

Important Hong Kong Decision Broadens Scope of Disclosure for SFC in Disqualification Proceedings

In December 2016, the High Court of Hong Kong ordered the Securities and Futures Commission (“SFC”) to disclose all relevant materials obtained in its investigations to respondents in disqualification proceedings.¹ The Court held that the test of relevance should be applied as broadly as is consistent with the requirements of justice having regard to the features of disqualification proceedings, leading to a standard of disclosure approaching that in criminal cases.

Related Capabilities

- Capital Markets
- Hong Kong

Background

In early 2015, the SFC filed a petition under s 214 of the Securities and Futures Ordinance (Cap 571) (“**Ordinance**”) seeking orders for disqualification of the respondents from acting as directors or in the management of companies in Hong Kong.

The respondents are four individuals who were all directors of a company (Inno-Tech Holdings Limited) (“**the Company**”), and of its subsidiaries (together “**the Group**”). The Company was listed on the Growth Enterprise Market of the Hong Kong Stock Exchange. The proceedings arose after the Group’s acquisition of interests in 3 hotels and in a gold mine in Mainland China between 2007 and 2010, which led to significant losses. The SFC’s petition alleges, *inter alia*, that each of the directors were negligent and acted in breach of their duties as directors to exercise reasonable care, skill and diligence in relation to the Group.

Disclosure

The discovery skirmish arose because the respondents sought access to copies of all records of interviews conducted and all documents supplied to the SFC by way of its “coercive” powers under Part VIII of the Ordinance for investigation,² including the power to compel wide categories of persons to produce records and documents and provide explanation and information, and to attend before an investigator to answer questions.³

In criminal cases, disclosure obligations on the prosecution are broader than on parties to civil proceedings, so much of the submissions by the parties focused on whether the disqualification proceedings should be classified as civil or criminal in nature.

In a criminal case, the duty of the prosecution is to disclose to the defence relevant material which may undermine its case or advance the defence case: *HKSAR v Lee Ming Tee*.⁴ Whereas the test applied in civil cases is that discovery has to be necessary for disposing fairly of the cause or matter.⁵

Counsel for the respondents submitted that the SFC's discovery obligations extend to all relevant unused materials obtained by it during the investigation, and that the documents sought here are such relevant materials and should be disclosed, in the same way as they would be disclosed by the prosecution if these were criminal proceedings. They relied on the requirement of "equality of arms",⁶ the law and practice in relation to disciplinary proceedings and disqualification proceedings, s 6 of the Ordinance, and well as the SFC's duty to act fairly.⁷

Counsel for the SFC submitted that disqualification proceedings are civil proceedings, their purpose being primarily protective rather than punitive. Thus, they submitted that the applicable test for discovery, if required, is therefore not found in the practice applicable in criminal cases, but is instead based on relevance in the *Peruvian Guano* sense.⁸ Counsel for the SFC submitted that it had disclosed all documents relevant under that test, and that there is no wider principle applicable to disclose all unused materials.⁹

Discovery obligations in disqualification proceedings

The Court said that the investigative powers invested in the SFC extend to the attainment of a just result which includes not only disqualifying those guilty of misfeasance but also dismissing the case against those who are not.¹⁰ In that context, the judgment noted that disqualification proceedings, while classified as civil rather than criminal for certain purposes including the standard of proof, are nevertheless different from ordinary civil litigation in that they are "brought by organs of the state for the benefit of the public against private individuals for orders restraining them from involvement in the management of companies".¹¹

The judgment included a thorough review of international jurisprudence including of the UK, New Zealand and Canada, regarding the applicable standard of disclosure in disciplinary and disqualification proceedings. In following the international consensus, the Court concluded that at least where serious disciplinary charges are concerned, the courts in various jurisdictions, while accepting disciplinary proceedings are non-criminal in nature, have been prepared to recognise a duty of disclosure on the prosecuting authority that approaches the duty on the prosecution in criminal proceedings.

The Court also distinguished a Court of Appeal decision¹² relied on by the SFC as authority for the proposition that it is inappropriate to import by analogy criminal

procedure and the giving of evidence under immunity in a criminal prosecution. It was distinguished on the basis that the case concerned immunity rather than disqualification proceedings or discovery of documents.¹³

The applicable approach

The Court held that the applicable rules of discovery have to be applied in a manner sensitive to the principle of equality of arms inherent in the concept of a fair trial.¹⁴ The Court noted that respondents in disqualification proceedings are faced with an adversary in the form of a governmental regulator which controls the investigatory process, with powers analogous to criminal law enforcement agencies, with the additional advantage that an interviewee's privilege against self-incrimination is abrogated.¹⁵

The Court further noted that the proper role of the SFC is not a prosecutor bent on securing the disqualification of a respondent, but a fair minded regulator willing if not anxious to make all materials available for potential use in the trial to ensure a just outcome.¹⁶

Given the Court's conclusions regarding international jurisprudence, it held that the applicable test of relevance should be applied as broadly as is consistent with the requirements of justice having regard to the features of disciplinary proceedings, leading to a standard of disclosure approaching that espoused in *Lee Ming Tee*. Thus approached, it held that the SFC's disclosure should ordinarily include the information and documents it has obtained from the investigation of the transactions that are eventually relied upon and complained of in the disqualification proceedings, except those which are obviously irrelevant.¹⁷

The Court ordered the SFC to file a list of documents which are or have been in its possession, custody or power relating to any matter in question in these proceedings within 28 days, which included the documents unused in the proceedings but obtained in its investigations under Part VIII of the Ordinance.¹⁸

Analysis

This decision was handed down shortly after the SFC stated its new policy directives to crack down on corporate fraud and misfeasance. However, individuals being investigated by the SFC can take some comfort from the fact that the SFC's duty in disqualification proceedings is not to act as a prosecutor determined to disqualify respondents, but to act fairly. The duty to act fairly thus requires the SFC to make all materials available for potential use in a trial to ensure a just outcome.

¹ *Securities and Futures Commission v Wong Uuen Yee* HCMP 241/2015 ("**SFC v Wong**").

² See SFC v Wong at [39].

³ Failure to comply with the Commission's requirement without reasonable excuse is an offence, and the privilege against self-incrimination is abrogated.

⁴ (2003) 6 HKCFAR 336

⁵ Order 24 rule 8 of the Hong Kong High Court Rules.

⁶ In the context of criminal proceedings, Art 11(2)(b) of the Hong Kong Bill of Rights , provides for the right "*in full equality ... to have adequate ... facilities for the preparation of his defence ...*". This principle of "*equality of arms*" provides a foundation, in parallel with the common law, for the entitlement of the accused to disclosure of relevant material: *HKSAR v Lee Ming Tee* (2003) 6 HKCFAR 336 at [156].

⁷ See SFC v Wong at [29].

⁸ *Compagnie Financière et Commerciale du Pacifique v The Peruvian Guano Co* (1882) 11 QBD 55, 62–63

⁹ See SFC v Wong at [30].

¹⁰ See SFC v Wong at [41].

¹¹ See SFC v Wong at [32].

¹² *Li Kwok Keung Asser v Securities and Futures Commission* [2010] HKEC 1834

¹³ See SFC v Wong at [68].

¹⁴ See SFC v Wong at [75].

¹⁵ See SFC v Wong at [76].

¹⁶ See SFC v Wong at [77].

¹⁷ See SFC v Wong at [82].

¹⁸ See SFC v Wong at [98].