由此

HCA 331/2002

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

ACTION NO. 331 OF 2002

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BETWEEN

TANG CHE TAI（鄧枝泰）	1st Plaintiff
TANG PAK HUNG（鄧伯洪）	2nd Plaintiff
TANG CHUNG MING（鄧仲明）	3rd Plaintiff

and

TANG ON KWAI（鄧安桂）	1st Defendant
TANG WING LOY（鄧永來）	2nd Defendant
TANG PAK LUK（鄧柏祿）	3rd Defendant
TANG KAM WAN（鄧金穩）	4th Defendant

(BY ORIGINAL ACTION)

AND BETWEEN

TANG ON KWAI（鄧安桂）	1st Plaintiff
TANG WING LOY（鄧永來）	2nd Plaintiff
TANG PAK LUK（鄧柏祿）	3rd Plaintiff
TANG KAM WAN（鄧金穩）	4th Plaintiff

and

TANG CHE TAI（鄧枝泰）	1st Defendant
TANG PAK HUNG（鄧伯洪）	2nd Defendant
TANG CHUNG MING（鄧仲明）	3rd Defendant
TANG CHI WAI（鄧枝偉）	4th Defendant
TANG KWAN YUE（鄧鈞裕）	5th Defendant

(BY COUNTERCLAIM)

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Before: Deputy High Court Judge To in Court

Dates of Hearing: 18 - 20, 23 - 25 May 2005; 6 - 10, 13 - 16 March 2006; 13 - 14 December 2006 and 8 - 9 January 2007

Date of Judgment: 13 April 2007

J U D G M E N T

INTRODUCTION

1. This is an action brought by members of the 3rd *fong*（房）of Tang Kwong Yu Tong（鄧光裕堂）(the "Tong"), which is an ancestral *t'ong*（堂）situated in Kam Tin in the New Territories, against four managers（司理）of the Tong for, *inter alia*, breach of duty as managers and trustees of the Tong in causing distribution of the Tong's money in the amount of $201,000 by way of *pai-ji*（派餼）or "relief of poverty" (the "2002 *Pai-ji*") to two hundred and one of its members on 24 March 2002 against the objection of the Plaintiffs. The Plaintiffs seek an order that the Defendants return the said sum of $201,000 with interest to the Tong and an injunction to restrain them from making further distribution of assets of the Tong in the absence of unanimous consent of all its members.

2. By counterclaim, the four Defendants claim against the 1st Plaintiff for breach of duty as a manager of the Tong and against the 1st, 2nd and 3rd Plaintiffs and two others members of the 3rd *fong* for breach of an agreement entered into at a meeting of the Tong on 7 February 1982 (the "1982 Agreement"). They seek: (1) a declaration that certain land

resumption compensation monies amounting to about $73.4 million in the bank accounts of the Tong be distributed amongst the members of the Tong in accordance with the 1982 Agreement; (2) an order against the 1st Plaintiff, who is also a manager of the Tong, to cause the distribution of the compensation monies forthwith accordingly; (3) damages for breach of duty and for breach of the 1982 Agreement and (4) damages for the late payment of surveyor's fees ("Fotton's fees") incurred in connection with negotiation with the Government for compensation for the resumption of the Tong's land caused by the 1st Plaintiff.

3. For convenience, the plaintiffs in the original action and the defendants in the action by counterclaim are collectively referred to as the Plaintiffs and are identified respectively as the 1st, 2nd, 3rd, 4th and 5th Plaintiffs in the order in which their names appear as defendants in the action by counterclaim. The defendants in the original action and the plaintiffs in the action by counterclaim are collectively referred to as the Defendants and are identified respectively as the 1st, 2nd, 3rd and 4th Defendants in the order in which their names appear as defendants in the original action.

4. The 2nd Defendant has, since the commencement of these proceedings, passed away and is no longer a party in the original action or the counterclaim.

5. Mr Shum, counsel for the Defendants, has sensibly agreed not to proceed with the claim for Fotton's fees on the mutual understanding that the concession was made without prejudice as to costs.

6. The 1st and 4th Plaintiffs gave factual evidence on behalf of the Plaintiffs. The 4th Defendant gave factual evidence on behalf of the Defendants. In addition, Professor Chang Wejen and Professor Anthony Richard Dicks SC were called as expert witnesses on Chinese customary law by the Plaintiffs and the Defendants respectively. Both experts enjoy tremendous reputation in this area of the law and need no introduction. They have appeared as experts in Chinese customary law in our courts previously, including occasions when they appeared together as experts for opposing parties.

The issues

7. The Plaintiffs' claim is based on the unlawfulness of the 2002 *Pai-ji*. The Defendants' counterclaim is based on the lawfulness of the 1982 Agreement. The subject matters of the 1982 Agreement and the 2002 *Pai-ji* are the Tong's assets which are impressed with trust for the members of the Tong. As the subject matters had their origin in land in the New Territories, two common legal issues are: firstly, what system of law is applicable to the 1982 Agreement and the 2002 *Pai-ji* and secondly, what are the applicable legal principles under that system of law. The Plaintiffs' contention is that both the 1982 Agreement and the 2002 *Pai-ji* are governed by Hong Kong law; while the Defendants' contention is that they are both governed by Chinese customary law pursuant to section 13 of the New Territories Ordinance, Cap 97 (the "NTO").

8. In respect of the 1982 Agreement, the Plaintiffs' contentions are that under Hong Kong law, the agreement is unenforceable as it was made without the authority of the 5th Plaintiff who was yet to be born at the time the agreement was entered into and besides, the agreement is voidable

as having been obtained by duress. The Defendants' case is that under Chinese customary law and custom, the 1982 Agreement is valid and binding on all the Plaintiffs as members of the Tong and is effective in distributing and dividing compensation received and to be received from the Government for resumption of land belonging to the Tong. The further issues are: firstly, what is the effect of the 1982 Agreement; secondly, would future members of the Tong be bound by the 1982 Agreement and thirdly, whether the 1982 Agreement was vitiated by duress under the applicable system of law.

9. In respect of the 2002 *Pai-ji*, the Plaintiffs' case is that the distribution was wrongful under Hong Kong law as it was made without their consent. The Defendants' case is that such distribution is authorised under Chinese customary law and custom. The further issue is whether under the applicable system of law the Defendants were in breach of their duty as managers of the Tong to effect the 2002 *Pai-ji* against the objection of the Plaintiffs.

THE FACTS

Tang Kwong Yu Tong（鄧光裕堂）

10. A *t'ong* is an ancient Chinese institution of ancestral land-holding, whereby land derived from a common ancestor is enjoyed by his male descendants for the time being living for their lifetimes and so on from generation to generation indefinitely. According to Annex 3 of the *Report of the Working Group on the New Territories Ordinance, Cap 97*, issued in April 1988, there are two common ancient Chinese institutions of ancestral land-holding in the New Territories which the New Territories

inherited from ancient China, namely the *t'ong* and the *tso*（祖）. A landowner in China might, instead of allowing succession to his land to devolve according to custom to be divided equally among his sons, decide all or part of his land would remain intact to be enjoyed in common by his sons and their male descendants in perpetuity, for the veneration of his name after his death and for the upkeep of his grave, buildings and temples. If a landowner thus disposed of his land as aforesaid during his lifetime, the land is held in the name of his *t'ong*. Alternatively, following a landowner's death, all or part of his land might be set aside by his sons or later descendants, by mutual agreement, in veneration of their common ancestor's name as a act of filial piety. In such case, the land is held in the name of the deceased landowner's *tso*. Thus, in the context of ancestral land-holding, *tsos* and *t'ongs* referred to identically motivated and managed bodies, the only distinction being whether they were set up before or after the death of the persons in whose names they were created. There were formal requirements as to registration for both institutions under the then *Qing* government as well as under the Hong Kong Government after 1898. In the later part of this judgment, I shall also refer to property held in the name of the clan（族產）. The Chinese customary law applicable to these three ancient institutions of ancestral land-holding are essentially the same.

11. A classic judicial statement of the nature of a *tso* or *t'ong* and the interest of its members is to be found in the often quoted dicta of Mills-Owens J in *Tang Kai-chung and another And Tang Chik-shang and others* [1970] HKLR 276. His Lordship said at 279-280:

> "Speaking generally, a Tso may be shortly described as an ancient Chinese institution of ancestral land-holding whereby land derived from a common ancestor is enjoyed by his male descendants for the time being living for their lifetimes and so from generation to generation indefinitely. Thus every male descendant of the common ancestor automatically becomes

> entitled at birth to an interest in the land for his life-time; on his death his interest merges so as automatically to enlarge the interests of the surviving male descendants; thus his interest at any given moment during his lifetime depends on the number of male descendants then living and on his death it forms no part of his estate."

12. Tang Kwong Yu Tong was established over two hundred years ago during the reign of *Qianlong* (1736 - 1795) of the *Qing* Dynasty in memory of the late Mr Tang Man Wai, alias Tsun Om. Tang Kwong Yu Tong is the name of the ancestral hall as well as the name of the *t'ong*.

13. The late Mr Tang Man Wai had six sons, whose descendents make up the six *fongs*（房）or stirpes of the Tong. In course of time, the 4th *fong* became extinct in the absence of male descendents. The Tong is managed by five managers（司理）jointly, one from each of the five remaining *fongs*. The managers are assisted by one or two duty officers（值理）and one or two secretaries who are responsible for the day to day management of the Tong and the secretarial duties of the managers.

14. Tang Kwong Yu Tong has no charter or written rules. It is common ground that the principal object of the Tong, like those of the many other *t'ong*s and *tsos* in Kam Tin and in the New Territories generally, is to facilitate the continued worship of the common ancestors and proper maintenance of the ancestral halls and graves. As is not uncommon amongst *t'ong*s and *tsos* in the New Territories, ancestral worship is conducted a few times a year. The Tong has substantial land holdings, some of which generate rental income to finance the above activities. Some of the income are used to pay for expenditures, such as "shoe money"（鞋金）as a recognition for the contribution of the managers in attending to the affairs of the Tong; "book money"（書金）as an

education subsidy for student members of the Tong and "pork money"（肉金）to "tings"（丁）, i.e. male descendants of the Tong in lieu of distribution of sacrificial pork during ancestral worship. The Tong also distributes the whole or part of its surplus income to its members by way of *pai-ji*. As the term suggests, the original purpose of *pai-ji* was to relieve the Tong's members from hunger. With the rapid development in the New Territories and the ever increasing land costs in the recent years, the Tong's property has been generating rental income far in excess of its expenditures. In recent years and until the present dispute arose, the surplus after allowing for the expenditures of the following quarter was distributed annually at the end of the lunar year to members of the Tong, irrespective of their needs.

15. The 1st Plaintiff's father, Tang Chik Lam, was a manager of the Tong representing the interest of the 3rd *fong* until his death on 29 January 1999. The 1st Plaintiff then succeeded as the head of the 3rd *fong*. His appointment as manager was approved by the District Officer (Yuen Long) on 4 March 2000. The four Defendants are managers representing the interests of the other four *fongs*. Members of the Tong mostly live inside Tai Hong Wai（泰康圍）in Yuen Long. The 1st and 4th Plaintiffs and their families occupy two adjacent houses at number 99 and 100 of Tai Hong Wai.

16. At the time of filing of the original action, the Tong had two hundred and six members, comprising of twenty-two from the 1st *fong*; eleven from the 2nd *fong;* five from the 3rd *fong*; one hundred and fifty-one from the 5th *fong* and seventeen from the 6th *fong*. The 3rd *fong* has the least number of members, while the 5th *fong* has the largest. If assets of the Tong are to be distributed on a per capita basis, members of the 5th *fong* would have the most to gain while members of the 3rd *fong* the least.

Distribution on a per stirpes basis would be most beneficial to members of the 1st, 2nd, 3rd and 6th *fongs*, and amongst them, members of the 3rd *fong* would have the most to gain. In terms of numbers, the 5th *fong* has three times as many members as the other four *fongs* together.

The background circumstances

17. In the 1960s, it became necessary for the Government to resume land held by *t'ongs* and *tsos* in connection with the development of the New Territories. Land was resumed by the Government and landowners were compensated partly by cash and partly by Letter B which is a right to exchange for land from the Government. Due to the shortage of land in the New Territories and the ever-increasing demand for land by property developers, with the passage of time land and Letter B held by *t'ongs* and *tsos* become very valuable. Usually, when *t'ong* or *tso* assets were sold, the proceeds of sale were not applied towards acquisition of other real property or other forms of investment for furthering the wishes of the ancestors who set up those institutions, but were distributed amongst the members. Sometimes, a nominal amount was set aside for ancestral worship and sometimes none at all. When it comes to distribution of the compensation monies or proceeds of sale of land or Letter B, the question of distribution per stirpes or per capita arises. Where there is great disparity in the number of members in the various *fongs*, as in the present case, the mode of distribution significantly affects the interests of the *fongs*. This is what underlies the present dispute.

An overall view of the facts

18. Tang Kwong Yu Tong had vast land-holding in the New Territories. In 1963, the Government resumed some of the land from the

Tong and paid compensation by cash and Letter B. From the evidence, it is not clear how much was the cash compensation and how it was distributed, but no dispute arose out of that distribution. Some thirteen years later, the Letter B was sold to a developer in June 1976 for about $15 million. The 3rd *fong* received $2,054,932.50. The Plaintiffs argue that this distribution was made on a per stirpes basis as the 3rd *fong* received one-fifth of the proceeds of sale net of expenses, commission and an amount set aside for renovation of the ancestral hall. The Defendants argue otherwise. They say that the distribution was the result of negotiation between the developer and the individual *fongs* or members of the Tong and was not made on a per stirpes basis. This dispute is not relevant to the present proceedings, but it sets the scene of what was to happen.

19. In 1981, the Government resumed more land from the Tong. The five then managers failed to reach agreement on the manner of distribution of the compensation. On 9 June 1981, Tang Chik Lam, in his capacity as one of the managers of the Tong and on behalf of the 3rd *fong*, wrote to the District Officer of the then New Territories Administration refusing to accept payment of compensation for the reason that no agreement could be reached amongst the members of the Tong on distribution of the compensation. On the same day, the windscreen of the 4th Plaintiff's car parked inside Tai Hong Wai was smashed by someone. That was followed by further harassment of the 1st and 4th Plaintiffs and damage to their motor cars. Eventually, at a meeting held in the ancestral hall on 7 February 1982, Tang Chik Lam and the other four managers at the time entered into a written agreement, i.e. the 1982 Agreement. Today, the 3rd Defendant is the sole survivor of the five then managers. Under that agreement, proceeds of all future sales of land or Government compensation for land resumption would be distributed as follows: 8% of

the proceeds would be distributed equally amongst the five *fongs* for the purpose of worshiping the common ancestors and 92% of the proceeds would be distributed equally amongst all the members of the Tong. The manner of distribution under the 1982 Agreement was followed in nine subsequent distributions of compensation monies from 1983 until 1997.

20. On 23 October 1998, Tang Kwong Yu Tong received notice of further land resumption by the Government. Tang Chik Lam sought to resile from the 1982 Agreement. On 6 November 1998, he wrote to all members of the Tong declaring that the 3rd *fong* would not agree to the Government's compensation proposal unless all the *fongs* would reach a new agreement on the mode of distribution of compensation money. There were three subsequent members meeting in which the manner of distribution was discussed but no agreement could be reached. As a practical interim solution, it was unanimously agreed that the compensation be collected and deposited into a special bank account (the "Third Bank Account") to be opened with the Overseas Trust Bank ("OTB") which was to be operated by all the five managers jointly. The Tong had two other bank accounts with OTB (the "First Two Bank Accounts) which, until December 2000, could be operated by the joint signatures of any three of the five managers.

21. Shortly after that, Tang Chik Lam died on 29 January 1999. In the year that followed, the remaining four managers delayed processing the 3rd *fong's* nomination of the 1st Plaintiff to fill the vacancy of manager left by Tang Chik Lam. Attempts were made by the other four then managers and other Tong members to collect compensation from the Government for distribution in accordance with the 1982 Agreement and to cancel the vacancy of manager resulting from the death of Tang Chik Lam.

All those efforts failed. Eventually, on 4 March 2000, the District Officer (Yuen Long) approved the 1st Plaintiff's appointment as a manager of the Tong.

22. On 22 June 2000, the Government offered payment of compensation in the amount of $398,577.60. It transpired from Mr Shum's cross-examination of the 1st Plaintiff that at about the same time the Government paid mesne profit to the Tong for using the Tong's land prior to its resumption. In view of the conclusion I reached, it is unnecessary for me to ascertain the amount of mesne profit so paid. At the time, pressure was mounting for the mesne profit to be distributed. On 15 September 2000, some Tong members issued a notice of meeting to discuss distribution of the mesne profit. The 1st Plaintiff responded by an open letter to the four Defendants and Tong members reiterating that members meetings may only be convened by the five managers jointly and that mesne profit paid by the Government should be deposited into the Third Bank Account pending unanimous agreement of all the managers and members on the manner of distribution of all the compensation. At a meeting held on 1 October 2000 convened by the duty officers, which the Plaintiffs did not attend, it was unanimously resolved that the mesne profit paid by the Government be deposited into the First Two Bank Accounts for distribution by way of *pai-ji*. On 3 October 2000, the Defendants informed the 1st Plaintiff of the resolution by letter.

23. On or about 22 December 2000, the 1st Plaintiff changed the mandate of the Third Bank Account by substituting Tang Chik Lam's signature with that of his own and also changed the mandate of the First Two Bank Accounts by requiring the joint signatures of all the five

managers. This effectively prevented the Defendants from distributing the money in any of the three bank accounts of the Tong without the consent of the 1st Plaintiff. On 22 December 2000, OTB informed the Tong of the change of mandate.

24. At a meeting held on 24 December 2000, the 1st Plaintiff formally repudiated the 1982 Agreement and proposed that 50% of any compensation money received be distributed on a per stirpes basis and 50% be distributed on a per capita basis. On the same day, the 1st Plaintiff was cornered by members of the Tong near the entrance of Tai Hong Wai. The incident was video taped by the 1st Plaintiff's daughter. When the members realised that they had been taped, they surrounded the Plaintiffs' houses and demanded destruction of the video tape. That dispute was eventually resolved upon police intervention.

25. On the following day, some members issued a notice of meeting to be held on 31 December 2000 and of a new year eve party after the meeting outside the Plaintiffs' houses. During that dinner party, the members rallied outside the Plaintiffs' houses to humiliate the 3rd *fong* and threw burning paper money into the Plaintiffs' houses. Since that incident and for fear of his own safety, the 1st Plaintiff did not attend further meetings with members of the Tong but dealt with the managers, duty officers or secretaries in connection with the affairs of the Tong.

26. At a meeting on 7 January 2001, which the Plaintiffs did not attend, the members approved *pai-ji* in the amount of $1,500 per member to be distributed on 9 January 2001. That distribution was cancelled for the obvious reason that the four Defendants could not mobilise the funds in any of the bank accounts without obtaining the 1st Plaintiff's agreement to *pai-ji*.

27. Later that month, the 1st Plaintiff requested inspection of the Tong's accounts at the office of the Tong but was refused by the duty officers. On 19 January 2001, the duty officers gave notice of meeting to be held on 4 February 2001 to consider the 1st Plaintiff's request to inspect the accounts. At that meeting, which the Plaintiffs did not attend, it was unanimously approved that the minutes of meeting may be inspected at members meetings but the accounts may only be inspected during the annual account audits. Obviously, the purpose of this resolution was to coerce the 1st Plaintiff to attend members meeting when he would be confronted by the majority of the members who would demand distribution on a per capita basis.

28. Towards the end of the lunar year, a meeting was held on 13 January 2002, in which it was approved to distribute by way of *pai-ji* in the amount of $1,000 per member on 28 January 2002 and to hold a year end dinner party to discuss distribution of the $84 million in the bank accounts of the Tong. The Plaintiffs did not attend that meeting. That distribution could not be effected on 28 January 2002 because of the 1st Plaintiff's objection. On 26 January 2002, the Plaintiffs instituted the present action. The Writ of Summons was served on the Defendants on 5 February 2002. At a members meeting on 17 March 2002, which the Plaintiffs did not attend, the members approved distributing $1,000 to each member by way of *pai-ji* and back paying pork money, book money and shoe money on 24 March 2002. On 24 March 2002, the Defendants caused the duty officers to effect the distribution, i.e. the 2002 *Pai-ji*, presumably by using rental income which they should have deposited into the First Two Bank Accounts but which they did not. This distribution forms the basis of the Plaintiffs' claim, whereas the Defendants' counterclaim is based on the 1982 Agreement.

The chronology

29. The following is a chronology of the major events leading to the 2002 *Pai-ji* on 24 March 2002. Most of the events are not in dispute and are documented by contemporaneous and incontrovertible documents. Of the events disputed by the Defendants, most of them could not have been seriously challenged by the only factual witness called by the Defendants, i.e. the 4th Defendant. I accept the evidence of the 1st and 4th Plaintiffs and prefer their evidence where they conflict with the 4th Defendant's. I find that the facts are as stated in the paragraphs 18 to 28 above and in this chronology. However, in the ultimate analysis, most of those events are not critical, other than setting the scene in which the disputes arose. The parties' rights and obligations remain to be determined mainly by legal arguments.

Date	Event
1963	The Government paid compensation for land resumption by cash and Letter B to the Tong.
1976	Letter B was sold, proceeds of sale distributed.
1981	The Government offered compensation for land resumption.
9/6/1981	Tang Chik Lam, as manager, wrote to District Officer of the then New Territories Administration refusing collection of the compensation money and Letter B. The windscreen of the 4th Plaintiff's car was smashed, the incident was reported to the police.

30/7/1981	Tang Chik Lam's solicitors, Messrs K M Lai & Li, wrote on behalf of the 3rd *fong* to the other four managers stating that distribution of the Tong's properties should be on per stirpes basis.
2/8/1981	Tang Chik Lam, the 1st and 4th Plaintiffs attended a meeting with the other *fongs* to discuss distribution of compensation, they were prevented from leaving the meeting until intervention by the elders, the incident was reported to the police.
13/8/1981	The Defendants' then solicitors, Messrs Laurence Pang & Co, replied to Messrs K M Lai & Li that all the Tong's properties belong to all the members of the Tong equally who were entitled to equal distribution.
16/1/1982	About thirty members gathered outside the Plaintiffs' houses and caused a commotion to coerce Tang Chik Lam to accept their proposed method of distribution of compensation money.
22/1/1982	The 1st and 4th Plaintiffs' cars were damaged and sprayed with paint, the incident was reported to the police.
26/1/1982	Tong members shot fire-crackers into the Plaintiffs' houses, the 1st and 4th Plaintiffs were assaulted by more than ten youth members when they went outside to investigate, the incident was reported to the police.
29/1/1982	Youth members gathered outside the Plaintiffs' houses threatening to cause the Plaintiffs bodily injury if they did not attend the meeting to discuss the method of distribution of compensation.

7/2/1982	Members meeting at the ancestral hall: Tang Chik Lam and the other four managers signed the 1982 Agreement.
8/3/1982	The 5th Plaintiff was born to the 3rd *fong*.
1983 - 1997	Nine distributions of compensation monies according to the 1982 Agreement.
23/10/1998	The Tong received notice of land resumption by the Government.
6/11/1998	Tang Chik Lam wrote to the other four managers and members of the Tong stating that the 3rd *fong* would not accept the Government's compensation proposal unless all the *fongs* could reach agreement as to the mode of distribution.
15/11/1998	Members meeting: the 2nd Plaintiff suggested that 50% of the compensation be distributed on a per stirpes basis and 50% on a per capita basis. Tang Chi Leung proposed to accept the compensation first and then deposit the compensation payment into a joint account to be opened which would be operated by all the five managers jointly pending resolution of dispute (#1).
29/11/1998	Members meeting: unanimously approved the proposal at (#1)
17/1/1999	Members meeting (∗): annual accounting audit, the members resolved *pai-ji* in the amount of $4,000 per member.
29/1/1999	Tang Chik Lam died, his office as manager was left vacant.

7/3/1999	Members meeting (∗): discussed the 3rd *fong's* nomination of the 1st Plaintiff as manager to fill the vacancy left by Tang Chik Lam (#2). Unanimously approved the existing four managers to accept compensation from the Government (#3).
28/3/1999	Members meeting: the 2nd and 3rd Plaintiffs objected to the proposal at (#2). The meeting was divided on the proposal and on processing the 1st Plaintiff's appointment as manager. Unanimously approved the appointment of Fotton Surveyors Limited to negotiate with the Government for compensation.
6/6/1999	Members meeting (∗): unanimously approved the proposal at (#3).
25/6/1999	Members meeting (∗): unanimously approved the 1st Plaintiff's appointment as manager to fill the vacancy.
8/8/1999	Members meeting (∗): unanimously approved distribution of compensation according to the 1982 Agreement, unanimously approved writing to the 1st Plaintiff offering him appointment as manager on condition that he would agree to the distribution according to the 1982 Agreement.
14/11/1999	Members meeting (∗): unanimously approved distribution according to the 1982 Agreement, unanimously authorized the existing managers to take legal action against those who objected to such distribution, unanimously resolved writing to the District Officer requesting to cancel the manager's vacancy occasioned by the death of Tang Chik Lam and

	suggesting the existing four managers be allowed to accept the compensation payment by the Government.
27/12/1999	Members meeting (✳): majority approved the appointment of the 1st Plaintiff as manager and to jointly collect compensation with the other four managers, unanimously agreed to sue the 1st Plaintiff for dereliction of duty as manager if he failed to collect compensation, unanimously agreed to serve a copy of the proposal to the 1st Plaintiff to seek his agreement to the proposal in writing within one week.
9/1/2000	Members meeting (✳): annual account audit, unanimously approved *pai-ji* in the amount of $4,000 per member and payment of manager's shoe money in the amount of $500.
23/1/2000	Members meeting (✳): unanimously approved withdrawing objection to the 1st Plaintiff's appointment as manager to the District Officer, unanimously approved suing the 1st Plaintiff if he failed to collect compensation payment within one week of notice of payment by the Government.
4/3/2000	The District Officer (Yuen Long) approved the 1st Plaintiff's appointment as manager.
22/6/2000	The Government offered $398,577.60 as mesne profit for using the Tong's land.
2/7/2000	Members meeting: the 1st Plaintiff objected to distribution of compensation money according to the 1982 Agreement.

15/9/2000	Some Tong members issued notice of meeting to discuss distribution of mesne profit paid by the Government.
28/9/2000	The 1st Plaintiff issued an open letter to the Defendants and the Tong members reiterating (a) that members meeting may only be convened by and upon the unanimous consent of all the five managers and after giving adequate notice and (b) that mesne profit paid by the Government should be deposited into the Third Bank Account pending disposal upon the unanimous agreement of all the managers and members (#4).
1/10/2000	Members meeting (∗): disapproved the 1st Plaintiff's letter at (#4). Unanimously resolved that the mesne profit be deposited into either of the First Two Bank Accounts and to take legal action against any manager who refused to accept payment of mesne profit (#5).
3/10/2000	The Defendants informed the 1st Plaintiff by letter of the resolution passed at the members meeting on 1/10/2000 at (#5).
12/10/2000	The Government offered the Tong $5,384,343 as compensation for land resumption.
15/10/2000	The 1st Plaintiff responded to (#4) by letter to the Defendants stating: (a) that he had not been given notice of the meeting of 1/10/2000; (b) that the meeting was improperly convened; (c) that he objected to distribute mesne profit by way of *pai-ji*; (d) that the mesne profit should be deposited into the Third Bank Account pending agreement as to manner of distribution; and (e) that the

	decision to distribute by way of *pai-ji* was premature.
22/12/2000	The 1st Plaintiff changed the bank mandate of all the three bank accounts of the Tong so that all the three bank accounts could be operated only by the joint signatures of all the five managers. OTB informed the Tong that OTB had received notice from the 1st Plaintiff of the above change in bank mandate.
24/12/2000	Members meeting: the 1st Plaintiff repudiated the 1982 Agreement and insisted that 50% of the compensation payment be distributed on a per stirpes basis and 50% on a per capita basis (#6). The 1st Plaintiff was cornered by Tong members outside the entrance of Tai Hong Wai, the incident was video taped, the Tong members demanded destruction of the tape, police intervened.
25/12/2000	Tong members issued notice of meeting to be held on 31/12/2000 to discuss distribution of compensation and to hold a new year eve dinner party after the meeting.
31/12/2000	Members meeting (∗): disapproved the 1st Plaintiff's changing the bank mandate. New year eve party outside the Plaintiffs' houses, mass rally to humiliate the 3rd *fong*, throwing burnt paper money into the Plaintiffs' houses, police intervention.

3/1/2001	The Defendants wrote to the 1st Plaintiff referring to OTB's letter of 22/12/2000 concerning the change of bank mandate.
7/1/2001	Members meeting (✳): approved *pai-ji* in the amount of $1,500 per member at 9:30 am on 9/1/2001.
8/1/2001	OTB confirmed with the Tong that the bank had accepted the change in mandate for all the three bank accounts of the Tong.
9/1/2001	The 1st Plaintiff wrote an open letter to the Defendants and all Tong members stating: (a) the 3rd *fong's* stance on distribution as in (#6); (b) that the 3rd *fong* objected to distribution according to the 1982 Agreement; (c) that he would not attend the members meeting on 13/1/2001 unless his proposal for distribution would be considered and because he had been subjected to threat every time he attended meeting; (d) that any dispute about distribution of the compensation be resolved by litigation; and (e) that he had not closed the bank accounts of the Tong with OTB and would continue to supervise the running of the Tong and approve the Tong's expenditure. *Pai-ji* was cancelled due to the 1st Plaintiff's refusal to sign cheques for payment.
15/1/2001	The Tong received notice of payment of compensation of $878,575 from the Government. Minutes of meetings and accounts were removed from the Tong's office. The 1st Plaintiff requested inspection of the account for

	the year 2000/2001.
19/1/2001	The duty officers gave notice of members meeting scheduled on 4/2/2001 to consider the 1st Plaintiff's request to inspect the latest account of the Tong.
21/1/2001	Members meeting (✳): reaffirmed distribution of compensation to be in accordance with the 1982 Agreement, unanimously agreed to take legal action against the 1st Plaintiff.
4/2/2001	Members meeting (✳): unanimously approved that minutes of meeting may be inspected at members meeting but accounts may only be inspected during annual account audit.
5/2/2001	Resolution passed on 4/2/2001 was posted up.
13/1/2002	Members meeting (✳): the 4th Defendant recommended *pai-ji* in the amount of $1,000 per member to be distributed on 28/1/2002, unanimously approved holding year end dinner party and to discuss disposal of $84 million in the bank accounts of the Tong.
14/1/2002	The 1st Plaintiff requested inspection of accounts, but the request was refused by the secretary, the 1st Plaintiff refused to sign the cheque for payment of the Fotton's fees if he could not inspect the accounts.
	The Defendants issued notice of meeting to be held on 20/1/2002 to consider the 1st Plaintiff's refusal to sign the cheque to pay the Fotton's fees and invited inspection of accounts at the meeting (#7).

	The Defendants issued another notice of year end dinner party to be held on 27/1/2002 and to discuss the disposal of $84 million in the bank accounts of the Tong at the party.
19/1/2002	The Plaintiffs' solicitors, Messrs Rowdget W Young & Co ("RWY") wrote to the Tong in response to (#7) demanding the accounts for inspection within seven days and intimating that the notice at (#7) was invalid as it was not signed by all the five managers (#8), the letter was ignored by the Defendants for the reason that it was written in English.
21/1/2002	The duty officers issued notice for *pai-ji* on 28/1/2002.
	The Plaintiffs wrote to the Defendants and duty officers to object to distribution by way of *pai-ji* because of lack of unanimous consent by all members.
23/1/2002	RWY wrote to the Defendants, duty officers and secretary stating that the Plaintiffs would proceed for an injunction to restrain them from distributing the Tong's money unless they would confirm by 24/1/2002 that the *pai-ji* would be cancelled.
	The Defendants requested RWY to provide Chinese translation of their letter at (#7) above.
25/1/2002	RWY wrote to the Defendants demanding the cancellation of the proposed year end dinner on 27/1/2002 and objecting to any distribution of the Tong's money and property.

26/1/2002	The Plaintiffs instituted the present action.
27/1/2002	Dinner party conducted outside the Plaintiffs' houses, the Defendants and duty officers announced distribution by way of *pai-ji* in the amount of $1,000 per member on 28/1/2002 and distribution of compensation in the amount of $390,000 on 20/2/2002, police stood by
28/1/2002	The *pai-ji* was cancelled
5/2/2002	Writ of Summons was served on the Defendants
17/3/2002	Members meeting (✳): approved the 2002 *Pai-ji* and back paying pork money, book money and shoe money on 24/3/2002
18/3/2002	The duty officers issued notice of *pai-ji* to be distributed on 24/3/2002 (#9).
19/3/2002	The Plaintiffs wrote to the Defendants and duty officers object to the notice of *pai-ji* at (#9).
24/3/2002	The 2002 *Pai-ji* was effected presumably by using rental income withheld from the Tong's bank accounts, but the Plaintiffs did not collect their shares.
25/3/2002	The duty officer wrote to the Plaintiffs reminding them to collect their shares of *pai-ji*; pork money and shoe money.

(✳): Members meeting not attended by the Plaintiffs

THE SYSTEM OF LAW APPLICABLE TO THE SUBJECT MATTERS OF THE 1982 AGREEMENT AND THE 2002 PAI-JI

30. The Plaintiffs' primary contention is that as the subject matters of the 1982 Agreement and the 2002 *Pai-ji* are not land, the 1982 Agreement and the 2002 *Pai-ji* are governed by Hong Kong law but not Chinese customary law and custom. On the basis that Hong Kong law governs the 1982 Agreement, the Plaintiffs argue that the 1982 Agreement is not binding on the 5th Plaintiff because Tang Chik Lam could not have authority to act on behalf of the 5th Plaintiff who was born about a month after the signing of the 1982 Agreement. Accordingly, as the 5th Plaintiff is not bound by the 1982 Agreement, no distribution of the compensation money in the bank accounts of the Tong could be made. Likewise, the Plaintiffs argue that Chinese customary law and custom are not applicable to *pai-ji* and the 2002 *Pai-ji* could not be effected without unanimous consent of all members of the Tong. The Defendants argue otherwise. Their contention is that the 1982 Agreement and the 2002 *Pai-ji* are both governed by Chinese customary law and custom. In accordance with Chinese customary law and custom, the 1982 Agreement is valid and binding on the present and future members of the Tong and the 2002 *Pai-ji* was properly authorised.

31. The starting point for considering which system of law is to be applied to the 1982 Agreement and 2002 *Pai-ji* is sections 2 and 13(1) of the NTO. Section 13(1) provides as follows:

> "(1) Subject to subsection (2), in any proceedings in the Court of First Instance or the District Court ***in relation to land in the New Territories***, the court shall have power to recognize and enforce any Chinese custom or customary right ***affecting such land***." (my emphasis added)

The provision section 13(1) is unequivocal. This section which preserves the application of Chinese custom and customary right only applies in relation to land in the New Territories. Thus, the court's power to recognize and enforce Chinese custom or customary right is only limited to those affecting land in the New Territories.

32. The definition of "land" as provided in section 2 of the NTO is as follows:

> "'land'(土地) includes land covered by water or within the flow of the sea and houses and other buildings and any undivided share in land and every estate and interest in land and also includes any ***rent or profit issuing out of land*** and any easement affecting land and also any market-building or portion of such building and any rent or profit issuing out of any market-building or portion of such building." (my emphasis added)

This definition is inclusive. It extends the meaning of land as is understood in the ordinary language, i.e. the solid part of the surface of the earth, to land covered by water, houses, other buildings etc and any rent or profit issuing out of such land. There is no dispute that the funds used for the 2002 *Pai-ji* was surplus rental income from land belonging to the Tong. There is also no dispute that some of the funds in the bank accounts of the Tong is of the nature of mesne profit paid by the Government for its use of land belonging to the Tong prior to its compulsory acquisition. Hence, the subject matter of the 2002 *Pai-ji* as well as the mesne profit are, as a matter of law, land within the meaning of section 2 of the NTO, in respect of which the Court shall have power to recognize and enforce any Chinese custom or customary right affecting such land, a point which has not been seized upon by counsel for both parties.

33. The next question is whether compensation from compulsory acquisition of land in the New Territories also falls within that definition of

land. Though the meaning of land has been enlarged by definition to include rental income from land, the definition is silent as to compensation or proceeds of sale of land. In its ordinary meaning, the word 'land' is incapable having such an extended meaning as compensation or proceeds of sale of land. The purpose of the NTO as stated in the preamble is "to consolidate and amend the laws relating to the administration and regulation of the New Territories". Part I of the NTO authorises the Chief Executive to appoint officers for the administration of the New Territories and authorises the Chief Executive in Council to make rules providing for levying, collection, recovery and safe custody of rents, rates, taxes and contributions from the New Territories. Part II of the NTO specifically applies to land in the New Territories. This Part vests land in the New Territories in the Government, gives the court jurisdiction to hear and determine disputes arising out of or regarding any land in the New Territories, provides for registration of manager of *t'ong* and certification of memorials of any deeds etc. The right to compensation is a chose in action. The compensation is Letter B and cash. It is difficult to see how Letter B and cash fit into the regime under Part II of the NTO and how such cash could be treated differently from other cash in the New Territories or any other parts of Hong Kong. I am quite unable to find it as the legislature's intention to apply Part II of the NTO to any other form of property converted from land in the New Territories. Reading the NTO as a whole, I could by no canon of construction interpret the word 'land' to include compensation or proceeds of sale of land.

34. In *Kan Fat-tat also known as Kan Tat And Kan Yin-tat also known as Kan Tat* [1987] HKLR 516, Deputy High Court Judge Robert Tang QC, as he then was, held at 524 that compensation cannot be regarded

as land and Chinese custom or customary right ceases to apply to such compensation. He said at 524D:

> "The definition of land in the New Territories Ordinance, which is inclusive, does not include proceeds of sale or compensation for compulsory acquisition of land.
>
> In my opinion, *prima facie*, the compensation cannot be regarded as land and insofar as the application of Chinese custom or customary right depends on s. 13 of the New Territories Ordinance, such Chinese custom or customary right ceases to apply upon reversion of the land to the Crown. The right to compensation is a *chose in action*, and the actual compensation are letters B and cash. Neither is land."

Kan And Kan has stood the test of time. It has been quoted and adopted in most decisions involving land in the New Territories and the court's power to recognize and enforce any Chinese custom or customary right affecting such land. These dicta are now cast in stone and I can see no reason to depart from them.

35. Mr Shum argues that although it was held in *Kan And Kan* that section 13(1) of the NTO does not extend to compensation that does not mean that Chinese customary law has no role to play on the issues of division and distribution of compensation monies. With respect, I find that proposition startling. I believe that proposition must have arisen out of counsel's misunderstanding of *Kan And Kan* and confusion in relation to two different concepts, i.e. the application of Chinese custom and customary rights to land in the New Territories and the dis-application of the common law of Hong Kong to traditional Chinese institutions. In *Kan And Kan*, after reaching his conclusion that section 13(1) of the NTO does not extend to compensation, Deputy High Court Judge Robert Tang QC, as he then was, embarked on a different front, i.e. whether the English common law rule against perpetuities, as part of the common law of Hong Kong, applies to compensation money. Immediately following the passage

in *Kan And Kan* which I quoted above, the learned judge went on and said at 524E:

> "That being the case, one has to ask whether the rule against perpetuities applies to such compensation.
>
> That would depend on whether such application would cause injustice or oppression. See *Yeap Cheah Neo and Others v Ong Cheung Neo* and per Hogan, CJ in *Re Tse Lai-chiu (deceased)* [1969] HKLR 159 at p 177.
>
> But in determining whether application of English law would cause injustice or oppression, one has to ask as Hogan, CJ did, *ibid*, at p 178 "Injustice! At what time?" On that authority, I am entitled, indeed bound, to consider the question of injustice as at the time of resumption."

Then, after considering the case of *Re Tse Lai-chiu (deceased)* [1969] HKLR 159, the Application of English Laws Ordinance (Cap 88) and *Webb v Outrim* [1907] AC 81 at 89, he concluded at 527E:

> "I have not found the question easy to answer. Doing the best I can, I have come to the conclusion that it would be unjust or oppressive to apply the rules against perpetuities to such compensation. It would be unjust and oppressive because it would effectively render void or destroy Tsos in the New Territories, some of which were purposely set up under the protective umbrella of the New Territories Ordinance, and others of antiquity. … I do not believe the legislature ever intended to destroy Tsos by a side wind. The definition of land in the New Territories Ordinance is inclusive. I do not read from it any intention on the part of the legislature deliberately to exclude such compensation from the protection of Chinese custom. I hasten to add that I do not decide what the position might be regarding the applicability of the rules against perpetuities to the proceeds of voluntary sales where different considerations may apply. That question does not arise here and naturally I would not deal with it."

36. The application of English laws to Hong Kong was brought about as follows. By a Convention between the Great Britain and China signed at Peking (now known as "Beijing") on 9 June 1898, the New Territories were leased to the Great Britain for ninety-nine years. The New

Territories Order in Council made on 20 October 1898 provided that the New Territories should be part and parcel of the then Colony of Hong Kong and that from a date to be fixed by proclamation to be made by the Governor all Laws and Ordinances in force in the then Colony should take effect in the New Territories. The proclamation was duly made and published on 8 April 1899 to take effect on 17 April 1899. Accordingly, by virtue of section 7 of the Supreme Court Ordinance 1873, such of the laws of England as existed on 5 April 1843 became the law of the New Territories as they had been the laws of the then Colony, except so far as the said laws are inapplicable to the local circumstances of the then Colony or of its inhabitants, and except so far as they have been modified by laws passed by the colonial legislature. Thus the English common law rule against perpetuities was imported into the then Colony in 1843 and thence to the New Territories in 1899 by the proclamation of 8 April 1899. This position was preserved subject to some modification by section 3 of the then Application of English Laws Ordinance (Cap 88), which provided that the common law and the rules of equity should be in force in Hong Kong, so far as they may be applicable to the circumstances of Hong Kong or its inhabitants and subject to certain modifications.

37. After deciding that section 13(1) of NTO did not extend to compensation, Deputy High Court Judge Robert Tang QC, as he then was, felt it necessary to consider whether the rule against perpetuities was applicable to the compensation. He adopted a similar approach as did the Privy Council in *Yeap Cheah Neo and Others v Ong Cheng Neo* (1873-75) LR 6 PC 381 and *Re Tse Lai-chiu (deceased)* and held that but for the NTO, the rule would have applied. The basis of his decision was that it would be unjust or oppressive to apply the rule against perpetuities to compensation for compulsory acquisition of *tso* land because to do so would be

destructive of the *tsos*. What was decided in respect of this issue in *Kan And Kan* was that the common law rule against perpetuities was dis-applied to compensation for compulsory acquisition of *tso* land in the New Territories. Thus, on a proper understanding of *Kan And Kan*, that case did not establish the legal principle advanced by Mr Shum that while section 13(1) of the NTO does not extend to compensation for land compulsorily resumed by the Government, Chinese custom and customary right is nevertheless applicable to such compensation. In fact, when the two propositions are placed side by side, as I do now, it is immediately apparent that the latter proposition is inconsistent with the former, which is one of the *ratio decidendi* in *Kan And Kan.* With respect to Mr Shum, he could not be right.

38. Next, Mr Shum referred to the Court of First Instance decision of *Lau Yue Kui (administrator of estate of Lau Wai Chau, deceased) and Estate of Lau Leung Chau, deceased & Others* [1998] 1 HKLRD 579, in which Cheung J, as he then was, applied Chinese customary law when considering the question whether ancestral worship trust could be revoked or dissolved by the descendents. Cheung J accepted the common opinion of the experts of both parties, who incidentally were also the same expert witnesses in the present case. Cheung J held at 594E:

> "All the experts agreed that even if the land is subject to an ancestral worship trust, his male descendants could disregard such trust and divide the property amongst themselves. The division must be done with the unanimous consent of all the members: *Tang v Tang* [1970] HKLR 276, *Chu v Chu* [1968] HKLR 542 and *Kan v Kan* [1987] HKLR 516.

This part of the decision was not challenged by the parties when the case was brought before the Court of Final Appeal in *Re Lau Wai Chau* (2000) 3 HKCFAR 98. The Court of Final Appeal held at 106G:

> "This alternative argument is based on a rule of Chinese law and custom which is not itself in dispute. Under Chinese law and custom, property endowed in perpetuity for the purpose of ancestral worship may be divided amongst the settlor's male descendants if they, as the heads of all his *fongs*, unanimously agree to such a division. Thus may an ancestral worship trust be dissolved under Chinese law and custom."

On the basis of these dicta, Mr Shum submits that I am bound by the Court of Final Appeal decision in *Re Lau Wai Chau* to apply Chinese customary law in deciding whether the compensation monies should be distributed in accordance with the 1982 Agreement just as the Court of Final Appeal would allow an ancestral worship trust to be dissolved under Chinese customary law and custom.

39. I must confess I have difficulties following Mr Shum's argument. In *Re Lau Wai Chau*, a testator divided some of his land in the New Territories into nine parts in 1932 and 1933, eight parts of which were registered in his eight sons' names, while the ninth part was held on trust by three of his sons for him. After the testator's death, dispute arose amongst his sons. Then under a deed of family arrangement made in 1946, the sons sub-divided the land held on trust for the testator into nine portions, with each of the son taking possession of one portion and leaving the ninth portion held on trust as common property for ancestral worship. The question for the court was about the division of this ninth portion of land and compensation monies in respect of parts of that portion which had been resumed by the Government. It was held that the 1946 deed of family arrangement was valid as no ancestral worship trust had been established by the testator during his lifetime. Thus, it is immediately apparent that quite apart from the fact that the above dicta of the Court of Final Appeal and the Court of First Instance were clearly obiter, they were concerned with land held in trust for ancestral worship and not with compensation.

There is no doubt that Chinese custom and customary right were applicable to such land under section 13(1) of the NTO. *Re Lau Wai Chau* did not decide anything about compensation or Letter B, which according to *Kan And Kan* are not land. *Kan And Kan* was quoted by the Court of First Instance, though not referred to by the Court of Final Appeal. There is nothing to suggest that it has been overruled by the Court of Final Appeal. It is therefore impossible for Mr Shum to make a quantum leap by applying dicta which are only applicable to land in the New Territories to compensation which is not land. I shall revisit these data on another legal argument advanced by Mr Shum.

40. In conclusion, I find that section 13(1) of the NTO is not applicable to the compensation; but to the mesne profit in the bank accounts of the Tong and to the surplus income used for the 2002 *Pai-ji*. Hence, the system of law to be applied to the compensation is Hong Kong law and that to be applied to the mesne profit in the bank accounts of the Tong and the funds used for the 2002 *Pai-ji* is Chinese customary law and custom. The conclusion that different systems of law apply to compensation which is converted from land and to rental income or mesne profit issuing out of land may appears conflicting. But the anomaly is consistent with section 13(1) of NTO and the authorities. This anomaly may be reconciled on the basis that in the case of rental income, the income is still attached to existing land held in perpetuity for the present and future generation, whereas in the case of compensation, the land has extinguished. In respect of compensation, which is governed by Hong Kong law, the common law rule against perpetuity is dis-applied as being unjust and oppressive, whereas in respect of rental income and mesne profit issuing out of land, to which Chinese custom and customary right apply, the

common law rule against perpetuity is not applicable as it is not a concept known to Chinese customary law.

THE APPLICABLE LEGAL PRINCIPLES UNDER HONG KONG LAW

41. I do not intend to set out in this section of the judgment all the legal principles under Hong Kong law which are applicable to the 1982 Agreement or would be applicable to the 2002 *Pai-ji* (if contrary to my conclusion that Chinese customary law and custom are applicable to the 2002 *Pai-ji*). They are well known principles under the law of agency and contract. They are all too familiar and not disputed by counsel. It would be more convenient to deal with those principles as and when I come to apply them to my finding of facts.

THE APPLICABLE LEGAL PRINCIPLES UNDER CHINESE CUSTOMARY LAW

42. Though Chinese customary law and custom are inapplicable to distribution of compensation, they are applicable to distribution of the mense profit in the bank accounts of the Tong and distribution of the rental income used for the 2002 *Pai-ji*. For completeness, I shall set out in this section of the judgment my findings of the relevant legal principles under Chinese customary law in respect of all these subject matters. My approach is, firstly, to find on the basis of the experts' evidence what legal principles under Chinese customary law relevant to disposition of *t'ong* property, whether in the form of land, proceeds of sale of land, compensation for compulsory acquisition of land, rental income or profit issuing out of land, were applied in ancient China. Then, I shall test those legal principles which I have found against decided cases in Hong Kong

and consider how those principles were applied in the Hong Kong context under the NTO and if those principles have evolved differently during the ninety-nine years while the New Territories were under British rule.

Chinese customary law applicable to disposition of t'ong land

43. Before considering what principles under Chinese customary law are applicable to distribution of *t'ong* property, I must remind myself of the nature of this ancient Chinese institution of ancestral land-holding: see Mills-Owens J's dicta in *Tang Kai-chung and another And Tang Chik-shang and Others* at 279-280 quoted in paragraph 11 above. As was held in that case, a *tso* or *t'ong* is a mode of devolution unknown to the English common law which is preserved by section 13 of the NTO and to which the rule against perpetuities is inapplicable. It is a trust and the registered managers are trustees within the meaning of the Trustee Ordinance. These dicta have been quoted and adopted in many subsequent decisions, including *Kan And Kan* and *Leung Kuen Fai and Tang Kwong Yu (or U) Tong or Tang Kwong Yu Tso* [2002] 2 HKLRD 705. These characteristics of this ancient form of institution are now firmly established.

44. It is the common opinion of both Professor Chang and Professor Dicks SC that land held by the *tso* or *t'ong* are meant to be inalienable, indivisible and perpetual and both the *Ming* and *Qing* imperial legal systems gave specific protection to such lineage endowment and ritual property by making fraudulent or improper sale of such land a criminal offence. The 1st *Li*（例）of the 9th *Juan*（卷）of the *Qing* Code (*Da Qing Lu Li*)（大清律例）enacted in the 3rd year of *Yongzheng*（雍正）in 1726 and amended in the 5th year of *Qianlong*（乾隆）in 1741 prohibited covert sale by descendants of collectively-owned mountain land where

ancestral graves were situated and prescribed banishment to a distant frontier for military servitude as the punishment for such infringement. In the 21st year of *Qianlong* in 1757, a further 6th *Li* was added, imposing the same punishment for wrongful sale of ancestral endowment land for sacrificial purposes amounting to fifty acres or more and lesser penalties for wrongful sale of smaller sacrificial estates for charitable as against sacrificial purposes and for sale of ancestral halls without authority. As noted in *清水盛光* at pages 184-185, many clan charters also specifically prohibited fraudulent sale of clan property.

45. However, the *Qing* Code is silent as to whether such property could be lawfully sold with the clan's authorization. This is where the two experts differ. According to Professor Dicks SC, it is clear from the text of the 6th *Li* that by 1757 at least, sale of lineage endowments was in itself not necessarily criminal, notwithstanding that such endowments were almost always intended by their founders to be perpetual. He was of the opinion that such sales were wrongful and illegal if made without the authority of the lineage to which they belonged, but could nevertheless be lawful if unanimously consented to by heads of the *fongs*. He referred to Appeal No 771 of the 4th year of the Republic of China (1915) of the *Da Li Yuan*（大理院）, the first supreme court of the Republic of China during the year 1911 to 1927, in support of his opinion. In that case, in applying the 6th *Li* of the *Qing* Code as part of the *Law Temporarily in Force in the Republic of China* pending enactment of the relevant books of the Civil Code in 1930, the *Da Li Yuan* sitting in Peking held as follows:

> "Sacrificial property (sichan 祀產) has the characteristics of co-proprietorship, the right of ownership belonging to all the branches (fong) of the same lineage. In view of its purpose, maintaining the sacrifices to the ancestors, [such property] should be preserved in perpetuity and it is not permissible to dispose of it for arbitrary reasons. Generally, the instrument by

> which the sacrificial property is appropriated contains some form of wording such as "in perpetuity never to be given in dian（典）"or sold (yongyuan bude dianmai 永遠不得典賣)". However, an examination of our country's customary law [shows that] when circumstances of necessity（必要情形）arise (for example where descendants encounter economic hardship or where serious complications develop in the management), such sacrificial property, with the unanimous agreement of all the branches [of the lineage] can nevertheless be divided, given in dian, sold or made subject to any other form of disposal. The customary rule is in no sense contrary to the public interest and does not conflict with any other mandatory provisions of law. The object of the provisions relating to fraudulent sale of sacrificial property in the *Law Temporarily in Force*, moreover, is only to prohibit fraudulent sales, the expression "fraudulent sales" meaning private unauthorized sales by persons having no power to sell the [property in question]; for example, a sale which has not been approved by all the branches [of the lineage] but has been effected by only one or some of the branches, would certainly fall within the rule on fraudulent sales. However, ***if the unanimous agreement of all the branches has been obtained there can be no question of a fraudulent sale***"
>
> (Words in square brackets supplied in translation. My emphasis added).

46. Three points emerge from the above judgment. Firstly, the *Da Li Yuan* construed the 6th *Li* as prohibiting unauthorised or fraudulent sale of clan property by one or some of the members of the clan but did not prohibit sale with the unanimous consent of all the branches or *fongs*. Secondly, the *Da Li Yuan* recognised and confirmed the principle that clan property was meant to be indivisible and inalienable. Thirdly, according to established Chinese customary law, under circumstances of necessity, clan property could be sold if unanimously consented to by all the *fongs*.

47. Professor Chang queried the *Da Li Yuan*'s finding of an established Chinese custom of sale of clan property by unanimous consent on the basis that most clan charters had provisions prohibiting division and that such custom as suggested or found by the *Da Li Yuan* was neither

frequent nor widespread. His opinion was that as clan property was meant to be indivisible and inalienable, it could not be lawfully sold, not even by unanimous consent of all members of the clan against the wishes of the founder. I respectfully differ from that view. The *Da Li Yuan* was not referring to a general custom of sale of clan property by unanimous consent as of right, but the custom of sale under circumstances of necessity by unanimous consent. Furthermore, the finding by the *Da Li Yuan* was a finding of contemporaneous Chinese customary law and not a finding of Chinese custom. I think the *Da Li Yuan* sitting in China almost a hundred years ago applying contemporaneous Chinese customary law must be in a much better position to find out what the Chinese customary law and custom were than us in Hong Kong a hundred years later. Indeed, *廣東宗族契據彙錄* edited by Dr James Hayes contains a number of examples of sales of clan property to meet circumstances of necessity including, the need to relieve the descendants from hardship and the need to pay for litigation expenses. Such a custom made good and practical sense. I have no doubt the Chinese customary law principle that *t'ong* or tso property may be sold under circumstances of necessity and by the unanimous consent of its members existed in ancient China.

48. The precise requirement for consent is a matter of some controversy. In Appeal No 977 of the 4th year of the Republic of China (1915), the *Da Li Yuan* held that while normally for disposition of clan property unanimous decision by all members of the clan was essential（自當以得族人全體之同意為有效要件), in practice such a decision could be valid if there was an established local custom or a provision in the clan's charter permitting the decision to be made unanimously by the heads of the *fongs* jointly representing all the members of the clan or by a majority of the clan members at a meeting called jointly by the heads of the *fongs*.

Professor Chang queried the appropriateness of according local custom and clan rule priority over the general principle of disposition only by unanimous consent. With respect, I consider the decision of the *Da Li Yuan* logical. A *tso* or *t'ong* was the creation of the founder who set aside property for the purpose of the *tso* or *t'ong*. It must be up to the founder to dictate its charter, including rules as to how the *tso* or *t'ong* may be dissolved and its property disposed of. Even if these rules were contrary to the general principle of disposition only under circumstances of necessity and by unanimous consent, these express rules must prevail. Indeed, it is Professor Chang's evidence that while some clans allowed clan property to be disposed of if all clan members unanimously decide to do so, a few clans even allowed a majority of the members to do the same: see *中國民商事習慣調查報告錄* (1924 Taipei) at page 1562 and *清水盛光* at pages 185 - 186. If, in the absence of provisions in the charter permitting disposition of clan property, local custom allowed such decision to be made unanimously by the heads of the *fongs* jointly representing all the members of the clan or by a majority of the clan members at a meeting called jointly by the heads of the *fongs*, such customary rule must apply as something that goes without saying. But in the present case, there is no evidence of any such local custom.

49. In that appeal, the *Da Li Yuan* recognised the principle that disposition of clan property could only be effected by unanimous decision of all members of the clan. I think the custom of consent by heads of the *fongs* could be explained as Professor Dicks SC suggested, on the premise that it was normally possible to infer such consent from the unanimous consent of the heads of the *fongs* and the meeting of the heads of the *fongs* was the occasion when such unanimous consent was obtained.

50. In Appeal No 1849 later that year, the *Da Li Yuan* went as far as to hold that where consent was unreasonably withheld by a *fong* for private gain to itself, the *Da Li Yuan* could upon petition by the other *fongs*, permit the division of clan property. Professor Chang had doubts about any such majority rule which is a concept unfamiliar to the traditional Chinese mind. I do not think I need to express any view on this decision. This is because in the present case, all the members of the 3rd *fong* oppose to the 1982 Agreement and the 2002 *Pai-ji*, while there is no dispute that the heads of the other four *fongs* had unanimous consent from their respective members to enter into the 1982 Agreement and to make the 2002 *Pai-ji*.

51. I therefore find that under Chinese customary law, *t'ong* property is indivisible, inalienable and perpetual, it is held by the *t'ong* for the benefit of its present generation and all future generations, it may not be disposed of unless under circumstances of necessity and then only by unanimous consent of all its members.

Chinese customary law applicable to distribution of proceeds of sale or compensation from compulsory acquisition of t'ong land

52. On the question whether there was any Chinese customary law or custom regarding distribution of proceeds of sales or compensation for compulsory acquisition of *tso* land, neither expert could offer any evidence of such law and custom. Professor Dicks SC frankly admitted that he has never come across any case where *tso* land was sold for the purpose of distribution amongst its members and that he was unaware of any unwritten rule or norm which enabled, authorised or permitted distribution of such proceeds, adding that such a case would be unusual. On the other hand, Professor Chang, approaching the matter from first principles, was of the opinion that such distribution was not permissible under Chinese customary

law and he was unaware of any custom providing for such distribution. His opinion was that as a matter of basic principle, *tso* land was meant to be inalienable, indivisible and perpetual for the purpose of worshipping ancestors and for the benefit of the present and future generations. It could not be disposed of unless under circumstances of necessity and then only by unanimous consent of every member of the *tso*. Thus, just as members have no right to dispose of *tso* land, they have no right to distribute the proceeds of sale of such land. If *tso* land was sold under circumstances of necessity which were financial, the proceeds of sale should be applied to meet those circumstances. If the sale was made under circumstances which were not financial, the proceeds of sale should be reinvested in land or otherwise held by the *tso*.

53. Professor Chang agreed that while compulsory acquisition had dispensed with the need for circumstances of necessity before *t'ong* land could be sold, existence of such circumstances is nevertheless necessary before compensation or proceeds of sales could be distributed. He said that in the absence of circumstances of necessity, which made the distribution inevitable, such compensation should, in principle, be reinvested in landed property. However, Mr Shum referred me to the following exchanges which took place between him and Professor Chang while under cross-examination:

> "Q1: I see. So you are saying actually, if I understand you correctly, the Da Li Yuan's decisions were the final decisions because they are supreme court, yes? And in our case it was not about disposal of properties because the properties were compulsorily resumed by the government, yes?
>
> A1: Yes.
>
> Q2: And therefore the bit about the first decision - about compelling reasons - are not applicable in this case

because they had no choice. The government resumed the land. Why talk about compelling reasons?

A2: But that is compelling reason.

Q3: I see. The fact that the government compulsorily resumed those land was the compelling reason under the first decision to you.

A3: Yes.

Q4: And therefore, if the first decision was to be followed, the only thing left behind to be satisfied would be unanimous consent.

A4: Yes.

Q5: Is that your evidence?

A5: Unanimous.

Q6: Is that your evidence?

A6: Yes.

Mr Shum argues that from these exchanges, Professor Chang seemed to have admitted that in the case of distribution of compensation, circumstances of necessity is not a necessary pre-condition. I respectfully differ. Obviously, Professor Chang was directing his mind to the issue of disposition of land and not the compensation from compulsory acquisition of land. That was why in answer to Mr Shum's second question quoted above, Professor Chang unhesitatingly replied that compulsory acquisition provided the compelling reason, i.e. the circumstances of necessity. Hence, when Mr Shum put his very critical fourth question, Professor Chang agreed that the remaining issue was unanimity. In all fairness to Mr Shum, his question was in the context of the facts of the present case, i.e. distribution of compensation. But Professor Chang obviously overlooked the context in which the questions were asked or misdirected himself because of the repeated reference to disposition of land. Had the fourth question been put more explicitly by referring to distribution of

compensation, the misunderstanding would not have arisen. However, in the total context of Professor Chang's evidence and his demeanour, I do not think by reason of the above exchanges he has detracted from his views as I understand him.

54. Referring to the practice of dividing up compensation and proceeds of sale of *tso* property, Professor Chang said that such practice was wrongful, being a violation of the law and vitiation of the very purpose of the *tso*. He explained that the practice was allowed to continue on the basis of practical reality because members of the *tso* had *de facto* power, as opposed to lawful authority to do so, in the absence of opposition as such distributions had always been by unanimous consent. He added that if one day one member or *fong* woke up and realised the wrong and wished to put it right, such practice should stop. This view was also echoed in a number of Hong Kong decisions: see for example, *Tang Kai-chung and another And Tang Chik-shang and others* at 320 per Mills-Owens J and in *Kan and Kan* at 539 per Deputy High Court Judge Robert Tang QC, as he then was.

55. As a matter of principle, I must agree with Professor Chang's view. *Tso* land was meant to be inalienable, indivisible and perpetual for the purpose of worshipping ancestors and benefit of the present and future generations. *T'ong* property is not an absolute gift to any particular member or generation. The land is held by the *t'ong* for the benefit of the present generation and all future generations. A member only has an interest in the use and benefit of the property and only for as long as he lives. The property is held by the *t'ong* in perpetuity for all future generations. Any appropriation of *t'ong* property to the present generation would have the effect of depleting the *t'ong* of its property for veneration of the common ancestor and for the use and benefit of the future

generations. Such distribution is contrary to the purpose for which the *t'ong* was set up and is destructive of the *t'ong*. Hence a very narrow exception is created under the principle which permits disposition of *t'ong* property under circumstances of necessity and by unanimous consent of all its members. As I see it, unanimous consent alone is not sufficient to secure perpetuity of the land-holding. It is only one of the safeguards against arbitrariness of the majority of the present generation in trying to appropriate *t'ong* property to the present members to the exclusion of the future members. The more important safeguard is the requirement for circumstances of necessity as a pre-condition before *t'ong* property may be disposed of. The existence of a *t'ong* is tied with the preservation of the *t'ong's* land. If the land is sold, the proceeds distributed and not reinvested in some other landed property, there will not be sufficient property to generate enough funds in future for ancestral worship. The *t'ong* will extinguish and the future generations who were intended to benefit from the bounty of the founder will be deprived of their benefit. Therefore, in principle, as Professor Chang said, the proceeds of sale of *t'ong* land should be reinvested in other land, otherwise the continued existence of the *t'ong* will be jeopardised and the rights of the future generations prejudiced. This is particularly so, bearing in mind that it never was the founder's purpose that any particular generation or member should have an absolute right to his bounty to the exclusion of the future generations. Therefore, the proceeds of sale of *t'ong* land should not be distributed, but should be reinvested in other landed property instead or otherwise held by the *t'ong* if not so reinvested. In the case of compensation for compulsory acquisition of land in modern times, the compulsory acquisition has provided the circumstances of necessity which make the disposition inevitable, but that does not mean the compensation should as of course be distributed amongst the members. The compensation should likewise be reinvested in other

landed property or held by the *t'ong* for the very purpose for which the *t'ong* was set up. I therefore find that the true principle under Chinese customary law is that proceeds of sale and compensation from compulsory acquisition of *t'ong* land should be reinvested in land or otherwise held by the *t'ong* and if not so reinvested or held, it may not be distributed to its members unless under circumstances of necessity which make the distribution inevitable and then only by unanimous consent of all its members.

Chinese customary law applicable to distribution by way of pai-ji

56. According to Professor Dicks SC, *pai-ji* is a clan matter, i.e. a matter of internal management of the *t'ong*. He made it amply clear that he was not fully appraised of what goes on in Tang Kwong Yu Tong and was not in any position to give evidence about *pai-ji*. He was of the opinion that as the Tong had no written rules, customary rules assumed crucial importance and the existence and content of such customary rules within each such lineage or clan is a question of fact rather than a question of Chinese customary law. He could not offer any expert evidence on how a court in traditional times would resolve disputes about *pai-ji*, but could only speculate that a magistrate would just send the parties back to resolve their differences. Thus, distribution of surplus rental income by way of *pai-ji* is not a matter governed by Chinese customary law. It is a matter of internal management for the *t'ong*. If the *t'ong* has no written rules about distribution of income, *pai-ji* is a matter to be determined by the custom of the *t'ong*. The existence and contents of such custom is of crucial importance.

Decided Hong Kong cases on Chinese customary law

57. Now I turn to examine local decisions on Chinese customary law and custom as they were applied in the New Territories. The Chinese customary law and custom as had been found in previous decisions are aspects of our local laws which I am entitled to take judicial notice of: see *Wong Yu Shi v Wong Ying Kuen* [1957] HKLR 420 at 438-440, per Hogan CJ and Gould J (Full Court) and *Yeung Chi Ding and Others v Yeung Tse Chun* [1986] HKLR 131 at 137G-138B, per Liu J, as he then was. The exercise will enable me to find if at all the Chinese customary law and custom which I have found existing in the 1900s have evolved differently while the New Territories were under British rule.

58. Mr Ho SC, counsel for the Plaintiffs, referred me to some useful decisions. The first one is *Tang Kai-chung and another And Tang Chik-shang and others* which I have referred to above. In that case, the common ancestor had six sons, each of them formed a separate *t'ong*. He divided his land into nine groups with six of the groups formed to correspond with the six *t'ongs*. Those six groups of land were not appropriated to each of the *t'ongs* but were managed by the *t'ongs* in rotation with the object of enjoying equally the income from the six groups of land. The other three groups were the worshipping group, the research group and the education group which ceased to exist in 1946. The two plaintiffs sought partition of the six *t'ong* groups of land based on the English Partition Acts 1539 and 1540 which then applied to Hong Kong by virtue of the Application of English Laws Ordinance. Mills-Owens J refused the application holding that a member of the *tso* could not seek partition of the *tso* property against the wishes of other members as a partition would be destructive of the social structure of the clan. Mills-Owens J said at 319-320:

> "I think the witness (the 4th defendant) finally agreed that there was a distinction to be drawn between the sale of lands in the Worshipping group and the sale of other lands in the Tso; lands in the Worshipping group would never be sold or otherwise voluntarily alienated, whereas ***other Tso lands might be sold but only if it served a good purpose*** [e.g. to raise fund for educational purposes such as building a school or to raise funds for repairing tombs, see p.318]; and any sale, in all cases, being ***subject to the agreement thereto of the members of the Tso assembled in a family meeting***. As I gather, any such meeting would not have the precision of, say, a company shareholders' meeting. Clearly there would be members of the Tso so young as to be unable to speak for themselves, very likely absent members also; and it appears that the views of the family elders would be, if not paramount then at least of considerable weight. As I gather, also, such dealings as letting or leasing Tso lands are subject to agreement in a family meeting. So that although the managers are invested with absolute powers under section 15 of the N.T. Ordinance, and so far as intending purchasers are concerned that is all that matters provided the Land Officer consents, their decision to exercise those powers in any matter is in fact controlled by the clan assembled in family meeting. …
>
> As I gather further, the ***distribution of part of the proceeds of sale or other alienation of lands on a per capita basis is a recent innovation***. In this regard I feel impelled to the conclusion that distribution on a per capita basis is ***not a product of the evolution of custom***, but rather the product of a bargaining or negotiating process carried out in the course of the deliberations of the family meeting whether to agree to a sale or other alienation. I feel impelled also to the conclusion that whilst lands of the Worshipping group would never be voluntarily alienated, there is not the same inhibition against sale of other lands of the Tso and that, if necessary, the family meeting would "adopt" some good purpose if it was desired to sell; in other words, whilst paying lip-service to custom, custom would not be allowed to stand in the way of an advantageous sale, whether advantageous to the Tso as a whole or advantageous to individual members by reason of intended distribution of moneys per capita." (my emphasis added)

59. Though it could be argued that the distinction between ancestral worshipping land and other land might be a custom of the *tso* in that case and is not of universal application, that distinction does not feature in the present case. The principles of Chinese customary law

revealed in *Tang Kai-chung and another And Tang Chik-shang and others* which may be relevant to the present dispute are:

(1) that a single member may not seek partition of *tso* property as that would be destructive of the social structure of the clan;

(2) that ancestral land other than worshipping land might only be alienated if it served a good purpose;

(3) that the decision whether to alienate was to be made in a family meeting; and

(4) that distribution of proceeds of sale or other alienation of *tso* property on a per capita basis is a recent innovation and not a product of evolution of custom.

The first three points are consistent with the Chinese customary law I found from the three *Da Li Yuan* decisions. The second point is a corollary of the principle that ancestral land might only be disposed of under circumstances of necessity, though good purpose is wider than circumstances of necessity. Implied in the first and third points is the principle that disposition of *t'ong* property may only be made upon unanimous consent as no single member may seek partition of *t'ong* property. In addition, in connection with the fourth point above, Mills-Owens J noted that in reality, while paying lip-service to custom, custom would not be allowed to stand in the way of a sale of *t'ong* or *tso* land for practical reasons, including the intending distribution of the proceeds amongst its members.

60. In *Kan And Kan*, some land of the *tso* was resumed by the Government and compensation in the form of cash and Letters B was paid to the *tso*. The plaintiffs' application for partition of land belonging to the *tso* was dismissed. After a thorough review of the authorities and the evidence before the court, Deputy High Court Judge Robert Tang QC, as he then was, concluded at page 537 that under Chinese customary law disposition or partition of *tso* land in the New Territories required the unanimous consent of all members of the *tso*.

61. The learned judge also considered the principle of Chinese customary law as it was applied outside Hong Kong. He was referred by Professor Dicks SC, who also gave expert evidence in that case, to the 1928 gazette of the Chinese supreme court in Nanking (now known as "Nanjing"), which was then the highest judicial tribunal of the Republic of China, recorded in *Le Droit Chinois Moderne No 16* published in 1933. The learned judge accepted the following summary of the *ratio decidendi* as announced by the supreme court in Nanking:

> "[When] the members of a clan dispose of fields [charged with] sacrifices [to the ancestors], the question is one of [assets] which have the character of collective property; the conditions of validity [of such an act of alienation] are, naturally, that it is a case of necessity, and that the unanimous consent of the members of the clan has been obtained. However, if by virtue of local custom, the heads of all the *fongs* acting collectively have the capacity to represent the members as a whole in the execution of an act of alienation; or if, [when] the heads of all the *fongs* have summoned a general meeting of the clan, the act of alienation [can] be decided upon by a majority of votes; or if the act of alienation, once effected, has been subsequently ratified by the clan as a whole; [an act of alienation made in any of these circumstances] must be recognized as valid."

62. The learned judge was then referred to another decision of the supreme court in Nanking, namely decision No 51 in the 18th year of the

Republic of China (1929) which dealt with renunciation of a right of redemption and in which the supreme court held that such redemption would only be valid if all the *fongs* of the clan had given their consent. In that decision, the supreme court in Nanking moved away from the consent of all members to the consent of all the *fongs*. The learned judge took the view that despite the difference between the two decisions, the emphasis was nevertheless on unanimous consent, though in the latter case, the units to give such consent, were the *fongs* rather than the individual members. He drew the inference that in giving consent, the *fongs* must have ascertained the wishes of its own members.

63. After referring to the Chinese customary law as applied in Vietnam, the learned judge concluded at page 536 that as a matter of Chinese customary law, as applied in China, disposition of *tso* property by sale, must be by the unanimous consent of members of the *tso* subject to local customs to the contrary. He could find no evidence of any local custom in the New Territories permitting sale otherwise than by unanimous consent and concluded at page 537 that the customary law applicable in the New Territories is the same. In his conclusion, he made no mention about the general rule that *tso* land may only be disposed of under circumstances of necessity, but that must be implicit in his conclusion. All the decisions of the *Da Li Yuan* and the supreme court in Nanking he referred to were made on the premises that disposition of clan property was a matter of necessity. The learned judge could for no reason have excluded this common and essential element from his finding of Chinese customary law. This is understandable as the focal point of dispute in *Kan And Kan* was about unanimous consent. This is obvious when the learned judge said at page 539 that he did not think there was any Chinese custom permitting sale or distribution as such. The legal principles of Chinese customary law

which I have found on the basis of the *Da Li Yuan* decisions and the expert evidence are the same as those found by the learned judge.

64. Then, the learned judge went on to consider the Chinese customary law applicable to distribution of compensation in the case of compulsory acquisition. He dismissed counsel's argument that no consent need be given by members of the *tso* as to division of the compensation. He said at 538E:

> "I am unable to see why that should be so. I believe the rationale behind the requirement of unanimous consent for sale of Tso land is that Tso land is meant to be kept in perpetuity, just as all Tso assets are meant to be kept in perpetuity and are meant to benefit generations to come. For that reason I can see no valid distinction between sale of a capital asset and the distribution of capital. Both are exceptional acts which should require unanimous agreement of all Tso members. In my opinion, it will be very mischievous, in the absence of compelling reason, for the court to hold that in the case of resumption, any member could put an end to the Tso by demanding distribution so that he could effectively compel the dissolution of the Tso."

I believe the "compelling reason" referred to by the learned judge in the above dictum is synonymous with the "circumstances of necessity" referred to in the *Da Li Yuan* decisions. Thus, the principle of Chinese customary law as found by the learned judge is that neither *tso* land nor compensation therefrom may be disposed of except under circumstances of necessity and then only by unanimous consent of all the members of the *tso*.

65. The learned judge then went on and made the following observation at 539B to F:

> "I am of the opinion, just as a member may not force a sale, nor a partition (regardless of s.15), a member may not compel a distribution, as a matter of Chinese customary law.
>
> In my opinion, what one member cannot do, a majority of members cannot do either. ... Dissolution by unanimous

> consent might have been tolerated on the basis that there was no legal sanction against it and of course there was no one to object.
>
> ... But I believe the true rule is that there can be no distribution without unanimous consent of all Tso members and a family meeting is where such unanimous consent may be given. ... I am not saying that as a matter of Chinese custom distribution may take place provided there was unanimous consent. Rather my decision is a negative one, namely, that there is no Chinese customary law, proved to my satisfaction, which would entitle any member or any number of members to demand distribution such that a court seized of the matter would enforce the demand. I do not think there was any Chinese custom permitting sale or distribution as such. Though in the absence of opposition there will be no one to stop it ..."

66. Like Mills-Owens J, Deputy High Court Judge Robert Tang QC, as he then was, was remarking on the somewhat sad reality that although under Chinese customary law *t'ong* land may not be sold and the proceeds of sale distributed except under circumstances of necessity, such sale and distribution was allowed to happen against the wishes of the founding ancestor because there was no one to prevent it from happening when it was the common desire of the present members to share the proceeds of sale of ancestral property or compensation to the exclusion of their own descendants. This was indeed what happened in the present case to the sale of Letter B and the distribution of proceeds of sale in 1976.

67. In respect of distribution of income, Deputy High Court Judge Robert Tang QC, as he then was, held at 543D:

> "As for relief of poverty, that no doubt depended on individual circumstances.
>
> …
>
> However, was that the custom?
>
> I asked Mr Dicks, how he thought a Chinese magistrate might have reacted if the same problem had been submitted to him. He

> said quite fairly that he thought the magistrate would have sent the litigants back to their villages for conciliation. Such was the traditional Chinese way. And according to Mr Lo, with his extensive experience in the New Territories, such seems to be still the custom in the New Territories. He tells me and I accept that there is a strong desire for consensus and harmony and although a Tso might not reach agreement at once, they would continue to try until they do reach agreement. At times, this process may take years."

Thus the learned judge also accepted the evidence of Professor Dicks SC who also gave expert evidence in *Kan And Kan* that distribution of income is a *t'ong* matter which is governed by custom of the *t'ong* but not Chinese customary law. Given the strong desire for consensus and harmony, the custom is in favour of unanimity.

68. The learned judge also made a further finding on the basis of the evidence before him that he was unable to come to any concluded view as to whether there was any custom of per capita distribution either in that case before him or in general in the New Territories. He thought such custom could never have existed as it would be contrary to the purpose of setting up the *tso* or *t'ong*. He said at 546E:

> "My conclusion is that I do not believe it has been established that a certain and continuous custom of sufficient antiquity existed in the Tsang Pak Long Village so that I must decide this matter on the basis of some custom which is general to the New Territories and not on the custom of a specific locality.
>
> I must turn to consider whether there is evidence of such custom in the New Territories. On the evidence I have reviewed above, I do not believe it has been proved to the degree of certainty required that there was such a custom. I am mindful of the observations of Mills-Owens, J., however, ***it seems to me clear that even though per capita distribution might have been a comparatively recent innovation, there is no evidence of a custom that the distribution of proceeds of compensation should be per stirpes***.
>
> Nor am I satisfied that the evidence of Professor Dicks shows that there was such a custom in China. ***I think it is not possible to talk of a custom in this context since distribution was not***

> ***supposed to take place at all. I do not believe any such "custom" would have been recognised or enforced by any Chinese court.*** More likely, the litigants would have been sent away with the admonition that sale of Tso land or distribution of proceeds of sale of Tso land or of compensation was impious and the court would have none of it." (my emphasis added)

Neither Professor Chang nor Professor Dicks SC could offer any expert evidence of the custom of distribution. I think the learned judge must be right. It is just impossible to have any custom on distribution of proceeds of sale of *tso* property as such property was intended to be inalienable, indivisible and to be held in perpetuity for generation after generation. I respectfully adopt that finding of Chinese customary law.

69. *Kan And Kan* has stood the test of time. It has been cited and adopted in many subsequent decisions of this Court, including *Leung Kuen Fai and Tang Kwong Yu (or U) Tong or Tang Kwong Yu Tso* in which the same Tang Kwong Yu Tong was a party. It confirms my finding of Chinese customary law as it was in the 1900s and confirms that the law has not evolved any differently while the New Territories were under British rule. It confirms that the same legal principles applies to compensation as to disposition of *t'ong* property. It also confirms that distribution of surplus income by way of *pai-ji* is a matter of internal management of the *t'ong* to which Chinese customary law is inapplicable, but which in the absence of written rules is governed by custom of the *t'ong*.

How might custom be modified under Chinese customary law

70. I now turn to examine how Chinese custom might be modified or varied under Chinese customary law. In *Kan And Kan*, Deputy High Court Judge Robert Tang QC, as he then was, held that a custom must be immemorial, certain in respect of its nature generally as well as in respect

of the locality where it is alleged to obtain and the persons whom it is alleged to affect, and must have continued without interruption since its immemorial origin. Neither Professor Chang nor Professor Dicks SC differ from the above views.

71. I respectfully adopt that finding of Chinese customary law by the learned judge. However, I would respectfully add the following gloss to the learned judge's finding of the law. Implicit in these characteristics is the concept that a custom must have an obligatory force from within the custom itself which is derived from continued practice without interruption since time immemorial so that the persons in the locality whom the custom is alleged to affect must feel it an obligation to conform as if it is a norm of human behaviour or practice within that locality. Hence, a practice which is the result of a mutual agreement cannot be regarded as a custom as it is not the result of observance of a norm which persons in the locality feel it obligatory to continue to behave in that particular manner. Furthermore, if the practice is the result of an agreement, it means others are free to agree otherwise and the element of certainty is missing. The other gloss is that a custom is living. It may evolve with changing social, economical and political conditions. The course of evolution is a long one. A new custom is said to have evolved or an old custom modified if the evolving custom has acquired the above characteristics. But by its very nature, an evolving custom or a particular aspect of an evolving custom may not have immemorial existence. However, to have the force of a custom, an evolving custom must have at least had a substantially long period of existence and recognition so that the persons whom this new custom is alleged to affect would feel it an obligation to follow in preference to the old one. Whether a practice had a substantially long period of existence and recognition as to qualify as a newly evolved custom is a question of fact.

A summary of the applicable Chinese customary law

72. In summary, I find that the following are the principles of Chinese customary law which may be applicable to the present case:

(1) *t'ong* property is meant to be indivisible, inalienable and perpetual;

(2) *t'ong* land may not be disposed of except under circumstances of necessity and by unanimous consent of all members of the *t'ong*, no single member may compel partition or sale of *t'ong* land;

(3) likewise, compensation from compulsory acquisition of *t'ong* land may not be distributed among members of the *t'ong* except under circumstances of necessity and by unanimous consent of all members, no single member may compel distribution of compensation;

(4) distribution of surplus rental income or profit issuing out of *t'ong* land for the purpose of *pai-ji* is a matter of internal management of the *t'ong* and not a matter subject to Chinese customary law, it is governed by rules, if any, or by custom of the *t'ong*, if there are none;

(5) a custom must be immemorial, certain in respect of its nature generally as well as in respect of the locality where it is applied and the persons whom it is alleged to affect;

(6) a custom must have obligatory force from within the custom itself which is derived from continued practice without interruption since its immemorial origin; and

(7) a custom may evolve with changing social, economical and political circumstances; a new custom has evolved or an old custom modified if the evolving custom has acquired the above characteristics; to have the force of a custom, an evolving custom must have at least had a substantially long period of existence and recognition, though not necessarily since time immemorial, so that the persons whom this new custom is alleged to affect would feel it an obligation to follow in preference to the old one.

THE 1982 AGREEMENT UNDER HONG KONG LAW

73. In this section of the judgment, I shall consider the effect of the 1982 Agreement under Hong Kong law insofar as distribution of compensation in the bank accounts of the Tong is concerned, which is the system of law I find applicable to distribution of compensation. Then I shall consider the effect of the 1982 Agreement as regards distribution of the mesne profit in the bank accounts assuming that Hong Kong law were applicable as if the mesne profit were not land within the definition of section 2 of the NTO. Mr Ho SC attacks the validity of the 1982 Agreement under Hong Kong law on two fronts: lack of authority and duress.

The authority point

74. Mr Ho SC's argument on lack of authority is a very narrow one. The Plaintiffs seek to resist the Defendants' counterclaim by raising the 5th Plaintiff's interest in the compensation in the bank accounts of the Tong. The 5th Plaintiff's interest in the compensation is an issue in which Chinese customary law is relevant. It would be useful to recapitulate Mills-Owens J's oft-cited dicta in *Tang Kai-chung and another And Tang Chik-shang and others* at 280 that every male descendant of the common ancestor automatically becomes entitled at birth to an interest in the *t'ong* land for his life-time. Thus, upon his birth shortly after the signing of the 1982 Agreement, the 5th Plaintiff has been entitled to an interest in the Tong land and subsequently in the compensation from the resumption of the land which has accumulated throughout the years.

75. Mr Ho SC's argument is premised on Tang Chik Lam's lack of authority to enter into any agreement which is binding on an unborn member of the 3rd *fong*, namely the 5th Plaintiff. There is no argument that the other four managers had not been duly authorised to enter into the 1982 Agreement on behalf of members of the other four *fongs*. Mr Ho SC refers to two well established principles of agency quoted by the learned authors in *Bowstead And Reynolds on Agency*, 18th Ed, 2006, paragraphs 2-030 and 2-032. Firstly, agency authority need not be expressed and may be implied in a case where one party has conducted himself towards another in such a way that it is reasonable for that other to infer from that conduct assent to an agency relationship. Secondly, where one person purports to act on behalf of another, the assent of that other will not be presumed merely from his silence, unless there is further indication that he acquiesces in the agency. But Mr Ho SC argues that an unborn is incapable of giving his or her assent to a purported agent to act on his or her behalf. He draws

support for this proposition by arguing by way of analogy that a contract entered into by a mentally incapacitated person is voidable if that person can show that he was at the time of contracting incapable of knowing what he was doing and that the other party was aware of the incapacity: see *Bowstead And Reynolds on Agency*, 18th Ed, 2006, paragraphs 2-009. These are trite principles and Mr Shum did not offer any argument to the contrary. I agree with Mr Ho SC's submission.

76. It is common ground that the 1982 Agreement was reached during the members meeting on 7 February 1982 when the then five managers as heads and representatives of the five *fongs* signed the minutes of the meeting agreeing to the manner of distribution of all future proceeds of sale of Tong land or compensation from the Government for land resumption. There is no dispute that the compensation in the bank accounts of the Tong is property held on trust for all members of the Tong, including members who would be born after the date of the 1982 Agreement. The 5th Plaintiff was born about a month after the 1982 Agreement. Hence, Mr Ho SC attacks the validity of the 1982 Agreement on the basis that Mr Tang Chik Lam, the grandfather of the 5th Plaintiff who was yet to be born, could not have had the 5th Plaintiff's authority to enter into a binding agreement on his behalf. Mr Ho SC submits that the silence of the 5th Plaintiff who was then unborn cannot be taken to amount to his assent to the head of his *fong* to act on his behalf. Likewise, the 5th Plaintiff could not have granted such authority to Tang Chik Lam or being a minor could not have ratified such authority after his birth. The 5th Plaintiff attained the age of eighteen on 8 March 2000, which was well after the 3rd *fong* had publicly made known to the other *fongs* that they would not agree to the manner of distribution under the 1982 Agreement. Since attaining the age of majority, the 5th Plaintiff has not accepted any distribution under the 1982 Agreement.

Clearly, he has not ratified that agreement. As the 1982 Agreement is not binding on the 5th Plaintiff, no distribution may be possible under that agreement.

77. Accordingly, Tang Chik Lam and the 1st Plaintiff who succeeded him as manager and trustee are duty bound to prevent distribution of the compensation in the bank accounts of the Tong in the light of the 5th Plaintiff's objection. On this ground alone, the Defendants' counterclaim must fail.

78. The above would have been sufficient to dispose of the Defendants' counterclaim. It was not pleaded by the Defendants that the application of ordinary agency principles under the law of Hong Kong to the 1982 Agreement would cause injustice or oppression and hence should be dis-applied as was the rule against perpetuity in *Kan And Kan*. However, out of extreme caution, Mr Ho SC argues against the dis-application of these ordinary agency principles. He submits that if the ordinary agency principles are dis-applied and the 1982 Agreement enforced by the Court, the compensation in the bank accounts of the Tong now and compensation to be received for future resumptions will be distributed resulting in dissipation of the Tong's land-holdings. The whole purpose of setting up the Tong for veneration of the common ancestor and welfare of the present and future generations will be swept away and the Tong disintegrated. On the contrary, he submits that if the Court applies the ordinary agency principles and holds that the 1982 Agreement cannot be enforced for lack of authority from infants or unborn members, the integrity to the Tong will be maintained.

79. In my view, this beautiful and high-sounding ideal is not realistic. Though the 1st Plaintiff now says that the 3rd *fong* objects to any form of distribution of the assets of the Tong, it never was the 3rd *fong's* intention to preserve the assets of the Tong when it objected to the distribution. Tang Chik Lam suggested distribution of 50% of the compensation on a per stirpes basis and the other 50% on a per capita basis. During the 1982 meeting, the 1st Plaintiff suggested to reduce the amount for distribution on a per stirpes basis to 20% and then to 10%. Clearly, the common purpose of the Plaintiffs and the Defendants then was to distribute the bounty left by their common ancestor. The only wall which divided them was how the distribution would be to the best of their respective interests. It was not until 21 January 2002 that the Plaintiffs raised objection to distribution as such rather than the manner of distribution. Despite this litigation, I do not believe the common purpose of the Plaintiffs and Defendants has changed. The Plaintiffs' avowed intention for resisting distribution is for preserving the integrity of the Tong. Though lip-service as such claim probably is, I must accept it on its face value. The Defendants have failed to show there is any paramount interest which overrides that claim.

80. Numerous examples can be found in the authorities where ordinary legal principles under the law of Hong Kong were applied to such traditional Chinese institutions. In *Leung Kuen Fai and Tang Kwong Yu (or U) Tong or Tang Kwong Yu Tso,* Deputy High Court Judge Lam, as he then was, held that the concept of adverse possession applied to land in the New Territories and the court should not apply section 13(1) of the NTO in a manner which allowed Chinese customary law to prevail over the relevant limitation statutes. In *Wu Koon Tai And Another And Wu Yau Loi* [1997] AC 179, the Privy Council held that Hong Kong law applies to

conveyance in respect of land in the New Territories. Despite my feeling in the preceding paragraph, I am quite unable to see how the application of ordinary agency principles to the 1982 Agreement would cause injustice or oppression to the Defendants and why these principles should be dis-applied.

Duress

81. The Plaintiffs' further and alternative defence to the Defendants' counterclaim is that the 1982 Agreement was voidable as it was obtained under duress. Mr Ho SC submits that a contract which has been entered into as a result of duress may be avoided by the party who was threatened. Duress may take the form of a wrongful or illegitimate threat to the victim's person or the persons of those with close relation to the victim. It may also take the form of wrongful or illegitimate threat to the victim's property or his economic interests. The burden is on the party seeking to avoid the contract to prove the duress and causation in that he genuinely believed that submission to the agreement was the only way to prevent the violence or threat of violence from being carried into effect. The burden is a heavy one. These are trite principles. See generally, *Chitty on Contracts, 29th Ed, Vol 1* paragraphs 7-001, 7-002 and 7-008. The issue in the present case is one of fact, i.e. whether the threats were operative on the mind of Tang Chik Lam as to have caused him to enter into the 1982 Agreement, when he otherwise would not have.

82. The chronology shows that on 9 June 1981 when Tang Chik Lam wrote to the District Officer to refuse to collect the compensation and Letter B, the windscreen of the 4th Plaintiff's car was smashed on that very day. That violence was followed by various confrontations and mass rally

outside the Plaintiffs' houses. On 22 January 1982, the Plaintiffs' car port was broken into and two cars belonging to the 1st and 4th Plaintiffs were severely damaged and sprayed. Four days later, during the Lunar New Year, members of the other *fongs* shot fire crackers into the Plaintiffs' houses and when the 1st and 4th Plaintiffs went out of their houses to intervene, they were assaulted by more than ten members. Then on 29 January 1982, some youths gathered outside the Plaintiffs' houses and threatened to cause them bodily injury if they did not attend a meeting to discuss the method of distribution of compensation. None of those incidents were seriously disputed by the Defendants. Indeed, those facts could not have been disputed by the Defendants' only witness. The damage to the Plaintiffs' cars on the two occasions had been reported to the police and were not disputed by the Defendants. I have no difficulties in finding that Tang Chik Lam, as father of the 1st and 4th Plaintiffs, had been subjected to those violence and threat of violence before the meeting. It was against this background of violence and threat of violence that Tang Chik Lam attended the meeting on 7 February 1982.

83. According to the 1st and 4th Plaintiffs, they accompanied Tang Chik Lam to attend the meeting in the ancestral hall on 7 February 1982. The ancestral hall was situated on the first storey of a small house of about 480 square feet. It was packed with members of the Tong and understandably so in view of the interest in the subject matter to be discussed. The attendees were mostly members of the 5th *fong* which had the greatest stake in the outcome of the meeting. Tang Chik Lam, being one of the elders and managers, was seated together with the other managers and elders by the table, while the 1st and 4th Plaintiffs stood separately amongst the other younger members at a distance and watched.

84. The meeting was chaired by Tang Chi Leung, a senior member of the 5th *fong*. He was also a village representative of Tai Hong Wai and the chairman of the Kam Tin Rural Committee. He declared that the meeting was convened to decide on the disposal of the compensation to be received by the Tong. According to the 1st and 4th Plaintiffs, the meeting was very hostile and one-sided. The 4th Plaintiff was threatened by Tang Chik Wai, a member of the 5th *fong*, that he would be beaten up if he said anything. Tang Chi Leung suggested setting aside $50,000 to $100,000 for distribution on a per stirpes basis and to have the balance distributed on a per capita basis. The 1st Plaintiff shouted out a suggestion to have 20% of the compensation distributed on a per stirpes basis and the balance 80% on a per capita basis. His suggestion was rejected by Tang Chi Leung and ignored by the others. According to the minutes of the meeting, there was a suggestion by someone by the name of 'Chi Tai（志泰）' to reduce the amount set aside for distribution to the *fongs* from 20% to 10% and then to 8%. The 1st Plaintiff denied that he had made such suggestions. According to the attendance record and minutes of the meeting, there was no attendee by that name 'Chi Tai（志泰）', but the pronunciation of the 1st Plaintiff's name bears the closest resemblance. In the circumstances, I find that the person recorded as 'Chi Tai（志泰）' could not be anybody but Tang Che Tai, i.e. the 1st Plaintiff. The error on the minute was probably a careless handwriting mistake. I do not think the person who wrote the minute would have there and then concocted such evidence especially as the meeting was attended by representatives from the then New Territories Administration. But, on the other hand, I do not consider the 1st Plaintiff's denial of his counteroffers affected my assessment of his honesty. He was recollecting events which happened over twenty years ago. He could have honestly forgotten that in a desperate attempt he had made the counteroffers. The substantial reduction is also evidence of sapping of his

will. I consider the rest of his evidence credible. After rejecting the 1st Plaintiff counteroffers, it was then agreed that 8% of all compensation money received and future compensation monies to be received should be distributed on a per stirpes basis to the *fongs* for worshiping the ancestors and the balance of 92% be distributed on a per capita basis. The five then managers, including Tang Chik Lam signed on the minutes. Mrs Law Wong Wai Yee of the then New Territories Administration also signed as attesting witness. Tang Chik Lam said nothing during the course of the meeting. He was trembling as he was escorted down the ancestral hall with the 1st and 4th Plaintiffs. While they were on their way their homes, some women shouted abusive words at them. The 4th Defendant disputed that the meeting was hostile and one-sided. But he could offer little evidence to contradict the Plaintiffs'.

85. Mr Shum submits that the content of the 1982 Agreement is the best and most objective evidence that a compromise was truly reached between the 3rd *fong* and the other *fongs* on the manner of distribution. He submits that the prevailing custom of the Tong strongly supports a per capita distribution of compensation and that the four *fongs* stepped back together and made real and significant concessions by agreeing to have 8% of the compensation distributed on a per stirpes basis. I am surprised by that submission and have no difficulties in rejecting it. The custom relied upon by Mr Shum was the distribution of pork money and book money. These are recurrent expenses. Roasted pork used to be given to members who paid respect to the ancestors' graves on certain festive occasions as a sign of ancestral blessing and good luck. Later, as the numbers of members grow and to reduce administrative work, pork money is given in lieu. By nature, this must be on a per head basis. This custom is probably common amongst all *t'ongs* and *tsos* in the New Territories in the recent years. In

Tang Kwong Yu Tong, the criterion for distribution is age. The elders are given bigger shares. Book money is of the nature of an education subsidy to student members. By nature, it makes better sense for the money to be given to student members on a per capita basis. I do not think such distribution indicative of any established manner of distribution of assets of the Tong, particularly of capital assets, such as compensation as against dishing out of benefits of the nature of recurrent expenses such as pork money, book money and shoe money and the like from surplus income.

86. There were only two known occasions when capital asset of the Tong was distributed. The first occasion was the distribution of cash compensation received for land resumption by the Government in 1963. But nothing is known about the manner of distribution of the cash compensation. The second occasion was the distribution of the proceeds of sales of Letter B in 1976. According to the Plaintiffs, the proceeds were distributed on a per stirpes basis. The 4th Defendant disagreed. He said that the sale was negotiated individually between the developer and the *fongs* or the members. He argued that if the distribution was on per stirpes basis, the 3rd *fong* would have received about $3,000,000 and not $2,054,932.50. It is common ground that the sale was negotiated by an agent and a developer who had discussions or interviews with representatives of the *fongs* or the members individually. According to a notice dated 5 March 1976 posted up in Tai Hong Wai by the then New Territories Administration, the District Officer gave notice that Tang Kwong Yu Tong through its managers intended to sell the Letter B for $14,429,569.50 at the rate of $52.67 per square foot. According to the 1st Plaintiff, he was informed by the developer that the sale price was $44.50 per square foot after setting aside $7 per square foot for renovation of the ancestral hall. On that basis, the proceeds of sale net of renovation provisions should be

$12,192,599.50 and the 3rd *fong's* one-fifth share should have been $2,438,519.90. The 1st Plaintiff accounted for the difference between that amount and what the 3rd *fong* actually received as expenses and commission charged by the agent. He produced a table prepared by an unknown estate agent who was unsuccessful in negotiating the sale. That table shows that the total amount received by the various *fongs* was $15,317,442 and the amount received by the 3rd *fong* was indeed $2,054,932.50. The accuracy of that table was not seriously challenged by the Defendants and insofar as it relates to the Plaintiffs' share is correct. The *t'ongs* and *tsos* in the New Territories were, at least at that time, very close communities which were almost inaccessible to the outsider. To bring about a transaction of this kind and magnitude, influential third parties who were familiar with the *t'ongs* and *tsos* and the procedures in the New Territories Administration had to be involved and had to be paid. There is probably some truth in the 1st Plaintiff's explanation as to why the 3rd *fong* did not receive the full 20% of the net proceeds of sales. On the other hand, the amount received by the 3rd *fong* was far far out of proportion with a distribution on a per capita basis as the 4th Defendant alleged. The evidence of the 4th Defendant show that he was prepared to distort the evidence to meet his own ends. I accept the Plaintiffs' evidence that the distribution on that occasion was on a per stirpes basis.

87. Mr Shum submits that the meeting on 7 February 1982 had not been hostile as the 1st Plaintiff was in a position to voice his suggestion. He portraits the other four *fongs* as very accommodating and stepping back by agreeing to have 8% of the compensation distributed on a per stirpes basis to maintain a harmonious relationship with the 3rd *fong*. With my finding that the distribution of the proceeds of sale of Letter B in 1976 was on a per stirpes basis, his argument just falls apart. When the 1982 Agreement was

viewed against the per stirpes distribution six years earlier in 1976, it was obvious that by the 1982 Agreement the Plaintiffs traded off their right to 20% of the compensation for a right to 20% of 8% (i.e. 1.60%) plus a negligible share on a per capita basis (i.e. 4/205 x 92% or 1.80%), i.e. a total of 3.4%. The concession given by the 3rd *fong* was so great that it was more likely that it was extracted from them as a result of duress as the Plaintiffs alleged.

88. Mr Shum argues that there are objective evidence which suggests that the 3rd *fong* was not as vulnerable to duress and coercion as the Plaintiffs suggest. Though few in number, the members of the 3rd *fong* are well educated. All along, they had been receiving legal advice and had been seeking their solicitors' and police assistance. Mr Shum further submits that the 1st and 2nd Plaintiffs were people of strong will. At a subsequent members meeting on 15 November 1998, the 2nd Plaintiff proposed 50% of the compensation be set aside for per stirpes distribution. In December 2000, the 1st Plaintiff altered the bank mandate, which effectively freezes the bank accounts of the Tong thereby preventing any distribution without his agreement. At the meeting on 24 December 2000, the 1st Plaintiff reiterated that 50% of the compensation should be distributed on a per stirpes basis and firmly repudiated the 1982 Agreement. On 26 January 2002, the Plaintiffs instituted the present action. Those facts are not in dispute. However, those incidents happened after the 1982 Agreement and were all related to the actions taken by the Plaintiffs and not Tang Chik Lam, who signed the 1982 Agreement.

89. Mr Shum also submits that the meeting was attended by staff of the then New Territories Administration and the police. This is perhaps the only objective evidence against the Plaintiffs. However, according to

the 1st Plaintiff, the police presence was inconspicuous and probably outside the ancestral hall.

90. There were fifty-seven members attending the meeting. Among them, only three were from the 3rd *fong*. The majority were members of the 5th *fong* who would be most interested in the outcome of the meeting and distribution on a per capita basis would be to their best interest. The 4th Plaintiff was threatened by a member of the 5th *fong* not to say anything. The 1st Plaintiff's proposal was drown in the noise of the crowd and ignored. I find that the other four *fongs*, in particular the 5th *fong*, were the aggressive parties. The meeting was chaired by Tang Chi Leung who was a member of the 5th *fong* but was neither the head of the 5th *fong* nor the manager representing that *fong*. I could have no doubt that the meeting was a one-sided one orchestrated by the 5th *fong* led by Tang Chi Leung and took place in the manner as described by the 1st and 4th Plaintiffs. As for why the managers from the other three *fongs* joined force with the 5th *fong* to press for per capita distribution against the interest of their own *fongs*, it is a matter which is beyond me. It may well be that in view of the number of their members, the 3rd *fong's* proposal only to have 50% distributed on a per stirpes basis and the other 50% to be distributed on a per capita basis would make little difference to them and it was a easier decision to fall in line with the majority. I do not wish to speculate on the reason. Suffice it is to say that even taking that into consideration, I have no difficulties in coming to the above conclusion.

91. Though Tang Chik Lam could not be available to give evidence as to his state of mind, I accept the evidence of the 1st and 4th Plaintiffs said that he was in fright. Tang Chik Lam was sat amongst the other elders away from the 1st and 4th Plaintiffs. The meeting was

conducted in a one-sided manner. The 1st Plaintiff's proposals were rejected and his voice was drowned in the noise of the crowd. The 4th Plaintiff did not say anything. Tang Chik Lam said nothing during the meeting. He just signed the minutes of meeting. He was trembling as he was escorted away from the ancestral hall by the 1st and 4th Plaintiffs. He traded off what he no doubt would have appreciated and had hitherto enjoyed was the 3rd *fong's* right to 20% interest in very substantial compensation to be received in the years to come for a meagre 3.4% interest. The 1982 Agreement is very much against the interest of the 3rd *fong*. Having regard to the background of violence to Tang Chik Lam and to the 1st and 4th Plaintiffs and the damage to the Plaintiffs' property which happened before the meeting, the atmosphere at the meeting, Tang Chik Lam's demeanour during the meeting, the fact that he and his family had to live inside Tai Hong Wai in the days to come and his concern for the safety of his family, I accept the 1st and 4th Plaintiff's evidence that Tang Chik Lam was put in fear. Fear is best felt than described. From all the surrounding circumstances I have outlined, I have no difficulties in drawing the inference that Tang Chik Lam was so frightened that he felt he had no alternative but to submit. Accordingly, I find that the 1982 Agreement was obtained as a result of duress and is voidable at the instance of Tang Chik Lam and Tang Chik Lam had avoided the agreement by his letter of 6 November 1998. In coming to this conclusion, I have also borne in mind the long lapse of time taken for Tang Chik Lam to raise his objection to the 1982 Agreement.

Conclusion

92. I therefore come to the conclusion that under Hong Kong law the 1982 Agreement insofar as it relates to distribution of compensation for

land resumption is invalid and not binding on the 5th Plaintiff as it was entered into without his authority. But even if the 1982 Agreement were valid, it was voidable as having been obtained by duress and had been effectively avoided by Tang Chik Lam on 6 November 1998. In the circumstances, this part of the Defendants' counterclaim must fail as it is essentially of the nature of specific performance of the 1982 Agreement, which is invalid or unenforceable. Accordingly, the Defendants cannot demand distribution of the compensation monies in the bank accounts of the Tong. In view of my finding of fact, I would for the same reasons reach the same conclusion in respect of distribution of mesne profit in the bank accounts of the Tong, if Hong Kong law were also applicable to such distribution under the 1982 Agreement.

THE 1982 AGREEMENT UNDER CHINESE CUSTOMARY LAW

93. I have held that insofar as the 1982 Agreement relates to distribution of mesne profit the Court shall have power to recognize and enforce Chinese custom and customary right. The Defendants' case on the counterclaim is that both distribution of compensation and mesne profit under the 1982 Agreement are governed by Chinese customary law.

94. Mr Shum does not draw any distinction between compensation and mesne profit. The Defendants' case on the counterclaim is that the 1982 Agreement is valid under Chinese customary law, is binding on all present and future members of the Tong and is effective in distributing and dividing both compensation and mesne profit received and to be received from the Government. In the alternative, Mr Shum argues that the 1982 Agreement and the distributions made pursuant to it created a valid new

rule which modified the existing custom of the Tong and is therefore binding on all present members of the Tong.

95. Mr Shum does not seek to place any significance on the distinction between compensation and mesne profit and adduced no evidence of any distinction between the two under Chinese customary law. The distribution which is being sought in this case is not a distribution of income only and for ordinary routine purposes, such as distribution of pork money, book money and shoe money which are of the nature of recurrent expenditure to be defrayed from income, or a distribution for specific purposes of the Tong, such as *pai-ji* to relieve the members from poverty. Nor is the distribution sort to meet contingencies occasioned by circumstances of necessity. The distribution being sought is for no other purpose but to appropriate property of the Tong to the present generation. For such distribution, I think it makes no difference whether the property to be distributed is compensation which is of the nature of capital asset or mesne profit which is of the nature of income. The same principles apply.

Validity and enforceability of the 1982 Agreement

96. Professor Dicks SC gave the following expert opinion about the validity of the 1982 Agreement. Firstly, he could see no substantial reason to question the formal validity of the 1982 Agreement. Secondly, he could not see any legal reason arising from Chinese customary law or custom why the 1982 Agreement should not validly modify the existing custom of the Tong. Thirdly, if the intention of the parties to the 1982 Agreement was to create a new rule, he could see no legal reason why this should not be validly achieved in this manner. Fourthly, he could see no

legal reason why a lineage organisation without written rules should not adopt one or more written rules at any stage of its existence.

97. Mr Ho SC commented Professor Dicks SC's opinion as a negative one and criticised the absence of a positive statement whether the 1982 Agreement would achieve legal validity under Chinese customary law. When asked what a Chinese court would have decided had the question been placed before the magistrate in traditional China, Professor Dicks SC said that the magistrate would have sent the parties back to the village to sort out the matter themselves. Obviously Professor Dicks SC was only prepared to go as far as to say that the 1982 Agreement has validity in form but steered clear of giving an opinion whether it would be legally valid in traditional times. When directly asked for a definitive opinion, Professor Dicks SC said:

> "I can't see an agreement of this kind being made in quite this way in traditional period. It's a modern agreement. It's got very little to do with the Chinese customary law. It's purely about the internal arrangements of the clan as they now are."

I think Professor Dicks SC has given as fair and accurate a view as he could. Such an agreement violates the very purpose for which a *tong* was set up and is destructive of the *tong*. The agreement is one which would not have arisen in traditional times. It is a modern agreement made to frustrate the benevolent intentions of the founder of the Tong for the selfish benefit of the present generation to the prejudice of the future generations for whose benefit the trust was intended. I think it is impossible for Professor Dicks SC to say anything of great significance in this context.

98. However, when the question comes to be decided by a modern court, the court has to reach a conclusion, but only if it can, by placing itself in the position of a *Qing* magistrate and ask what conclusion the *Qing*

magistrate would have reached. The conclusion must be one which is reached on the basis of expert evidence on relevant principles of Chinese customary law which have been proved to the satisfaction of the court. In this regard, two important principles of Chinese customary law are relevant. Firstly, *t'ong* property, including compensation from compulsory acquisition of *t'ong* property, proceeds of sale and mesne profit, is inalienable, indivisible and perpetual. Secondly, *t'ong* members may not, even by unanimous consent, dispose of *t'ong* property unless there are circumstances of necessity of the kind I referred to which make the distribution inevitable. If the court is unable to reach a conclusion, the issue will have to be resolved against the party who bears the burden of proof.

99. Mr Ho SC argues that a new member was born to the 3rd *fong* about a month after the signing of the 1982 Agreement, namely the 5th Plaintiff. He further argues that under Chinese customary law the 5th Plaintiff has an interest to the compensation upon his birth; that his consent to distribution of Tong's property was required and that he could not have given any consent at the time of agreement. Hence, Mr Ho SC submits, no distribution may be made under the 1982 Agreement without the 5th Plaintiff's consent. Mr Shum's contrary argument is based on the fact that the 1982 Agreement was made with the consent of the heads of all the *fongs*, including the 3rd *fong*, of which the 5th Plaintiff is a member. He referred to *Kan And Kan*, in which it was established that in the event that *t'ong* property is to be disposed of by sale, such disposition must be made by the unanimous consent of all members of the *t'ong* subject to any local custom to the contrary. He also referred to the Court of Final Appeal in *Re Lau Wai Chau* which held that with the unanimous consent of all *fongs* representing all the members it would be lawful for the *t'ong* to dispose of not only some but all of its properties to the extent that the *t'ong* would be

dissolved. On these legal principles, particularly the principle established by the Court of Final Appeal, Mr Shum argues that in the absence of evidence of any contrary local custom applicable to the Tong, the five heads of the five *fongs* of Tang Kwong Yu Tong had full authority to decide on behalf of the Tong and to bind all members of the Tong by the 1982 Agreement. Hence, he argues that the 5th Plaintiff has no right or de facto power to object to the 1982 Agreement.

100. With respect, Mr Shum's argument is based on his misunderstanding of *Kan And Kan* and on an obiter dictum in *Re Lau Wai Chau*. It is difficult to see how Mr Shum could make a quantum leap from the proposition in *Kan And Kan* that if *t'ong* property is to be disposed of it must be by unanimous consent to the proposition that *t'ong* members may as of right dispose of *t'ong* property by unanimous consent regardless whether there were circumstances of necessity which make the disposition inevitable and hence leap onto the *Re Lau Wai Chau* dicta to bring the *t'ong* to dissolution. If *Kan And Kan* is not to be taken as the authority for the proposition that existence of circumstances of necessity is a pre-condition to any disposition of capital asset such as compensation received for compulsory acquisition of *t'ong* land, I would hold on the basis of the expert evidence on Chinese customary law before me that there must be circumstances of necessity which make it inevitable for the *t'ong* to dispose of the compensation before the *t'ong* may lawfully do so. For reasons as stated in paragraphs 38 and 39 above, I think Mr Shum's reliance on the dicta in *Re Lau Wai Chau* is misplaced. I must say with no disrespect to the Court of Final Appeal, those dicta were reached on the basis of agreed expert evidence on Chinese customary law which in itself was inchoate. The same experts have now testified that existence of circumstances of

necessity is a pre-condition before *t'ong* property may be disposed of. Thus, I would reject Mr Shum's argument.

101. Since 6 November 1998, the 3rd *fong* has voiced their objection to the 1982 Agreement. Originally, their objection might not have been based on the lofty ideal of preservation of the Tong and its property but was for personal motive which was probably financial. However, they have now objected, ostensibly at least for the purpose of preservation of *t'ong* property. The Defendants seek to implement the 1982 Agreement. But, the circumstances have changed. Not only were there no circumstances of necessity to justify the distribution, there was no unanimity among the members now. For this reason alone, the 1982 Agreement could not be enforced. A *Qing* magistrate might not be familiar with the Hong Kong authorities I referred to above. But the legal principles on which these authorities were decided are the two very well established Chinese customary law principles, i.e. *t'ong* property is inalienable, indivisible and perpetual and may not be distributed unless under circumstances of necessity and then by unanimous consent. Thus, had the matter been placed before a *Qing* magistrate, he would for the above reasons refuse to enforce the 1982 Agreement.

102. In Appeal No 771 of the 4th year of the Republic of China, the *Da Li Yuan* upheld the custom of disposition of clan property under circumstances of necessity as it was not contrary to public interest and was not in violation of any statutory law, i.e. the 6th *Li*. It is implicit in that decision that Chinese customary law recognised the principle that a contract might be void or unenforceable if it was illegal or otherwise contrary to public policy. Though the *Da Li Yuan* took a more relaxed view about unanimous consent in Appeal No 977 and Appeal No 1849 of

the 4th year of the Republic of China, it nevertheless did not detract from the above principles.

103. Professor Chang argued that the 1982 Agreement and the distributions made pursuant to the agreement were illegal. But Professor Dicks SC argued otherwise. He referred to the dicta of the *Da Li Yuan* in Appeal No 771 of the 4th year of the Republic of China (1915) which I have quoted in paragraph 45 above. The *Da Li Yuan* held that the fraudulent sale prohibited by the 6th *Li* meant unauthorized sale by person having no power to sell or one which has not been approved by all the *fongs*. Hence, Professor Dicks SC opined that disposition of *t'ong* asset by unanimous consent of the members was not illegal. The report of that decision was very brief, but it stated succinctly that clan property was meant to be inalienable and might only be disposed of under circumstances of necessity and by unanimous consent of all members of the clan. Thus, whatever was said in that decision about disposition of clan property was premised on the fact that circumstances of necessity existed to justify the disposition. The construction of the 6th *Li* as given by the *Da Li Yuan* must be understood on the premise that the disposition by unanimous consent was made under circumstances of necessity. In other words, if in the absence of circumstances of necessity, the *fongs* gathered together and decided to divide the clan property amongst the present generation, that must be a fraudulent sale caught by the 6th *Li*. Such a sale would be an appropriation by the present generation of property belonging to the *t'ong* held in trust for the benefit of the present and future generations but in respect of which the present generation does not have an absolute interest. Any sale by the present generation would have the effect of depriving the future generations of their right to a life interest in the property. However, if the property had been lawfully sold or converted into compensation as a result of

compulsory acquisition, appropriation of the proceeds of sale or compensation would not be a fraudulent sale of ancestral land within the meaning of the 6th *Li*. Under Chinese customary law, the compensation should be reinvested in landed property or otherwise held by the Tong. Any distribution of the compensation otherwise than under circumstances of necessity is arguably theft of the Tong's property. On common law principle, I would have considered the 1982 Agreement illegal as being a conspiracy to steal from the Tong. But in the absence of expert opinion on Chinese criminal law, I am not prepared to go that far.

104. Though I am not prepared to hold that the 1982 Agreement is illegal under the *Qing* Code or Chinese criminal law, the agreement is obviously unlawful. With the two well established Chinese customary law principles in mind, it can readily be appreciated that *t'ong* property is intended to be held in perpetuity for the benefit of its present and future members. Any appropriation of *t'ong* property to the present generation otherwise than under circumstances of necessity would have the effect of depleting the *t'ong* of its property and depriving the future generations of the use and benefit of the property. Such appropriation would be destructive of the *t'ong* and would violate the purpose for which the *t'ong* was set up and therefore unlawful. The purpose and effect of the 1982 Agreement is to make indiscriminate distribution of the Tong's property by appropriating it to the present generation regardless whether there are circumstances of necessity making the distribution inevitable. The 1982 Agreement is therefore unlawful.

105. The 1982 Agreement is also contrary to public policy of traditional China. This traditional institution of land-holding was encouraged in ancient China because of the social benefit it brought to the

clan. This was the public interest referred to by the *Da Li Yuan*. The social benefit has diminished in modern time, but it does exists. The 1982 Agreement has the effect of dissolving or disintegrating the Tong. The agreement is therefore unenforceable as being contrary to public policy both in traditional China and in modern time.

106. Furthermore, Mr Shum accepts that under Chinese customary law the effect of duress on a contract is the same as that under Hong Kong law. Thus, on the facts as I have found and for the reasons as I have given in paragraphs 81 to 91, the 1982 Agreement was voidable under Chinese customary law by reason of the fact that it was obtained by duress and is unenforceable as it has been effectively avoided.

107. On the facts of the instant case, all the heads of the *fongs* unanimously agreed in 1982 to distribute all compensation to be received from the Government for no other reason but to appropriate the compensation amongst the present generation. There is no dispute that there are/were no circumstances of necessity which made distribution of the compensation inevitable. An agreement to distribute the compensation and mesne profit in the absence of any circumstances of necessity is in contravention of the purpose of the Tong and is therefore unlawful. It is also contrary to public policy as it would result in disintegration of the Tong. The agreement was also voidable as having been obtained by duress and has been effected avoided by Tang Chik Lam on 6 November 1998.

108. Though according to the expert opinion of Professor Dicks SC, there is no reason to question the formal validity of the 1982 Agreement and though nine distributions were made pursuant to the 1982 Agreement between 1983 and 1997, the truth is, as Professor Chang said,

the agreement was only allowed to be implemented in the absence of opposition. If one day a member woke up and realised the unlawfulness, the distribution should stop. Had the matter been placed before a *Qing* magistrate, I think he must have refused to enforce the 1982 Agreement because no distribution under the agreement could now be made in the absence of circumstances of necessity and unanimous consent of all the members of the Tong. Another reason is that it would be contrary to public policy to enforce the 1982 Agreement because it was unlawful, voidable and has been effectively avoided.

109. No argument has been advanced by the Plaintiffs on the basis of the interest of unborn members, i.e. future members to be born. There is no need to as the 5th Plaintiff was born to the 3rd *fong* and is now in the position to resist the distribution. I do not intend to deal with the issue of the unborn's interest as I do not consider I have sufficient expert evidence on Chinese customary law to assist me to come to any conclusion.

Whether a new rule of distribution of the Tong's property has evolved since 1982

110. Mr Shum next advanced a novel argument that by reason of the 1982 Agreement and the nine distributions made pursuant to that agreement during the fourteen years between 1983 and 1997, a new rule of distribution has evolved in modern times under new circumstances faced by the Tong and that such a new rule is binding on all members of the Tong. This argument is built on as a logical deduction from his misconceived argument based on *Kan And Kan* and *Re Lau Wai Chau.* As I have found, there is no basis for the aforesaid argument and accordingly no such logical deduction could be reached. I shall nevertheless deal with his further argument, which I summarise as follows. Mr Shum argues that under

Chinese customary law, there is no rule to prevent members of a *t'ong* form creating new rules for the *t'ong* by unanimous decision to meet the changing circumstances that only emerge in contemporary society. This proposition is accepted by both Professor Dicks SC and Professor Chang. I have no difficulties with this proposition.

111. Then Mr Shum relied on the following evidence from Professor Chang as evidence that the new rule has evolved:

> "Q1: Thank you. So from the last part of your answer, in the example that I have given about distribution of compensation money, from your last part of the answer, is it not right that the lawful situation would be if the new generations are not happy with the rule, lawfully, they could by unanimous consent of all existing members then have the rules changed. Yes?
>
> A1: They certainly have the right to reject the rule.
>
> Q2: And then have a new rule.
>
> A2: Well, if they decide to have a new rule in compliance with the very purpose and spirit of the establishment of the *tso*, I would say they have the right to make new rules.
>
> Q3: And that you …
>
> A3: If they decide to do – make rules totally arbitrarily, then I would say they probably have the power just as this generation has the power to make rules. They would have the power to make arbitrary rules as well, but that rule would not be considered as lawfully made.
>
> Q4: If that rule is not arbitrary, it's proper, then it would be lawful.
>
> A4: Then it will become a new set of rules.
>
> Q5: It would be lawful.
>
> A5: … and will be tested by future generations. If they are accepted generation after generation, time after time, it will become a rule in practice. Then when circumstances change, the rule may change again.

Q6: Yes, and every decision to change the rule must be by unanimous consent of then existing members. It must be right.

A6: I would say so, yes."

112. From the above exchanges, it is Professor Chang's evidence that if the present generation does not agree with any rules of the *t'ong*, they may change it by unanimous consent. The new rule will then be tested generation after generation and time after time. While Mr Shum emphasises in his submission on Professor Chang's statement that the present generation has the right to make new rules and the legality of the new rules, he missed the very important rider in Professor Chang's answer to his second question that to be lawful the new rule must be in compliance with the very purpose and spirit of the establishment of the *t'ong*. It is the unequivocal and unchallenged evidence of Professor Chang that new rules to be made by the present generation must be consistent with the purpose of the *t'ong* and not contrary to it. The new generation may not make any new rules arbitrarily simply because they do not like it and unanimously want to change it. It is common ground that the purpose of the Tong is to provide for ancestral worship and the welfare of the present and future generations on a perpetual basis. On the principle of Chinese customary law which I have found, *t'ong* property, including compensation money, may only be disposed of or distributed under circumstances of necessity. This purpose and rule must be sacrosanct and may not be changed. Any new rules which is inconsistent with or contrary to the above purpose must be arbitrary and unlawful.

113. In the present case, the new rule permitting indiscriminate distribution of compensation and mesne profit in the absence of circumstances of necessity has the effect of depleting the asset of the Tong,

disintegrating the Tong, jeopardizing its continued existence and prejudicing the interest of the future generations. This new rule violates the very purpose for which the Tong was set up and seeks to distribute the Tong's asset amongst the present generation to the deprivation of the future generations which is repugnant to the nature of the institution itself. The present generation cannot make any new rule which has the effect of dissolving the Tong and distributing its property among the present generation to the exclusion of the future generations. In my view, the new rule created by the 1982 Agreement is arbitrary and for the self-interest of some of the members of the present generation. It is inconsistent with the purpose of the Tong. The requirement of circumstances of necessity is a custom which safeguards the existence of the Tong and the interest of the future generations. The new rule which seeks to change the above custom is also arbitrary. I have no doubt that the new rule is unlawful under Chinese customary law.

114. Furthermore, most fatal to Mr Shum's submission is that this new rule does not have the essential characteristics of a custom in that it does not have an immemorial origin. The Tong has a history of over two hundred years. A deviation which was practiced on nine occasions over a period of fourteen years is such a *de minimis* existence which could hardly be regarded as a custom, especially in the face of objection within such a short time of its existence. Equally fatal to Mr Shum's submission is the gloss which I have added to *Kan And Kan* that a rule which is the result of an agreement cannot be regarded as a custom which is a rule observed as a matter of course in the locality where the custom is said to exist. A custom must have acquired the characteristics of having immemorial origin, certainty in its contents and must have continued without interruption since its immemorial origin. It must have an obligatory force from within the

custom itself and not derived from any agreement outside it. The new rule argued by Mr Shum does not possess any of these characteristics. I, therefore, reject Mr Shum's argument that the 1982 Agreement is a new rule which is binding on all the members of the Tong.

THE 2002 PAI-JI UNDER CHINESE CUSTOMARY LAW

115. Since rental income and profit issuing out of land is included as land by virtue of section 2 of the NTO, Chinese customary law and custom apply to the surplus rental income which was used in the 2002 *Pai-ji*. In this section of the judgment, I shall consider the Plaintiffs' claim in respect of the 2002 *Pai-ji* under Chinese customary law and custom. I shall then consider in the next section of the judgment, the Plaintiff's claim under the contrary hypothesis that Hong Kong law is applicable.

116. I accept Professor Dicks SC's opinion as stated in paragraphs 56 and 67 that *pai-ji* is a *t'ong* matter which is subject to the rule and custom of the Tong and is not governed by any Chinese customary law. It is common ground that the Tang Kwong Yu Tong has no written rules or constitution. Hence, whether to distribute the Tong's surplus income by way of *pai-ji* is solely a matter to be decided by custom of the Tong.

The pleaded custom and burden of proof

117. It is Mr Shum's submission that as the Plaintiffs are the claimants in the original action, they bear the burden of proving the illegality of the 2002 *Pai-ji*. He says that the only pleaded case of the Plaintiffs in respect of this claim is that as a matter of custom *pai-ji* may only be effected with the unanimous consent of each and every manager

and member of the Tong and that where any objection to *pai-ji* has been raised by any member, no distribution shall be effected. Hence, he submits that the Plaintiffs bear the burden of proving the existence of the above custom to the standard required in *Kan And Kan*, i.e. a custom must have the characteristics of certainty, continuity and sufficient antiquity and that the Plaintiffs have failed to discharge the burden of proof. On the other hand, Mr Ho SC submits that as the Defendants' defence is that it is the custom of the Tong to distribute the surplus income every year, the Defendants bear the burden of proving the custom of distribution as of course whenever there is any surplus.

118. Usually, wherever possible, the court will endeavour to determine a case on its merits based on facts which it finds proved to its satisfaction to the requisite standard. It is only in exceptional cases when the court cannot make any relevant finding of fact that the case will have to be resolved on burden of proof. The present case is not exceptional. However, as the argument has been raised, I shall deal with it.

119. I think it is important to distinguish between evidential burden and persuasive burden or legal burden. Evidential burden means the burden of passing the judge or the burden of adducing evidence. This burden may shift during the course of the trial. The legal burden does not. It is the burden which the law imposes on a party to prove a fact in issue to the requisite standard of proof. A party who fails to discharge a persuasive burden placed on him to the requisite standard of proof will lose on that issue. So far as the legal burden is concerned, I do not think there is any simple rule that it lies upon the claimant. The burden of proof in any particular case depends on the circumstances in which the claim arises. The general rule is *Ei qui affirmat nopn ei equi negat incumbit probation.*

Proof rests on he who affirms not he who denies. It therefore lies upon the party who substantially asserts the affirmative of the issue: see *Constantine Line v Imperial Smelting Corporation* [1942] AC 154 at 174. This burden is fixed at the beginning of the trial by the state of the pleading. The Defendants have not pleaded or advanced any argument that the approach of Chinese customary law is any different from the above. With the above principle in mind, I now turn to examine the pleadings of the parties.

120. In paragraphs 10 and 11 of the Statement of Claim, the Plaintiffs pleaded:

> "10. Each year, an audit meeting is held in the ultimate month of the lunar year. Discussions are held in that meeting amongst the Managers and members concerning whether, and if so, how the surplus income of the preceding financial year, if there is any, is to be disposed of. A decision is then made on whether and, if so, how much distribution of the surplus income is to be made and for what cause with due observance of the Tong's customs and rules.
>
> 11. Amongst others, it is the Tong's custom and rule that:
>
> (1) if there is surplus income at the end of each financial year, and if all the members and Managers give their consent, a portion of this surplus may be distributed to the members of the Tong as "Relief of Poverty" (派饑);
>
> (2) if there is any objection to the distribution of the surplus income as "Relief of Poverty" from any Manager or member of the Tong, there must be no such distribution at all."

121. The Defendants responded to the above pleadings in paragraph 7 of their Defence and Counterclaim as follows:

> "Paragraphs 10 and 11 of the Statement of Claim are denied save as stated below. It is the custom of the Tong to:
>
> (a) distribute once every year to each of its managers shoes money …;

(b) distribute to each of its members in equal amounts on a per capita basis pork money …;

(c) after the passing of the accounts of the previous year held in the last month of the lunar year and after setting aside from the surplus of the income over expenditure of the previous year a reserve sum for the expenditure of the coming 1st quarter, distribute the net surplus as Relief of Poverty among all members in equal sums on a per capita basis; and

(d) abide by all relevant binding decisions reached by members' meetings of the Tong."

122. In paragraph 7 of their Reply and Defence to Counterclaim, the Plaintiffs pleaded as follows:

"It is admitted that it is the custom of the Tong: -

(a) to pay, as part of the expenditure of the Tong, its Managers a token sum in the form of "shoe money" once a year …;

(b) to pay, as part of the expenditure in ancestral worship, members of the Tong "pork money" in lieu of sacrificial port at [five festive occasions] …;

(c) to decide at the annual audit meeting whether to distribute "Relief of Poverty", and if so, how much, and when to so distribute. In the event where there is objection to distribute from any members, no "Relief of Poverty" will be distributed.

Save as aforesaid, paragraph 7 of the Defence is denied. It is further averred that any distribution of the Tong's assets is contrary to the principal objective of the Tong, and unanimous consent from all the members is mandatory if the Tong's assets are to be distributed."

123. After comparing the above pleadings, a fair amount of agreement as to the content of the custom is notable. There is a custom of paying shoe money to the managers every year in recognition of their service to the Tong. There is a custom of paying pork money in lieu of sacrificial pork on five festive occasions, namely, the lunar new year, the

spring ancestral hall worship, the Ching Ming Festival, the Autumn Ancestral Hall Worship and the Chung Yeung Festival. Those matters are not in dispute.

124. There is also a fair amount of agreement about *pai-ji*. The decision whether to distribute by way of *pai-ji* and, if yes, the amount and when to distribute, is to be made at the annual accounting audit meeting at the end of the lunar year. The disagreement between the parties is that according to the Defendants the surplus income of the current year after allowing for the estimated expenditure for the first quarter of the following year will be distributed as a matter of course amongst all members in equal sums on a per capita basis, whereas according to the Plaintiffs, no distribution will be made if any member objects and that any distribution of the Tong asset require unanimous consent from all its members. The custom relied on by the Plaintiffs and the Defendants are not quite the same. Thus, the question is who bears the burden of proof and of proving what custom.

125. There can be no dispute that rental income is land and trust property held by the Tong for the benefit of the present generation, including the Plaintiffs, and all future generations. There is no dispute that surplus income was distributed without the Plaintiffs' consent and despite the objection of the 1st Plaintiff as a manager of the Tong. On the face, there was clear infringement of the Plaintiffs' right. The Plaintiffs have discharged the evidential burden. The Defendants' defence is that they distributed the surplus income in the exercise of their obligation as managers in accordance with the custom of the Tong. The Defendants are asserting the affirmative of the issue, i.e. the custom of distributing surplus income as a matter of course. Hence, the legal burden is on the Defendants

to prove this custom and not for the Plaintiffs to prove the negative by negating the custom alleged by the Defendants or by showing some other custom such as distribution only upon unanimous consent. I therefore find that the Defendants bear the legal burden of proving the custom they assert, i.e. the custom of distribution of surplus income as a matter of course. If the Defendants fail to discharge this legal burden, they stand to lose on this issue. The Plaintiffs are entitled to succeed even without proving the custom of distribution only by unanimous consent.

126. The 4th Defendant who gave evidence on behalf of the Defendants is over eighty years old. He was born in the 1920s. He was not very consistent in his evidence, which was partly attributable to his age and background and partly to his dishonesty. The way in which he together with the other managers reacted to the 1st Plaintiff's repudiation of the 1982 Agreement and denied the 1st Plaintiff's access to the accounts of the Tong indicated bad faith and unfair dealing. This reflects his inclination to tailor his evidence to serve his or the Defendants' interest than to tell the whole truth. This was borne out very clearly in his evidence that the distribution of the proceeds of sale of Letter B was on a per capita basis. His evidence about *pai-ji* was also contradicted by the accounts of the Tong. He was an exaggerating witness. I give little weight to his evidence save those which are against the Defendants' interest. The 1st Plaintiff who gave evidence on behalf of the Plaintiffs is much younger. He was sixty-eight, being born in 1937. He was told about the custom of the Tong by his father, Tang Chik Lam. I find him a truthful witness, but his evidence about the custom of the Tong lacks particularity and is of little assistance.

127. According to the 4th Defendant, the custom of *pai-ji* began when he was about ten years old in the 1930s. He said that originally *pai-ji*

used to be a subsidy for the needy but over the years the nature had changed and since 1980 *pai-ji* became an annual event of distributing surplus income equally to all members whenever there was a surplus. His evidence is that after approving the accounts during the annual accounting audit at the annual meeting, the Tong would approve distribution of the surplus income after setting aside the estimated expenditures for the first quarter of the following year. The Plaintiffs do not dispute that the decision whether to distribute is made at the annual general meeting after the annual accounting audit. What the 1st Plaintiff denied is that there was any such custom of distribution whenever there was surplus. The 1st Plaintiff's evidence was simply that the decision to distribute was made at the annual general meeting held at the end of the lunar year on the basis of unanimous consent and there were years when no distribution was made despite there was surplus income.

128. Under cross-examination, when the 4th Defendant was confronted with the accounts of the Tong, he admitted that there were many occasions when no distribution was made despite there was surplus. The accounts of the Tong shows there were thirty-seven *pai-jis* in the eighty-four years between 1899 and 1993, excluding the eleven years between 1953 and 1963 when no record was available. In some years there were two *pai-jis*. There was only one *pai-ji* between 1986 and 1993. Such distribution could only be described as sporadic. As the accounts of the Tong show, *pai-ji* has only become an annual event since 1994 and not as early as 1980 as the 4th Defendant alleged. There were many occasions prior to 1994 when no distribution was made despite there was surplus. Eventually, the 4th Defendant had to agree that there was no rule to distribute whenever there was surplus income. On this admission, the Defendants' case falls apart. When the 4th Defendant's evidence is married

with the incontrovertible accounts of the Tong, the effect of his evidence is that until 1994, instead of 1980, the custom was to distribute surplus income to the needy as indeed the words "*pai-ji*" suggest and not to distribute surplus income as of course.

129. On the more critical issue whether there was any custom that the decision to distribute would only be made upon unanimous consent, the 4th Defendant's evidence is equivocal and inconsistent. During cross-examination, he repeatedly switched between majority vote and unanimous decision. Ultimately, he agreed that apart from the 2002 *Pai-ji*, the decisions to distribute were all unanimous and until then no one ever raised any objection. On the other hand, the 1st Plaintiff said he was told by his father that there was one occasion when *pai-ji* was withheld as a result of objection from one member even after notice of *pai-ji* had been issued. However, he was unable to give further particulars of that incident. Because of the lack of particularity, rather than of hearsay, I am unable to give that evidence any weight.

130. I can only make the following finding of facts. Since 1930 as far as the memory of the 4th Defendant went and until 1994, the distributions by way of *pai-ji* were sporadic and not annual events and the purpose of the distributions was to provide for the needy and not to distribute surplus income to the members as of course. For as long as the 4th Defendant could remember, i.e. since 1980 when he was first appointed as manager of the Tong, there was no occasion known to him when the decision to distribute was made against objection of any member. It was only since 1994 and until 2000 that distribution became an annual event. Prior to 1994, there were many years when there were no distribution despite there was surplus income. In addition, there is incontrovertible

evidence from the minutes of the meeting of the Tong or of its managers that hitherto all decisions were made upon unanimous consent or at least in the absence of any objection and that where no consensus was reached, the meetings were usually adjourned for discussion.

131. On the above finding of facts and on the 4th Defendant's own admission under cross-examination, it is manifestly obvious that the Defendants have utterly failed to prove any custom of distribution of surplus income as of course with an immemorial origin. The practice of distribution of surplus income to members regardless of need which has developed since 1994 is in clear violation of the purpose for which the Tong was set up. Tang Kwong Yu Tong has an existence of over two hundred years. Even taking into account that the practice of distribution of surplus income as of course and regardless of need has evolved since 1994 as supported by the accounts, I consider that as a wrongful deviation from the established custom. A wrongful deviation of seven years from a custom practised over a period of more than two hundred years is too much of a *de minimis* deviation as could be called a custom.

132. Can I take a step further to find if the Plaintiffs have proved the custom of no distribution unless by unanimous consent? On this question, assistance would have to be sought from Chinese customary law, not because it is applicable to the surplus income but because from which some clues as to the custom of the Tong on this matter could be ascertained. I shall start off with the two well established principles of Chinese customary law. Firstly, *t'ong* property is inalienable, indivisible and perpetual. Secondly, it may not be disposed of or distributed except under circumstances of necessity and then only with unanimous consent. As *t'ong* property is held in perpetuity for the benefit of the present and future

generations, a *t'ong* needs capital growth in order to keep pace with the needs of the future generations and their ever-increasing number of members. In the circumstances, it is only logical that surplus income should be kept within the *t'ong* as an accretion to the *t'ong's* capital. Thus, I would draw no distinction between capital asset and income. Distribution even of surplus income, otherwise than for the purposes of the *t'ong* would run counter to the purpose of the *t'ong* of providing funds for veneration of the common ancestor and for the needs of the future generations and would in the long term jeopardise its perpetual existence and prejudice the interest of the future generations. The present generation simply has no right to distribute surplus income as of course, in just the same way as it has no right to dispose of capital assets of the *t'ong*, otherwise than for the purpose of providing for the needy and the other legitimate purposes of the *t'ong*. Unanimous consent is the minimum safeguard to ensure that the *t'ong*'s income will be properly applied to the purposes for which the *t'ong* was set up and the minimum safeguard to secure its perpetual existence against indiscriminate and selfish siphoning off of *t'ong* assets by the present generation for its own benefit and to the exclusion of the future generations. With all these in mind, it would not be difficult to draw the inference that the sporadic distribution prior to 1994 is reflective of this long existing custom since 1899 of distribution of income only by unanimous consent.

133. Though the 1st Plaintiff was unable to give evidence of an immemorial custom of distribution only upon unanimous consent, the 4th Defendant, at least, admitted that since he became manager in 1980, there was no occasion when distribution was made against the objection of any member of the Tong. As at the time when the present dispute arose, there is evidence of twenty years uninterrupted observance of such a practice. I am prepared to hold that uninterrupted observance of a practice for twenty

years is some evidence on which the inference of its immemorial origin could be drawn. The way the Tong conducted its affairs as revealed by its minutes of meeting shows the strong desire for consensus and harmony which is reflective of a custom of unanimity of action. The sporadic distributions throughout the ages and the many occasions when no distribution was made even when there was surplus income are evidence which support a custom of unanimity. Accordingly, I find that there has been in existence a custom that unanimous consent is required to authorise distribution of surplus income for the purpose of *pai-ji*. This custom has transcended through the ages and hardened into a rule of the Tong in modern times. Save for a *de minimis* deviation of six years between 1994 and 2000, there is no evidence that this rule has been changed in modern times. Thus, when a member of the Tong wakes up and says he wants to put the Tong back to its right track, such deviation should come to an end.

134. It was argued that unanimous consent to distribute had nevertheless been made in the meeting in which the Plaintiffs did not attend. Though it is pleaded by the Plaintiffs that the decision whether to distribute is to be made after the annual accounting audit, that only goes to procedure and not to substance of the custom that distribution is only to be made in the absence of objection or by unanimous consent. Where and when the consent is obtained and the decision to distribute made is only a matter of procedure. The decision may be made at annual general meeting held at the end of the lunar year or if it is not convenient to do so, at the beginning of the following lunar year. It cannot be said that a decision to distribute or not to distribute made at a general meeting held on the first day of the lunar new year is invalid but would be valid had it been made at a general meeting held one day earlier on lunar new year eve. In fact, there were incidents in the past when *pai-ji* was made during the lunar new year. I

think the decision may also be made at any other time. If it becomes necessary to distribute by way of *pai-ji* to relieve the members of a calamity which occurred during the middle of the year, an unanimous decision to distribute by way of *pai-ji* made at that time could not be said to be invalid as not having been made at the end of the lunar year. What is important is that the decision to distribute must be unanimous and may not be made in the face of objection.

135. On the facts, to protect the interest of the 3rd *fong,* the 1st Plaintiff altered the bank mandate in December 2000 so that the Tong's bank accounts could only be operated on the joint signatures of all the five managers, including the 1st Plaintiff. The attitude of the other members of the Tong towards the Plaintiffs, particularly the 1st Plaintiff, became very hostile since 24 December 2000 when the 1st Plaintiff openly repudiated the 1982 Agreement. The 1st Plaintiff was cornered by members of the Tong outside the entrance of Tai Hong Wai, only to be released upon arrival of the police. On 31 December 2000, the members held a new year eve party outside the Plaintiffs' houses and conducted a mass rally to humiliate the 3rd *fong* and threw burnt paper money into the Plaintiffs' houses. For fear of his own safety, the 1st Plaintiff did not attend members meetings so as to avoid having direct confrontation with the members. He only attended to the matters of the Tong in managers meetings or through the secretary of the Tong. At a members meeting held on 7 January 2001 in which the Plaintiffs were absent, the members approved *pai-ji* in the amount of $1,500 per member. That *pai-ji* had to be aborted as the 1st Plaintiff objected and refused to sign cheques for making the payment. Thus the Plaintiffs' objection to *pai-ji* was unequivocal despite he did not attend the meeting.

136. As a result of the 1st Plaintiff's request for inspection of the accounts of the Tong for the year 2000/2001, the duty officers convened a meeting of the members on 4 February 2001 and invited the 1st Plaintiff to inspect the accounts at the meeting. Obviously, the motive was to force the 1st Plaintiff to have a direct confrontation with the members. The 1st Plaintiff did not attend that meeting. At the meeting, it was resolved that in future the accounts of the Tong may only be inspected at the annual meeting at the end of the year. In my view, the Defendants and members had no right to deny a manager, as opposed to a member, of his right to access the accounts of the Tong at any time for the purpose of discharging his duty as manager. It is only too obvious that the Defendants have teamed up with the members to refuse the 1st Plaintiff access to the accounts of the Tong for the purpose of forcing him to confront the members at general meetings.

137. The hostile relation continued into 2002. At a general meeting held on 13 January 2002, a resolution to distribute $1,000 per member by way of *pai-ji* was passed in the absence of the 1st Plaintiff. On 14 January 2002, the 1st Plaintiff requested the secretary to produce the accounts of the Tong for inspection. The request was refused by the secretary. On 19 January 2002, the Plaintiffs' solicitors, RWY wrote to the Defendants demanding submission of the Tong's accounts for inspection. The demand was ignored by the Defendants under the pretext that the letter was written in English. On 21 January 2002, the duty officers issued a notice of *pai-ji* on 28 January 2002. RWY wrote to the Defendants and duty officers on 23 January 2002 to object to the *pai-ji*. That *pai-ji* was cancelled as the 1st Plaintiff refused to sign cheques for payment. Despite the 1st Plaintiff did not attend the annual meeting to object to *pai-ji*, his objection was obvious and known to the Defendants.

138. Then the Plaintiffs instituted the present action on 26 January 2002 with an endorsement seeking an injunction to restrain the Defendants from distributing the asset of the Tong without the unanimous consent of each and every member of the Tong. The Writ of Summons was served on the Defendants on 5 February 2002. Thus the Defendants had knowledge of the Plaintiffs' objection to any form of distribution of the Tong's asset. Despite that at a members meeting held on 17 March 2002 in which the Plaintiffs did not attend, the members approved distributing $1,000 to each member by way of *pai-ji*. On 24 March 2002, the distribution was effected, presumably with rental income which the Defendants received and which they should have, but deliberately failed, to deposit into the First Two Bank Accounts.

139. Though the decision to distribute by way of *pai-ji* was made at members general meeting which the Plaintiffs chose not to attend, the objections of the Plaintiffs was patently known to the Defendants before the meeting by reason of the Plaintiffs' express objections and particularly the service on the Defendants of the Writ of Summons on 5 February 2002. It does not matter that their objections were not raised at the meeting. The Defendants as managers of the Tong had in the face of objection from members of the Tong caused the duty officers to distribute $201,000 from funds belonging to the Tong, when they had no authority to do so. In any event, the Defendants bear the burden of proving the custom of distribution of surplus income as of course and they have failed to discharge that burden. They have therefore failed to prove that they had the authority to cause the distribution. Accordingly, the 1st, 3rd and 4th Defendants are jointly liable to pay back to the Tong the said sum of $201,000 so distributed with interest from 24 March 2002.

THE 2002 PAI-JI UNDER HONG KONG LAW

140. Having found that the 2002 *Pai-ji* was unlawful on the basis that it was governed by Chinese customary law, it becomes quite unnecessary for me to consider what the position would have been under Hong Kong law as it never was the Defendants' position that Hong Kong law applies to the 2002 *Pai-ji*. For completeness, I shall deal with that issue very briefly. The position is essentially the same under Hong Kong law or Chinese customary law.

141. For similar reasons as considered above, the Defendants bear the burden of proving distribution of surplus income as of course. They have failed to discharge that burden under Hong Kong law. In respect of the characteristics of a custom, the only difference between the two systems of law is that under Hong Kong law a custom would have to be reasonable in its content. Bearing in mind the purpose of the Tong and the perpetual nature of the trust, it can hardly be argued that the custom of no distribution without unanimous consent unreasonable. Thus, were Hong Kong law applicable to the 2002 *Pai-ji*, I would for the same reasons hold that the Plaintiffs have successfully proved the custom that there shall be no distribution of surplus income unless with unanimous consent. I would also hold in the alternative that the burden of proving the custom of distribution of surplus income as of course is on the Defendants and the Defendants have failed to discharge that burden of proving the custom of distribution of surplus income as of course. Hence, the result would be the same if Hong Kong law were applicable to the 2002 *Pai-ji*.

CONCLUSION

142. I reach the following conclusions in respect of the Plaintiffs' claim in the original action. As the funds used for the 2002 *Pai-ji* was rental income or profit issuing out of the land of Tang Kwong Yu Tong, it was land within the meaning of section 2 of the NTO. Chinese custom and customary right is applicable to the 2002 *Pai-ji* under section 13(1) of the NTO. *Pai-ji* is a matter of internal management of Tang Kwong Yu Tong and is not governed by Chinese customary law. As the Tong has no written rules, *pai-ji* is a matter which is subject to the custom of the Tong. The Plaintiffs have proved the custom that there shall be no *pai-ji* unless the unanimous consent of all members of the Tong has been obtained. As the Plaintiffs had communicated their objection to the 2002 *Pai-ji* to the Defendants, the Defendants were in breach of their duty as managers and trustees of the Tong to cause the distribution. Accordingly, the 1st, 3rd and 4th Defendants are jointly liable to return to the Tong the sum of $201,000 so distributed together with interest at judgment rate since 24 March 2002. Assuming that the Plaintiffs had failed to prove the custom as they alleged, the Plaintiffs are also entitled to judgement. This is because the burden was actually on the Defendants to prove the custom of distribution of surplus income as of course and the Defendants have failed to discharge that burden. There is no evidence to suggest that despite my judgment in this case the Defendants would attempt further distribution of the Tong's asset without unanimous consent. Hence, I am not going to make the injunction order sought by the Plaintiffs.

143. My conclusion in respect of the Defendants' action by counterclaim is as follows. The subject matter of the 1982 Agreement is cash compensation and mesne profit held in the bank accounts of the Tong.

Mesne profit is land within the meaning of section 2 of the NTO, but not compensation. Thus, section 13(1) of the NTO applies to the mesne profit in the bank accounts of the Tong but not to compensation. The 1982 Agreement, insofar as it concerns distribution of compensation, is governed by Hong Kong law, whereas insofar as it concerns distribution of mesne profit, is governed by Chinese customary law.

144. Under Hong Kong law, the 1982 Agreement purported to affect the rights of a future member of the 3rd *fong*, namely, the 5th Plaintiff, who was not in existence at the time the agreement was entered into. Hence, Tang Chik Lam, the head of the 3rd *fong* at the time, could not have authority to enter into any agreement binding on the 5th Plaintiff. The 1982 Agreement is therefore unenforceable. Furthermore, the 1982 Agreement was voidable as having been obtained as a result of duress and has been effectively avoided by Tang Chik Lam on 6 November 1998. The Defendants have no legal basis under Hong Kong law to demand distribution of the compensation in the bank accounts of the Tong.

145. Insofar as the 1982 Agreement concerns distribution of mesne profit, the Court shall have power to recognize Chinese custom and customary right affecting such mesne profit. Under Chinese customary law, the 1982 Agreement would be unlawful as it seeks to appropriate the Tong's asset to the present generation in the absence of any circumstances of necessity which is a condition precedent to the disposition of property of that nature under Chinese customary law. The 1982 Agreement is also unenforceable as being contrary to public policy for the following reasons. It is unlawful. It violates the purpose of the Tong and is destructive of the Tong. It would rob the future generations of their right to the asset of the Tong. It was also voidable as having been obtained by duress and has been

effectively avoided by Tang Chik Lam on 6 November 1998. The Defendants have no legal basis under Chinese customary law to demand distribution of the mesne profit in the bank accounts of the Tong.

146. For the above reasons, the Defendants have no right or interest under the 1982 Agreement under Hong Kong law or under Chinese customary law to seek the declaration, order of distribution or damages they sought. It is the 1st Plaintiff's duty as manager of the Tong to prevent the unlawful distribution of the assets of the Tong. Accordingly, the Defendants' counterclaim is dismissed.

147. I also make an order *nisi* that the Defendants shall pay the Plaintiffs' costs of this action with certificate for two counsel, to be taxed if not agreed.

(Anthony To)
Deputy High Court Judge

Mr Ambrose Ho, SC and Mr Paul H M Leung, instructed by M/s Rowdget W Young & Co, for the Plaintiffs in original action and Defendants in counterclaim

Mr Eric Shum and Ms Queenie W S Ng, instructed by M/s Hagon Wai & Partners, for the Defendants in original action and Plaintiffs in counterclaim