

## Hong Kong: Overseas Contracts And The Employment Ordinance

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*This article was first published on 17 December 2007.*

### Summary

A recent decision of the High Court in an application for an urgent injunction has cast doubt on the extent to which the Employment Ordinance applies to employees who work in Hong Kong, but who are employed under a contract which is governed by a law other than that of Hong Kong. The case also highlighted the ability for an employer to enforce restrictive covenants.

### Full Update

#### *The Background*

The case of **HSBC vs Stephen Wallace** involved a senior investment banker (Mr. Wallace) who was leaving HSBC to join another investment bank.

Mr. Wallace was employed by HSBC Bank Plc (a UK company) under a contract of employment (the "**Employment Contract**") which was expressly stated to be governed by the laws of England. He was recruited from the UK, but there was a clear intention for Mr. Wallace to work in Hong Kong. Therefore, on the same day as he signed his Employment Contract, he also signed a secondment agreement under which he agreed to work in Hong Kong for HSBC Markets (Asia) Limited, a Hong Kong company. This all happened in April 2004.

In 2007, whilst still working in Hong Kong, Mr. Wallace gave notice of resignation to his employer, HSBC Bank Plc. The Employment Contract required Mr. Wallace to give 6 months notice.

HSBC Bank Plc, as is customary for financial institutions in these circumstances, immediately exercised an express power in the Employment Contract to place Mr. Wallace on gardening leave.

Sometime into Mr. Wallace's gardening leave he approached HSBC with a view to HSBC releasing him early. Mr. Wallace was keen to commence employment with his new employer. HSBC refused.

Mr. Wallace then approached HSBC and suggested that he had the right to buyout the remainder of his notice period by means of payment of wages in lieu of notice under section 7 Employment Ordinance.

Section 7 Employment Ordinance provides that any party to a contract of employment, having given notice of termination, can terminate the contract immediately by paying to the other party an amount calculated in accordance with section 7 (which has been recently been amended by the Employment (Amendment) Ordinance).

HSBC responded to Mr. Wallace's suggestion by pointing out that the Employment Contract was governed by the laws of England and, therefore, the Employment Ordinance did not apply. Mr. Wallace disagreed and highlighted section 70 Employment Ordinance (which provides that any attempt in a

contract of employment to "extinguish or reduce" any statutory right under the Employment Ordinance is void).

Mr. Wallace then decided to take the matter into his own hands and simply presented HSBC with a cheque which, he alleged, was sufficient in order to buy out his notice period under section 7 and therefore terminate the Employment Contract immediately. HSBC returned the cheque to Mr. Wallace and repeated their stance that Mr. Wallace was not able to buy out his notice period and remained employed by HSBC. HSBC continued paying him his salary and otherwise treating him as an employee.

On 1 November 2007 HSBC became aware that Mr. Wallace had commenced work with his new employer, another investment bank which competed with HSBC.

### ***Post-Termination Restrictions***

The Employment Contract also contained certain detailed provisions purporting to prohibit Mr. Wallace from, inter alia, working for a competitor for a period following cessation of his employment.

The period for which the restrictions applied was capped at 6 months, but such 6 month period was reduced by the amount of any garden leave served by Mr. Wallace. So, if Mr. Wallace were to serve 6 months' garden leave then the period during which the non-compete restriction would apply would be reduced to zero.

### ***The Injunction Application***

As soon as it came to the attention of HSBC that Mr. Wallace had, as a matter of fact, commenced employment with a competitor, HSBC immediately applied to the court for an urgent injunction. The injunction sought was to prohibit Mr. Wallace from working for the competitor on two grounds:

that Mr. Wallace was still an employee of HSBC (due to the fact that his attempt to buy out his notice period under section 7 was wrong in law as section 7 did not apply to his contract), and

in the alternative, Mr. Wallace was restricted from working for the competitor on the grounds that the relevant non-competition restrictive covenant was valid.

The Courts (Deputy Judge Gill) agreed with HSBC on both counts. As such Mr. Wallace was held to still be an employee of HSBC. In addition Deputy Judge Gill determined that the non-compete restriction was valid and, therefore, operated to prohibit Mr. Wallace from working for any competitor. Due to the fact that Mr. Wallace had already worked for the competitor for a period of 6 or 7 weeks prior to the time of the injunction hearing, the Court held that the period during which he was working for a competitor could not be considered "gardening leave" for the purpose of reducing the period during which the non-compete restriction would apply. As such the court determined that the period during which the non-compete restriction should apply should extend to March 2008.

### ***Points To Note***

Whilst it is rare in Hong Kong for financial institutions to have recourse to the courts in settling disputes of this nature, this case is a clear demonstration of the power of court proceedings in cases where there has been a flagrant disregard of contractual obligations.

From a technical perspective perhaps the most interesting aspect of this case is the finding by the Court that section 7 Employment Ordinance did not operate to protect an employee who was employed under a contract governed by an offshore law. This is the case even where the entirety of the contract has been performed in Hong Kong. Deputy Judge Gill did, however, clarify that this would only be the case where was a genuine and true connection with the offshore jurisdiction (i.e. it would not be possible for a person

to argue that the Employment Ordinance did not apply in respect of a Hong Kong employee recruited in Hong Kong by a Hong Kong company).

Author: Duncan Abate

For further information, please contact :

Name: [Duncan Abate](#)

Position: Partner, JSM

Phone: (852) 2843 2203

Fax: (852) 2103 5066

Name: [Hong Tran](#)

Position: Partner, JSM

Phone: (852) 2843 4233

Fax: (852) 2103 5070

Name: [Anita Lam](#)

Position: Consultant, JSM

Phone: (852) 2843 4536

Fax: (852) 2103 5158

Relevant area(s) of interest :

- Employment & Employee Benefits

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