

Court quashes payment order made against AIA and order costs against tribunal

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Introduction

A recent Court of First Instance case, *AIA International Limited v Appeals Tribunal of the Hong Kong Federation of Insurers* ([2017] HKCU 1821), involved a judicial review sought by AIA International Limited in relation to a payment order made against it by the Insurance Agents Registration Board (IARB).

Leave was granted to AIA on November 17 2015. The substantive hearing took place on May 11 2017 and the judgment was delivered on July 20 2017. The court quashed the IARB's decision and remitted the matter back for rehearing in the Appeals Tribunal of the Hong Kong Federation of Insurers.

Facts

Lau Chun Ming, a former agent of AIA, fraudulently misappropriated funds that he had received from his clients, Ms Tsui and Ms Suen, by falsely representing to them that the funds were to be invested in a non-existent AIA investment product.

On February 22 2014, the IARB initiated disciplinary proceedings against Lau for breaches of the Code of Practice issued by the Hong Kong Federation of Insurers, (1) including use of documents containing inaccurate information, making inaccurate representation and mishandling client funds. The IARB determined in Lau's absence that his insurance registration be revoked for seven years, and made a payment order of HK\$806,200 against AIA which was intended to repay the policy premiums dishonestly procured by Lau.

Before the disciplinary proceedings, Lau had pleaded guilty in the district court to fraud-related offences, for which he had been sentenced to three years' imprisonment.

On May 12 2012, AIA lodged an appeal seeking a reversal of the IARB's decision at the Appeals Tribunal of the Hong Kong Federation of Insurers. The appeal was dismissed on May 15 2015 without a hearing.

The grounds on which AIA sought a judicial review included:

- whether the IARB had the power to make a payment order;
- whether the IARB, by making the payment order against AIA, had breached the principles of natural justice;
- whether the appeals tribunal had erred in law by not holding an oral hearing when there was a dispute over the facts; and

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- whether the appeals tribunal had erred in law in finding that AIA was liable for Lau's acts.

In summary, AIA's position was that:

- it was not party to the disciplinary proceedings before the IARB;
- the Hong Kong Federation of Insurers did not inform AIA that it would be held liable for Lau's conduct;
- AIA was not given notice of the payment order; and
- AIA was not given the opportunity to be heard.

Decision

Did the IARB have power to make payment order?

The IARB had found that a 'previous practice' had developed within the insurance industry, whereby it was accepted that in cases involving disciplinary action against an agent, the IARB could require the principal to:

"repay any premiums procured by the misconduct or reinstate the status of an insurance policy notwithstanding that the premiums in respect of that policy were misappropriated by the agent and never received by the insurer."

The IARB considered that ordering an insurer to repay premiums caused by an agent's fraudulent behaviour fell within its right to take "such other action as the IARB thinks fit".

The court's view was that, since no actual policy was in existence, the payment order did not constitute a repayment of a premium or the reinstatement of a policy where a premium had been misappropriated. Therefore, no payment order should have been made in this case.

Did the appeals tribunal err in law and should there have been an oral hearing?

AIA submitted that:

- the IARB was in breach of the principles of natural justice in making the payment order, since no notice was given that the payment order might be made against it;
- the IARB had failed to give adequate reasons for its decision to make the payment order; and
- AIA was not given the opportunity to be heard as the appeals tribunal failed to hold an oral hearing of the appeal.

The court agreed with AIA that there was a denial of natural justice. AIA had been prejudiced by being denied an oral hearing and by not being given notice that a payment order might be made against it. On this basis, the IARB had failed to fulfil an "important obligation... in the context of this case".

Was AIA liable for Lau's actions?

The appeals tribunal found that:

"the amount of HK\$806,200 was indeed received directly or indirectly by Mr. Lau in his capacity as insurance agent of the Appellant [AIA] and, in case it is necessary, under his apparent authority bestowed upon him by his appointment as the Appellant's insurance agent [AIA] which the Complainant obviously relied on."

In deciding whether AIA was liable for the acts of Lau as its former agent on the grounds of apparent authority, it had to be established that:

- the agent has represented or held out to possess that authority; and
- the third party reasonably relied on that representation or holding out.

This was a matter for the appeals tribunal and not for the court hearing the judicial review.

Ruling

The court therefore quashed the decision of the IARB, including the payment order, and remitted the

matter back to the appeals tribunal for rehearing.

Decision on costs

In the costs decision delivered on August 11 2017,(2) the court held that:

"when an inferior court or tribunal actively resists an application for judicial review which is unsuccessful, it faces the prospect of costs being awarded against it on the general principle that costs follow the event."

The court ordered costs against the IARB and the appeals tribunal.

Comment

This case emphasises the importance of observing the rules of natural justice in the context of disciplinary proceedings involving the IARB and the appeals tribunal. AIA will now have an opportunity to make submissions as to whether it should be made responsible for its former agent's misconduct. The IARB's practice of making payment orders has not been found to be unlawful, but in making a payment order it will need to be mindful of the rights of any third party against which any such order is made.

Going forward, within the next two years the powers and functions of the Hong Kong Federation of Insurers in terms of supervising and regulating insurance intermediaries will be taken over by Hong Kong's new Insurance Authority. The authority (which has been in operation since June 26 2017) will regulate and supervise the insurance industry for the protection of existing and potential policy holders. It has its own Insurance Appeals Tribunal (a quasi-judicial body, independent of the authority) to review its decisions on insurers and intermediaries.(3)

The Insurance Ordinance (Cap 41) does not include any specific provisions relating to the IARB's practice of making payment orders in respect of premiums caused by an agent's fraudulent behaviour. However, Section 35(1) of the ordinance confers powers on the authority to impose requirements on an insurer "as the Authority considers appropriate". This appears to afford considerable scope for determining what is considered appropriate and whether a premium repayment to an innocent third party is allowed.

Section 26(5) of the ordinance provides that:

"the Authority shall not exercise any power... by section 35 in respect of an authorized insurer unless... the exercise of... section 27 to 34... would not appropriately safeguard the interests of policy holders or potential policy holders of the insurer."

It appears that Sections 27 to 34 of the ordinance are qualifying provisions. Some qualifying requirements include that the insurer not make investments which would be assets representing a fund maintained by the insurer (Section 28) and maintain assets in Hong Kong equal to the whole or a specific portion of the amount of its domestic liabilities (Section 29). It also provides a requirement for disclosure, whereby the insurer should produce documents as the authority may specify (Section 34). Only when, in the authority's opinion, these qualifying provisions do not safeguard the interests of policy holders or potential policy holders, should Section 35 be relied on.

The ordinance therefore provides specific requirements which are aimed at stronger policy holder protection. Insurers and intermediaries should be aware of how the powers differ from what was previously permitted.

For further information on this topic please contact [Kevin Bowers](#) or [Michael Withington](#) at Howse Williams Bowers by telephone (+852 2803 3688) or email (kevin.bowers@hwbhk.com or michael.withington@hwbhk.com). The Howse Williams Bowers website can be accessed at www.hwbhk.com.

Endnotes

(1) The code provided that the IARB may:

- issue a reprimand to any of its insurance agents;
- suspend or terminate the appointment of any of its insurance agents; or
- take or refrain from taking such other action as the IARB thinks fit.

(2) *AIA International Ltd v Appeals Tribunal of the Hong Kong Federation of Insurers* [2017] HKCU 2032.

(3) "Specific Decisions Made in relation to Insurer" at Schedule 9, Part 1 of the Insurance Ordinance (Cap.41); "Specified Decisions Made in respect of Insurance Intermediaries" (Part 2, not yet in force).

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