

RE : PROPOSED LISTING OF K CASH CORPORAION LIMITED

LEGAL OPINION

INTRODUCTION

1. Those instructing me act for DBS Asia Capital Limited and Ping An of China Capital (Hong Kong) Company Limited (the “**Joint Sponsors**”), the joint sponsors to the proposed listing of the shares of K Cash Corporation Limited (the “**Company**”), formerly known as K Cash Fintech Corporation Limited, on the main board of The Stock Exchange of Hong Kong Limited.
2. By written instructions to me dated 8 August 2023 (the “**Instructions**”) and the extract of a draft opinion issued by the Company’s legal counsel (the “**Company’s Legal Opinion**”) enclosed therewith, I am instructed to consider the Company’s Legal Opinion, and to provide my legal opinions on (a) the implications of the Company’s loan transactions with an effective rate of interest exceeding 36% per annum since 31 December 2022 (the “**Concerned Transactions**”) and (b) whether by virtue of the Concerned Transactions, the Company might be regarded as engaging in loan transactions being extortionate (the “**Issues**”).
3. I now render my opinions on the Issues by way of this Legal Opinion, on the factual basis and/or information taken from the Instructions and the Company’s Legal Opinion provided to me, and/or the factual assumptions more specifically set out hereinbelow.

FACTUAL BACKGROUND

4. According to the Instructions, the Company is a licensed money lender in Hong Kong focusing on providing unsecured loans, and has entered into loan agreements which

have come into force only since 31 December 2022 and are with an effective rate of interest exceeding 36% per annum, i.e., the Concerned Transactions. I am not given any copy of such loan agreements or details of calculation of such rate(s) for the Concerned Transactions. Hence, in this Legal Opinion, I am proceeding on the assumption that the Instructions provided to me are factually accurate and correct.

STATUTORY REGULATION ON INTEREST RATES

5. Part IV of the Money Lenders Ordinance (Cap. 163) (the “**MLO**”) governs “Excessive Interest Rates”. This consists of Section 24 on the prohibition of excessive interest rates, and Section 25 on the reopening of certain transactions.
6. According to Section 24(1) of the MLO, any person who lends or offers to lend money at an effective rate of interest which exceeds 48% per annum (the “**Prohibited Rate**”) commits an offence. Section 24(2) stipulates that no agreement of loan, or security shall be enforceable where the effective rate of interest exceeds the Prohibited Rate.
7. Section 25(1) of the MLO, on the other hand, provides that subject to Section 24(2), the Court may reopen a loan transaction so as to do justice between the parties where (a) proceedings are taken for the recovery of any money lent or the enforcement of any agreement or security in respect of any loan; and (b) subject to Section 25(3), there is evidence which satisfies the Court that the transaction is extortionate.
8. Section 25(3) stipulates that any agreement for the repayment of a loan or for the payment of interest on a loan in respect of which the effective rate of interest exceeds 36% per annum (the “**Presumed Extortionate Rate**”) shall, “*having regard to that fact alone*” [emphasis added], be presumed to be a transaction which is extortionate; but the Court may (except where such rate exceeds the Prohibited Rate) declare that any such agreement is not extortionate if, having regard to all the circumstances relating to the agreement, the Court is satisfied that such rate is not unreasonable or unfair.
9. Section 25(2) provides that a transaction is extortionate if (a) it requires the debtor or a relative of his to make payments (whether unconditionally or on certain contingencies)

which are grossly exorbitant; or (b) it otherwise grossly contravenes ordinary principles of fair-dealing. Sections 25(4) to (6) further deal with such evidence to which the Court shall have regard in determining whether a transaction is extortionate.

10. According to Section 25(9), the Legislative Council may alter the Presumed Extortionate Rate, but in relation to any such agreement which is in force at the date when such rate is so altered, the rate so specified as at the coming into force of such agreement shall continue to apply. By resolution passed in the Legislative Council meeting on 26 and 27 October 2022, the Presumed Extortionate Rate has been reduced from 48% to the prevailing 36% per annum with effect from 30 December 2022. Therefore, for loan agreements only coming into force since 31 December 2022 (as concerned in this Legal Opinion), the applicable Presumed Extortionate Rate is 36%.

ANALYSIS ON THE ISSUES

Presumption of Extortionate Transactions

11. According to the factual background provided in the Instructions, the Company has entered into the Concerned Transactions, which are loan agreements being in force only since 31 December 2022 and with an effective rate of interest exceeding the Presumed Extortionate Rate.
12. Assuming that the rate in respect of the Concerned Transactions does not exceed the Prohibited Rate, pursuant to Section 25(3) of the MLO, having regard to the fact that such rate exceeds the Presumed Extortionate Rate alone, the Concerned Transactions shall be presumed to be transactions which are extortionate. Such transactions fall within Category (ii) set out in *Celerity Special Situations Fund I, LP v China Linkage International Ltd* [2018] HKCFI 259 at §16, which are “*presumed to be extortionate without more, entitling the Court to re-open the transaction(s)*” [emphasis added].
13. However, notwithstanding the said presumption, the Court may declare that the Concerned Transactions are not extortionate if, having regard to all the circumstances relating thereto, the Court is satisfied that such rate is not unreasonable or unfair.

Adopting the words of the Full Bench in *Chu Pei Cheng & Anor v The Queen* (HCMP 487/1982, 26 April 1982) at §1, the effect of entering into the Concerned Transactions is “not to render that transaction void or illegal but ... to place the onus of showing that the transaction was not extortionate upon the money lender” [emphasis added]. As noted in *Celerity Special Situations Fund I, LP* (supra) at §23, “that presumption is rebuttable and in determining whether or not the rate of interest is ‘extortionate’, the court has regard to the relevant factors” [emphasis added].

14. Therefore, where the effective rate of interest of a transaction exceeds the Presumed Extortionate Rate, it becomes the burden of the lender seeking recovery to show that the transaction is not extortionate in all the circumstances of the case, including taking into such evidence or factors stipulated under Sections 24(4) to (6): *Lam Yee Hung v Chinachem Charitable Foundation Ltd* [2023] HKCFI 908 at §§68-71.

Rebutting the Presumption

15. In showing that the transaction is not extortionate, the relevant circumstances may include *inter alia* the prevailing interest rate at the time the agreement was made; the circumstances of the debtor and his then financial pressures; and the degree of risk accepted by the lender, the relation between the parties, whether there was any specious cash price, and how far the transaction(s) was/were reasonably required for the parties’ protection or in the debtor’s interest: Sections 24(4) to (6) and *Chan Sze Sze Gabrielle v Tu Christopher* (HCA 2125/2006 & HCA 2007/2005, 9 April 2009) at §18.
16. In *Fu Sau Kin De Yau v Tang Fu Hong* [2019] HKCFI 540 at §§47-48, where the stipulated interest rate of 60% per annum exceeded the Presumed Extortionate Rate (which was then 48% per annum) by a significant margin, and such rate had not been discussed between the parties, the Court indicated that it would be very difficult to see why the Court should not interfere in the matter to do justice between the parties.
17. In that case, there was no evidence of the prevailing interest rate referred to in Section 25(4), and little evidence of the matters identified in Sections 25(5) and (6). The parties

were not very sophisticated middle-aged individuals. There was no evidence of the interest rate offered by other finance companies to the borrower, or information about the lender's financial circumstances or the alternative use in which she might have put her funds. The Court rejected the lender's argument that it was a very risky venture for her and that such risk was reflected in the high interest rate, and accepted that the borrower was not a person of means and could ill afford to pay 60% interest. It eventually decided to reopen the transaction: *Fu Sau Kin De Yau* (supra) at §§49-53.

18. Whilst each case must depend upon its own circumstances, the above case illustrates that in order to persuade the Court that a transaction with an effective rate exceeding the Presumed Extortionate Rate is nonetheless not extortionate, the lender would likely have to adduce at least some evidence on the matters identified in Sections 24(4) to (6).
19. Turning to examples in which a presumption may be rebutted, in the English case *Reading Trust Limited v Spero* [1930] 1 KB 492, 503-504, 508-510, 515-516, the Court considered a similar provision that where an interest exceeds 48% per annum, the Court shall, unless the contrary is proved, presume that the interest is excessive and that the transaction is harsh and unconscionable. The interest charged in that case exceeded 48% per annum. However, the lenders were found to have discharged the burden on their part of rebutting the presumption, because (a) the borrower was a business man of 40, borrowing to provide working capital for a speculative business, for which he could make large profits; (b) the borrower had for some years been borrowing money, with late payments sometimes, and could give no security; (c) some of the loans were for short terms and thus, the rate of interest per annum was deceptive; and (d) there was no evidence of any circumstances proving harshness or unconscionableness, such as misstatements by the lender, weakness or lack of understanding on the part of the borrower or undue pressure; there was no taking advantage of the ignorance or the necessity of the borrower. In short, the Court was satisfied that the rate was one which a man of full understanding and in full possession of the facts was for his own business purposes content to pay, and there was nothing harsh or unconscionable in the lender's treatment of the borrower.
20. The case of *Reading Trust Limited* (supra), whilst being an old English case, was cited by Hong Kong Court in *Lam Yee Hung* (supra) at §71 in referring to the lender's burden

to show that the transaction is not extortionate where the effective rate exceeds the Presumed Extortionate Rate. Therefore, I take the view that the reasoning in *Reading Trust Limited* (supra) does provide guidance to the operation of Section 25(3) in Hong Kong.

21. In *Lam Yee Hung* (supra) at §§71-78, the Court noted the lender's burden where interest exceeded the Presumed Extortionate Rate, but pointed out *inter alia* that :-
- (a) the circumstances were such that the lender had reasons to expect high level of security and return, while the borrower had reasons to accept that as the cost for the finance needed;
 - (b) the parties entered into the transaction with full knowledge of the cost and benefit;
 - (c) in view of its accounts, effectively insolvency state and lack of assets for security, the borrower had no real prospect to secure such loans at a normal or low interest rate;
 - (d) the loan was for a substantial sum put together within a short period of time, and it was the lender's own costly undertaking to extend such loan by sourcing the funds at an interest; and
 - (e) there was no suggestion or evidence that the borrower was labouring under any ignorance or undue pressure, or that there was any misrepresentation on the part of the lender.

Nevertheless, the Court eventually found on evidence that the parties at the time of the loan agreement had contemplated a rate not exceeding the Presumed Extortionate Rate.

22. In the present case, I note that in the Company's Legal Opinion at §73, there is a list of measures which have allegedly been taken by the Company in respect of loans carrying high interest rates. In the draft prospectus [p.132], the Company confirmed that it has implemented and appropriately adopted the said measures in respect of all the Concerned Transactions. On such a basis, I have considered those measures and have the following opinions:-
- (a) On the compliance assurance framework and internal training referred to at §73(1), such may facilitate the collection of information on the circumstances of the debtor as referred to in Section 25(5) of the MLO, and may thus increase the chance for

the Company to successfully rebut the presumption under Section 25(3) if such circumstances are in favour of the Company. For instance, it is generally less likely for a transaction to be extortionate if the borrower is a sophisticated businessman or commercial entity taking a speculative or business decision, rather than an uneducated or unsophisticated man under dire financial pressures to take out a loan.

(b) The explanations of the terms and conditions as proved by the audio and/or video records mentioned at §73(2) may also help to evidence, to some extent, the fair-dealing relationship between the parties as referred to in Section 25(6) of the MLO. Such may also be a relevant consideration as referred to in Section 25(4) of the MLO in any event, being evidence that the borrowers have full knowledge and understanding about the terms and conditions of the transactions.

(c) In the same vein, the declarations referred to at §73(3) may also improve the Company's position, in that it is less likely for a transaction to be extortionate if the borrower entered into it upon making an informed decision with the full knowledge and understanding that the effective rate exceeds the Presumed Extortionate Rate.

23. I note that in the Company's Legal Opinion at §73(3), in referring to the borrower's declaration, it was mentioned that borrowers were charged an effective rate exceeding the Presumed Extortionate Rate "*based on assessment of their risk profile*". Assuming that there was in fact such an assessment, the risk profile would likely be a relevant factor under Section 25(5), and the degree of risk accepted by the Company would also be relevant under Section 25(6). It would generally be less likely for a transaction to be extortionate if the effective rate, even though exceeding the Presumed Extortionate Rate, corresponds to the risk taken by the Company, rather than being fixed invariably.

24. In considering the risk taken by the Company, I have also taken into account the fact that the Company focuses on providing unsecured loans. Assuming that all the Concerned Transactions are unsecured loan transactions, it should be more likely for the Company to rebut the presumption under Section 25(3), as the fact that the loans are unsecured would normally indicate a higher risk accepted by the Company, and a lower chance to obtain such loans at a normal or lower interest rate by the borrowers.

25. Where the effective rate had been thoroughly discussed or seriously negotiated upon between the parties prior to entering into the transaction, it may also be a factor further deterring the Court from interfering in the relevant transaction, as such would likely evidence the borrower's informed decision with full knowledge of the cost and benefit and willingness to accept such rate.
26. In the circumstances, by reason of the aforesaid, whilst the Company would be presumed to have engaged in loan transactions being extortionate by virtue of the Concerned Transactions, if the measures mentioned in Paragraph 73 of the Company's Legal Opinion were all adopted, I take the view that the chances that the Concerned Transactions would be regarded by the Court as extortionate should be low.

Limited Application of Section 25 of the MLO

27. Further, the Concerned Transactions may have no practical implications as extortionate transactions under Section 25 themselves, if and where Section 25 is inapplicable.
28. Under Section 25(1), the Court may exercise its power to reopen a transaction where proceedings are taken for the recovery of any money lent or the enforcement of any agreement or security in respect of any loan. Sections 25(7) and (8) provide that such a power may also be exercised in, respectively, any Court in which proceedings might be taken for such recovery (notwithstanding that a lender has not taken proceedings), and any application relating to the admission or amount of a proof by a money lender in any bankruptcy proceedings.
29. In *Cheung Bing Sum Juana v Lee Leo* [1996] 4 HKC 130, 134B-D, the Court found that, in proceedings which concerned an agreement for the sale of a property and in which, even though there might have been a potential element of security, the order claimed did not seek to enforce it, there was no basis to reopen the agreement under Section 25 as the proceedings were not for the recovery of money lent or the enforcement of any security.

30. Further, Section 25(9A) provides that nothing in that section (i.e., Section 25) shall apply to a loan specified in paragraph 12 in Part 2 of Schedule 1 to the MLO, or as respects such loan, any person who makes such loan. The said Paragraph 2 in Part 2 of Schedule 1 specifies “[a] *loan made to a company that has a paid up share capital of not less than \$1,000,000 or an equivalent amount in any other approved currency*”.
31. Accordingly, where the loans made in the Concerned Transactions are made to a company with a paid-up share capital of not less than HK\$1,000,000 or an equivalent amount in any other approved currency, such loans are “exempted loans” to which Section 25 does not apply. This includes any security provided in respect of such exempt loans: *Chow Kin Ming v Always Fortune Limited* (HCA 906/2003, 5 January 2003) at §§17-35 concerning a similar provision under Section 24 of the MLO.

Consequences of Reopening Transactions

32. Where Section 25 applies, and the presumption under Section 25(3) is not rebutted, pursuant to Section 25(1), the Court “*may reopen the transaction so as to do justice between the parties having regard to all the circumstances, and, for that purpose, make such orders and give such directions in respect of the terms of the transaction or the rights of the parties thereunder*”.
33. Whilst the word “*may*” denotes a discretion, absent exceptional circumstances, it is probable that the Court would exercise its power to reopen the transaction: see for example *Leo Lee alias Lee Hok Yuen v Cheong Oi Sum Ader* (DCCJ 19219/1991, 26 November 1993) at §9 stating that “*as a starting point, it seems to me that the transaction should be reopened if the court is clearly satisfied that the transaction is extortionate because the rate exceeds 60 percent*”.
34. The issue would therefore be how the Court would do justice and in particular, what orders or directions would be given in respect of the terms of the transaction or the rights of the parties. In this regard, I note that even where the issue of whether the transaction should be reopened and if so, to what extent is yet to be determined, the Court may still find that the debtor has failed to identify any circumstances which

render it arguable that he would not be held liable to repay even the outstanding principal, and hence, refuse to grant unconditional leave to defend in relation to the principal: *Wang Waichen v Praise Fortune Ltd* [2022] HKCFI 1880 at §§21-22.

35. Further, as observed in *Treasure Spot Finance Co Ltd v Li Chik Ming & Anor* (HCA 5387/2001, 3 December 2007) at §52, the ordinary consequence of the reopening of a transaction would be to reduce the rate to an equitable level where that was necessary. In *Fu Sau Kin De Yau* (supra), the Court in reopening the transaction accepted the debt's proposal to adopt the commercial interest of prime plus 1%, which was said to be not ungenerous in the low interest rate environment having prevailed for many years.

Licensing Implications

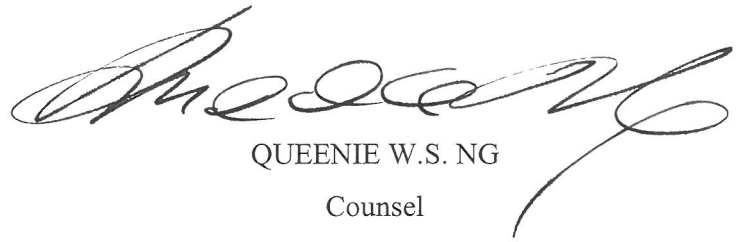
36. According to Section 10 of the MLO, the licensing court shall hear and determine an application for a licence in accordance with Section 11. Section 11(5) provides a list of circumstances which the licensing court must be satisfied prior to granting a licence, including *inter alia* “that in all the circumstances the grant of such licence is not contrary to the public interest”.
37. In *Chu Pei Cheng* (supra), the appellant appealed against a refusal of the licensing court to grant her a renewal of a licence on the ground that the interest rate which she intended to charge, i.e. 59.1% (exceeding the then Presumed Extortionate Rate), was excessive. By the time of the appeal, the Crown and the appellant agreed that the Crown would not oppose the grant of a licence on certain conditions. The Court ordered that a licence be granted on such conditions accordingly. But in the judgment at §§2 and 5, the Court specifically stated that “[n]owhere in Section 11(5) is it indicated that the Court would be entitled to refuse an application where it was satisfied that the applicant intended to charge an excessive, but lawful, interest rate”, but such rate may still be a ground of refusal, if what is intended is “because the applicant stated that she intended to charge an excessive but lawful interest rate, that the grant of a licence to her would be contrary to the public interest”, on the basis that “there are already an adequate number of money lending institutions which were prepared to lend money at lesser rates”.

38. In the present case, noting the Company's Legal Opinion at §71(6) stating that there is no evidence that the Company invariably charges interests exceeding the Presumed Extortionate Rate, I take the view that the Company's situation is different from the situation as envisaged in *Chu Pei Cheng* (supra) at §§2 and 5. Accordingly, the Concerned Transactions alone should unlikely have any licensing implications.

CONCLUSION

39. By reason of the foregoing, on the Issues, my opinions are that:-
- (a) By virtue of the Concerned Transactions and the statutory effect of Section 25(3) of the MLO, the Company would be presumed to have engaged in extortionate transactions. However, the implication of that presumption is not to render the Concerned Transactions void or illegal, let alone attracting any criminal sanction as against the Company, but is rebuttable and to place the onus of showing that the Concerned Transactions are not extortionate upon the Company only.
 - (b) Should the said measures mentioned in Paragraph 73 of the Company's Legal Opinion be all adopted, I take the view that the chances that the Concerned Transactions would be regarded by the Court as extortionate should be low.
 - (c) Even where the Concerned Transactions are extortionate, it may not have any implications under Section 25 if the proceedings are neither for the recovery of money lent or the enforcement of security, nor stipulated under Section 25(7) or (8), or if it is in respect of an exempt loan under paragraph 12 in Part 2 of Schedule 1.
 - (d) Where an extortionate transaction is reopened under Section 25(1), the Company may still have a reasonable claim for the repayment of the outstanding principal, and even interest at such a reduced rate as the Court deems fit or equitable.
40. I believe that the above should have addressed all the matters raised for my legal opinions. I shall advise further as and when I am so instructed.

Dated this 27th day of November 2023



QUEENIE W.S. NG
Counsel