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Newsletter

Litigation & Dispute Resolution

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What's inside?

Hong Kong regulator broadens scope of insider dealing

Joseph Kwan

Following consultation, the Securities and Futures Commission ("SFC") announced on 8 August 2023 that they will seek to amend the Securities and Futures Ordinance (Cap. 571) ("SFO") to broaden the scope of our insider dealing provisions to cover:

1. Insider dealing perpetrated in Hong Kong of overseas-listed securities or their derivatives; and

2. Insider dealing perpetrated outside of Hong Kong of Hong Kong-listed securities or their derivatives.

Currently, the SFO only prohibits insider dealing regarding securities listed in Hong Kong. The SFC can only deal with suspected insider dealing in Hong Kong relating to overseas-listed securities by indirect means, for example, by providing assistance to regulators in the relevant jurisdiction, or by seeking to prosecute under s.300 of the SFO (being an offence involving fraud or deception in securities transactions). However, this might be difficult to prove and it is not an effective way to address the wrong. We have covered an example of a case under s.300 in 2017 (see here).

On the other hand, it is noted that as much as approximately 61% of insider dealing matters handled by the SFC between 2017 and 2021 involved dealing of Hong Kong-listed securities outside Hong Kong. Although the SFC can and has in the past investigated and prosecuted these cases, the amendments are intended to address the absence of express provisions that bring such activities within the Hong Kong court's jurisdiction.

The proposed amendments will enhance protection to investors as well as the integrity and reputation of Hong Kong as a global financial market. They will also align our insider dealing regime in this area with other major common law jurisdictions.

Points to note about the proposed amendments

1. The alleged insider dealing of overseas-listed securities must also be unlawful in the overseas jurisdiction in question;

2. The new provisions will also apply to "over-the-counter" transactions in overseas-listed debt securities;

3. Any breach of the new provisions would be a reportable matter for licensed or registered persons under the Code of Conduct, and they have to report when they become aware of any suspected breach and to use their best endeavours to obtain the relevant data and submit it to the SFC; and

4. No transition period is intended for the proposed amendments. Accordingly, clients should take prompt action in updating their internal manuals and policies as well as conducting training to avoid any issue when the new provisions come into force.

Our team at Deacons regularly assists clients facing investigations by the SFC, including those who are accused of insider dealing and other contraventions of the SFO. Stay tuned on our news, as we will update our clients when the wording of the proposed amendments is published.

Competition Tribunal lays down principles for restricting use and disclosure of confidential information in competition proceedings

Peter So and Victor Wong

In two recent decisions made after a joint hearing of two sets of proceedings, Mr Justice Harris, President of the Competition Tribunal (Tribunal), laid down the principles that guide the Tribunal in determining applications for orders restricting use and disclosure of confidential information (confidentiality orders) of whatever nature. Parties should note that the Tribunal is only prepared to allow redaction of confidential information in limited circumstances and with justifications, going forward.

Confidentiality Treatment

The Commission is empowered with the right to require persons to provide it with confidential information, as defined in section 123 of the Competition Ordinance, Cap. 619 (Ordinance), in the course of performance of its functions under the Ordinance. In proceedings before the Tribunal, there might be information which the information provider legitimately considers confidential or that the disclosure of such to the public may lead to an anti-competitive effect. For instance, competitors may adjust their prices with reference to price information disclosed in the proceedings in a manner which distorts competition, thereby going against the objectives of the Ordinance.

With a view to addressing these potential issues, the Competition Tribunal Rules, Cap. 619D and Competition Tribunal Practice Direction No.2 (Confidential Information) prescribe procedures for parties to apply to the Tribunal for confidentiality orders. The Tribunal's power to place restrictions on the use and disclosure of confidential information is confirmed in *Competition Commission v ATAL Building Services Engineering Limited & Ors* CTEA 2/2022 [2022] HKCT 4.

Restrictive Approach

Proceedings before the Tribunal involve determination of matters similar to a criminal charge, thereby engaging Articles 10 and 11 of the Hong Kong Bill of Rights Ordinance, which have constitutional force by virtue of Article 39 of the Basic Law. As such, in *Competition Commission v Quadient Technologies Hong Kong Limited & Ors* CTEA 1/2021 [2023] HKCT 1, Harris J held that it was clear from Article 10 that redaction of information would be exceptional and it needs to be demonstrated by a party seeking redaction that it is necessary in order either to protect their personal privacy or is necessary in the interests of justice. In other words, there is little room for restricting information on the grounds of confidentiality.

Open Justice Principle and its restrictions

In *Asia Television Ltd v Communications Authority* [2013] 2 HKLRD 354, Cheung CJHC (as he then was) held that any restriction on open administration of justice necessarily represents a compromise between interests, rights and freedoms, and must be justified by considering and balancing all pertinent interests, rights and freedoms. Further, the following considerations or matters do not by themselves justify any restriction on open administration of justice:

(i) Publicity of litigation leading to embarrassment and inconvenience;

(ii) Publicity leading to economic damage, even very severe economic damage; or

(iii) Professional embarrassment and possible damage to professional reputation.

Nevertheless, where open administration of justice in a case would frustrate the t ultimate aim of doing justice, such as jeopardising some right or interest of one or both of the parties outside of the case, a balancing exercise must be

conducted to assess whether open justice should be restricted and if so, the manner and extent of restriction. An example of circumstances which are capable of justifying departure from the open justice principle in the competition law enforcement context is a case in which it can be demonstrated that disclosure of information would harm competition and frustrate the purpose of the legislation and the proceedings.

In *Quadient*, Harris J held that in order for the Tribunal to undertake the balancing exercise Cheung CJHC explained in *Asia Television Ltd*, it must have something more than conjecture to work with in deciding whether the open justice principle should be moderated in a particular case.

Application

In these two cases, the Commission had reached a settlement with some or all of the Respondents. In such circumstances, the practice is for the Commission to file consent summonses and Statements of Agreed Facts. The Statement of Agreed Facts will be appendices to the judgment which will be published to members of the general public. In both cases, the Commission, with the support of the Respondents, applied for redaction of certain information in the version of the Statements of Agreed Facts to be attached to the judgment.

Competition Commission v Quadient Technologies Hong Kong Limited & Ors CTEA 1/2021

Amongst others, the Commission initially asked for redaction of the value of sales which was related to the Respondents' contravention and turnover of the Respondents in the financial year ending 31 January 2019, on the grounds that (i) that was commercial information relating to the business interests of the Respondents; (ii) even if they were no longer particularly current, it was desirable to avoid any potential harm of publishing such information to the wider world; and (iii) the publication of such information did not appear necessary for third parties to understand the substance of the Commission's proposed calculation of the recommended pecuniary penalty and investigation costs, and the orders to be made by the Tribunal.

Nevertheless, Harris J disagreed that making the above information public might frustrate the purpose of the Ordinance or that revealing such information would be prejudicial to the legitimate interests of the Respondents and outweigh the conventional application of the open justice principle. It was subsequently conceded that the above information would not allow the relevant Respondent's profit to be calculated. The Commission subsequently abandoned redaction of the sales figures and turnover.

The Commission also applied for redaction of identities of employees not pursued and certain non-parties. In this regard, the Tribunal accepted that there may be cases in which there is potential prejudice to individuals interviewed by the Commission, which is sufficiently serious to justify moderating the application of the open justice principle. If it becomes generally known that the identity of witnesses has been made public, this may impact the cooperation the Commission obtains from individuals it seeks information from in regard to future investigations.

Accordingly, Harris J allowed the individual names in the Statements of Agreed Facts to be replaced with the description "an employee of X Limited or X Respondent" or similar appropriate wording.

Competition Commission v Gray Line Tours of Hong Kong Limited & Ors CTEA 1/2022

The Commission applied for redaction of certain financial information and names of individuals.

As to financial information, Harris J only granted redaction of figures and sums from 1 June 2021, i.e. approximately two years before his decision on 14 June 2023. The judge considered that this period was sufficient, in the absence of any detailed explanation why any older information needed to be kept confidential.

By adopting the same principles held in *Quardiant*, Harris J allowed the individual names in the Statements of Agreed Facts to be replaced with the description "an employee of X Limited or X Respondent" or similar appropriate wording.

Implications

In view of these two decisions, it is clear that the Tribunal is only prepared to exercise its power to allow redaction of confidential information in limited circumstances and with justification.

The starting point is that pricing information which is more than two years old (unlike the EU Courts which adopt 5 years) will not be redacted in the Originating Notice of Application nor Statements of Agreed Facts to be attached to the Tribunal's judgments, l in the absence of any evidence suggesting why any older information needs to be kept confidential. On the contrary, the Tribunal is prepared to redact names of individuals who are not parties to the proceedings provided that such names are replaced by an appropriate description, as illustrated above.

Accordingly, those investigated should be prepared for the fact that confidential information disclosed to the Commission in the course of the investigation might be disclosed to the general public, if the matter proceeds to an enforcement action before the Tribunal.

Deacons act for the 1st and 2nd Respondents in CTEA 2/2022 and the 5th Respondent in CTEA 1/2022.

Pension sharing in divorce - How much of my pension will my spouse be entitled to?

Sherlynn Chan and Rachael Leung

Very often in divorce proceedings, the carving up of family assets into two separate households is the most stressful and contentious aspect. Pension or retirement benefits may also be one of the more substantial assets in the family pot, especially in grey divorces, where one party gave up their career to look after the children. If an agreement on financial relief cannot be reached, the Court's assistance would be required.

As mentioned in previous articles, there is a duty for parties in divorce proceedings to fully disclose all their assets in a Financial Statement known as "Form E", to allow the Court to properly assess the size of the family pot. Pensions and Mandatory Provident Funds (MPFs) are no exception and must be disclosed in the Form E, in addition to landed properties, bank savings and stock investments, shareholdings in private companies, insurance policies, motor vehicles and other luxury goods, such as yachts, cars, jewellery and watches.

Thus, in the event of pre-retirement divorce, should the pension/MPF be considered as a matrimonial asset at all and if so, how much of it should be attributed to the family pot?

In the recent decision of *陳對鍾 CACV 461/2022, [2023] HKCA 560*, the Court of Appeal overturned a Family Court decision which attributed only one-third of the husband's pension to the matrimonial pot.

In this case, the husband had served in the Hong Kong Police Force for 17 years before marrying the wife. After 10 years of marriage, the parties separated and the husband was expected to receive a pension of approximately HK$6.17 million when he retired, which was around 5.5 years after the Decree Nisi (i.e. provisional divorce decree) had been granted. Taking into consideration other matters, the Family Court was of the view that only one-third of the pension should be included in the matrimonial pot because the parties were only married for 10 years during the husband's 36 year career as a policeman. Based on this finding, the judge held that the wife was entitled to one-sixth (16.67%) of the husband's pension.

The wife was dissatisfied with the judge's finding and appealed to the Court of Appeal. Whilst the appellate court reaffirmed the equal sharing principle (i.e. all matrimonial assets should be divided equally, unless there are good reasons not to do so) as laid down in *LKW v DD (2010) 13 HKCFAR 582,* it recognized that the same may not apply to non-matrimonial assets.

At the end of the day, whether such assets should be excluded from equal sharing is entirely a matter for the court's discretion, with fairness as the overriding principle guiding the exercise of such discretion. Examples of non-matrimonial assets may include:

- Gifts acquired during marriage;
- Inheritance;
- Trust money and assets; and
- Pre-marital assets.

In this case, even though the husband's pension entitlement was not a matrimonial asset at the time of marriage, it had gradually evolved into one as time passed during the long marriage. This was because the longer the marriage lasted, the more interdependent the parties had become and the more difficult it was to distinguish the source of the property (*Z v X (C Intervener) [2015] HKLRD 791).*

In view of the long duration of the marriage and the fact that the husband could only realize the pension 5.5 years after the divorce, the Court of Appeal held that the Judge had the discretion not to treat the entire pension as a matrimonial asset. However, because 10 years is considered to be a long marriage, 80% of the pension should be treated as a matrimonial asset and the Court of Appeal ultimately awarded the wife 40% of the same.

Stay tuned for more updates on family law developments.

Our Family Law team at Deacons is experienced in handling matrimonial and family matters including asset division and maintenance claims. Please reach out to us if you would like to know more.

Crossley Applications: Holding your spouse to your nuptial agreement

Sherlynn Chan and Rachael Leung

Nuptial agreements usually address the division of assets in the event of a marital breakdown. If discussed early, they may avoid costly and acrimonious litigation between estranged couples.

Prenuptial and post nuptial agreements (PNA) are treated differently in different jurisdictions and in Hong Kong, although a PNA is not legally enforceable per se, the Courts will give "full weight" to such an agreement if it is entered into with the benefit of independent legal advice, with full appreciation of its financial implications and in ample time for the parties to consider and the agreement is not seen as unfair to one spouse.

The case of *Crossley v Crossley [2007] EWCA Civ 1491* demonstrates the discretionary power of the court to require a party to "show cause" as to why a contractual agreement should not rule the outcome of an ancillary relief claim, when the contract was made pre or post marriage and before the breakdown of the marital relationship. Hence, an application made to the Court to show cause is known as a "Crossley application".

If a spouse wants to wriggle out of a PNA, how do we hold them to the spirit of the contract?
The resiling spouse has the burden of proof to satisfy the Court as to why the agreement should not be enforced. The Court may be convinced if there were vitiating factors (such as duress, fraud and misrepresentation) at the time the agreement was executed. Unconscionable conduct, such as undue pressure or exploitation of one's dominant position to secure an unfair advantage, may also be a deciding factor.

Furthermore, when there are prevailing circumstances at the time of divorce which renders it unfair to enforce the agreement, the Court may also release the parties from the same.

L v F [2023] HKFC 108

In the recent case of *L v F*, the Court laid down some clear guidance on how the Court deals with Crossley applications in ancillary relief proceedings. The brief facts of this case are: the Wife was a renowned philanthropist in Hong Kong and the granddaughter of a successful entrepreneur; the husband a Swiss banker. Six months prior to their marriage, the parties, with separate legal representation, started negotiating the terms of the PNA, which they signed one day before their marriage registration.

Thirteen years into the marriage, the Wife filed for divorce. With a net worth of around HK$200M (excluding shareholdings in over 10 companies, 48 properties, various pieces of artwork and jewellery), the Wife issued a Crossley application and sought directions from the Court to limit the scope of her financial disclosure to the Husband, should he fail to "show cause" as to why he should not be bound by their PNA.

The Husband's case

The Husband initially took issue with the execution of the PNA, claiming that "*the PNA came as a 'surprise', was prepared 'in a rush' and on terms which were 'blatantly clear to him' to be 'non-negotiable'.*" He further put forward an odd claim that he was legally advised to include fictitious accounts in his financial disclosure to the PNA, so that his assets would be "*roughly the same*" as the Wife's. At trial, the Husband abandoned this argument, which the Court considered to be a "sensible" move, as there was clear evidence showing that he was actively involved in negotiating the PNA terms.

On the ground of fairness, the Husband argued that it would be unfair to hold him to the PNA as he was financially destitute. He painted a desperate picture of himself by claiming that he was jobless, that all his businesses had failed, that no companies would hire him, and that he was forced to leave Hong Kong because it was unaffordable.

The Wife's case

The Wife contended that the PNA was "*of magnetic and overriding importance and should be given the fullest possible effect.*" The Wife produced evidence to prove the Husband's proactive negotiation of the PNA terms, and argued that the Husband was unable to support his poverty claim.

It was also the Wife's case that the parties had conducted their marriage strictly in accordance with the PNA. For example, during the marriage, the parties were financially independent of each other and paid for their own expenses. The Husband would further repay loans from the Wife and pay her a monthly fee for his accommodation.

The Court's ruling

The Court held that the Husband failed to show cause as to why he should not be bound by the PNA. The Judge further ordered that there be limited discovery within the parameters of the disputed issues, to enable the Court to follow the processes set down in *DD v LKW [2010] 13 HKCFAR 537* at the ancillary relief proceedings. The Court also found, amongst other things, that the PNA captured the parties' intention and was consistent with their conduct all the way up until their divorce, which is highly significant, as it suggests that the parties themselves all along regarded the PNA, as determinative of how their finances are to be managed.

Nuptial agreements do not oust the Court's jurisdiction to consider other factors

In a Crossley application, the Court is not so much concerned with the final outcome of the ancillary relief application, but rather whether the parties should be bound by the PNA. Thus, as a matter of sound case management, Crossley applications can be heard as a preliminary issue, if the Court is of the view that it can help parties to save costs and time. It is also important to note, that nuptial agreements do not oust the Court's discretion in respect of ancillary relief proceedings

The Courts in Hong Kong have a wide discretion in deciding how family assets should be divided in divorce proceedings. Whilst the Courts respect parties' autonomy in entering into nuptial agreements, such agreements cannot oust the Court's discretion in ancillary relief proceedings and in particular, to consider the factors under section 7 of the Matrimonial Proceedings and Property Ordinance (for details, please refer to our article here). In fact, it is well recognized that a nuptial agreement can be considered as one of the factors in the section 7 exercise.

In *L v F*, the Wife sought substantially limited financial disclosure should the Husband fail to show cause. Given the Wife's vast wealth, the Court recognized that a preliminary hearing would save the Wife from a "*long and expensive (and even contentious) exercise*" of financial disclosure.

Our Family Law team at Deacons is experienced in handling matrimonial and family matters. Should you have any questions on nuptial agreements and related matters, please reach out to us if you would like to know more.

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