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Briefing note

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SFC's broad power under section 213 confirmed

In a landmark ruling on 30 April 2013, Hong Kong's Court of Final Appeal (**CFA**) dismissed Tiger Asia Management LLC's (**Tiger Asia**) appeal brought against the Hong Kong Securities & Futures Commission (**SFC**), in which Tiger Asia, an off-shore hedge fund based in New York, had sought to challenge the market regulator's power to seek final freezing orders against some of Tiger Asia's assets in the jurisdiction, without Tiger Asia or its executives ever having been convicted of an offence of insider dealing or market misconduct in Hong Kong for its alleged dealings in shares of the Bank of China Limited and the China Construction Bank Corporation Limited during 2009.

The CFA ruling, which upholds an earlier Court of Appeal ruling in the SFC's favour, means that the SFC does have authority to seek remedial orders and injunctions against Tiger Asia without a criminal conviction or civil misconduct offence having been recorded, and to ban Tiger Asia from trading in Hong Kong, by invoking section 213 of the Securities & Futures Ordinance (SFO) – paving the way for the SFC to pursue compensatory claims on behalf of investors.

(See our previous client briefings for more information on the background of the case.)

CFA's reasons for the decision

The CFA mirrored the Court of Appeal's decision that the CFI had jurisdiction under section 213(2) of the SFO to independently determine whether there had been market misconduct and to grant a final order to the SFC, without the need for the Market Misconduct Tribunal (**MMT**) or the criminal court to make such a determination first. The CFA also made these additional observations:

- Although a finding by the MMT or the criminal court will each involve a determination of whether Tiger Asia had contravened the prohibition on insider dealing, it does not mean that such determination may only be made under the two routes. A determination may be made under other provisions in the Ordinance and will depend on the construction of those provisions.
- The remedies under section 213 of the SFO serve a different purpose from the penalties which can be imposed by the MMT or the criminal court. Remedies under section 213 of the SFO provide remedies for the benefit of victims involved in impugned transactions. Penalties imposed by the latter are in the general public interest, which is to punish wrong doing. Proceedings under the former is not a substitute for criminal prosecution or proceedings before the MMT.

- The SFC in proceedings under section 213 of the SFO acts “not as a prosecutor…but as a protector of the collective interests of the persons dealing in the market who have been injured by market misconduct”.
- A declaration by the CFI that Tiger Asia has contravened the prohibition on insider dealing only means that Tiger Asia has done acts which found jurisdiction under section 213 of the SFO (which acts also happen to be a criminal offence). This is a declaration by a civil court. Whether Tiger Asia has committed a criminal offence remains entirely a matter for the criminal court.
- Although there might be a danger of inconsistent decisions (where the CFI finds a contravention under s213 of the SFO but the criminal court or the MMT does not), inconsistency is always a possibility when different tribunals have jurisdiction to decide the same issue. In the face of plain language, this is not a good enough reason to say that it was intended for only one tribunal to have jurisdiction to decide an issue.
- Finally, the separate jurisdictional nature of the MMT and the CFI under section 213 of the SFO is consistent with the legislative history of the SFO.

Whilst clearly a landmark ruling in relation to the SFC's powers to deal with offshore parties that have committed market misconduct in Hong Kong but who are otherwise not amenable to the jurisdiction of the criminal courts – such cases may not be that common. What remains to be seen is how broad an impact this decision will have in relation to how the SFC deals with onshore parties. No doubt the SFC will want to make the most of its powers under section 213 of the SFO to pursue its goal of compensating victims of market misconduct in relation to Hong Kong's securities and futures markets.

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