
Counsel's note

DotAsia Organisation Limited – potential criminal liability – conclusions

Summary of conclusions

1. I have been provided with a copy of the opinion of counsel dated 13 May 2021 from Mr John Brewer of Pacific Chambers. Mr Brewer's advice was given to the board of DotAsia Organisation Limited (“**DA**”) to assist with issues arising in the context of electing a chairman.
2. I have been asked by Mr Joel Disini to provide preliminary advice to the board of DA on the potential criminal liability arising out of the facts set out in the opinion of Mr Brewer. (I note that I have not had the opportunity to consider the underlying documents. Accordingly, my understanding of the facts is solely based on what is set out in the opinion provided by Mr Brewer).
3. In particular, I have been asked to provide preliminary advice on five issues. Those issues and a summary of my opinion is set out in sub-paragraphs (a)-(e) below:
 - (a) Was there any misrepresentation by DotAsia to the Company Registry and in its Financial Reports? Based on the facts set out in paragraphs 16 and 17 of Mr Brewer's opinion, the company has misrepresented true facts to the Registrar of Companies and possibly to its bankers. (That is not to exclude the possibility that the misrepresentations may also have been made to other stakeholders or interested parties). In particular it would seem that there have been representations made by the company that Alirezah Saleh (“**AS**”) is not a director, when in fact he is, and was at all material times. (I note here that a director is defined in s2 of the Companies Ordinance as including any person occupying the position of director (by whatever name called). Section 2 further defines a shadow director as shadow director a person in accordance with whose directions or instructions (excluding advice given in a professional capacity) the directors, or a majority of the directors, of the body corporate are accustomed to act. Accordingly, whether or not AS resigned as director at any time, if he then continued to have a influence on the decision making of the board, he would be deemed to be a director by virtue of the shadow director provisions in the Companies Ordinance).
 - (b) *If there was misrepresentation, is it advisable to keep misrepresenting the position to the Companies Office and others?* No. The misrepresentations referred to in paragraph (a) above, could constitute offences under the Companies Ordinance, Cap 622; crimes under the Theft Ordinance, Cap 210; and the common law crime of conspiracy to defraud.

- (c) *What is the liability facing the directors of DotAsia (a) now, and (b) if we continue misrepresenting the position?* If charged with offences under the Companies Ordinance, potential liability includes both fines up to \$300, 000 and imprisonment up to 2 years. If charged with offences under the Theft Ordinance, potential liability includes imprisonment up to 14 years.
- (d) *As the Company's officer that implemented the misrepresentations, is there a conflict of interest between the CEO and DotAsia?* It appears that there are a number of reasons for concluding that either: (a) there is already be a conflict of interest as between the CEO and the board (or any particular board member), or that (b) such a conflict of interest as between the CEO and the board (or any particular board member) will emerge during the course of investigation and advice to the board. In particular, it seems quite possible that for example, the CEO may claim that his actions were knowingly authorised by the board, whereas it may be the case that either the board does not agree that was the case, or that particular board members do not agree that is the case. Alternatively it may be that the board acted on assurances given by the CEO that what was proposed to deal with the situation of As's directorship were normal practice, commercially legitimate and otherwise lawful – assurances which, if given, seem to me to be likely to have been unwarranted. In addition, I understand from the opinion of Mr Brewer that the CEO may have a personal interest in the financial arrangements. If so, his interests may well diverge from the position of DA in terms of regularising matters with DA's bankers. Finally I note my understanding that there is litigation involving DA and the CEO in which their positions are unlikely to be aligned. In particular, I note that DA and the CEO, while both defendants, appear to be separately represented which suggests that they have different interests. I have also been made aware of a further issue by Mr Dinisi, namely whether DA has relinquished its rights to the .spa TLD. (I note here the difference between the position stated in the board minutes of 18 September 2019 where DA appears to be abandoning rights, and the position taken in correspondence from between Dundons and So Lung & Associates dated 17 January 2020 in the context of the litigation where DA appears to be maintaining its rights). While the extent and importance of this difference is beyond the remit of my engagement, (which is to advise the board in relation to issues arising out the apparent misrepresentation of the position of AS as director to the Companies Office and to DA's bankers) it appears that this may be a further example of where the position of the CEO and the board (or any particular board member) are not aligned.
- (e) *Is it advisable the board seek independent lawyers?* The role of any lawyers engaged by the board would be to minimise the risks arising from the past misrepresentations to the company, the individual directors and the executives, and to regularise the company's affairs moving forward. In normal circumstances, if DA's usual lawyers cannot properly advise the board, (either because of concerns that they might seem "aligned" with one or more of the executives, or one or more of the board members, or because they are not equipped with the requisite specialisation – forensic investigation, regulatory, fraud and white collar prosecutions) the board might consider it prudent to engage alternative lawyers. In the particular circumstances of DA at this time, it appears that there are a number of reasons for concluding that there may be a conflict of interest as between the CEO and the board (or any particular board member) that will emerge during the course of investigation and advice to the board. That being the case, it seems to me that there are a number of reasons in this case why the board may well consider it prudent to engage independent lawyers.

4. My reasons for the conclusions set out above are included in a separate note of counsel.

Next steps - recommendations

5. I have also been asked by Mr Dinisi to advise the board on next steps. In light of the conclusions set out above, and in light of the reasoning I have set out in my separate note, in my view, the board ought to appoint independent lawyers to minimise and manage the risks to the company and to individual board members arising out of the prior misrepresentations to the Companies Office and to DA's bankers. In particular, I would recommend that the board engage independent lawyers to investigate what has occurred and to prepare a memorandum of advice to the board as to how best to regularise matters given what has occurred.
6. To facilitate that exercise, I would advise the board to obtain from the company the following documents as a matter of priority:
 - (a) All documents filed with Company's Office which omit AS as a director;
 - (b) All correspondence between HKSB, CITIC Bank, ICBC Bank and JO Morgan;
 - (c) All banking documents (ie facility and security agreements) and bank statements over the relevant period;
 - (d) All board minutes over the relevant period.
7. Once the board has received the documents set out above from the company, board members will be in a position to assess the extent to which misrepresentations have been made by the Companies Office and to DA's bankers. I would then recommend that the board provide those documents to whoever the board engages to provide it with the memorandum of advice referred to above.
8. If I were engaged by the board to investigate what has occurred and to prepare a memorandum of advice to the board as to how best to regularise matters with both the Companies Office and with DA's bankers given what has occurred, I would anticipate that this would involve perhaps 20-30 hours work (given that I already have some familiarity with the issues as a result of preparing this preliminary advice). My hourly rate would be HKD5,000.

4 August 2021

MA Corlett QC
Barrister