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Court of Appeal dismisses leave application of Citron Research's Andrew Left

13 Jan 2017

The Court of Appeal has dismissed Mr Andrew Left's application for leave to appeal against the determination of the Market Misconduct Tribunal (MMT) on questions of fact (Notes 1 & 2).

The Court of Appeal said that Left's application was made out of time, and that, even if the application were within time, it had no reasonable prospects of success and was wholly without merit.

On 26 August 2016, the MMT found Left culpable of disclosing false and/or misleading information inducing transactions under the Securities and Futures Ordinance (SFO) by publishing a research report on Evergrande Real Estate Group Limited in June 2012.

The Court of Appeal rejected Left's contention that there was no evidential basis for the MMT to find that Left was aware of the risk that the allegations in the research report were false or misleading as to material facts and that the risk was of such substance it was unreasonable to ignore it.

It also rejected the contention that the MMT erred in finding that Left must have been aware that his analysis and logic required expertise in accountancy regulation and standards.

Left was ordered to pay the SFC's costs.

End

Notes:

1. For further details of the MMT proceedings, please see the SFC's press releases dated [22 December 2014](#), [19 March 2015](#), [2 November 2015](#), [26 August 2016](#) and [20 October 2016](#).
2. Left has also filed an appeal to the Court of Appeal against the MMT finding on points of law under section 266(1)(a) of SFO. This will be dealt with by the Court separately.

Page last updated : 13 Jan 2017

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL

MISCELLANEOUS PROCEEDINGS NO 3195 OF 2016

(ON AN INTENDED APPEAL PURSUANT TO SECTION 266 OF THE SECURITIES AND
FUTURES ORDINANCE, CAP 571 FROM DETERMINATIONS OF THE MARKET
MISCONDUCT TRIBUNAL)

IN THE MATTER OF s 266 of the Securities and Futures Ordinance, Cap 571

and

IN THE MATTER OF proceedings conducted by and determinations of the Market
Misconduct Tribunal into whether any market misconduct had taken place in relation to the
dealings in the listed securities of Evergrande Real Estate Group Limited (stock code 3333)
and on other related questions

BETWEEN

ANDREW EDWARD LEFT

Applicant

and

SECURITIES AND FUTURES COMMISSION

1st Respondent

MARKET MISCONDUCT TRIBUNAL

2nd Respondent

Before: Hon Kwan and Poon JJA

Dates of Written Submissions: 16 November and 2 December 2016

Date of Judgment: 13 January 2017

J U D G M E N T

Hon Kwan JA (giving the judgment of the Court):

1. This is the application of Andrew Edward Left for leave to appeal to the Court of Appeal against the determination of the Market Misconduct Tribunal (“the MMT”) on questions of fact.
2. Having considered the papers, we decided to exercise our power under Order 59 rule 2A(5) to determine the application on the basis of written submissions only without a hearing. Unless defined in this judgment, we will adopt the same terminology as in the report of the MMT dated 26 August 2016 (“Part I of the Report”). The matters giving rise to the present application arose in this way.
3. By Part I of the Report, the MMT determined that Mr Left was culpable of market misconduct within the meaning of section 277 of the Securities and Futures Ordinance, Cap 571 (“the Ordinance”) in that^[1]:
 - (1) he published a document under the name of “the Citron Report” and thereby disseminated the information contained in it;
 - (2) certain of the information contained in the Citron Report, namely, that Evergrande Real Estate Group Limited (“Evergrande”) had been culpable of “fraudulent accounting” and that in reality it was “insolvent”, was likely to impact on Hong Kong market in one or more of the ways set out in section 277(1);
 - (3) such information was false and/or misleading as to material facts or through the omission of material facts;
 - (4) Mr Left was reckless as to whether such information was false and/or misleading as to material facts or through the omission of material facts;
 - (5) if not reckless, Mr Left was negligent as to whether such information was false and/or misleading as to material facts or through the omission of material facts.
4. On 19 October 2016, the MMT made these consequential orders under section 257:
 - (1) a ‘cold shoulder’ order prohibiting Mr Left from any dealings in the Hong Kong financial market for five years;
 - (2) a ‘cease and desist’ order that he shall not again perpetrate any conduct which constitutes the form of misconduct identified in the present proceedings under section 277(1);
 - (3) an order for disgorgement of profit in the sum of HK\$1,596,240 with interest; and
 - (4) an order for costs in favour of the Government and the Securities and Futures Commission (“the SFC”).
5. On 10 November 2016, the MMT handed down the reasons for the consequential orders in Part II of the Report.

6. On 16 November 2016, Mr Left issued a summons for an order for leave to include certain questions of fact in his appeal to the Court of Appeal against the determinations of the MMT in Parts I and II of the Report with a Notice of Appeal annexed.

7. Under section 266(1)(a) of the Ordinance, Mr Left can appeal on points of law as of right. He has done so by serving the Notice of Appeal. Save for three of the grounds of appeal he has identified (§§6(3), 6(4) and 10), the rest are said to concern points of law.

8. Under section 266(1)(b), he can appeal on a question of fact but only with the leave of the Court of Appeal. Hence, he brought the present application for leave to appeal in respect of the grounds in §§6(3), 6(4) and 10.

If the application was made out of time

9. In its statement of opposition dated 2 December 2016, the SFC made the point that the application should be dismissed as it was made out of time.

10. Mr Left's solicitors responded to this on 12 December by referring the court to the decision of the Court of Appeal in *Leung Chi Keung v Market Misconduct Tribunal & Anr*, HCMP 2539/2009, 16 November 2010, in which Cheung JA stated in §4: "Under Order 59, rule 4 and Order 60A, rule 3 of the Rules of the High Court the applicant has 28 days to appeal against the order." Mr Left would appear to contend that the time limit for issuing the present application should be 28 days and hence his application would be within time. There is no application before this court for an extension of time to apply for leave to appeal on questions of fact if we should find his contention to be wrong.

11. The SFC responded by letter dated 14 December, making the point that in §4 of *Leung Chi Keung*, the court was not dealing with the time limit for an application for leave to appeal on a question of fact. The court was setting out the time limit for an appeal from an order of the MMT on a question of law which was brought as of right. Hence, reference was made to Order 59 rule 4 and Order 60A rule 3. The court in §4 was addressing the issue that the delay of 81 days was substantial, in light of the appeal period of 28 days. There was no need to differentiate between an appeal as of right and an application for leave to appeal.

12. We agree with the SFC. The correct position is as stated in the statement of opposition. An application for leave to appeal is made under Order 59 rules 1(1) and 2B(4). The application, made directly to the Court of Appeal, must be made within 14 days of the orders of the MMT under section 257, not from the date of Part II of the Report. Order 60A rule 3, which provides for the time for appealing, stipulates that a notice of appeal must be served within 28 days of the date on which the judgment or order of the tribunal was given. It applies to the situation where the appeal is brought as of right, not where leave to appeal must first be sought. As stated in the *Hong Kong Civil Procedure 2017*, vol 1, at §59/0/48: "The current scheme of things therefore calls for different procedural steps to be taken before the appeal proper can be heard."

13. The deadline for the present application is 14 days from 19 October 2016, i.e. 2 November 2016. The summons issued on 16 November was out of time.

14. For this reason alone, the summons for leave to appeal must be dismissed.

15. We will nevertheless deal with the merits. For the reasons given below, we do not think the grounds in §§6(3), 6(4) or 10 would have reasonable prospects of success and leave to appeal should be refused even if the application were within time.

The grounds in §§6(3) and (4)

16. The MMT found Mr Left reckless in that it was satisfied each of these three matters was to be answered in the affirmative. First, when he came to publish the Citron Report he was aware of the risk that the information in it was false or misleading as to material facts. Second, he was aware that in the circumstances the risk was of such substance that it was unreasonable to ignore it. Third, nevertheless he went ahead and published the Citron Report.

17. The grounds in §§6(3) and (4) must be read with §6(2). In §6(2), it was contended that there was no evidential basis to find that Mr Left was aware of any unreasonableness of taking the risk that the information in the Citron Report was false or misleading as to material facts. The two paragraphs that followed set out the findings of fact that the MMT should have made. §6(3) contended that the undisputed evidence (the Citron Report itself, the fact that Mr Left did not consult an accounting expert, and that he short sold Evergrande shares) showed and the clear inference should be that he believed he had a sufficient working knowledge of accounting for him to conduct his commentary. §6(4) contended that the undisputed evidence showed and the clear inference should be that Mr Left believed his commentary to be materially correct.

18. On behalf of Mr Left, it was submitted that as a non-accounting expert, Mr Left would not see the complexity and technicality of the accounting issues and had relied on his non-expert working knowledge of accounting, as part and parcel of what investors would do in reading and trying to understand accounts. In doing the analysis of the accounts, he would not see that his working knowledge of accounting would fail him and that expert clarification was needed. After hearing expert evidence on how complex and technical the accounting issues were, the MMT came to agree with the expert. In finding Mr Left reckless and negligent as he did not obtain expert advice or clarification from Evergrande on the accounting issues, it was submitted that the MMT had adopted a circular reasoning in that a non-expert would not know that the accounting issues required expert advice or clarification.

19. Similar arguments had been advanced by his counsel before the MMT[2].

20. The MMT had recognised that the “trust financing” investment products in the Mainland may have been some cause for confusion to those who are not experts in the field[3]. In arriving at its conclusion, the MMT had considered the following matters:

(1) the provenance of the draft for the Citron Report was unknown and its authorship was anonymous[4];

(2) the allegations were extensive and sensationalist in nature, they spoke of a company that had abused the market and resorted to fraudulent accounting to disguise its insolvency and they could have material financial consequences[5];

(3) the allegations were based on a supposed understanding of the relevant accountancy regulations and standards, these being of some complexity and in important respects particular to Hong Kong, and yet there was no evidence that the anonymous author of the draft had any expertise in these areas[6];

(4) Mr Left was not an expert in such matters[7];

(5) it was Mr Left's case that he did go through a careful verification exercise; he would not have done that unless he was aware of the real risk in the circumstances that the allegations made in the draft were false and/or misleading as to material facts[8];

(6) Mr Left had many years of experience in publishing corporate commentaries, seemingly specializing in hunting down corporate fraud; while Mr Left and his research team might not have held themselves out in specific terms to be experts in Hong Kong accountancy matters, they did hold themselves out to be experts in the area of identifying corporate fraud and the Citron Report was promoted as the work of a professional body; Mr Left must therefore have appreciated that an anonymous draft of this kind required careful scrutiny[9];

(7) when Mr Left short sold the shares, he must have appreciated the real need to ensure that the draft could be relied and acted upon, in order to avoid any accusation he had attempted to exploit the allegations to advance his own interests [10];

(8) it does not appear that Mr Left, in the conduct of his verification exercise, took any steps to secure expert advice as to the relevant regulations and standards, nor did he approach Evergrande for clarification of relevant matters[11].

21. The reasoning of the MMT cannot be faulted. We reject the contention there is no evidential basis for the MMT to find that Mr Left was aware of the risk that the allegations in the Citron Report were false or misleading as to material facts and that the risk was of such substance it was unreasonable to ignore it. In our view, the inferences drawn on the proved facts are sufficiently compelling. There is no valid basis to interfere with the findings of fact of the MMT.

The ground in §10

22. The claim here was that the MMT erred in finding that Mr Left must have been aware that his analysis and logic (which he adopted from an anonymous author) required expertise in accountancy regulation and standards of some complexity and in important respects particular to Hong Kong, and that it was unreasonable for Mr Left not to seek accounting advice or approach Evergrande for clarification on accounting issues. §10(1) repeated the contention that it is not unreasonable for an investor like Mr Left to rely on his working knowledge of accounting.

§10(2) repeated the contention that it is not unreasonable for an investor like Mr Left to miss the complexities and technicalities in the accounting issues such that he would be unaware of any special need for expert advice or further clarification.

23. We reject the contentions for the reasons given earlier. There is no proper basis to interfere with the inferences drawn by the MMT.

Conclusion

24. We dismiss the summons of Mr Left. As the application is wholly without merit, we further order that pursuant to Order 59 rule 2A(8) no party may under rule 2A(7) request the determination to be reconsidered at an oral hearing inter partes.

25. Costs of this application should follow the event. We make an order *nisi* that Mr Left is to pay the costs of the SFC in this application. Any party who seeks to vary the costs order *nisi* shall lodge a written submission within seven days hereof, failing which the order shall become absolute.

26. We will make a gross sum assessment on paper. We direct the SFC to lodge a statement of costs for summary assessment within seven days of the handing down of this judgment, with leave to Mr Left to respond within seven days thereafter.

(Susan Kwan)
Justice of Appeal

(Jeremy Poon)
Justice of Appeal

Written submissions by Mr Laurence Li, instructed by Timothy Loh LLP, for the Applicant

Written submissions by Mr Peter Duncan SC and Mr Yuan Shan Cao, for the 1st Respondent

[1] Part I of the Report, §255

[2] Part I of the Report, §§210, 212, 213, 214, 215

[3] Part I of the Report, §212

[4] Part I of the Report, §247

[5] Part I of the Report, §§249, 214

[6] Part I of the Report, §§249, 252

[7] Part I of the Report, §252

[8] Part I of the Report, §247

[9] Part I of the Report, §§247, 214, 215

[10] Part I of the Report, §250

[11] Part I of the Report, §252

IN THE HIGH COURT OF THE
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questions

BETWEEN

ANDREW EDWARD LEFT

Applicant

and

SECURITIES AND FUTURES COMMISSION
MARKET MISCONDUCT TRIBUNAL

1st Respondent

2nd Respondent

Before: Hon Kwan JA and Poon JA

Date of Decision on Costs: 10 February 2017

DECISION ON COSTS

Hon Kwan JA (giving the decision on costs of the Court):

1. On 13 January 2017, we handed down judgment dismissing the application of Mr Left for leave to appeal to the Court of Appeal and made a costs order *nisi* that he should pay the costs of the SFC in this application. We gave directions for a gross sum assessment on paper.

2. The SFC has since submitted a statement of costs for summary assessment in the total sum of \$138,800. Mr Left's solicitors responded by letter dated 27 January 2017 that he has no objection to the statement of costs.
3. We have considered the statement of costs. We find the amount of costs claimed reasonable. Accordingly, we assess costs payable to the SFC in the amount as stated.

(Susan Kwan)
Justice of Appeal

(Jeremy Poon)
Justice of Appeal

Timothy Loh LLP, for the Applicant

Legal Services Division of the Securities and Futures Commission, for the 1st Respondent