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FROM GLOOM TO BLOOM: PEKING  
FOUNDER RULING ON KEEPWELL  
DEEDS OVERTURNED ON APPEAL

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## P R E A M B L E

10 May 2024 marked a significant legal turning point on the enforcement of keepwell deeds as the Hong Kong<sup>1</sup> Court of Appeal (the “CA”) overturned the judgment handed down by Justice Harris in the Hong Kong Court of First Instance (the “CFI”) in May 2023 on the Peking Founder case<sup>2</sup> (the “CFI Judgment”)<sup>3</sup>, which was the first time enforceability of keepwell deeds was subject to scrutiny in a Hong Kong court<sup>4</sup>. The CA overturned the decision in the CFI Judgment which had dismissed the claims of three of the four plaintiffs and granted declaratory relief in an amount of approximately US\$1.7 billion to those three plaintiffs (the “CA Judgment”)<sup>5</sup>. This is a significant development for offshore creditors

in cross-border financing who rely on, or are concerned with, the enforceability of keepwell deeds.

In our article *Are Keepwell Deeds Keeping Well?*<sup>6</sup>, we examined the intricacies of keepwell deeds and discussed issues and key takeaways relating to the Peking Founder case and two other CFI cases on keepwell deeds. In this article, we revisit the background of the Peking Founder case, summarise the CA’s decision and rationale, contrast the CA Judgment with the CFI Judgment, anticipate future development, and offer insights into the use of keepwell deeds in light of the CA Judgment.

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<sup>1</sup> For the purpose of this article, “PRC” or “Mainland” means the People’s Republic of China other than Hong Kong and Macau Administrative Regions and Taiwan.

<sup>2</sup> See further on the Peking Founder case in section 1 (*Background of the Peking Founder case*) below.

<sup>3</sup> [2023] HKCFI 1350. The judgment is available at: [https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=152651&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=152651&QS=%2B&TP=JU)

<sup>4</sup> There was an earlier action on keepwell deeds in the CEFC case (Re The Joint And Several Liquidators Of CEFC Shanghai International Group Limited (In Liquidation) In The Mainland Of The People’s Republic Of China [2020] HKCFI 167) but the CFI in that case handed down a default judgment as the defendant keepwell provider did not appear in court to defend the case. Please refer to our article *Are Keepwell Deeds Keeping Well?* for details (see footnote #6 below).

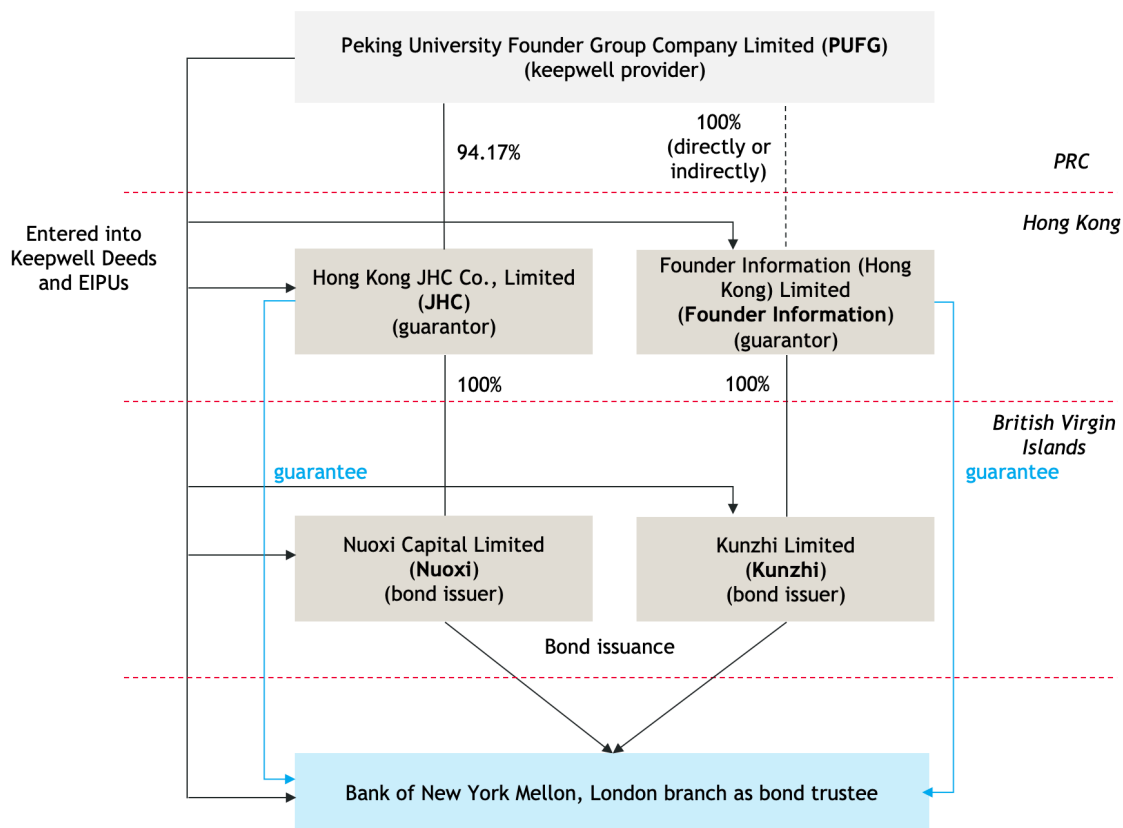
<sup>5</sup> [2024] HKCA 445. The judgment is available at: [https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=159968&QS=%28on%2Bappeal%2Bfrom%2BHCA%7C%E5%8E%9F%E9%AB%98%E9%99%A2%E6%B0%91%E4%BA%8B%E8%A8%B4%E8%A8%9F%7C%E5%8E%9F%E9%AB%98%E7%AD%89%E6%B3%95%E9%99%A2%28%E5%8E%9F%E8%A8%9F%E6%B3%95%E5%BA%AD%29%E6%B0%91%E4%BA%8B%E8%A8%B4%E8%A8%9F%29&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=159968&QS=%28on%2Bappeal%2Bfrom%2BHCA%7C%E5%8E%9F%E9%AB%98%E9%99%A2%E6%B0%91%E4%BA%8B%E8%A8%B4%E8%A8%9F%7C%E5%8E%9F%E9%AB%98%E7%AD%89%E6%B3%95%E9%99%A2%28%E5%8E%9F%E8%A8%9F%E6%B3%95%E5%BA%AD%29%E6%B0%91%E4%BA%8B%E8%A8%B4%E8%A8%9F%29&TP=JU)

<sup>6</sup> Our article *Are Keepwell Deeds Keeping Well?* was published in February 2024, and is available at: <https://www.kwm.com/hk/en/insights/latest-thinking/are-keepwell-deeds-keeping-well.html>



# 1. BACKGROUND OF THE PEKING FOUNDER CASE

In 2017 and 2018, two BVI incorporated subsidiaries of Peking University Founder Group Company Limited (“**PUFG**”) (a PRC conglomerate associated with the Peking University), namely, Nuoxi Capital Limited (“**Nuoxi**”) and Kunzhi Limited (“**Kunzhi**”), issued US\$1.7 billion of bonds (the “**Bonds**”) guaranteed by two subsidiaries of PUFG incorporated in Hong Kong, namely, Hong Kong JHC Co., Limited (“**JHC**”) and Founder Information (Hong Kong) Limited (“**Founder Information**”) (these four offshore subsidiaries (in liquidation) of PUFG are collectively referred to as the “**PUFG Obligors**”). The financing structure is shown in the diagram below:




\*The structure chart above is based on information from (i) the offering circulars issued by Kunzhi dated 12 April 2018 and 14 May 2018 respectively; and (ii) the offering circulars issued by Nuoxi dated 12 April 2017 and 18 January 2018 respectively

The Beijing No.1 Intermediate People’s Court (“**Beijing Court**”) ordered the commencement of reorganisation proceedings of PUFG in February 2020. After the commencement of reorganisation, Nuoxi and Kunzhi defaulted on their payment obligations under the Bonds. The liquidators of the PUFG Obligors submitted claims in respect of the keepwell deeds<sup>7</sup> relating to the Bonds to the court-appointed administrators. All claims were rejected by the administrators without giving reasons, save for one submitted by JHC, which was not adjudicated on the basis that it was submitted out of time.

<sup>7</sup> PUFG entered into four keepwell deeds and equity interest purchase undertakings in respect of the Bonds, which were all English law governed and contained an exclusive jurisdiction clause submitting disputes to Hong Kong courts.





In 2021, the liquidators of the PUFG Obligors sought declaratory relief from the CFI in respect of the rights of such PUFG Obligors under the keepwell deeds. In May 2023, the CFI handed down the CFI Judgment, which recognised the binding effect of keepwell deeds, and declared that PUFG had breached one of the keepwell deeds because Founder Information had failed a net worth requirement and PUFG had not used its best efforts to obtain relevant governmental approvals to remit funds to Founder Information prior to the commencement of reorganisation. The CFI granted declaratory relief of approximately US\$167 million for losses incurred by Founder Information. On the other hand, in respect of Nuoxi, Kunzhi and JHC, which defaulted under the Bonds after the commencement of reorganisation but with no evidence of other relevant breach prior to the commencement of reorganisation, the CFI found that there was no realistic likelihood of obtaining the relevant governmental approvals for PUFG to remit the funds offshore after the commencement of reorganisation, and thus the failure to take any steps by PUFG to obtain relevant governmental approvals did not breach the “best efforts” undertakings. Hence, the claims under those Bonds of Nuoxi, Kunzi and JHC were rejected by the CFI. Nuoxi, Kunzhi and JHC (collectively the “**Appellants**”) appealed the CFI Judgment.

Please refer to our article [\*Are Keepwell Deeds Keeping Well?\*](#) for more details of the CFI Judgment.

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## 2. DECISION AND RATIONALE OF THE CA JUDGMENT

The only ground of appeal<sup>8</sup> that was successful in the CA centered around clauses 2.2 and 4.1(ii) of the relevant keepwell deeds:

**Clause 2.2** provides that if and to the extent that PUFG is required to obtain necessary approvals, consents, licenses, orders, permits, or any other authorisations from the relevant Approval Authorities<sup>9</sup> (“**Relevant Approvals**”) in order to comply with its keepwell deed obligations, then PUFG’s performance shall always be qualified by, and subject to, PUFG having obtained the Relevant Approvals. PUFG undertakes to use its best efforts to obtain the Relevant Approvals within the time stipulated by the relevant Approval Authorities, if applicable.

**Clause 4.1(ii)** provides that PUFG shall ensure that the PUFG Obligors have sufficient liquidity to ensure timely payment of any amount payable under or in respect of the Bonds or the relevant guarantees (the “**Liquidity Support Undertaking**”).

The CA agreed with the submission by the Appellants that on the proper construction of clause 2.2, to perform PUFG’s obligations under the keepwell deeds, Relevant Approvals **might, but not necessarily will**, be required. This is borne out by the words in clause 2.2 of the keepwell deeds:

“if and to the extent that [PUFG] is required to obtain necessary approvals”

The CA Judgment referred to modes of performance by which PUFG could fulfill its obligations under the keepwell deeds without the necessity of obtaining Relevant Approvals, such as asking a third-party entity not restricted by PRC law to provide financial support to PUFG, utilising offshore assets, or engaging in offshore refinancing. Such modes of performance do not involve cross-border remittance from the PRC to offshore. As PUFG had provided no evidence at all on its intended mode of performance of its keepwell obligations, and that its intended mode of performance was one which required Relevant Approvals, PUFG could not establish that it had satisfied the “escape clause” under clause 2.2 that it had used its best efforts to obtain Relevant Approvals.

In light of that reasoning, the CA allowed the appeal and ruled in favour of the Appellants, concluding that PUFG had breached the keepwell deeds and granted declaratory relief amounting to approximately US\$1.7 billion in favour of the Appellants.

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<sup>8</sup> This article does not set out the grounds of appeal by the appellants and defences of the respondent that were not accepted by the CA. Please refer to the CA Judgment for details (see footnote #5 above).

<sup>9</sup> CA rejected PUFG’s argument that the administrators fall within the definition of “Approval Authority” as defined under the keepwell deeds, and agreed with the ruling in the CFI Judgment that this term does not include the administrators.

### 3. COMPARISON WITH THE CFI JUDGMENT

The table below summarises the main differences between the CFI Judgment and the CA Judgment:

	CFI JUDGMENT	CA JUDGMENT
DATE OF JUDGMENT	18 May 2023	10 May 2024
PLAINTIFFS / APPELLANTS	Plaintiffs were four offshore PUFG Obligors – Nuoxi, Kunzhi, JHC and Founder Information.	Appellants were three of the four offshore PUFG Obligors – Nuoxi, Kunzhi and JHC.
OUTCOME	The CFI dismissed the claims of three of four plaintiffs and made a declaration that PUFG breached the keepwell deed in respect of Founder Information, awarding approximately US\$167 million in declaratory relief to Founder Information.	The CA allowed the appeal and ruled in favour of the Appellants (i.e. the three plaintiffs whose claims were previously rejected by the CFI) and made a declaration that PUFG breached the keepwell deeds in respect of the three Appellants, awarding approximately US\$1.7 billion in declaratory relief for the losses incurred by the Appellants.
RATIONALE	PUFG's keepwell obligations are qualified by PUFG using its best efforts to obtain Relevant Approvals to transfer funds out of the PRC. The CFI found no realistic likelihood of obtaining the Relevant Approvals for PUFG after the commencement of its reorganisation. Thus, failure by PUFG to take any steps to obtain Relevant Approvals did not breach its "best efforts" undertaking. Therefore, the timing at which the keepwell obligations are triggered (whether before or after the commencement of reorganisation) is critically important.	Whether PUFG's keepwell obligations are qualified by using its best efforts to obtain Relevant Approvals hinges on PUFG's ability to establish that Relevant Approvals to perform its keepwell obligations are necessarily required. As PUFG failed to object to the notion that there are alternative modes of performance of its keepwell obligations not requiring Relevant Approvals, PUFG did not establish that it would come within the "escape clause" regarding using its best efforts to obtain Relevant Approvals. As a result, the timing at which the keepwell obligations are triggered (whether before or after the commencement of reorganisation) has no bearing on the keepwell obligations of PUFG.

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## 4. POTENTIAL FUTURE DEVELOPMENT

### a. Possibility of further appeal

Hong Kong has a “three-instance” judicial system<sup>10</sup>, where parties may be permitted to appeal a case twice when certain conditions are met. Cases heard by the CA, such as the Peking Founder case, may be permitted to be further appealed to the Hong Kong Court of Final Appeal (the “CFA”) when prescribed conditions are met. Market participants should therefore continue to pay close attention to any possible appeal of the CA Judgment to the CFA, and any possible appeal to the CFA may yield a ruling which may or may not differ from the CA Judgment.

### b. Enforcement in the PRC

In both the CFI and the CA, the PUFG Obligors sought declaratory relief<sup>11</sup>, as opposed to a monetary judgment, for the purpose of proving their debts in connection with the keepwell deeds in the reorganisation of PUFG.

It is reported that the Beijing Court had decided to hear a petition filed on behalf of some holders of the Bonds to recognise the CFI Judgment. Following the CA Judgment, it may be anticipated that the Appellants may apply to the Beijing Court for the recognition of the CA Judgment after it becomes legally effective pursuant to the *Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of Hong Kong*<sup>12</sup>.

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<sup>10</sup> Compared to the “two-instance” judicial system in the PRC, whereby parties are generally permitted to appeal a court decision only once.

<sup>11</sup> Declaratory relief is a judgment from a court that defines the rights of the parties regarding the legal issues presented. It differs from other judgments because it does not order a party to take any action or award any damages.

<sup>12</sup> This new arrangement (《关于内地与香港特别行政区法院相互认可和执行民商事案件判决的安排》) took effect from January 2024. For more information, please refer to our article “Mainland-Hong Kong reciprocal arrangement for civil & commercial judgments moves forward with new practice direction” which is available at: <https://www.kwm.com/hk/en/insights/latest-thinking/mainland-hong-kong-reciprocal-enforcement-arrangement.html>



### c. *Stare decisis*

Under the common law system in Hong Kong, the doctrine of *stare decisis* (a Latin term which means “let the decision stand”) requires courts to follow the *ratio decidendi* (a Latin term which means “the reason for deciding”) of prior similar cases when making their decisions.

Generally speaking, the decision of the CA is binding on itself as well as the lower courts (such as the CFI), and the decision of the CFI is binding on the lower courts only, but not itself (its decisions are only persuasive on itself). Therefore, the CA Judgment has set a binding precedent with more extensive authority and binding effect for similar cases concerning keepwell deeds.

### d. Tsinghua Unigroup case

We looked into another CFI case on keepwell deeds, the Tsinghua Unigroup case<sup>13</sup>, in our article [\*Are Keepwell Deeds Keeping Well?\*](#). Is there any implication of the CA Judgment on the Tsinghua Unigroup case?

In the Peking Founder case, the Appellants on appeal were the three plaintiffs who defaulted under the Bonds **after the commencement of reorganisation** but with no evidence of other relevant breach prior to the commencement of reorganisation. The CA held that:

- PUFG failed to object to the submission that there were alternative modes of performance of its keepwell obligations not requiring Relevant Approvals, and PUFG did not establish that it would come within the “escape clause” regarding using its best efforts to obtain Relevant Approvals; and
- the argument that using no efforts to obtain Relevant Approvals was no longer relevant.

In the Tsinghua Unigroup case, Justice Harris ordered PUFG to pay the plaintiff approximately US\$480 million, which consisted of the principal, interest, and related expenses of the bonds as a result of a payment default by the bond issuer **prior to the commencement of reorganisation**. Therefore, the argument in the Peking Founder case that using no efforts did not breach the best efforts obligations because approvals would never have been obtained **after the commencement of reorganisation** was not applicable to the Tsinghua Unigroup case.

As such, the CA Judgment does not appear to have any impact on the Tsinghua Unigroup case because of the different factual background.

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<sup>13</sup> Tsinghua Unicorp Co., Ltd was the keepwell provider in this case.



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## 5. FUTURE USE OF KEEPWELL DEEDS

We set out six key takeaways in our article *Are Keepwell Deeds Keeping Well?*, which remain relevant. Taking into account the rulings in the CA Judgment, we update two of the key takeaways as follows:

**a. The fourth takeaway: timing is key when evaluating the “best efforts” provisions in keepwell deeds, if the only mode(s) of performance require(s) regulatory approvals**

The CA Judgment overturned the CFI Judgment primarily because PUFG failed to object to the notion that there are alternative modes of performance of its keepwell obligations not requiring Relevant Approvals. If Relevant Approvals may not be necessarily required, the “escape clause” under clause 2.2 of the keepwell deeds was not engaged. The essence of this argument rests on the opening phrase of clause 2.2 of the keepwell deeds which reads: “if and to the extent that [PUFG] is required to obtain necessary approvals.” (please see section 2 above (*Decision and rationale of the CA Judgment*)).

Based on the reasoning of the CA Judgment:

- the “best efforts” qualification in keepwell deeds is only relevant when obtaining regulatory approvals to fulfil keepwell obligations is the only mode of performance. If the modes of performance of keepwell obligations are not limited to those requiring regulatory approvals, the “best efforts” to obtain regulatory approvals qualification may not be relied on by the keepwell provider to avoid its keepwell obligations
- whether keepwell obligations are triggered prior to or after the commencement of reorganisation may not have a bearing on the keepwell provider’s obligations if obtaining regulatory approvals to fulfil keepwell obligations is not the only mode of performance

It is important to note, however, that if the fact pattern is different in another scenario such that a keepwell provider’s only mode of performance involves cross-border remittance of funds or other means which requires regulatory approvals, any qualification regarding using best efforts to obtain regulatory approvals would become relevant and the dichotomy between triggering of keepwell obligations **prior to** or **after** the commencement of reorganisation would become the focal point of contention.

**b. The fifth takeaway: scrutinise the keepwell obligations and how the keepwell obligations are intended to be fulfilled**

Following from the previous takeaway, when drafting or reviewing keepwell deeds, focus should be placed on specifying the keepwell obligations, the triggers of the keepwell obligations, and how the keepwell obligations are intended to be fulfilled. Where feasible, offshore creditors should consider setting out different modes of performance of the keepwell obligations. This does not only facilitate the enforcement of keepwell obligations, it could potentially reduce the possibility of the keepwell provider’s reliance on the “escape clause” relating to the taking of best efforts in obtaining necessary governmental approvals.

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## CONCLUSION

The CA Judgment represents a significant development of the enforcement of keepwell deeds. It is recommended that offshore creditors who are beneficiaries of keepwell deeds thoroughly understand the ramifications of the CA Judgment and continue to monitor its development. The application of the decision reached in the CA Judgment is highly fact specific. In new deals with keepwell support, offshore creditors should pay close attention to the terms of the keepwell obligations as well as how such keepwell obligations are intended to be fulfilled.

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