appendix 17. Notwithstanding the requirements of para (c) of the Appendix, I am of the view that it is not a pre-requisite before a school is able to dismiss or terminate the employment of a teacher that the Director of Education should have investigated the matter. Nothing in sub-para (d) makes this a requirement. The role of the Director of Education is stated in sub-paras (b) and (c): a copy of the warning letter should be given to the Director and the Director shall then conduct an investigation. It should be remembered here that the COA not only sets out applicable terms of contract between a teacher and a school, it also sets out the relationship and obligations between an aided school and the Government (see clauses 1(a) and 3 of the Introduction to the COA: para 15 above).

(10) I have so far been dealing only with the position of teachers such as the plaintiff. Appendix 18 deals with the applicable procedures in relation to the dismissal or termination of employment of teachers who are on probation. It is, however, of note that para 2 of Appendix 18 emphasises the importance of Appendix 17, stating that it "should be observed strictly".

66. Where of course a teacher wishes to terminate, the relevant notice provisions in clause 56 apply. That is not the position in the present

case where it was the School which purported to dismiss or terminate the plaintiff's employment.

67. The effect of the construction I have placed on clause 56 is admittedly to limit the circumstances under which a school can lawfully dismiss or terminate the employment of teachers like the plaintiff. It is entirely consistent with and complements clauses 46(a) and 55 of the COA. And given these limited circumstances, it matters not (as stated in paras 57 and 60 above) whether or not contracts for a stated term are or are not permitted under the terms of the COA because even if they are permitted, there cannot be any termination by effluxion of time (only as far as the school is concerned) unless the terms of Appendix 17 are complied with. This effectively disposes of the defendants' argument that the contract of employment came to an end in any event by effluxion of time.

68. As to Mr Chan's alternative argument that even if the contract did not terminate by effluxion of time, it could nevertheless be determinable by giving three months' notice under clause 56(c) of the COA, this argument is not valid in light of the position that clause 56(c) is not a self-standing provision. It must seen together with clause 56(g): see para 65 above.

69. As his ultimate fallback position, Mr Chan argued that whatever the effect of the COA, its terms were to be read subject to and could not override the express terms of the written contract between the parties: see paras 7(3)(b) and 53 above. He principally referred to clause 54(b) and 55 of the COA to say that, whatever their effect, the period of

employment clause took precedence. The same argument could be made also in relation to clause 56 and Appendix 17 of the COA. But, in my view, this is not a valid argument.

70. There is no conflict between the period of employment clause and clause 56 (and Appendix 17): the former clause and the rest of the Conditions of Service are silent on renewals, whereas clause 56(g) and Appendix 17, as I have already analyzed, do specifically deal with renewals (or, more accurately, non-renewals). This is also consistent with the relevant Termination Clause (see para 46 above) which refers only to unsatisfactory service as the reason for termination of employment (apart, of course, from the summary dismissal provision).

71. I am fully aware that the effect of the above construction of the employment contract is to provide a substantial measure of protection to the plaintiff and other teachers in his position. This appears to me, however, to be the policy behind the COA: teachers are afforded a sizeable measure of security in their employment. I am of course referring to the position of full time teachers: the position of supply teachers and temporary teachers hired on a monthly basis are in a different position: see clauses 29 and 30 of the COA.

72. By reason of the foregoing, I am of the view that under the contract between the plaintiff and the defendants, unless the defendants can show that clause 56(g) of the COA is applicable - and this means that it will have to be shown that the requirements of Appendix 17 have been fulfilled –

the plaintiff's dismissal from the defendants' employment would have been unfair and in breach of contract. The defendants cannot just rely on the contract being terminated either by effluxion of time or by the giving of three months' notice under clause 56(c) of the COA. This is of course subject to the defendants' argument based on the Employment Ordinance, to which I now turn.

E.3 *The Employment Ordinance*

73. Sections 5(1) and (2) and 6(1) and (2) of the Ordinance provide as follows:

> "5. Duration of contracts of employment
>
> (1) Every contract of employment, which is a continuous contract, shall, in the absence of any express agreement to the contrary, be deemed to be a contract for 1 month renewable from month to month.
> (2) Notwithstanding that it is proved that a contract of employment is for a period in excess of 1 month such contract shall be deemed to be a contract for 1 month renewable from month to month unless the contract is evidenced in writing signed by each of the parties thereto.
>
> ….
>
> 6. Termination of contract by notice
>
> (1) Subject to subsections (2), (2A), (2B), (3) and (3A) and sections 15 and 33, either party to a contract of employment may at any time terminate the contract by giving to the other party notice, orally or in writing, of his intention to do so.
> (2) The length of notice required to terminate a contract of employment shall be -
> (a) in the case of a contract which is deemed by virtue of the provisions of section 5 to be a contract for 1 month renewable from month to month and which does not make provision for the length of notice required to terminate the contract, not less than 1 month; *(Amended 44 of 1971 s 2)*
> (b) in the case of a contract which is deemed by virtue of the provisions of section 5 to be a contract for 1 month renewable

> from month to month and which makes provision for the length of notice required to terminate the contract, the agreed period, but not less than 7 days; *(Added 44 of 1971 s 2)*
>
> (c) in every other case, the agreed period, but not less than 7 days in the case of a continuous contract.

74. The defendants' submissions were concisely put by Mr Chan:-

(1) The final year of the plaintiff's employment at the FK-LMST School (the 2000/2001 academic year) were on the terms as evidenced by the minutes of the 8 August 2000 meeting (para 21 above). These minutes were, however, not signed by the plaintiff.

(2) Accordingly, since there was no contract evidenced in writing signed by each of the parties, by reason of s 5(2) of the Ordinance, the contract between the parties was to be deemed a contract renewable from month to month.

(3) And further, by reason of s 6(2)(a), the contract of employment was terminable by the giving of one month's notice. Alternatively, if the terms of the COA were incorporated into the contract, clause 56(c) required only 3 months notice to be given to terminate, and therefore s 6(2)(b) applied.

75. Chu J held that s 6(2)(a) of the Ordinance applied in the present case. She agreed with the defendants' submission that the contract between the plaintiff and the defendants for the final year was not evidenced in writing. She also held that the terms of the COA were not incorporated into the contract except insofar as they set out only the plaintiff's obligations and no more: see para 14 above. The consequence of this narrow view of the

applicability of the COA meant that the provisions contained in clause 56 of the COA regarding the requisite period of notice were therefore not incorporated, meaning then that the contract did not contain any provision for the length of notice to be given. As the defendants (through the letter dated 13 July 2001from their solicitors) had given one month's notice, the learned judge concluded that the contract had been lawfully terminated under the Employment Ordinance.

76. The Court of Appeal did not specifically address the position under the Ordinance. However, it is tolerably clear the Court of Appeal must have held that in view of the applicability of the Termination Clause (see para 48 above), the contract between the parties did make provision for the termination of contract. Accordingly, s 6(2)(a) would have no application. And, as there had been no findings based on the Termination Clause (there were no findings in relation to either unsatisfactory service or summary dismissal: para 48 above), presumably the Court of Appeal would have found s 6(2)(b) of no application as well.

77. In my view, this aspect of the case can be quickly disposed of:-

(1) First, s 5(2) has no application. It is clear from the findings of the trial judge and the Court of Appeal that the final year of the employment was to be on the same terms as for the 1999/2000 academic year (with some additional terms as shown by the Minutes of the 8 August 2000 meeting). Although the minutes of that meeting were not signed, the contractual documents for the 1999/2000 year were. In these circumstances, I would say

that on the facts, the contract for the final year was evidenced by documents that were signed.

(2) Secondly, in case there is any doubt as to this view, the contract between the parties quite clearly (for the purposes of s 6(2) of the Ordinance) made provision for the termination of the contract including the giving of notice. To this extent, I would agree with what I take to have been the Court of Appeal's reasoning, although it can be seen that I have substantially differed on what were the applicable terms of contract enabling the defendants to dismiss or terminate the contract of employment. The critical question therefore remains: did the defendants dismiss or terminate the employment lawfully under the contract?

(3) The Employment Ordinance therefore has no application, other than to underline the importance of the critical question. Certainly, the contract of employment in the present could not be terminated merely by giving one month's notice.

E.4 *Conclusion on Issue 1*

78. The Employment Ordinance not having any application, the issue of lawful determination of the contract of employment must therefore be decided by looking at the relevant terms of the contract between the plaintiff and the defendants. Here, I would repeat my view that the contract of employment could only be terminated with reference to the procedures in clause 56(g) and Appendix 17 of the COA (unless the summary dismissal provisions applied). It is to be noted that in the present case, that is what the

defendants in fact purported to do. In allowing the appeal, the Court of Appeal held that there had been a wrongful termination and ordered that the case be remitted to the trial judge for an assessment of damages. The basis for the Court of Appeal finding that there had been a wrongful termination was that it was of the view that the employment of the plaintiff was a permanent one (lasting until he reached the age of 60). The Court of Appeal noted in para 46 of Tang Ag CJHC's judgment that there had been no finding by the trial judge as to whether or not the contract of employment had been lawfully terminated by the defendants, whether as a result of the unsatisfactory service or summary dismissal.

79. In view of the conclusion I have reached – subject to the determination of Issue 2 – the proper order to make would be to remit the matter to the trial judge for a determination, in the light of this judgment:-

(1) As to whether the contract of employment had been lawfully terminated by the defendants. This would mean an investigation as to whether the terms of clause 56(g) and Appendix 17 of the COA were complied with by the defendants (including whether he had been summarily dismissed). If there had been a lawful termination by the defendants, the action must be dismissed.

(2) If there was a wrongful termination, as to the damages that should be awarded to the plaintiff. Here, as with all such exercises, the assessment of damages must necessarily be on a somewhat speculative basis. For example, the court must consider aspects of mitigation. Or, where there has been a

breach of contract, the court can assess on the basis that the party in breach would be taken to have exercised any power he had to bring the contract to an end in the way most beneficial to him: see *Gunton v Richmond-Upon-Thames London Borough Council* [1981] Ch 448 at 469C-D. In the present case, the court might have to consider whether, even if the requirements of clause 56(g) and Appendix 17 had not actually been fulfilled (the matter to be determined under sub-para (1) above), that clause and Appendix was relevant in the assessment of damages. This would require the court (when looking at Appendix 17) to see whether the plaintiff's work had been unsatisfactory, if so whether warnings could have been given, (as required by paras (a) and (b) of the Appendix), whether the plaintiff might have made any improvement and finally, taking into account the requisite period of notice to be given. The object would of course be to calculate the appropriate period when the plaintiff could be expected to be paid his salary until his contract of employment would have been terminated. Even if looking at clause 56(g) and Appendix 17 is not the appropriate method of assessment, the judge will of course take into account other factors. I note that in her Judgment in dealing with the issue of damages, the learned judge made a number of observations (see paras 258-263 of the Judgment).

80. Before leaving this Issue, I should just make one final observation. The contractual terms this Court has had to construe were poorly drafted. Both courts below also had difficulties in the exercise of construction. Even in a poorly drafted contract, the Court must construe every relevant term and try to ascertain the true intention of the parties. The reconciling of seemingly contradictory terms will often be required, but the object of the exercise is to ascertain the probable and sensible intention of the parties, given the context of their relationship. In doing so, a court would be justified, in a poorly drafted contract, not to pay too much regard to semantic niceties: see *Mitsui Construction Co. Ltd. v Attorney General* [1987] HKLR 1076, at 1082G (per Lord Bridge of Harwich).

81. I now turn to Issue 2.

F Issue 2: Does the prosecution of the present action constitute an abuse of the process of the Court?

82. The abuse that is known as the *Henderson v Henderson* abuse (or *res judicata* in the wider sense – the nomenclature is not important) is derived from the case of that name. It has been developed and explained by the House of Lords in *Johnson v Gore Wood & Co*. (a firm) [2002] 2AC 1, by the Judicial Committee of the Privy Council in *Yat Tung Investment Co. Ltd. v Dao Heng Bank* and *Brisbane City Council v Attorney General for Queensland* [1979] A411, by the English Court of Appeal in *Bradford and Bingley Building Society v Seddon* [1999] 1WLR 1482 and by our Court of Appeal in *Ngai Few Fung v Cheung Kwai Heung* [2008] 2HKC 111 and

Chiang Lily v Secretary for Justice [2009] 6HKC 234. The essence of the doctrine is that a party ought generally not be permitted to raise in subsequent proceedings matters which that party could and should have raised in earlier proceedings.

83. For reasons that will become evident presently, it is unnecessary in order to resolve this part of the appeal to go into the precise ambit of the principles regarding this form of abuse, although for my part, I would say that the present state of the law is reflected by the decision of the House of Lords in *Johnson v Gore Wood* and of the Court of Appeal in *Chiang Lily v Secretary for Justice*. For present purposes, it is sufficient just to refer to the following facets of the doctrine:-

(1) The starting point is to recognize that the doctrine is founded on an abuse of process. As Lord Wilberforce said in *Brisbane City Council v Attorney General for Queensland*, "it ought only to be applied when the facts are such as to amount to an abuse: otherwise, there is a danger of a party being shut out from bringing forward a genuine subject of litigation" : at 425.

(2) This concern (that a party ought not lightly be deprived of the right to have serious matters litigated) was echoed by Lord Millet in *Johnson v Gore Wood* : at 59D-G.

(3) It must therefore be essential when striking out a claim on this basis (and thus preventing a litigation of that claim) that an abuse is found to exist in seeking to raise in subsequent proceedings claims or issues which could and should have been raised in earlier proceedings. This abuse will usually take the

form of the other party being "vexed" (or in some cases, the terms "oppressed", "unjustly harassed" or "unjustly hounded" are used) by the subsequent set of proceedings: *Johnson v Gore Wood* at 31A-B.

(4) The abuse can also take the form of the administration of justice being brought into disrepute: see *Chiang Lily* at 256D-G (para 58) referring to *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529. With the procedural reforms introduced by the Civil Justice Reform in 2009, the courts in Hong Kong must now, when exercising their procedural powers, increasingly bear in mind not just the parties before them in any particular litigation but also the position of other litigants in the court process. RSC O.1A r.1(f) states as one of the underlying objectives of the court's procedural powers under the Rules to be "to ensure that the resources of the court are distributed fairly".

(5) In examining aspects such as abuse, the court is concerned with balancing interests: not just those of the litigants before it, but also taking into account the other interests involved in the administration of justice. It is important therefore here to emphasise that when the court is dealing with the *Henderson v Henderson* type of abuse, it is not looking at an absolute bar to litigation such as issue estoppel or cause of action estoppel. On the contrary, in considering this type of abuse, the court is required to assess a number of factors and balance competing interests. See here, *Bradford and Bingley Building Society* at

1490F-H. It is also worth making the following observations at this juncture:-

(a) There is conceptually an important distinction between absolute bars such as issue estoppel and the type of abuse with which we are concerned. In the former situation, the party who seeks to re-litigate an issue or cause of action has already had his day in court, whereas in the latter situation, that party has not: *cf Johnson v Gore Wood* at 59D ("It is one thing to refuse to allow a party to re-litigate a question which already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which is not previously being adjudicated upon" per Lord Millett).

(b) The assessment of different factors and balancing competing interests can be said to be an exercise of a discretion. A number of decisions of the English Court of Appeal have cast doubt on whether the court does indeed exercise a discretion as such: see *Aldi Stores Ltd. v WSP Group Plc.* [2008] 1 WLR 748, at 762C-D (para 16) and *Stuart v Goldberg Linde* (a firm) [2008] 1 WLR 823, at 845E-846C (para 81). It is unnecessary for present purposes to decide whether or not a discretion is actually being exercised. The more important point to bear in mind is that an appellate court is obliged to pay sufficient regard to the decision of the court below and should be reluctant to interfere where the decision is based on the assessment or balancing of a number of

factors. Nothing in the two said cases suggests otherwise; in fact, quite the contrary.

84. The jurisdiction to prevent claims being litigated in proceedings is almost invariably exercisable by an application to strike out. It is true that an application to strike out can be made at any time: see RSC O.18 r.19(1). However, where an application is made to strike out proceedings or any part thereof on the basis that they should not be permitted to go to trial, it is obvious that such an application should be made at the earliest possible opportunity, before the parties and the court's resources are potentially wasted. Obviously, where a claim or defence is unsustainable as a matter of law, the timing of the application to strike out is less critical, but where a discretion (or something akin to it) exists as to whether or not a set of proceedings or any part thereof should be permitted to continue, time is important. In this latter situation, where proceedings may constitute an abuse on the basis that it would be vexatious for a court to try the case, the sooner this is dealt with the better; otherwise, the very evils sought to be avoided (the wastage of time and resources causing vexation or harassment of the other party) would continue to accumulate. The present case provides a glaring example of this.

85. In the speeches of Lord Bingham of Cornhill and Lord Millett in *Johnson v Gore Wood*, references were made to the importance of expedition in such a situation: at 34C-D and 61C-E. A delay in raising this point of abuse gives rise to a reasonable inference either that the relevant defendant is not really vexed at all by the second set of proceedings or has

acquiesced in it. It is certainly not acceptable from the point of view of the administration of justice.

86. The trial judge's decision to dismiss the plaintiff's claim on this basis was reversed by the Court of Appeal. A number of reasons were articulated in support of this conclusion, but I need only refer to one: the delay on the defendants' part to raise the point of abuse. It was not until the trial itself that the point was raised by the defendants that the action ought to be dismissed on the basis of abuse. An argument was made along the lines that the defendants had expressly in their pleadings reserved their position in this regard. Reference was made to paras 34 to 35 of the Re-Re-Amended-Defence. It is far from apparent that such a reservation was actually made in those paragraphs of the pleading but it matters not. Even if there was such a reservation, this did not justify the defendants waiting until such a late stage – it could hardly have been later – to make an application to strike out.

87. By the time Chu J was invited to deal with the issue, the parties were already fully prepared for trial on each of the issues raised in the action. In other words, there was an irony here that presented itself before the court: Chu J was asked to strike out the proceedings on the basis that the plaintiff ought not to be permitted to go to trial when at that stage, both parties (not to mention the Judge) had fully prepared themselves for a trial. By then, discovery had taken place, witness statements had been exchanged (including those of expert witnesses) and all other preparations on the assumption that a trial would take place, had been made. And yet, the judge was persuaded not only to deal with the strike out application but also to

embark on the trial itself. In my view, the Judge ought to have refused to deal with the abuse arguments and simply have dealt with the substantive issues in the action only. It was at that stage far too late to mount a strike out application on the basis of the abuse alleged. I reiterate the irony of an application to strike out to prevent issues being raised in subsequent proceedings which could and should have been made in earlier proceedings when in those very subsequent proceedings, both parties (and in particular, the party applying to strike out) were fully prepared to embark on a trial of those issues. This is not a situation where a late strike out application is made on the basis that no reasonable cause of action or defence existed. In that situation, a court may well find it appropriate to deal with the application: see, for example, *Tang Woung Shiu v Tang Kun Yeung* [2002] 3 HKLRD 627.

88. The Court of Appeal was of the view that it was far too late for the defendants to apply to strike out at the trial stage and that the Judge had failed to take into account this important factor. With respect, whatever were otherwise the merits of the application to strike out, I agree that the Court of Appeal was entitled to reverse the Judge's finding of abuse on this ground alone. This then provides the answer to the second issue for which leave was given by the Appeal Committee to appeal to this Court.

89. Before leaving this issue, I also ought to mention that at the hearing before us, Mr Chan sought to introduce an argument along the lines that there was also an issue estoppel following the settlement of the First Proceedings. Whatever the merits of this argument, this was, until it was

first raised before us, not an issue that had been raised before either the Court of First Instance or the Court of Appeal. Nor had it featured in the parties' respective Cases. Leave to appeal to this Court had not been given for this issue either. It was not pleaded in the defence (an estoppel must be pleaded: see Hong Kong Civil Procedure 2012 at para 18/8/11). This was not an argument that this Court was prepared to entertain.

G. Outcome of appeal

90. For the above reasons, I would allow the appeal only to the extent as indicated in para 79 above in terms of what should be remitted to the trial judge.

91. Nevertheless, as far costs are concerned, I am of the view that although the appeal has been allowed in part, the plaintiff has largely been successful in this appeal. While recognizing that the defendants have had to appeal to this Court, for my part, I would make an order *nisi* that the defendants pay to the plaintiff 75% of his costs, such costs to be taxed if not agreed. If any party wishes to have a different order for costs, written submissions should be served on the other party or parties and lodged with the Court within 14 days of the handing down of this judgment, with liberty on the other party or parties to lodge written submissions within 14 days thereafter. In the absence of such written submissions, the order *nisi* will stand absolute at the expiry of the time limited for these submissions.

Mr Justice Bokhary PJ:

92. I agree with the judgment of the Chief Justice and the observations of Mr Justice Chan PJ.

Mr Justice Chan PJ:

93. I agree with the judgment of the Chief Justice and the orders proposed by him for the disposal of this appeal. I would just like to make a few observations.

94. Teaching is an honourable vocation and teachers play a vital role in the education and upbringing of our younger generations. There are many who consider that it is important to provide greater protection for teachers in their employment in order to attract high quality people to join the profession. This concern is apparently shared by the education authority and is, to some extent, reflected in the relevant provisions of the Code of Aid as discussed in this appeal.

95. The Code is a somewhat unique document. It prescribes the rules and conditions in accordance with which the Government promotes education by means of grants to aided schools and such schools are to be managed and conducted in accordance with the Education Ordinance, Cap 279, its subsidiary legislation and this Code. In s 3 of the Ordinance, the Code is defined as a code issued by the Permanent Secretary for Education, under the terms of which the Government gives subsidies to certain schools. However, it does not have any legislative status since it was not issued under the rule-making power as provided in the Ordinance. But any school which

chooses to receive government subsidy is obliged to abide by the provisions in the Code, including those which touch on the relationship between the school and its teachers, such as the protection offered by the Code.

96. The Code is not satisfactorily drafted, to say the least. It was first issued in 1984; it contains over 120 pages (including appendices) and has been revised many times since then. It would also appear that changes had been made to the Code in a piecemeal manner, giving rise to inherent inconsistencies or even internal conflicts and thus creating difficulties in the understanding and construction of this document. This state of affairs has been subject to criticisms by the lower courts in this case and in the cases mentioned above. In my view, it is high time to have an overall review of the Code for the better guidance to aided schools. This is also desirable if it is the intended policy of the education authority to afford greater protection to teachers in aided schools.

97. I would share the Judge's feelings against the conduct of the respondent. In dismissing the respondent's claim on the ground of abuse, the trial judge obviously disapproved of the manner in which he brought these proceedings against the School, not only what he had said but especially what he had deliberately refrained from revealing to the Labour Tribunal and the School. After his dismissal in 2001, he had clearly obtained legal advice from solicitors who then entered into correspondence with the Education Department alleging wrongful termination by the School. Although the first claim (which was lodged a year after his dismissal) was only for arrears of wages, both the first and second claims were based on the same set of facts and the same cause of action; the same issues were raised and the same

provisions of the Code were relied on. The respondent was also well aware of the basis on which the School chose to settle his first claim and yet he chose to keep it to himself what he was already thinking of, i.e., instituting a second action against the School. In my view, the judge was right in criticizing such conduct. However, I agree with the Chief Justice that in the present case, the action had already proceeded to trial and it was far too late to strike out the respondent's claim on the ground of abuse.

Mr Justice Ribeiro PJ:

98. I agree with the judgment of the Chief Justice.

Sir Anthony Mason NPJ:

99. I agree with the judgment of the Chief Justice.

Chief Justice Ma:

100. The appeal is accordingly allowed to the extent stated in paras 79 and 90 above. The Court makes an order in accordance with the order set out in para 79, namely, that the matter be remitted to the trial judge for a determination, in the light of this judgment:-

(1) As to whether the contract of employment had been lawfully terminated by the defendants.

(2) If there was a wrongful termination, as to the damages that should be awarded to the plaintiff.

As to costs, the Court makes an order *nisi* in terms as stated in para 91 above.

(Geoffrey Ma) Chief Justice	(Kemal Bokhary) Permanent Judge	(Patrick Chan) Permanent Judge

(R.A.V. Ribeiro) Permanent Judge	(Sir Anthony Mason) Non-Permanent Judge

Mr Edward Chan, SC and Mr Lee Tung-ming, instructed by ONC Lawyers for the 1st defendants (appellants)

Mr Erik Shum, instructed by Ho, Tse, Wai & Partners for the plaintiff (respondent)