##### HCA 1277/2019

[2021] HKCFI 2172

**IN THE HIGH COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**COURT OF FIRST INSTANCE**

ACTION NO 1277 OF 2019

\_\_\_\_\_\_\_\_\_\_\_\_

BETWEEN

SECURITIES AND FUTURES COMMISSION Plaintiff

and

ISIDOR SUBOTIC 1st Defendant

DAVID SUBOTIC 2nd Defendant

SASHA SZABO 3rd Defendant

HO MIN HIN 4th Defendant

SIT YI KI 5th Defendant

LAU YIK KWAN 6th Defendant

SUEN MAN SIMON 7th Defendant

LAM WING KI 8th Defendant

TAM CHEUK HANG 9th Defendant

EDEN INVESTMENTS LTD. 10th Defendant

360HK LIMITED 11th Defendant

DAS CAPITAL LIMITED 12th Defendant

EASTMORE GLOBAL, LTD. 13th Defendant

EASTMORE MANAGEMENT, LLC 14th Defendant

MIGHTY EDGE LIMITED 15th Defendant

COASTAL MANAGEMENT LLC 16th Defendant

(discontinued)

CHINA JOINT FUNDS MANAGEMENT  
 LIMITED 17th Defendant

EASTMORE HOLDINGS, LTD 18th Defendant

CURRENT TRADING, LLC 19th Defendant

BOOTHBAY MULTI STRATEGY  
 FUND LP 20th Defendant

(discontinued)

\_\_\_\_\_\_\_\_\_\_\_\_

Before: Hon Au-Yeung J in Chambers

Date of Hearing: 19 March 2021

Date of Decision: 23 July 2021

\_\_\_\_\_\_\_\_\_\_\_\_\_

D E C I S I O N

\_\_\_\_\_\_\_\_\_\_\_\_\_

*Index Paragraph*

1. Introduction 1
2. Background 6
3. Legal principles 18
4. Eastmore Defendants’ case 47
5. Gateway F 51
6. Gateway B 102
7. Gateway C 121
8. Material non-disclosure before the Master 126
9. Amendment Summons 127
10. Conclusion 128
11. introduction

In this decision, D2, D3, D13, D14, D18 and D19 shall be referred to collectively as “**Eastmore Defendants**”.

1. The Plaintiff (“**SFC**”) sues, amongst others, the Eastmore Defendants for breaching various sections of the Securities and Futures Ordinance, Cap 571 (“**the Ordinance**”) and conspiracy to do false trading in Hong Kong. SFC seeks various reliefs including an order for restoration of the market participants to the positions they were in before the relevant transactions and an injunction against false trading and damages.
2. SFC obtained leave (“**Original Leave**”) to serve various court documents on the Eastmore Defendants out of the jurisdiction under O11, r.1(1)(f) (“**Gateway F**”, tort claim) and r.1(1)(b) (“**Gateway B**”, injunction claim) of the Rules of the High Court, Cap 4A (“**RHC**”).
3. There are 3 summonses before the Court:

(1) A summons dated 1.11.2019 issued by the Eastmore Defendants (“**Eastmore Summons**”) seeking, amongst others, a declaration that the Court has no jurisdiction over them in respect of the subject matter of the claims or relief sought in this action; an order that the Original Leave be set aside; and an order that the interim injunction against D2, D13, D14 and D19 be discharged;

(2) A summons dated 29.5.2020 issued by SFC under O11, r.11(1)(c) (“**Gateway C Summons**”) seeking an order that, in the event that the Original Leave is set aside as against any of the Eastmore Defendants, fresh leave be granted to SFC to serve various documents out of the jurisdiction on those Defendants as they are necessary or proper parties to the claim (“**Gateway C**”).

(3) A summons filed on 6.11.2020 by SFC for leave to serve the Amended Writ of Summons on the Eastmore Defendants (“**Amendment Summons**”).

1. The Eastmore Defendants challenge the use of Gateway F, raising a novel issue as to whether the claims under the Ordinance are founded on tort. They say that the injunctions are not rightly sought to justify the use of Gateway B. As for Gateway C, the validity of the Writ of Summons had expired and it would be futile to give leave to serve the writ out of jurisdiction.
2. BACKGROUND

The background facts are largely not in dispute. I gratefully adopt the summary of Mr Man SC (leading Ms Sheena Wong), counsel for SFC.

1. These proceedings were commenced by SFC in July 2019 under s.213 of the Ordinance in respect of the trading in the shares of a listed company, Ching Lee Holdings Limited (“**Ching Lee**”).
2. On 11.7.2019, SFC made an *ex parte* application for, amongst others, freezing injunctions and ancillary disclosure orders under s.213 of the Ordinance, Order 29 of RHC, s.21L of the High Court Ordinance (Cap 4) and the court’s inherent jurisdiction.
3. SFC’s case is that the Defendants had been involved in an extensive and well-choreographed scheme of “false trading” (“**Scheme**”) for about 7 months between February 2016 and 7.9.2016 (“**Relevant Period**”). That scheme was in contravention of ss.274 and/or 295 of the Ordinance by (i) creating a false or misleading appearance of “active trading” in Ching Lee shares, and/or (ii) creating and maintaining an artificially inflated price of Ching Lee shares during the Relevant Period.
4. The Scheme was implemented in 5 main stages:

Stage 1: Planning, funding and allocation of Placement Shares to 116 nominee placees.

Stage 2: On the first trading day (29.3.2016), manipulative trading orders were executed through the accounts of the nominee placees and traders in order to create and maintain an artificially inflated price of Ching Lee shares, which was 700% above the placing price at the end of that day.

Stage 3: Throughout the rest of the Relevant Period, the artificially inflated prices of Ching Lee shares were maintained by the execution of manipulative trading orders through an extensive network of nominee traders.

Stage 4: Substantial cash loans were obtained (through D15) from two lenders (“**Lenders**”) using the inflated prices of Ching Lee shares as collaterals.

Stage 5: On the last day of the Relevant Period (7.9.2016), the Defendants caused almost all of the Ching Lee shares then held by the nominee traders to be sold on the market, which resulted in a huge plummet in its share price by 90% from its previous closing price. Since then, the price of Ching Lee shares never recovered to any level like that before 7.9.2016. D15 defaulted on the cash loans, and the Defendants caused substantial amounts of proceeds of sale of Ching Lee shares and the cash loans to be remitted overseas.

1. It is estimated that some 896 market participants had suffered an aggregate loss of over HK$101.28 million, and the Scheme had generated very substantial illicit profits for the syndicate of Defendants of around HK$124.88 million.
2. On 15.7.2019, on an *ex parte* basis, DHCJ MK Liu granted, amongst others:

(1) Injunction orders freezing about HK$124.88 million and ancillary disclosure orders against, amongst others, D2, D13, D14 and D19 of the Eastmore Defendants; and

(2) The Original Leave.

1. On 16.7.2019, SFC issued the Writ of Summons in this case, seeking:

(1) A declaration that the Defendants had (i) contravened ss.274 and/or 295 of the Ordinance, and/or (ii) aided, abetted, induced another to commit, been knowingly involved in, and/or conspired with others to commit, such contraventions;

(2) An restoration order under s.213(2)(b) of the Ordinance requiring the Defendants to take such steps as the Court may direct to restore: (i) the market participants who had bought Ching Lee shares during the Relevant Period at an artificial price and incurred a loss (“**Market Investors**”); and (ii) the Lenders of the cash loans, to the positions in which they were before the impugned transactions;

(3) An order under s.213(8) of the Ordinance requiring the Defendants to pay damages to the Market Investors and/or the Lenders;

(4) An order under ss.213(2)(a), (f) and/or (g) of the Ordinance that the Defendants be restrained from false trading or creating/maintaining an artificially inflated price for such dealings;

(5) A *Mareva* type of injunction against assets of the Defendants; and

(6) An order under s.213(2)(d) of the Ordinance that an Administrator be appointed to receive the frozen assets of the Defendants.

1. On 26.8.2019, DHCJ MK Liu ordered that the freezing injunctions be continued as against, amongst others, D2, D13, D14 and D19 of the Eastmore Defendants, until substantive hearing or further order of the court.
2. On 1.11.2019, the Eastmore Defendants issued the Eastmore Summons.
3. SFC filed its Statement of Claim on 13.12.2019, which was subsequently amended (“**ASOC**”) to reflect discontinuance of proceedings against D16 and D20 on 17.12.2019.
4. On 29.5.2020, SFC issued the Gateway C Summons.
5. LEGAL PRINCIPLES

C1. Lack of a specific gateway for s.213 the Ordinance claims

Ss.274(1) and (3) of the Ordinance have “extra territorial effect”, referring expressly to things done or participation in transactions “in Hong Kong or elsewhere”.

1. However, as long ago as in 2008, Kwan J (as she then was) has commented that there was an apparent lacuna in the legislation to provide for a power to effect service out of jurisdiction of originating process under s.213 of the Ordinance: *SFC v C,* HCMP 727/2008, 22 October 2008, §55.
2. This is unlike the situation with some specialist proceedings in Hong Kong:

(a) O73, r.7, RHC which permits service of an originating summons under the Arbitration Ordinance, Cap 609, with leave of the Court of First Instance, if the arbitration is to be held within the jurisdiction; or

(b) Rule 16 of the Competition Tribunal Rules, Cap 619D, which permits service of an originating document out of the jurisdiction, with leave of the Tribunal, if each claim to which the document relates falls within the jurisdiction of the Tribunal.

1. The position under the parallel of Order 11 of RHC in other common law jurisdictions are more general:

(a) Under the CPR in England, PD 6B §3.1(20)(a) permits grant of leave where the claim is made ‘under an enactment which allows proceedings to be brought and those proceedings are not covered by any of the other gateways. Lewison LJ observed in *Orexim Trading* *Ltd v Mahavir Port and Terminal Pte Ltd* [2018] 1 WLR 4847, §§33 and 48 that it must be implicit in that gateway that the enactment in question must allow (as a matter of construction although not by express provision) proceedings to be brought against persons not in England and Wales, otherwise the gateway would be of extraordinary width.

(b) In Singapore, its Gateway S under Order 11 facilitates a grant of leave for any claim that “concerns the construction, effect or enforcement of any written law”: O11, r.1(1)(s).

So SFC has to resort to O11, r.1(1) for service out of jurisdiction.

*C2. General principles for leave for service out of jurisdiction*

Under O11, r.1(1), the plaintiff must satisfy 3 main requirements: *Dynasty Line Ltd v Sukamto Sia* [2009] 4 HKLRD 454, §29 (per Cheung JA).

(1) There is a good arguable case that its case falls within one or other of the gateways under O.11;

(2) There is a serious issue to be tried on the merits of the case; and

(3) Hong Kong is the appropriate forum under the principle governing *forum conveniens* for the trial of the action.

1. No leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction: O11, r.4(2).
2. A given set of facts may give rise to different causes of action and different heads of relief. Each cause of action requires separate consideration and a separate grant of leave under the relevant gateway. An applicant who “piggy backs” a non-gateway claim onto a gateway claim without identifying to the *ex parte* Master or Judge may be guilty of material non-disclosure.
3. In *張才奎所託管中國山水投資有限公司股份相關員工v張才奎*,HCA 1661, 1766 and 2191/2014, 13 May 2015, the plaintiffs failed to draw to the Master’s attention that there were 2 claims - ownership claim over shares (§60) and corporate misconduct claim (§61); and that the grounds in O11, r.1(1) relied upon were relevant only to the ownership claim. The plaintiffs also failed to draw to the Master’s attention the evidential requirement of the corporate misconduct claim. Due to these material failures, G Lam J (as he then was) set aside leave to serve out of jurisdiction insofar as it concerned the corporate misconduct claim (§115).
4. The duty of disclosure of the applicant extends not only to facts but potentially also to matters of law: *張才奎v張才奎*, G Lam J, §113.
5. An application for leave to issue a writ for service out of the jurisdiction ought to be “made with great care” and “looked at strictly”: *Kayden Ltd v SFC* (2010) 13 HKCFAR 696, §35. The court ‘scrutinises most jealously’ any factor which provides jurisdiction, *Chen Hongqing v Persons …* [2019] HKCFI 2121, K Yeung J.
6. The strict approach is dictated by at least 3 related considerations:

(1) Recognition of the need for ‘special care’ given the “extraordinary” nature of the long-arm jurisdiction asserted under Order 11;

(2) The court acts on the faith of the plaintiff’s representations made to it *ex parte* when granting leave; given the extraordinary nature of the jurisdiction which the court would thereby be asserting, it insists on special care on the plaintiff’s part and full disclosure of the basis upon which that jurisdiction is invoked; and

(3) It is not only the court which must be apprised of the cause of action alleged; the defendant must know the basis of the claim he has to meet so that, if so advised, he can challenge the order which asserts the court’s jurisdiction over him.

*Kayden*, §35.

1. However, the concept underpinning the requirement of leave for service out of jurisdiction has evolved. The traditional view that service out of the jurisdiction was “an interference with the sovereignty of the state in which the process was served” or “exorbitant” is “no longer realistic”. The modern pragmatic approach has been stated in Lord Sumption JSC’s judgment (with whom other law lords agreed) in *Abela v Baadarani* [2013] 1 WLR 2043, §53:

“The characterisation of the service of process abroad as an assertion of sovereignty may have been superficially plausible under the old form of writ (‘We command you…’). But it is, and probably always was, in reality no more than notice of the commencement of proceedings which was necessary to enable the defendant to decide whether and if so how to respond in his own interest. It should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like ‘exorbitant’. The decision is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum.” (underline added)

1. That judgment has been cited with approval by Lam VP in *AXA China Region Insurance Co Ltd v Leong Fong Cheng* [2016] 6 HKC 220, §20; and Kwan JA (as she then was) in *Deustche Bank v Zhang Hong Li* [2016] 3 HKLRD 303, §§74-76.
2. In *Johnston: The Conflicts of Law* (3rd ed.) at §§3.063 & 3.067, it was further noted that the emergent trend seems to be *not* to interpret the gateways in an artificially restrictive manner, but rather to interpret them *realistically*, relying upon the court’s ability to limit the exercise of the jurisdiction by reference to the principle of *forum conveniens.*
3. Whilst recognizing that service out of jurisdiction should no longer be described as “exorbitant”, judges in England maintain the view that any doubt as to the correct construction of the gateways should be resolved in favour of the foreign defendant: *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2014] EWHC 3704 (Comm), at §16, Males J; *Talos Capital Ltd v JCS Investments Holdings XIV Ltd* [2014] EWHC 3977 (Comm), §56, Flaux J.
4. Lord Sumption JSC also emphasises the need to keep the jurisdictional gateways and the discretion as to forum conveniens distinct: *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192, §31:

“The jurisdictional gateways and the discretion as to forum conveniens serve completely different purposes. The gateways identify relevant connections with England, which define the maximum extent of the jurisdiction which the English court is permitted to exercise. Their ambit is a question of law. The discretion as to forum conveniens authorises the court to decline a jurisdiction which it possesses as a matter of law, because the dispute, although sufficiently connected with England to permit the exercise of jurisdiction, could be more appropriately be solved elsewhere. The main determining factor in the exercise of the discretion on forum conveniens grounds is not the relationship between the cause of action and England but the practicalities of litigation. The purpose of the discretion is to limit the exercise of the court’s jurisdiction, not to enlarge it and certainly not to displace the criteria in the gateways. English law has never in the past and does not now accept jurisdiction simply on the basis that the English courts are a convenient or appropriate forum if the subject matter has no relevant jurisdictional connection with England. In *Abela v Baadarani,* I protested against the importation of an artificial presumption against service out as being inherently “exorbitant”, into what ought to be a neutral question of construction or discretion. I had not proposed to substitute an alternative, and equally objectionable, presumption in favour of the widest possible interpretation of the gateways simply because jurisdiction first conferred by law could be declined as a matter of discretion.”

C3. Good arguable case

A “good arguable case” does not postulate an Order 14 case, but requires something better than a mere prima facie case, and is higher than a “triable issue” or “serious issue to be tried”. It has also been described as “more than barely capable of serious argument”: *Hong Kong Civil Procedure 2021* (Vol 1) (“**HKCP 2021**”) §§11/1/43-44.

1. A good arguable case is an argument on jurisdiction “with a good prospect of success”. The argument that there is jurisdiction must be better than the competing argument that there is no jurisdiction: HKCP 2021, §§11/1/44-45; *Dynasty Line* §29(a).
2. However, the court will *not* require proof to its satisfaction as at trial on the balance of probabilities – in other words, the judge does *not* need to be satisfied that it has a “better than 50% chance of success”: HKCP 2021, §§11/1/41 & 11/1/44.
3. The Plaintiff must supply a plausible evidential basis for the application of a relevant jurisdictional gateway. If there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but if no reliable assessment can be made at the interlocutory stage, there is a good arguable case for the gateway if there is a plausible (albeit contested) evidential basis for it: *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192, §7, Lord Sumption JSC; followed in Hong Kong in*China National Geological & Mining (HK) Ltd v Tianjin Hopetone Co Ltd*[[1]](#footnote-1) per DHCJ Le Pichon, §10.
4. The practice is to look primarily at the plaintiff’s pleading *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3 [22], per Lord Hamblen; and evidence and not to attempt to try disputes of fact on affidavit: *GDH* *Ltd v Creditor Co Ltd* [2008] 5 HKLRD 895, §18, per DHCJ To (as he then was).
5. If a question of law that goes to the existence of jurisdiction arises on the application in connection with a gateway, the court will decide that question of law, rather than treating it as a question of whether there is a good arguable case: *Altimo Holdings & Investment CJSC v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 (PC), §81, per Lord Collins.

C4. Serious issue to be tried

A “serious issue to be tried” requires a lower degree of proof than a “good arguable case”. The rationale for this requirement is that the court should not subject a foreigner to proceedings here that he would be entitled to have summarily dismissed: HKCP 2021 §11/1/50.

C5. Forum conveniens

The question is whether Hong Kong is the place where the case could suitably be tried for the interests of all the parties and for the ends of justice in accordance with the principles laid down in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460: see *Dynasty Line* §§55 & 56.

1. The burden is on the plaintiff to show that there is a serious question that Hong Kong is clearly the appropriate forum to try the case: *Dynasty Line* §57.
2. The “appropriate” or “natural” forum is one “with which the action had the most real and substantial connection”: *Dynasty Line* §58**.**

C6. Applications under O12 r.8 of RHC

The plaintiff retains the onus: (i) to establish a good arguable case on jurisdiction (ie that the claim falls within one of the gateways under O11 r.1(1)); (ii) to establish a serious issue to be tried on the merits; and (iii) to satisfy the court on *forum conveniens* issues. The question to be determined is as at the date of the original application.

1. All the affidavit evidence filed up to the date of the hearing is to be considered and not just that of the plaintiff by the time of the *ex parte* application: DHCJ Le Pichon in *Ver Roger Keith v Okex Fintech Co Ltd* [2020] HKCFI 788 at §§25-26.
2. Eastmore defendants’ case

The Eastmore Defendants have not put forward rival contentions of fact. For the sole purposes of the O.12, r.8 application, they do not dispute that:

(1) The RASOC raises a serious issue to be tried on the merits against each of them, up to the point of remedies.

(2) Potentially relevant to Gateway B, the RASOC seeks as against the Eastmore Defendants *Mareva* injunctions.

(3) Potentially relevant to Gateway F is that the pleaded losses have been suffered in Hong Kong by the Lenders and/or the Market Investors.

(4) Hong Kong would be the appropriate forum for the trial of the action under the *forum conveniens* principles.

1. However, the Eastmore Defendants dispute that SFC has made out a good arguable case on either Gateway F or B.
2. Those 2 Gateways were created with private claims in mind. For this novel regulatory enforcement claim against foreigners, SFC cited no authority to the *ex parte* judge directly on point for either Gateway. The Gateways are to be construed strictly and any doubt should be exercised in favour of the Eastmore Defendants.
3. Further, there is no dispute that D2 and D3 reside in the United States. They have no real or substantial connection with Hong Kong. All relevant companies in the Eastmore Group are incorporated outside Hong Kong and do not have a physical presence in Hong Kong. The conspiracy was hatched outside Hong Kong. The RASOC pleads that multiple defendants were responsible for the Scheme without specifying who did what and where.
4. Gateway F – claims founded on a “tort”

Under O11, r.1 (1)(f), leave for service out of the jurisdiction may be granted in respect of an action begun by writ, in which the claim is “founded on a tort” and the damage was sustained, or resulted from an act committed, within the jurisdiction.

1. The Eastmore Defendants raise the following disputes:

(1) The claim is not in tort; and

(2) The SFC has not satisfied the “double actionability rule” to show that the tort is actionable both in the jurisdictions where the Eastmore Defendants are and in Hong Kong.

E1. Meaning of “tort”

There is no settled authority on the meaning of tort.

E1.1 Hong Kong and UK authorities

In *Johnston: The Conflicts of Law* (3rd ed) §5.083, it was stated that “a ‘tort’ in Hong Kong domestic law is a convenient classification of different types of liability with certain common characteristics, rather than a strict legal category with particular legal consequences. In the international choice of law context, it is suggested that, in principle and as a general rule, a ‘tort’ should be regarded as a non-contractual civil cause of action in respect of harm *suffered by the claimant* as a result of the actions or causal omissions of the defendant. It ought not to matter whether, as a matter of Hong Kong domestic law or foreign law, the claim is considered to arise in law or in equity; or whether it is based on case law or statute.

1. In *R v Secretary of State for Transport, ex parte Factortame Ltd (No 7)* [2000] 1 WLR 942, the English court had to consider the meaning of “an action founded on a tort” under s.2 of the English Limitations Act 1980. After examining various authorities on the meaning of a “tort” (§§134-149), Judge Toulmin QC concluded that the term should be “given a wide construction” (§149), and defined it as “a breach of non-contractual duty which gives a private law right *to the party injured* to recover compensatory damages at common law from the party causing the injury” (§150) (emphasis added).
2. In that case, the judge further held that:

(1) an action for damages for an infringement (contrary to s.2 of the European Communities Act 1972) of rights conferred by Community law amounted to a breach of statutory duty (§145);

(2) an action for breach of English statutory duty was classified as an action founded on tort for the purpose of s.2 of the English Limitation Act 1980 (§148); and

(3) it made no difference that the source of the duty was Community law (§156).

1. In *Vidal-Hall v Google Inc* [2014] 1 WLR 4155 (QBD); [2016] QB 1003 (CA), the English court had to consider what constituted a claim “made in tort” under the parallel of Gateway F.

(1) The claimants issued proceedings alleging that Google Inc (registered and having its principal place of business in USA) had obtained and used information relating to their internet usage, which amounted to (i) a misuse of their private information and/or breach of confidence, and (ii) acted in breach of their statutory duties under the English Data Protection Act 1998 (“**DPA**”). As to the DPA claim, s.13(1) of the Act provides that “An individual who suffers damage by reason of any contravention by a data controller of any of the requirements of this act is entitled to compensation from the data controller for that damage”*.* See QBD decision, at §83.

(2) On the defendant’s application to set aside the order for service out of jurisdiction, Tugendhat J held that the claims (i) for misuse of private information, and (ii) those under s.13 of the DPA were claims “made in tort” for the purpose of service out of the jurisdiction. See QBD decision, at §§49, 50, 70 & 143.

(3) On appeal**,** the claimants argued, amongst others, that the judge was wrong to hold that “misuse of private information” was a claim “made in tort”, but there was no appeal against the finding that breach of statutory duty under DPA was a claim “made in tort”.[[2]](#footnote-2)

(4) The English Court of Appeal upheld Tugendhat J’s decision. Accordingly, misuse of private information was regarded as a tort for the purposes of service out of the jurisdiction (CA Decision, §§43 & 51).

1. In Hong Kong, it has been suggested that by analogy with the English DPA, a claim for “compensation” by a person who “suffers damage” under s.66 of the Personal Data (Privacy) Ordinance (Cap. 486)[[3]](#footnote-3) would also be a claim in tort for the purposes of service out of the jurisdiction: HKCP 2021 §11/1/337(v).

E1.2 Australian authorities

*Williams v The Society of Lloyd’s* [1994] 1 VR 274 was a Gateway F case before the Supreme Court of Victoria:

(1) The Plaintiff’s claim was under s.52 of the Trade Practices Act which provided that a corporation shall not, in trade or commerce, engage in conduct that was misleading or deceptive. It was a private action based on deceit. For contravention of s.52 Trade Practices Act, the measure of damages was in tort and not for breach of contract. (at p 311, line 30).

(2) McDonald J referred to *Philip Morris Ltd v Ainley & Incorporated Nominal Defendant* [1975] VR 345, at pp 348‑9, which held that “an action of tort is one in which the remedy is a common law cause of action although the right being enforced in the action may be a right created by either the common law or statute.” Philip Morris preferred the definition that “tortious liability arises from the *breach of duty* primarily fixed by law; such duty is towards persons generally and its breach is redressible by an action for unliquidated damages.” (emphasis added)

(3) McDonald J held that the remedy provided by s.82 of the Trade Practices Act for breaches of s.52 of that Act, although resting in damages, was a statutory remedy. Applying the reasoning of Philip Morris, McDonald J held that a breach of s.52 of the Trade Practices Act did not constitute a tortious act or omission. (at p 312 of *Williams*).

1. *ACQ Pty Ltd v Cook* [2008] NSWCA 161, §174 was not an Order 11 case but the issue was whether the claim was in tort so that the defence of contributory negligence would apply:

(1) ACQ owned a light aircraft, operated by Aircair. During spraying of a cotton field, the aircraft collided with a power line and caused the line to drop and remained swinging over the field at a height of about human throat level. P, a linesman employed by a power company, went to the scene to deal with the situation but received an electric shock from the line. P sued, amongst others, ACQ and Aircair under s.10 of the Damage by Aircraft Act 1999 (“**DAA**”) for personal injury caused by something that was a result of the impact on the aircraft in flight with the conductor (§§1-11 and 103).

(2) S.11 of DAA provided that damages under s.10 were recoverable without proof of intention, negligence or other cause of action, as if the injury, loss or damage had been caused by the willful act, negligence or default of the defendants.

(3) Part 3 of the Law Reform (Miscellaneous Provisions) Act 1965 (“**the 1965 Act**”) defined “wrong” as an act or omission that gave rise to a liability in tort in respect of which a defence of contributory negligence was available at common law. S.9 of the 1965 Act provided for damages to be reduced to the extent of the claimant’s contributory negligence. The issue was whether the defence of contributory negligence applied to a cause of action under DAA (§§144-180, specifically §§144, 146 & 157).

(4) The NSW Court of Appeal held that DAA did not impose a statutory duty on anyone to act in a particular way. All that it said was that damages were recoverable by a particular type of person, from a particular type of person, if events of a particular description happen. Given the scope of s.10(1)(d) DAA, there was room for argument (which the Court of Appeal did not need to resolve) about whether DAA operated “for the benefit of a class of persons”. The Court of Appeal upheld the trial judge’s holding that an action under s.11 was not a cause of action for breach of statutory duty. (§§172-173)

(5) The NSW Court of Appeal mentioned that the balance of authority supported the view that the action for damages conferred by s.82 Trade Practices Act was not an action in tort, notwithstanding that it expressly conferred a remedy for a breach of a standard of action that the Trade Practices Act itself requires to be adhered to. (§174)

(6) The NSW Court of Appeal also held that when the action for damages under DAA was not for breach of the tort of statutory duty, but was the enforcement of an expressly conferred statutory right of action, circumstances that fell within s.10(1) DAA would not be a “wrong” within the meaning of s.9(a) of the 1965 Act because they would not involve an act or omission that gave rise to a liability in tort. Nor would there be a liability in respect of which a defence of contributory negligence was available at common law. The wording of s.8(b) of the 1965 Act clearly did not apply to the action under DAA. Thus, such an action was not a “wrong” within the meaning of the 1965 Act. (§174)

(7) Indeed, when DAA did not require any particular standard of action to be adhered to, the situation was a fortiori that covering the Trade Practices Act. (§175)

1. I take note that the cause of action under DAA was special as it did not require proof of intention, which is distinguishable from the claims of SFC. *ACQ* was also not about Gateway F.
2. *Lew Footwear Holdings Pty Ltd v Madden International Ltd* [2014] VSC 320, §§160-197 was a Gateway F case before the Supreme Court of Victoria:

(1) The claim was under s.52 of the Trade Practices Act 1974.

(2) Elliott J considered 2 conflicting authorities of single judges (at §§160 and 175):

(a) *Williams*, above (at§§50-51), wherein McDonald J held that damages claimed under s.52 of the Trade Practices Act caused by misleading or deceptive conduct was not caused by a “tortious act or omission” as that term was used in the tort gateway.

(b) *Commonwealth Bank of Australia v White* [1999] 2 VR 681, Byrne J held that a claim for misleading or deceptive conduct was a tort within the meaning of r7.01(1)(i) (the parallel of Gateway F). He found nothing in the history of r7.01(1) to suggest that the word “tort” should be given a meaning limited to one group of the traditional common law causes of action. In so finding, Byrne J expressly acknowledged that his decision was in conflict with McDonald J’s.

(3) Elliott J referred to various definitions of tort (§§161-163) and various authorities since the 2 conflicting authorities. He followed *CBA v White*:

“Accordingly, I find that, upon the enactment of the Trade Practices Act in 1974, together with the enactment of the Fair Trading Act 1985 (Vic), the Parliament of the Commonwealth, and the Parliament of Victoria, introduced legislation which proscribed certain conduct throughout the commercial community. For the reasons set out above, there is no logical or jurisprudential reason why the fact that the remedy of damages is included in the statutes themselves, and that such a remedy is not confined in the same manner as other common law causes of action, ought to alter the proper characterization or classification of the causes of action as torts. These observations equally apply to claims for misleading or deceptive conduct under the Australian Consumer Law.” (§197, *Lew Footwear*) (underline added)

(4) Having referred to various authorities and articles, in §170, Elliott J took the view that the cases demonstrated that:

(a) Statutes may create a tort.

(b) It is not necessary for a statutory cause of action to be analogous to a pre-existing common law cause of action in tort for it to be properly characterized or classified as a tort.

(c) A cause of action may be characterized or classified as a tort even though a claim involves a nominal defendant who has not committed a wrong.

(d) Not every statute which creates a liability to pay an amount of damages creates a tort.

(5) Elliot J further held that the mere fact that other discretionary remedies may be available should not alter the proper characterization of a cause of action as a tort:

“181. The mere fact that other remedies may be available as a matter of the court’s discretion ought not alter the proper characterization of the cause of action as a tort. Indeed, injunctive and declaratory relief might also be ordered by the court in relation to causes of action founded in tort. That this is so does not alter the nature of the underlying cause of action. It would be somewhat peculiar if the fact that there are even more expansive remedies available under s87 of the Trade Practices Act (and s237 Australian Consumer Law) would have the consequence that a cause of action that would otherwise be characterised as a tort would cease to be so characterised.

182. Finally, the fact that damages under s82 of the Trade Practices Act (and s236 of the Australian Consumer Law) cannot be confined by principles applicable to damages awarded in causes of action in contract or tort does not change the nature of the cause of action; namely a claim for an award of compensation for a wrong committed in contravention of a statutory norm created to operate throughout the commercial community.”

1. *Prentice v AGL Sales Pty Ltd* (2015) 296 FLR 202, §§20-31, dealt with s.74B of the Trade Practices Act 1974 which created an action in favour of a consumer against a corporation in respect of the supply of unsuitable goods. Martin J held that damages recoverable under that section were not damages “suffered as a result of a tort” within the meaning of s.6 of the Law Reform Act 1995 (“**LRA**”). *Williams* and *ACQ v Cook* were followed; *Lew Footwear* was not followed.
2. The following observations of Martin J are important:

(1) There was no single definition for a tort (§28-30).

(2) *Lew Footwear* was inconsistent with the Court of Appeal decision in *ACQ v Cook* (§24).

(3) Various sections in Part V Div 1 to Trade Practices Act 1974 proscribed certain “unfair practices” in corporations (§14-15), eg:

s.52 “A corporation shall not … engage in conduct that is misleading or deceptive …”

s.53(a) “A corporation shall not … falsely represent that goods are of a particular standard …”

s.55A “A corporation shall not … engage in conduct that is liable to mislead the public as to the nature, characteristics … of any services.”

(4) On the other hand, s.74B was in Pt V Div 2A of the Trade Practices Act, which was a revolutionary code of products liability dealing with actions against manufacturers or importers of goods. Other sections dealt with actions in respect of false descriptions (s.74C), goods of unmerchantable quality (s.74D) and goods which did not match a sample (s.74E) (§§16-17).

(5) None of the provisions in Div 2A purported to prohibit any conduct. They created a consequence for certain defined actions or behaviour. Insofar as s.74B was concerned, it created a right in a consumer to recover loss or damage from the manufacturer of goods which were not reasonably fit for a particular purpose made known to the manufacturer but, contrary to eg s.52 of the Trade Practices Act, the section did not prohibit conduct of any kind by anybody. It followed that no claim could be brought under s.82 (§18).

(6) “At the base of each of the *Lew Footwear* and *Jonstan* decisions is the fact that s 52 imposes a duty on corporations. Where there is a duty, then a breach of that duty is possible and, so, one can speak of a breach of s 52. The same cannot be said of s 74B … because no duty is imposed nor is any conduct prohibited. That, though, is not conclusive of the matter.” (§27) (underline added)

“That very brief survey did show a concentration on the presence of a “duty” as an element of a broad definition of “tort”. S.74B did not impose a duty and the right to claim damages did not rest upon any breach of a duty, an obligation or a requirement. One of the purposes of s.74B was to give a remedy to a person who might otherwise not have been able to seek redress due to not having any contractual relationship with a manufacturer. The action available under s.74B could not be classified as tortious. It was a statutory right which arose in the circumstances prescribed in that section. Thus, any damages which the plaintiffs could recover from L&G [the manufacturer and supplier] under s.74B were not damages ‘suffered … as a result of a tort’ and L&G cannot avail itself of s 6 of the LRA.” (§31)

E1.3 Principles distilled from the authorities

Having gone through the above common law authorities, I find myself most guided by the Australian authorities, in particular, *Lew Footwear* (which directly dealt with Gateway F) and *Prentice*. I have distilled the following principles for deciding whether a claim is in tort:

(1) There is no universal definition of tort.

(2) A claim in tort can be created by common law or statute. For those created by statute, it is not necessary for the statutory cause of action to be analogous to a pre-existing common law cause of action in tort: *Lew Footwear*.

(3) Within the same statute, some claims may be in the nature of tort whilst others may not, eg under the Australian Trade Practices Act 1974: *Prentice*.

(4) The presence of a “duty” towards person generally or a class of persons is an element of tort: *Prentice*.

(5) If the statute provides that a person “shall not … engage in [certain types of conduct]”, that is prohibiting certain conduct, breach of which may result in liability in tort: *Prentice*.

(6) If the statute merely provides that damages are recoverable by a particular type of person, from a particular type of person, if events of a particular description happen, without regard to the defendant’s intention, negligence or default, it may not be a tort, as the statute does not impose a duty on anyone to act in a particular way: *ACQ v Cook.*

(7) A claim in tort is redressible by unliquidated damages but not every statute which creates a liability to pay damages creates a tort: *Prentice*, §§18 & 27.

(8) The mere fact that other discretionary remedies (eg injunction or declaration) may be available should not alter the proper characterization of a cause of action as a tort: *Lew Footwear*.

1. The caveat is that all the above authorities concern private plaintiffs who have suffered personal loss. None of the authorities directly cover the present scenario where SFC has not personally suffered harm as a result of the acts of the Defendants.
2. However, I do not see why those distilled principles should not apply provided that, on a proper construction of the Ordinance, the underlying conduct supporting the claims under s.213 are of tort.

E2. Nature of claims under s.213 of the Ordinance

S.245 of the Ordinance describes market misconduct as including false trading and assisting another to engage in such conduct.

1. False trading requires intention, recklessness as to whether, an act has, or is likely to have the effect of creating a false or misleading appearance of active trading in the shares or of creating an artificial price: s.274(3).
2. Such provisions have the effect of proscribing certain conduct or creating a duty on the Defendants not conduct themselves in a certain way. The proscribed conduct could, foreseeably, lead to loss of market participants on the basis of the performance of the listed shares.
3. Due to the Eastmore Defendants’ false trading, SFC seeks by way of relief, amongst others,

(1) an “restorative order” under s.213(2)(b) of the Ordinance; and

(2) an order for damages under s.213(8) of the Ordinance to compensate the Market Investors and the Lenders.

1. An restorative order seeks to restore parties to their relevant financial positions prior to the transactions impugned (even if full restitution *in specie* is impossible): *Securities and Futures Commission v Tsoi Bun* [2014] 2 HKLRD 1, §§12-13, per G Lam J (as he then was). That bears the “classic features of a rescission in equity” or is restitutionary in nature: *Securities and Futures Commission v Qunxing Paper Holdings Co Ltd (No 2)* [2018] 1 HKLRD 1060, §§52-62.
2. Proceedings under s.213 of the Ordinance are civil proceedings of a remedial nature: *Securities and Futures Commission v Tiger Asia Management LLC* [2012] 2 HKLRD 281, Tang VP (as he then was), §24, approved by the CFA (2013) 16 HKCFAR 324.
3. Notwithstanding the availability of civil remedies to individual investors, there may be cases where investors cannot be expected to take proceedings individually to enforce their legal rights. For example, in cases where there are executory contracts involving a large number of small investors, it may be unreasonable to expect small investors to take proceedings. There may be circumstances when it would be eminently reasonable for proceedings to be taken by SFC under s.213 for the investors’ benefit: *Tiger Asia* (CFA) at §16; *Tiger Asia* (CA), Tang VP, at §24.
4. S.213 is “complementary to the civil liabilities created by s.281 and s.305” and provides valuable tools to SFC to protect the investing public which is an important objective of the Ordinance: *Tiger Asia* (CFA) at §16; *Tiger Asia* (CA), Tang VP, at §35.
5. S.213 proceedings are the public law analogue of actions for damages by individuals under s.305” of the Ordinance, which confers a right to sue for damages upon a person who has suffered pecuniary loss as a result of a contravention of market misconduct offences. The SFC acts, not as a prosecutor in the general public interest but as a protector of the collective interests of the persons dealing in the market who have been injured by market misconduct: *Tiger Asia* (CFA), at §16 and *Tiger Asia* (CA), Tang VP, at §8.
6. S.281(1) (under Part XIII of the Ordinance[[4]](#footnote-4)) provides that: “a person who has committed a relevant act in relation to market misconduct shall… be liable to pay compensation by way of damages to any other person for any pecuniary loss sustained by the other person as a result of the market misconduct…”
7. S.305(1) (under Part XIV of the Ordinance[[5]](#footnote-5)) provides that: “a person who contravenes any of the provisions of Divisions 2 to 4 [of Part XIV] shall… be liable to pay compensation by way of damages to any other person for pecuniary loss sustained by the other person as a result of the contravention…”*.*
8. Ss.281 and 305 confer private right causes of action for damages on a class of the public who have suffered pecuniary loss as a result of false trading.
9. The financial benefits of a s.213 claim are for the investors and not SFC: *Securities and Futures Commission v Qunxing*, at §46. Despite that:

(1) This does not mean that s.213 is merely procedural in the provision of financial relief, limited to providing a representative mechanism for enforcing existing individual rights. For example, the statutory remedy in s.213(2)(b) is available against a third party involved in any matter in s.213(1)(a)(i)-(v) albeit there is no contractual cause of action at common law against such a person for rescission of the transaction (§47).

(2) Instead, s.213 creates a substantive statutory cause of action which is vested in SFC, and is intended to enable SFC, as regulator, to take action “to obtain civil remedies for the benefit of investors, who may otherwise be deterred by cost and other considerations from instituting legal proceedings individually to obtain redress for their relatively small losses” (§50).

E3. Good arguable case of a claim founded on a tort

The following are indicia that the SFC’s claim under the Ordinance against the Eastmore Defendants are founded on a tort:

(1) Given the analyses in paragraphs 68-70 above, the claim is in the nature of tort for breach of ss.274 and 295 of the Ordinance against false trading. It requires proof of intent on the part of the wrongdoer to establish the tort.

(2) The Market Investors and Lenders in the present case plainly belong to a class of the public that the Ordinance is intended to protect. Each of them would most probably have a claim against the Defendants under s.281 and/or s.305 of the Ordinance and it could not be denied that that would be in the nature of tort, although the cause of action is created by statute.

(3) The fact that SFC is enabled by s.213 to bring the action in its own name as the protector of individual market participants (many of whom with relatively small losses) does not undermine the tortious nature of such a claim.

(4) The claim in conspiracy based on, amongst others, s.213(1)(a)(v) of the Ordinance is also analogous to the tort of conspiracy.

1. Mr Alder, counsel for the Eastmore Defendants, however, submits that the following are indicia that SFC’s claim is not in tort:

(1) S.213 is “complementary” to the civil liabilities created by ss.281 and 305, and the orders under s.213(2) are by their nature designed to ensure that the relevant provisions are complied with (s.5(1)(d)), to maintain and promote confidence in the industry (s.5(1)(g)), to protect investors (s.5(1)(l)) and to suppress illegal practices (s.5(1)(n)),*Tiger Asia* (CA), §35, Tang VP. Those are not the purposes of tort law (“**contention 1**”).

(2) The rights of the SFC under s.213 clearly go further than ordinary enforceable civil law rights (tort and contract). They are substantive rights created by statute that fulfils a wider social purpose in setting standards for the markets and discouraging aberrant behaviour: *SFC v Qunxing*, §§47, 49-50 (“**contention 2**”).

(3) The restorative remedy, being restitutionary in nature (paragraph 72 above) is not a right in tort and SFC should have resorted to O11, r.1(1)(p) (“**contention 3**”).

(4) The fact that a claim under s.213 is a representative right conferred only on SFC distinguishes it from a typical tort claim (“**contention 4**”).

(5) There is no absolute statutory requirement that anybody (let alone SFC) should have suffered loss or damage in order for a claim to be brought under s.213 (“**contention 5**”).

(6) Under s.213 there is no ‘right’ to damages where loss has been suffered. All of the remedies under s.213(2) are discretionary, whereas remedies in tort are not discretionary (injunctions aside) (“**contention 6**”).

(7) The powers of the SFC under s.213 are ‘open textured’ and “characterised by their extreme flexibility”, *SFC v Qunxing,* §54, which is very different from tort law which has been developed carefully by evolution of case law and strict requirements (“**contention 7**”).

(8) There are other provisions in the Ordinance for direct action by persons who have suffered loss *eg* ss.108, 281 and 391 (“**contention 8**”).

1. With regard to contentions 1, 2 and 8, there is overlap in the remedies recoverable under s.213 and other sections. It is up to the trial judge to ensure that is no double recovery. The fact that s.213 also fulfils other public purposes does not undermine the fact that the conduct sued on was tortious in nature. The law on negligence, for example, also sets standards.
2. With regard to contention 3, the remedies under s.213 are no doubt restorative in nature. However, where the Court has power to make a restorative order under s.213(1), it may, in addition to or in substitution of such order, make an order for damages against the defendants. There is a good arguable case that the measure of damages for tort will apply. In *Clerk & Lindsell on Torts,* 23rd ed,§27-07, it is stated that:

“The general object of an award of damages is to compensate the claimant for the losses, pecuniary and non-pecuniary, sustained as a result of the defendant’s tort. The general principle is, in the oft-quoted words of Lord Blackburn, that the court should award “that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation”. … Even where restoration is possible, as with damaged property, the courts will not always award the costs of restoring the property to its original state; they may instead assess the damages on the diminished value of the asset. … Restitutionary damages concerned to reverse the defendant’s wrongful enrichment, rather than to compensate the claimant, may sometimes be awarded.” (underline added)

1. With regard to contentions 4 and 8, I repeat paragraph 81(3) above. Although this is not like the usual collective claims where the representative is himself a plaintiff, the damages and reliefs go to the persons who have suffered loss and not SFC.
2. Contention 5 is correct on its face, but the present claim is premised on someone having suffered loss or damage.
3. Contentions 6 and 7 mean that the Ordinance affords more reliefs than damages to the type of tort sued upon in this case. A statutory tort does not require a parallel tort with parallel reliefs at common law.
4. In summary, despite the persuasive arguments of Mr Alder, on a proper construction of s.213 of the Ordinance in the light of the distilled principles in paragraph 65 above, I find that SFC has a good arguable case that the claim is one founded on a tort.
5. I agree with Mr Man SC that, adopting the “pragmatic” and “realistic” approach that was advocated by the UK Supreme Court and endorsed in the Hong Kong courts, sound policy and reason exist that a claim under s.213 should be regarded as a tort for the purpose of Gateway F. In the present day, multinational operators abound, and market misconduct and market offences are often conducted by overseas parties on the Hong Kong securities market. There is every reason why such overseas defendants, who have committed market misconduct or market offences in Hong Kong and/or caused loss to Hong Kong market participants, should be subject to the possible jurisdiction of the Hong Kong court under s.213 proceedings. Gateway F should at least be a gateway available to serve on such defendants.

E4. Damage sustained in Hong Kong

There is no dispute that substantial damage was sustained within the jurisdiction by the Market Investors and the Lenders.

E5. Double actionability rule being satisfied

The plaintiff must satisfy the court (as part of its good arguable case) that the claim is actionable in tort both in Hong Kong and the place abroad: *Boys v Chaplin* [1971] AC 356. The court should look back at the series of events constituting the tort and ask *where in substance* the cause of action arose. In answering that question the court must apply Hong Kong law. If the court finds that the tort has in substance been committed in Hong Kong, the fact that some of the relevant events have happened abroad is irrelevant, as is the law of the foreign country where such events may have happened. The court can thenceforth wholly disregard the double actionability rule in *Boys v Chaplin.* If, on the other hand, the tort has in substance been committed in a foreign country, the court must apply the rule and give leave only if the act complained of is one which would be a tort in Hong Kong and in the foreign country where the act was done. See *Hong Kong Civil Procedure 2021*, Vol 1, §11/1/338; *Shanghai Reeferco Container Co Ltd v Waggonbau Elze GmbH & Co Besitz KG* [2005] 2 HKLRD 711, §41, Deputy Judge Poon (as he then was); *China Medical Technologies Inc (in liquidation) v Paul, Weiss, Rifkind, Wharton & Garrison LLP* [2019] HKCFI 2631, §§126-128, G Lam J (as he then was).

1. Mr Alder queries whether the alleged torts were committed in Hong Kong when all the Eastmore Defendants were resident or corporations operating outside Hong Kong. Specifically, the tort of conspiracy was hatched at the place where the agreement/common design was reached. If the conspiracy was formed out of Hong Kong, SFC has to satisfy the double actionability rule with foreign law. On the other hand, if the conspiracy occurred in substance in Hong Kong, then SFC has to

(a) particularise what acts were committed personally by which Eastmore Defendant and when within Hong Kong;

(b) establish that those were ‘substantial and efficacious acts’ within the jurisdiction, *Dynasty Line*, §37, preparatory or trivial acts being insufficient;

(c) show that the damage effectively resulted from the substantial acts; and

(d) prove all of those with a cogent evidentiary case to the good arguable case standard.

1. Mr Alder submits that the evidence in support of the application was not sufficient. Simply pleading one or more visits to Hong Kong by D2 and/or D3 is insufficient to satisfy Gateway F. There are no particulars as to who did what, where and what D2 or D3 did whilst in Hong Kong.
2. I am unable to agree with him with regard to the legal definition of conspiracy, which does not only hinge upon the formation of the agreement or common design but also the causing of the damage:

“A conspiracy consists in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. The crime inheres in the agreement to act unlawfully, but the tort arises when damage is caused (or, for a *quia timet* injunction, threatened) by the combination.” See *Clerk & Lindsell* *on Torts,* §23-98.

“The conspirators need not all join in at the same time, nor need they have exactly the same aim in mind; but the possession of a separate aim may be evidence that the party concerned has not participated in the combination at all, at any rate if he acted throughout in ignorance of the true facts. The question is how far the defendant was aware of the plan and then joined in the execution of it.” See *Clerk & Lindsell,* at §23-104.

1. Where a tort was in fact committed in Hong Kong by a co-conspirator pursuant to a common design, it did not matter that the foreign defendant has not himself committed the tort. Nor did it matter that the common design was not formed in Hong Kong: *Pushner v Tom Palmer (Scotland) Ltd & anor* [1989] RPC 430.
2. In *Pushner*, Ds were joint tortfeasors who were, respectively, a UK and Austrian entity. P pleaded that Ds were engaged in a common design to import into and sell infringing products in UK. It was not alleged that D2 had sold any of the infringing products but that it was jointly liable with D1 for each of D1’s acts complained of. D2 applied to set aside service of the writ out of jurisdiction on the ground, amongst others, that there were no good grounds for alleging that D2 had done anything within the jurisdiction actionable at the suit of P (at pp433-47 to 434-5).
3. Aldous J, following *Morton-Norwich Products Inc v Intercen Ltd* [1978] RPC 501, held as follows:

“…persons whose respective shares in the commission of a tortious act are done in furtherance of a common design are properly regarded as joint tortfeasors …

Provided a tort is in fact committed in the United Kingdom and it is proved that the defendants had a common design to commit it, it does not in my view matter whether the agreement which is the basis of such design was made in this country or outside the jurisdiction, nor does it matter that the person sued has not himself done within the jurisdiction any act which taken by itself could be said to amount to several infringement. Though Scrutton LJ’s often quoted words in The *Koursk* were I think strictly speaking obiter they are always relied upon as correctly stating the law. He was of course speaking of a civil matter. Common design or conspiracy to commit a crime is different in many respects from common design or conspiracy to commit a tort. In the crime, the offence is constituted by the mere act of agreement.” (underline added)

1. *Pushner* was applied in Hong Kong in *Anheuser-Busch, Incorporated v Budejovicky Budvar, Narodni Podnik* HCA 11095/1999, 4 October 2000, DHCJ Kwan (as she then was). In that case, the plaintiff was a corporation incorporated under the laws of the State of Missouri in the USA. The defendant was a Czechoslovakian corporation. Solar Max was an importer of the defendant’s beer. The plaintiff sued the defendant in infringement of trademark and passing off, alleging, amongst others, that the defendant and Solar Max were involved in a common design for the sale, supply and export of the defendant’s beer to Hong Kong for sale, distribution and consumption in Hong Kong (at p3). It was held that the cause of action as pleaded did attract the relief of an injunction, notwithstanding that the defendant had not conducted any sales in Hong Kong but has only sold to Solar Max, an importer (at p12). (That case was concerned with Gateway B.)
2. There is here a pleaded case on conspiracy. Those Defendants within Hong Kong were individually engaged in substantive acts that infringed the Ordinance pursuant to the Scheme. The pleaded acts of individual Eastmore Defendants were substantial and efficacious acts within Hong Kong contributing to substantial loss to market participants. The fact that D2 and D3 only came to Hong Kong on occasional visits was not an insignificant matter. (See paragraphs 109 and 111 below.)
3. Accordingly, although the Eastmore Defendants were resident outside Hong Kong, there is a good arguable case that the conspiracy was in substance committed in Hong Kong and the Eastmore Defendants were joint tortfeasors. SFC does not have to show that the double actionability rule has been satisfied.
4. In summary, I am satisfied that SFC has demonstrated a good arguable case under Gateway F.
5. GATEWAY B – CLAIM FOR FINAL INJUNCTIONS AGAINST THE EASTMORE DEFENDANTS

Under Gateway B, the applicant must not merely make out a good arguable case that it seeks an injunction, but must make out a good arguable case for the injunction, *Chen Hongqing*, §§80 and 108.

1. An injunction will not be granted simply as a result of a finding that a defendant has acted in breach of a plaintiff’s rights, or because of subjective fear on the part of the plaintiff that the defendant may do so. It will be granted if the court finds that there is an appreciable risk that (absent an injunction) the defendant will in the future interfere with the plaintiff’s rights. See *Vidal-Hal v Google Inc*, §§43-48 (QBD).
2. In that case, there was uncontradicted evidence that Google had ceased the conduct complained of and has destroyed the subject information. Tugendhat J held that the claimants could not bring themselves within the equivalent of Gateway B.
3. The court will not grant injunctions that are hopelessly wide and ill-defined and the court simply has no power to restrain conduct outside the jurisdiction: *Galloway v* *Frazer* [2016] NIQB 7, §57.
4. In that case, Horner J held that the equivalent of Gateway B was closed to the plaintiff as there was no realistic prospect of any court granting any injunction (i) to restrain Google (one of the defendants) from publishing *any* information on the internet and to remove contents specified within a schedule or (ii) to restrain Google from publishing *unspecified* libels relating to the plaintiff; or (iii) to restrain against republication of some information.
5. SFC seeks, by way of final relief, injunctions against the Eastmore Defendants, (i) of *Mareva* type; and (ii) restraining them from contravening the provisions against false trading (pursuant to ss.213(2)(a), (f) and (g) of the Ordinance). The injunctions sought are very wide in scope to restrain contravention of s.213 in any way, anywhere and any time.
6. In the affirmations of D2 and D3, the Eastmore Defendants contend that Gateway B is not applicable because:

(1) All of them were based outside Hong Kong, and none of them were domiciled or carried on business in Hong Kong;

(2) As such, there is “no reason to suspect” that any of them would commit any acts in Hong Kong which would amount to false trading activities as contemplated by the injunction sought; and

(3) The Eastmore Defendants are foreign residents who are already under an “obligation not to infringe s.213” and it is a criminal offence. It is difficult to see what the injunction adds.

1. With respect, one should take a common sense view of the circumstances. From around February to September 2016, the Eastmore Defendants were able to, and did conduct, a range of activities which constituted false trading on the Hong Kong stock market, without maintaining much physical presence in Hong Kong. In summary, those activities included:

(a) giving instructions to other members of the syndicate or agents based in Hong Kong (through instant messaging applications) to plan and execute manipulative trades on the Hong Kong stock market;

(b) opening and operating bank and securities trading accounts in Hong Kong to conduct or facilitate the conduct of manipulative trades on the Hong Kong stock market; and

(c) placing manipulative trade orders with securities brokerage firms, which executed them on the Hong Kong stock market.

Those activities resulted in acts done by or on behalf of the Eastmore Defendants in Hong Kong.

1. Further, in the light of the international nature of the Hong Kong Stock Exchange (in the sense of trading through brokers and clearing houses that execute orders placed mostly by phone or on the internet), false trading in securities or futures contracts do not require the wrongdoer to have physical presence in Hong Kong.
2. In any case, notwithstanding their claims that they were based outside Hong Kong, the Eastmore Defendants maintained sufficient connections in Hong Kong, such that they were and remained capable of conducting further acts in Hong Kong. By way of example:

(a) D2 and D3 were frequent travellers to Hong Kong. Between January 2016 and December 2017 (which covered the Relevant Period), D2 made 17 visits, and D3 made 10 visits, to Hong Kong, and part of those stays coincided with the scheduled meeting with D4 in Hong Kong for discussing the Scheme.

(b) D2, D13 and D18 also held/hold accounts with banks and brokerage firms in Hong Kong.

1. Overall, I agree with Mr Man SC that there is a good arguable case that an injunction would be granted against the Eastmore Defendants, restraining them from committing further false trading activities in Hong Kong, given:

(a) how the elaborate Scheme had been orchestrated and implemented by the defendants during the Relevant Period;

(b) the fact that these overseas defendants (such as D2 and D3) may well visit Hong Kong again in the future as they had frequently done in 2016 and 2017;

(c) these are sophisticated parties who maintained and/or could open and operate bank and securities trading accounts in Hong Kong; and

(d) they are certainly capable of conducting and may further conduct false trading on the Hong Kong stock market in future in the absence of an injunction.

1. The present case is distinguishable from *Vidal-Hall v Google* because in that case, Google has produced evidence that it ceased the offending conduct. Here, the Eastmore Defendants were silent as to what they had done and their future intentions on trading.
2. Of greater concern at this stage is that, applying *Galloway v Fraser,* the Hong Kong courts may not grant an injunction to restrain acts not only in Hong Kong but also unspecified “elsewhere”. In fact, Gateway B also specifies that the writ should be one that seeks an injunction to restrain the defendant from doing anything “within the jurisdiction”.
3. In my view, SFC does not need to rely on Gateway B at all once Gateway F is passed. The scope of the injunction can be debated at the trial. Should SFC need to rely solely on Gateway B, leave to serve the Eastmore Defendants out of jurisdiction should still be granted as if the injunction to restrain would be limited to acts within Hong Kong.
4. The Court has in the past granted an injunction of a wide scope against defendants in a similar situation under s.213(2)(a) or from disposing of the proceeds of the frauds in bank accounts: *Securities and Futures Commission v Unknown persons trading as Cardell Ltd et al* [2019] 1 HKLRD 702, at §29, Ng J. The Court may also grant a post-judgment injunction to facilitate enforcement.
5. In the circumstances of this case, the egregious conduct of the Eastmore Defendants had caused significant losses to the Investors and Lenders. There is a good arguable case that the Court may impose draconian injunctions so as to deter them.
6. In summary, I am satisfied that the injunctions are genuinely sought and there is a good arguable case that the injunction will be granted. Gateway B is open to SFC.
7. Just to complete the analyses, the administrator to be appointed under s.213(2)(d) of the Ordinance is intended to recover, receive and administer assets of the Defendants frozen by the injunction. It can reasonably be contemplated that assets of the Eastmore Defendants might be outside Hong Kong over which the Hong Kong Court has no jurisdiction.
8. The appointment of an administrator is not a form of injunction and does not fall within Gateway B. Again, once Gateway F is passed, the appointment really falls within a matter of relief for the tort, to be debated at the trial. There is no separate gateway needed for this relief.
9. Gateway C – NECESSARY OR PROPER PARTIES TO CLAIMS BROUGHT AGAINST PERSONS DULY SERVED

As the Original Leave was correctly granted under Gateways F and B, there is no basis for setting aside or discharging the same. I therefore only deal with Gateway C for the purpose of completeness.

1. O11, r.1(1)(c) applies where the claim is “brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto”.
2. The Amended Writ was issued on 16 July 2019 and would have expired on 16 July 2020. O11, r.4(2) provides that no leave shall be granted unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of jurisdiction.
3. It would not be a proper exercise of discretion for the Court to grant leave to serve out of jurisdiction 10 months after expiry of the validity of the writ, even if Gateway C were applicable. It is not sufficient for Mr Man SC to orally submit that validity of the writ should be renewed and that the limitation time under the Ordinance has not expired. There has to be an application to extend the validity of the writ supported by affidavit evidence.
4. For the reasons given in paragraph 124 above, I dismiss SFC’s Gateway C Summons.
5. MATERIAL NON-DISCLOSURE BEFORE THE MASTER

This issue can be dealt with simply. The evidence has remained the same before the Master and this Court. Although novel issues are involved and the legal arguments are not straightforward, the situation is far from saying that SFC was guilty of material non-disclosure.

1. AMENDMENT SUMMONS

Master Lai has granted leave to amend the Writ and the statement of claim but adjourned the question of service until this hearing. That question is not contested. Given my findings under the Eastmore Summons and that the Eastmore Defendants were clearly aware of and had no objection to the Amended Writ (which only made minor typographical amendments), I order that service of the Amended Writ and ASOC be dispensed with.

1. CONCLUSION

The Original Leave was rightly granted under Gateways F and B (save as to the relief for injunction to restrain acts outside Hong Kong). The Hong Kong Court has jurisdiction over the Eastmore Defendants. SFC was not guilty of material non-disclosure before the Master. I therefore order as follows:

(1) The Eastmore Defendants’ Summons is dismissed;

(2) The Gateway C Summons is dismissed; and

(3) There be leave to serve the Amended Writ and ASOC on the Eastmore Defendants, but service is dispensed with.

1. In principle, SFC should get costs under the Eastmore Defendants’ Summons and costs of this hearing as regards the Amendment Summons; whereas the Eastmore Defendants should get costs under the Gateway C Summons. The Gateway C Summons and Amendment Summons did not take up much time. On a n*isi* basis, I make an overall costs order that SFC do recover 90% of their costs under the Eastmore Summons from the Eastmore Defendants, with certificates for 2 counsel. I summarily assess the costs at $563,085.
2. I thank counsel for their assistance.

(Queeny Au-Yeung)

Judge of the Court of First Instance

High Court

Mr Bernard Man SC leading Ms Sheena Wong, instructed by Securities and Futures Commission, for the Plaintiff

Mr Edward Alder, instructed by MinterEllison LLP, for the 2nd, 3rd, 13th, 14th, 18th and 19th Defendants

1. [2020] HKCFI 1338 (leave to appeal refused [2020] HKCFI 2780). [↑](#footnote-ref-1)
2. There was only an appeal on the meaning of “damage” under s.13 of the DPA ([2016] QB 1003, §1). [↑](#footnote-ref-2)
3. S.66(1) provides that “an individual who suffers damage by reason of a contravention – (a) of a requirement under this Ordinance; (b) by a data user; and (c) which relates, whether in whole or in part, to personal data of which that individual is the data subject, shall be entitled to compensation from that data user for that damage”. [↑](#footnote-ref-3)
4. Proceedings brought before the Market Misconduct Tribunal. [↑](#footnote-ref-4)
5. Offences relating to dealings in securities and futures contracts, etc. [↑](#footnote-ref-5)