

THE CFA AFFIRMS THE SFC'S POWER TO TACKLE CROSS-BORDER MARKET MISCONDUCT

The Hong Kong Court of Final Appeal (“CFA”) recently decided that the Securities and Futures Commission (“SFC”) could serve legal proceedings on foreign defendants without first seeking leave from the court where the proceedings were commenced under section 213 of the Securities and Futures Ordinance (“SFO”) in relation to an alleged violation of sections 274 and/or 295.

As commented by the SFC’s Executive Director of Enforcement, Mr. Christopher Wilson, the CFA’s decision affirmed the SFC’s power under section 213 of the SFO, especially in relation to cross-border market misconduct by wrongdoers who are out of jurisdiction.

This briefing highlights the main points of the decision.

Background

In July 2019, the SFC commenced civil proceedings in the High Court of Hong Kong against a group of local and overseas traders and investors, who were suspected of manipulating the shares of Ching Lee Holdings Limited through a large scale and highly organised “ramp and dump” scheme. This syndicate allegedly made an illicit profit of over HK\$124 million.

Amongst the defendants are six defendants who are individuals residing in the United States and foreign-incorporated companies (the “Eastmore Defendants”). The Eastmore Defendants were alleged to have engaged in false trading contrary to sections 274 and/or 295 of the SFO. Pursuant to section 213 of the SFO, the SFC sought various reliefs against them, including a declaration that they have contravened the relevant sections, restoration orders and orders to pay damages.

The SFC initially successfully obtained leave to serve the proceedings on the Eastmore Defendants out of the jurisdiction under Order 11, rule 1(1)(f) and rule 1(1)(b) of the Rules of the High Court (“RHC”), which provide specific “gateways” for service of legal claims subject to the Hong Kong court’s jurisdiction to overseas defendants.

The Eastmore Defendants applied to set aside the order granting leave for service on the basis that the Hong Kong court lacks jurisdiction over them. The application was not successful but leave to appeal was granted to the Eastmore Defendants. On appeal, the Court of Appeal (“CA”) decided against the Eastmore Defendants. Whilst dismissing the appeal, the CA granted leave to appeal to the CFA. The CFA was asked to decide whether the leave for service out of jurisdiction was properly granted pursuant to the gateway under Order 11, rule 1(1)(f) (in particular, whether an action by the SFC for discretionary relief under section 213 of the SFO can properly be characterised as a ‘claim’ and/or ‘founded on a tort’ for the purposes of that rule).

The CFA’s decision

The CFA did not deal directly with the question put by the CA. Instead, the court considered that the real issue in this case was whether the Order 11 rule 1(2) of the RHC¹ was applicable. This provision allows service of proceedings out of the jurisdiction without the leave of the court if certain conditions are satisfied.

¹ Order 11 rule 1(2) of the RHC provides that:

“Service of a writ out of the jurisdiction is permissible without the leave of the Court provided that each claim made by the writ is—

(b) a claim which by virtue of any written law the Court of First Instance has power to hear and determine notwithstanding that the person against whom the claim is made is not within the jurisdiction of the Court or that the wrongful act, neglect or default giving rise to the claim did not take place within its jurisdiction.”

The CFA clarified that an application for leave to serve proceedings on someone out of the jurisdiction under Order 11 rule 1(1) is to ask the court to assume jurisdiction over that person. Leave is only granted where the matter comes within one of the specified “gateways” provided under this rule and where Hong Kong is the appropriate forum for dealing with the matter. However, Order 11 rule 1(1) only applies if Order 11, rule 1(2) is not applicable.

Order 11, rule 1(2) specifies that it is unnecessary to seek the court’s leave where any legislative provision empowers the CFI to assume jurisdiction in respect of a claim over someone who is outside Hong Kong or in respect of a wrongful act committed outside Hong Kong. It means that where a statute independently confers the court jurisdiction over the person to be served, the requirements under Order 11 rule 1(1) will not apply.

The CFA was therefore faced with the issue as to whether the claims pursued by the SFC against the Eastmore Defendants under sections 213 and 274 of the SFO were premised on legislative provisions which empower the CFI to assume jurisdiction over persons who are outside of the jurisdiction.

The court decided that sections 213 and 274 of the SFO clearly contemplate proceedings being brought against persons who are not within the jurisdiction of the court or where the wrongful act giving rise to the claim did not take place within the jurisdiction. This is because under these provisions, the CFI has the jurisdiction to decide and grant relief against a person who does anything or causes anything to be done constituting false trading in “*Hong Kong or elsewhere*”. On this basis, Order 11, rule 1(2) applied and leave was not required for service of the proceedings on the Eastmore Defendants.

It is notable that the CFA also clarified that if the written law concerned is simply of general application and may be invoked against persons who may be within or outside the jurisdiction, Order 11 rule 1(2) will not apply and the plaintiff will need to satisfy one of the specific “gateways” under Order 11 rule 1(1) before serving the proceedings on the foreign defendants.

Key Takeaway

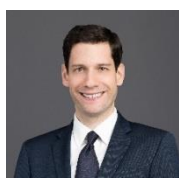
The CFA’s decision is a useful reminder of the wide territorial scope of certain market misconduct provisions under the SFO. In particular, the CFA acknowledged that “*the SFO’s intent is plainly to cater for the territorial dimensions of wrongful acts damaging to market participants*”. It is worth noting that the decision will apply to legal actions in relation to, not only false trading, but also to price rigging, disclosure of false or misleading information inducing transactions and stock market manipulation, which has extra-territorial dimensions.

In this regard, the SFC has in August this year concluded the consultation on its proposed amendments to the enforcement-related provisions of the SFO. One of its proposals which the SFC will proceed with is to broaden the territorial scope of the insider dealing provisions so that the SFC can take actions to tackle (a) insider dealing perpetrated outside Hong Kong which involves Hong Kong listed securities or their derivatives, as well as (b) insider dealing perpetrated in Hong Kong which involves overseas listed securities or their derivatives. It is expected that the amended provisions will also give the Hong Kong court jurisdiction over people who are outside Hong Kong and/or in respect of a wrongful act committed outside Hong Kong.

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