



Lam Siu Po v Commissioner of Police

FACV No 9 of 2008¹ (March 2009)

Court of Final Appeal

In this appeal, the applicability and operation of Article 10 of the BoR fell to be considered in connection with police disciplinary proceedings. The appellant, a police constable, complained that the exclusion of professional legal representation by the relevant regulations deprived him of a fair hearing. He therefore challenged the constitutional validity of that exclusion and the lawfulness of the disciplinary proceedings concerned.

Background

The appellant engaged in speculation on the stock market and incurred significant losses. He was declared bankrupt upon his own petition. The police administrative instructions stated that officers had the responsibility not to incur expenses they were unable to afford, including expenses in relation to “speculation in the stock, financial and property market”. The appellant was charged with a disciplinary offence. It was the offence of contravening Police General Order 6-01(8) which, in the version applicable at the material time, provided:

“A police officer shall be prudent in his financial affairs. Serious pecuniary embarrassment stemming from financial imprudence which leads to the impairment of an officer’s operational efficiency will result in disciplinary action.”



The appellant was given an immediate sentence of compulsory retirement with deferred benefits after two sets of disciplinary proceedings were held. The appellant applied for judicial review to quash the convictions and sentences and a declaration that regulations 9(11) and (12) of the Police (Discipline) Regulations (Cap 232A), to the extent that they restricted the appellant’s choice of representative at the hearing, were unconstitutional and void.

Regulations 9(11) and (12) provide that a police officer charged with a disciplinary offence may be represented by (a) an inspector or other junior

¹ Reported at [2009] 4 HKLRD 575.



police officer of his choice; or (b) any other police officer of his choice who is qualified as a barrister or solicitor. Subject to this, no barrister or solicitor may appear on behalf of the officer.

The CA granted leave to appeal to the CFA. Three questions of great general or public importance were identified, including:

- (a) whether Article 10 of the BoR is engaged in police disciplinary proceedings;
- (b) whether regulations 9(11) and 9(12) are consistent with Article 10;
- (c) whether it is necessary or permissible to adduce evidence to prove or disprove an “impairment of operational efficiency” as a police officer (in addition to “serious pecuniary financial embarrassment stemming from financial imprudence”) in establishing a disciplinary offence under Police General Order 6-01(8).

Whether Article 10 was engaged

Article 10 provides (insofar as material):

“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ...”

The Court was of the view that Article 10 was clearly engaged in relation to the disciplinary proceedings in the present case. The Administrative Instructions on the Management of Indebtedness in force at the relevant time made it clear that punishment for the disciplinary offence under Police General Order 6-01(8) with which the appellant was charged was “normally terminatory”. Such was in fact the nature of the punishment meted out in this case. Although the relevant jurisprudence was still in the course of development, it had developed sufficiently to enable the Court to say that the appellant undoubtedly faced a determination of his rights and obligations in a suit at law, meaning his civil rights and obligations.

The Court referred to the European Convention on Human Rights case of *Eskelinen*² which laid down the principled approach of (i) placing the onus on the State to specify, in legislation, the particular class of civil servants who were to be excluded from the protection of the Convention; and (ii) subjecting such legislation to scrutiny by the Court which asked whether objective grounds related to the effective functioning of the State or some other public necessity which justified removal of Convention protection had been established.

In the present case, there had been an express prohibition by subordinate legislation of any legal representation which undoubtedly bore on the right to a fair hearing protected by Article 10. To that extent, the CFA was prepared to accept that the first *Eskelinen* condition was complied with. However, the second condition had not been met:

² (2007) 45 EHRR 43.



The Court held that where a Hong Kong court was able to exercise its full powers on judicial review, it was likely to qualify as a court of full jurisdiction for Article 10 purposes.

the Commissioner had not provided sufficient justification for excluding Article 10 protections in the disciplinary proceedings.

The Court did not accept that the requirements of the police disciplinary tribunals in Hong Kong justified a total ban on legal representation regardless of the requirements of fairness. There seemed to the Court to be little doubt that the effective functioning of the Police Force as a disciplined service would not be impaired by allowing its disciplinary tribunals a discretion to permit an officer to be legally represented where fairness so dictated. No ground of public necessity had been suggested as a basis for excluding the constitutional protection.

The CFA therefore concluded that no objective grounds had been established to justify excluding the disciplinary proceedings in the present case from the protection of Article 10. To the extent that the Court of Appeal held in *Chen Keng-chau v Commissioner of Police* HCMP 2824/2004 was inapplicable to police disciplinary proceedings, the Court overruled that decision.

Compliance with Article 10 in general

The CFA held that Article 10 did not require every element of the protections conferred to be present at every stage of the determination of a person's rights and obligations, but only that such protections should be effective when the determination was viewed as an entire process, including as part of that process such appeals or judicial review as might be available.

The position was therefore that Article 10 could be given effect without demanding radical changes to the administrative system provided that the process of determining a person's rights and obligations beginning with the administrative process was subject to control by "a court of full jurisdiction".

A court of full jurisdiction might deal with the case in the manner required in at least two different ways. It might do so by supplying one or more of the protections mandated by Article 10 which were missing below, for instance, by assuming the role of the necessary independent tribunal or by giving the individual concerned the needed public hearing. Or it might do so by exercising its supervisory jurisdiction so as



to correct or quash some non-compliant aspect of the determination by the authority or tribunal concerned, for instance, where there had been a want of impartiality or some unfairness in the original process. If in assuming such a role, the court was armed with full jurisdiction to deal with the case as the nature of the challenged decision required, there was compliance with Article 10's requirements.

The Court held that where a Hong Kong court was able to exercise its full powers on judicial review, it was likely to qualify as a court of full jurisdiction for Article 10 purposes. This proposition assumed that there was no statutory restriction on the judicial review powers available to the court. Accordingly, the Court held that in Hong Kong, a court exercising its judicial review jurisdiction without statutory interference was likely to qualify for most purposes as a court of full jurisdiction.

Legal representation and a fair hearing

The Court held that an arrangement which satisfied the requirements of the common law principles of procedural fairness would almost certainly conform with the fairness requirements of Article 10. The common law requirements regarding legal representation at disciplinary proceedings were recently examined in *The Stock Exchange of Hong Kong Ltd v New World Development Co Ltd*.³ In that case, the Court decided that there was no absolute right to legal representation, this being a matter to be dealt with in the tribunal's discretion in accordance with

principles of fairness. The factors to be taken into account in deciding whether fairness required such representation to be permitted included the seriousness of the charge and potential penalty; whether any points of law were likely to arise; the capacity of the individual to present his own case; procedural difficulties; the need for reasonable speed in making the adjudication; and the need for fairness among the individuals concerned. It was recognized that no list of factors could be exhaustive and that the common law principles operated flexibly, requiring the tribunal to respond reasonably to the requirements of fairness arising in each case, balancing any competing interests and considering what, if any, limits might proportionately be imposed on legal representation in consequence.

In the present case, regulations 9(11) and 9(12) imposed a blanket restriction on professional legal representation in police disciplinary proceedings. The vice which resulted was that in a case where the common law principles and compliance with Article 10 compelled the conclusion that the tribunal's discretion ought to be exercised in favour of allowing legal representation, regulations 9(11) and 9(12) prevented that course from being followed. In other words, they made it part of the disciplinary scheme that the tribunal was prevented from complying with its duty of fairness where such duty called for legal representation to be permitted.

Further, the regulations prevented the court on a judicial review from remedying non-compliance by quashing the decision on the ground of unfairness. Being sanctioned by subordinate

³ (2006) 9 HKCFAR 234.



legislation, the refusal of legal representation could not be said to be unlawful as a matter of common law. Therefore, so long as they remained in force, the regulations divested the reviewing court of the status of a “court of full jurisdiction”, depriving it of the power necessary to deal with the case as the nature of the decision (involving an unfair refusal of legal representation) required. Non-compliance would therefore be unremedied unless the regulations were struck down so as to remove the obstacle to conformity with Article 10.

The Court thus ruled that regulations 9(11) and 9(12) were systemically incompatible with Article 10. In its view, it was appropriate and just that they be declared unconstitutional and invalid with the result that the tribunal, as master of its own procedure at common law, was able to exercise a discretion unfettered by those regulations to permit legal or other forms of representation where fairness required this. It also held that the appellant was indeed deprived of a fair hearing so that his conviction and sentence must be quashed.

Construction of Police General Order 6-01(8)

The Court held that giving effect to the ordinary meaning of the words used in the 1999 version of the above Order, proof of impairment of the officer’s operational efficiency as a separate element of the offence, flowing from his serious pecuniary embarrassment, was required.

Outcome

The Court allowed the appeal and granted a declaration declaring that regulations 9(11) and 9(12) were inconsistent with Article 10 of the BoR and BL 39, and were unconstitutional, null, void and of no effect. In addition, it quashed the decisions by which the appellant was convicted and sentenced.



Yeung Chung Ming v Commissioner of Police

FACV No 22 of 2007¹ (July 2008)

Court of Final Appeal

A decision to withhold any proportion of the pay of an interdicted officer facing criminal charges as contemplated by section 17(2)(a) of the Police Force Ordinance would not violate the presumption of innocence.

Commissioner's decision was the alleged violation of the constitutional guarantee of the presumption of innocence. It was contended that section 17(2)(a) of the Ordinance breached the presumption of innocence and was unconstitutional. By a majority (Bokhary PJ dissenting), the Court of Final Appeal dismissed the appeal.

The statutory scheme

The decisions to interdict the appellant and to withhold 7% of his pay were made by the Commissioner under section 17 of the Ordinance. The present case was concerned with an officer who had been charged with a criminal offence. In summary, the position of such an officer under the statutory scheme was as follows:

- (1) The Commissioner had a discretion to interdict him if he was satisfied that the public interest so required.
- (2) If the officer was interdicted, the Commissioner must direct whether any proportion and if so, what proportion of his pay up to one-half, should be withheld.
- (3) If the officer was convicted, his pay would cease unless the Commissioner decided

Background

The appellant was a police sergeant. Following the laying of criminal charges against him, the Commissioner of Police (the Commissioner), the respondent, interdicted him and withheld 7% of his pay under section 17 of the Police Force Ordinance (Cap 232) (the Ordinance). The appellant was later convicted whereupon he ceased to be paid. Subsequently, he was dismissed from the Police Force.

The appellant did not question the validity of the Commissioner's decision to interdict him, but he challenged the Commissioner's decision to withhold his pay by 7% prior to his conviction.

The sole ground relied on by the appellant in this appeal in support of his challenge to the

¹ Reported at [2008] 4 HKC 383.



that it should continue. If he was acquitted, he was entitled to the full amount withheld during his interdiction.

The constitutional provisions

Article 87(2) of the Basic Law provides:

“Anyone who is lawfully arrested shall have the right to a fair trial by the judicial organs without delay and shall be presumed innocent until convicted by the judicial organs.”

The right to be presumed innocent was also enshrined in the Hong Kong Bill of Rights Ordinance (BoR) which, as required by Article 39 of the Basic Law, implemented the provisions of the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong. Article 11(1) of BoR, which corresponded with Article 14(2) of the ICCPR, provided:

“Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”

The presumption of innocence

The constitutional guarantee of the right to be presumed innocent was deeply rooted in the common law and was the basis of the cardinal rule that the prosecution had the burden of proving the defendant's guilt of the offence charged beyond reasonable doubt. The right to be presumed innocent was an essential element of the individual's right to a fair trial.

The issue was whether the statutory power vested in the Commissioner by section 17(2)(a) to withhold the pay of an interdicted officer who had been charged with criminal charges infringed the presumption of innocence. The critical question was the proper test to be applied in judging whether the Commissioner's decision in withholding pay as contemplated by the provision violated the presumption.

Where a person had been charged with a criminal offence, he was only at the beginning of due process. He was presumed to be innocent and was entitled to a fair trial at which he might be found guilty or might be acquitted. Where a public authority took action in relation to a person charged merely on the basis that he might be guilty, his presumption of innocence would not be violated. By taking action on this basis, the public authority would not be prejudging his guilt in any way prior to the trial and the fairness of his trial would not be prejudiced. Indeed, the very act of charging a person with criminal offences involved a view by the prosecuting authority that he might be guilty. The approach advocated by the appellant that the presumption of innocence would be violated where action was taken merely on the basis that the person charged might be guilty and that such violation had to be justified was not warranted.

The proper test

Taking into account the decisions of the European Court of Human Rights, the proper test to be applied in the present context in considering whether section 17(2)(a) of the Ordinance infringed the constitutional guarantee



of the presumption of innocence should be stated as follows: whether the Commissioner's decision to withhold any proportion of the pay of an interdicted officer who had been charged with criminal offences as contemplated by the provision implied a view that the person charged was guilty. The test was of course an objective one.

In applying this test, it was important to consider the Commissioner's decision in the light of the circumstances leading to it as contemplated by the statutory scheme. The officer had been interdicted on the ground that the Commissioner considered that the public interest required his interdiction. Having been interdicted, he was relieved from his duties and was doing no work. A decision by the Commissioner to withhold a proportion of the officer's pay, not exceeding half, taken pursuant to section 17(2)(a) in such

circumstances as envisaged by the scheme plainly did not imply any view that he was guilty.

The Commissioner's decision merely implied a view that he might be found guilty after trial. There was no question of any prejudgment of his guilt or any prejudice to his fair trial at which he was presumed to be innocent. Such a decision also envisaged that he might be acquitted after trial as the statutory scheme expressly provided that on acquittal, he should be entitled to the full amount of the pay withheld. Accordingly, a decision to withhold any proportion of the pay of an interdicted officer facing criminal charges as contemplated by section 17(2)(a) would not violate the presumption of innocence. Therefore, the provision was constitutional and the Commissioner's decision in the present case was also constitutional. Accordingly, the appeal was dismissed with costs.





Chan Kin Sum v Secretary for Justice

HCAL Nos 79, 82 & 83 of 2008¹ (December 2008)

Court of First Instance



Background

Two prisoners serving their sentence in Stanley Prison and a member of the Legislative Council (LegCo) challenged section 31(1)(a) and (b) and section 53(5)(a) and (b) of the Legislative Council Ordinance (Cap. 542) as unreasonable restrictions of the right to vote protected under BL 26 and Article 21 of the Hong Kong Bill of Rights (BoR). Under these challenged provisions (disenfranchisement provisions), a person who had been sentenced to death or imprisonment and had not fully served the sentence or received a free pardon, or who was serving a sentence of imprisonment on the date of application

for registration as an elector or on the date of election, was disqualified from being registered as an elector and voting.

The two prisoners were both permanent residents of the HKSAR. One of them was a registered voter but the other was not. The LegCo member was not a prisoner at any material time. He, however, argued that he had been approached by interested parties who had complained to him of their lack of right to vote as a prisoner or as a remanded person.

Right to vote

Permanent residents' right to vote is protected under both the BoR and the Basic Law: BL 26 and Article 21 of the BoR.

The Court held that BL 26 did not provide an absolute right. The article had to be read together with Article 21 of the BoR and be subject to "reasonable restrictions". Accordingly, the right to vote under BL 26 might be restricted if (1) the restriction was "prescribed by law", and (2) such restriction did not contravene Article 21 of the BoR, in accordance with BL 39(2). There was no difference between the two rights to vote guaranteed under the respective instruments.

¹ Reported at [2009] 2 HKLRD 166 and [2008] 6 HKC 486.



Permissible restrictions – the correct test to apply

The Court rejected the respondents' argument that the *Wednesbury* unreasonableness test should apply in the present case – which, in its classic formulation, means something that was “so unreasonable that no reasonable authority could ever come to it”. The Court held that Article 21 of the BoR had been considered in at least two local cases,² where the proportionality test, instead of any *Wednesbury* unreasonable test, had been applied. The Court cited with approval the following test:

- (a) what objectives the restrictions are to be achieved;
- (b) whether there is a rational connection between the objectives to be achieved and the means or restrictions employed; and
- (c) whether the restrictions are proportionate responses to the achievement of the legitimate objectives.

The Court considered the proportionality test to be the appropriate test to apply in the Article 21 context.

Proportionality test

The Court was prepared to accept that the following could be legitimate aims of the disenfranchisement provisions:

- (a) prevention of crime, incentive to citizen-like conduct and enhancing civil responsibility and respect for the rule of law;
- (b) additional punishment in the form of forfeiture of rights.

The Court, however, found that the respondents had failed to establish a rational connection between the restrictions and the aim. Having regard to, inter alia, the decision of the European Court of Human Rights (ECtHR) in *Hirst v United Kingdom (No. 2)* (2006) 42 EHRR 849 which concerned Article 3 of Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (a provision guaranteeing the right to vote), the Court held that in the Hong Kong context, the automatic and blanket disenfranchisement drew no distinction as to the type, nature or seriousness of different offences, the length of custodial sentences and the stage of completion of the terms of imprisonment. It operated without regard to the degree of culpability save to the extent that the offence in question merited imprisonment (or a suspended sentence), nor to personal circumstances. All this led to various unacceptable situations in terms of the stated aims for imposing the restrictions.

Disqualification from registration

The disqualification from registration as an elector made the situation even worse. A prisoner who

² *Lee Miu Ling v Attorney General* [1996] 1 HKC 124 and *Lau San Ching v Liu, Apollonia* (1995) 5 HKPLR 23.



was released after the registration deadline but before election day was unable to vote if he had not registered as an elector prior to sentencing. Yet a person who had so registered prior to sentencing could vote. It was difficult to see what legitimate aim this difference in treatment was intended to serve, or how it was proportionate as a measure to achieve the stated legitimate aims.

Efficacy of restrictions to further legitimate aims

The Court noted that no evidence whatsoever had been produced by the Government that a meaningful number of prisoners would have thought twice before committing their crimes if they had known before that if caught, convicted and sentenced to imprisonment, they would lose the right to be registered as an elector or to vote; that the provisions would give an incentive to citizen-like conduct; or that they would enhance civic responsibility and respect for the rule of law.



courts should, where appropriate, defer to the wisdom and choices made by the LegCo or the executive, in particular where questions of social or economic policy were involved. The respect and deference was much less required where the rights were of high constitutional importance or were of a kind where the courts were especially well placed to assess the need for protection.

In the present case, the Court should proceed on the basis that the legislature had given the matter serious thought on many occasions. Due respect had to be had to the choices made by the legislature and the executive. That said, it did not relieve the Court of its constitutional responsibility to examine the choices closely and see whether the restrictions on voting rights could be justified. The Court concluded that the right to vote was without doubt the most important political right, and that the general, automatic and indiscriminate restrictions on the right to vote and the right to register as an elector could not be justified under the proportionality test. They were unreasonable restrictions. Further, if being a prisoner was a “status”, the restrictions also amounted to



The Court’s constitutional duty

The Court stated that it had no difficulty with the concept of margin of appreciation or deferring to the judgement of the legislature. It held that the



unjustified discrimination against those behind bars (as well as those who had been sentenced to imprisonment, which sentences had not been served out or freely pardoned). That said, it was the function of the legislature to determine what would constitute reasonable restrictions on the voting right of prisoners in Hong Kong.

Remanded persons' rights to vote

The Court held that the lack of special arrangements available to those on remand to enable them to vote on election day was indefensible. The Court fully recognized the possible concerns, including security ones, that such special arrangements might entail, but it noted that similar arrangements had been made elsewhere, and was of the view that if one tried hard enough, reasonably satisfactory arrangements could be worked out.

Outcome

In conclusion, the Court held that the disenfranchisement provisions contravened the right to vote constitutionally guaranteed under BL26 and Article 21 of the BoR, so far as they affected prisoners (and those convicted persons who had been sentenced to death or imprisonment, and who had not served the sentences or received a free pardon). Arrangements should be made to enable prisoners to vote on election day. The Court also held that the constitutional right to vote of remanded persons was not affected by any law, and arrangements should be made to enable them to vote on election day whilst being held in custody.³

³ Upon the Administration's application, the Court granted a temporary 10-month suspension order in relation to its declarations relating to prisoners' voting right up to 31 October 2009: see *Chan Kim Sum Simon v Secretary for Justice and Electoral Affairs Commission*, HCAL 79/2008. For the repeal of the disenfranchisement provisions, see the Voting by Imprisoned Persons Ordinance (Ordinance No. 7 of 2009).



Luk Ka Cheung v The Market Misconduct Tribunal & Anor

HCAL No 49 of 2008¹ (November 2008)

Court of First Instance



Background

In this application for judicial review, the applicant challenged the decision of the Chairman of the Market Misconduct Tribunal (MMT) that the Tribunal was validly constituted and had jurisdiction to determine the matters referred to it by the Financial Secretary's notice. The said notice directed the Tribunal to institute and conduct proceedings to determine whether any market misconduct within the meaning of Part XIII of the Securities and Futures Ordinance (Cap.571)(the Ordinance) had taken place in relation to the dealings in the securities of China Overseas Land and Investment Ltd.

Separation of powers and the Basic Law

The applicant contended, in essence, that what the Ordinance required the MMT to do was to exercise the judicial power of the State, which was reserved exclusively under the Basic Law for the courts of judicature of the HKSAR to exercise. This offended against the doctrine of separation of powers, which underlined the political and legal structures set up under the Basic Law. Section 291 in Part XIV of the Ordinance provided, inter alia, that conduct commonly described as insider dealing constituted a criminal offence. Yet Part XIII of the Ordinance provided an alternative regime

¹ Reported at [2009] 1 HKLRD 114 and [2009] 1 HKC 1.



by which the MMT, a statutory body established by the Ordinance and consisting of three people, two of whom were not judges and were appointed by the Financial Secretary, might at the Financial Secretary's instigation determine whether conduct identified in section 279 under Part XIII had taken place. Such conduct was identical in all material respects to the criminal conduct that was set out in section 291 under Part XIV.

The only and all important issue in the application was whether the Tribunal did purport to exercise the judicial power of the HKSAR, which was vested exclusively in the Judiciary of the HKSAR, pursuant to the provisions in the Basic Law. In other words, the issue was: was the Tribunal purporting to function as a 'court' or a 'court of the classic kind', when it was not such a court?

Interpreting the Basic Law – importance of context

The Court held that it was true that the principle of separation of powers was enshrined in the Basic Law, and the judicial power of the SAR was exclusively vested in the Judiciary. The task in the present case was to determine whether the Market Misconduct Tribunal was required by the Ordinance to exercise such a power.

Each constitution is the child of its environment. Hence, it was unsafe to simply borrow and apply the Australian jurisprudence on separation of powers in general and on judicial power in particular without first recognizing the rationale behind the Australian approach, which was a "strict" one. Unlike Australia, Hong Kong did not have a federal system. Further, a main theme

of the Joint Declaration and the Basic Law was that of continuity, including continuity between the pre-existing and the present court and judicial systems.

In a modern society like Hong Kong, administrative tribunals and bodies had an important role to play. They could offer speedier, cheaper and more accessible justice. Further, a specialized tribunal possessed expertise in its own field. This was not a new phenomenon. It was already the case before the Basic Law was promulgated. Given the theme of continuity, it would be very surprising if the effect of the Basic Law, upon its proper interpretation, were to outlaw these administrative tribunals and bodies for ousting the jurisdiction or usurping the judicial functions of the courts of judicature of the HKSAR. Or put another way, the Basic Law should be interpreted in such a way as to enable, so far as violence was not done to the principle of separation of powers as understood in the tradition of English common law, the continued existence and development of administrative tribunals and bodies. This called for a flexible and realistic, as opposed to an idealistic, approach to the doctrine of separation of powers, and a purposive and contextualised interpretation of the scope and meaning of "judicial power" in the Basic Law.

In relation to the above theme of continuity, the Insider Dealing Tribunal, the predecessor of the MMT, was already in existence for some years before 1997, pursuant to the provisions in the Securities (Insider Dealing) Ordinance (Cap 395) (now repealed).



A novel subject matter

Another important fact was if the subject matter was one that had, traditionally or historically, been the subject of adjudication by the courts of judicature, that was an indication that what was involved was the judicial power of the State. Thus, subjects such as crimes, or claims in contract or tort, were subjects traditionally dealt with by the courts in exercise of their judicial power of the State. Hiving off any such subject matters from the court's jurisdiction to a tribunal could therefore be problematic.

The same consideration did not apply where the subject matter was novel to the common law. Insider dealing was such a subject. It was not a common law offence. Nor did it sit comfortably well with traditional causes of action based on contract, tort, trust, agency or companies law. Likewise, the sanctions that the MMT could impose, namely, orders of disqualification, cold shoulder orders, cease and desist orders, disgorgement orders and extensive costs orders, were, by and large, sanctions not known to the common law. They were creatures of statute.

In short, it was not a case of removing from the jurisdiction of the court a subject matter and giving it to a statutory tribunal to deal with. What actually happens was that by legislative intervention, a new subject matter was identified as one that required regulation or policing, and, for policy or administrative reasons, the task was given, not to the traditional courts, but to a statutory tribunal specially established for such purposes.

MMT did not decide criminal guilt/civil liability

The Court further held that the MMT's determination, based on the civil standard and according to rules and procedures that were civil and inquisitorial in nature, was not a determination of criminal guilt or civil liability. The Ordinance created a civil cause of action based on market misconduct (section 281) but did not give the jurisdiction to determine such liability to the MMT. Rather, such civil liability was to be determined by the civil courts. What the legislature had done was to render the determination by the MMT admissible evidence in the civil proceedings and to create a rebuttable presumption based on the determination of market misconduct against the defendant.

Nature of the function of MMT

Looking at the dual regimes under the Ordinance, and particularly the Part XIII scheme, the Court held that the purpose of the MMT was to protect and maintain the integrity of the financial markets in Hong Kong, thereby enhancing and preserving Hong Kong's reputation as an international financial centre. It was regulatory in nature. While the sanctions were potentially severe, and therefore carried with it a deterrent effect, that did not render the sanctions any less protective in nature.

To a substantial extent, the MMT was performing a function comparable to that performed



by a regulating body or disciplinary tribunal established to self-regulate a particular type of activities amongst a specific class of people in the society. It was very different in nature from, say, the determination of a criminal offence by a criminal court, or the adjudication of civil disputes before a civil court.

Registration of MMT's orders

It was true that an order of the Tribunal might be registered in the Court of First Instance, and once registered, it should take effect as if it were an order of that court (section 264(1)). However, registration was not automatic. Further, taken at the highest, that was only a pointer, albeit an

important one, that what was being exercised was the judicial power of the State.

Viewed historically, provision for automatic registration of the orders of the Insider Dealing Tribunal was already in existence prior to 1997, and assuming that the Basic Law did not intend to create a sea change in terms of regulating insider dealing in Hong Kong, it was difficult to see how a discretionary power to register could turn the successor to the Insider Dealing Tribunal into a tribunal seeking to exercise the judicial power of the State. All things considered, what was being sought to achieve in s 264(1) was nothing more than to provide a convenient aid to execution.

MMT's powers

That the Tribunal was given powers regarding gathering evidence and punishing people for contempt could not be conclusive of the matter. The Tribunal's power to commit people for contempt was not unique to it. The Solicitors Disciplinary Tribunal certainly possessed such a power. Taking a step back, the whole question of whether a tribunal was in fact exercising the judicial power of the State could not possibly be determined by the single question of whether it had a power to commit for contempt in the face of the tribunal.

Policy intention

The fact that it was thought that securing a Part XIV conviction was difficult and thus there was a need to set up a Part XIII alternative did not turn the Part XIII scheme into one whereby the judicial



power of the State was exercised. One must not confuse the reasons for needing an alternative regime with the true nature of that alternative regime.

Double jeopardy

In the absence of provisions safeguarding against double jeopardy, a person might be vexed in two sets of proceedings did not necessarily or logically mean that the nature of those two sets of proceedings was the same or similar.

Conclusion

The Court had no hesitation in concluding that the MMT was not required by the Ordinance to exercise the judicial power of the HKSAR. It did not oust the jurisdiction of the criminal courts in

Hong Kong, nor did it usurp their function. It was established to perform a regulatory and protective role in Hong Kong's financial markets. It was there to ensure that those engaged in market misconduct did not profit from their wrongs. In a fairly general sense, it performed a function that protected and benefited the interests of the society as a whole. It did not determine criminal guilt nor impose penal sanction. Certainly it wielded extensive powers and indeed it had to act judicially, but one thing it did not do was to exercise the judicial power of the HKSAR. Hong Kong had a long history of using administrative bodies and tribunals for similar functions. They were, to a certain extent, integrated into and form part of the "machinery of justice". In the Court's view, their place in Hong Kong was not affected by the provisions in the Basic Law. The Court dismissed the application for judicial review.