

## Ground-breaking Court of Appeal decision

29 May 2009

The Court of Appeal has allowed the Securities and Futures Commission's (SFC) appeal against an order of the court discharging injunctions obtained to prevent dissipation of assets in an on-going insider dealing investigation (Note 1).

This decision is the first time the Court of Appeal has considered the SFC's civil remedies under section 213 of the Securities and Futures Ordinance (SFO) (Note 2). This ground-breaking decision paves the way for the SFC to widen its attack against market misconduct, especially against any off-shore party who may manipulate or trade illegally in Hong Kong's markets.

The interim injunctions granted on 16 April 2008 froze disposal of assets of up to \$43 million based on evidence and suspicion that "C", a person whose identity is the subject of a suppression order, was involved in insider trading in shares of a company listed in Hong Kong. The court later discharged the interim injunctions (Note 3). The SFC appealed to the Court of Appeal against the court's decision to discharge the interim injunctions.

The Court of Appeal delivered its judgment, on 22 May 2009, overturning the decision to discharge the interim injunctions and allowing the SFC's appeal. The SFC was given permission to serve the proceedings afresh out of the jurisdiction and the injunctions previously granted against three of the defendants were re-imposed (Note 4). A fourth defendant has previously given an undertaking not to dispose of assets.

The unanimous decision of the Court of Appeal (Note 5) is significant in that it confirms:

- the SFC has statutory authority under section 213 of the SFO to apply to the court for orders to freeze assets in cases of suspected insider dealing;
- proceedings under section 213 are entirely free-standing and not contingent or conditional on there being other substantive proceedings on foot, including proceedings in the Market Misconduct Tribunal;
- the court may grant permission to serve legal proceedings on persons outside of Hong Kong, where claims are made under section 213, so as to bring them within the jurisdiction of the Hong Kong courts; and
- the court may grant orders to restore all the parties to transactions to their respective former positions where those transactions contravene the SFO. In other words, orders under section 213 may be "... restitutionary in nature and ... would provide compensation to those who have sustained losses through the wrongdoing in question, in the present case, insider dealing" (Note 6).

This is the first time the Court of Appeal has been required to consider the nature and extent of the remedies available under section 213 of the SFO.

"This is an important decision which will assist the SFC in tackling market misconduct including those cases where persons or assets are outside Hong Kong. This extends the SFC's enforcement reach to offshore parties who take illegal profits from Hong Kong's markets. It also paves the way for the SFC to bring substantive civil proceedings before the court to overturn the adverse consequences of market misconduct transactions," the SFC's Executive Director of Enforcement, Mr Mark Steward, said.

The SFC will not disclose any further details about the investigation which is continuing.

End

Notes:

1. Please see SFC press releases dated [2 May 2008](#) and [5 November 2008](#) for details.
2. Section 213 of the SFO empowers the court to make injunctions and other civil orders on the application of the SFC.
3. The SFC had been granted leave on 16 April 2008 to serve the interim injunctions on defendants who were outside of Hong Kong. On 22 October 2008, the High Court discharged the interim injunctions against "C" and two British Virgin Islands companies controlled by "C", following a jurisdictional challenge by these defendants. "C" resides or appears to reside mainly in Beijing and assets held by the defendants

are in other overseas jurisdictions.

4. SFC v C, D, E and F, Civil Appeal No 319 of 2008 (on Appeal from HCMP No 727 of 2008). The Court of Appeal was constituted by The Hon Justice Le Pichon JA and The Hon A Cheung J.
5. The judgment can be found on the Judiciary website at [www.judiciary.gov.hk](http://www.judiciary.gov.hk) (Ref: CACV 319/2008, Securities and Futures Commission v "C" and others).
6. See Para 36 of the judgment by The Hon Justice Le Pichon JA.

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