

## Insights

# POTENTIAL LIABILITY FOR CONTEMPT OF COURT OF SIGNERS OF INACCURATE STATEMENTS OF TRUTH

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We all have had to arrange clients to sign the required “statement of truth” concerning the contents of pleadings in court proceedings. Some arbitrators are directing similar signed statements on statements of case and memoranda in arbitrations.

But, what are the consequences (if any) – for the person who signed the statement of truth - where something in the pleadings turns out to be inaccurate?

In *Mathnasium Center Licensing, LLC v Chang Chi Hung (aka Alex Chang)* [2020] HKCA 1016, the Hong Kong Court of Appeal (the “**Court**”) dealt with this question. The case was even more noteworthy because the inaccuracy in the pleading was not an inaccurate positive allegation, but was a false admission of something pleaded by the other party.

The person who had signed the (inaccurate) statement of truth was found guilty in the Court of First Instance (“CFI”) of contempt of court for making a false admission in a defence and counterclaim (and its amendment) (the “Defence”) verified by statements of truth. The Court allowed an appeal and reversed the finding of contempt of court.

## Factual background

The plaintiff was a US company engaged in the business of operating Mathematics learning centres, and was the registered owner of the “Mathnasium” trademarks and teaching materials. The defendant (being the signer of the statement of truth) was the sole director and (at the material time) the sole director of MHK.

In 2009, the plaintiff and MHK entered into a Regional Franchise Agreement (“**RFA**”), by which MHK was granted a licence to use the “Mathnasium” as the Regional Franchisor to establish and operate “Mathnasium” branded learning centres in Hong Kong. There were two kinds of Mathnasium centres under the RFA: (a) those owned or operated by MHK, the Regional Franchisor (“**Regional Franchisor Centres**” or “**RFCs**”), and (b) those established and operated by franchisees licensed by MHK pursuant to franchise agreements (“**Franchised Centres**” or “**FCs**”). MHK was required to pay the plaintiff royalty fees.

In 2014, the plaintiff terminated the RFA on the ground that MHK failed to pay the monthly royalty payments. In 2015, the plaintiff commenced court proceedings against MHK, seeking, *inter alia*, an order that MHK do provide all financial reports and royalty reports on all the “HK Centres”.

In paragraph 5 of the statement of claim, the plaintiff pleaded that MHK “*opened and operated*” in excess of ten Methnasium Centres including 12 HK Centres, meaning that the plaintiff’s position was that all these centres were RFCs. In the Defence, MHK stated that “[p]aragraph 5 is admitted” (“**MHK’s Admission**”). The defendant on behalf of MHK verified the Defence in the statements of truth.

## **Proceedings against MHK**

In 2016, the plaintiff issued a summons for summary judgment, and the parties subsequently agreed to enter into a Tomlin Order. The schedule of the Tomlin Order included an order that MHK was to disclose to the plaintiff for inspection all financial reports and royalty reports of all the learning centres operated by MHK in Hong Kong. The schedule did not specify the number and particulars of the learning centres operated by MHK.

Believing that the information provided by MHK did not comply with the Tomlin Order, the plaintiff subsequently issued a summons to enforce the terms in the schedule of the Tomlin Order. The summons included a request for access to inspect books and records of 19 learning centres in Hong Kong and Macau. The court allowed access to the plaintiff to the 13 learning centres which MHK’s then solicitors did not dispute were operated by MHK.

MHK appealed against this decision. In the appeal, the defendant made an affirmation to contend (a) that learning centres were not opened, owned or operated by MHK, and (b) what MHK did was to license the Mathnasium programme to those centres when they were opened, i.e. those centres were FCs. The defendant also contended that MHK’s Admission in the amended defence “*is not entirely accurate*” or “*could not be said to be wholly inaccurate*”.

## **Contempt proceedings in the CFI**

In 2017, the plaintiff brought proceedings in the CFI for contempt against the defendant on the basis of MHK’s Admission.

The CFI applied the principles in *Numeric City Ltd v Lau Chi Wing* [2016] 4 HKLRD 812 at §35, and held that in citing a person for contempt for making a false statement in a document verified by a statement of truth, the plaintiff must prove each of the following three elements beyond reasonable doubt: (a) the falsity of the statement in question, (b) the statement has or would have interfered with the course of justice in some material respects, and (c) at the time it was made the maker of the statement had no honest belief in the truth of the statement and knew of its likelihood to interfere with the course of justice.

The CFI found that each of the three elements were established beyond reasonable doubt in relation to MHK's Admission. The CFI took the view that MHK's Admission was "*an unqualified admission*" that the HK Centres were opened and operated by MHK.

## **Court of Appeal's decision**

The Court allowed the appeal against the finding of contempt for the reasons below.

First, the Court took the view that there had not been a clear and unqualified admission. The Court was critical of the CFI's reading of MHK's Admission in isolation, which on the face of it would seem to admit paragraph 5 of the statement of claim without qualification. The Court considered other parts of the Defence where the defendant expressly pleaded that some of the learning centres were not opened and operated by MHK, but were franchisees, i.e. FCs.

Secondly, the Court was of the view that the CFI failed properly to assess the evidence as to the circumstances under which MHK's Admission came to be made. The Court considered the draft Defence, which was provided by the counsel who prepared it. In the draft Defence, the original wording of MHK's Admission was that "*[s]ubject to paragraph 8 below, Paragraph 5 is admitted*". Paragraph 8 of the draft Defence stated that "*[o]nly the centers mentioned in Paragraph [5(?), (?), ...], are opened and operated by [MHK], the rest of the said "Mathnasium Centers" in Hong Kong, as stated in Paragraph 5 were franchisees under the RFA.*"

The defendant gave evidence that although he told his legal team that all the HK Centres were FCs, his then solicitor misunderstood him and thought that none of the HK Centres were FCs. As a result, the "subject to paragraph 8 below" wording and paragraph 8 of the draft Defence were deleted by the defendant's then solicitor. The CFI had rejected the defendant's evidence as to the instructions he gave to his legal team. However, the Court took the view that, while it was open to the CFI to doubt the credibility of the defendant's explanation, the defendant's case of mistake and miscommunication was not implausible, and at the very least it could not be said that it had been established beyond reasonable doubt that the defendant's case of mistake should be rejected in its entirety.

## **Takeaway points**

Although the defendant's appeal was allowed and the finding of contempt in this case was set aside, this case serves as a cautionary tale for lawyers (in particular solicitors who take instructions directly from clients) when settling documents verified by statements of truth. The following points should be noted:

1. Clients should be warned of the potential criminal liability (including jail time) for making false statements verified by statements of truth. Where necessary, the contents of a document verified by a statement of truth should be explained to the client.

2. One would not be absolved from contempt of court merely because they made a false admission rather than a false positive averment. Both types of statement are capable of leading to contempt proceedings.
3. Lawyers should keep clear records of instructions from clients, in particular instructions relating to the settling of important documents, such as pleadings. Where instructions are given orally, attendance notes should be made.

## **RELATED CAPABILITIES**

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- Business & Commercial Disputes

## MEET THE TEAM



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