Court of Appeal dismissed SFC's leave application to the Court of Final Appeal against MMT decision on Asia Telemedia Limited case

24 Aug 2017

The Court of Appeal has dismissed the Securities and Futures Commission's (SFC) application for leave to appeal to the Court of Final Appeal against the Market Misconduct Tribunal's (MMT) findings that two former executives of Asia Telemedia Limited (now known as Yunfeng Financial Group Limited), Mr Yiu Hoi Ying and Ms Marian Wong Nam, had not engaged in insider dealing (Notes 1 to 3).

The SFC is reviewing the decision.

End

Notes:

1. The MMT was chaired by The Honourable Mr Justice Michael Hartmann with two lay members, Mr Stephen Chan Sai Hung and Dr Ricky Chu Keung Wah. The MMT's decision is available on its website (www.mmt.gov.hk).
2. A copy of the Court of Appeal judgment (Case No:CACV 154/2016) is available on the Judiciary's website (www.judiciary.gov.hk).
3. Please see the SFC's press release dated 28 April 2017.

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IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO 154 OF 2016

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

IN THE MATTER OF section 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 Asia Telemedia Limited (now known as Reorient Group Limited) (stock code 376) and on other related questions

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BETWEEN

SECURITIES AND FUTURES COMMISSION	Appellant
and	
YIU HOI YING CHARLES	1st Respondent
WONG NAM MARIAN	2nd Respondent
MARKET MISCONDUCT TRIBUNAL	3rd Respondent

Before: Hon Lam VP, Cheung JA and Kwan JA

Dates of Written Submissions: 6, 20 and 27 June 2017

Date of Judgment: 23 August 2017

J U D G M E N T

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

1. This is the application of the SFC for leave to appeal to the Court of Final Appeal against our judgment of 26 April 2017. We will adopt the same nomenclature as in our judgment.

2. Six questions were formulated in the Notice of Motion dated 23 May 2017 as questions of great general or public importance. They read as follows:

> "1.1 Whether, in the context of the statutory defence to insider dealing provided for in section 271(3) of the SFO, the meaning of "using" relevant information for the purpose of securing or increasing a profit or avoiding or reducing a loss as used is broad enough to encompass the "withholding" or "non-disclosure" of relevant information and the taking advantage of such withholding or non-disclosure for the purpose of securing or increasing a profit or avoiding or reducing a loss?
>
> 1.2 Whether the effect of the interpretation contended by the Appellant (as identified in paragraph 40 of the Judgment, referred to as the "Appellant's Interpretation") would be to equate the "use" of such information with the mere "possession" of it so as to render the statutory defence in section 271(3) wholly or largely inoperative, otiose or illusory?
>
> 1.3 Whether the statutory defence provided in section 271(3) is intended by the legislature to be exceptional or of limited application?
>
> 1.4 Whether the adoption of the Appellant's Interpretation means that the provisions of the SFO concerning insider dealing are being employed to "further the same objective" as that which governs disclosure of price sensitive/relevant information prescribed in Rule 13.09 and the related provisions of the Listing Rules (as now codified into Part XIVA of the SFO)?
>
> 1.5 Does the rule in *Browne v Dunn* (1893) 6 R 47 apply to Market Misconduct Tribunal ("MMT") proceedings?
>
> 1.6 To what extent is it required for the Securities and Futures Commission to put its case in a MMT inquiry to the specified persons?"

3. Put simply, the nub of this case concerns the defence in section 271(3) of the SFO. Essentially, this section provides that a person shall not be regarded as having engaged in market misconduct if he establishes that "the purpose for which he dealt in … the listed securities or derivatives … was not, or, where there was more than one purpose, the purposes … did not include, the purpose of securing or increasing a profit or avoiding or reducing a loss, … *by using* relevant information." (Emphasis supplied)

4. As Mr Laurence Li submitted on behalf of Marian, the purpose of securing or increasing a profit or avoiding or reducing a loss is normal in any dealing in securities. What is impugned by the legislation on insider dealing is any attempt to achieve this purpose "by using" inside information.

5. The Tribunal made a finding of fact that Charles and Marian believed the inside information "will not pass into the public domain; put another way, that whatever threatens the share price will be resolved behind closed doors." This finding relating to the subjective belief of Charles and Marian was affirmed in our judgment[1]. To their minds, the inside information was irrelevant. The Tribunal was further satisfied on the evidence that when they dealt in the shares, they had no desire to make a profit or avoid a loss "by using" the inside information, and the statutory defence was made out.

6. The SFC sought to argue on appeal that the words "by using" in section 271(3) should be construed to mean that the statutory defence would not be available to an insider who has withheld or failed to disclose inside information. We have rejected the arguments advanced by Mr Horace Wong, SC and Mr Norman Nip for the SFC for the reasons given in our judgment at §§46 to 59.

7. The arguments advanced by Mr Wong in support of this application are in essence the arguments he ran before us and were rejected. We wish to remind practitioners that in Practice Direction 2.1 §3(e), parties are directed that the skeleton submissions for the purpose of the leave application should not seek to re-argue the grounds and points already canvassed in the appeal but should focus on helping the court to determine whether grounds have been made out for the appeal to be heard by the Court of Final Appeal.

8. Of the six questions formulated in the Notice of Motion, the only question that requires some discussion is the first question. We agree with Mr Li leave should not be granted for this question for the reasons he submitted.

9. First, the legal argument advanced by the SFC on appeal to counter the statutory defence was not raised in the Tribunal. It did not have the factual basis required for its support[2]. Even if this question is certified, it would be academic and the CFA does not hear academic appeals.

10. Second, Mr Wong submitted that withholding information for this purpose means "conscious withdrawal" of the information knowing that there is a duty to disclose and a person *uses* the withheld information when he takes advantage of the non-disclosure to achieve a purpose. This seems to be another shifting of position of the SFC, see §§36 and 40 of our judgment. The point previously made was failure to disclose what the insider

knew to be inside information. The submission now made is that there is a conscious purpose of taking advantage of the non-disclosure. As with the argument previously advanced, there is no factual basis to decide whether Charles or Marian "consciously" withheld or withdrew inside information to take advantage of the non-disclosure in order to make a profit. This was not an issue canvassed at the trial.

11. Third, this is not a question of great general or public importance. The present case involves very peculiar facts. It was hardly a common occurrence of senior executives taking advantage of inside information to profit from trading in shares as contended by Mr Wong. As Mr Li has put it so well, this is a case which involves:

> (1) an insolvent listing shell receiving repeated statutory demands for the same debt but the demands being always resolved behind closed door;
>
> (2) Charles and Marian having stock options but which were worthless because the share price was always dismal; and
>
> (3) due to external factors, the share price suddenly skyrocketed hence all the employees of ATML naturally wanting to and did exercise their share options and selling their shares.

12. The Tribunal regarded this as a rare case and noted there is no risk of the floodgates being opened for people who may wish to rely on the defence in section 271(3)[3].

13. We turn to the second, third and fourth questions. We agree with Mr Li they are not proper questions. They concern arguments in support of the SFC's reading of section 271(3). If leave is refused on the first question, there is no need to be concerned with these other questions.

14. The fifth and sixth questions can also be dealt with shortly. They concern the application of well-established principles (the rule in *Browne v Dunn*) to the particular circumstances of this case. They do not give rise to questions of great general or public importance. We decline to give leave on them.

15. The SFC also relies on the "or otherwise" limb. In essence, the same matters advanced in support of the questions of great general or public importance are relied on to support the "or otherwise" limb. There is no satisfactory explanation why if the matters advanced in support of the former limb fail, they may nevertheless support the "or otherwise" limb (*Dr Leung Shu Piu v Medical Council* (2014) 17 HKCFAR 356, §14).

16. For the above reasons, we dismiss the application for leave to appeal. We order the SFC to pay the costs of Charles and Marian in this application. We have considered the

statements of costs submitted by their solicitors for summary assessment. We assess the reasonable costs of Charles at $146,450 and those of Marian at $147,150.

(M H Lam)	(Peter Cheung)	(Susan Kwan)
Vice President	Justice of Appeal	Justice of Appeal

Written submissions by Mr Horace Wong SC and Mr Norman Nip, for the Appellant

Written submissions by Mr Samuel Wong, instructed by Sit, Fung, Kwong & Shum, for the 1st Respondent

Written submissions by Mr Laurence Li, instructed by Raymond Chan Solicitors, for the 2nd Respondent

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[1] Report, §274; Judgment, §§33, 61, 66 to 68

[2] Judgment, §§57 to 59

[3] Report, §279

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Dates of Written Submissions: 6, 20 and 27 June 2017

Date of Judgment: 24 August 2017

Date of Corrigendum: 24 August 2017

CORRIGENDUM

Please note the following corrigendum in the Judgment: -

On line C of page 2, “Date of Judgment: 23 August 2017” should read as “Date of Judgment: 24 August 2017”.

Dated this 24th day of August 2017

(Sam Lam)
Clerk to Hon Kwan JA