Contentious Commentary

Hong Kong

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contents

Long-arm of the Law

Combatting fraudulent schemes in overseas-listed securities

The essentially territorial nature of securities regulation in Hong Kong sometimes presents a challenge for regulators. In *SFC v Young Bik Fung & Ors*, HCMP 2575/2010, the SFC pursued a claim under section 300 Securities and Futures Ordinance to get round the restriction of the territorial application of the insider dealing provisions of the Ordinance. Two former solicitors at Slaughter & May and Linklaters were found guilty of misuse of confidential material price sensitive information so as to benefit from share trading.

This information concerned Standard Chartered Bank's (SCB) tender offer in 2006 for the shares of Hsinchu International Bank Co Ltd, a corporation listed on the Taiwan Stock Exchange. A solicitor employed in private practice and seconded to SCB to work on the offer was given access to confidential and price sensitive information including SCB's decision to make a firm offer and the price. Prior to the announcement of the tender offer, the solicitor tipped off her boyfriend and his two sisters to buy Hsinchu shares, resulting in a profit of HKD2.7 million.

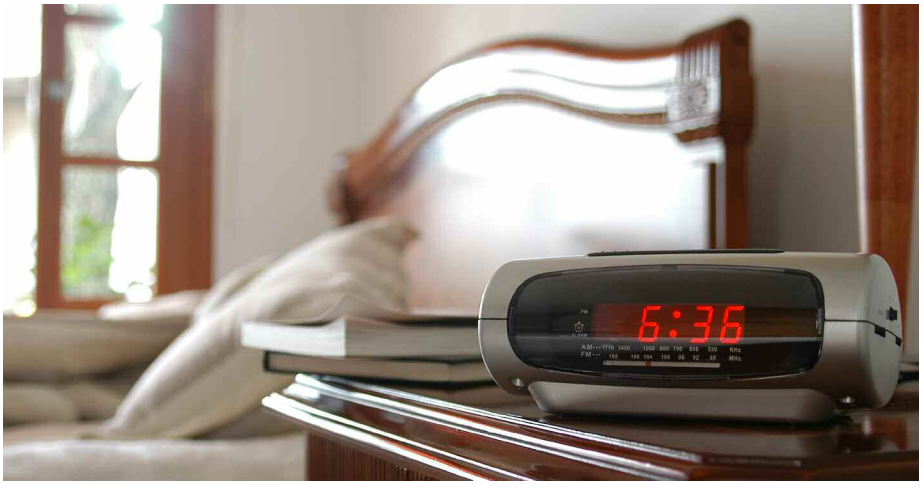
Section 300 spells out the offence that no person shall, directly or indirectly, in a transaction involving securities, futures contracts or leveraged foreign exchange trading:

(i) employ any device, scheme or artifice with intent to defraud or deceive; or

(ii) engage in any act, practice or course of business which is fraudulent or deceptive, or would operate as a fraud or deception.

The Court found that the behaviour constituted fraud or deception within the meaning of section 300.

While the Court accepted the defendants' argument that section 300 does not have extra-territorial application, it held that applying section 300 to this case did not involve an extra-territorial application of the law, because the *"deceptive or fraudulent scheme"* caught by the section (ie. the plan put in place to buy the stocks) was *"consummated"* in Hong Kong.



The Court found an analogy with section 9(2) of the Prevention of Bribery Ordinance, where, as the Court of Appeal held in *HKSAR v Krieger* [2014] 3 HKLRD 404, *"if the offer is made in Hong Kong it matters not…that the offeree agent is a public official of a place outside Hong Kong or that the act or forbearance in respect of which the offer is made concerns duties outside Hong Kong."*

The Judgment includes cautionary comments as to the nature and effectiveness of the Chinese walls that Linklaters had in place, as one of the defendants did not actually work on the deal.

Snooze, you lose

Defence struck out after failure to attend Pre-Trial Review

The Defendant in *So Hung Kit v Tong Kai Man* DCCJ 5116/2006 (Chinese Judgment) failed to turn up for a Pre-Trial Review (PTR) hearing. The Court ordered the Defendant to submit, within 14 days, a written explanation for the absence and whether he intended to defend the action, failing which the Defence would be struck out. The Court adjourned the PTR. The Plaintiff's solicitors contacted the Defendant to inform him of the Order and also published an advertisement giving the date and time of the PTR. Despite this, the Defendant failed to attend the hearing.

The Court ordered the Defence be struck out and the Plaintiff granted default judgment. The failure of the Defendant to provide any reason for absence would in itself allow the Court to grant the order.

Quick off the mark

Need for promptness in applying for anti-suit injunction

The Court in *Sea Powerful II Special Maritime Enterprises (ENE) v Bank of China Ltd* [2016] HKEC 90 dismissed the Plaintiff's application for an anti-suit injunction to prevent a shipping dispute being held in the Qingdao Maritime Court. The Plaintiff argued that an arbitration clause within the Bill of Lading should govern the dispute.

The Court rehearsed the general principles that the courts *"should ordinarily grant an injunction to restrain the pursuit of foreign proceedings brought in breach of an agreement for Hong Kong arbitration, at any rate where the injunction has been sought without delay and the foreign proceedings not too far advanced."* The Court found that the arbitration clause had been validly incorporated into the Bill of Lading, but that the Plaintiff had been evading service of the mainland proceedings waiting for the limitation period to expire. The Plaintiff's delay was inordinate and culpable.

Biased – surely not!

When a judge should remove himself from trial

The 1st Defendant in *Komal Patel v Chris Au* [2015] HKEC 2371 applied that Zervos J recuse himself from the proceedings on the basis of apparent bias. The test was *"whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge had not brought or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to the evidence and the submissions of counsel…"*.

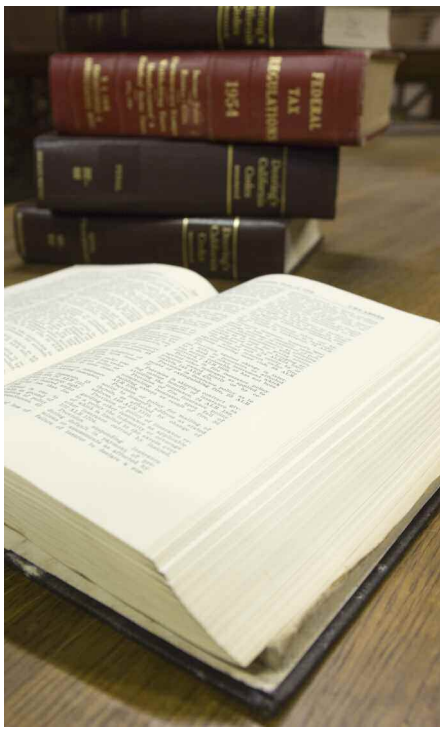
The test looks at bias from the point of view of a fair-minded and well informed observer. The grounds for recusal included factors such as the professional relationship of Zervos J's brother with the brother of the 3rd plaintiff and his personal relationship with the 3rd plaintiff, an allegation that most of Zervos J's decisions in the proceedings had been against the defendants and that Zervos J had already made his mind up upon issues to be tried during the trial in favour of the Plaintiffs. Zervos J dismissed the application, the second time in recent weeks he had rejected accusations of apparent bias.

Zervos J also commented upon the written submissions presented to the Court by the solicitor advocate in support of the application that were *"unfortunately at times couched in extreme and inappropriate language [and] where in some instances submissions were made based on material that was not sourced or verified, or without substantiation"*. It was *"incumbent on a solicitor advocate to ensure that he or she adheres to the high standards of professional conduct expected of an advocate before the courts."*

It's an ex-Company….

No derivative action possible on behalf of dissolved company

The Plaintiff in *Chet Yuet Ying v Wong Choi Hung* [2016] HKEC 78 brought a derivative action on behalf of a company that had long since been dissolved. A dissolved company ceases to exist as a legal entity and cannot itself sue or do any other legal act unless it is restored to the Companies Register. Since the company could no longer sue the alleged wrongdoers, it followed that a derivative action could not be brought on its behalf. The Plaintiff had no derivative cause of action and further pursuit of such a claim would be an abuse of the court's process.



Arbitration wins the day

Court considers when court proceedings should be stayed in favour of arbitration

The case of *Bluegold Investment Holdings Ltd v Kwan Chun Fun Calvin* [2016] HKEC 532 concerned the defendant's application under section 20 of the Arbitration Ordinance for a stay of proceedings and a referral of the dispute to arbitration.

The Court summarised the approach to be taken as a four stage test: (1) Is there an arbitration agreement between the parties? (2) is the clause in question capable of being performed? (3) Is there in reality a dispute or difference between the parties? (4) Is the dispute or difference between the parties within the ambit of the arbitration agreement? The onus is on the applicant to demonstrate there is a prima facie case that the parties are bound by an arbitration clause.

Citing the Court of Appeal's decision in *PCCW Global Ltd v Interactive Communications Service Ltd* [2007] 1 HKLRD 309, the Court ruled that unless the point is clear, the matter should be stayed in favour of arbitration. The Court also held that a non-exclusive jurisdiction clause referring to the jurisdiction of the Hong Kong courts operated in parallel with the arbitration clause in the same agreement. The purpose of the clause was to fix the supervisory court of the arbitration. The Court made an order to stay the proceedings in favour of arbitration and ordered the plaintiff to pay the defendant's costs of the summons on an indemnity basis.

Broken records

Inspection of company records under the Companies Ordinance

The plaintiff in *Hao Xiaoying v Green Valley Investment Limited* [2016] HKCU 476 applied for inspection of the defendant company's records under s.740 of the Companies Ordinance, Cap 622. The plaintiff was a 20% shareholder of the company. The Court said the applicant must first establish that he is acting in good faith and second, the court must believe the circumstances are such that the inspection sought is for a proper purpose.

A wish to inspect documents to investigate a genuine and credible belief that there has been corporate mismanagement is capable of constituting a proper purpose. Where the court is satisfied the purpose is germane to a shareholder's economic interest in the company, a proper purpose will have been satisfied. A shareholder is not entitled to embark on a fishing expedition in search of a cause of action to support a mere suspicion of wrongdoing. A shareholder has no general right to access the records of the company in order to challenge the commercial decisions of its management. Applying the tests, the Court granted inspection of some of the records sought.

Foreign Visitor

When mainland judgments can be set aside in Hong Kong

In what is believed to be the first reported case under the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597) since its introduction in August 2008, the Court of First Instance dismissed the defendants' application in*吳作程 v 梁儷 & Ors* – [2016] HKCU 401 to set aside an order for registration of a Mainland Judgment in Hong Kong.

The 1st defendant defaulted on a loan agreement under which the 2nd to 5th defendants were guarantors. The plaintiff obtained a judgment from the Shenzhen court ordering the defendants to make payment by instalments (the Mainland Judgment). The defendants defaulted on the payments and the Shenzhen court issued the plaintiff with a certificate that the Mainland Judgment was final and enforceable in the Mainland. The plaintiff obtained an order from the Hong Kong court to register the judgment in Hong Kong. The defendants applied to set aside the order.

Referring to s. 5(2) of the Ordinance, the Court found that as the plaintiff had produced the necessary certificate, the defendants needed to prove to the satisfaction of the Hong Kong court why it should not register the Mainland Judgment. The defendants were in effect asking the Hong Kong court to conduct a mini-trial to assess the merits of its case, which was not the role of the court.

Clearly a wind-up

Costs where petitioner withdraws winding-up petition

Harris J considered the position regarding costs where a petitioner withdraws a petition to wind up a company after receiving the company's evidence in opposition. Giving judgment in *Re Sino Pacific Corp Ltd* [2016] HKEC 548, he cited his earlier judgment in *Re Lucky Ford Industrial Ltd* [2013] 3 HKLRD 550, in which he said it was appropriate for costs to follow the event.

Having voluntarily offered to withdraw the petition, it followed that the petitioner should pay the costs of the proceedings. A petitioner should assess in the first instance whether or not to issue a winding-up petition. If the assessment proves to be incorrect, and the petitioner later recognises that it should be dismissed, the petitioner will have to pay the costs. On the facts, the Court considered the issue of the petition was a misuse of the winding-up procedure and costs should be paid on an indemnity basis.

Marriage not made in heaven

Jail for husband, defeat for wife in court application

In related cases arising out of a failed marriage, the Court considered the appropriate sentence for contempt of court for breach of a Court order and whether a party's conduct should mean that an injunction should be discharged. In *Suzanne Ruth Henderson v Scott Henderson* [2016] HKEC 858, Queenie Au-Yeung J said that a prime consideration of the court in sentencing contempt was *to "signal importance of demonstrating to litigants that orders of the court are to be obeyed."* In the case of a Mareva injunction, deliberate breaches should be met with an immediate term of imprisonment measured in months rather than weeks, although there may be circumstances in which a substantial fine would be sufficient (eg. the contempt has been purged and the assets recovered). Here, the respondent had committed deliberate breaches which had deprived the applicant and their children of maintenance monies. The Court imposed a three month sentence.

Meanwhile, the plaintiff wife in *Suzanne Ruth Henderson v Scott Henderson* [2016] HKEC 857 sought to continue a Mareva injunction in aid of enforcement of maintenance orders obtained in Ontario under section 21M High Court Ordinance, Cap 4. The Court found she had committed a gross violation of her obligations underlying the grant of a Mareva injunction through material non-disclosure, intentional misrepresentation and lying to the Court when making the application. She also breached an undertaking not to institute proceedings without leave of the Hong Kong court by pursuing contempt proceedings in Arizona. In the circumstances, the Court discharged the Mareva injunction and declined to regrant it.

Poor service

Strict approach to applications for leave to serve out of jurisdiction

The defendant in *Newocean Petroleum Co Ltd v Rio Tinto Shipping (Asia) Pte Ltd* [2016] HKEC 879 sought to discharge an earlier order granting leave to the plaintiff to issue and serve a concurrent writ on the defendant in Singapore. Jurisdiction under RHC O. 11 is exorbitant in nature. *"It is a strong thing for the court to go outside its territory and to compel a foreigner to come to Hong Kong in order to defend itself."* The plaintiff had to demonstrate that each of its claims fell within one of the heads of O 11, r1(1).

The plaintiff's claim was brought under O 11, r1(1)(d), in which the claim was brought to enforce a contract made within the jurisdiction, made through an agent in the jurisdiction, governed by Hong Kong law or gave jurisdiction to the CFI through a term in the contract. The Court accepted the defendant's claim that there was never a contract between the parties. It was *"difficult to see how (the defendant) could be contracting with (the plaintiff) not just unknowingly, but contrary to its own understanding."* Anthony Chan J set aside the leave order.

Conspiracy of silence

How strike-out principles are applied to conspiracy claims

The defendants in *Ammolite Wealth Ltd v King China Properties Ltd* [2016] HKEC 886 applied for an order that the plaintiff's claims be struck out and the action dismissed on the grounds that the claims disclosed no reasonable cause of action, were frivolous or vexatious or were otherwise an abuse of process. While the power to strike out is exercised in *"plain and obvious cases"*, Master M Wong in Chambers noted that *"plain"* is not the same as simple and *"obvious"* is not the same as short. *"If the Statement of Claim, however complicated, shows that there is no cause of action a court will order it to be struck out".*

When pleading the tort of conspiracy, the pleader must allege at least one overt act which is the act of all the alleged conspirators or failing that, a number of overt acts which include at least one act on the part of each conspirator.
The cause of action should be set out clearly in the pleadings and should not require inferences to be drawn. The Court accepted the defendants' submission that there was no basis to suggest that the sole or predominant purpose was to injure the plaintiff rather than to pursue their own advantage. The Court ordered that the plaintiff's claims based on conspiracy to injure be struck out.

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