



Summary of Judgment

**Tam Sze Leung & Ors (“Applicants”) v
Secretary for Justice and Securities and Futures Commission
HCAL 177/2022; [2022] HKCFI 2330**

Decision : **Application for leave to apply for judicial review dismissed**
Date of Hearing : **28 and 29 July 2022**
Date of Judgment : **26 September 2022**

Background

1. The Applicants sought leave to apply for judicial review to challenge the constitutionality of the Securities and Futures Commission’s (“SFC”) statutory power to issue Restriction Notices (“RNs”) under ss. 204 and 205 to freeze assets held in various trading accounts held by the Applicants with certain licensed corporations on the basis of s. 207(e) of the Securities and Futures Ordinance, Cap. 571 (“SFO”), i.e. when “it appears” to the SFC that the imposition of the prohibition or restriction is “desirable in the interest of the investing public or in the public interest.”
2. The Applicants are members of the same family. This matter arose out of the SFC’s investigation against the Applicants and other suspects for a large-scale ramp-and-dump scheme¹ conducted by a syndicate. The SFC’s suspicions against the Applicants included market misconduct, offences of false trading, price rigging and stock market manipulation.
3. On 15 March 2021, the SFC issued a number of RNs pursuant to ss. 204(1)(a) and 205(1) on the basis of s.207(e) of the SFO to certain licensed corporations in relation to the trading accounts held by the Applicants (“Accounts”). Under the relevant RNs, the licenced corporations were, *inter alia*, prohibited from disposing of or dealing with, or assisting, counselling or procuring another person to dispose of or deal with any assets, in any way, in each of the Accounts up to a certain value.
4. A rolled-up hearing was conducted before The Honourable Mr Justice Coleman

¹ ‘Ramp and Dump’ scheme is a form of unlawful market manipulation where suspected perpetrators use different dishonest means to ‘ramp’ up the share prices of a listed company and then ‘dump’ the shares onto retail investors at an artificially high price.



(“Coleman J”) at the Court of First Instance on 28 and 29 July 2022.

5. The RNs have remained in effect up to the time of the hearing, i.e. more than 16 months from the initial issuing of them. No charges as to alleged market misconduct or other offences under the SFO had yet been laid against the Applicants.

Issues in Dispute

6. Whether the SFC’s statutory power to issue RNs under ss.204 and 205 on the basis of s.207(e) of the SFO interferes with the constitutional rights to property under Articles 6 (“BL6”) and 105 (“BL105”) of the Basic Law on the grounds that it (a) is not prescribed by law and (b) fails the proportionality test.

Department of Justice’s Summary of the Court’s rulings

(Full text of the CFI’s judgment at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=147488&QS=%2B%7C%28HCAL%2C177%2F2022%29&TP=JU)

7. The Court observed that there is no fact-specific challenge on the issuance or continuation of the actual RNs in this case, which is a purely systemic challenge (§54).

Ground 1: “Prescribed by law” requirement (§§58-168)

8. The Court agreed with the Applicants’ submissions that the relevant administrative intervention powers granted to the SFC are highly intrusive to the individual’s property rights under BL6 and BL105 (§§77-81).
9. The language of “*it appears to the Commission that the imposition of the prohibition or requirement is desirable*” does not concern the strength of evidence required to rely on s.207(e). It simply means that the SFC must form the view on the materials available to it that the imposition of the prohibition or requirement is the right and appropriate step to take in the circumstances those materials identify (§98).
10. A prohibition or requirement can be triggered by s. 207(e) when – after balancing (1) the stage of the investigation, (2) the potentiality of the unfavourable outcome which has been identified by the materials generated by the investigation, (3) the



apparent need to safeguard the rights of others or protect the public interest, and (4) the impact will be from the prohibition or requirement – that balancing makes it appears to be desirable (§103).

11. Considering the following, the Court held that overall, ss. 204 and 205 when invoked on the basis of s.207(e) of the SFO satisfy the “prescribed by law” requirement (§168):-

(1) There is sufficient guidance from the statutory context to give contours to the meaning of “public interest” in s.207(e). The regulatory objectives and statutory functions of the SFC and the regulatory purposes served by ss. 204, 205 and 207 are central to the statutory role and functions served by the SFC as the market regulator (§§123-125);

(2) The broad and general concept of “public interest” in section 207(e) could gradually be clarified through applications to specific facts. The existence of the review mechanism in the Securities and Futures Appeals Tribunal (“SFAT”) provides an infrastructure which is conducive to the gradual development or clarification on the meaning of s.207(e). Further assistance or development may come from Court decisions, either on appeal from the SFAT or in judicial review (§§126-129);

(3) While there is no express time limit for the RN after issuance (and no legally required periodic review of the RN), the actions of SFC as a public authority would be subject to public law control. In an review by the SFAT, the SFAT can also decide whether the duration was, or continues to be, reasonable (§§130-132);

(4) There are sufficient safeguards provided by the SFAT and by the Courts in judicial reviews (§133). The SFAT conducts a full merits review and makes the decision as if it is the original decision maker. In doing so, the SFAT could take into account the intrusion into individual’s property rights and decide the proper weight that should be accord to that factor (§§145, 147-161). In addition, the exercise of powers might be subject to judicial review on conventional grounds, and the SFAT’s decisions are subject to appellate review on points of law, as well as being subject to judicial review (§§164-167).

Ground 2: Proportionality (§§169-187)



12. The Applicants did not contend that the administrative powers do not serve any legitimate aim or that they are not rationally connected to that aim, and the complaint only targets the last two steps of the proportionality analysis (i.e. restriction or limitation must be no more than was necessary to accomplish that legitimate aim; and whether a reasonable balance had been struck between the societal benefits of the encroachment and the inroads made into the constitutionality protected rights of the individual) (§55).
13. On the appropriate standard of review, the Court found the context favours a standard of review closer to the ‘manifestly without reasonable foundation’ end of the spectrum. Regulation and enforcement in the financial markets stand firmly with the types of matters where the Court should, and is accustomed, to accord the Government with a broad margin of discretion (§§173-174).
14. The restriction or limitation pursues a legitimate aim of protection of investors, creditors of the licenced corporation and the public interest. In respect of the public interest, one aspect is the preservation of monies that might otherwise be dissipated, pending the outcome of investigations. Other aspects of the public interest including deterrence, prevention of dealing in proceeds of an indicatable offence and the confiscation of such proceeds (§185(1)-(3)).
15. While the restriction or limitation temporarily deprives a client of a licensed corporation access to the funds in a relevant account, it preserves the status quo pending the outcome of investigations. Therefore, the restriction or limitation is rationally connected to the legitimate aim (§185(4)-(5)).
16. A person affected is granted two rights of (i) a review and (ii) an appeal to an independent tribunal though not immediate. Both are very real and not so inadequate as to cause the RN Regime to be transparently disproportionate to the problem it seeks to address. With the protections provided, the restriction or limitation is no more than necessary to accomplish the legitimate aim (§185(6)-(10)).
17. The Court is satisfied the restriction or limitation pursues a legitimate aim and is rationally connected to that legitimate aim. On balance, it is no more than is necessary to accomplish that legitimate aim, and strikes a reasonable balance between the societal benefits of the encroachment and inroads made with the constitutionally protected rights of the individual, and does not result in an unacceptably harsh burden on the individual (§187).



18. Application for judicial review is dismissed with costs to the SFC and the Secretary for Justice (\$190).

Civil Division

Department of Justice

26 September 2022