

Recent Court of Final Appeal Decision Enables Speedier Enforcement against Foreign Defendants for Market Misconduct Offences

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Introduction. Where a plaintiff intends to commence legal proceedings against defendants who are ordinarily resident outside Hong Kong or against foreign-incorporated entities, the plaintiff will often need to apply for leave (*i.e.*, permission) from the Hong Kong Court for service of court documents out of the jurisdiction. The application must be based on specified grounds set out in Order 11 rule 1 of the Rules of the High Court (Cap. 4A) (the “RHC”) or the Rules of the District Court (Cap. 336H).

In a recent enforcement action by the Hong Kong Securities and Futures Commission (the “SFC”) against overseas defendants for false trading,¹ the respondents challenged the court order granting leave to the SFC to effect service out of the jurisdiction, alleging that the Hong Kong Court lacked jurisdiction over them.

The Hong Kong Court of Final Appeal (the “CFA”) confirmed on 30 October 2023 that the Court’s leave for service out of the jurisdiction is not required for regulatory action under the Securities and Futures Ordinance (Cap. 571) (the “SFO”) so long as the relevant provisions specifically envisage proceedings being brought against respondents outside of Hong Kong.²

CFA Confirms Leave to Serve Out Not Required for False Trading. In a recent case *David Subotic & Others v SFC* [2023] HKCFA 32, the SFC commenced enforcement action against the defendants (including residents of the United States and foreign incorporated companies) under section 213 of the SFO for false trading activities in contravention of sections 274 and/or 295 of the SFO.³ SFC sought restoration orders, orders for damages, orders restraining the appellants from false trading or creating or maintaining artificial prices, the appointment of an administrator over recovered assets and asset-freezing injunctions.

In order to serve the court documents on the foreign defendants, the SFC applied for and obtained the Court’s leave to do so on the basis that their claims were founded on

¹ Under section 274 of the SFO.

² *David Subotic & Others v SFC* [2023] HKCFA 32, at [23].

³ *David Subotic & Others v SFC* [2023] HKCFA 32, at [19].

tort leading to damage sustained within Hong Kong (“Gateway F”)⁴ and involved the seeking of an injunction requiring the defendants to do or refrain from doing anything within Hong Kong (“Gateway B”).⁵

The appellants applied to set aside this leave. Both the Court of First Instance (the “CFI”)⁶ and the Court of Appeal (the “CA”)⁷ upheld the leave granted to the SFC for service out of the jurisdiction on the basis that the SFC’s claims came within Gateways F and B.

However, when the appellants appealed to the CFA, the Court invited the parties to consider whether the SFC’s claims fell under an exception to the requirement that leave is required to serve out of the jurisdiction.⁸ The exception provides that where “*any written law*” empowers the CFI to assume jurisdiction in respect of a claim over someone who is outside Hong Kong or in respect of a wrongful act committed outside Hong Kong, it is unnecessary to seek the Court’s leave to serve a writ containing such a claim.⁹

Upon considering the parties’ submissions on this issue, the CFA dismissed the appeal, holding unanimously that the SFC did not require leave to serve the writ in question on the appellants, as the claims in the writ fell within the said exception. The CFA’s decision turned on the construction of the false trading provisions in section 274 of the SFO, which the appellants were said to have contravened.

Specifically, section 274 provides that false trading may take place as a result of a person’s conduct “*in Hong Kong or elsewhere*”. Together with section 213 of the SFO, which provides that relief may be claimed against someone who has contravened section 274, it is clear that the “*written law*” expressly contemplates proceedings being brought against persons engaged in false trading who are not within the jurisdiction of the Court.¹⁰ This confers statutory authority on the Court to assume jurisdiction over such persons, and it is therefore not necessary to seek the Court’s further authorisation to serve out of jurisdiction. This is to be contrasted from the situation where although the written law may be invoked against persons outside the jurisdiction, it is of general application and does not specifically envisage proceedings being brought against a foreign defendant. In such cases, leave to serve out of jurisdiction would still be required.

⁴ Order 11, rule 1(1)(f) of the RHC.

⁵ Order 11, rule 1(1)(b) of the RHC.

⁶ *David Subotic & Others v SFC* [2021] HKCFI 2172.

⁷ *David Subotic & Others v SFC* [2022] HKCA 1909.

⁸ *David Subotic & Others v SFC* [2023] HKCFA 32, at [13]-[14].

⁹ Order 11, rule 1(2) of the RHC.

¹⁰ *David Subotic & Others v SFC* [2023] HKCFA 32, at [34].

Implications of the CFA Decision. Whilst the CFA’s decision was made in the context of false trading under section 274, it should be noted that the principle would also apply to various other market misconduct provisions in the SFO, including price rigging,¹¹ disclosure of false or misleading information inducing transactions,¹² stock market manipulation¹³ and their criminal offence counterparts,¹⁴ all of which expressly prohibit the relevant conduct “*in Hong Kong or elsewhere*”.

Relieved of the need to first apply for leave to serve out of the jurisdiction, the SFC will be able to take enforcement action against foreign defendants for market misconduct offences more speedily and effectively, which will no doubt be welcomed by the investors and other participants in the Hong Kong market.

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¹¹ Section 275 of the SFO.

¹² Section 277 of the SFO.

¹³ Section 278 of the SFO.

¹⁴ Sections 296, 298 and 299 of the SFO.