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# Court Of Final Appeal Hands Down Landmark Ruling On The Application Of Section 213 Of The SFO

The Court of Final Appeal (**CFA**) has [dismissed the appeal](http://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=13PR41) [[archived copy](Dismiss.pdf)] of asset management company, Tiger Asia Management Ltd (**Tiger Asia**) in a landmark decision on the application of section 213 of the Securities and Futures Ordinance (**SFO**). This decision puts an end to Tiger Asia’s challenge to the court’s jurisdiction under section 213 and sets a strong precedent that allows the SFC to enter into civil proceedings under section 213 as well as criminal market misconduct proceedings under Part XIV SFO with respect to the same incidence of market misconduct.

## Background

Tiger Asia is an asset management company based in New York that faced allegations of insider dealing and market manipulation in 2009. It was alleged that Tiger Asia received inside information about the size and discount range of a placement of shares in China Construction Bank Corporation (**CCBC**) and used this information to profit from short selling CCBC shares before the placement was publicly announced. The information disclosed to Tiger Asia was confidential and price sensitive and three of its senior officers knew this. The notional profit gained from those transactions was alleged to be HKD29.9 million. It was also alleged that Tiger Asia engaged in insider trading in shares in Bank of China. Prior to a placement of Bank of China shares by UBS AG, Tiger Asia allegedly made a notional profit of HKD8.6 million from short selling those shares. Prior to another placement of Bank of China shares, this time by Royal Bank of Scotland, Tiger Asia allegedly incurred a notional loss of approximately HKD10 million from short selling those shares. The Securities and Futures Commission (**SFC**) considered all the above transactions entered into by Tiger Asia to constitute illegal insider trading.

The SFC applied to the court under section 213 seeking orders for violations of relevant “market misconduct” provisions of the SFO without having obtained a prior ruling by either a criminal court or the Market Misconduct Tribunal (**MMT**) finding a violation of the SFO. No prior rulings finding violations of the SFO had been made because the SFC had not referred the matters to the Financial Secretary for civil proceedings before the MMT under Part XIII of the SFO nor to the Secretary for Justice for criminal prosecution on indictment under Part XIV of the SFO before commencing the section 213 actions. Nonetheless, in 2011 the Court of Appeal (**COA**) in Tiger Asia’s case found (contrary to the decision of the Court of First Instance (**CFI**)) that the SFC could obtain a final order under section 213 otherwise than on the basis of a prior finding of market misconduct by the MMT or a criminal court. Thus, a court could find a contravention of relevant provisions of the SFO independently from a determination made in other prior proceedings under Parts XIII or XIV of the SFO and, accordingly, under section 213 that court may grant an order or injunction on the basis of that finding.

## Section 213

Section 213 of the SFO grants the SFC the power to apply to the CFI for a broad range of declaratory orders and injunctions for:

1. contraventions of (A) any relevant provisions, (B) any notice or requirement given or made under or pursuant to any relevant provisions, (C) any terms and conditions of any licence or registration under the SFO, or (D) any other condition imposed under or pursuant to any provision of the SFO;
2. aiding, abetting or otherwise assisting, counseling or procuring a person to commit any such contravention;
3. inducing, whether by threats, promises or otherwise, a person to commit any contravention;
4. directly or indirectly being knowingly involved in, or a party to, any such contravention;
5. attempting, or conspiring with others, to commit any such contravention; and
6. instances where it appears, whether or not during the course or as a result of the exercise of any power under Part VIII of the SFO, to the SFC that any of the matters referred to above has occurred, is occurring or may occur.

All provisions of the SFO and of the Companies Ordinance (**CO**) prospectus regime (as set out in Parts II and XII of the CO) are within the definition of “relevant provisions”.

The orders and injunctions which may be imposed include:

1. orders restraining or prohibiting the offending conduct;
2. orders restraining or prohibiting a person from dealing in property;
3. orders appointing an administrator to a person’s property;
4. orders requiring steps to restore the parties to any transaction to the position in which they were before the transaction was entered into;
5. orders declaring a contract to be void or voidable;

i.orders requiring payment of damages; and

1. any ancillary order that the CFI considers necessary.

## Implications of the COA Decision

As a result of the COA’s decision, concerns have been raised that the recent use of section 213 allows the SFC to side-step the market misconduct regime. Under the market misconduct regime, Parts XIII and XIV are mutually exclusive and constitute a dual civil and criminal regime to deal with market misconduct; an alleged wrongdoer could therefore potentially face a criminal or a civil proceeding, but not both. Moreover, the civil regime under Part XIII is designed to ensure that cases are heard by way of inquiry rather than court litigation and affords respondents the protection of having a tribunal which is comprised of not just a High Court judge but also lay persons with experience of the market. Section 213 as interpreted by the COA creates a third procedure which the SFC can use to punish market misconduct which is not mutually exclusive with the criminal market misconduct regime, meaning that an alleged wrongdoer could potentially face both civil and criminal proceedings – a civil proceeding under section 213 and a criminal prosecution under Part XIV of the SFO. Furthermore, a court proceeding under section 213 does not offer an alleged wrongdoer the same structure and protections as offered under the market misconduct regime, as mentioned above.

## The CFA Decision

The CFA upheld the decision of the COA unanimously. In his judgement, the Right Honourable Lord Hoffmann NPJ stated that the MMT and the criminal court are not intended to be the only avenues for dealing with market misconduct. Lord Hoffmann [explained this point](http://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=13PR44) [[archived copy](Reasons.pdf)] by stating that:

* the remedies under section 213 serve a different purpose to the penalties that can be imposed in criminal or civil market misconduct proceedings under Parts XIII and XIV of the SFO, respectively;
* in proceedings under section 213, the SFC acts as a “protector of the collective interests of the persons dealing in the market who have been injured by market misconduct” rather than as a prosecutor; and
* the question of whether a person has committed a criminal offence is entirely a matter for the criminal court and is not a matter that is determined in proceedings under section 213 which are clearly civil proceedings.

This decision sets a precedent that extends the reach of the SFC and strengthens its ability to combat cross-border market misconduct. Tiger Asia was located outside the reach of the criminal jurisdiction of the Hong Kong courts. Although the COA stated in its decision that criminal prosecution in this case was difficult or impossible because Tiger Asia and its officers were located overseas, it did not limit section 213’s application to overseas wrongdoers. The COA did, however, confirm that section 213 was intended to increase the SFC’s ability to protect investors and provide remedies for contraventions of market misconduct provisions. Since the CFA decision also did not limit the application of section 213 to overseas wrongdoers, it appears that it may be used in civil proceedings against entities in Hong Kong as well. Since this case confirms the existence of a third procedure by which the SFC may pursue civil proceedings against market misconduct, alleged wrongdoers may now face both criminal and civil proceedings in respect of the same conduct.

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