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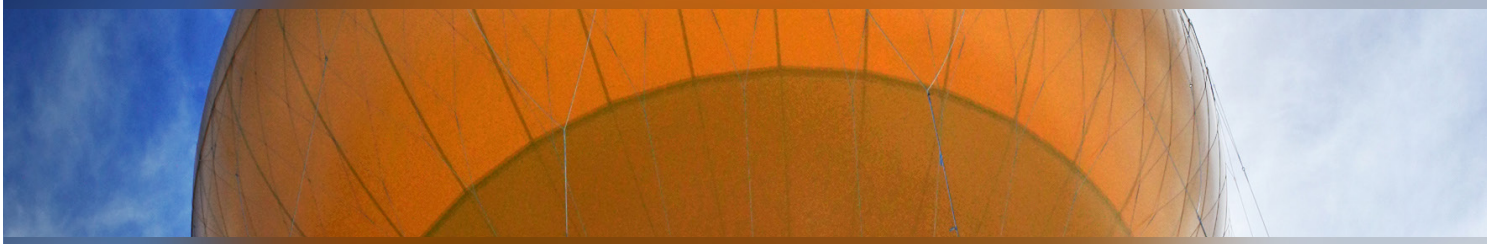

CONTENTIOUS COMMENTARY
JANUARY 2018

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Big Ticket

Extensive discovery ordered against solicitors' firm

The tale of the solicitor who took large sums of money from his firm's client account and used it to gamble in casinos in Macau continues to provide the courts with interesting fodder. In *K&L Gates v Navin Kumar Aggarwal* [2017] HKEC 2538, David Lok J ruled upon specific discovery applications by the casino defendants in an action by the plaintiff to recover the funds. The plaintiff seeks to recover on the basis of knowing receipt or money had and received, on the ground the casino defendants are alleged to have had knowledge of Aggarwal's fraud such as to make it unconscionable for them to retain the money. The casino defendants say they reasonably believed the transfers were legitimate transfers and that the sums were received for valuable consideration, for Aggarwal's gambling activities or settlement of outstanding credit.

The plaintiff opposed discovery of many of the documents sought on the basis of relevance or legal professional privilege. It claimed an order compelling it to disclose bank statements and transaction records (enabling the casino defendants to trace the source of the monies transferred to them) would be *"extremely oppressive"* given the number of documents and the timescale in question.

Lok J said the documents were central to the issue of the title of the monies used to pay out the transfers. He agreed with counsel for the casino operators that this litigation was*, "by any measure, "big ticket" litigation being conducted by well-funded and resourced parties."*

The plaintiff sought to claim legal privilege over internal correspondence in respect of the making of the transfers and in respect of enquiries made by the firm's bankers, including of a meeting attended by Aggarwal. Lok J said the plaintiff had put nothing before the court to explain why such correspondence was privileged.

As for the notes of the meeting, the plaintiff had already waived privilege since it had summarised and relied on the contents of the meeting in its pleadings and witness statements. Lok J criticised some of the redactions made by the plaintiff saying the plaintiff should have given the court a sense of the materials excluded and why they were not relevant to the issues of the case.

In ordering extensive discovery against the plaintiff, the Court made a costs order *nisi* the plaintiff should pay the casino defendants 80% of the costs of the applications.

On the inside

Court of Appeal rejects appeal against insider dealing verdict

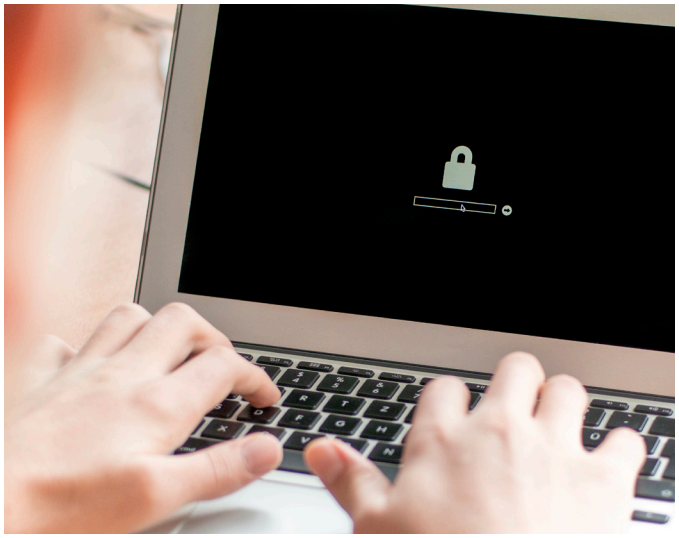
The Court of Appeal in *Securities and Futures Commission v Young Bik Fung* [2017] HKEC 2414 has dismissed an appeal by a solicitor and two others against a finding they had contravened section 291 Securities and Futures Ordinance (SFC) by insider dealing in the shares of Asia Satellite Telecommunications Holdings Limited (AsiaSat); and section 300 SFO which makes it an offence to employ fraudulent or deceptive schemes in transactions involving securities. The SFC had been unable to rely on the insider dealing provisions in respect of dealings in Hsinchu International Bank Company Limited (Hsinchu), as Hsinchu was listed in Taiwan and the SFO provisions do not cover trading in overseas listed shares.

The Court of Appeal upheld the restoration order made by the Court of First Instance against the defendants pursuant to section 213 SFO. The total profit from the impugned transactions was HK$2.9 million.

The SFC claimed that the solicitor, Betty, whilst on secondment to a bank, obtained confidential material price sensitive information (CMPSI) about a tender offer that the bank intended to make for Hsinchu. Betty then shared the information with Eric (also a solicitor) and both acquired Hsinchu shares through an account opened in the name of Patsy (Eric's sister). Patsy also invested on her own account and on behalf of Stella (Eric's other sister). Patsy and Stella accepted the offer at a substantial premium to the market price, making a profit for all involved.

As for AsiaSat, the SFC's case was that Eric, acquired CMPSI when another team of lawyers in the law firm in which he

worked advised on the company's privatisation. Eric shared the information with Betty and Patsy. Betty and Patsy (acting for herself and Stella) then purchased shares in AsiaSat and afterwards sold the shares at a profit upon privatisation. Eric, Patsy and Stella pursued appeals against the CFI judgment.



The Court of Appeal rejected counsel's argument that, as the vendors in Patsy's purchase of the Hsinchu shares were not defrauded, there was no deception in the transaction involving securities and the case was therefore outside the scope of section 300. The word "*transaction*" should be given a wide interpretation and should encompass the whole course of trading up to and including the sale of the shares. Liability could be established under section 300 based on fraud or deception practised upon a person other than the counterparty directly engaged in the transaction.

The Court of Appeal also rejected the argument there was no deception on the bank because the information ceased to be CMPSI by the time of the tender offer. Betty owed a continuous duty to the bank to disclose the misuse of the CMPSI even after the tender offer was made public.

The Court of Appeal also rejected a jurisdictional argument that as the making of the offer to purchase the Hsinchu shares took place in Taiwan, the activities should be regarded as being undertaken outside the jurisdiction, finding that the preponderance of the activities under the scheme took place in Hong Kong.

Although Stella had not knowingly participated in any insider dealing, the Court of Appeal confirmed that the restoration order against her should stand. Her investment decisions were influenced by information that was sourced from or based upon inside information, even though she was not aware of it.

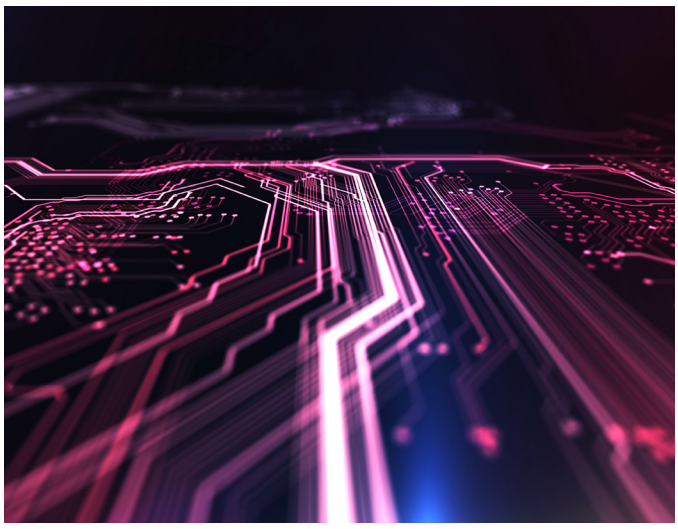
The broad interpretation given by the Court of Appeal to section 300 will be welcomed by the SFC, as the SFC is now assured a broad remit to address insider dealing cases (or other market misconduct) where some of the acts complained of took place outside Hong Kong and where the securities concerned are not listed in Hong Kong.

Digital dilemma

Broadband provider falls short in fibre challenge

The information superhighway has many potholes along the way. One such obstacle presented itself in *PCCW HKT Telephone Ltd v Link Properties Ltd* [2017] HKEC 2386. The plaintiff network service provider wanted to access the common use parts of a commercial complex in the Choi Wan district to install telecommunications lines without seeking approval from the defendant. The defendant's usual practice was to permit access to telecommunications companies to install lines upon prior application and upon payment of a fee.

The plaintiff claimed it had a statutory right of access to the common use parts pursuant to section 14(1) Telecommunications Ordinance and that if its right of access were denied, it might not be able to provide telecommunications services to tenants in the complex. By entering into tenancy agreements in the complex, the defendant had demonstrated an intention not to occupy or use the common use parts exclusively.



Lok J did not accept the argument. In the tenancy agreements, the defendant at all times exercised sole control as to whether it leased out any parts of the complex and the extent of any rights to be granted to the tenants, unlike the case in a multi-ownership building.

It was common for landlords of commercial shopping malls in Hong Kong to set up sales promotion counters especially during the festive seasons. If the plaintiff were to have the statutory right to install telecommunications lines in the common use parts, and the defendant then decided to convert a former public area into a shop, the defendant would have to ask the plaintiff to reroute the lines and would have to bear the cost. The statutory right of access was inconsistent with the defendant's property right and its right to change the common use parts, a right it had expressly reserved to itself under the tenancy agreements.

In order to attract tenants and customers to their shopping malls, landlords such as Link would not want to make it difficult for operators to lay telecommunications lines. The Court rejected the claim, saying that such matters should be dictated by market forces.

Full speed ahead

Court chides plaintiff for delay in commencing arbitration

The plaintiff company in *VE Global UK Ltd v Charles Allard Jr* [2017] HKEC 2135 claimed to be the assignee and business of a holding company controlling a global group of companies that developed sales and marketing software for online businesses. The first defendant managed subsidiaries in Asia. The parties entered into a shareholders' agreement and a licence agreement containing an arbitration clause for licensing of various rights to develop the business in Asia.

In July 2017, the plaintiff became suspicious that the first defendant had set up a rival business in Asia. It successfully obtained an *ex parte* injunction, restraining the defendants from operating the Asian subsidiaries. The injunction was continued at an *inter partes* hearing on 4 August 2017. The Court granted relief in support of an arbitration to be commenced pursuant to the arbitration clause in the licence agreement. The defendants challenged the grant of the injunction, citing excessive delay in commencing the underlying proceedings. The Request for Arbitration was served on the defendants on 21 September 2017.

An applicant who obtains an urgent *ex parte* injunction should act with diligence and speed in initiating proceedings for which the injunction was granted. However, in this case, Mimmie Chan J was not satisfied that the delay caused prejudice to the defendants, despite a *"regrettable delay"* in commencing the arbitration. She proceeded to balance the risks of injustice that would be caused by continuing or discharging the interim relief, finding that the plaintiff would suffer *"irreparable damage"* if the injunction were discharged and the defendants could act in a manner that avoided prejudice if it were continued.

The Court therefore dismissed the application for the injunction to be discharged and also rejected the defendants' application that the plaintiff's undertaking as to damages be fortified.

Clearer resolution

More mediation, less litigation for financial disputes?

Hong Kong's Financial Dispute Resolution Scheme is to be expanded in stages with effect from 1 January 2018 following the conclusions of a consultation carried out by the Financial Dispute Resolution Centre (FDRC). Following varied feedback from respondents, the FDRC decided to introduce a narrower package of reforms than those previously proposed.

The major amendments are: (i) raising the maximum claimable amount under the scheme to HK$1,000,000 from the current limit of HK$500,000; (ii) extending the limitation period in which claims may be made from 12 to 24 months from the date of purchase of the financial instrument or date of first knowledge of loss, whichever comes later; (iii) expanding the scope of *"eligible claimants"* (ECs) by allowing *"small enterprises"* (SEs) to bring

complaints against financial institutions (FIs) and allowing FIs (qualifying as SEs) to bring claims against fellow FIs; and (iv) accepting cases which are under current court proceedings without the claimant withdrawing the case from the court.

In addition, a number of further changes which are subject to parties' consent will be introduced to expand the scope of the FDRC's services, including allowing the FDRC to handle claims which exceed the amended intake criteria (in other words, claims that exceed HK$1,000,000 or are filed after the 24-month limitation period); allowing FIs to lodge disputes and counterclaims with the FDRC; and allowing *"mediation only"* or *"arbitration only"* as an alternative to the *"mediation first, arbitration next"* process for cases referred to the FDRC voluntarily by the parties.

While the changes are less far-reaching than those previously proposed, they do mean a noticeable expansion in the FDRC's jurisdiction. Although these changes do not impose new regulatory obligations which have been in place since the introduction of the scheme, we expect that FIs will experience an increase in the number of cases made against them through the scheme, in particular by small businesses.

Absolute privilege

Court of Appeal split on availability of defamation damages

During the course of a widely-publicised probate trial in 2009 (in which a notorious feng-shui master, Tony Chan, sought to establish that he was the sole beneficiary of the will of the late Chinachem Group chairperson, Nina Wang, to the detriment of the Chinachem Charitable Foundation), the defendant in *Chang Wa Shan v Esther Chan Pui Kwan* [2017] 5 HKLRD 57 gave lawyers acting for Mr Chan a document intended to discredit a significant witness for the Foundation.

The defendant told the lawyers by telephone that the plaintiff had passed the document to her, knowing this was untrue. This was repeated at the probate trial in open court at the prompting of the defendant and was subsequently widely reported in the media, causing the plaintiff what he claimed was serious damage to his reputation.

The plaintiff sued the defendant for slander and malicious falsehood. The defendant said that any damage caused by the republications in the media – being fair and accurate reports of what was said in open court – could not be recovered in an action founded on the original publication, because of the principle of absolute privilege.

The Court of Appeal unanimously held the trial judge had been wrong to dismiss the action on the ground that the original communication to the lawyers was protected by absolute privilege. Absolute privilege extended only to recognised groups of persons who participate in court proceedings (witnesses, parties, lawyers, jurors and judges) and, in civil proceedings, did not extend to an informer who was not a potential witness. It did not apply to the original communication.

The majority in the Court of Appeal (Kwan and Macrae JJA) held that the statement bore a defamatory meaning and that it was more likely than not that people would be put off from doing business with the plaintiff.

As for the media republications, the majority held that damages flowing from absolutely privileged republications could not be recovered against the original publisher, as to do so may deter a participant in proceedings from speaking freely without inhibition. The majority therefore awarded general damages of HK$30,000 for injury to reputation directly caused by the original

publication, ignoring the plaintiff's claim for special damages arising from the media republications.

Yuen J, dissenting, said that special damages caused by the republications should be available in an action founded on the original publication. There was no reason as a matter of policy why a person, who had intentionally authorised the further promotion of a statement which he knew to be false, should be able to hide behind the fact that the republication was on an occasion of absolute privilege. The general rule at common law, was that where there was a wrong, there should be a remedy.

The fact the Court of Appeal was divided on the core question of whether it is possible to recover damages arising as a consequence of absolutely privileged republications of slander and malicious falsehood originally published on an occasion not protected by absolute privilege, means that a further appeal to the Court of Final Appeal can be expected.

Taking the register

Court considers shareholders' right to company documents

The Court of First Instance has been asked in a number of recent cases to order that shareholders be allowed to inspect company documents.

In *Lam Kin Chung v Soka Gakkai International of Hong Kong Ltd* [2017] 4 HKLRD 192, Deputy Judge Anthony To ordered that the applicant be allowed to inspect and copy the respondent's register of members, pursuant to section 631 Companies Ordinance (Cap 622). The respondent was a non-profit making organisation with the main objective of furthering the cause of Buddhism. The applicant was a member of Soka since 1975 but recently became concerned about the absence of any right to nominate and/or be elected as members of Soka's management committee, and about the excessively high salaries and wages of its staff. The applicant wanted access to the register so he could call an EGM to address and vote on these matters.

The legal issue raised was whether a member of a company is entitled to an absolute right to a copy of the register or whether the exercise of the right is subject to the court's discretion. The language used in section 631 made it clear it was the legislature's intention to give the public and members of a company a legal right to inspect the register. The burden must be on the company seeking to resist disclosure to persuade the court it is appropriate to exercise its narrow discretion to refuse to make the order.

The applicant had shown a strong *prima facie* case of malpractice in the election and nomination of members for appointment to the management committee. The applicant's request for a copy of the register was clearly made in the exercise of a membership right and for a proper purpose. As such, the Court allowed the application on the applicant's undertaking to use the information solely for the purpose for which it was requested and to destroy any copies within a month after the proposed EGM.

Deputy Judge William Wong SC in *Wong Sau Man Samuel v Wong Kan Po Wilson* [2017] 4 HKLRD 542 rejected the applicant's request for inspection of a wide range of company documents under section 740 Companies Ordinance (Cap 622), on the grounds that the application was essentially a fishing expedition with a view to *"carry out a thorough investigation"* of the company's affairs. The plaintiff had been a director of the small family-run company and was dependent on his father, the defendant, for financial assistance. This came to an abrupt end because of the plaintiff's alleged overspending.

The Court ruled a shareholder was not entitled to inspect documents for the purpose of challenging the managerial decisions of directors. In any event, the plaintiff had not shown the application was made in good faith and for proper purpose. During his thirteen year directorship, the plaintiff had never participated in the company's management nor had asked to exercise his right to inspect company documents.

Demonstrating hostility towards the management of a company does not of itself negate *"proper purpose"* provided the application itself is made in good faith. Deputy Judge Alex Lee in *Fung Chuen v Sandmartin International Holdings Ltd* [2017]

HKEC 2193, found the plaintiff had adduced sufficient material before the court to give rise to a reasonable case for investigating whether loans advanced to two Nepalese debtors were a pretext by the directors for siphoning off the company's funds.

The Court did not agree with the defendant that the documents sought were a *"fishing expedition"*. The documents requested were directly relevant to the plaintiff's complaints and the Court allowed inspection of most of them. Taken together, these recent cases highlight the need for the scope of a request to inspect company documents to be limited and to be directly related to the acts complained of.

Expertly handled

Court appoints single joint expert against the wishes of the parties

Anthony Chan J in *Peace Mark (Holdings) Ltd v Chau Cham Wong Patrick* [2017] HKEC 2358, rehearsed the principles involved when considering whether the director defendants of a Bermudan-incorporated company in liquidation were responsible for perpetrating a false trading scheme and that certain of the directors were negligent in failing to discover it. At issue was an interpretation of Bermudan law and issues of forensic accounting.

Under RHC O.38, r.4A, the court has jurisdiction to appoint a single joint expert, even if a party disagrees with the appointment. The rule was part of a substantial body of rules incorporated into the Rules of the High Court as a result of Civil Justice Reform (CJR). Its purpose, as explained in the ruling, was to provide for the just resolution of disputes expeditiously and cost effectively.

Chan J said it should not be forgotten *"that the scarce resources of the court belong to the public".* Expert evidence was not to be treated as a tool to enhance the chances of winning a case. The measures introduced by the CJR had not had the desired effect, and litigants were still shopping around until they find a witness whose evidence suits their case.

The Court noted that instructing a single joint expert can have a very significant impact on the length of a trial. Doing so could *"enhance the quality of the expert evidence, reduce the costs of litigation, improve the speed at which actions can be resolved and is helpful to the fair distribution of the court's resources."* In appointing a single joint expert to cover both areas of evidence, Chan J said he saw *"no proper justification why 4 experts are to be instructed on aspects of (Bermudan) company law which are likely to be similar to those of Hong Kong".*

Done and dusted

Is a foreign default judgment "final and conclusive" in an action for enforcement?

The plaintiff in *Fabiano Hotels v Profitmax Holdings Inc* [2017] HKEC 1997, the owner of a London hotel, was attempting to enforce an English judgment of £4.2 million against the Hong Kong-incorporated defendant companies which provided hotel management services, and their BVI-incorporated group. The defendants argued that as the English judgment was a default judgment, it was *"by its very nature"* not final and conclusive.

Deputy Judge To reviewed a long line of authorities in England and other common law jurisdictions, demonstrating that the courts *"draw no distinction between a judgment after trial and a judgment by default. Though a default judgment may be set aside by the very court rendering it, until that happens, it remains in full*

force and effect and capable of being sued upon." Two Privy Council authorities relied upon by the defendants could be distinguished on their facts. The Court therefore ordered summary judgment against the defendants.

The Court then turned to the existing injunction in place made pursuant to section 21M of the High Court Ordinance that prohibited the defendants from disposing of their assets. The Court gave short shrift to counsel's argument that, once the Hong Kong action had commenced, the case should cease to come within the ambit of section 21M and that the plaintiff should apply for a fresh injunction. The court noted the *section "does not require such jurisdiction to cease immediately when the plaintiff obtains judgment abroad and hence has a cause of action in Hong Kong, irrespective of whether enforcement proceedings are commenced immediately or not".*

In deciding whether there was a risk of dissipation of assets held in Hong Kong, the Court noted that four of the defendants' hotel contracts were inexplicably terminated or not renewed at the same time. Given the serious accounting irregularities detailed by the plaintiff, and suspicious changes to the defendants' corporate structure, the Court had no difficulty in finding there was risk of dissipation of assets and continued the injunction order until further notice.

Competition concerns

Competition Tribunal considers admissibility of employee statements

The first major action by Hong Kong's Competition Commission against five information technology companies for alleged bid rigging in the supply of server equipment continues to be played out before the Competition Tribunal. The issue under consideration before Godfrey Lam J in *Competition Commission v Nutanix Hong Kong Ltd* [2017] HKEC 2111 was whether statements made by an employee held pursuant to section 42 of the Competition Ordinance (Cap 619) are inadmissible against the employer.

The first and second respondents, Nutanix and BT, contended that the statements made by individuals at their interviews were inadmissible in the substantive proceedings, by virtue of section 45(2), which says that *"no statement made by a person (a) in giving any explanation or further particulars about a document; or (b) in answering any question…is admissible against that person in proceedings … unless, in the proceedings, evidence relating to the statement is adduced, or a question relating to it is asked, by that person or on that person's behalf."* Counsel for Nutanix submitted that their employee was called to speak at the interview *"on behalf of Nutanix"* and that the employee's conduct was sought to be attributed to Nutanix, and that as such, the privilege against self-incrimination should apply to the company itself.

Lam J had considerable difficulty with the argument. Where a section 42 notice was issued to a natural person, his obligation before the Commission was personal to him. The employee's answers were personal to the employee and did not bind the employer. Lam J was similarly unconvinced that the answers given by the individual should be regarded as the undertaking's answers.

Taken to its logical conclusion, the "*attribution*" argument (advanced by BT) would mean it would continue to apply even when the employee has left the employer and become wholly unconnected with it. Whilst it was possible, as a matter of Hong Kong law, for a company to claim privilege against self-incrimination, the principle did not apply where it was the employees, not the companies, that were compelled to answer questions at the interviews. The Court dismissed the applications of Nutanix and BT and ordered them to pay the Commission's costs.

The Commission's apparent focus on targeting enforcement against individuals as well as companies was highlighted in a speech given in Hong Kong by the Chief Executive, Brent Snyder, on 28 November 2017. He said that he did not foresee there being any *"significant problems holding individuals accountable"* and said that the inclusion of a right against self-incrimination in the Ordinance only made sense if the individuals themselves could be pursued.

Whilst the Ordinance prescribes a range of specified offences that apply to individuals where they obstruct, mislead or fail to

co-operate with an investigation, it is possible the Chief Executive's reference was to a more open-ended liability, through the concept of *"being involved in a contravention of a competition rule"* (section 91). The section is broadly defined, and subject to no upper limit in terms of quantum. Liability under the section cannot be covered by an indemnity from another person, such as the individual's employer (section 168).

Applying the section to employees would appear to broaden the scope of the Ordinance considerably and would depart from the approach taken in many other jurisdictions, where either there is no individual liability for breaches of competition law or where the range of offences for which an individual can be penalised (and the sanctions involved) are much clearer and often need to be proved to a criminal standard.

Figuring it out

Court decides appropriate interest rate in share scam

The question of how to calculate interest on pre-judgment debts and on awards post-judgment regularly comes before the Hong Kong courts. A new twist was added in *Chow How Yeen Margaret v Wex Pharmaceuticals* [2017] HKEC 1921, in which the plaintiffs successfully sued the defendants for fraudulent misrepresentation which induced them to enter into a share agreement. The Court had awarded pre-judgment interest to the plaintiffs at judgment rate rather than the lower rate of prime plus 1% usually used by the court in respect of pre-judgment debts.

The defendants applied to vary the award of interest for the pre-judgment period from Hong Kong judgment rate of 8% to Canadian prime rate plus 1%, arguing that as the damages were awarded in Canadian dollars, the rate of interest should be taken at the rate at which the currency could be borrowed in the country in which the debt should have been paid. Using that as the basis for calculation would have saved the defendants CAD$640,000 (HK$3.9 million).

Queeny Au-Yeung J dismissed the application, noting that rates higher than prime plus 1% had previously been awarded in respect of pre-judgment interest in cases of fraudulent misrepresentation. This, she said, was a *"thoroughly bad case of fraudulent misrepresentation and concealment".* She also rejected the argument the rate to be used should be Canadian prime plus 1%. The place where the debt should have been paid was Hong Kong, not Canada, which was also where the litigation took place.

Given the behaviour of the defendants (who had failed to respond to a sanctioned offer and who had presented half-truths to the court to try to reduce their liability), the Court also allowed enhanced interest on the judgment sum at 10% above judgment rate from the latest date the sanctioned offer could have been accepted.

The decision is an illustration of the broad discretion enjoyed by the courts in keeping with the overriding principle that interest should be awarded to plaintiffs, not as compensation for the damage done, but for being kept out of money which by rights ought to have been paid to them.

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