

Hong Kong Court of Final Appeal Confirms That No Leave Is Required for Securities and Futures Commission to Serve a Writ Out of Jurisdiction

Client Alert | November 14, 2023

A summary and commentary on the recent decision of the Hong Kong Court of Final Appeal regarding service of originating process by the Securities and Futures Commission On 30 October 2023, the Hong Kong Court of Final Appeal (the “CFA”) handed down its reasons for dismissing the appeal in Securities and Futures Commission v Isidor Subotic and Others [2023] HKCFA 32^[1]. The CFA confirmed that leave is not required for the Securities and Futures Commission (the “SFC”) to serve proceedings out of jurisdiction as the relevant provisions in the Securities and Futures Ordinance (the “SFO”) has empowered the Court of First Instance (the “CFI”) to hear and determine a claim made against persons who are not within the jurisdiction.

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1. Background

In July 2019, the SFC commenced the present proceedings against various individuals and companies under sections 213 and 274 of the SFO. It was alleged that these parties were operating a false trading scheme involving artificially inflating the price of the share of a Hong Kong listed company before “dumping” them and causing loss to market participants and lenders. The SFC sought, amongst other relief, a restoration order in favour of the market participants involved and an injunction to freeze certain assets. As six of the defendants in this case were located outside of Hong Kong (the “**Foreign Defendants**”), the SFC applied for and was granted leave to serve a concurrent writ on them outside of Hong Kong. The Foreign Defendants applied to set aside the order granting leave and sought a declaration that the CFI lacks jurisdiction over them, arguing that leave was wrongly granted as the SFC’s claims did not come within any of the “gateways” specified in Order 11, rule 1(1) of the Rules of the High Court (the “RHC”) (i.e., the types of claims for which leave to effect service outside of Hong Kong could be obtained). The CFI^[2] and the Court of Appeal^[3] both upheld the decision granting leave to effect service out of the jurisdiction on the basis that claims of the SFC were either a claim founded on tort and damage was sustained or resulted from an act committed within the jurisdiction (“**Gateway F**”) or a claim for an injunction restraining a conduct within the jurisdiction. The Foreign Defendants then appealed to the CFA on grounds that the relief sought by the SFC under Section 213 of the SFO cannot be properly characterized as a claim and even if it is a claim, it is not founded on tort for the purpose of invoking Gateway F. Before the CFA hearing, the CFA directed the parties to make submissions on whether leave was in fact necessary in the circumstances because under Order 11, rule 1(2) of the RHC, if a legislative provision already confers the CFI with jurisdiction in respect of a claim over a defendant outside of Hong Kong or in respect of a wrongful act committed outside Hong Kong, leave from the court is not required for effecting service of a writ out of the jurisdiction.

2. CFA’s Decision

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The CFA unanimously dismissed the appeal and held that, according to Order 11, rule 1(2) of RHC, it was not necessary for the SFC to seek leave from the CFI to serve its claim on the Foreign Defendants. In coming to such conclusion, the CFA looked into three questions in particular, namely (1) what are the claims that the SFC is making; (2) whether the CFI is empowered to hear and determine the claims made by the SFC by virtue of any written law; and (3) whether the CFI is so empowered notwithstanding that the person against whom the claim is made is not within the jurisdiction of the court or that the wrongful act giving rise to the claim did not take place within the jurisdiction. On the first question, it was observed that the writ which the SFC served upon the Foreign Defendants seeks declarations that they are persons within section 213 of the SFO who have engaged in false trading activities in contravention of sections 274 and/or 295 of the SFO. On the second question, having identified the claims of the SFC, the CFA then considered the effect of sections 213 and 274 of the SFO. The CFA held that these provisions are intended to operate in combination and must be read together. Whilst section 274 of the SFO defines the prohibited acts of false trading, section 213 of the SFO provides for the orders that the CFI may impose against the contraveners. It is clear that by virtue of the written law, CFI is empowered to hear and determine the claims put forwarded by the SFC under sections 213 and 274 of the SFO. On the last question, the CFA found in the affirmative because upon contravention of section 274 of the SFO, the CFI is empowered under section 213 of the SFO to grant relief against a person "in Hong Kong or *elsewhere*" where such person does anything that constitutes false trading affecting the Hong Kong market. It was noted that the policy to confer the CFI with extraterritorial jurisdiction over persons outside of Hong Kong is justified considering that trading on the Hong Kong Stock Exchange is global and therefore it would be necessary to make sanctions legally available against overseas fraudulent parties who cause disruption to the local market and losses to other investors. Notwithstanding the above, the CFA also made clear that the application of Order 11 rule 1(2) of the RHC is limited to cases where the written law in question clearly contemplates proceedings being brought against persons outside of jurisdiction or where the wrongful act did not take place within the jurisdiction. It is not sufficient if the written law is of general application and may be invoked against persons within or outside the jurisdiction.

3. *Comment*

This decision confirms that no leave is required for the SFC to serve a writ seeking reliefs such as restoration orders, damages and compensation orders or restraint orders under section 213 of the SFO on foreign defendants out of jurisdiction. Such decision is consistent with the intent of the SFO to seek redress in relation to wrongful acts damaging to market participants whether such acts took place within or outside Hong Kong and to provide appropriate legal recourse against the wrongdoers. In light of the decision, it is expected that the SFC may take more aggressive enforcement actions against parties who have engaged in cross-border market misconduct and pursue them regardless of their physical location.

[1] https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=155879

[2] https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=137397&currpage=T

[3] https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=149666

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