

Latest weapon deployed by the SFC: Section 300

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Last week, the Court of First Instance issued a landmark ruling interpreting s.300 of the Securities and Futures Ordinance (SFO), which prohibits fraudulent or deceptive conduct in a transaction involving securities.

The Court imparted relatively broad interpretations to s.300's required elements of "fraud and deception" and "in a transaction involving securities", raising the question of whether we might see more widespread deployment of s.300 in the future.

A little background

In simple terms, the case involved a lawyer seconded to a bank to work on a transaction, who acquired confidential material price sensitive information through her work on the transaction. She used that information and tipped off others knowing that they would insider deal on the relevant shares. The basic facts of the case were undisputed.

The SFC brought proceedings under s.213 SFO, seeking, among other things, a declaration of a contravention of s.300. As this was a previously unexplored provision, extensive analysis of the legal issues was required, including a venture into criminal territory.

The latest weapon: s.300

Territorial reach of s.300

The SFC sought to rely on s.300 and not the insider dealing provisions under the SFO because of the extra-territorial feature of the case: the relevant shares were listed overseas.

Upon analysis, **the Court found that s.300 does not have extra-territorial application but that s.300 could nevertheless be applied to the facts of this case without requiring extra-territorial application of the law.**

The fact that the shares were traded overseas was not a critical feature. Giving buy instructions, which constituted an offer, as well as acceptance of the offer, in Hong Kong was sufficient to bring the case within s.300.

The judgment cited the definition of "transaction" in s.300(3) to include "an offer and an invitation (however expressed)", which does not require the securities transaction to be a completed transaction – meaning that the execution of the share trade outside of Hong Kong was not critical.

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"Fraud and deception"

In considering the "fraud and deception" that may fall within s.300, the Court considered a wealth of authorities detailing the concepts but concluded in a broad brush approach that there was no difficulty in applying s.300 to this case.

The decision and actions to misuse confidential material price sensitive information secretly, in knowing breach of dealing restrictions as a person working on that deal, constituted a scheme or act of deception. It was strictly unnecessary to have caused economic loss to, or put at risk the economic interests of another; a benefit to the fraudster / deceiver was sufficient.

"In a transaction involving securities"

Section 300 requires the fraudulent or deceptive conduct to be committed "in a transaction involving securities". Arguments were raised as to whether the conduct must have been committed within the transaction itself (i.e. for the defrauded party to be a party to the securities transaction) or "in connection with" the transaction and, if the latter, how far such connection would reach.

The Court found that the whole purpose of the deceptive scheme was to gain an advantage in the acquisition of those shares, hence the connection between the deceptive scheme and the "transaction involving securities". The fraud is consummated, not when the fraudster gains the confidential information, but when the information is deployed to sell or purchase the securities.

In conclusion

This is the first substantive judgment considering the provisions of s.300 of the SFO. Given the Court's relatively broad interpretations to s.300, we may see it featured more regularly in the SFC's enforcement ammunition toolbox in the future.

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