Court of Final Appeal unanimously dismisses appeal by solicitor and his sisters in fraud case involving overseas listed securities

31 Oct 2018

The Court of Final Appeal (CFA) today dismissed the appeal by Mr Eric Lee Kwok Wa, a solicitor, and his two sisters, Ms Patsy Lee Siu Ying and Ms Stella Lee Siu Fan, against the decision of the Court of First Instance (CFI) which had been upheld by the Court of Appeal (CA).

In December 2010, the SFC commenced civil proceedings under section 213 of the Securities and Futures Ordinance (SFO) in the CFI against Lee, his two sisters and another solicitor Ms Betty Young Bik Fung for fraud/deception in transactions involving the shares of Taiwan-listed Hsinchu International Bank Company Limited (Hsinchu) and for insider dealing in the shares of Asia Satellite Telecommunications Holdings Limited (AsiaSat).

In January 2016, the CFI found that Young, Lee and his sister Patsy Lee had contravened section 300 of the SFO by engaging in fraud or deception in transactions involving Hsinchu shares and section 291 of the SFO by insider dealing in AsiaSat shares and granted orders under section 213 against all four defendants (Notes 1 & 2).

In February 2016 the four defendants appealed against the CFI's decision to the CA. Young withdrew her appeal before the CA heard the case. In November 2017, the CA dismissed the appeal (Note 3).

In a judgment handed down today, the CFA unanimously dismissed the appeal of Lee and his two sisters and held that:

- section 300 of the SFO is directed at fraudulent/deceptive conduct perpetrated in connection with or in relation to transactions involving securities;
- the transactions involving securities which section 300 of the SFO targets cover a variety of activities including the steps that are taken with a view to profit, or avoid loss, by the misuse of inside information, such as the opening of a securities trading account and the giving of trading instructions to intermediaries;
- insider dealing is a species of fraud and a fraud on the public. It is not a victimless crime;
- where there is conduct which answers the definition of an insider dealing offence in the SFO, the perpetrator(s) should be prosecuted for the relevant, specific insider dealing offence under the SFO. It should not be prosecuted for an offence under section 300 of the SFO; and
- although Hsinchu shares were not Hong Kong-listed securities, the fraudulent or deceptive conduct of Young, Lee and his two sisters in respect of their dealings in Hsinchu shares can properly be dealt with under section 300.

The SFC's Executive Director of Enforcement, Mr Thomas Atkinson, said: "We are pleased with the CFA's judgement clarifying the interpretation of section 300 of the SFO. The SFC will continue to robustly pursue enforcement actions where the misuse of inside information occurs in Hong Kong even if the actual execution of transaction takes place on overseas exchanges. We also take this opportunity to remind market participants including professional parties not to misuse inside information."

End

Notes:

1. Hsinchu Bank was a listed company on the Stock Exchange of Taiwan in September 2006 and Asia Satellite was a listed company on the Stock Exchange of Hong Kong in February 2007.
2. Please see the SFC's press release dated 15 January 2016.
3. Please see the SFC's press release dated 9 November 2017.

Page last updated : 31 Oct 2018

終審法院一致駁回在涉及海外上市證券的欺詐案的事務律師及其兩名姊姊所提出的上訴

2018年10月31日

終審法院今天駁回一名事務律師李國華（男）及其兩名姊姊李少英（女）和李少芬（女）就原訟法庭的裁決所提出的上訴。該項原訟法庭的裁決早前獲得上訴法庭維持不變。

證監會於2010年12月根據《證券及期貨條例》第213條在原訟法庭對李、李的兩名姊姊及另一名事務律師楊碧鳳（女）展開民事法律程序，指他們在涉及於台灣上市的新竹國際商業銀行股份有限公司（新竹銀行）股份的交易時進行欺詐／詐騙，及就亞洲衛星控股有限公司（亞洲衛星）股份進行內幕交易。

原訟法庭在2016年1月裁定，楊、李及其姊姊李少英因在進行涉及新竹銀行股份的交易時使用欺詐或詐騙手段及進行亞洲衛星股份的內幕交易，而分別違反了《證券及期貨條例》第300條及第291條，並根據第213條向全部四名答辯人作出命令（註1及2）。

四名答辯人於2016年2月就原訟法庭的裁決向上訴法庭提出上訴。楊在上訴法庭展開聆訊前撤銷其上訴申請。上訴法庭在2017年11月駁回有關上訴（註3）。

在今天頒下的判決書中，終審法院一致駁回李及其兩名姊姊的上訴，並裁定：

- 《證券及期貨條例》第300條是針對相關或對於證券的交易而作出的欺詐／欺騙行為；
- 《證券及期貨條例》第300條所針對有關涉及證券的交易涵蓋各類活動，包括藉著不當地使用內幕消息，為了賺取利潤或避免損失而採取的行動，例如開立證券戶口及向中介人作出交易指示；
- 內幕交易是欺詐的一種，是一項對公眾進行的欺詐，並非是沒有受害人的罪行；
- 若有關行為屬於《證券及期貨條例》下內幕交易的定義，犯案者便應被控該條例下相關及特定的內幕交易罪行，而不應被控第300條下的罪行；及
- 儘管新竹股份當時並非香港上市的證券，但楊、李及其兩名姊姊就涉及新竹股份的交易作出的欺詐或欺騙行為，可根據《證券及期貨條例》第300條適當地加以處理。

證監會法規執行部執行董事魏建新先生（Mr Thomas Atkinson）表示：“我們歡迎終審法院的裁決，而該裁決釐清了對《證券及期貨條例》第300條的詮釋。如在香港發生不當使用內幕消息的情況，即使有關交易實際上是在海外交易所執行，證監會亦將繼續嚴厲執行監管行動。我們亦藉此機會提醒市場參與者，包括專業機構或人士，切勿不當地使用內幕消息。"

完

備註：

1. 新竹銀行在2006年9月為於臺灣證券交易所上市的公司，而亞洲衛星在2007年2月為於香港聯合交易所上市的公司。
2. 請參閱證監會於2016件1月15日發出的新聞稿。
3. 請參閱證監會於2017件11月9日發出的新聞稿。

最後更新日期：2018年10月31日

Press Summary (English)

Press Summary (Chinese)

FACV No. 7 of 2018

[2018] HKCFA 45

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO.7 OF 2018 (CIVIL)

(ON APPEAL FROM CACV NO. 33 OF 2016)

BETWEEN

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

Before: Chief Justice Ma, Mr Justice Ribeiro PJ, Mr Justice Tang PJ, Mr Justice Fok PJ and Mr Justice Spigelman NPJ

Date of Hearing: 15 October 2018

Date of Judgment: 31 October 2018

J U D G M E N T

Chief Justice Ma and Mr Justice Fok PJ:

1. We have had the benefit of reading the judgment in draft of Mr Justice Tang PJ as well as the concurring judgments of Mr Justice Ribeiro PJ and Mr Justice Spigelman NPJ. We, too, would dismiss this appeal. The central issue in the appeal concerns the proper construction of section 300 of the Securities and Futures Ordinance (Cap.571)("the SFO"). The main contentions of the appellants are set out in the judgment of Mr Justice Ribeiro PJ. For the reasons given by him, by Mr Justice Tang PJ and by Mr Justice Spigelman NPJ, those contentions cannot be accepted. We make the following observations:

(1) Given the analysis of the meaning of the word "transaction" contained in the judgment of Mr Justice Tang PJ, it is unnecessary to explore whether that word can also be construed in the plural: see paragraph 26 below. We express no views on this aspect.

(2) We also adopt the reasoning of Mr Justice Spigelman NPJ in relation to the proper approach to section 300 within the insider dealing scheme in the SFO as set out in paragraphs 62 to 70 of his judgment.

Mr Justice Ribeiro PJ:

2. I have had the benefit of reading in draft the joint judgment of Chief Justice Ma and Mr Justice Fok PJ as well as the judgments of Mr Justice Tang PJ and Mr Justice Spigelman NPJ. Subject to the observations made in the joint judgment of Ma CJ and Fok PJ, and by Spigelman NPJ, with which I respectfully agree, I am in respectful agreement with the judgment of Tang PJ. I gratefully adopt his Lordship's recitation of the facts and wish to add a few words directed at the way in which the case was developed at the hearing by Mr Gerard McCoy SC.

3. The case turns on the true construction of section 300 of the Securities and Futures Ordinance,[1] which 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).

4. The objective of Mr McCoy SC's argument was to establish that the conduct of the defendants fell outside the terms of section 300. To that end, the construction that he advanced involved three main propositions:

(a) First, that the words "a person shall not directly or indirectly, in a transaction involving securities" must be read to require that "person" – ie, the defendant – to be *a party* to the "transaction" referred to.

(b) Secondly, that, since the only transactions that the defendants (meaning Patsy and, through her as their agent, Eric, Betty and Stella) entered into were the contracts to purchase the Hsinchu shares and then to sell them to SCB in accepting SCB's Tender Offer, the relevant transactions in the present case were those share dealing transactions, ie, the purchase and then the sale of the shares, taken as separate transactions.

(c) Thirdly, that the fraud or deception also had to be "in the transaction", meaning, they had to be practised by the defendant on the counterparty to the relevant transaction.

5. Applied to the facts of this case, Mr McCoy SC's argument was that the defendants' share dealing transactions (i) did not involve any fraud or deception practised on their counterparties, that is, the shareholders in Taiwan or the SCB, when contracting to purchase or sell the Hsinchu shares respectively; and (ii) those transactions in any event took place outside of Hong Kong and could not found jurisdiction here. He did not have leave to argue point (ii), but sought impermissibly to raise it, purportedly as an aspect of his construction argument.

6. It will be evident that the lynchpin of the appellants' argument is the proposition that section 300 requires the defendant to be party to the "transaction involving securities" in question. In my view, it is an unwarranted construction of the section. To produce the result desired by the appellants, section 300 would have to say something along the lines of: "A person, *being a party to* a transaction involving securities, shall not directly or indirectly" employ a fraudulent or deceptive scheme, etc. That is obviously not what

section 300 says. The words "in a transaction involving securities" are most naturally read to mean "in connection with" or "in relation to" a transaction involving securities. There is no requirement that the defendants be parties as long as their fraudulent or deceptive scheme or course of business is employed in connection with or in relation to the transaction.

7. The reality of the defendants' scheme is comfortably accommodated within section 300 so read. The relevant "transaction involving securities" as engaged by their fraudulent scheme encompassed Betty's misuse and disclosure to the defendants of inside information regarding SCB's takeover plans; their misuse of that information by purchasing, through Patsy and Hong Kong brokers, Hsinchu shares with a view to selling them to SCB at the higher tender price; and their acceptance of SCB's offer and their fraudulent or deceptive realisation of large profits derived from their misuse of the inside information. They were indeed parties to the share dealing transactions. But those dealings formed merely a part of the overall transaction.

8. Once the premise that the defendant must be a party to the transaction referred to in section 300 is removed, Mr McCoy SC's argument is entirely undermined. But even on his argument, it is hard to avoid the conclusion that in taking advantage of SCB's tender offer without disclosing that they had accumulated the shares being sold through misuse of inside information obtained in breach of duty to SCB by a solicitor working on the deal, they had practised a fraud or deception on SCB, a party to the sale transaction.

Mr Justice Tang PJ:

Introduction

9. The facts are simple. They are not or can no longer be disputed. I will state them briefly. At the material time, the 1st defendant, Betty, was a solicitor in the employ of Messrs Slaughter & May ("SANDM"). The 2nd defendant, Eric, was also a solicitor and was employed by Messrs Linklaters. He was Betty's good friend and one-time lover. Patsy, the 3rd defendant, is Eric's elder sister. Stella, the 4th defendant, is Patsy's younger sister and Eric's elder sister.

10. Hsinchu International Bank Co Ltd ("Hsinchu Bank") shares were listed on the Taiwan Stock Exchange. In 2006, Hsinchu Bank was acquired by the Standard Chartered Bank (HK) Ltd ("SCB") pursuant to a friendly takeover which began on 29 September 2006 when SCB made a recommended tender offer for all its shares. Earlier, on 20 April 2006, Betty was seconded by her employer, SANDM to SCB's Group Legal Department to assist with the work which led to the offer. In the course of such work, Betty learned on 14

September 2006 that the recommended tender price would be NT$24.50. This was confidential material price sensitive information ("inside information"). The SFC's case was that Betty shared the inside information with Eric[2] about the impending offer and the proposed tender price. In other words, Betty was the tipper and Eric, the tippee. On 20 September 2006, Patsy[3] opened an account with Tai Fook Securities Co Ltd ("Tai Fook") for the purpose of trading in shares listed in Taiwan. Between 22 and 29 September, using the Tai Fook account, 1,576,000 shares at the average price of NT$16.99 were purchased. The purchase money HK$6,381,000 was contributed by the four defendants.[4] The tender offer was made public on 29 September and the tender price became publicly known. Patsy accepted the tender via Tai Fook and made a profit of HK$2,685,000. The profits were distributed as follows: Betty $1,000,000, Eric $1,300,000, Patsy $175,000, Stella $210,000.

11. In proceedings under s 213 of the Securities and Futures Ordinance (Cap 571)("SFO"), brought by the plaintiff, the Securities and Futures Commission ("SFC"), Mr Justice Anthony Chan found that Betty, Eric, and Patsy being persons within s 213(2)(b) had contravened s 300 of the SFO in that they, directly or indirectly, in transactions involving securities, namely the shares of Hsinchu Bank listed on the Taiwan Stock Exchange:

> "(a) employed a scheme with intent to defraud or deceive or;
>
> (b) engaged in acts which were, or a practice which was, fraudulent or deceptive or would operate as a fraud or deception,
>
> in that in September 2006, they engaged in dealings in Hsinchu Bank shares for personal profit whilst in possession of and misusing confidential material price sensitive information obtained in the course of Betty's employment with Messrs. Slaughter and May and/or her secondment to Standard Chartered Bank (Hong Kong) Ltd, without those principals' informed consent."

12. Section 300 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.[5]
>
> (3) In this section, a reference to a transaction includes an offer and an invitation (however expressed)."

13. Also, pursuant to s 213(2)(b), the 1st, 2nd and 3rd defendants were ordered to, *inter-alia*, disgorge or account for the profits made in their dealings in Hsinchu Bank shares in September 2006. Although the 4th defendant Stella was not found to have contravened s 300 of the SFO, a similar order was made against her, pursuant to s 213(2)(b) because she

had been involved in the contravention of s 300 by the 1st, 2nd and 3rd defendants. The learned judge was satisfied that it is desirable that these orders be made and that they would not unfairly prejudice any of them.[6]

14. On appeal by the 2nd, 3rd and 4th defendants, the Court of Appeal affirmed the learned judge's decision. All four defendants appealed to the Court of Appeal but the 1st defendant withdrew her appeal before the hearing.

15. Leave to appeal was granted to the 2nd, 3rd and 4th defendants by the Court of Appeal on 6 March 2018 on the following questions of great general or public importance, namely:

> "(i) In the context of s.300 of the SFO, how should the word '*transaction*' be construed? In particular:
>
> > a. Was the CA correct in giving the word '*transaction*' a wide interpretation to give effect to s.300 as a '*general catchall provision*', giving s.300 an even wider application than Rule 10b-5 of the Securities [Exchange] Act 1934 (from which our s.300 originated)(CA Judgment §§25-34)?
> >
> > b. Was the CA correct in construing the word '*transaction*' independently from how that word is used in other parts of the SFO, such as s.271(8)(a)(ii), 292(8)(a)(ii), 295(3) & (4), and Schedule 5 Part 2 (CA Judgment §30)?
> >
> > c. Whether the scope of the phrase '*transaction involving securities*' should extend to conduct other than the purchase and sale of securities, and the offer or invitation to trade in securities (s.300(3) of the SFO)? In particular, is the concept of a '*transaction involving securities*' capable of covering '*the whole deceptive scheme or the whole course of dealings*', including acts such as the disclosure of inside information for the purpose of trading in securities, the opening of a securities account for the purpose of trading in securities, the depositing of money for the purpose of trading in securities, and the giving of instructions for the purpose of trading in securities (CA Judgment §§25-49)?
>
> (ii) In the context of s.300 of the SFO, how does one determine whether the alleged fraudulent or deceptive act or scheme occurred '*in a transaction involving securities*', particularly where the transaction in issue concerned securities traded on a stock exchange? Was the CA correct to adopt a '*nexus*' approach, requiring simply that there be a '*real and substantial*' connection between the fraud or deception and the transaction (CA Judgment §41)?"

The Questions

16. The questions turn on the construction of s 300, question (i) in relation to the word "transaction", and question (ii) the words "in a transaction involving securities".

Question (i)

17. The defendants argued that the purchase of the shares was a transaction and their sale when the tender was accepted was a separate transaction,[7] and that it would strain the natural meaning of the word to cover preparatory steps antecedent to the dealing in securities such as the use or disclosure of the inside information, or the deposit of money into the Tai Fook account.[8]

18. It is not clear from the appellants' printed case why that mattered. Suppose one reduces "transaction" to the narrowest unit of offending, the inclusive definition of "transaction" under s 300(3) includes "an offer and an invitation (however expressed)". [9] Thus, a bid or an offer could be a transaction. But it does not follow that a purchase which followed a bid, or a sale following an offer, could not also be a transaction under s 300(1). Nor do the defendants so contend. They merely contend that purchases and sales are separate transactions. Indeed, given the number of Hsinchu Bank shares purchased, the purchases most probably ranged over a number of days but the defendants appeared to be willing to accept that they could be one transaction. But, if so, why should "transaction" not include a purchase and sale, or a sale and purchase, or a series of both?

19. In *HKSAR v Yeung Ka Sing Carson* (2016) 19 HKCFAR 279, in connection with the crime of money laundering,[10] this court said:

> "137. In making a judgment as to whether acts are so connected that they can fairly be regarded as forming part of the same transaction or criminal enterprise it is necessary to keep in mind the purpose for which the question is asked."

20. That statement followed what Lord Diplock said in *Director of Public Prosecutions v Merriman*:[11]

> "Where a number of acts of a similar nature committed by one or more defendants were connected with one another, in the time and place of their commission or by their common purpose, in such a way that they could fairly be regarded as forming part of the same transaction or criminal enterprise, it was the practice, as early as the eighteenth century, to charge them in a single count of an indictment."

21. I am sure that if the defendants had been prosecuted in connection with their purchase and sale of shares in Hsinchu Bank, the charge would not have been bad for duplicity for the reasons given by Lord Diplock and by this court in *Yeung Ka Sing*.

22. For the same reason I do not believe in civil proceedings under s 213, "transaction" in s 300 could not cover both the purchase and sale of the shares.

23. The Court of Appeal observed[12] and I respectfully agree, it is contrived and artificial to split the purchase and sale into two or more separate transactions. That 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 them by accepting the tender offer,[13] and that the scheme or course of business planned by the defendants[14] was to make a profit by purchasing and then selling the shares by accepting the tender offer.[15]

24. As the Chief Justice has said, in interpretation, a word must be given a meaning that is required by the context of the section and such as would achieve its purpose.[16] Adopting this approach, I am sure the entire enterprise could be regarded as a transaction.

25. That being the case, I do not believe the argument (question (i)(b)) based on the use of the word "transaction" in the singular as opposed to in the plural in some of the provisions helps the defendants. Counsel for the respondent has referred us to even more provisions where "transaction" appears in the singular. I would not trawl through them.

26. In any event, I agree with the Court of Appeal that there is nothing in the context of s 300 which displaces s 7(2) of the Interpretation and General Clauses Ordinance (Cap 1), namely, that words and expressions in the singular include the plural and words and expressions in the plural include the singular, which applies "save where the contrary intention appears either from [Cap 1] or from the context of any other Ordinance or instrument".

27. Question (i)(c) raises the question whether the scope of the phrase "transaction involving securities" should cover or be capable of covering "the whole deceptive scheme or the whole course of dealings"[17] which includes acts such as the disclosure of inside information for the purpose of trading in securities, the opening of a securities account for the purpose of trading in securities, the depositing of money for the purpose of trading in securities, and the giving of instructions for the purpose of trading in securities. As I have said, *Yeung Ka Sing* shows clearly that such acts or conduct could fairly be regarded as forming part of the same transaction.

28. Moreover, it makes no sense to consider "transaction involving securities" in isolation, they must be construed in the context of s 300 which makes it an offence in any transaction involving securities to "(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". It defies all sense to say that in such proceedings, evidence relating to such device, scheme, act, practice or course of business etc should be disregarded.

29. Question (ii), I think, concerns the question whether any of the circumstances covered by s 300(1)(a) or (b) had been shown. I think the submission is that that the fraud or deception must be practiced on a counterparty to the transaction before it can be regarded as being "in a transaction".[18] In other words, no victim no fraud. Let me say at the outset that I agree with the learned judge and the Court of Appeal that fraud was practiced on SCB both in respect of the misuse of the inside information and the tender of the shares to SCB.

30. Mr McCoy SC relied on the fact that the origin of s 300 can be traced back to s 10(b) and Rule 10b-5 of the Securities Exchange Act 1934 ("SEA").[19] These US provisions have been characterized by the US Supreme Court as a *catchall*.[20] There is no dispute

about that. However, Mr McCoy would not accept that characterization for s 300. That does not matter. Essentially, Mr McCoy relied on the dissenting judgment of Justice Thomas in *US v O'Hagan* 521 US 642, which was decided in 1997, and sought to persuade us that we should construe s 300 in accordance with Justice Thomas's dissent. At the risk of simplification, Justice Thomas equated the use of inside information with the theft of say, cash from an employer to buy shares, and held that in such a case there was no fraud in the purchase of the shares. But, the majority espoused what may be called the misappropriation theory, and was of the view that a fiduciary who misused inside information for gain or avoidance of loss had dishonestly misappropriated that information which makes the conduct fraudulent.

31. Section 300 is a general provision and its effect does not depend on the metaphor used to describe it. What it catches or covers should be considered in the context of Hong Kong's legislation and according to our circumstances. Given the big difference between the treatment of insider dealing in the US and Hong Kong, I think it is unhelpful to consider how Rule 10b-5 had been construed since 1934 by different US courts.[21] In any event, both the learned judge[22] and the Court of Appeal[23] agreed with the majority in *O'Hagan*. Moreover,I don't think it was, and in any event, cannot be disputed that fraud had been practised on SCB by the misuse of the inside information in the purchase and subsequently when the shares were tendered to SCB.

32. It is pertinent to mention at this juncture that in these proceedings, the SFC also alleged that in 2007 there was insider dealing contrary to s 291(5) by the defendants in connection with shares in Asia Satellite Telecommunications Holdings Ltd ("AsiaSat"). The evidence[24] showed that Eric's then employer, Linklaters, was involved in the privatization of AsiaSat. Eric was not a member of the team involved in such work, but because of the proximity of Eric's office to the office of the team and that they shared the same printers, photocopiers, and fax machine, Eric was able to work out that a proposed privatisation was imminent. Anthony Chan J held, in respect of AsiaSat, Eric was the tipper and Betty, the tippee. That led to frantic purchases of AsiaSat shares by Betty and Patsy between the opening of trading on 9 February 2007 and 11:19 am when trading was suspended as the result of a request by AsiaSat because of the fluctuations in the share price, when their trading accounted for 73% of the entire turnover of AsiaSat on the Stock Exchange of Hong Kong ("SEHK").[25]

33. In respect of AsiaSat, the learned judge made orders similar to those made in respect of the Hsinchu Bank shares. There was no appeal in respect of the AsiaSat shares dealings.

34. Because of the definitions of listed securities and listed corporation under s 285, s

291(5) does not apply to shares listed on the Taiwan Stock Exchange. But "securities" under s 300 is defined in wide terms and as defined under the Interpretation and General Provisions,[26] is not confined to shares listed in Hong Kong. It can cover shares not listed in a recognized stock exchange.[27] I think it would be in keeping with the purpose of the SFO and Hong Kong's position as an international financial center, that provided "substantial activities constituting the crime" occurred within Hong Kong,[28] s 300 should cover the insider dealing in shares listed in Taiwan. I have no doubt that substantial activities constituting the complaint under s 300 occurred in Hong Kong. That was the view of the Court of Appeal, with respect, I agree.[29]

35. Since Hsinchu Bank shares were not listed in Hong Kong, there was no insider dealing under s 291(5), but if these shares are covered by s 300, might the transaction which involved them as found by the learned judge come within s 300 (1)(a) or (b)?

36. Here too, s 300 should be interpreted in the context of the SFO. If an insider dealing transaction under s 291(5) would be regarded as a transaction in which "any device, scheme or artifice with intent to defraud or deceive" has been employed or "any act, practice or course of business which is fraudulent or deceptive, or would operate as a fraud or deception" has been engaged, I see no reason why a different conclusion should apply to a similar transaction which is covered by s 300.

37. In *HKSAR v Du Jun* [2012] 6 HKC 119, which concerned insider dealing which took place in early 2007, the Court of Appeal after dismissing the appeal against conviction and when dealing with an appeal against a sentence of 7 years' imprisonment and total fine of $23,324,117 said at para 156 "… Insider dealing is a crime. It is a crime of dishonesty. It is cheating". The Court of Appeal endorsed the categorization of insider dealing by Lord Judge CJ in *R v McQuoid*[30] as a "species of fraud; it is cheating".[31] I would also note that Lord Judge also said the offence was "not to be treated as a victimless crime"[32] emphasizing that "[t]he person who sold the shares in TTP at 13 [pence] may have been determined to sell on that date at that price, or at any price. However, he would not have sold at that price if he had known that the takeover was already agreed and would become public within 48 hours." [33]

38. In this court, in *HKSAR v Chan Pak Hoe*,[34] Ribeiro PJ said:[35]

> "50. The courts recognize that insider dealing is a fraud on the public and, [in some cases], that it also involves a breach of trust."

39. It is clear from the above that insider dealing under s 291(5) of the SFO is a crime, a species of fraud and cheating. Moreover, it is a fraud on the public and not a victimless crime.

40. That being the case, I am of the view that conduct which would have amounted to insider dealing, but for the fact that the shares were not listed in Hong Kong, should be regarded as a crime, a species of fraud or cheating, thus coming within s 300(1)(a) or (b). It is unnecessary to distinguish between (a) and (b).

41. Also, I would note that s 305(1) provides that a person who contravenes, for example, s 291(5) or s 300:

> "shall … be liable to pay compensation by way of damages to any other person for any pecuniary loss sustained by the other person as a result of the contravention, whether or not the loss arises from the other person having entered into a transaction or dealing at a price affected by the contravention."

42. In *Du Jun*, the Court of Appeal reduced the fines imposed on the defendant because the fines would deprive the defendant's trading counterparties of compensation pursuant to s 213, in respect of which the SFC had commenced proceedings. The Court of Appeal also noted that a claim under s 305 might also be made by a losing counterparty.[36] *Du Jun* was concerned with shares in China Resources Holding Limited which were listed in Hong Kong. On 18 August 2015, the SFC announced that the court-appointed administrators had completed distributions of restoration payments to all but 3 of the 297 counterparties to the insider dealing by *Du Jun*, a total of $23,086,314 had been paid and a balance of $813,686 due to the remaining three investors returned to *Du Jun* with the approval of the court.[37] Just as a claim might be made by victims of s 291(5), I see no reason why a claim might not be made by victims of insider dealing which fell outside because the shares were listed in Taiwan. I would add that in the Court of Appeal Mr Shieh SC rightly accepted for the defendants that the fraud or deception was practiced on the vendors of the Hsinchu Bank shares when they were purchased on the Taiwan Stock Exchange.[38]

43. Mr McCoy also submitted that if s 300 was construed so as to cover insider dealing, then a person who is prosecuted under s 300 for insider dealing might, for example, be deprived of the defences available to him under s 292. The concern is misplaced.[39] To my mind, conduct for which the defences afforded by s 292 are available would not satisfy s 300(1)(a) or (b). Section 291 prohibits any dealing by an insider and those whom I would loosely call tippees subject to defences provided by ss 292, 293 and 294. It is clear that insider dealings which the courts would regard as a crime, a species of fraud or cheating, are dealings in respect of which none of the defences under s 292 could be established.

44. For the above reasons, I would dismiss the appeal.

45. For completeness sake, I would answer the questions, as follows:

Question 1

(a) The word transaction has a wide meaning and covers in the present case, the appellants' scheme to profit by the use of inside information.

(b) This exercise is unhelpful in view of the answer to (a).

(c) The phrase "transaction involving securities" must be considered in the context of s 300, and as such covers, *inter alia*, dealings with a view to profit or avoidance of loss by the use of inside information.

Question 2

In the context of s 300, the question is whether "in [any] transaction involving securities", any of the matters outlined in sub para (a) or (b) had been employed or was engaged and the words should be construed in its context.

Mr Justice Spigelman NPJ:

46. I have had the advantage of reading the judgments of Tang PJ and Ribeiro PJ in draft. Subject to one matter in the judgment of Tang PJ, where I reach the same result by a different route, I agree with both judgments. I wish to state my own reasons with respect to certain discrete issues raised by the submissions.

"Catch All"

47. The Court of Appeal adopted the description of s 300 of the Securities and Futures Ordinance ("SFO") as a "catch all" provision. That is inappropriate terminology for a criminal offence. In the Court of Appeal, the words were said to have been applied by the Supreme Court of the United States to the similarly worded offence under s.10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 and which, probably indirectly, was the origin of s 300 and its predecessors in Hong Kong.

48. This attribution to the Supreme Court was derived from an express reference in one of the leading American texts on securities law: Loss, Seligman and Paredes *Fundamentals of Securities Regulation* (6th ed. p1288. Now see 7th ed. p1442). They rely on the Supreme Court judgement in *Ernst & Ernst v Hochfelder* 425 U.S. 185, 203 (1976).

49. The Supreme Court was dealing with a submission that a company's auditor could be liable in negligence for failing to detect an underlying fraud and had, thereby, aided and abetted the contravention. This was a form of accessorial civil liability.

50. It appears that the words were first used by Thomas G. Corcoran, characterized by the Supreme Court as a "spokesman for the drafters". Probably correctly so characterized, as

Corcoran was regarded as the leader of the "New Dealers", a group of influential young lawyers in the FDR White House, when the Securities Exchange Act became law. The Court interpreted the words of the statute to conclude that it was concerned only with knowing and intentional conduct.

51. It was in this context that the Court referred favourably to the terminology of a "catch all" provision as the only aspect of the legislative history of any assistance to the issue before the Court. The majority reasons stated:

> "This brief explanation of §10(b) by a spokesman for its drafters is significant. The section was described rightly as a 'catchall' clause to enable the Commission 'to deal with new manipulative (or cunning) devices.' It is difficult to believe that any lawyer, legislative draftsman, or legislator would use these words if the intent was to create liability for merely negligent acts or omissions" (emphasis added).

52. Whilst the Court accepted the terminology, the politically charged advocacy in the origins of the phrase makes it quite inappropriate to apply it to a criminal offence. Further, the use made by the Supreme Court of the comments by the "spokesman for the drafters" of the legislation in 1934, is not appropriate under Hong Kong law (see *HKSAR v Cheung Kwun Yin* (2009) 12 HKCFAR 568 at [15]–[17]).

53. It is the words of s 300 that must be applied, not a characterization expressed at a high level of generality, in terms that are likely to misstate the scope of the offence.

The Counterparty Issue

54. I wish to add two observations to reinforce the analysis of Ribeiro PJ with respect to the submission that a person cannot be found guilty of an offence against s 300 unless that person is a *party* to the transaction. This proposition is not consistent with the legislative history.

55. The predecessor provision was s 136 of the Securities Ordinance (Cap 333) which provided:

> "A person shall not, directly or indirectly, in connection with any transaction with any other person involving the purchase, sale, or exchange of securities—
>
> (a) employ any device, scheme, or artifice to defraud that other person; or
>
> (b) engage in any act, practice, or course of business which operates as a fraud or deception, or is likely to operate as a fraud or deception, of that other person."

56. Virtually identical provisions appeared in the then separate regulation of futures trading and leveraged foreign exchange trading (see s 63 of the Commodities Trading Ordinance (Cap 250) and s 40 of the Leveraged Foreign Exchange Trading Ordinance (Cap

451)). The words "with any other person" appeared in all three. The words "involving the purchase or sale (or exchange in Cap 333) of securities/a futures contract" appeared only in Cap 333 and Cap 250. These disparate schemes of regulation were consolidated into s 300 of the SFO.

57. As indicated above, s 136 of Cap 333 expressly referred to a "transaction *with any other person*",as did Cap 250 and Cap 451. These words do not appear in the successor section s 300, which replaces the three former regulatory schemes. That formulation is now expressed as a "transaction involving securities, futures contracts or leveraged foreign exchange trading". There is no express reference to a counterparty. The effect of the Appellants' submission is to write back into the section the words which the legislature removed.

58. Secondly, the legislature also removed the reference to the kinds of transactions which must be "involved", by not repeating the reference to "purchase, sale, or exchange". These words of limitation no longer appear. The generality of the word "involving" is no longer restricted in this, or any other way.

59. The word "involving" suggests a wide range of connection. As Bokhary PJ noted in *Mariner International Hotels Ltd v Atlas Ltd* (2007) 10 HKCFAR 1 at [51], the word "involving" was "one of the broadest words of association known to the English language". (Referred to with approval in *Moody's Investors Service Hong Kong Ltd v Securities and Futures Commission* [2018] HKCFA 42 at [35]).

60. In any event, "transaction" is not a word that can be confined to a single arrangement, like a contract for sale or purchase. As the Ontario Court of Appeal put it in *R v Canavan and Busby* [1970] 3 OR 353 at 356, per Schroeder J.A.: "[a] 'transaction' may and frequently does include a series of occurrences extending over a length of time". The preposition "in" can clearly be applied to such a sequence.

61. For present purposes it is sufficient to conclude that conduct can involve "securities", and have occurred "in a transaction", if the events said to constitute the transaction consist of a series of inter-related, but discrete, steps. That was the case here.

The Insider Dealing Scheme

62. The one respect in which I would reach the same conclusion as Tang PJ, but by a different route, arises from para 43of his reasoning. This paragraph deals with the Appellant's submission that the interpretation of s 300 adopted by the Court of Appeal, would permit the Securities and Futures Commission ("SFC") to prosecute for an insider dealing offence that would otherwise fall within s 291 of the SFO. They submitted that

such a course would deprive an accused of the defences for which that legislative scheme provides.

63. Tang PJ states that a contravention of s 300 would not be upheld unless none of the ss 292–294 defences could be established. I prefer to analyse this issue by applying the frequently deployed interpretive technique of reading down general words, relevantly, to s 300.

64. I adopt the principle of statutory interpretation that general words will be read down so as not to apply when the same instrument contains a particular provision, which would otherwise wholly fall within the wider provision but which, unlike that provision, contains exceptions, restrictions, conditions or procedural requirements. In such a case, interpreting the instrument as a whole leads to the conclusion that the legislature intended only the particular provision to apply (see e.g *Anthony Hordern & Sons Ltd v Amalgamated Clothing & Anor* (1932) 47 CLR 1 at 7; *R v Wallis* (1949) 78 CLR 529, at 550; *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at [2], [54], [59]; *Saraswati v The Queen* (1991) 172 CLR 1 at 23-25*; R v J* [2005] 1 AC 562 at [21], [35], [48] and [63]. See also D.C. Pearce and R.S. Geddes, *Statutory Interpretation in Australia* (8th ed, LexisNexis 2014) at [4.36]–[4.39]).

65. Most relevantly, *Saraswati* in the High Court of Australia and *R v J* in the House of Lords applied this approach in a criminal context. Both courts were faced with similar provisions for sexual offences. An offence of indecent assault was subject to a time bar, but an offence of committing an act of indecency (which always occurs in a sexual assault) was not. Both courts held that it was impermissible to charge a person with the act of indecency offence, when the facts constituted an assault and, in the circumstances, the time bar applied.

66. Division 2 of Part XIV of the SFO contains a comprehensive and detailed scheme for the prohibition of insider dealing directed to shares listed on the Hong Kong Stock Exchange. The provenance of this inside dealing regime is the Securities (Insider Dealing) Ordinance (Cap 395), a different Ordinance than Cap 333, where s 300 of the SFO originated. Section 300 is now found in Division 4 of Part XIV of Cap 571. Interposed in Division 3, which is entitled “Other market misconduct offences”, are provisions relating to false trading and price rigging. Like s 300 they were transferred from Cap 333.

67. Focusing on Division 2, specifically the defences set out in ss 292-294, it is apparent that the Division constitutes a self-contained, comprehensive scheme. Those sections provide protection for:

- shares acquired to qualify as a director;
- good faith performance of an underwriting agreement;
- good faith performance of functions of a liquidator, receiver or trustee in bankruptcy;
- acquisition by a corporation when the persons who made the decision did not have the inside information that other directors or employees did have;
- acquisition or disposal which was not for the purpose of making a profit or avoiding a loss by using inside information;
- a person who acted as an agent, without knowledge that the principal had inside information;
- an off market transaction between persons who both had the inside information;
- where the inside information was "market information" or a "market contract", both as defined;
- acquisition by a trustee or personal representative acting in good faith on advice, and
- acquisition by exercise of a right to subscribe attached to securities acquired before the person became aware of the inside information.

68. The scope and detail contained in these defences indicate an integrated scheme, intended to make comprehensive provision with respect to the insider dealing offence created by s 291. That conclusion is reinforced by the fact that the defences are generally introduced by the words: "for the person to prove".

69. The separation of the two schemes is further reinforced by s 306. That section empowers the SFC to makes rules prescribing circumstances in which conduct, that would otherwise offend Part XIV, including s 291, do not constitute an offence. Section 300 is specifically excluded from this power. Where such rules had been made, a prosecution for such conduct under s 300 must be impermissible.

70. The Appellant's submission to the effect that a prosecution under s 300 for conduct constituting an offence under s 291 may be permissible, should be rejected. The legislature intended that conduct, which constitutes an offence under s 291, should be prosecuted under Division 2, to the exclusion of s 300.

Chief Justice Ma:

71. For the above reasons, the appeal is dismissed. As to costs, we would make an order *nisi* that the Appellants pay the costs of the Respondent in this appeal, such costs to be taxed if not agreed. Should any party seek a different order as to costs, written submissions should be lodged with the Registrar (and served on the other parties) within 14 days of the handing down of this judgment, with liberty on the other parties to lodge and serve written submissions in reply within 14 days thereafter. If no written submissions are received seeking a different order as to costs before the expiry of the relevant period, the order *nisi* will become absolute.

(Geoffrey Ma)	(R A V Ribeiro)	(Robert Tang)
Chief Justice	Permanent Judge	Permanent Judge

(Joseph Fok)	(James Spigelman)
Permanent Judge	Non-Permanent Judge

Mr Gerard McCoy SC, Mr Derek Chan SC and Ms Cherry Xu, instructed by Wellington Legal, for the 2nd to 4th Defendants (1st to 3rd Appellants)

Mr Benjamin Yu SC and Mr Laurence Li, instructed by the Securities and Futures Commission, for the Plaintiff (Respondent)

---

[1] (Cap 571).

[2] CFI, para 132.

[3] The judge found that Patsy knew that Betty was the source of the inside information. CFI, para 141.

[4] Betty $2,250,000, Eric $3,280,000, Patsy $351,000, Stella $500,000.

[5] The seriousness of the offence can be gathered from the fact that on conviction on indictment, *inter alia*, there could be imprisonment for 10 years and a fine of $10,000,000, s 303(1)(a) as well as payment to the government of an amount not exceeding the amount

of profit made or loss avoided
(s 303(2)(d)). No criminal prosecution was brought against any of the defendants.

[6] Section 213(4).

[7] Appellants' case, para 3.3.

[8] Appellants' case, para 3.4.

[9] Possibly because I believe it is probable that the extended meanings were already covered.

[10] Section 25(1) Organized and Serious Crimes Ordinance (Cap 455), in connection with the question whether charges which involved multiple transactions in multiple bank accounts were bad for duplicity.

[11] [1973] AC 584, 607.

[12] Court of Appeal, paras 26 & 29.

[13] Court of Appeal, para 38.

[14] Court of Appeal, para 25.

[15] Court of Appeal, para 38.

[16] *Fully Profit (Asia) Ltd v Secretary for Justice* (2013) 16 HKCFAR 351.

[17] Court of Appeal, para 41.

[18] Court of Appeal, para 17.

[19] This is raised in question (i)(a) but I think this is a better place to deal with it.

[20] *Fundamentals of Securities Regulation*, by Loss, Seligman and Paredes, 6th ed, vol 2, p. 1288; *Ernst & Ernst v Hochfelder* 425 US 185 (1976), 203.

[21] Insider dealing in the US had its origin in the common law, whereas in Hong Kong it has always been statutory.

[22] CFI, paras 208-213, 218-219.

[23] Court of Appeal, para 42.

[24] CFI, paras 38-52.

[25] CFI, para 52.

[26] Schedule 1 of the SFO.

[27] At one time, Mr McCoy submitted that it would cover shares in an unlisted company in Hong Kong. Given that the definition expressly excluded private companies as defined now in s 11 of the new Companies Ordinance Cap 622, Mr McCoy may well be right that s 300 might also cover shares in a public company as defined in s 12 of Cap 622, notwithstanding that they were not listed. But it is unnecessary to decide the point and I would not do so.

[28] *HKSAR v Wong Tak Keung* (2015) 18 HKCFAR 62, para 33.

[29] Court of Appeal, paras 53-68.

[30] [2009] 4 All ER 388, giving the judgment of the English Court of Appeal.

[31] Para 9.

[32] Para 7. I think two victims can be readily identified. The person whose inside information was misused and the person who traded with the impugned person in ignorance of the inside information.

[33] Para 7.

[34] (2012) 15 HKCFAR 244, 258.

[35] With the agreement of Ma CJ, Chan PJ and Lord Collins of Mapesbury NPJ.

[36] Para 171.

[37] https://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=15PR85

[38] Court of Appeal, para 17.

[39] One would not be prosecuted for insider dealing under s 300. Any prosecution or claim will be made on the basis that the relevant conduct came within s 300(1)(a) or (b).

香港終審法院

THE HONG KONG COURT OF FINAL APPEAL

This Summary is prepared by the Court's Judicial Assistants

and is not part of the Judgment.

The Judgment is available at:

http://www.hkcfa.hk/en/work/cases/index.html

or

http://legalref.judiciary.hk/lrs/common/ju/judgment.jsp

PRESS SUMMARY

Securities and Futures Commission

v

Lee Kwok Wa and Ors

FACV No. 7 of 2018 on appeal from CACV No. 33 of 2016

APPELLANTS: Lee Kwok Wa, Lee Siu Ying Patsy, Lee Siu Fan Stella

RESPONDENT: Securities and Futures Commission

JUDGES: Chief Justice Ma, Mr Justice Ribeiro PJ, Mr Justice Tang PJ, Mr Justice Fok PJ and Mr Justice Spigelman NPJ

COURTS BELOW: Court of First Instance: Anthony Chan J; Court of Appeal: Lam VP, Kwan and McWalters JJA

DECISION: Appeal unanimously dismissed

JUDGMENT: Mr Justice Tang PJ delivering the main judgment of the Court dismissing the appeal, Mr Justice Ribeiro PJ delivering a concurring judgment, Mr Justice Spigelman NPJ delivering a separate judgment concurring with Mr Justice Tang PJ and Mr Justice Ribeiro PJ, Chief Justice Ma and Mr Justice Fok PJ delivering a joint judgment concurring with Mr Justice Tang PJ, Mr Justice Ribeiro PJ and Mr Justice Spigelman NPJ.

DATE OF HEARING:15 October 2018

DATE OF JUDGMENT:31 October 2018

REPRESENTATION:

Mr Gerard McCoy SC, Mr Derek Chan SC and Ms Cherry Xu, instructed by Wellington Legal, for the Appellants

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

SUMMARY:

1. The 1st Defendant, Young Bik Fung ("**Betty**"), was a solicitor in the employ of Slaughter and May ("**SANDM**"). The 1st Appellant, Lee Kwok Wa ("**Eric**") was also a solicitor. He was Betty's good friend and one-time lover. The 2nd Appellant, Lee Siu Ying Patsy ("**Patsy**") and the 3rd Appellant, Lee Siu Fung Stella ("**Stella**") are Eric's sisters.

2. In April 2006, Betty was sent by her employer to Standard Chartered Bank (HK) Limited ("**SCB**") on secondment to work on SCB's intended takeover of Hsinchu International Bank Co Ltd ("**Hsinchu Bank**"). Hsinchu Bank was a company listed on the Taiwan Stock Exchange. In the course of such work, Betty learned of the impending takeover offer and the proposed price of the offer. This information was inside information.

3. In breach of her duties to her employer and SCB, Betty shared the inside information with Eric. They then arranged for Patsy to open a new securities account in Hong Kong with Tai Fook Securities Co Ltd ("**Tai Fook**"). Between 22 and 29 September 2016, Patsy placed purchase order for substantial shares in Hsinchu Bank via Tai Fook on the behalf of Betty, Eric and Stella using the purchase money contributed by all four of them. The instruction was relayed to an intermediary in Taiwan where the purchase of securities took place. On 29 September 2016, the takeover offer was announced. Betty and the appellants accepted the offer via Tai Fook, netting substantial profits.

4. The Securities and Futures Commission ("**SFC**") commenced proceedings against Betty and the appellants in the Court of First Instance. The Court of First Instance found that they have misused the inside information in the dealings in Hsinchu Bank shares to obtain personal profits without the consent of SANDM and SCB. Accordingly, the Court of First Instance found that Betty, Eric and Patsy were culpable of employing fraudulent or deceptive devices in transactions involving securities under section 300 of the Securities and Futures Ordinance ("**SFO**"). While the Court of First Instance found that Stella did not contravene s 300, she was involved in the

contravention and thus was liable to return her profits.

5. The appellants appealed to the Court of Appeal. One of the appellants' arguments was that the word "transaction" under s 300 does not include conduct that occurred before the purchase and sale of securities, such as the opening of the securities account by Patsy in Hong Kong. Furthermore, it was argued that s 300 does not cover the purchase and sale of the Hsinchu Bank shares which took place outside Hong Kong. Therefore, the appellants could not have contravened s 300.

6. Additionally, the appellants argued that in order for their conduct to be regarded as occurring "in a transaction involving securities" for the purpose of s 300, the fraud must have been practised on the counterparty of either the purchase or the sale of the securities. It was argued that when the shares were purchased, the vendors of the Hsinchu Bank shares were not defrauded. Nor was there deception in the sale of the shares as the information about the takeover offer had ceased to be inside information by the time the sale took place. Therefore, there was no deception "in the transaction involving securities".

7. The Court of Appeal rejected both arguments and affirmed the decision of the Court of First Instance. The appellants brought a further appeal to this Court.

8. The central questions in this appeal turn on the construction of s 300. Firstly, whether the word "transaction" in the context of s 300 of the SFO should be widely interpreted to include conduct which took place before the purchase and sale of securities. Secondly, whether any fraudulent or deceptive acts have occurred "in a transaction involving securities".

9. The Court held that the word "transaction" should be interpreted by the context and purpose of s 300. S 300 is a general provision that outlaws fraudulent conduct in securities transactions. Adopting this approach, the word "transaction", for the purpose of s 300, must be given a wide meaning.

10. In the present case, it includes a series of purchases and sales of Hsinchu Bank shares and the steps that were taken with a view to profit or avoid loss by misusing inside information, such as the opening of the securities account and the giving of instructions for the purpose of trading in securities.

11. Additionally, the Court held that in the present case, there was fraud on SCB "in a transaction involving securities" in respect of the appellants' misuse of the inside information for personal gain.

12. Moreover, insider dealing is a species of fraud. It is a fraud on the public and not a victimless crime. Since it is undisputed that the appellants would have contravened s 291(5) of the SFO for inside dealing but for the fact that Hsinchu Bank shares were not listed in Hong Kong, their conduct amounted to a species of fraud which comes within s 300. Given that substantial activities constituting the complaint under s 300 occurred in Hong Kong, the appellants' conduct is covered by s 300.

CONCLUSION:

13. Accordingly, the appeal was unanimously dismissed.

[Chinese Translation — 中譯本]

香港終審法院

本摘要由終審法院司法助理擬備

並非判案書的一部分

判案書可於下述網址取閱:

http://www.hkcfa.hk/tc/work/cases/index.html

或

http://legalref.judiciary.hk/lrs/common/ju/judgment.jsp

新聞摘要

證券及期貨事務監察委員會

對

楊碧鳳

李國華

李少英

李少芬

終院民事上訴*2018*年第*7*號

(原上訴法庭民事上訴*2016*年第*33*號)

上訴人: 李國華、李少英及李少芬

答辯人**:**證券及期貨事務監察委員會

主審法官 **:** 終審法院首席法官馬道立、終審法院常任法官李義、終審法院常任法官鄧國楨、終審法院常任法官霍兆剛及終審法院非常任法官施覺民

下級法院**:** 原訟法庭(高等法院法官陳健強); 上訴法庭(上訴法庭副庭長林文瀚、上訴法庭法官關淑馨及上訴法庭法官麥偉德)

判決**:** 本院一致駁回上訴

判案書 **:** 常任法官鄧國楨 宣告本院的主要判詞, 駁回上訴; 常任法官李義宣告一份同意

判詞；非常任法官施覺民另外宣告一份判詞，表示贊同常任法官鄧國楨　及常任法官李義的判決；首席法官馬道立及常任法官霍兆剛共同宣告一份判詞，表示贊同常任法官鄧國楨、常任法官李義及非常任法官施覺民的判決。

聆訊日期：2018年10月15日

判案書日期：2018年10月31日

法律代表：

資深大律師麥高義先生、資深大律師陳政龍先生及大律師許琪莉女士（由趙國賢律師事務所延聘）代表上訴人

資深大律師余若海先生及大律師李律仁先生（由證券及期貨事務監察委員會延聘）代表答辯人

摘要：

1.　第一被告人楊碧鳳是一位受聘於司力達律師樓（「司力達」）的事務律師。第一上訴人李國華也是一位事務律師。他是楊碧鳳的好友，兩人曾爲情侶。第二上訴人李少英及第三上訴人李少芬則是李國華的姐姐。

2.　2006年4月，楊碧鳳被僱主借調到渣打銀行（香港）有限公司（「渣打銀行」），爲渣打銀行有意對新竹國際商業銀行有限公司（「新竹銀行」）進行的收購進行相關工作。新竹銀行是一間在台灣證券交易所上市的公司。在進行這項工作期間，楊碧鳳得悉了即將公佈的收購要約和該要約的建議價格。這些資料均屬內幕消息。

3.　楊碧鳳違反了她對僱主及渣打銀行的義務，將有關內幕消息告知李國華。其後，他們安排李少英在香港的大福證券有限公司（「大福」）開設一個新的證券戶口。
在2016年9月22日至29日期間，李少英代楊碧鳳、李國華和李少芬向大福下達購買新竹銀行股份的指示。購買股份的資金由四人共同提供。大福將有關指示轉達到一個台灣的中介人，並通過中介人代四人購入大量股份。有關方面於2016年9月29日公佈了收購新竹銀行的要約。及後，楊碧鳳和各上訴人通過大福接受了該要約，獲取了豐厚的利潤。

4.　證券及期貨事務監察委員會（「證監會」）對楊碧鳳及各上訴人在原訟法庭展開法律程序。原訟法庭裁定他們在進行涉及新竹銀行股份的交易時，未經司力達和渣打銀行的同意，利用有關內幕消息來謀取個人利益。因此，原訟法庭裁定楊碧鳳、李國華及李少英的行爲構成「在涉及證券交易方面使用欺詐或欺騙手段」，違反《證券及期貨條例》第300條。雖然原訟法庭裁定李少芬沒有違反第300條，但她從該項非法交易中獲利，故須退還她所獲的利潤。

5. 各上訴人向上訴法庭提出上訴。他們主張第300條中「交易」一詞並不包括買賣有關證券前作出的行爲，例如：李少英在香港開立證券戶口此舉。此外，上訴一方說第300條並不涵蓋上訴人在香港以外地方所就新竹銀行股份進行的股份買賣，故各上訴人不可能違反了第300條。

6. 另外，各上訴人提出，根據第300條的規定，他們進行的欺詐必須針對買入或賣出有關證券的交易對象才能被視為「在涉及證券的交易中」。上訴方辯稱他們在買入股份時並沒有欺詐新竹銀行股份的賣方。再者，在賣出股份時，有關的資料已經不再是內幕消息。所以他們的行為並不構成欺詐。因此，上訴人認為本案他們並沒有「在涉及證券的交易中」使用欺詐手段。

7. 上訴法庭拒絕接納上述兩個論據，並維持原訟法庭的裁定。各上訴人不服裁決，進一步上訴至本院。

8. 是次上訴的核心問題在於如何詮釋第300條。首先，考慮到《證券及期貨條例》第300條的文意，「交易」一詞是否應獲廣泛釋義爲包括在買入及賣出有關證券之前作出的行爲。其次，上訴人的行為是否構成「在涉及證券的交易中」使用欺詐或欺騙手段。

9. 本院裁定「交易」一詞應按第300條的文意及目的來釋義。第300條是一般條文，概括地禁止任何人在涉及證券的交易中進行欺詐行爲。使用此詮釋方法來解讀第300條，「交易」一詞必須被予以廣泛的涵義。

10. 在本案中，有關「交易」包括一連串買入和賣出新竹銀行股份的交易，以及上訴人為了藉不當使用內幕消息以賺取利潤或避免損失而採取的行動（例如：開立證券戶口及作出指示以便買賣證券）。

11. 此外，本院裁定在本案中，由於各上訴人不當使用內幕消息謀取個人利益，他們的行為構成「在涉及證券的交易中」對渣打銀行進行欺詐。

12. 況且，內幕交易是欺詐的一種。這是一項對公衆進行的欺詐，並非是沒有受害人的罪行。若不是因爲新竹銀行的股份未有在香港上市，他們的行爲早已構成《證券及期貨條例》第291（5）條中所指的內幕交易。因此，他們的行爲是欺詐的一種，並違反第300條。考慮到被指稱違反第300條的行為主要在香港發生的，故各上訴人的行爲是受第300條涵蓋的。

結論：

13. 因此，本院一致駁回上訴。