

CHAPTER 4

THE NATURE OF THE SOLICITOR'S PRACTICE AND THE SOLICITOR'S MANAGEMENT OF HIS OFFICE

1. THE NATURE OF THE SOLICITOR'S PRACTICE

1.1 What is permitted and what is forbidden; corporate and multi-disciplinary practices

[4-1] Solicitors, other than employed solicitors,¹ may either practise as sole practitioners/principals, partners in a law partnership (including a limited liability partnership), solicitors privately employed by other solicitors or firms of solicitors or as consultants.² There are, however, two significant limitations upon the nature of their practices in Hong Kong which have been the subject of change elsewhere; *both corporate and multi-disciplinary practices are presently prohibited*, although legislation providing for solicitor corporations is expected soon to be brought into effect.

¹ See Chapter 14.

² Many consultants are employed by Hong Kong firms of solicitors. They may be partners or employees of the firm, although many are neither partners nor employees. As to whether a consultant, who was neither a partner nor an employee of the firm of solicitors, stood in a fiduciary relationship with the firm was considered in a very lengthy and carefully reasoned judgment by Dty District Judge *KW Wong in Wong Sui-Kwan v Cheong Pui Fan* [2006] HKCU 1803 (unreported, DCCJ 4987/2004, 27 October 2006). The learned judge returned to this issue more recently in *ONC Lawyers v Yiu Wing Ching John* [2019] 2 HKC 393, [2019] HKDC 144. See also *Chan Yee Ling Elaine v Christine M Koo & Ip, Solicitors & Notaries* [2019] 1 HKLRD 344, [2018] HKCU 4339, [2018] HKCFI 2670.

1.2 Solicitor and foreign lawyer corporations; the provisions of the Legal Services Legislation (Miscellaneous Amendments) Ordinance 1997

[4-2] The Legal Services Legislation (Miscellaneous Amendments) Ordinance was enacted in June 1997 to give effect to recommendations made in a Consultation Paper on Legal Services to permit solicitors and foreign lawyers to incorporate their practices. Provision has, accordingly, been made for the approval of the Law Society of both solicitor corporations and foreign lawyer corporations.³ A person who wishes to have a company or proposed company approved as a solicitor corporation or a foreign lawyer corporation must apply to the Law Society for approval and, once formed, a solicitor corporation or a foreign lawyer corporation is authorised to do anything only a solicitor can lawfully do and is required to do anything that a solicitor is required to do by law.⁴ It is, however, a criminal offence for any person to offer or invite the public to subscribe for, or purchase, shares in, or debentures of, a solicitor corporation or foreign lawyer corporation.⁵ Solicitor client privilege will exist between a solicitor corporation and a client of the corporation in the same way as it exists between a solicitor and a client of the solicitor.⁶ As noted above, these provisions have not yet been brought into effect.

1.3 Prohibition on any separate business which offers services normally offered by a solicitor as part of his practice

[4-3] A solicitor is prohibited from setting up a separate business offering services normally offered by a solicitor as part of his practice. The Solicitors' Guide, however, expressly excludes from the prohibition a wholly owned executor and trustee company and a company providing company secretarial services.⁷ The extent of the prohibition is not made clear. This prohibition will not, of course, apply to solicitor corporations once such are permitted.

1.4 No right to form multi-disciplinary practices

[4-4] Solicitors in Hong Kong are not permitted to enter into partnerships with other professionals such as accountants, estate agents, merchant bankers and surveyors, as an arrangement of this nature would breach the rule against profit sharing with non-qualified persons.⁸ Multi-disciplinary practices are, therefore, prohibited.

3 Sections 7C and 39BA, Legal Practitioners Ordinance (Cap 159).

4 Section 7D(1), Legal Practitioners Ordinance (Cap 159).

5 Sections 7F(1) and 39BB, Legal Practitioners Ordinance (Cap 159).

6 Section 7J, Legal Practitioners Ordinance (Cap 159).

7 Principle 2.07, Solicitors' Guide. Presumably a business supplying translation services, or a computer service company, would be exempt also.

8 Rule 4, Solicitors' Practice Rules.

1.5 Solicitors may form a service company to carry out administrative functions

[4-5] Solicitors may, however, form a service company to carry out necessary administrative functions concerned with the running of their practice.⁹ These functions include the provision of professional and non-professional staff, the hiring of premises, the purchasing of furniture and office equipment, and general maintenance.¹⁰ Such service companies should be incorporated in Hong Kong so as to be fully governed by the provisions of the Companies Ordinance (Cap 622). The advantage of such an arrangement lies in the greater administrative simplicity in hiring staff and purchasing equipment through a corporate structure.

2. LIMITED LIABILITY PARTNERSHIPS

2.1 Introduction

[4-6] Before 1 March 2016 solicitors in Hong Kong were only permitted to practise through partnerships with unlimited liability. This meant that, if one partner was at fault and was successfully sued for damages, upon the execution of judgment against that partner, the assets of the firm and of all other partners would be at risk.¹¹ Solicitors were therefore very cautious about whom they would take on as partners and consequently Hong Kong had many sole practitioners and small firms.

[4-7] Limited liability partnerships (LLPs) are partnerships where a solicitor will only be liable for his own negligence and not the negligence of his partners. Such an arrangement would, of course, be adverse to the interests of clients unless adequate insurance cover is ensured to compensate the firm's clients for any potential negligence in handling client matters. Before 2012, the position was that solicitors had insurance cover up to \$10 million (though with options to 'top-up'); but this sum would need to be increased if LLPs were introduced into Hong Kong.

2.2 Amending legislation¹²

[4-8] In July 2012, new provisions were added to the Legal Practitioners Ordinance (Cap 159) via the Legal Practitioners (Amendment) Ordinance (Ordinance No 22 of 2012) ('the Ordinance') to permit solicitor firms to practise as limited liability partnerships. Local and foreign law firms may practise this¹²

9 Principle 2.07, Solicitors' Guide. Directors and shareholders must be solicitors or other professionals as required by Law Society Circulars Nos 389 of 1997, 155 of 2000 and 337 of 2006.

10 Commentary 1 of Principle 2.07, Solicitors' Guide. Commentary 2 of Principle 2.07 requires that a service company must not be used to evade the requirements of the Solicitors' Practice Rules; for example, to share profits with unqualified persons.

11 See sections 11, 12 and 14, Partnership Ordinance (Cap 38).

12 There is a valuable article on the legislation and on the experience of LLPs in other jurisdictions by Meggitt G, 'Limited liability partnerships in Hong Kong: Challenges and conundrums' available at: <http://ssrn.com/abstract=2290112>.

way; what is required is that the partners agree in writing to form a limited liability partnership.¹³ They are partnerships, not separate legal entities, and continue to be governed by the laws relating to partnerships, save to the extent of any inconsistency with the new statutory provisions.¹⁴

[4-9] The Ordinance came into effect as from 1 March 2016. In brief its major provisions are:

- (i) partners will not be personally liable for the negligent acts or omissions or misconduct of any other partner or an employee of the firm;
- (ii) each partner will, however, be liable for his or her own default and for the defaults of those employees he or she directly supervises;
- (iii) the firm must inform all clients of the identity of at least one partner with responsibility for overall supervision of each matter that the firm handles within 21 days after its accepts instructions and must keep the client informed of the identity of at least one partner with responsibility for overall supervision of the matter throughout the time that the matter is handled by the firm; and
- (iv) the firm must maintain top-up insurance of not less than \$10 million per claim in addition to the statutory professional indemnity cover of \$10 million per claim.

2.3 Liability of partners

[4-10] When the firm is constituted as a limited liability partnership a partner is not, solely by reason of being a partner, jointly or severally liable for any partnership obligation (whether founded on tort, contract or otherwise) that arises from the provision of professional services by the partnership as a limited liability partnership as a result of a default of:

- (a) another partner; or
- (b) an employee, agent or representative of the partnership.¹⁵

[4-11] This limited liability applies only if at the time of the default:

- (a) the partnership was a limited liability partnership;
- (b) the client knew or ought reasonably to have known that the partnership was a limited liability partnership;
- (c) the partnership had complied with section 7AD (that is the requirement for top-up insurance); and
- (d) the partnership had complied with section 7AE(2) which requires the partnership to inform the client of the identity of at least one supervising partner for the matter in respect of which the default occurred.

13 Section 7AB(a), (b), Legal Practitioners Ordinance (Cap 159).

14 Section 7AR(1), (2), Legal Practitioners Ordinance (Cap 159).

15 Section 7AC(1)(a), (b), Legal Practitioners Ordinance (Cap 159). This applies irrespective of whether the liability is in the form of indemnification, contribution or otherwise: section 7AC(2), Legal Practitioners Ordinance.