National Security (Legislative Provisions) Bill : Official Secrets Ordinance – Damaging Test

This paper considers whether the Hong Kong courts would be likely to follow the House of Lords decision in *Lord Advocate v The Scotsman* [1989] 3 WLR 358 (see Paper No. 49).

Civil proceedings

2. The case related to civil proceedings by the British Crown to restrain a newspaper from publishing information obtained by a former member of the British Intelligence Service (a Mr Cavendish) in the course of his employment with the security services, which he had included in a book printed at his own expense. The House of Lords refused to restrain the newspaper since –

(1) the Crown did not claim that the contents of the book could damage national security; and

(2) the book had already been published to a small number of people and any further publication would not increase the damage to the public interest.

3. The decision related to the civil law, which is not being affected by the current Bill. However, the common law principles applied by the House of Lords are applicable in Hong Kong. If similar proceedings were instituted in Hong Kong, the local courts would be likely to follow the House of Lords decision.

4. In submission no. 155, Professor Johannes Chan states that "the House of Lords suggested that it was necessary to show a strong likelihood of harm as a result of the unauthorized disclosure and that the nature of the harm must be specified". However, the judgment does not expressly refer to any such requirements. Instead it relied on the tests adopted in the Spycatcher case –

> *"In so far as the Crown acts to prevent such disclosure or to seek redress for it on confidentiality grounds, it must necessarily, in my opinion, be in a position to show that the disclosure is likely to damage or has damaged the public interest. How far the Crown has to go in order to show this must depend on the circumstances of each case".*

Criminal proceedings

5. Two of the judges referred to the tests for criminal liability for unauthorized disclosure contained in the Official Secrets Act 1989.

6. Lord Templeman held that an injunction to restrain a breach of confidence at the suit of the Crown should not, in principle, be exercised in a manner different from or more severe than any appropriate restriction in the 1989 Act which, if breached, would be a criminal offence.

7. Having analysed relevant sections of the Act (which are similar to sections 13 and 18 of the Official Secrets Ordinance), Lord Templeman concluded that –

(1) the newspaper had come into possession of protected information as a result of its having been disclosed by a Crown servant without lawful authority, "notwithstanding that Cavendish had retired from his employment and was not a Crown servant at the date when information protected against disclosure was disclosed by Cavendish";

(2) a third party (such as the newspaper) is only guilty of an offence if the information is damaging in the sense defined in the Act;

(3) the Crown conceded that future publication would not be likely to cause damage other than indirect damage which the learned judge rejected as insufficient;

(4) the information itself did not fall within a class or description of information the unauthorized disclosure of which would be likely to be damaging.

8. Lord Jauncey of Tullichettle expressed the view that the newspaper could not have been prosecuted under the 1989 Act because disclosure by third parties is only an offence if the disclosure is damaging. The learned judge assumed that the section equivalent to section 18 of the Official Secrets Ordinance was intended to apply to confidential information deriving from past as well as present members of the security services. However, he added that the assumption "may well be unjustified having regard to the obscurity of the language".

9. It is considered that the statements by these two learned judges concerning the necessity of satisfying the damage test before a person can be convicted under section 18 of the Official Secrets Ordinance would be followed in Hong Kong. However, the statements have not resolved the question

whether section 18 applies where a ***former*** public servant or government contractor made the unauthorized disclosure.

10. The current Bill proposes to put the matter beyond doubt by providing that the section does apply to that situation (see clause 11(1)(c)).

Likelihood of damage

11. On pages 11 and 12 of his submission, Professor Johannes Chan, states that, under the proposed new section 16A(2) of the Official Secrets Ordinance, all the prosecution is required to prove is that the information falls within a ***class*** whose disclosure is likely to have the effect of endangering national security.

12. With respect, that is not correct. The only provision that allows such an approach is the existing section 14(2)(c), which relates to the disclosure of security or intelligence information by a person who is or has been a public servant or government contractor. It provides that a disclosure is damaging if "the information, document or article in question falls within a class or description of information, documents or articles the unauthorized disclosure of which would be likely to have that effect".

13. The proposed section 16A(2)(b) is similar to the existing sections 14(2)(b), 15(2)(d) and 16(2)(b). It provides that a disclosure is damaging if the information, document or article in question is of such a ***nature*** that its unauthorized disclosure would be likely to endanger national security. There is no provision similar to section 14(2)(c).

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