## DCCJ 3404/2021

[2025] HKDC 353

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

CIVIL ACTION NO 3404 OF 2021

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##### BETWEEN

SINO DATABASE LIMITED 1st Plaintiff

CHAN TIN CHI 2nd Plaintiff

and

ABERDEEN BOAT CLUB LIMITED Defendant

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Before: Deputy District Judge Patrick Siu in Court

Date of Hearing: 17-21 February 2025

Date of Judgment: 3 March 2025

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JUDGMENT

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# *Introduction*

1. The 2nd Plaintiff claims to be the beneficial owner of the 1st Plaintiff, which in turn was the owner of a yacht named Christine Lorraine (“**Yacht**”). The 2nd Plaintiff moored the Yacht in a mooring buoy allocated by the Defendant.
2. In August 2017, the Yacht drifted away from the mooring buoy and grounded ashore. The Yacht was found to be beyond repair and treated as total loss. The 1st and 2nd Plaintiffs now claim against the Defendant for breach of duties in relation to the incident.

# *Background*

1. The Defendant operates the Aberdeen Boat Club (“**ABC**”), which is a recreational boating and sailing club, on 20 Shum Wan Road, Aberdeen, Hong Kong. ABC provides a wide range of facilities for yacht and cruiser owners, with moorings available for its members. ABC maintains moorings both in the Aberdeen typhoon shelter and in the sea areas to the north of Middle Island.
2. The 2nd Plaintiff (“**Mr Chan**”) joined as a member of ABC on 1 August 2011. On 16 March 2015, Mr Chan and ABC entered into a written agreement titled “Allocated Mooring / Space Agreement” pursuant to which ABC agreed to let and Mr Chan agreed to hire such mooring as allocated by ABC in consideration of a monthly rental of HK$1,481 to be paid by him (“**Mooring Agreement**”).
3. ABC allocated mooring no D12 to Mr Chan for the mooring of the Yacht. Mooring no D12 has at all material times been situated in the sea areas near Middle Island and it comprises one buoy, which is known as swing mooring as the yacht may swing around the buoy. This is unlike some other moorings in the Aberdeen typhoon shelter which consist of two buoys, with each buoy connecting to the fore and aft of the yacht respectively, such that the yacht would not swing.
4. Mr Chan and ABC subsequently entered into another agreement titled “Renewal of Allocated Mooring / Space Agreement”, which apparently was for the purpose of renewing the Mooring Agreement for the period from 1 July 2015 to 30 June 2016. The renewal agreement expressly stipulated that ABC allocated mooring no D12 to Mr Chan for him to moor the Yacht.
5. In May or June 2016, ABC sent another renewal agreement to Mr Chan with a view to further renewing the Mooring Agreement to 31 December 2016. Mr Chan did not respond to it and in any event ABC treated the Mooring Agreement as having been renewed to 31 December 2016.
6. By a letter dated 16 December 2016, ABC informed Mr Chan that the extant mooring agreement would expire on 31 December 2016 and requested him to execute a new mooring agreement on or before 20 January 2017 (“**New Mooring Agreement**”), otherwise the mooring agreement would terminate on 20 January 2017 and the Yacht would have to be vacated from mooring no D12.
7. Having heard no response from Mr Chan, ABC by an email dated 22 June 2017 requested Mr Chan to sign the New Mooring Agreement and to provide some supporting documents, failing that the mooring agreement between ABC and Mr Chan would terminate with immediate effect and the Yacht would need to be removed within 14 days.
8. There was still no response from Mr Chan. Consequently, on 7 July 2017, ABC by letter terminated the mooring agreement with immediate effect and demanded Mr Chan to remove the Yacht from the mooring by 19 July 2017. By another email dated 31 July 2017, ABC said to Mr Chan that the Yacht was still in mooring no D12, and enquired when Mr Chan would remove it.
9. Mr Chan explained that he was not aware of ABC’s request for him to enter into a further renewal agreement or the New Mooring Agreement. Nevertheless, he continued to pay for the mooring rental including the rental for August 2017 in the sum of HK$1,630.
10. A super typhoon called Hato formed as a tropical depression over the western North Pacific on the night of 20 August 2017 and entered the South China Sea on 22 August 2017. The Hong Kong Observatory issued the No 1 Standby Signal in the morning of 22 August 2017 and issued the No 3 Strong Wind Signal in the evening. No 9 Increasing Gale or Storm Signal was issued in early morning next day, and No 10 Hurricane Signal was issued at 9:10am on 23 August 2017.
11. On 23 August 2017, during super typhoon Hato, the Yacht was blown off mooring D12, drifted away and grounded ashore at the western side of Deep Water Bay. The Marine Department informed Mr Chan of the incident in the morning of 24 August 2017, and it issued a removal order for Mr Chan to arrange for wreck removal of the Yacht. At 3:52pm on 24 August 2017, ABC also emailed Mr Chan to inform him that the Yacht broke from the mooring.
12. The Plaintiffs engaged a contractor named Kwong Sun Transportation and Engineering Ltd to remove the Yacht, and the wreck was completely removed by 14 November 2017. It was subsequently dismantled and dumped.
13. A swing mooring of ABC at the material times comprised a buoy floating on the sea. Inside the buoy there was a D-shaped shackle with a pin on top and a chain attached to it at the bottom, and it is known as the mooring shackle. The chain was then connected to an anchor block lying on the sea bed. A typical swing mooring would operate as follows. The yacht would need to have mooring ropes. At the end of the ropes there would be one or more D-shaped shackles, which would be connected to a swinging metal device called a swivel on one end, and the other end of the swivel would be connected to another D-shaped shackle, which would serve to connect the swivel with the mooring shackle inside the buoy.
14. There is no dispute between the parties that at the material times, the Yacht had three to four mooring ropes with two D-shaped shackles at their end, and there was a swivel connecting these two shackles directly to the mooring shackle. In other words, there was no shackle connecting the swivel with the mooring shackle.
15. The Plaintiffs engaged a Mr Bruce Hung from Marinasia Limited to compile survey report regarding the shipwrecking incident. Mr Hung noted that the swivel connecting the Yacht to mooring no D12 was broken whereas the mooring ropes on the Yacht were in good order, so he considered that the main cause of the incident was the failure of the swivel metal ring. Despite there being no leave granted for the Plaintiffs to adduce expert evidence, ABC agreed with Mr Hung’s view that the Yacht drifted away during super typhoon Hato because the swivel was broken.

# *Procedural Matters*

1. After the parties filed pleadings, on 7 September 2022 Master M Soong (as Registrar M Soong then was) ordered the Plaintiffs to file and serve a statement of damages by 21 September 2022, and directed the Plaintiffs to take out an application for expert evidence directions by 19 October 2022, failing that they would be treated as having no intention to adduce expert evidence. The Plaintiffs have not submitted any statement of damages and did not apply for expert evidence directions by the stipulated deadline.
2. On 1 March 2024, Master Michael Lok provisionally struck out Mr Chan’s claims as he was absent from the case management conference; the 1st Plaintiff’s claims remained intact as its representative attended the hearing. On 31 October 2024, His Honour Judge Alan Kwong restored Mr Chan’s claims, and the pre-trial review was conducted before the learned Judge on 12 December 2024.
3. After the pre-trial review, Mr Chan took out three summonses in January 2025, seeking leave to among others amend the writ of summons and statement of claim, adduce a supplemental witness statement of his own, adduce an expert report, and seek specific discovery against ABC. With no objection from ABC, His Honour Judge Alan Kwong granted leave for Mr Chan to amend the writ of summons and statement of claim and to file his supplemental witness statement. The learned Judge dismissed Mr Chan’s other applications, and he in particular considered that Mr Chan’s delay in applying to adduce expert evidence was inordinate and inexcusable; see the written decision in [2025] HKDC 154. Mr Chan has not appealed against the said decision.
4. Against the above procedural background, Mr Chan sought to produce yet further evidence by filing an affirmation on 14 February 2025 (ie right before the trial commenced on 17 February 2025), to which he exhibited a tape recording of his conversation with a staff from the Hebe Haven Yacht Club. Since Mr Chan did not take out any application, and his attempt to produce further evidence was made extremely late, I told Mr Chan I would not allow him to rely on the contents of the tape recording.
5. In any event, such purported evidence was of no probative value. As will become clear, one major dispute in this case is whether ABC provided Mr Chan with the swivel, which was broken during super typhoon Hato causing the Yacht to drift away. Mr Chan sought to prove that ABC did provide the swivel to him by saying that another yacht club would also provide swivels to its members. This however is a purely factual question, and what another yacht club does has no bearing on the actual practice of ABC.
6. In their written opening and closing submissions, the Plaintiffs attached some extra documents not previously disclosed. As there was no application to adduce them as evidence, I would disregard them.
7. On the other hand, ABC also took out a late interlocutory application before trial. On 28 January 2025, ABC through its solicitors indicated by correspondence that it would crave indulgence for one of its witnesses, Ms Jennifer Li, to give evidence by way of video-conferencing facilities (“**VCF**”). ABC took out the summons only on 12 February 2025, returnable on the first day of the trial on 17 February 2025.
8. In the supporting affirmation, ABC explained that at the time the case was set down for trial, Ms Li was ABC’s employee so there would be no issue for Ms Li to testify in court. However, Ms Li left ABC’s employment on 22 November 2024 and took up employment with B and G Sportz Limited as the team administrator of an electric raceboat team, and she was assigned to travel with the team to Doda, Qatar from 17 to 23 February 2025 to participate in the UIM E1 World Championship series. ABC learned from Ms Li on 16 January 2025 that her assignment would render it implausible for her to attend the trial and give evidence in court.
9. The principles and considerations applicable to an application for giving evidence by VCF have been summarized by Anthony Chan J in *Re Nobility School Ltd* [2020] HKCFI 891 at §9. In gist:-
   1. The giving of evidence by VCF is an exception.
   2. The starting point is that proceedings are conducted in court.  This is more important when it comes to a trial.
   3. Sound reason is required to justify a departure from the starting point.
   4. The solemnity of court proceedings and its atmosphere is highly important in the taking of evidence.
   5. The court may be more disposed to exercise its discretion to allow evidence by VCF in respect of technical or purely factual evidence which involves no serious issue on credibility or relatively unimportant evidence.
   6. Where the credibility of the witness is seriously contested, it is important for the witness to be examined under the solemn atmosphere of the court.
   7. Costs and convenience may be important considerations which the court will have to weigh in the determination of the application.
   8. Ultimately, it is a matter of judgment of the court choosing the course best calculated to achieve a just result by taking into account all the material considerations, including whether the witness is capable of attending the proceedings, any prejudice to the other party, the underlying objectives, any delay to the proceedings and practical considerations like the availability of the facilities.
10. At the commencement of the trial, Mr Simon Westbrook SC, leading counsel for ABC, informed me that both Plaintiffs consented to the VCF application. Be that as it may, I explained to the Plaintiffs that it would be exceptional for a witness to give evidence by VCF and the norm would be for the witness to physically testify in the court room. Having heard my explanation, both Plaintiffs maintained that they consented to the application. In light of the Plaintiffs’ stance, and considering that Ms Li’s evidence would be relatively unimportant and that there was a good explanation for her inability to physically attend the trial, I granted the VCF application and I reserved the question of costs. Considering that it was ABC who sought the court’s indulgence and that the Plaintiffs reasonably acceded to the application, I will now make a costs order *nisi* that ABC do pay the Plaintiffs’ costs of the VCF application.
11. Another procedural matter was the Plaintiffs’ request to have the trial conducted in Chinese, as the 1st Plaintiff’s representative spoke Mandarin whereas Mr Chan himself spoke Cantonese. Having considered their request, I decided to conduct the trial in English, as the pleadings (including the Plaintiffs’ amended statement of claim and reply) and most of the contemporaneous documents (including the various mooring agreements) were in English. Throughout the trial, each of the 1st Plaintiff’s representative and Mr Chan was assisted by a court interpreter, and I also indicated to them that I was conversant in both Mandarin and Cantonese such that their submissions would not be lost in translation.

# *Issues in Dispute*

1. In their amended statement of claim, the Plaintiffs pleaded that ABC was in breach of its duties in the following manner:-
   1. In breach of the Mooring Agreement, ABC failed to install, supply and/or maintain adequate and sufficient tackles, mooring and associated components for the Yacht.
   2. ABC failed to advise the Plaintiffs to take precautionary measures to secure the Yacht and to remove the Yacht from its mooring in anticipation of super typhoon Hato.
   3. ABC failed to notify the Plaintiffs in time for them to render rescue operation when the Yacht started to drift away from its mooring because ABC did not monitor the moorings.
2. The Plaintiffs claimed monetary compensation in the sum of HK$1,700,000, which they said to be the market value of the Yacht at the time of the incident.
3. ABC’s defence, as set out in its amended defence, can be briefly stated as follows:-
   1. Under both the Mooring Agreement and the New Mooring Agreement, it was the responsibility of the hirer to provide adequate and sufficient lines and other equipment to secure the yachts to the mooring. The broken swivel in question was not provided by ABC. Instead, it belonged to the Plaintiffs.
   2. The Mooring Agreement was renewed once up to 30 June 2016. Thereafter Mr Chan did not enter into any renewal agreements or the New Mooring Agreement. As a result, ABC terminated the mooring agreement and demanded the Yacht be removed from the mooring by 19 July 2017. At the time of the shipwrecking incident on 23 August 2017, there was no contractual relationship between the Plaintiffs and ABC.
   3. ABC carried out sufficient precautionary measures, including inspecting and maintain the moorings, as well as issuing guidelines to members and mooring users.
4. While not pleaded in the amended defence, ABC mentioned in evidence two exemption clauses in the Mooring Agreement, which stipulated as follows:-
   1. Clause 7(f): “*Neither the Club nor its officers, employees, servants or agents shall be liable for any breach of this Agreement or terms hereof, nor for any act, omission or negligence. Neither the Club nor its officers, employees, servants or agents make or shall be deemed to have made any representation as to the safety, adequacy or sufficiency of the Allocated Mooring or Allocated Space or any parts thereof or as to the positioning, the safety, adequacy or sufficiency of any terms or conditions imposed by the Club pursuant to Clause 2 or otherwise under this Agreement.*”
   2. Clause 7(g): “*The Hirer confirms that he is liable to the Club for all costs incurred pursuant to action taken by the Club in connection with the moving or removal of the Vessel and the Hirer further confirms that the has no claim against the Club, its officers, employees, servants or agents in connection therewith. The Hirer further indemnifies and will keep the Club, its officers, employees, servants and agents fully indemnified against any and all damages, costs, disbursements or other expense which the Club, its officers, employees, servants or agents may incur as a result of any claim or demand made upon them or any civil or other proceedings or action instituted against them or any of them in relation to the Vessel, the Allocated Mooring or the Allocated Space or any vessel kept at the Allocated Mooring or Allocated Space or in relation to any act or omission by the Hirer.*”
5. Mr Westbrook SC has, with exemplary fairness, in his written opening submissions conceded that there was an implied continuing mooring agreement between the parties and that in any event ABC would owe a concurrent duty of care in tort to the Plaintiffs. He also indicated that for the purpose of this trial, ABC would not rely on the aforesaid exemption clauses.
6. In light of the stance of the parties, it is clear to me that there are only the following issues to be determined:-
   1. Whose responsibility was it to provide and maintain the swivel?
   2. Regardless of the answer to (1) above, was the breaking of the swivel attributable to the act or omission of ABC?
   3. Regardless of the answers to (1) and (2) above, was ABC responsible for the wrecking of the Yacht?
   4. If ABC is liable, what is the quantum of damages?

# *Issue (1) – The Swivel*

1. The cases of Mr Chan and ABC are diametrically opposite, with each claiming that the other party provided the swivel and bore the responsibility of maintaining it. Mr Chan claimed that the swivel in question was already attached to mooring no D12 when he first moored the Yacht there, whereas ABC contended that the members would purchase their own swivels and shackles for securing their yachts to the mooring.
2. In resolving the factual dispute, I bear in mind that where there is a host of contemporaneous documentation, such documentation must assume a special importance. The truth can best be tested by reference to contemporaneous documentation where it exists, as well as to inherent improbabilities having regard to all the facts: *Esquire (Electronics) Ltd v Hong Kong and Shanghai Banking Corp Ltd* [2007] 3 HKLRD 439 at §135; *Lee Fu Wing v Yan Po Ting Paul* [2009] 5 HKLRD 513 at §53.
3. The most important contemporaneous documentation in this regard is the Mooring Agreement. Clause 1 of the agreement defines various terms including mooring, it is defined to mean “*(i) the mooring anchor block or blocks; (ii) the mooring buoy or buoys connected to it and (iii) the chain and/or other attachment between the mooring anchor block or blocks and the mooring buoy or buoys*”.
4. Further, clause 3 of the Mooring Agreement sets out the parties’ respective responsibility relating to mooring and securing a vessel to the mooring. The following sub-clauses are particularly relevant:-
   1. Clause 3(a): “*The Hirer shall be responsible for keeping the two Mooring buoys of the Allocated Mooring in the Typhoon Shelter securely attached together at all times throughout the duration of this agreement. The Club shall be responsible for the supply and maintenance of the mooring anchor block or blocks, the mooring buoy or buoys connected to it and the chain and/or other attachment between the mooring anchor block or blocks and the mooring buoy or buoys of both 2-point typhoon shelter moorings and swinging moorings.*”
   2. Clause 3(c): “*It is the responsibility of the Hirer to provide adequate and sufficient lines or other tackle to secure the Vessel to the Allocated Mooring;*”
   3. Clause 3(d): “*The Club shall have the right, but shall be under no obligation, to replace any line or tackle, which the Club may, in its absolute discretion, consider to be inadequate without any prior notice to the Hirer.*”
   4. Clause 3(f): “*The Club shall not be liable for any damage caused to or by the Vessel, whether it has replaced any line or tackle or not.*”
5. Mr Chan argued that the term “swivel” was not mentioned at all in the Mooring Agreement. Nevertheless, it is clear from the above provisions in the Mooring Agreement that the mooring provided by ABC includes only the anchor block on the sea bed, the buoy floating on water and the chain that connects the anchor block and the buoy, though ABC accepted during the trial that the mooring shackle in the buoy would also be ABC’s property. Members, including Mr Chan, bear the responsibility to provide lines and tackles to secure their yachts to the mooring. ABC has the right but not the obligation to replace any lines or tackles, and shall not be liable for any damage whether it has replaced any lines or tackles. While the term “tackles” is not defined, it is clear that it refers to any shackles or swivels that connect the ropes or lines of the yachts to the mooring.
6. The New Mooring Agreement contains provisions similar to those in the Mooring Agreement. But instead of defining mooring, it defines the term tackle to mean “*the equipment of the Mooring comprising* *(i) the mooring anchor block or blocks; (ii) the mooring buoy or buoys connected to it and (iii) the chain and/or other attachment between the mooring anchor block or blocks and the mooring buoy or buoys*”. While the New Mooring Agreement is not executed by the parties, it sheds light on ABC’s continued practice of not providing shackles and swivels to its members.
7. Mr Chan said that he did not understand the terms of the Mooring Agreement, which was in English, and nobody from ABC explained to him those terms as he signed the agreement in his own place and then sent it back to ABC. Ms Jennifer Li, who used to be an assistant marine and sailing manager of ABC, refuted Mr Chan’s version by saying that Mr Chan signed the agreement in the ABC premises in her presence. She said she remembered it vividly because prior to that she emailed the agreement to Mr Chan’s assistant, who told her Mr Chan would go to ABC to sign the agreement. Eventually, Ms Li met Mr Chan in the café in ABC and Mr Chan signed the agreement after she explained some key terms of the agreement to him (she did not suggest that she explained and translated each and every clause of the agreement to Mr Chan). Whether Mr Chan understood the terms of the Mooring Agreement is beside the point. Firstly, having signed the Mooring Agreement, he was bound by it even if he did not understand the terms: see *Ming Shiu Chung v Ming Shiu Sum* (2006) 9 HKCFAR 334 at §§83-84. Secondly, putting aside the binding effect the Mooring Agreement, the agreement is still strong corroborating evidence that ABC would not provide swivels to members.
8. I have considered the possibility that ABC, despite disavowing any obligations to provide shackles and swivels to members by the mooring agreement, would as a matter of fact provide such tackles to members. However, the evidence obviously does not support such a possibility. During cross examination, Mr Alex Johnston, a marine services manager of ABC, unequivocally said that ABC would not provide swivels to members and would not maintain any inventory of swivels for members’ use. Ms Li also said that throughout the years when she worked in ABC, ABC did not provide swivels to members.
9. Mr Chan highlighted an apparent inconsistency between the evidence of Mr Johnston and Ms Li. During cross examination, Mr Johnston said whenever there were members who newly moored their yachts to the ABC moorings, he would advise them to purchase their own swivels and shackles, and he would recommend vendors such as a Ming Kee in Ap Lei Chau to members. Ms Li, however, said she did not provide such advice to Mr Chan when Mr Chan signed the Mooring Agreement in her presence. I do not think this constitutes an inconsistency. After all, it was March 2015 when Ms Li presented the Mooring Agreement for Mr Chan to sign, and at that point of time Mr Johnston had not joined ABC yet. Their evidence only shows that they may have different practice towards what they may advise members, and certainly does not go to support Mr Chan’s case that ABC would provide the swivels to members. Another inconsistency in Mr Johnston and Ms Li’s evidence is that Mr Johnston said ABC would only provide a mooring with mooring ropes attached for its visitor moorings but not any other moorings, whereas Ms Li said there was only one visitor mooring in ABC and visitors would need to supply their own mooring ropes and tackles. While the two versions cannot really be reconciled, they do not lend support to the Plaintiffs’ suggestion that ABC would provide swivels to members.
10. I have also considered the possibility, as contended by Mr Chan, that the swivel in question was left behind by the previous hirer and ABC let Mr Chan use it. In this regard, I accept Ms Li’s evidence that after the previous hirer, a Mr Stephen Chow, removed his yacht from mooring no D12, she instructed a marine coxswain (who passed away in February 2020 and could not be ABC’s witness) to inspect the mooring to ensure that it was clear of any shackles and swivels before it was handed over to Mr Chan. Ms Li also said that Mr Stephen Chow moved his yacht to mooring no D20, so he would have taken his shackles and swivels with him and would not leave them behind in mooring no D12. I find this to be a reasonable and logical inference.
11. On the other hand, while Mr Chan said his captain was responsible for mooring the Yacht to mooring no D12, he somehow did not call his captain to be a witness. On the Plaintiffs’ side, Mr Chan and two other witnesses (a Mr Hung Chi Sing and a Ms Lam Ka Man, both being directors of the 1st Plaintiff) have filed witness statements, but eventually only Mr Chan himself testified in court. The Yacht’s captain, who would be expected to give first hand evidence on the mooring facilities in mooring no D12, was inexplicably never intended to be a witness. While I do not have to draw adverse inferences against the Plaintiffs for failing to ask Mr Hung and Ms Lam to testify in court, I would draw an adverse inference against the Plaintiffs that the Yacht captain’s evidence would have been unfavourable to the Plaintiffs: see *Telings International Hong Kong Limited v John Ho* CACV 10/2010 (unreported, 22 October 2010) at §§79-80.
12. The Plaintiffs also referred to section 48 of the Shipping and Port Control Regulations (Cap 313A) to argue that the statue imposed the obligation on ABC to maintain the swivel. In particular, section 48(6) provides that “*A private mooring and the chains, shackles and other accessories shall be of such nature and construction as the Director may direct and the owner of the mooring shall keep and maintain the mooring and its accessories in the approved position and in good condition*.” I consider this to be irrelevant. It is one thing to say ABC is required by the Government to maintain the moorings and its accessories, but it is another matter for ABC to agree with its members as to how they should divide up the responsibility of maintaining the moorings and the accessories.
13. Lastly, Mr Chan relied on an English authority *The Quercus* [1943] P 96 to contend that as a matter of law the swivel is part of the mooring and it was ABC’s responsibility to inspect and maintain the swivel. In that case, the plaintiff’s yacht broke adrift from the defendants’ moorings, and the accident was caused by the mooring chain parting through kinking, and the kinking was caused or contributed to by the failure of a swivel to work effectively owing to rust and marine growth. That case only establishes that a mooring provider may be obliged to exercise reasonable care and skill to maintain the efficiency of the mooring, and it may be a breach of that duty if the mooring provider does not carry out sufficient inspections of the mooring. However, that case does not and cannot possibly stand for a sweeping proposition that a swivel must necessarily be provided by the mooring provider; this is not to mention that the “swivel” in *The Quercus* is apparently not the same swivel in this present case.
14. Having taken into account the above matters, both individually and cumulatively, I find it as a matter of fact that the swivel in question was not provided by ABC to Mr Chan. Rather, it was Mr Chan who provided his own swivel. Under the Mooring Agreement, it was the responsibility of Mr Chan to maintain his own swivel. Thus, ABC is not liable for having provided a faulty swivel to Mr Chan.

*Issue 2 – Breaking of the Swivel*

1. As a fallback, the Plaintiffs argued during the course of the trial that even if the swivel was provided by him, ABC is still liable for the breaking of the swivel because:-
   1. The mooring shackle of mooring no D12 was heavily rusted, which increased the friction between it and the swivel and caused the swivel to break.
   2. The design of mooring no D12 was defective because the D-shaped mooring shackle did not leave sufficient room for the swivel to move around.
   3. In breach of the Mooring Agreement, ABC did not provide Mr Chan with a two-buoy mooring.
2. I do not think the Plaintiffs should be allowed to advance these arguments. These are not their pleaded complaints. Their pleaded complaint, insofar as the mooring facility is concerned, is that ABC “*failed to install and/or supply and/or maintain adequate and sufficient tackles, mooring and associated components for the Yacht*”. No further particulars have been given. While I can accept that the plea is wide enough to cover their complaint that ABC did not provide an appropriate swivel (as analysed under issue 1 above), the plea cannot be stretched so much as to cover the complaints about the rusting of the shackle, the design of the mooring and ABC’s alleged failure to provide a two-buoy mooring.
3. In this connection, the Court of Final Appeal has repeatedly emphasized the importance of pleadings. In *Kwok Chin Wing v 21 Holdings Limited* (2013) 16 HKCFAR 663 at §21, Ma CJ stated that the basic objective of pleadings was fairly and precisely to inform the other party or parties in the litigation of the stance of the pleading party so that proper preparation is made possible, and to ensure that time and effort are not expended unnecessarily on other issues.  It was the pleadings that would define the issues in a trial and dictate the course of proceedings both before and at trial.  Where witnesses were involved, it would be the pleaded issues that define the scope of the evidence, and not the other way round.  It would not be acceptable for unpleaded issues to be raised out of the evidence which was to be or has been adduced.  In *Sinoearn International Ltd v Hyundai-CCECC Joint Venture* (2013) 16 HKCFAR 632 at §§30-34, Chan PJ stated that pleadings were not mere formalities.  They imposed a necessary discipline and were fundamental to enabling every procedural facet of the adversarial system to operate fairly. The other party was entitled to know from a clear pleading what was the entire case he had to meet so he could decide whether particulars should be sought, how he should plead in response, what discovery he was entitled to, what evidence he should adduce and what points of law should be taken.
4. This disposes of the three complaints of the Plaintiffs. For the sake of completeness, I shall say that the Plaintiffs’ complaints about the rusting shackle, the design of the mooring and the non-provision of a two-buoy mooring are bound to fail. The Plaintiffs bear the burden of proof, but they have not adduced any expert evidence even though they were specifically reminded by Master M Soong to take out an application for expert evidence directions. Even Mr Chan’s belated application for expert evidence before His Honour Judge Alan Kwong related only to the issue of the rusting pin and had nothing to do with the mooring design or any inherent risk with a swing mooring.
5. Mr Chan suggested that it was only common sense that a rusting pin would increase the friction when the pin was rubbed against the swivel. I do not agree. How the rust may affect the friction between the pin and the swivel and how such change in friction may cause the swivel to break are matters of expert evidence. With no expert evidence adduced, the Plaintiffs have plainly failed to discharge their burden in proving that the rusting pin caused the swivel to break.
6. As to the design of mooring no D12, Mr Chan complained that it was inferior to the design of other moorings such as moorings nos. D11 and D20, which have a U-shaped shackle on top, reducing the friction between the shackle and the swivel. By contrast, mooring no D12 was installed with a D-shaped mooring shackle with a flat pin on top, which left little room for the swivel to move around. Again, how the U-shaped and D-shaped shackles may affect the integrity of the swivel is a matter of expert evidence, and without such evidence the Plaintiffs have not even begun to discharge their burden of proof.
7. Further, during cross examination, both Mr Johnston and Ms Li said that the U-shaped shackles on moorings nos. D11 and D20, as shown in the photos produced by Mr Chan, were installed by the respective hirers. Those shackles were not provided by ABC and there was no difference between the design of mooring no 12 with other swing moorings. I accept their evidence, which is consistent with the terms of the mooring agreement and is not contradicted by any of the Plaintiff’s evidence. In other words, if moorings nos. D11 and D20 were safer than mooring no D12, it was because the relevant hirers chose to install an extra shackle onto the buoy. The Plaintiffs cannot complain when it was their own decision not to install extra shackles.
8. The Plaintiffs pointed out that after the incident in August 2017 ABC replaced all the swing moorings with new ones whose default design already includes a U-shaped shackle on top, and Mr Chan went so far as to argue that ABC replaced the moorings because it became alerted of the defective designs of the original moorings. When cross examined, Mr Johnston said the moorings were replaced in 2018 as part of ABC’s regular maintenance programme and it had nothing to do with the incident. Ms Li supplemented by saying that the replacement was planned well before the incident. Both of them said that while the new moorings may be better in causing fewer scratches to the yachts, the old moorings were safe. There is nothing to contract their evidence.
9. Regarding the provision of two-buoy mooring, the Plaintiffs alleged that ABC had breached the Mooring Agreement by providing only a swing mooring to Mr Chan. In this connection, they relied on the first sentence of clause 3(a) of the Mooring Agreement, which as seen above provides that “*The Hirer shall be responsible for keeping the two Mooring buoys of the Allocated Mooring in the Typhoon Shelter securely attached together at all times throughout the duration of this agreement*”, to argue that ABC was contractually obliged to provide Mr Chan with a two-buoy mooring. In response, Mr Westbrook SC submitted that the Mooring Agreement was a standard form contract of ABC, and when interpreted properly, it should be clear that the first sentence of clause 3(a) was not related to Mr Chan. I agree. The Mooring Agreement does not oblige ABC to provide two-buoy moorings to Mr Chan. Rather, it stipulates that if the mooring provided is a two-buoy mooring (ie those moorings in the Aberdeen typhoon shelter), then the member is obliged to keep the two buoys securely attached together at all times. While the Mooring Agreement has apparently not stipulated as to what mooring was being rented to Mr Chan, Mr Chan himself accepted that from day one he knew the mooring assigned to him to the north of Middle Island was a swing mooring, which was also made clear by the renewal agreement.
10. If the Plaintiffs’ complaint is that ABC should not have provided swing moorings at all because they are inherently less safe than two-buoy moorings, then it is for the Plaintiffs to adduce expert evidence to substantiate their claim. They have failed to do so. In any event, such a complaint would seem to go against common sense as swing moorings are commonplace. The Plaintiffs would have had to adduce sufficiently strong evidence to say that swing moorings are so inherently unsafe that they should not be provided by ABC or other boat clubs.
11. In sum, I do not think the Plaintiffs’ pleadings allow them to argue that the swivel broke because of the various reasons suggested by the Plaintiffs during the trial, and the Plaintiffs have not adduced evidence to substantiate such complaints.
12. On the other hand, the Plaintiffs complained that ABC did not carry out sufficient inspections to mooring no D12 and failed to advise them to remove the Yacht from the mooring in anticipation of super typhoon Hato. I accept that these complaints were raised in pleadings, but I have no hesitation in rejecting them.
13. As analysed under issue 1, the component that failed and broke was the swivel. The buoy, the chain and the anchor block for mooring no D12 remained intact after super typhoon Hato, which is not like what happened in *The Quercus*, where the mooring chain parted. The duty to ensure that the tackles are proper, including any shackles or swivels, rests with the hirers including Mr Chan. Whether ABC sufficiently inspected mooring no D12 is irrelevant when the mooring itself was working perfectly well.
14. In any event, all three witnesses of ABC, including Mr Johnston, Ms Li and Mr Wong Tim Fuk who is the head coxswain of ABC, testified that ABC would arrange staff to carry out regular inspections of the moorings. They have produced mooring status check lists from various dates, and in the trial Mr Wong confirmed that he did carry out visual inspection of the moorings including mooring no D12 on 3 July 2017 and 31 July 2017, ie two times in the month prior to super typhoon Hato, and he did not spot any problems with the mooring. Further Mr Johnston himself carried out underwater inspection to the moorings, and for mooring no D12, he did the underwater inspection on 19 April 2017. He produced the video footage of that diving inspection, and it can be seen that he did inspect the underwater components and remove the marine growth along the underwater components.
15. The Plaintiffs argued that the inspections carried out by ABC were not sufficient, and in accordance with industry practice ABC should have employed cranes to lift up the moorings to see if they were adequately resistant. There is no evidence as to whether such a test is indeed the industry practice, and as mooring no D12 was working well at the material time, whether ABC carried out the lifting test is neither here nor there.
16. As for the Plaintiffs’ complaint about ABC’s failure to advise them to take precautionary measures, Mr Johnston said ABC would routinely remind all members to keep their mooring tackles in sound conditions via newsletters and magazines, including the magazine of ABC named “Horizons”. Indeed, in the July-August 2017 issue of Horizons, yacht owners were specifically reminded of the steps to take for the safety and security of the yachts when a typhoon was approaching. For instance, yacht owners were reminded to check the shackle from the mooring lines to the swivel, to check that the swivel was rotating freely and was in good condition, and to replace the swivel if in doubt (which incidentally reinforces my analysis under issue 1 above that it was Mr Chan’s duty to provide and maintain the swivel). So if there was any duty on ABC’s part to advise Mr Chan on the precautionary measures, ABC already discharged that duty.

*Issue 3 – Wrecking of the Yacht*

1. The Plaintiffs contended that ABC failed to monitor the situation during super typhoon Hato and to notify them in time after the Yacht started to break free from mooring no D12 for them to initiate a rescue operation.
2. According to Mr Chan, the Marine Department informed him of the wrecking of the Yacht after midnight on 24 August 2017, and ABC informed him of the same by email only at 3:52pm on that day. Mr Chan said it might have taken some hours before the Yacht grounded ashore, and if ABC had notified him earlier, he could have asked his captain or the marine region of the police to try to salvage the Yacht.
3. In response, Mr Johnston said ABC had installed CCTV in its Middle Island premises and ABC staff and members did have access to the footage of the CCTV in real time. Both he and Ms Li said, however, that the CCTV was only for security purpose to forestall people from stealing the yachts or their components. Mr Johnston added that during typhoon, especially super typhoon Hato, nothing could be clearly seen through the CCTV and there was no available technology at the time for monitoring the moorings during typhoon.
4. There is no evidence from the Plaintiffs as to the exact time the Yacht began to break free from mooring no D12 and the time it took for the Yacht to ground ashore, which means there might or might not be time for a rescue operation. Further, there is no evidence from the Plaintiffs as to what the marine police might have done in response to the Plaintiff’s request and the Plaintiffs did not call Mr Chan’s captain to be a witness, so it is not known if the marine police or the captain would find it advisable or plausible to mount a rescue operation during such extremely bad weather. It is, with respect, highly speculative for the Plaintiffs to suggest that had ABC notified them earlier, the Yacht might not have wrecked.
5. In light of the above, it is not necessary for me to decide if ABC owed a duty to Mr Chan to notify him timely when the Yacht started to drift out from mooring no D12. I would, however, observe that under the Mooring Agreement, it was the responsibility of Mr Chan to secure the Yacht to the mooring, and the Mooring Agreement did not oblige ABC to notify Mr Chan in the event that the Yacht drifted away from its mooring. It would therefore seem to me that ABC may not have any contractual or tortious obligation to notify the Plaintiffs if the Yacht broke free from the mooring.

*Issue 4 – Quantum*

1. Given my ruling above that ABC is not liable to the Plaintiffs for the wrecking of the Yacht, the issue of quantum does not arise.
2. That said, I would note that while the Plaintiffs claimed monetary compensation in the sum of HK$1,700,000 being the market value of the Yacht, they have not adduced any expert evidence on valuation. In fact, initially they have not even adduced evidence on the purchase price of the Yacht. During cross examination, it was put to Mr Chan that he bought the Yacht for HK$1,650,000, and only then did Mr Chan say he bought the Yacht for HK$4,000,000, with HK$1,650,000 paid as the first instalment. Still, there is no evidence on when the Yacht was bought (such that the depreciation period cannot be determined) and on the condition of the Yacht before it wrecked.

*Conclusion*

1. Given my conclusion on liability under issues 1 to 3 above, I would dismiss the Plaintiffs’ claim against ABC. During the trial Mr Westbrook SC indicated he would ask for indemnity costs if the court was to rule in favour of ABC, because the Plaintiffs’ claim was devoid of merits, the repetitive cross examination by the Plaintiffs prolonged the trial and the Plaintiffs repeatedly referred to materials which had already been ruled out.
2. I do not think this case warrants indemnity costs. While the Plaintiffs might not have conducted the cross examination in the most effective manner, the parties were able to complete the trial within schedule. Indeed if it had not been necessary for Ms Li to give evidence by VCF, day 4 of the trial might not have had to take place, and the Plaintiffs acted reasonably in consenting to the VCF application which saved time for arguments. ABC was not prejudiced by the Plaintiffs’ reference to inadmissible materials during cross examination as Mr Westbrook SC was astute in objecting to those questions.
3. Mr Westbrook SC reminded this court that there was one costs order reserved by His Honour Judge Alan Kwong relating to ABC’s application for security for costs against the 1st Plaintiff, which was made after Mr Chan’s claim was provisionally struck out. As Mr Chan’s claim was subsequently restored, ABC withdrew its application. Mr Westbrook SC asked for costs of that application, whereas Mr Chan proposed that costs be in the cause. Now that I have ruled in favour of ABC, there is no difference between the parties’ proposals.
4. As such, I would make the following orders:-
   1. The Plaintiffs’ claim be dismissed.
   2. There be an order *nisi* that the Plaintiffs do pay ABC the costs of the action, including all costs reserved, with certificate for counsel, to be taxed on party-and-party basis if not agreed.
   3. There be an order *nisi* that ABC do pay the Plaintiffs costs of the VCF application, to be taxed on party-and-party basis if not agreed.

( Patrick Siu )

Deputy District Judge

The 1st and 2nd Plaintiffs appeared in person

Mr Simon Westbrook SC, instructed by Fairbairn Catley Low & Kong, for the defendant