Paper No. 8E/01

Bills Committee on
Securities and Futures Bill and Banking (Amendment) Bill 2000

Part IX –
Use of information in disciplinary proceedings

Introduction

In relation to the discussion on clause 193 of the Securities and Futures Bill (SF Bill) at the Bills Committee meeting on 24 April 2001, Members asked us to provide examples of illegally obtained evidence which might be held admissible for the purpose of criminal proceedings. This paper –

(a) recapitulates the policy intention of clause 193 in the disciplinary regime administered by the Securities and Futures Commission (SFC);

(b) explains the common law position with respect to admissibility of evidence in disciplinary proceedings; and

(c) provides some examples to illustrate the common law principle that subject to a judicial discretion to exclude, illegally or irregularly obtained evidence is admissible for the purpose of criminal proceedings.

Use of information in disciplinary proceedings

2. Clause 193 of the SF Bill provides that in reaching a disciplinary decision under specified provisions in Part IX of the Bill, the SFC may have regard to any information or material in its possession which is relevant to the decision, regardless of how the information or material has come into its possession.

3. The clause is drafted with a view to prevent unnecessary arguments about the information the SFC can rely upon in disciplinary proceedings. At common law, there is no requirement that a disciplinary body must observe the strict rules of evidence observed in courts. The overriding principle is that the disciplinary proceedings should observe the rules of natural justice (*Law and practice of Disciplinary & Regulatory Proceedings*, Brain Harris QC 1995 at p. 143. See also *Mahon v Air New Zealand and Others* [1984] 3 All ER 204 and *R v Hull Board of Visitors, ex parte St Germain and Others (No. 2)* [1979] 3 All ER 545). We believe clause 193 is declaratory of what we understand to be the common law.

4. The SFC cannot recall any specific instance in which it has in the conduct of disciplinary proceedings relied on information which it itself has illegally or unlawfully obtained. However, the SFC can think of some instances, as follows, which may fall within such a category, although such information would not be illegally or unlawfully obtained by the SFC in the strict sense –

(a) the first example is information which a person (a "whistle-blower") may have taken from a licensed company and has given to the SFC to support a complaint he has made about that company. In these circumstances, the SFC would not itself have illegally or unlawfully obtained the information but the person who gave the SFC the information may technically have engaged in theft or breach of confidence. We understand that, under the current law, a court would not stop the SFC from relying on the information. In our view, the public interest clearly favours the SFC's use of such information if it discloses wrongdoing; and

(b) the second example is where SFC staff acts as an agent provocateur to obtain information. In some cases, primarily involving unauthorised promotion of investment products (presently in breach of the Protection of Investors Ordinance and which will be in breach of Part IV of the Bill), SFC staff will pose as ordinary members of the public to obtain information about these suspected breaches of the law. The information gathered may subsequently be used against the person suspected of breaching the relevant laws. This is usually in summary criminal proceedings. However, if the people involved were licensed by the SFC, it is possible that the SFC could consider taking disciplinary action against them.

5. In these circumstances, the SFC usually tries to obtain information that independently corroborates the information obtained from a whistle-blower or through an agent provocateur. If the SFC cannot do this, it will carefully consider the reliability of such information and the policy arguments for and against using it before deciding to rely on it in proceedings.

6. As a procedural safeguard, the SFC already is obliged to disclose the information it relies upon in disciplinary proceedings through the obligation under clause 189 to accord the subject of the disciplinary proceedings a reasonable opportunity of being heard.

Admissibility of evidence in criminal proceedings

7. It is noted that in criminal cases, no evidence is automatically excluded from consideration. The following cases illustrate the common law principle that subject to a judicial discretion to exclude, illegally or irregularly obtained evidence is admissible for the purpose of criminal proceedings –

(a) In *Kuruma, Son of Kaniu v the Queen* (1955) A.C. 197 at P. 203, Lord Goddard said :

> *"In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.*

He further observed at P. 204 :

> *"...No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused..."*

(b) In *Lam Tat ming and Anr* [2000] 2 HKLR 431, the Court of Final Appeal further elaborated the rule governing the admissibility of confessions obtained during undercover operations. The Court recognises the necessity of using *"subterfuge, deceit & trickery"* (442J) in investigations involving undercover agents. The

suspect's right of silence is not per se infringed, and the confessions so obtained are prima facie admissible subject to a judicial discretion to exclude. In answering whether the right of silence was infringed, the law has to apply "practical common sense" :

> *"Where the undercover officer plays a passive role and hears or overhears the confession or records it, there can be no basis for rejecting. R v Keeton (1970) 54 Cr App R 267 and HKSAR v Ng Wai Man [1998] 3 HKC 103 are examples of this situation."*

(c) In *R v Leatham* (1861) 8 Cox C.C. 498, the existence of two incriminating letters only became known by answers the defendant had given to another statutory tribunal in respect of which the statute provided that answers before that tribunal should not be admissible in evidence against the defendant. The letter was held to be admissible. Crompton J went so far as to say that :

> *"It matters not how you get it; if you steal it even, it would be admissible."*

This case was quoted without adverse comment by Lord Goddard C.J. in *Kuruma*.

(d) In *Lee Yin-ping v. the Queen* [1979] HKLR 454, Roberts C.J. said at 457 : –

> *"If a police officer who enters premises unlawfully, but finds on those premises evidence of an offence, he is then entitled, and indeed under a duty, to take whatever action is proper for a police officer in whose presence an offence is committed. This clearly includes the power of arrest."*

(e) Another example is admissibility of exhibits seized without a warrant in relation to an offence under the Gambling Ordinance (*AG v Ting Shui-ching and others* [1966] HKLR 174).

Conclusion

8. In conclusion, we see no particular reason for preventing the SFC from relying upon illegally or irregularly obtained information in its disciplinary proceedings. At common law, reliance upon such information in disciplinary proceedings is permitted. It is also permitted in criminal proceedings on a balancing test of the interests of the society in fighting crime and wrongdoing against the interests of the individual and society in guarding against improper action by public authorities. In the SFC's case, the use of information is to ensure that appropriate action can be taken against privileged regulated persons to protect the investing public.

Securities and Futures Commission
Financial Services Bureau
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