Section 213(2)(b) of the Securities and Futures Ordinance (Cap. 571)

In Securities and Futures Commission v Qunxing Paper Holdings Co Ltd (No 2) [2018] 1 HKLRD 1060, the Court points out that s.6(2) of the (UK) Financial Service Act 1986 is "the foreign legislation closest to" s.213(2)(b). (para 51)

S.6(2) provides that the Court may, on the application of the Secretary of State, order a person who has contravened the relevant provisions of the Financial Service Act 1986 or any other party who appears to have been knowingly concerned in the contravention "to take such steps as the Court may direct for restoring the parties to the position in which they were before the transaction was entered into."

The leading case on s.6(2) was Securities and Investments Board v Pantell S.A. and Others [1993] Ch 256. It concerns an unsuccessful striking-out application.

There were four types of contraventions involved in Pantell S.A., pursuant to four different sections of the Financial Services Act 1986 (now repealed). They were the carrying on of an unauthorised investment business (s.3), the publishing of misleading statements (s.47), the publishing of unauthorised advertisement (s.57) and the purchase or sale to subscribers of shares in consequence of unsolicited telephone calls (s. 56). Contravention of s.3 gave rise to a right of action by the regulatory authority under s.6. Contraventions of the remaining three sections entitled the regulatory authority to sue under s. 61. The terms of the relevant provisions in sections 6 and 61were similar but not the same. Both were headed "Injunctions and restitution orders."

As mentioned, section.6(2) provided for an order requiring the contravener and people knowingly concerned in the contravention to “take such steps as the court may direct for restoring the parties to the position in which they were before the transaction was entered into.”

S.61(1)(c) provided for the making of an order requiring the contravener and persons knowingly concerned in the contravention to “take such steps as the court may direct to remedy [the contravention]”

Not a class remedy

In his leading judgment, Scott LJ stressed that s.6(2) did not contemplate court orders made for the benefit of investors as a class; it was not about class recovery or remedy. The regulatory authority must be able to identify the specific transactions impugned by the contravention. The expression "the parties" in s.6(2) meant
“all the parties to the "transaction in contravention of section 3" and does not simply mean "the investors." The purpose of any order under subsection (2) must, in my opinion, be to restore all of the parties to their former positions. It would not be a proper exercise of the subsection (2) power to make an order simply directed to the repayment to the investors of their money.” (p. 271F)

Moreover, Scott LJ held that s.6(2) contemplated orders “directed to reversing specific transactions: note the reference to "the position in which they were before *the transaction* was entered into."” (p.271G)

The references to “the parties” and “the transaction” in s.6(2) evidenced the legislative intention that orders made under s.6(2) to restore the parties to their former position concerned only specific transactions, to which the contraveners

and the victims of the contraventions were parties. It provided for the reversal of those transactions and did not give jurisdiction to make orders "for the benefit of investors as a class" (p. 272C).

Later in the judgment, Scott LJ said:-

"the remedy the [Securities Investment Board] can seek under section 6(2), whether against the contravener or anyone else, ought, in my opinion, to be directed to specific transactions. A class recovery… is not available under subsection (2)." (p. 278E)

Section 6(2) therefore dealt with specific transactions. It did not provide for a class remedy. The identities of the parties to the impugned transactions had to be ascertainable and ascertained, in order that the parties may be restored to their former positions through restitution and counter- restitution. "An order for payment of money or for the transfer of assets cannot be an order intended to restore parties to transactions to their former positions unless it is known in relation to each transaction in question (a) who were the parties (b) what the nature of the transaction was and (c) what assets or money each party to the transaction had paid or transferred to the others." (p. 278E-F)

Statutory rescission

It was held further that s.6(2) provided for statutory rescissions of unlawful transactions; orders made under it were restitutionary; they were not to be made unless the investor returned the shares purchased under the unlawful transaction to the contravener; in other words, there had to be counter-restitution, generally in specie. "If an investor wants to keep the shares acquired under the transaction in question but to recover the difference in value between the shares and the price paid, the remedy to achieve this is not, in my judgment, a restitutionary

one, but is compensatory and cannot be obtained under subsection (2).” (per Scott LJ at p278H).

The Court of Appeal in Pantell S.A. considered that a form of order permissible under s.6(2) would provide for repayment of the share price to be made against “the delivery up by the investor of the share certificates and, if necessary, a form of transfer.” (p. 281B) In other words, there were to be restitution and counter-restitution. But if restitution in specie was no longer possible, the s.6(2) court order could, the Court of Appeal held, provide for financial restitution (p. 281C).

It may be noted also that in the first instance judgment in Pantell SA, Lord Browne Wilkinson observed that the statutory requirement under s. 6(2) to take steps to restore the parties to their positions before the transactions displays “classic features of a rescission in equity”. They result in “restitution in integrum, or the putting back of the parties into their position they were formerly in.” (at 264A) The Court in Qunxing Paper Holdings agreed with these observations. (para 52)

Accessory liability

But there are key differences between s. 6(2) of the Act and s.213(2)(b) of the Ordinance. Both provide for liability for persons involved or concerned in the contravention, but s.213(2)(b) applies whether or not the persons in question are knowingly involved.

S.6(2) provided for the taking of steps to restore the parties to their pre-transaction positions and nothing else. S. 213(2)(b), on the other hand, provides for steps to be taken by the defendant as the court may direct, “including” steps

to restore the parties to their pre-transaction positions. On the fact of it, restitution is only one of the potential remedies available under s.213(2)(b).

Importantly for present purposes the Court in Qunxing Paper Holdings departed from Pantell SA on the question of whether restorative orders can be made in favour of parties who purchased the shares, not directly from the contravener or person who has been involved in the contravention, but on the market. The defendants in Qunxing Paper Holdings were liable to restore the purchasers of the listed shares on the open market even though they, the contraveners, were not the vendors. "There seems to be no a priori reason to limit the persons against whom an order may be made under s.213(2)(b) to those who are counterparties to the transactions in question." (at para 55)

In support of this view, the Court (ironically) referred to Pantell SA. It observed that s.6(2) of the Financial Services Act 1986

"expressly enabled a restorative order to be made, not only against a person who has entered into a transaction in contravention of the law, but also against any other person who has been knowingly concerned in the contravention: see *Pantell,* p.264C-D." (para 55)

Under s.6(2) of the Act, a restorative order might be made not only against the contraveners with whom the investors had entered into the unlawful transactions, but also third parties, who were not parties to the transactions, but were knowingly concerned in the contravention.

The reliance on Pantell SA here, it is respectfully submitted, is misplaced. In Pantell SA restitution orders could be made against the defendants knowingly concerned because s.6(2) so provided. Like s.6(2) of the Act, s. 213(2)(b) of the

Ordinance provides for orders to be made against persons involved in the contraventions; indeed under s.213(2)(b) the orders may be made against them irrespective of their state of mind. But it does not follow that the Court can make a restitution order against a contravener in respect of all the open market purchases tainted by the contravention (to which the contravener was not a party).

Recall the relevant observations made in Pantell SA. Section 6(2) dealt with specific transactions; its objective was the restoration of the parties to their pre-transaction positions; it did not give jurisdiction to make orders for the benefit of investors generally; the parties to those transactions, their nature, the transfers made pursuant to them all had to be ascertained; there had to be restitution and counter-restitution. All the above suggest that as a pre-condition to relief, whether against the contravener or those knowingly involved in the contravention, the impugned transactions had to be between the investors and the contravener.

Pantell SA did not decide that contraveners were liable to parties with whom it had not entered into any transactions. What it decided was that s.6(2) of the Financial Services Act 1986 provided for accessory liability on the part of a person who was knowingly involved in the impugned transaction, despite not being party to it. This accessory liability was described by Scott LJ as follows:

“An order could… be sought imposing on the contravener and, in default of payment by the contravener, on the person or persons "knowingly concerned" liability to repay to the investor the purchase price of the shares comprised in a particular investment transaction, with payment to be made against the delivery up by the investor of the share certificates and, if necessary, a signed form of transfer… If the contravener paid up there would be no liability on the persons

knowingly concerned. If not, the persons "knowingly concerned" would have to pay and, on payment, would become subrogated to the primary claim against the contravener... Financial restitution, if restitution in specie were not possible, could be provided for by the section 6(2) order … A lien over the shares to be restored by the investor could be granted to persons "knowingly concerned" in order to secure their right to be reimbursed by the person primarily liable to repay the investor." (p. 281B-D)

The accessory liability was therefore secondary in character, enforceable only to the extent that the contravener had failed to give restitution, and in such a case, the accessory defendant was entitled to a lien on the subject shares which, by way of counter-restitution, the investor was obliged to restore to the contravener. Qunxing Paper Holdings is just not a case about accessory liability. What was said in Pantell SA about accessory liability does not support the proposition that an aggrieved investor who has not dealt with the contravener may invoke the restitutionary jurisdiction in s.213(2)(b).

The difficulty with the relevant part of the judgment in Qunxing Paper Holdings (it is respectfully submitted) is that s.213(2)(b) demands more analysis. The observation by the Court In Qunxing Paper Holdings that there appears to be no a priori reason to limit the persons liable under s.213(2)(b) to contractual counterparties is no substitute for a proper construction exercise in relation to the sub-section.

Construing s.213(2)(b)

What is the precise scope of s.213(2)(b)? As ever, it is necessary to consider context and purpose.

Can the words "take such steps as the Court of First Instance may direct" be interpreted to include the payment of damages? The last part of s.213(2)(b) expressly contemplates the giving of restitution; it refers to steps being ordered to be taken to "restore the parties to any transaction to the position in which they were before the transaction was entered into." If giving restitution is properly referred to as a step which the Court may order to be taken, why not the payment of compensation?

A legitimate retort is that if s.213(2)(b) was intended to give jurisdiction to make an order for payment of compensation, the legislature would have so provided, in express and very simple terms. Section 213(2)(b) contains no such provision.

The terms of s.213(8) support a construction against jurisdiction to make compensatory orders under s.213(2)(b). Subsection 213(8) provides as follows:-

"Where the Court of First Instance has power to make an order against a person under subsection (1) or (3A), it may, in addition to or in substitution for such order, make an order requiring the person to pay damages to any other person."

Subsection (8) provides for payment of damages, but only in cases where the Court has power to make an order under subsections (1) or 3(A). The two latter subsections of course cross-refer to the orders specified in subsection (2).

If both subsection 2(b) and subsection (8) gave jurisdiction to award damages, the expressions "in addition to" and "in substitution for" in subsection (8) would be redundant.

On the face of it, it appears necessary for the SFC to apply for one of the orders set out in subsection (2) and establish that the order would be or would have been granted, before the jurisdiction to award damages under subsection (8) comes into play. On this view, an award of damages under subsection (8) is dependent on the SFC being able to obtain one of the subsection (2) orders. It may be granted in place of a subsection (2) order or in additional to it. It cannot otherwise be obtained. This construction supports the view that subsections (2)(b) and (8) are intended to deal with different remedies, and subsection (2)(b) is not about damages. A compensatory order may be obtained under subsection (8), as an order made in addition to or in substitution for a restitutionary order under subsection (2)(b). But it cannot be obtained directly under subsection (2)(b). Subsection (8) is the only applicable provision governing the question of compensation.

This construction, as we shall see later, appears to have been accepted by the SFC in Securities and Futures Commission v Sun Min [2017] 4 HKLRD 211.

A further word about subsection (8).

Section 213(8) is based on s.1324(10) of the Australian Corporation Act 2001, though unlike subsection (8), the Australian provision only concerns the grant of an injunction and the award of damages "in addition to" and "in substitution for" an injunction. The leading case is the decision of the Queensland Court of Appeal in McCracken v Phoenix Constructions (Queensland) Pty Limited 289 ALR 710. The Queensland Court of Appeal held that s.1324(10)

"may be seen as conferring power to award damages only as a substitute remedy, or supplementary remedy, for an injunction to remedy, or partly

remedy, the adverse effect upon interests which are protected by the provision of the Act which has been contravened." (para 30)

Thus, the Queensland Court of Appeal observed, if an injunction could not be granted because the property the subject of the claimed injunction had been lost irretrievably, damages may be awarded as a substitute remedy. If only part of the property could be recovered, an award of damages might provide compensation for the value of the part of the property lost. An award of damages under s.1324 (10) would be a substitute or supplementary remedy for the injunction in that way. (para 30)

But s.213(2)(b) uses the word "including". Restitution apart, what are the other orders being contemplated? These orders are unlikely to be those concerned with the compliance and implementation of the orders permissible under s.213, since they appear to have been dealt with under sub-sections (2)(f) and (g) already.

Sub-section (2)(f) provides for the making of an order "directing a person to do or refrain from doing any act specified" [in any order made under s.213] "for the purpose of securing compliance with" that order.

Sub-section (2)(g) provides for the making of "any ancillary order which the Court of First Instance considers necessary in consequence of the making of any of the orders referred to in paragraphs (a) to (f) [of s.213(2)]."

So what are the orders, other than restitution, being contemplated in s.213(2)(b)?

We are satisfied that, as a matter of construction, an order for payment of compensation is not permissible under s.213(2)(b). What other substantive remedial orders are there left? What about an order for an account of profits?

Without doubt it would promote the purpose of the Ordinance to give the Court the power to strip contraveners of their profits made on account of the contraventions. A purposive construction would favour a liberal interpretation of the words "take such steps as the Court of First Instance may direct".

But it can be argued that if an account of profit was permissible in s.213 one would expect the legislature to have expressly provided for the jurisdiction to order it. It did exactly that in s.257(1), which provides that the Market Misconduct Tribunal may order the contravener to pay the Government an amount not more than any profit gained or loss avoided as a result of the market misconduct.

In the relevant UK legislation as well the jurisdiction to order an account of profit is dealt with expressly. Section 382 of the Financial Services and Markets Act 2000 provides that the Financial Service Authority or the Secretary of State may apply to the High Court for an order requiring a contravener or a person who has been knowingly concerned in the contravention to pay to the Court such sum as appears to be just, having regard to the profits which has accrued to him as a result of the contravention. In the Financial Services Act 1986, s.6(3) and s.61(3) provided for the making of court orders requiring contraveners (but not third parties) to disgorge profits made on account of the contraventions.

It has been said that s.213(2)(b) is based on certain provision in the Securities Ordinance (1974), Protection of Investors Ordinance (1976), Securities (Disclosure of Interests) Ordinance (1988), Securities (Inside Dealing) Ordinance (1990) and Leveraged Foreign Exchange Trading Ordinance (1994). (Butterworths Hong Kong Securities Law Handbook 6th Edition 2020 LexisNexis, pp. 715-716) The words "to take such steps as the Court may direct" appeared only in s.55 of the Foreign Exchange Trading Ordinance. The section was headed "Injunction to restrain contraventions" and provided as follows:-

"If on the application of the Commission the Court of First Instance is satisfied that there is a reasonable likelihood that any person will disregard any prohibition or fail to comply with any requirement imposed under section 18, 50, 51, 52, 59 or 60, the Court may grant an injunction restraining the act of any person in that behalf or, as the case may be, make an order that any person who appears to the Court to have been knowingly involved in any act in that behalf, take such steps as the Court may direct."

The sections referred to in s.55 covered such things as financial resource requirements to be observed by licensed leveraged foreign exchange traders, restrictions as to the business and the manner in which it might be carried on by such traders, maintenance of and restrictions on dealing with assets by them, and petitions by the Commission for winding-up orders against licensed leveraged foreign exchange traders on just and equitable ground and for bankruptcy orders against licensed representatives. None of these matters appears to have required the Court to have jurisdiction to order an account of profits. The steps contemplated would have been those necessary to restrain breaches or ensure compliance with the statutory requirements in question.

There is a further argument against interpreting s.213(2)(b) as giving jurisdiction to order an account of profit. It was held in the Securities and Futures Commission v Isidor Subotic [2021] 3 HKLRD 777 (affirmed on appeal) that s.213 gave rise to a tortious statutory cause of action. At common law, an account of profits is available in tort actions involving breaches of intellectual property rights. If s.213(2) were intended to allow the Court to order an account of profits despite the position at common law, one would expect it to provide for such a power expressly.

The scope of s.213(2)(b)

If the above views are correct, then the scope of s.213(2)(b) really is not as broad as the language used there, in particular the words "such steps as the Court of First Instance may direct", would suggest. Compensation and disgorgement are ruled out. Sub-sections (2)(f) and (g) would appear to cover the ground sufficiently in terms of steps needed for the implementation and compliance of orders made under s.213. What work is left for s.213(2)(b) to do, regarding contraventions that involved market misconduct? No one would suggest that the reference to taking "such steps as the Court of First Instance may direct" entitles the Court to impose penalties, otherwise not provided for in the Ordinance, on contraveners. It may be that restitution (whether in specie or by way of financial restitution) is indeed the sole concern of s.213(2)(b).

These views are of course tentative. More analysis and research would be needed.

Securities and Futures Commission v Young Bik Fung & Others

It is convenient here to consider some specific cases involving s.213(2)(b). First, the well-known case of Securities and Futures Commission v Young Bik Fung & Others [2016] 1 HKLRD 1249. There two corporate lawyers at two leading international law firms tipped off each other and allowed each to buy shares on the strength of inside information concerned with, in one case, a takeover of a Taiwanese bank in Taiwan and, in the other, a privatisation transaction in Hong Kong.

Also buying shares in the companies in question, and making gains as a result, was a sister of one of the lawyers. She denied having relied on any inside information from either lawyer. In relation to the purchase of the shares in the Taiwanese bank, she relied on the opinion of her brother (one of the two lawyers) that the subject Taiwanese bank was likely to be bought by a Hong Kong bank, but it was a different bank from the one which was actually negotiating to buy the Taiwanese bank. Her brother's firm was not involved in the transaction. He was tipped off about the takeover by the other lawyer whose firm acted for the acquiring bank.

In relation to the purchase of the shares in the company the subject of a privatisation, she said she simply let her sister (a co-defendant) decide whether to purchase shares in the company on her behalf, and denied having any knowledge about the privatisation.

The Court was satisfied that the requisite knowledge was not proved against her and that she was not knowingly involved in the insider dealing. Nonetheless, she was found liable. Under s.213(2)(b) an order may be made against a defendant who, "whether knowingly or otherwise", has been, is or may become involved in a contravention identified in subsection (1). She was ordered under to pay to the SFC the profits made from both the bank takeover in Taiwan and

the privatisation. The Court considered that it must be right to compel her to return the profits obtained from the tainted transactions, even if she were unaware of the contraventions. (See para 270) There was no consideration as to the precise scope of s.213(2)(b) and the order was made notwithstanding that the subsection does not in terms refer to an account of profits.

If the views expressed earlier concerning the construction of s.213(2)(b) are correct, the order for an account of profits in Young Bik Fung would be wrong. Section 213(2)(b) gives only jurisdiction to reverse impugned transfers. It did not permit an order for an account of profits.

Securities and Futures Commission v Sun Min

The second case is Securities and Futures Commission v Sun Min [2017] 4 HKLRD 211, a case also to do with insider dealing. Various orders were made, including orders for payments by the defendant to counterparties to the trades in question. It was contended that the applicable measure of restitution under s.213(2)(b) was, in Sun Min, the difference between the price at which the shares were sold to the defendant and the value of the shares assessed on the basis of their market price once the inside information became public. Harris J observed as follows:-

"17. I had some concerns about whether or not an order that the defendant pay to a counterparty to a transaction who sold her shares an amount assessed on the basis of the difference between the sale price and a valuation of the shares based on the price in the market once the inside information became known to the market, was a windfall for the seller rather than restitutionary in nature as s.213(2)(b) envisages.

18. [The SFC's] argument is that it is apparent from the inclusion of s.213(8), which allows damages to be claimed by the SFC on behalf of a counterparty to a transaction, that s.213(2)(b) is not concerned with compensating a counterparty for any loss caused to him or her. Section 213(2)(b) requires the court to make the assumption that the counterparty retained the shares and ignore the sale. On this assumption it is legitimate to calculate the amount to be paid by way of restitution by looking at what the position of the counterparty would have been if he or she had retained the shares and been in a position to sell them when the share price rose." (para 18)

The Court was correct to express concern. It (respectfully) rightly pointed out that the SFC's argument "results in a defendant having to pay a sum that neither represents (a) disgorgement of profit improperly made by the insider nor (b) restoration of loss suffered by another person trading in the shares as a consequence of the insider's conduct. It seems to fall into a separate category, which I have difficulty in characterising." (para 19)

It was simply wrong to suggest that the sale should be ignored. The relevant measure of restitution in Sun Ming was simply the return of the money transferred under the impugned transaction; in other words, the sale price. There had to be counter-restitution, that is, the return of the purchased shares to the defendant contravener.

The measure of recovery suggested by the SFC in Sun Min is just not a recognizable measure of recovery in the law of restitution. It is more akin to the compensatory measure of damages, if not actually it. The investors were compensated for what they would have received if the wrong in question (insider dealing) had not been committed (such that they would have refrained

from selling the shares until after their market price had risen). This is in effect the tortious measure of damages.

In the law of restitution, there are two possible measures of recovery – a reversal of the impugned transfer, which is what should have taken place in Sun Min, and the full or partial disgorgement of the profit made, which is appropriate in some restitution for wrong cases but clearly is not what was sought by the SFC in Sun Min.

Securities and Futures Commission v Mo Shau Wah

Securities and Futures Commission v Mo Shau Wah [2018] 3 HKLRD 356 is another case where s.213(2)(b) was invoked. Mo was an account executive in a securities company. She also held a securities account with the company. She was alleged to have misappropriated securities belonging to the clients of the company, causing them loss which exceeded HK$156 million. It was alleged that she and a number of co-defendants had falsely claimed that they had deposited physical shares with the company. When they gave orders to the company to sell those (non existent) shares, the company sold the same number of shares in its account with CCASS (the Hong Kong Securities Clearing Co Ltd). The proceeds were paid to Mo. But the shares sold in fact belonged to other clients of the company.

The company with the help of loans borrowed from its shareholders and directors purchased replacement securities and restored them to the affected clients. The SFC commenced proceeding under s.213, and sought, under subsection (2)(b), "an order requiring the defendants to take such steps as the Court may direct, including payment of sums or transfer of securities to [the

company] and/or its shareholders and directors…so as to restore them to the position they were in before the misappropriation." (para 17)

Section 213(2)(b) refers to the restoration of "the parties to the transactions" to their pre-transaction positions. In Mo Shau Wah, there had been no transactions between the defendants and the clients of the company or its shareholders or directors. No shares were transferred between them. There were no share transfers to be reversed. Were the claims based on s.213(2)(b) permissible, if the view is correct that s.213(2)(b) provides for restitution only?

The company had no doubt suffered loss to the extent of the sums borrowed to buy the replacement shares. But a claim for such loss would be compensatory. It is, however, possible for the SFC to rely on a restitutionary claim based on a mistaken transfer, induced by fraud, which occurred when the company paid the share proceeds to Mo. But it does not appear from either the first instance or Court of Appeal judgment that such a claim had in fact been made. There was no reference to any claim based on mistake.

However, the clients in Mo Shau Wah probably had a claim based on tracing to the proceeds of the shares sold. Having paid the clients, the shareholders and directors of the company would have been subrogated to their proprietary interests in the share proceeds. This potential claim would be restitutionary in character. But before the first instance court the SFC conceded that it could not pursue such a proprietary claim ([2007] 4 HKLRD 347, paragraph 50). The Court considered that the concession was made correctly.

Securities and Futures Commission v Maxim Capital Limited & Another

Securities and Futures Commission v Maxim Capital Limited & Another (unreported, HCA 2482/2015, 7 June 2022) concerns fraudsters masquerading as dealers and investment managers. They promoted and invited subscriptions in an investment fund which did not exist. Fake contact details were used. False information about the fund and the defendants' financial background was given in seminars and in social media. Following investigation, the SFC established that there were about 250 aggrieved investors but the money recoverable from the contraveners amounted to only 22% of the sums paid by the investors.

The SFC proposed and the Court accepted that "[t]he most appropriate form of restitution order would be to distribute the amounts frozen in the bank accounts to the complainants/victims on a pro-rata basis, i.e. by dividing the amount left in the bank accounts among the complainants/victims by reference to the amounts they respectively remitted to the defendants." (para 67(1)) It was accepted that the order would not "fully restore the victims to their pre-transaction positions, it is nevertheless desirable because it provides compensation to the victims to the extent that is reasonably practicable." (para 67(3)) The Court added that the exercise of the discretion to make an order under s.213(2)(b) "does not entail prior consultation with all or the majority of the affected investors on its proposal to the court. Otherwise, overall fairness and cost-effectiveness will be compromised especially when the enrolment of the affected investors has not closed." (para 67)

An administrator was appointed to receive and administer the money in the defendants' (frozen) bank accounts and to administer the distribution of the same. The order contemplates submissions of claims by other investors and requires the SFC to advertise in local newspapers inviting claims from any investor who had invested with the defendants. An investor claiming will have to provide a statutory declaration confirming the amount alleged to be due.

The order made in Maxim Capital Limited seems in effect to provide for a class remedy. It provides for the pari passu distribution of the sums in the defendants' bank account because it was in the best interest of the investors as a class. It will be recalled that in Pantell S.A. it was held that s.6(1) of the Financial Service Act 1986 was not about class recovery. It did not "contemplate orders made for the benefit of investors as a class." (p. 272C) Scott LJ held expressly that a section 6(2) order should be "directed to individual transactions with payment being directed to be made to individual investors" (p. 280E).

Similar orders have been made in a number of other cases, including Broadspan Securities (unreported, HCA 2511/2014, 12 May 2021) and the leading case of Securities and Futures Ordinance v Unknown persons trading as Cardell Ltd et al [2019] 1 HKLRD 702. No doubt they represent a practical and pragmatic solution to the situation before the Court, where the sums recoverable from the contraveners are insufficient to pay all the victims of the contraventions. The question is whether s.213(2)(b) gives the Courts jurisdiction to make those orders, to the extent that they appear to provide for a class remedy. If the English Court of Appeal's interpretation of s.6(2) is applicable to the construction of the s.213(2)(b), the jurisdiction does not exist.

It is unknown if in Pantell S.A. the assets held by the contraveners were sufficient to repay the investors or if the Securities and Investment Board had obtained a freezing injunction, and whether in such a case the money in the frozen accounts was enough to repay the sums claimed under s.6(2). The English Court of Appeal in Pantell S.A. only had to rule on (and rejected) a striking-out application. But it would appear to follow from the requirement that "[a] section 6(2) order should be directed to individual transactions with payment being directed to be made to individual investors upon the individual investors retransferring" their shares or delivering up their share certificates,

that the trial Court would not have had jurisdiction to order that the sums recovered from the contraveners be distributed to all the investors on a pro-rata basis. A distribution to the above effect would seem appropriate rather in insolvency proceedings that would have followed if, judgment having been obtained against them, the contraveners were unable to repay all the investors.

It may be added also that s.6 of the Financial Service Act 1986 contained express provisions, in subsections (3) to (7), for the appointment of a receiver to recover from the contravener profits he had obtained as a result of the contravention, or such sum as appeared to the Court to be just, having regard to the loss suffered by the victims of the contravention. The receiver was to distribute such profits or sum to persons who appeared to have entered into transactions with the contravener. In Pantell S.A., Scott LJ referred to subsections (3) to (7) and pointed out that they were only available for the purposes of disgorgement of profits and compensatory remedies; they were not available for the purposes of the subsection (2) restitutionary remedy. “This feature”, his Lordship observed, “emphasizes the point already made, namely, that the subsection (2) remedy is directed to the reversal of specific transactions and, unlike the subsections (3) to (7) remedies does not contemplate orders made for the benefit of investors as a class.” (p 272C)

Section 213(b)(2) of the Ordinance contains no provisions like those of s.6(3) to (7) of the 1986 Act, providing for distribution of sums recovered from contraveners. There are simply no provisions akin to those in s.6(3) to (7) of the 1986 Act, available whether for the purposes of restitutionary or compensatory remedies.

Section 384 of the Financial Services and Markets Act 2000 contains similar, though not identical, provisions for the distribution of sums payable by the contravener to victims of relevant breaches of the Act.

Distinction between restitution and compensation

A further observation that could be made concerns the distinction between restitution and compensation. It is not a distinction that has been observed in some of the Hong Kong judgments. In Maxim Capital Limited, for instance, the Court refers to the order proposed by the SFC and observes that while it does not fully restore the victims to their pre-transaction positions, it would provide "compensation" to them, to the extent that is reasonably practicable. (para 67(3)) This potentially conflates two very different remedies. Restitution and compensation are different measures of recovery, even though in particular cases the sums recoverable on account of either measure may be the same. Section 213(2)(b) provides for the former only.

In contrast, the Court of Appeal in Pantell S.A. was astute in distinguishing between the restitutionary and compensatory remedies contained in the relevant provisions of the 1986 Act, pointing out, for instance, that s.5 of Act (which concerned remedies for individual investors in respect of unauthorized investment businesses) combined "a restitutionary remedy and a compensatory remedy". (p. 270 D)

The relevant dicta in Pantell S.A. mentioned in the last hour were not considered by the Courts in most of the Hong Kong cases, even though some of the material words in the s.6(2) of the Act and s.213(2)(b) of the Ordinance are almost identical. It seems that somehow they had been considered irrelevant so that the Courts' attention was not drawn to them. It seems to me that if the

Court had had the benefit of submissions on the relevant dicta in Pantell S.A., there would have been more analysis as to the scope of s.213(2)(b) in the judgments. Presently it seems that the SFC invariably invokes s.213(2)(b) when seeking monetary remedies, even though the order sought is in truth compensatory (as in Sun Min) or appears to contemplate a class remedy (as in Maxim Capital Limited), which Pantell S.A. had held to be impermissible under s.6(2) of the Act. It may be that the propriety of such orders is suspect.

Clemence Yeung
Fortune Chambers
3 October 2023

Appendix

Securities and Futures Commission v Tsoi Bun [2014] 2 HKC 468

Pantell S.A. was considered in Securities and Futures Commission v Tsoi Bun [2014] 2 HKC 468, where the Court held that Pantell S.A. was distinguishable. The Court refers to the judgment of Scott LJ in Pantell S.A. and takes the view that under s.6(2) of the Financial Services Act, restitution was permissible only if the physical shares might be returned to the contraveners; if counter-restitution in specie was no longer possible (e.g. because the victims of the contraventions had already sold the shares), then the statutory remedy under s.6(2) was not available. In contrast, the Court in Tsoi Bun observes, s.213(2)(b) contains no such requirement. It then points out that

"12. The breadth of this language is striking and while the nature of the steps that may be required may be limited by the spirit and intendment of the statute and the content and purpose of the application under s.213, I see no reason why they are confined to making full restitution in *specie*. There appears to me to be no basis for reading such restriction into the provision."

In truth, the Court of Appeal decision in Pantell SA does not contain any dictum prohibiting recovery where restitution in specie is not possible. Scott LJ held expressly that "[f]inancial restitution, if restitution in specie were not possible, could be provided for by the section 6(2) order" (at p 281C). This dictum appears to have been overlooked in Tsoi Bun and the observation there (at paragraph 11) that s.213(2)(b) is therefore distinguishable from s.6(2) of the Act is, it is respectfully submitted, erroneous.