Court of Appeal upholds SFC's case of insider dealing and fraud against solicitors

9 Nov 2017

The Court of Appeal today upheld the decision of the Court of First Instance (CFI) which had ruled in favour of an insider dealing and fraud case brought by the Securities and Futures Commission (SFC) against two solicitors – Ms Betty Young Bik Fung and Mr Eric Lee Kwok Wa – and Lee's two sisters.

On 15 January 2016, the CFI found Young, Lee and his sister Ms Patsy Lee Siu Ying contravened the Securities and Futures Ordinance (SFO) by insider dealing in the shares of Asia Satellite Telecommunications Holdings Ltd and section 300 of the SFO (section 300) by engaging in fraud or deception in transactions involving the shares of Taiwan-listed Hsinchu International Bank Company Ltd (Hsinchu Bank) (Note 1).

The CFI also made restoration orders against Lee's other sister, Ms Stella Lee Siu Fan, under section 213 of the SFO in respect of the same transactions.

In February 2016, all four defendants appealed against the CFI's decision, but Young withdrew her appeal shortly before the September 2017 hearing in the Court of Appeal.

The trio argued in their appeal that:

- The CFI failed to properly consider the evidence they adduced at the trial;
- Section 300 was not applicable to their conduct in relation to the Hsinchu Bank shares because (i) the Hong Kong courts have no jurisdiction over trading activities carried out on the Taiwanese Stock Exchange; (ii) the supposed victims of their alleged fraudulent activities were not counterparties to their trades conducted on the Taiwanese Stock Exchange; and (iii) the alleged fraudulent or deceptive activities and the trading activities were not sufficiently related to form the elements of section 300.

The Court of Appeal disagreed and held that:

- The CFI did properly consider the defendants' evidence and draw proper inferences;
- Hong Kong courts had jurisdiction to hear this case because a substantial measure of activities constituting the contravention took place in Hong Kong;
- The application of section 300 would not be limited to a case in which the counterparties in the securities transaction were the victims of the fraud; and
- Although the fraud was not directed at the counterparties to the subsequent trading activities on the Taiwanese Stock Exchange, the fraud or deception and the subsequent trading activities were sufficiently related (i.e. there was a real and substantial nexus) to form the elements of section 300.

The SFC's Executive Director of Enforcement, Mr Thomas Atkinson, said: "We welcome the Court of Appeal's judgment clarifying the interpretation of section 300. The SFC will vigorously pursue enforcement actions to combat violation of the SFO when a substantial measure of activities designed to breach the SFO occur in our jurisdiction even if it involves securities traded on exchanges outside Hong Kong".

Lawyers for Stella Lee argued that she should not be ordered to restore her counterparties since she was found not to have participated in the insider dealing. But the Court of Appeal upheld the restoration order against her because (i) there is no assertion that the making of the order will prejudice her beyond removing the profits made; and (ii) her investment decisions were prompted or influenced by the disclosure to her of information that was based on the inside information even though she was unaware of that.

End

Note:

1. Please see the SFC's press release dated 15 January 2016.

Page last updated : 9 Nov 2017

上訴法庭維持證監會就內幕交易及詐騙案對兩名事務律師提出訴訟的裁決

2017年11月9日

上訴法庭今天維持了原訟法庭早前對證券及期貨事務監察委員會（證監會）就一宗內幕交易及詐騙案對兩名事務律師楊碧鳳（女）及李國華（男）以及其兩名姊姊提出的訴訟並獲勝訴的裁決。

原訟法庭於2016年1月15日裁定楊、李及其姊李少英（女）因進行亞洲衛星控股有限公司股份的內幕交易而違反《證券及期貨條例》，並因在進行涉及在台灣上市的新竹國際商業銀行股份有限公司（新竹銀行）股份的交易時，使用欺詐或欺騙手段而違反《證券及期貨條例》第300條（註1）。

原訟法庭同時根據《證券及期貨條例》第213條，就上述兩宗交易向李的另一名姊姊李少芬（女）頒發回復原狀令。

四名被告於2016年2月就原訟法庭的裁決提出上訴，但楊在上訴法庭於2017年9月展開聆訊前不久，撤銷了其上訴申請。

三名被告在上訴中質疑：

- 原訟法庭未有妥善考慮他們在審訊期間援引的證據；
- 第300條並不適用於他們就新竹銀行股份作出的行為，理由是 (i) 香港法院對他們在臺灣證券交易所進行的交易活動並無司法管轄權；(ii) 他們涉嫌進行的欺詐活動的受害者並非是與他們在臺灣證券交易所進行交易的對手；及(iii) 涉嫌進行的欺詐或欺騙活動與有關交易活動之間並無充分關連以構成第300條的元素。

上訴法庭不同意上述論點並裁定：

- 原訟法庭已妥善考慮各被告的證據並作出恰當推論；
- 香港法院有司法管轄權對本案進行聆訊，理由是構成相關違法行為的活動有一大部分是在香港發生的；
- 第300條並非只限於在證券交易對手為欺詐受害人的案件中才適用；及
- 儘管欺詐的對象並非事後在臺灣證券交易所進行交易活動的交易對手，惟有關欺詐或欺騙活動與事後的交易活動之間有充分關連（即存在真正及實質的連結），這足以構成第300條的元素。

證監會法規執行部執行董事魏建新先生（Mr Thomas Atkinson）表示：“我們歡迎上訴法庭的判決，當中釐清了對於第300條的詮釋。當意圖違反《證券及期貨條例》的活動有一大部分是在本地發生時，即使當中涉及的證券是在香港境外的交易所買賣，證監會仍會嚴厲採取執法行動，打擊違反《證券及期貨條例》的行為。”

李少芬的代表律師質疑，法庭已裁定李少芬沒有參與該內幕交易，因此她不應被命令須將其交易對手回復到交易發生前的狀況。然而，上訴法庭維持對李少芬作出的回復原狀令，理由是 (i) 無法斷言作出該命令除了令她失去所獲取的利潤外，將會對她不利；及 (ii) 她是在受到有關人士向她透露源於內幕消息（雖然她對此並不知情）的資訊所促使或影響下而作出該投資決定。

完

備註：

1. 請參閱證監會2016年1月15日的新聞稿。

最後更新日期：2017年11月9日

CACV 33/2016

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO 33 OF 2016

(ON APPEAL FROM HCMP NO 2575 OF 2010)

BETWEEN

THE SECURITIES AND FUTURES COMMISSION	Plaintiff
and	
YOUNG BIK FUNG	1st Defendant
LEE KWOK WA	2nd Defendant
LEE SIU YING PATSY	3rd Defendant
LEE SIU FAN STELLA	4th Defendant

Before: Hon Lam VP, Kwan and McWalters JJA in Court

Dates of Hearing: 5 and 6 September 2017

Dates of Further Written Submissions: 27 September and 4 October 2017

Date of Judgment: 9 November 2017

JUDGMENT

The Court:

1. In 2010, the Securities and Futures Commission [“SFC”] brought proceedings against four defendants in respect of their dealings in the shares of a Taiwanese bank, Hsinchu

International Bank Co Ltd ["Hsinchu Bank"] in 2006 and in the shares of Asia Satellite Telecommunications Holdings Ltd ["AsiaSat"] in 2007. The 1st defendant ["Betty"] and 2nd defendant ["Eric"] are solicitors. The 3rd and 4th defendants are Eric's sisters. Betty and Eric had been cohabitees up to January 2006 and remained as friends after their cohabitation ended. They worked in different solicitor firms.

2. As regards dealings in Hsinchu Bank shares, the case of the SFC was that Betty had acquired confidential material price sensitive information ["CMPSI"] when she was seconded to the Standard Chartered Bank ["SCB"] by her employer in respect of SCB's takeover of Hsinchu Bank. Based on such information, Betty and Eric through Patsy (the 3rd defendant) acquired shares in Hsinchu Bank in September 2016. Later, when SCB made a tender offer for Hsinchu Bank shares, they accepted the offer. In so doing, they made a profit of $1 million (for Betty) and $1.3 million (for Eric). Patsy also invested in Hsinchu Bank shares on her own account and made a profit of $175,000. Further, Patsy also invested for Stella (the 4th defendant) and the latter made a profit of $210,000.

3. As regards dealings in AsiaSat, the case of the SFC was that Eric acquired CMPSI when another team of lawyers in his employer advised on a proposed privatization of AsiaSat. Eric passed on such information to Betty and Patsy who then purchased shares in AsiaSat and afterwards sold the same upon privatization. Betty made a profit of $203,747 whilst Patsy and Stella made a profit of $55,050.

4. Proceedings were brought under s213 of the Securities and Futures Ordinance Cap 571 against the defendants. The trial took place before A Chan J in October and November 2015. On 15 January 2016, the learned judge handed down his judgment finding that the SFC had established its case against Betty, Eric and Patsy. He found that in the dealings of the Hsinchu Bank shares, (1) Betty had employed a scheme with intent to defraud or deceive or engaged in an act or practice which was fraudulent or deceptive or would operate as a fraud or deception; (2) Eric and Patsy had employed or engaged in the same; (3) further or alternatively, Eric and Patsy had aided and abetted in Betty's conducts in (1)[1].

5. In the dealings of the AsiaSat shares, the judge found (1) Eric's colleagues working on the proposed privatisation were persons connected to AsiaSat; (2) Eric received information of the proposed privatisation, directly or indirectly, from a colleague whom he knew was connected to AsiaSat and whom he knew or had reasonable cause to believe held the information as a result of being so connected; (3) Eric disclosed the information to Betty and Patsy, knowing or having reasonable cause to believe they would deal in the

shares; (4) Betty received the information knowing that its source was connected to AsiaSat and whom she knew or had reasonable cause to believe held the information as a result of being so connected. Therefore, her dealings in AsiaSat shares were in contravention of s291(5)(a) of the Securities and Futures Ordinance; (5) likewise, Patsy had the same knowledge and her dealings in AsiaSat shares were also in contravention of s291(5)(a)[2].

6. The judge granted declarations and relief against Betty, Eric and Patsy accordingly.

7. In respect of Stella, the judge was not satisfied that she had knowingly participated in any insider dealing[3]. However, the judge held that she was involved in the dealings and there was no suggestion that a restoration order would unfairly prejudice her. The judge made a restoration order under s213(2)(b) of the SFO accordingly[4].

8. Initially all the defendants appealed against the judgment. On 7 August 2017, Betty decided not to pursue her appeal and her solicitors informed the Court by letter. On 17 August 2017, the Court made an order dismissing her appeal with costs. Eric, Patsy and Stella continued with their appeal.

9. Mr Paul Shieh SC (together with Mr Derek Chan and Ms Cherry Xu) appeared for Eric, Patsy and Stella in the appeal. In this very well-argued appeal, the grounds of appeal advanced on their behalf focused on the following issues:

(a) Whether the alleged fraudulent or deceptive conduct in respect of the dealings of Hsinchu shares occurred 'in a transaction involving securities' for the purpose of s300 of the SFO;

(b) The applicability of s300 to the purchase and sale of securities listed on an overseas stock exchange;

(c) Whether the judge was correct to make a restoration order against Stella;

(d) Whether the judge correctly drew certain factual inferences against them.

10. The first two issues arose only in respect of the dealings in Hsinchu Bank shares. Hsinchu Bank was a Taiwanese bank and its shares were listed in Taiwan but not in Hong Kong. Hence they were not listed securities for the purpose of s291 of the SFO[5] and the SFC had to rely on s300 instead. s300 provides:

> " (1) A person shall not, directly or indirectly, in a transaction involving securities, futures contracts or leveraged foreign exchange trading –
>
> (a) employ any device, scheme or artifice with intent to defraud or deceive; or

(b) engage in any act, practice or course of business which is fraudulent or deceptive, or would operate as a fraud or deception.

(2) A person who contravenes subsection (1) commits an offence.

(3) In this section, a reference to a transaction includes an offer and an invitation (however expressed)."

11. The salient facts concerning the dealings in the Hsinchu Bank shares were helpfully summarized at [14] to [22] in the judgment below:

" 14. SCB was interested in expanding its operations in Taiwan. In 2006, it was in confidential negotiations with Hsinchu Bank, which was listed on the Taiwan Stock Exchange, to takeover and privatise the latter by making a recommended tender offer for all its shares ("Tender Offer"). The Tender Offer would be "recommended" in the sense that the management of Hsinchu Bank would recommend the shareholders to accept the offer.

15. SCB's Group Legal Department in Hong Kong was involved in handling and managing the legal and regulatory work. Ms Mabel Chu ("Mabel") (one of SFC witnesses) was the lead in-house lawyer on the matter. On 20 April 2006, Betty was seconded by S&M to SCB to assist Mabel on the transaction. She was reminded and she acknowledged that she was an insider and had access to highly confidential and sensitive information.

16. Important milestones in SCB's negotiations with Hsinchu Bank in August and September 2006 are summarised in §11 of the Statement of Claim ("SOC"), which are admitted by Betty at §§15-16 of the Amended Defence of the 1st to 4th Defendants ("AD"). At that time (August and September 2006), Betty was spending around 70-80% of her time working on this project.

17. On around 23 August 2006, SCB and Hsinchu Bank started negotiations on the price for the Tender Offer. By 14 September 2006, the proposed tender price of NT$24.50 per share was approved by SCB and inserted into a draft press release which was circulated internally. Hsinchu Bank shares were then trading at around NT$14 per share.

18. Information about the Tender Offer, together with information about its offer price of NT$24.50 per share, constituted CMPSI about Hsinchu Bank shares before the public announcement of the Tender Offer on 29 September 2006 (the parties' experts are in agreement on this issue).

19. There is no controversy that Betty was aware of both the Tender Offer and the proposed tender price on 14 September 2006 at the latest. In respect of her fiduciary duties, the SFC relies on:

(1) an express duty of confidentiality in her employment letter with S&M;

(2) S&M's Dealing Rules prohibiting disclosure or misuse of confidential information, in particular in buying and selling any shares (whether directly or indirectly) without first obtaining permission from S&M and complying with insider dealing laws;

(3) an email sent by Betty on 6 June 2006 in which she acknowledged reading and understanding SCB's Memorandum on Inside Information, imposing a duty of confidence and prohibiting disclosure or use of inside information;

(4) Principle 8.06 of the Solicitor's Guide to Professional Conduct which prohibits a solicitor from making personal profit by using confidential information acquired in the course of a professional relationship; and

(5) the common law duties of a person in a fiduciary position to act in good faith and not to "*act for his own benefit or the benefit of a third person without the informed consent of his principal*" (see *Bristol & West Building Society v Mothew*[1998] 1 Ch 1, at 18B-C).

20. Betty was aware of her obligations to maintain confidentiality in relation to the Tender Offer. As stated in §32 of her witness statement, which was adopted as part of her evidence:

" Having worked as a solicitor on corporate transactions for several years already I was well aware of my professional obligation to avoid breach or misuse of client confidential information. At no time did I discuss any of the bank's projects with individuals outside and at no point did I knowingly deal in shares of the bank, Hsinchu Bank or any other business in which the bank was interested, nor did I encourage anyone else to deal."

21. On 20 September 2006, Patsy opened a new securities account in Hong Kong with Tai Fook Securities Co Ltd ("Tai Fook" and "TF Account") which allowed her to trade in Taiwanese shares. Between 21 and 29 September, Betty, Eric, Patsy, and Stella put together substantial sums of money and injected them into the TF Account. Between 22 and 29 September 2006, Patsy acquired for the defendants a total of 1,576,000 shares in Hsinchu Bank at an average price of NT$16.99 (HK$4.05) per share and an aggregate cost of NT$26,782,000 (HK$6,381,000).

22. This court has been provided by the SFC with a helpful Chronology for the Hsinchu Bank Case. Section II of that document contains the details concerning the raising of funds by the defendants, the acquisitions of Hsinchu Bank shares and the source of the information. Such facts are based on undisputed documentary evidence.

23. Both Betty and Eric went to considerable length in raising funds. Overdraft facilities were drawn down by them, and they liquidated a considerable portion of their investment portfolio. Eric also borrowed HK$430,000 from Patsy. The money came from breaking a fixed deposit, which was due to mature in 2 weeks' time, with the forfeiture of interest of HK$1,228. Likewise, Betty borrowed HK$300,000 from her sister. Betty's funds were first transferred to Eric before they were deposited into the TF Account. As soon as funds became available, Hsinchu Bank shares were acquired. In all, 6 purchases were made.

24. In the afternoon of 29 September 2006 (Hong Kong time), SCP announced the Tender Offer. The offer price was at a substantial premium to the market price. For the defendants, the offer price was 44% above the average price of their acquisitions.

25. Patsy accepted the Tender Offer for all the Hsinchu Bank shares in the TF Account. She then distributed the proceeds to the others in proportion to their contributions. The principal invested, sale proceeds, and profits for each defendant are as follows:

	Sum Invested (HK$)	Sale Proceeds (HK$)	Profits (HK$)
Betty	2,250,000	3,250,000	1,000,000
Eric	3,280,000	4,580,000	1,300,000
Patsy	351,000	526,000	175,000
Stella	500,000	710,000	210,000
Total:	**6,381,000**	**9,066,000**	**2,685,000**

26. Neither Betty … sought approval from or reported to S&M, SCB … any of their respective transactions in Hsinchu Bank shares."

12. In addition, counsel referred to the evidence on the actual implementation of the orders

placed by Patsy with Tai Fook through Capital Securities Corporation ["CSC"], a Taiwanese broker. The following facts are taken from the evidence of the Sheung Shui Branch manager of Tai Fook and the flowcharts on Tai Fook's practice in handling purchase of shares listed in Taiwan[6] which are not disputed. Patsy's TF Account was opened at the Sheung Shui Branch of Tai Fook and she placed her orders for Hsinchu Bank shares at that branch. She placed orders in person as well as by phone. Altogether 18 orders were placed between 22 and 29 September 2006, acquiring a total of 1,576,000 Hsinchu Bank shares. The orders were not executed on real time basis because Tai Fook's staff at the Sheung Shui Branch had to forward the orders to the 24-hour Investment Centre at its Head Office which would relate the same to the International Desk at the Head Office. Dealers at the International Desk placed the orders with CSC Taiwan to execute the same at the Taiwan Stock Exchange. On successful execution, CSC Taiwan reported to the International Desk which in turn related the same to the 24-hour Centre for onward reporting to Sheung Shui Branch. Sheung Shui Branch then confirmed with Patsy on the execution of her order. The dealing tickets had to be signed by Patsy and she did so at the Sheung Shui Branch office. Daily statements recording such dealings were sent to Patsy by post.

13. Patsy's TF Account was a cash account (meaning that it was not a margin account with a credit line) and she had to put in sufficient funds before each purchase. Payments for the purchase were effected by way of deductions from funds deposited into that account beforehand. Between 21 and 29 September 2006, Patsy deposited monies into bank accounts of Tai Fook on 17 occasions for the credit of her TF Account. The total amount was $6,381,000 and such funds were utilized for the purchase of the Hsinchu shares.

14. As the acquisitions in Taiwan were made by CSC Taiwan under the account of Tai Fook maintained with them (as shown by statements of account produced by CSC to the SFC), as evidenced by CSC's account statements for the TF Account[7], Tai Fook effected payments through such account.

15. In respect of the acceptance of the Tender Offer and settlement of that sale, the branch manager described what happened at paragraphs 22 to 23 of his statement[8]:

> " 22. On or about 24 October 2006, we received a Corporate Action Form from CSC Securities (Hong Kong) Limited, which was the Hong Kong office of the Taiwanese broker (called Capital Securities Corporation) with whom we placed Patsy Lee's buy orders for Hsinchu Bank shares, concerning the tender offer. I related the tender offer to Patsy Lee and faxed to her a notice and reply form. She only had one day to decide whether or not she would accept it, i.e. agreeing to part with her 1,576,000 shares to Standard Chartered Bank at the offer price per share. I received her fax confirming that Patsy Lee accepted the tender offer on 24 October 2006, i.e., the same day when she was informed of the tender offer by my colleague in Settlement Department.
>
> 23. The net proceeds of Patsy Lee's disposal of her Hsinchu Bank shares amounted to HK$9,066,346.30. On or about 9 November 2006, Patsy Lee gave instructions to us by fax to

> withdraw funds from her securities. She told me by phone that she wanted to withdraw all the available funds from her account. According to her account statement the available funds amounted to HK$9,066,709.40, which comprised HK$9,066,346.30 as net proceeds and some interests. There was no money left in her account after the widrawal (sic). Then I passed her signed withdrawal instruction to the Settlement Department. As a result, a cheque amounted to HK$9,066,709.40 was issued in favour of LEE, Siu Ying Patsy and deposited into her designated account at DBS on 9 November 2006."

16. In terms of the actual mechanics for the acceptance, Patsy was notified of the same by Tai Fook and the reply form was faxed to her. She accepted by sending the signed reply form by fax on 24 October 2006[9]. Tai Fook in turn sent an acceptance in its own name to CSC Hong Kong on the same date[10]. It was verified by CSC[11] and acted upon. According to the CSC statements of the TF Account, the acceptance of the Tender Offer was completed on 26 October 2006[12]. Proceeds of the Tender Offer were booked into TF Account on 7 November and remitted on 8 November 2006[13] according to the instruction given by Tai Fook to CSC on that date[14]. After Tai Fook received the money, it credited the TF Account of Patsy on 9 November 2006[15].

Fraud and deception in the dealings of the Hsinchu Bank shares

17. Counsel are in agreement that for the purpose of s300 of the SFO, insider dealing involves fraud and deception. Mr Shieh's submission is that as there was no fraud or deception practised in the transaction involving securities, the conduct is, therefore, outside the scope of s300. According to Mr Shieh, the fraud or deception must be practised on the counterparty to the transaction before it can be regarded as being "in a transaction". In this case, he submits, the fraud or deception must have been practised on the vendors of the Hsinchu Bank shares when they were purchased on the Taiwan Stock Exchange.

18. In our judgment, proper consideration of the submission should start with a clear identification of the elements of fraud or deception and the transaction in question. We shall start with the elements of fraud or deception. At [184] of the judgment, the judge referred to the fraud or deception in question by reference to the pleaded case of the SFC as follows:

> " The SFC's pleaded case is that the *actus reus* of s.300 (ie, the employment of a device etc, or engaging in acts or a practice) was committed by Betty, with "knowing assistance of [Eric, Patsy and/or Stella]", in that she "traded in the shares of Hsinchu Bank using confidential … information for personal profit." In the Agreed List of Issues at §9, the device / scheme / acts / practice is particularised as the "misappropriation / misuse of inside information and illicit dealings". In the SFC's Opening at §108, the *actus reus* is identified as the disclosing of CMPSI for the purpose of dealing in the relevant shares."

19. The judge further explained that the crime is not a "single *actus reus*" crime and the focus is on a fraudulent or deceptive scheme or act. Thus he said at [187]:

> " The focus is on the fraudulent or deceptive scheme or act, albeit the ambit of the offence is limited to a transaction involving securities. By their natural meaning, words such as "scheme",

> "practice or course of business" clearly include conduct which goes beyond a single act. The scheme or practice must take place in a transaction which involves securities, but the conduct comprising the scheme or practice is not limited solely to the purchase of the securities."

20. On the facts of the Hsinchu Bank dealings, the judge regarded SCB as the party defrauded or deceived, see [188], [205] to [207] of the judgment. The element of fraud or deception was described at [206]:

> " There can be little doubt that SCB was deceived by Betty. SCB must have been labouring under the belief that Betty was abiding by her representation [that she would not deal in Hsinchu Bank shares][16]. Thus, by Betty's deception, SCB was deprived to its prejudice of the right to take action to protect its CMPSI. Betty, Eric and Patsy had all benefited from SCB's failure to protect its rights – the buying of Hsinchu Bank shares before the CMPSI became public and then accepting the Tender Offer shortly afterwards at a significant premium."

21. The economic detriment suffered by SCB was stated as follows at [207]:

> " … SCB acted to its economic detriment by paying the defendants via the Tender Offer for their shares, when, if they had known the shares had been bought in breach of fiduciary duties owed to it by Betty, they would obviously have refused to pay out to her and her tippees. …"

22. Hence, the judge's findings on deception are premised on the same being a scheme founded upon the misuse of insider information by Betty for trading in the Hsinchu bank shares. The scheme involved the buying of such shares and then accepting the Tender Offer of SCB in making a profit. SCB was defrauded in paying the Tender Offer price to the defendants.

23. Viewed in that light, if one were to analyse the case by reference to s300(1)(a), the *actus reus* was the employment of the whole scheme with intent to defraud or deceive SCB. If one were to analyse it by reference to s300(1)(b), it would be the engagement in the whole course of business which is fraudulent or deceptive. Under both limbs the "scheme" and "course of business" went well beyond the purchasing of the Hsinchu Bank shares.

In a transaction involving securities

24. Mr Shieh laid great emphasis on the qualification arising from the expression "in a transaction involving securities". He submitted that as the vendors in Patsy's purchase of the Hsinchu Bank shares were not defrauded, there was no deception in the transaction involving securities and the case was therefore outside the scope of s300.

25. With respect, we cannot agree with this submission. As the judge rightly held, the *actus reus* under s300 is not confined to the purchase of the shares. Bearing in mind the context in which s300 operates, the word "transaction" should be given a wide interpretation. Such legislative intent is partly reflected in s300(3). We see no reason in principle why the transaction, in a situation like the present case, cannot be the whole

transaction in respect of the trading of the Hsinchu Bank shares by Patsy in the TF Account, including the buying and the acceptance of the Tender Offer. That was the scheme or the course of business executed as planned by the defendants. To them, it would have been meaningless to purchase the Hsinchu Bank shares if they could not also accept the Tender Offer. The fraud or deception was consummated (and SCB was deceived) upon the acceptance of the Tender Offer by Patsy.

26. Mr Shieh submitted that the purchase of the shares was one transaction and the sale or acceptance of the Tender Offer was another transaction. For the purpose of s300, Mr Shieh's isolation of the purchase of the shares from the acceptance of the Tender Offer is, in our judgment, contrived. Such isolation was made to facilitate the argument that as the purchases were not caught by s300 the defendants were entitled to accept the Tender Offer in the same way as other innocent owners of Hsinchu Bank shares. With respect, such an analysis does not accord with reality.

27. As mentioned earlier, in the present context, the *actus reus* under s300 is the employment of a scheme of trading in Hsinchu Bank shares with intent to defraud SCB (or alternatively, the engagement in a course of trading in Hsinchu Bank shares which is fraudulent or deceptive). The issue in this appeal is whether the scheme or course of business had been perpetrated "in a transaction involving securities".

28. In substance, Mr Shieh's submission has two limbs:

(a) the scheme or course of trading involves two separate transactions; and

(b) because the counterparties to the "first" transaction were not deceived, there was no deception on SCB as the counterparty in the "second" transaction for the purpose of s300 as the information had already ceased to be insider information by the time of the second transaction.

29. With respect, this analysis fails to take account of the nexus between the purchase and the sale. The defendants purchased the shares with a view to taking up the Tender Offer. In the circumstances of this case, the transaction involving securities was the course of trading in Hsinchu Bank shares which was not completed until the acceptance of the Tender Offer. We have no hesitation in rejecting such artificial splitting of the course of trading into two separate transactions so as to remove from the equation the deceptive effect on SCB in the acceptance of the Tender Offer. This is an unrealistic view of the true nature of the transaction. Likewise, we reject the submission of Mr Shieh that because by the time of acceptance of the Tender Offer, the insider information had become public, there was, therefore, no deception. Such argument fails to take full account of the whole

course of trading in the Hsinchu Bank shares (the buying as well as the selling of which constituted the transaction involving securities for the purpose of s300) by the defendants. Also, Betty owed a continuous duty to SCB to disclose the misuse of the insider information even after the Tender Offer was made public. Hence, there was deception on SCB when the defendants accepted the Tender Offer in the absence of such disclosure.

30. The same conclusion can be reached even assuming Mr Shieh were correct in the first limb of his submission that the whole fraudulent scheme involves a series of transactions. There is no reason why s300 should not be read together with s7(2) of the *Interpretation and General Clauses Ordinance* Cap 1. By that subsection, any reference in an ordinance in the singular includes the plural. We do not accept the submissions of Mr Shieh that the context of s300 excludes the operation of s7(2). Whatever the position might be regarding s271(8)(a)(ii), 292(8)(a)(ii), 295(3) and (4) and Schedule 5 Part 2, s300 (unlike those other provisions) is meant to be a general catchall provision and should be construed widely. We cannot discern any rational basis for confining the scope of s300 narrowly to a fraudulent scheme involving only a sale or a purchase. A scheme or course of dealings in respect of securities often involves both sale and purchase. Thus, the reference to “a transaction” in s300(1) could mean “a series of transactions” if the word “transaction” is to be construed in the way submitted by Mr Shieh. There is no doubt in our minds that the series of transactions were all transactions involving securities and the scheme was employed with intent to defraud SCB.

31. For these reasons, we reject the grounds of appeal based on the submission that the fraudulent scheme was not employed or the fraudulent course of business was not engaged “in a transaction involving securities”.

32. We should make it clear that we do not hold that it is not possible to apply s300 in respect of a fraudulent act engaged in a purchase of securities without any sale. There can be cases where it may be contended that the offence has been completed in the purchase of securities alone. It depends on the facts of the case. In the present appeal, we only have to decide if s300 is applicable to the facts of the present case. Based on what the judge had found as to the fraud and deception, as set out above, the proper analysis is that the transaction should not be confined to only the purchase of the Hsinchu Bank shares. It should also include the acceptance of the Tender Offer. That would be the whole course of the trading in the shares.

33. We appreciate that our analysis is not the same as the judge’s approach at [218] and [219] of the judgment, where the judge, in essence, agreed with the majority in the U.S. Supreme Court in *US v O’Hagan* (1997) 521 US 642. On the other hand, Mr Shieh relied

substantially on the dissenting judgment of Justice Thomas in *O'Hagan*. Counsel drew the same analogy, as Justice Thomas did, with a person using stolen money to buy shares. He further submitted that the fraud or deceit identified by the majority in *O'Hagan* occurred outside of (even though it is connected with) the securities transaction and no fraud or deceit had been committed within the transaction itself.

34. *O'Hagan* was a decision on Rule 10b-5 made under the Securities and Exchange Act 1934. Though the drafting of our s300 was based on an adaptation of that rule[17], there is a material distinction in the wording for present purposes. Whilst our s300 refers to fraud or deception "in a transaction involving securities", Rule 10b-5 uses the expression "in connection with the purchase or sale of any security". On the wording of Rule 10b-5, it may be that under US law the purchase of shares had to be considered on its own without regard to the subsequent sale. As explained above, there is no need to do so in construing our s300.

35. Further, the majority explained the difference between the classical theory of insider trading liability and the misappropriation theory under the US law[18] and Mr O'Hagan[19] was not regarded as an "insider" for the purpose of the classical theory and liability could only be founded on the misappropriation theory. The charge against Mr O'Hagan was framed accordingly[20]. We agree with the judge[21] that it is not necessary to import the misappropriation theory into Hong Kong in the application of s300. In terms of Hong Kong law, the bidder and those obtaining information concerning a takeover bid from the bidder are insiders, see s291(2), (4) and (6) of the SFO.

36. As we have seen above, the judge's finding of deception of SCB is based not only on the misuse of the insider information in purchasing the shares but also on the acceptance of the Tender Offer from SCB. SCB was the counterparty with whom the defendants dealt by way of acceptance of the Tender Offer.

37. The judge did refer to the reasoning of the majority in *O'Hagan* at [218] and applied the same in the present context at [219] as follows:

> " Although the Court was dealing with the misappropriation theory and R.10b-5 is not identical with s.300, the above reasoning can apply with equal force in the Hsinchu Bank case. Betty's misuse of SCB's CMPSI (the deceptive scheme) was consummated when the information was deployed in the purchase of Hsinchu Bank shares. Indeed, the whole purpose of the deceptive scheme was to gain an advantage in the acquisition of shares in that bank. Hence, the connection between the deceptive scheme and the "*transaction involving securities*". It should be added that the reasoning deals with the theft example raised by Mr Sussex."

38. With respect, the judge's statement in that paragraph as to the consummation of the deception and the purpose of the scheme was incomplete. The purpose of the defendants was not the mere acquisition of the shares. Their purpose was to make a profit by

purchasing and then selling the shares by accepting the Tender Offer. In our view, as explained earlier, the scheme comprised not only the misuse of insider information in the purchase of the Hsinchu Bank shares but also the deception of SCB in the acceptance of the Tender Offer. According to the judge's finding, the deception was not the mere misuse of information but also the concealment from SCB that the defendants had acquired shares through misuse of insider information. Full consummation of this fraudulent scheme took place when the Tender Offer was accepted.

39. On the facts of the present case, it is not necessary for the Court to decide if liability under s300 can be founded simply upon the misuse of insider information in the purchase of shares where the source of the information was not a counterparty in the transaction involving securities. Nor is it necessary for us to deal with the analogy with the purchase of shares by stolen funds strongly relied upon by Justice Thomas and Mr Shieh. Once the artificial splitting of the scheme is rejected, the analogy disappears.

40. Though it is not necessary for our decision, we agree with Mr Yu that s300 itself does not in terms require that the fraud or deception must be directed at the parties to the sale or purchase of the securities. Further, the prefacing words "directly or indirectly" in s300 make it clear that the fraud or deception need not be part of the transaction itself. Hence, as a matter of construction of s300, it is open for liability to be established under s300 based on fraud or deception practised upon a person other than the counterparty directly engaged in the transaction.

41. Under s300, the fraud or deception has to be practised, directly or indirectly, in a transaction involving securities. We have already stated our view that "transaction" should, in the context of this section, be construed purposively to cover the whole deceptive scheme or the whole course of dealings. We also agree with Mr Yu that since s300 refers to "transaction involving securities", the dealings in securities need not form the entirety of the transaction. In these respects, the scope of s300 is wider than Rule 10b-5. The nexus between the fraud or deception and the transaction must be real and substantial instead of being peripheral.

42. As regards the debate between Justice Thomas and the majority in *O'Hagan*, it seems that Justice Thomas tried to demonstrate the fallacy of the view of the majority by reference to the example of share acquisition by embezzled monies. In view of the wider scope of our s300, we would not rule out completely the possibility of a case where on the facts a scheme of fraud or deception practised for the purpose of procuring the funds for the purchase of securities is so substantially entwined with the dealings in shares that they could properly be regarded as part of the same transaction or series of transactions. With

respect, we are inclined to agree with the majority, for the reasons set out at p.656, that there is a sufficient nexus on the facts of *O'Hagan* between the misappropriation of insider information and the purchase of the shares to characterize the former as being in connection with the purchase of the shares.

43. For these reasons, we do not accept Mr Shieh's submission that there was no deception in the transaction involving securities in respect of the defendants' dealings in Hsinchu Bank shares in 2006.

44. Mr Shieh made a subsidiary point in respect of s300. He submitted that as there are specific defences for insider dealing in ss292 to 294 of the SFO, and such defences are not applicable to a prosecution under s300, the court should not construe s300 as being available for prosecution of insider dealing as it would deprive those prosecuted of the benefit of the specific statutory defences.

45. In the supplemental submissions Mr Shieh placed before us at the hearing, counsel specifically referred to ss292(3), (5), (6) and (7).

46. On the facts of the present case and the elements of the fraud or deception under s300 in the present context, none of these defences is applicable. Further, as submitted by Mr Yu, they are not applicable to exonerate a defendant who practised a fraud of the same nature as the one identified in *O'Hagan*.

47. By reason of the intrinsic elements in such defences, we are unable to see a case of s300 arising from facts where ss292(3), (5), (6) or (7) would be applicable. In particular, we cannot see how the elements in s300 (a) or (b) can be established. For cases under s292(3), there would not be any misuse of insider information.

48. For cases under s292(5), (6) and (7), in light of (5)(b)(i)(B) and (ii)(B), (6)(b) and (7)(b), those are likely to be transactions conducted in private with the parties knowing the identities and backgrounds of each other. For such transactions, the use of the insider information is unlikely to be an issue. However, if there were elements of fraud or deception arising not from misuse of insider information, there is no sound rationale for affording a defence to a prosecution under s300.

49. The last point actually highlights the fallacy in this line of submission by Mr Shieh. There are different varieties of fraud or deception and s300 is included in the statute book as a catch-all provision. For insider dealings, there is no risk of s300 being applied in an oppressive manner as suggested by Mr Shieh. We are not satisfied that simply because of these specific defences in s292, we should construe s300 in a way to exclude its application to transactions of insider dealings.

Substantial measure of the activities of the Hsinchu Bank dealings

50. The judge held that s300 has no extraterritorial effect. This is common ground in this appeal.

51. It is also common ground that the correct approach was the one set out by Stock V-P (as he then was) in *HKSAR v Krieger* [2014] 3 HKLRD 404 at [122]:

> " The phrase 'substantial measure of the activities constituting a crime' has its genesis in a judgment cited in *R v Smith (Wallace Duncan) (No 4)* to which Deputy Judge Stuart-Moore referred in *HKSAR v Chan Shing Kong*. *Smith* was a case in which a substantial part of the deception took place within the jurisdiction of the proposed trial. Lord Woolf CJ referred to *Libman v The Queen* in which it was said that:
>
> ' The English courts have decisively begun to move away from definitional obsessions and technical formulations aimed at finding a single *situs* of a crime by locating where the gist of the crime occurred and where it was completed. Rather, they now appear to seek by an examination of relevant policies to apply the English criminal law where *a substantial measure of the activities constituting a crime* take place in England, and restrict its application in such circumstances solely in cases where it can seriously be argued on a reasonable view that these activities should, on the basis of international comity, be dealt with by another country.' (Emphasis added)"

52. This approach was endorsed by the Court of Final Appeal in *HKSAR v Wong Tak Keung* (2015) 18 HKCFAR 62 at [45] for application to cases where the essential elements of a "result crime" (i.e. where a defendant does a prohibited act producing a prohibited result and the act and the result occur in two different jurisdictions) occur partly within and partly outside the jurisdiction. At [50], Ribeiro PJ reiterated that the approach was to be applied by reference to the constituent elements of the offence instead of other factors. Acts in Hong Kong which are not constituent elements of the offence are irrelevant.

53. In relation to the application of s300 to the Hsinchu Bank shares, the real issue in the present context is whether a substantial measure of the activities constituting the contravention of s300 took place in Hong Kong.

54. Mr Shieh submitted that as the actual making of the offer to purchase the Hsinchu Bank shares took place in Taiwan, the activities should be regarded as being undertaken outside the jurisdiction. Mr Shieh submitted that all the acts done by Patsy in the purchase of the shares at Tai Fook were only preparatory steps and they should not be regarded as substantial. Counsel laid emphasis on the possibility of the defendants recalling the orders before the Taiwanese broker placed the same at the Taiwan Stock Exchange.

55. Mr Shieh also submitted that the judge erred in finding that the acceptance of the Tender Offer was made in Hong Kong.

56. We have already set out above the sequence of events in the buying of the shares and the acceptance of the Tender Offer.

57. The judge's analysis is at [168] to [170]:

> " 168. In the Hsinchu Bank case, the SFC's case on the *actus reus* is the fraudulent or deceptive act or practice perpetrated on SCB in Hong Kong. Mr Westbrook submitted that the trading in Taiwan merely provides the context and acts as a limitation on the type of fraud or deception caught by s.300. In other words, it is only fraudulent or deceptive conduct in a transaction involving securities that is caught, not other types of such conduct. I will have to consider later whether SFC's case, as proven, satisfies s.300.
>
> 169. However, as indicated above, insofar there was fraudulent or deceptive conduct used in offering to buy the Hsinchu Bank shares in question, it would amount to an offence under s.300. The fact that the shares were traded overseas is not a critical feature. Here, the defendants bought the Hsinchu Bank shares via the TF Account. The buy instructions given to Tai Fook must have constituted an offer. The fact that the offer had to be transmitted via Tai Fook to Taiwan for execution is not critical for purposes of s.300.
>
> 170. Further, I accept the SFC's submission that fraudulent or deceptive conduct used in accepting the Tender Offer, such acceptance having taken place in Hong Kong (it was accepted by Patsy in Hong Kong via Tai Fook), can also bring the Hsinchu Bank case within s.300."

58. For present purposes, as analysed above, the essential elements of the s300 crime are the employment of a scheme with intent to deceive or alternatively the engagement in a deceptive course of business in the transaction or series of transactions involving the Hsinchu Bank shares.

59. It should be noted that the crime is not the conception of the scheme or the planning for the course of business. It is the actual employment of the scheme and the engagement in the course of business. Hence, it is not a conspiracy offence and it is not suggested by Mr Shieh that Hong Kong courts have no jurisdiction because of the jurisdictional limit of conspiracy charges that is discussed in *HKSAR v Wong Tak Keung*, supra.

60. Likewise, the offence in the present case is different from the offence considered by the Court of Appeal in *HKSAR v Krieger*, supra. In the latter case, the offence was the conspiracy to make a corrupt offer. Hence, Stock VP had to consider the place where the substantive offence took place, namely the making of the offer. Mr Shieh placed reliance on [102] to [103] of the judgment in *HKSAR v Krieger*, supra to support his submission that preparatory acts could not be relevant. With respect, those paragraphs should be read in the context of the crime in question.

61. All the acts done by the defendants under the scheme or in the course of dealings of the Hsinchu Bank shares constituted elements of the crime. The starting point of the scheme or the course of dealings was the misuse of the insider information by Betty in communicating the same to Eric. It was followed by the placing of orders through Tai Fook for the purchase of the shares. It was fully consummated upon the acceptance of the Tender Offer without making any disclosure to the SCB with regard to the misuse of insider information.

62. As discussed by Ribeiro PJ in *HKSAR v Wong Tak Keung*, supra, at [33] the modern

trend was to move away from the traditional "terminatory approach" towards a wider approach. At [45], the Court of Final Appeal endorsed the wider approach.

63. Hence, even assuming Mr Shieh was correct in his submission that the offer for the buying of the shares and the acceptance of the Tender Offer took place in Taiwan, it would not be the end of the analysis. One should still take into account the full range of activities under the scheme or conduct in the course of dealings in assessing whether a substantial measure of activities of the crime took place in Hong Kong. If the answer is in the affirmative, it does not matter that the final acts of placing the purchase orders and the acceptance of the Tender Offer took place in Taiwan.

64. We are of the view that the preponderance of the activities under the scheme or the course of dealings took place in Hong Kong. We do not accept Mr Shieh's submission that the unauthorized disclosure of information by Betty to Eric and the placing of orders by Patsy with Tai Fook were mere preparatory acts. They were an important part of the activities in the scheme or course of dealings. Without the disclosure of information, there would not be any basis for a case of deception of SCB as the deception was the concealment of such wrongful disclosure from SCB. It is therefore an essential ingredient of the offence.

65. The deposit of monies into the TF Account and the physical acts of Patsy in giving instructions to Tai Fook (including the signing of the tickets) all took place in Hong Kong. They were again not mere preparatory acts. Rather they were instrumental to or part of the process in the making of the offers. If Patsy did not deposit monies into the TF account, Tai Fook would not process her orders. Likewise, if Patsy did not place the orders with Tai Fook, Tai Fook would not in turn place the orders with CSC Taipei. Hence, these were also activities under the scheme of deception or the course of deceptive dealings.

66. Patsy's signature on the confirmation reply to accept the Tender Offer also occurred in Hong Kong. Again that was not a preparatory act. Without such confirmation, Tai Fook would not accept the Tender Offer. Thus, it was also part of the activities under the scheme of deception or the course of deceptive dealings.

67. Though we accept that the final acts undertaken by CSC Taipei were essential steps in the scheme or course of dealings (because without those steps the scheme could not be completed), they were by no means the only activities which constituted the crime. We have no hesitation in rejecting Mr Shieh's submissions that all the acts taking place in Hong Kong were only actions with reference to a contemplated transaction. They are, in our judgment, parts of the transaction.

68. For these reasons, the courts in Hong Kong have jurisdiction to hear the case.

69. Mr Shieh referred to *Morrison v National Australian Bank* (2010) 561 US 247 in support of his submission that s300 should not have application in respect of dealings of shares listed in an overseas market. On the other hand, Mr Yu referred to *Securities and Exchange Commission v Tourre,* a decision of the United States District Court of 4 June 2013 on s17(a) of the Securities Act to demonstrate that in light of our s300(3), the reasoning in *Morrison* has no application in Hong Kong.

70. Provided that the activities that took place in Hong Kong satisfy the test in *Kreiger*, there is no intrinsic reason for excluding the application of s300(3) from fraud or deception in respect of securities listed in an overseas market. Mr Yu took us to various sections in the SFO to illustrate that the purpose of the SFO is not confined to activities in respect of securities listed in Hong Kong but also to activities in Hong Kong in relation to securities listed elsewhere. The long title of the ordinance states that, amongst other things, it provides for the regulation of activities and other matters connected with financial products and the securities and futures industry[22]. As Hong Kong is an international financial centre, the financial products marketed here are not confined to securities listed in Hong Kong. Likewise, those engaged in the industry (including professionals serving the industry like lawyers and accountants) very often provide services in relation to securities or other financial products listed elsewhere. Thus, s6(2)(a) highlights that the SFC shall have regard to the international character of the securities and futures industry and the desirability of maintaining the status of Hong Kong as a competitive international financial centre.

71. In the context of Part XIV of the SFO (and s300 is in Division 4 of Part XIV), there are provisions governing activities in Hong Kong concerning overseas market, e.g. ss 295(2) and (4), 296(2), 299(2).

72. On the face of s300, it is not confined to a transaction involving "listed" securities or securities "traded on a relevant recognized market" (which are the formula used in other sections to confine their application of securities listed in Hong Kong). In this connection, in view of the *Kreiger* test and the catch-all nature of s300, we are of the view that it is a matter of little moment that s300 does not refer to securities traded "on a relevant overseas market".

73. In this connection, we do not regard the reasoning in *Morrison v National Australian Bank*, supra, to be an obstacle to our above conclusion. First, it is quite apparent from that judgment that the law on extraterritoriality in the U.S. is different and they did not have the benefit, as we do, of the test in *Kreiger*. Prior to *Morrison*, there were several decisions in

the Second Circuit applying different tests to activities in the U.S. in respect of securities listed elsewhere[23]. Those tests were not easy to apply and were subject to academic criticism. The Supreme Court found those criticisms justified. By reference to the focus of congressional concern in terms of section 10(b) of the Exchange Act, the Supreme Court found that the focus was not on the place where the deception originated but upon purchases and sales of securities in the U.S.[24] In that respect, we have already highlighted the difference in wordings between section 10(b) and our s300 above.

74. Mr Shieh relied on the discussion at [18] of *Morrison* and submitted that there is a risk of incompatibility with the applicable laws of the place where the sale and purchase are actually conducted. In our respectful view, it is a *non sequitur*. Such risk must have been taken into account when it is accepted (as the Court of Final Appeal accepted in *HKSAR v Wong Tak Keung*, supra) that the test in *Kreiger* set out the proper limit of the territorial jurisdiction of the courts in Hong Kong. Now that the test has been settled, it is simply a matter of application of such test to the facts of each case.

75. We do not find it necessary or fruitful for us to be engaged in this judgment with the debate on the U.S. law after *Morrison*.

76. For these reasons we reject Mr Shieh's submission on extraterritoriality.

The restoration order against Stella

77. Before addressing the grounds of appeal we should briefly set out the factual findings of the judge in relation to both transactions. In respect of the Hsinchu Bank transaction the judge found that Betty shared CMPSI with Eric and that they decided to trade with this information. They opened an account in Patsy's name so as to create distance between themselves and the trading. The judge further found that Patsy was a knowing participant in the unlawful enterprise and found that the evidence of Betty, Eric and Patsy was unbelievable.

78. Recognizing that there was no direct evidence to implicate Patsy in being knowingly involved in the insider dealing the judge, nevertheless, said at paragraph 141:

> " The issue is whether the established evidence justifies an inference on the matter on which there is no direct evidence. In this case, the inferences that Patsy knew that Betty was the source of inside information and that it was fraudulent or deceptive for her to take advantage of such information received via Eric or directly from Betty, are justified …"

79. In respect of Stella the judge noted that her investment history revealed that she had very little interest in stock trading and that she and Patsy had never previously traded together. He said Stella's "sudden investment of HK$500,000 in a single overseas stock, which on her own evidence she knew nothing about, was entirely out of character."

However, he decided that there was insufficient evidence to conclude that she must have known about the illicit enterprise.

80. In respect of the AsiaSat transaction the judge drew the following inferences in paragraph 244:

> " (1) Eric had acquired CMPSI, namely, knowledge of the Proposed Privatisation;
>
> (2) He did so by virtue of working in Linklaters, ie, the information came from a connected person (see analysis below on connected person);
>
> (3) He shared the information with Betty (and Patsy, see below), encouraging and intending that she (and they) would trade on it;
>
> (4) Betty must have known it was CMPSI and she knew that Eric had it because his firm Linklaters was working on the transaction; and
>
> (5) Betty traded on the information."

In respect of Patsy the judge concluded that "the only reasonable inference is that she traded with CMPSI given to her by Eric".

81. The judge then went on to address the evidence against Stella and concluded that it was no stronger than in the Hsinchu Bank case and he "rejected the case that she knowingly participated in any insider dealing in respect of AsiaSat".

82. In deciding whether to make s 213(1) orders against Stella the judge had regard to the purpose of the s 213(2) remedies against the backdrop of the regulatory objectives and function of the SFC and the powers granted to it, as discussed by Le Pichon JA in *SFC v C*[25]. Adopting for Stella an analysis that he said he would apply to Patsy were he found to be wrong in concluding that she knew of the fraudulent scheme, he determined, at paragraph 270, in respect of Stella that "it must be right to compel her to return the profits obtained from tainted transactions in both the Hsinchu Bank case and AsiaSat case, even if she were unaware of the wrongdoings. It has not been suggested in this case that any prejudice would be caused to anyone in the event that this court makes a restoration order."

83. The amounts of the restoration orders were the profits that Stella made from the two transactions. In respect of the Hsinchu Bank transaction this was HK$210,000 and in respect of the AsiaSat transaction it was HK$36,700. These figures are not in dispute.

84. The restoration orders were made under s 213(2)(b) of the SFO. The scheme of s 213 is to set out in subsection (1) the circumstances which trigger the making of one or more of the orders contained in subsection (2). For present purposes the relevant triggering provision is s 213(1)(a)(i)(A), namely that a person has contravened a "relevant provision". "Relevant provision" is defined in Schedule 1 to mean, amongst others, the provisions of the SFO.

85. No dispute is taken that the power to make orders under s 213(1) was triggered by the judge's findings that Betty, Eric and Patsy were in breach of s 300(1) and s 291(5)(a) of the SFO. The dispute is over whether, in the particular circumstances of this case, the judge was entitled to make an order under s 213(2)(b) and if he was, whether in the exercise of his discretion he should have done so.

86. There are a number of other subsections in s 213 but the only one relevant to the circumstances of this appeal is subsection (4) which requires the Court of First Instance, before making an order under s 213(1), to "satisfy itself, so far as it can reasonably do so, that it is desirable that the order be made, and that the order will not unfairly prejudice any person."

87. Section 213(2)(b) itself provides:

> " (b) where a person has been, or it appears that a person has been, is or may become, involved in any of the matters referred to in subsection (1)(a)(i) to (v), whether knowingly or otherwise, an order requiring the person to take such steps as the Court of First Instance may direct, including steps to restore the parties to any transaction to the position in which they were before the transaction was entered into;"

88. Because the order that is made under s 213(2)(b) can only be made in respect of a person who has been "involved in any of the matters referred to in subsection (1)(a)(i) to (v), whether knowingly or otherwise" it is necessary to set out those parts of s 213(1) which, so far as is relevant to the present case, are as follows:

> " (1) Where –
>
> > (a) a person has –
> >
> > (i) contravened –
> >
> > (A) any of the relevant provisions;
>
> …
>
> > (ii) aided, abetted, or otherwise assisted, counselled or procured a person to commit any such contravention;
> >
> > (iii) induced, whether by threats, promises or otherwise, a person to commit any such contravention;
> >
> > (iv) directly or indirectly been in any way knowingly involved in, or a party to, any such contravention; or
> >
> > (v) attempted, or conspired with others, to commit any such contravention; or
>
> …
>
> the Court of First Instance, on the application of the Commission, may, subject to subsection (4), make one or more of the orders specified in subsection (2)."

89. The grounds of appeal in relation to the restoration orders assert:

> " Given her ignorance of inside information her trading was entirely legal and could not be

impugned. There was no basis in law or in fact for the making of a restoration order against Stella."

90. The argument of Mr Shieh is that the judge was not entitled to make an order against Stella under s213(2)(b) because the requirement of the subsection that the subject of the order, namely, Stella, is shown to be "involved" in the matters referred to in s213(a)(i) to (v), was not proven. Alternatively, he argues that even if the judge was entitled to make the order, he should not have exercised his discretion to do so because he could not have been satisfied, under subsection (4), that "it is desirable for the order to be made and that the order will not unfairly prejudice any person."

91. In support of his grounds of appeal Mr Shieh argues that the word "involves" should be construed narrowly so that it only applies to situations where a person is innocently drawn into others' insider dealing, such as by facilitating that insider dealing in some way, for example by being a nominee holder of shares for an insider dealer or having some other part to play, such as holding the proceeds of the insider dealing after it has taken place. It should not extend to persons who legitimately trade in the shares about which inside information is known, but do so without being aware that inside information is being misused.

92. In his alternative submission Mr Shieh submitted that a restoration order should have been refused under s213(4) because such an order would unfairly prejudice Stella who took an investment judgment innocently, with her own funds, and legitimately reaped profits from so doing. The judge simply asserted that it must be right to deprive Stella of her profits without explaining why he reached that conclusion.

93. We are not persuaded that the word "involved" should be construed in the narrow way submitted by Mr Shieh. As Le Pichon JA observed in the *C* case the ambit of these powers and remedies is to be determined by a purposive construction of the words employed in their drafting. The Court of Appeal in *C* was concerned with the construction of the words "dealing in" that are contained in s213(2)(c) of the SFO and Le Pichon JA's analysis and reasons for construing those words liberally are equally applicable to the approach that should be taken to construing the words "involved in", in s213(2)(b). At [33] to [35] of her judgment Le Pichon JA said:

" 33. In determining the nature of an order under s. 213(2)(c) of the Ordinance, it is necessary to view it in its proper context, that being the statutory scheme to be found within the four corners of the Ordinance for the regulation of the securities and futures industry. The regulatory objectives and functions and powers of the SFC are to be found in ss. 4 and 5 of the Ordinance. One of its regulatory objectives is 'to minimize crime and misconduct in the securities and futures industry' (s. 4(d)) and one of its statutory functions is 'to suppress illegal, dishonourable and improper practices in the securities and futures industry' (s. 5(n)).

34 It is noteworthy that the Ordinance conferred on the SFC an array of powers and provided the

> SFC with a range of remedies, no doubt, to facilitate the attainment of the SFC's regulatory objectives and render more effective the discharge of its statutory functions. Of its nature, proceedings involving the SFC are necessarily different from actions between private individuals because the SFC is a public body with statutory duties to discharge and there can be no private rights between the SFC and the defendants.
>
> 35. It is against that backdrop that the range of remedies contained in s. 213(2) has to be considered. Indisputably, those remedies were created by statute and are intended or designed to provide substantive relief to address specific types of wrongdoing (identified in s. 213(1)) the regulator may encounter in the course of discharging its statutory functions. Section 213(1) empowers the court to make a range of substantive orders on the application of the SFC if the SFC is satisfied that the contravention of any of the relevant provisions (defined to mean the provisions of the Ordinance and certain provisions of the Companies Ordinance) 'has occurred, is occurring or may occur'".

94. The power contained in s213(2)(b) is, clearly, a very important one. It exists to ensure that no benefits are obtained from insider dealing by anyone – whether that person is directly implicated in it or unknowingly caught up in it. In so doing it adds further strength to an already strengthened approach to the problem of insider dealing. Prior to the enactment of the SFO insider dealing was not a criminal offence. The SFO changed that. In *Koon Wing Yee v Insider Dealing Tribunal*[26] the Court of Final Appeal was dealing with the provisions of the Securities (Insider Dealing) Ordinance Cap 395 (SIDO). Sir Anthony Mason NPJ, in giving a judgment with which the other members of the court agreed, characterized insider dealing as "very serious misconduct" and as "a species of dishonest misconduct"[27]. He then went on to note the change effected by the SFO, saying at [47] of the new approach of criminalizing insider dealing:

> " 47. Moreover, insider dealing is a form of conduct which can be readily characterized as criminal conduct. Indeed, the SFO, which enacted the present legislation governing insider dealing, provides for dual civil and criminal regimes to deal with six types of market misconduct. The purpose of the SFO was to enhance the deterrent and punitive effect of the available sanctions for insider dealing on the basis that the regime under SIDO was insufficient to combat effectively acts of market misconduct. Similar dual regimes had by then been adopted in the United Kingdom, the United States and Australia."

95. Just as Le Pichon JA determined that a purposive construction of s 213(2)(c) required that its language be construed liberally we are likewise persuaded that a similar liberal construction of s 213(2)(b) is required if it is to be effective in achieving its purpose of, in the words of Sir Anthony Mason NPJ, "to enhance the deterrent and punitive effect of the available sanctions" to "combat effectively acts of market misconduct."

96. However, the SFO recognizes that the very breadth of the power could result in unfairness in its application. Hence the provision in subsection (4). This subsection requires the Court of First Instance to be satisfied of two matters. The first is that "it is desirable that the order be made." The focus of this requirement is on whether the making of the order would be consistent with and advance, generally, the objects and purpose of the ordinance and, more specifically, the role of the offence provision and the role of the remedial orders, in deterring the conduct of insider dealing and ensuring that no one

benefits from it. Ensuring that no one benefits from insider dealing is not just a desirable goal in itself but it is an important element in deterring those who might be contemplating this form of market misconduct. It is inevitably linked to the second requirement in that an unfair order would not be one that it would be desirable to make. In this way, it will be relevant, even under the first requirement, for the court to have regard to the circumstances leading to the involvement of the person against whom the order is sought in the insider dealing.

97. The second requirement is that the order will not unfairly prejudice any person and the focus of this requirement will be on the circumstances by which the subject of the order came to be involved in the insider dealing and the impact the order will have on him. Where the person is unknowingly involved in the insider dealing through trading in shares it will be relevant to have regard to the extent to which he acted independently in his decision to trade in the shares.

98. In the present case there is no assertion that the making of the order will prejudice Stella in any way beyond stripping her of the profits she made. But, Mr Shieh argues that Stella was a legitimate investor, exercising independent judgment in making her decisions to invest in Hsinchu Bank and AsiaSat shares. In these circumstances she is no different from any other investor and, like any other investor, she assumes the risks of investing and so is entitled to take and keep the profits of her investment decisions when profits are made.

99. The problem with Mr Shieh's argument is that there is nothing in the judge's findings which support such a level of independence in Stella's investment decision making. The restoration orders against Stella are not made simply because she is a close relation of the insider dealers. They are made because her investment decisions were influenced, if not prompted by, the provision to her of information, advice or tips that were sourced from, or based upon, inside information, albeit she was unaware of that.

100. Once a court determines that a person has benefited from inside information in the sense that he made investment decisions which were influenced in a significant way by inside information, however conveyed to him, whether as a tip, advice or information then, unless it can be shown that depriving him of his profits will in some way unfairly prejudice him, a restoration order will be appropriate. That was precisely the situation in respect of Stella and we can see no error of law or fact in the decision of the judge to make the s213(2)(b) orders that he did.

The factual inferences

101. In respect of the Hsinchu Bank transaction it is complained in the ground of appeal that the judge erred in finding that Betty shared confidential inside information with Eric and that Eric and Betty decided to open an account in Patsy's name "so as to create some distance between themselves and the trading." It is argued that the judge made these inferential findings prior to his consideration of and without taking account of the evidence in the defence case.

102. Further grounds of appeal assert the judge erred in rejecting the evidence of Betty and Eric in making the findings he did as to Patsy's knowledge and that his finding as to Patsy's knowledge was contrary to the weight of the evidence.

103. In respect of the AsiaSat transaction the grounds of appeal assert the judge erred in finding that Eric was in possession of confidential price sensitive information concerning AsiaSat and passed this information to Betty and Patsy.

104. It is also said that even if Eric had passed such information to Betty and Patsy there was no evidence to support the judge's finding that Betty and Patsy knew that Eric received this information from Messrs Linklaters who were working on the proposed privatization of AsiaSat.

105. We do not accept that the judge made findings adverse to the defendants without having regard to the evidence in the defence case. There is nothing unusual in the judge's analysis of the evidence. That discussion and analysis commences at [101] and concludes at [132] where the judge draws inferences in respect of Betty and Eric. True, he commences with a discussion of the SFC's case but that is hardly surprising as the SFC is the plaintiff. But even in discussing the SFC's case he refers at [103] to the evidence of Betty and Eric and at [105] to the evidence of Eric and Patsy. Indeed, the judge's discussion of the SFC's case is replete with references to the defence case or defence evidence.

106. This is hardly surprising given the SFC's case relied upon, amongst other evidence, uncontested evidence or evidence obtained from the defendants in the course of pre-trial investigations or in their responses when cross-examined at trial. That many of the primary facts on which the inferential findings were made were drawn from the evidence of the defendants is apparent from statements by the judge. For example, the facts that Betty and Eric had not previously invested in overseas markets or had no prior experience in identifying takeover targets,[28] and the facts that Eric did not normally ask Patsy to assist him in his trading in shares[29] and Betty did not normally entrust money to Eric for investment.[30]

107. The judge drew heavily on the past investment behavior of all of the defendants and contrasted it with their conduct in the Hsinchu Bank share purchases. He noted:

> " … the trading history of Betty and Eric, are important matters which can assist the court in assessing the inherent probabilities of the evidence."[31]

108. Their past trading behaviour contrasted dramatically with how they conducted themselves in respect of the Hsinchu Bank transactions. Both Betty and Eric's behaviour was, in the judge's words "wildly out of line with their investment habits."[32] In the succeeding sentence the judge made clear that this comment was based upon Betty and Eric's account statements and what each of them had admitted in cross-examination.

109. At [108] when addressing a defence submission in the course of discussing the SFC's case the judge said:

> " There is a body of evidence concerning the Hsinchu Bank case, and this court has the evidence of the defendants. The findings should be based on evidence."

110. There could not be a clearer indication from the judge that his later findings would take account of the defence evidence and be based upon his consideration of the whole of the evidence.

111. There is no merit in the complaint that the judge made adverse findings against the defendants prior to and without having regard to the defence evidence.

112. Once this complaint is rejected the other complaints in respect of the Hsinchu Bank transaction fall away.

113. After considering the whole of the evidence the judge assessed that Betty and Eric's testimony was not credible. He made this assessment after a thorough analysis of their evidence and he provided detailed reasons for reaching this conclusion. The judge was right to conclude that their evidence was illogical and implausible. The appellants have not come anywhere close to showing that the judge was plainly wrong in his assessment.

114. Likewise, he found the evidence of Patsy was not believable. Again, the judge gave detailed reasons for so concluding and we are of the view that he cannot be shown to be plainly wrong.

115. Having rejected Patsy's evidence, the judge went on to consider what findings he could make as to her knowledge that the trading was making use of confidential information. The judge was well aware that there was no direct evidence on this matter and his findings would have to be inferential. He explained why he was drawing adverse inferences and on which primary facts they were based. In our view he was entitled to

make the inferential findings in respect of Patsy's knowledge and active participation in the illicit enterprise that he did.

116. The AsiaSat transaction was different from the Hsinchu Bank transaction in that neither Betty nor Eric was involved in it and could not, therefore, be a direct or primary source of the insider information. However, the SFC's case is that Eric's employer was involved in the transaction and the inference can be drawn that through his employment Eric somehow acquired the insider information.

117. Mr Shieh argues that as the SFC cannot point to how Eric acquired the insider information it is pure speculation, unsupported by any evidence, to conclude that he did in fact acquire it.

118. It seems to us that there are two stages to the judge's reasoning process. The first stage is to determine whether, given the security measures implemented by Linklaters, it would have been possible for Eric to be aware of his employer's involvement in the AsiaSat privatisation. This assumption is really based upon common sense. Colleagues in an office readily talk about each other's work and may reveal confidential information simply because they know they are talking to a colleague and implicit in that relationship is an assumption that they can trust the colleague not to breach the confidentiality of the matter being discussed.

119. Notwithstanding the lack of direct evidence that Eric did know of his employer's involvement with the AsiaSat transaction it can be inferred, on the balance of probabilities, that he would have known.

120. Of course knowing of the involvement of his employer in this general sense is only half of the knowledge required to be proven. The key other half of the knowledge is that he was also able to acquire, and did in fact acquire, specific details of this transaction.

121. That he could have acquired the detailed insider information also relies on common sense assumptions that no security system is foolproof, that security systems fail because they are implemented by humans who are prone to making mistakes either through carelessness, loose comments or overly trusting attitudes towards others. The mere fact that there was a security system in place combined with the fact that it is not possible to say how that system might have failed does not mean that it was not possible for Eric to have acquired insider information on the AsiaSat privatization.

122. However, it does mean that before drawing any inference that Eric was the source of the insider information there must be a careful analysis of the primary facts by the court in order to satisfy itself that those primary facts do allow of such an inference.

123. The evidence clearly allowed of the inference that there would have been opportunities for Eric to acquire the information. For example, Eric's supervising partner was in the Mainstream Corporate Department of Linklaters and was a member of the team working on the privatisation, as was Eric's secretary. Eric and the team members shared the same office equipment and Eric's office was close to the offices of his supervising partner and a managing associate who was also a member of the AsiaSat team. Thus, even though Eric was not himself a member of the team he would have had daily contact with key members of it and worked in close proximity to them.

124. Having rejected the evidence of Betty and Patsy, as he was entitled to do, the judge was faced with persons who were trading in AsiaSat shares in an unusual manner. The unusual features of their trading evidenced a desire to acquire as many of the shares they could, as quickly as they could, and a confidence in the investment that could only be explained by their being in possession of insider information in relation to the shares. Once the inference is drawn that their investment behaviour is explained by their having insider knowledge then the inference is inevitable that the source of that knowledge was Eric.

125. We can see no merit in any of the complaints by Mr Shieh in respect of the AsiaSat transaction.

Disposition

126. For these reasons, we dismiss the appeal. We also make an order nisi that the 2nd to 4th defendants shall pay the costs of the SFC in the appeal, such costs are to be taxed if not agreed.

(M H Lam)	(Susan Kwan)	(Ian McWalters)
Vice President	Justice of Appeal	Justice of Appeal

Mr Benjamin Yu SC and Mr Laurence Li, instructed by the Securities and Futures Commission, for the plaintiff

Mr Paul Shieh SC, Mr Derek C L Chan and Ms Cherry Xu, instructed by Wellington Legal, for the 2nd to 4th defendants

[1] [222] of the judgment, reported at [2016] 1 HKLRD 1249.

[2] At [265] of the judgment.

[3] At [145] to [146] and [252] of the judgment.

[4] At [267] to [270] of the judgment.

[5] The operation of the statutory scheme in this regard is, unfortunately, rather convoluted. One has to refer to the definition for "listed securities", which in turn refers to "listed" in s285 of the SFO, and in turn refers to the definitions for "recognized stock market" and "recognized exchange company" in Schedule 1 of the SFO, and then to recognition of exchange company at s19 of the SFO in order to understand the scope of s291.

[6] The flowcharts are at B1/1071 and 1072

[7] Bundle B1 p.1032-1040.

[8] Bundle B1 at p.551-552,

[9] Bundle B2 at p.1017

[10] Bundle B2 at p.1018

[11] Bundle B2 at p.1031

[12] Bundle B2 at p.1037

[13] Bundle B2 at p.1039

[14] Bundle B2 at p.1019

[15] Bundle B2 at p.1014

[16] See [205].

[17] See [208] and footnote 20 the judgment.

[18] *US v O'Hagan* (1997) 521 US 642 at p.651-653.

[19] Because his firm acted for the bidder, not the company the shares of which were subject to the offer, see footnote 5 at *ibid* p.653.

[20] The majority judgment referred to the indictment at *ibid* p.648 and 653

[21] At [213] of the judgment.

[22] See also ss 4, 5 and 6 of the SFO regarding the regulatory objectives of the SFC and its functions and powers and duties.

[23] See the discussion at [7] in *Morrison* at p.2878 to 2881.

[24] [16,17] of *Morrison* at p.2884 to 2885

[25] [2009] 4 HKLRD 315 at 328.

[26] (2008) 11 HKCFAR 170

[27] (2008) 11 HKCFAR 170 at 190, paragraph 46.

[28] [103] of the judgment.

[29] [109] of the judgment.

[30] [110] of the judgment.

[31] [107] of the judgment.

[32] [115] of the judgment.