

Court of Appeal dismissed Moody's leave application to appeal to the Court of Final Appeal

17 Oct 2017

The Court of Appeal today dismissed Moody's Investors Service Hong Kong Limited's (Moody's) application for leave to appeal to the Court of Final Appeal in the matter of the Securities and Futures Commission's (SFC) disciplinary action in relation to a special comment report published by Moody's in 2011 (the Report) (Notes 1 & 2).

Moody's application was made after the Court of Appeal dismissed its appeal against the determination of the Securities and Futures Appeals Tribunal (SFAT) on 31 March 2016 which affirmed the SFC's decision to reprimand and fine Moody's for breaching the Code of Conduct in its preparation and publication of the Report (Note 3). In dismissing Moody's appeal, the Court of Appeal said in its 8 June 2017 ruling that it agreed that misconduct on the part of Moody's can be established on the basis that the preparation and publication of the Report formed part and parcel of the carrying on of the business of credit ratings by Moody's (Notes 4 & 5).

End

Notes:

1. Moody's is licensed to carry on business in Type 10 regulated activity (providing credit rating services) since 1 June 2011.
2. The Court of Appeal's judgment dated 17 October 2017 (Civil Appeal No. 103 of 2016) will be available on the Judiciary's website at www.judiciary.gov.hk.
3. Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission (Code of Conduct).
4. For further details of the SFAT's determination, please see the SFC's press release dated [5 April 2016](#). The SFAT's determination is available on the SFAT's website at www.sfat.gov.hk.
5. For further details of the Court of Appeal's judgment dated 8 June 2017, please see the SFC's press release dated [8 June 2017](#). The Court of Appeal judgment (CACV103/2016) is available on the Judiciary's website (www.judiciary.hk).

Page last updated : 17 Oct 2017

CACV 103/2016

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CIVIL APPEAL NO 103 OF 2016
(ON APPEAL FROM THE SECURITIES AND FUTURES APPEALS
TRIBUNAL APPLICATION NO 4 OF 2014)

IN THE MATTER OF A DETERMINATION
BY THE SECURITIES AND FUTURES
APPEALS TRIBUNAL IN APPLICATION
NO 4 OF 2014

AND IN THE MATTER OF AN APPEAL
UNDER SECTION 229 OF THE
SECURITIES AND FUTURES
ORDINANCE (CAP 571)

BETWEEN

MOODY'S INVESTORS SERVICE HONG
KONG LIMITED

Appellant

and

SECURITIES AND FUTURES
COMMISSION

Respondent

Before: Hon Lam VP, Yuen and Kwan JJA in Court

Dates of Written Submissions: 20 July 2017 and 3, 14 August 2017

Date of Judgment: 17 October 2017

JUDGMENT

Hon Lam VP (giving the Judgment of the Court):

1. On 8 June 2017, we dismissed the appeal by Moody's. Though we held that the 11 July 2011 Report did not by itself constitute credit ratings within the meaning of such expression in part 2 of Schedule 5 of the Securities and Futures Ordinance ["SFO"], we agreed with the Tribunal that the Report was an act relating to the earlier credit ratings published by Moody's. The Tribunal was therefore correct in holding that section 193 of the SFO can be relied upon to establish misconduct in the publication of the Report.

2. Moody's now applied for leave to appeal to the Court of Final Appeal. In the Notice of Motion of 6 July 2017, the questions of great general or public importance ["GPI"] are framed as follows:

“ Having regard to the freedom of expression and opinion constitutionally guaranteed by Article 27 of the Hong Kong Basic Law and Article 16 of the Hong Kong Bill of Rights:

1. Whether the publication of a report (“the Report”) which:

(1) Does not constitute a credit rating or purport to change an existing credit rating (“the Credit Rating”) or the rating methodology thereof; but which

(2) Comments upon certain indicators or parameters relevant to credit risk (which are not equivalent to the rating methodology used for the Credit Rating)

constitutes “provision of credit rating services” within the meaning of part 2 of Schedule 5 of the Securities and Futures Ordinance (Cap 571) (“SFO”)

2. If not, whether the publication of the Report constitutes an “act or omission relating to the carrying on of” the regulated activity of providing credit rating services, within the meaning of section 193 of the SFO.

3. Whether the answers to 1 and/or 2 above depend on whether the publisher of the Report is also the publisher of the Credit Rating.”

3. Pursuant to Practice Direction 2.1, parties lodged written submissions on the application and we have read the same. We do not see any need for an oral hearing. This is our determination of the application.

4. In the submission on behalf of Moody's, Mr Shieh SC (counsel for Moody's in this application) confirmed that Moody's did not rely on Question 3 as a separate GPI question.

5. Moody's also filed a second affirmation of Fung Denise Oi Yee on 14 August 2017, exhibiting two articles attached to the submissions on behalf of Moody's lodged on 20 July

2017.

6. Whilst we would not rule out completely the scope for evidence to be filed in support of an application for leave to appeal to the Court of Final Appeal, such occasion must by the nature of things be rare. We do not think the two articles which Moody's attempt to put in fall within such rare exception. As the Court has repeatedly emphasized, normally it is not the proper function of an appeal to this Court (still less in the context of an appeal to the Court of Final Appeal) to revisit the salient findings of fact by reference to new evidence. In the present instance, the reference to the two articles was a blatant attempt to invite this Court to revisit our assessment of the correctness of the findings by the Tribunal as to the relationship between the Report and the credit ratings published by Moody's. Moody's has not even begun to satisfy us that the criteria in *Ladd v Marshall* [1954] 1 WLR 1489 were met and if application was made at the substantive appeal before us for such admission of evidence, they would have been admitted.

7. With respect, we do not accept the admission of such articles can be justified on the basis that they could demonstrate the great general or public importance. As we shall explain below, whether the publication of a particular statement or report is related to the credit ratings of Moody's depends on the facts and circumstances of the case in question. The two new articles are wholly different in nature from the Report and have no bearing in the present context.

8. In our judgment, the slipping in of such materials in an application for leave to appeal to the Court of Final Appeal in such manner is an abuse of process. We have no hesitation in holding that the second affirmation and the articles are not admissible for the purpose of the present application.

9. Under Questions (1) and (2), Mr Shieh submitted in essence Moody's arguments were as follows and they merit consideration by the Court of Final Appeal:

“ (a) as the tribunal acknowledged, type 10 licensed businesses need and are entitled to have “bright line” certainty as to the scope of their regulated activities (§206);

(b) only steps taken in the preparation of credit ratings could fall within the phrase “relating to” the carrying on of regulated activities;

(c) a report which was *not* part of the preparation of credit ratings and a framework which was *not* adopted as part of any existing methodology for conducting credit ratings cannot be regarded as “part and parcel” of credit ratings;

(d) nor does the preparation of such a report form “part and parcel” of the carrying on of business regulated activities or “relate to” the carrying on of the business of regulated activities.”

10. We have already explained in our judgment that the narrow construction given to section 193 (confining it to activities in the preparation of credit ratings) should be rejected. In that respect, we were in agreement with the Tribunal, see [29] to [33] of the judgment and [105] to [119] in the Tribunal’s determination.

11. Mr Shieh made a valiant attempt to persuade us that due to the practical consequence of the concurrent conclusion of this Court and the Tribunal as to the scope of section 193, Moody’s is placed in a disadvantageous position as compared with other financial commentators who do not provide credit ratings.

12. With respect, we are not impressed by such argument. As a provider of credit ratings, Moody’s is in a privileged position (in terms of its potential influence over those involved in the market) as compared with other commentators. We cannot see anything intrinsically disproportionate in subjecting them to the disciplinary regime of the SFO for activities relating to the credit ratings published by Moody’s.

13. Mr Shieh seems to labour under the misapprehension that the effect of our judgment would preclude Moody’s from commenting on matters relevant to credit risk without being subject to regulation by the SFC. With respect, this is not so. It is not our holding (and nor was it the holding of the Tribunal) that every statement by Moody’s will be regarded as an activity relating to credit ratings. It is a question of fact and much depends on the circumstances surrounding the activities in question. In substance, Moody’s appeal was a challenge to the application of section 193 to the findings by the Tribunal in this regard, in particular at [106] of the determination made in the context of the facts and circumstances in this case.

14. As regards the construction of section 193, notwithstanding the submission of Mr Shieh, we are of the firm view that the narrow construction contended by Moody’s is plainly unarguable. On the application of a wider construction, Mr Shieh has not placed before us any reasonable argument for reversing the concurrent conclusion of the Tribunal and this Court.

15. For these reasons, we do not find it appropriate to grant leave and the Notice of Motion is dismissed with costs accordingly. The Statement of Costs of the SFC add up to \$154,940. It is a reasonable figure and we fix the costs at \$154,940.

(M H Lam)
Vice President

(Maria Yuen)
Justice of Appeal

(Susan Kwan)
Justice of Appeal

Mr Paul Shieh SC, instructed by Linklaters, for the appellant

Mr Benjamin Yu SC and Mr Laurence Li, instructed by Securities and Futures Commission, for the respondent