

HONG KONG / JUDGMENT

RE KOON WING YEE

COURT

Court of First Instance

DECIDED

1 February 2007

CASE / FILE NUMBER

HCAL7/2007

Source: legalref.judiciary.hk · Research copy typeset by Esheria. Not court-issued or certified.

bjbj HCAL 7/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO. 7 OF 2007

IN THE MATTER of an Application by KOON WING YEE for leave to apply for the Judicial Review pursuant to Order 53, Rule 3 of the Rules of the High Court, Cap. 4A and IN THE MATTER of Section 183(1) of the Securities and Futures Ordinance, Cap. 571

KOON WING YEE Applicant

Before: Hon Saunders J in Chambers Date of Hearing: 29 January 2007 Date of Judgment: 1 February 2007

J U D G M E N T

Introduction

This is an application for leave to make application for Judicial Review to quash a Notice issued by the Securities and Futures Commission, (the Commission) under section 183(1) of the Securities and Futures Ordinance Cap 571, (the Ordinance), requiring the Applicant to attend an interview and to answer questions in connection with suspected offences under the Ordinance. The Notice was issued following a Direction to Investigate, (the Direction), issued under section 182(1) of the Ordinance, that Direction having been signed by one M J Kenny, an officer and a delegate of the Commission. Following the issue of the Direction, the Notice requiring the Applicant to attend and answer questions was issued. Plainly, the validity of the Notice is

dependent upon the validity of the Direction. First, it is said that the Direction is invalid because section 182 requires, as a precondition for the commencement of the investigation of suspected offences, that the Commission has reasonable cause to believe that such suspected offences had been committed. The argument is that the formulation of the opinion that there is reasonable cause to believe that suspected offences have been committed, is a judgement that cannot be delegated by the Commission to its offices. Second, it is argued that the Notice breaches the fundamental protection guaranteed by Article 11 of the Hong Kong Bill of Rights Ordinance, namely that an accused person should not be compelled to testify against himself or to confess guilt. The delegation argument: The argument that the power to formulate the opinion that the Commission has reasonable cause to believe that such suspected offences had been committed, is not delegable, is based upon the decision in *Ratnagopal v AG* [1970] AC 974, a decision of the Privy Council, on appeal from the Supreme Court of Ceylon. I am satisfied that the argument is fundamentally flawed. The headnote to the report adequately sets out the appropriate facts in the following terms: The Commissions of Inquiry Act of Ceylon, by section 2, empowered the Governor-General to appoint by warrant a commissioner to inquire into matters in respect of which an inquiry would in the opinion of the Governor-General be in the interests of the public welfare. The Governor-General by warrant appointed a commissioner to inquire into and report on whether there had been abuses in connection with certain tenders made or contracts entered into by contractors between June 1, 1957 and July 31, 1965. The warrant empowered the commissioner to inquire into and report whether during the period in question any abuses occurred in relation to such tenders or such contracts as the commissioner should in his absolute discretion deem to be, by reason of their implications, financial or otherwise, on the Government, of sufficient importance in the public welfare to warrant an inquiry and report. The Privy Council held that in the terms of the Act the scope of the inquiry should be limited by the Governor-General; but that by the terms of the actual warrant of appointment the commissioner was entrusted with deciding what tenders and what contracts would be inquired into. In simple terms, the legislation required the Governor-General to form the opinion as to which matters would be inquired into, and then permitted him to delegate the enquiry to a commissioner. In reality, and wrongly, the Governor-General had required the commissioner to form that opinion, and then to conduct the inquiry. In the course of the hearing Mr Swain cited *Canada (AG) v Brent* [1956] SCR 318, a decision of the Supreme Court of Canada. The decision reflects the same issue as that in *Ratnagopal*. The relevant legislation, the Immigration Act 1952, empowered the Governor General to make regulations for carried into effect the purposes and provisions of the Act. There was nothing in the empowering provision that permitted the delegation of the formulation of the opinion that a person should not be admitted to Canada. The regulations were found to be invalid. The case is a classic example of the application of the maxim *delegatus non potest delegare*. In stark contrast section 10(1)(c) of the Ordinance clearly gives the power to the Commission to delegate any of its functions to an employee of the Commission, (as Mr Kenny unarguably is). Those functions which may not be delegated are the power of delegation under section 10 itself: section 10(2)(a), and certain functions specified in Part 2 of Schedule 2 to the Ordinance: section 10(2)(b). It cannot be argued that the power to form the opinion that there is reasonable cause to believe that an offence may have been committed is included as one of the

functions excluded from the power of delegation. No argument can be mounted that the legislature does not have power to give to the Commission, as it has in section 10, a power to delegate, including the power to form the opinion that there is reasonable cause to believe that an offence may have been committed. So long as the delegation is within that power it must be lawful. It is unarguable in this case that the delegation made is not within the terms of the power. The argument made is based upon a fundamental misunderstanding of the decision in *Ratnagopal* and is doomed to failure. The Bill of Rights argument:

- (a) A disgorgement order is a penalty: The argument is that the power of the Market Misconduct Tribunal to impose a disgorgement order on a person found to be guilty of market misconduct constitutes a penalty thereby making the proceedings before the Market Misconduct Tribunal criminal proceedings. It is then said that if the proceedings are criminal proceedings, the legislation unlawfully removes the right to silence to which a person facing criminal proceedings is entitled. Under the provisions of the Ordinance, conduct which falls generally under the description of market misconduct may be dealt with either in the criminal courts of Hong Kong, by way of criminal prosecution, or by way of civil proceedings before the Market Misconduct Tribunal. In this respect there is a marked difference between the current regime and that involving the Insider Dealing Tribunal, in that in the time of the Insider Dealing Tribunal, conduct now described as market misconduct could not be prosecuted in the criminal courts. There is now in place a dual regime. It is clear that a person required to attend for examination upon a Notice is obliged to answer the questions posed or to produce the documents required to be produced, under penalty of fine or imprisonment: see section 184. Art. 11(ii)(g) of the Bill of Rights is quite clear: (ii) in the determination of any criminal charge against him everyone shall be entitled to the following guarantees, in full equality,
 - (g) not to be compelled to testify against himself or to confess guilt. Consequently, any evidence obtained, or confession obtained, pursuant to an interview following a Notice, will be inadmissible in criminal proceedings against the subject to the notice. This right is commonly known as the right to silence . Plainly, the terms of any interview obtained pursuant to a Notice will not be admissible against the subject of the Notice, in criminal proceedings under the Ordinance in the courts of Hong Kong. Consequently, in being required to answer questions pursuant to the Notice the Applicant is not put at risk of prosecution in the criminal courts of Hong Kong, in reliance upon any answer he may give. The argument of the applicant properly acknowledges this, but contends that proceedings before the Market Misconduct Tribunal are criminal in nature, because the provisions upon which the Market Misconduct Tribunal will rely in dealing with any person found to have committed Market Misconduct, section 257, permit the Tribunal to order that the person must pay to the Government an amount not exceeding the amount of any profit gained, or loss avoided, by the person, as a result of the market misconduct in question: see section 257(1)(d). Such an order is usually known as a disgorgement order. Other than costs, no other financial orders may be made against a person by the Market Misconduct Tribunal. The Market Misconduct Tribunal has no power of imprisonment in relation to market

misconduct. The essence of the argument for the Applicant is that because the order that may be made by the Market Misconduct Tribunal will, in circumstances where shares have been retained, deal with notional profits, that is profits which have not been made but which could have been made, or losses avoided, which are always by their very nature notional losses, the order made will constitute a penalty. Mr Swain submitted that the decision of the Court of Final Appeal in *Insider Dealing Tribunal v Shek Mei Ling* (1999) 2 HKCFAR 205 was authority for the proposition that where an insider dealer acquired shares as a result of insider dealing, and sold those shares after the relevant information was known to the public but prior to it becoming crystallised in the market, he would be liable, on a disgorgement order, not only to repay the profit made as at the date of the sale, but also to the notional profit assessed as at the date of the crystallisation of the information. With the greatest respect to Mr Swain, an examination of the decision makes it absolutely plain that that is not so. A disgorgement order imposed on a person who has sold shares after information becomes known to the public, but before the information is fully absorbed by the market, is as to the actual profit achieved: see p 210H-J. The concept of a notional profit comes into play only when the shares are retained after the information has been absorbed by the market: see p 211A-E. In my view the proposition that a disgorgement order constitutes a penalty, and that accordingly the proceedings are criminal proceedings, is simply not capable of successful argument. Whether actual profits made, notional profits made, or notional losses avoided, are ordered to be paid to the Government, the sums ordered are merely a restitution to the State of an assessment of the benefit achieved by the person found to have carried out market misconduct, which benefit, having accrued by virtue of market misconduct, that person ought not to be entitled to retain. Any sanction of a financial nature over and above any such sum so ordered plainly would constitute a penalty. But it is clear that under the Ordinance the Tribunal has no power to order any other financial sanction. The Applicant seeks also to rely upon *Han v Commissioners of Customs & Excise* [2001] 1 WLR 2253. It is important to remember that in that case, in addition to the tax that could be ordered to be paid, the Commissioners were entitled to impose a penalty up to the sum of 100% of the tax evaded. The Market Misconduct Tribunal has no jurisdiction at all to impose any penalty in addition to requiring disgorgement of profits gained all losses avoided. The case is plainly distinguishable. The other authority relied upon by the Applicant is *King v Walden (Inspector of Taxes)* [2001] 1 STC 822, [2001] BPIR 1012. There, Jacobs J. determined that, having regard to the nature and degree of the severity of the potential and actual penalty faced by the taxpayer, the assessments and appeals were proceedings in which a person was charged with a criminal offence. Again that was a taxation matter where penalties up to the sum of 100% of the tax evaded might be imposed, in addition to an order for the payment of the tax. The authority is distinguishable on the same basis as that in *Han*. The contention that the disgorgement orders that may be made by the Market Misconduct Tribunal constitute a penalty may be usefully tested by comparing the distinction between liquidated damages and a penalty at civil law. An integral factor of liquidated damages is that the sum must be capable of arithmetical calculation, and that it is a proper reflection of the damage caused. On the other hand a penalty is an

arbitrary sum imposed by way of punishment, usually exceeding any sum required to properly remedy any damage that might have been caused. It is clear in my view, having regard to the mode of calculation used to determine a profit gained, or a loss avoided, in the context of market misconduct, the sum determined is not a penalty imposed by way of punishment, but a sum arrived at by arithmetic calculation, properly representing the appropriate amounts which a person found to have committed market misconduct, should not be entitled to retain as a result of that market misconduct. The power vested in the former Insider Dealing Tribunal to impose an additional requirement to pay a sum equivalent to up to three times the profit gained or loss avoided is, on the other hand, arguably a penalty. I am satisfied that the disgorgement orders that may be made by the Market Misconduct Tribunal cannot reasonably be argued to constitute a penalty that is criminal in nature.

- (b) Has the appropriate balance been struck: However, whether or not the sum payable is a penalty is not the only criteria by which the issue raised by the Applicant must be assessed. The question of the extent of the right to silence was considered by the Court of Final Appeal in *HKSAR v Lee Ming Tee & Anor* (2001)4 HKCFAR 133 at 163-172. The court concluded that a statutory abrogation of the privilege against self-incrimination, with a substituted protection permitting the derivative use of compulsorily obtained self-incriminating material, could be justified if it was not a disproportionate response to a serious social problem. The question is whether a fair balance had been struck between the general interest of the community in realising the legislative aim on the protection of the fundamental rights of the individual. It is necessary to bear in mind the provisions of section 187(2) of the Ordinance, whereby if, in response to a question, a person being examined pursuant to a Notice, claims privilege before making the explanation or providing the statement, the answer will not be admissible in evidence against that person in criminal proceedings in a court of law. There are certain exceptions which are not applicable here. At this point it must also be borne in mind that the provisions of section 253(4) of the Ordinance provide that a person is not excused, on the ground that to do so might tend to incriminate the person, from complying with an order, notice, prohibition or requirement of the Market Misconduct Tribunal made under section 253(1), which includes the requirement, in section 253(1)(d), to be examined before the Tribunal and to answer truthfully any question the Tribunal considers appropriate for the purposes of the proceedings. Such a requirement is equally an abrogation of the right to silence. In relation to conduct declared by the legislature to constitute market misconduct, the apparent aim of the Ordinance is the protection of public from that misconduct, and the levelling of the playing field upon which all those who choose to enter into dealing in securities must play. There is a clear argument that that is a significant social concern which calls for strong regulation. I am presently of the view that it is strongly arguable that the balancing solution adopted by the legislature, in permitting answers, given compulsorily, to be admissible only in proceedings before the Market Misconduct Tribunal, but not admissible in the criminal courts of Hong Kong, appropriately strikes the fair balance between the general interest of the community in realising the

legislative aim and the protection of the fundamental rights of the individual as enshrined in the Bill of Rights. I have to have regard however to the fact that the right to silence enshrined in the Bill of Rights is a fundamental protection and ought not to be found to have been taken away from the citizens of Hong Kong unless it can be said that the legislature clearly intended to do so and any protection put in place appropriately struck the fair balance required. That is a matter, involving as it does a value judgement on the issue of the fair balance, which cannot properly be dealt with on an application to leave. Although I consider the chances of success to be slim, I can see the argument that can be made. Leave to apply for judicial review is granted, limited however to the question as to whether or not the removal of the right to silence in relation the requirement to answer questions pursuant to a Notice issued under section 183(1) of the Ordinance, and in relation to proceedings before the Market Misconduct Tribunal, is in breach of Art. 11(ii)(g) of the Bill of Rights. (John Saunders) Judge of the Court of First Instance High Court Mr John Swaine QC, SC, and Ms Diana Cheung, instructed by Messrs William Sin & Co, for the Applicant Mr Adrian Bell, instructed by the Department of Justice, holding a watching brief for the Securities & Futures Commission. PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G 1udk 1udk (#p# HCAL.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=55925
CASE PAGE <https://chat.esheria.ai/case-law/hong-kong/re-koon-wing-yee-2007>

Prepared on 25 October 2026 · Esheria