Summary of Judicial Decision

Cheung Ka Ho Cyril & Others v Securities and Futures Commission & Others
HCAL 2132-2134, 2136 & 2137/2018; [2020] HKCFI 270

Decision	**:**	**Applicants' judicial review applications dismissed**
Date of Hearing	**:**	**30-31 July 2019**
Date of Judgment	**:**	**14 February 2020**

Background

1. These judicial review ("JR") applications arose out of the Securities and Futures Commission's ("SFC") ongoing investigations against the Applicants, the detailed background facts of which are immaterial for the purposes of these proceedings.

2. Between 3 and 5 July 2018, the SFC applied to different Magistrates for the issuance of search warrants ("Search Warrants") pursuant to s.191(1) of the Securities and Futures Ordinance (Cap. 571) ("SFO") authorising the SFC to search for, seize and remove records and documents at certain premises. In the course of execution of the Search Warrants, digital devices (including mobile phones, tablets and/or computers) belonging to the Applicants were found. Due to (a) the difficulties in conducting a detailed examination of those digital devices which were not password protected or voluntarily unlocked following a preliminary examination, (b) certain Applicants' refusal to unlock or provide the passwords allowing access to those password protected digital devices or email accounts, and (c) certain Applicants' claim for legal professional privilege, the relevant digital devices were seized; notices under s.183(1) of the SFO requiring the provision of login names and/or passwords to various digital devices or email accounts were also issued to the respective Applicants.

3. The Applicants then applied for JR to challenge the SFC's decisions to seize and retain the Applicants' digital devices, to issue the s.183(1) notices, and the legality and validity of the Search Warrants on the basis of their lack of specificity. It was directed that a rolled-up hearing be conducted.

Issues in dispute

4. At the Court of First Instance ("CFI"), the main issues in dispute were:

   (1) As regards the SFC's decisions to seize various digital devices belonging to the

Applicants in the course of execution of the Search Warrants and retain them afterwards, whether such decisions (a) were *ultra vires* (i.e. beyond the scope of) the SFO or the Search Warrants, unlawful and/or or unconstitutional;

(2) As regards the SFC's decisions to issue the s.183(1) notices, whether such decisions were *ultra vires* the SFO or the Search Warrants, unlawful and/or unconstitutional; and

(3) Whether the Search Warrants were unlawful and invalid for want of specificity.

Department of Justice's Summary of the CFI's rulings

(Full text of the judgment at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=126907&QS=%28SFC%29%7C%28search%2Bwarrants%29&TP=JU)

5. The question of whether the decisions to seize the digital devices were *ultra vires* turned on the statutory construction of the empowering provision and, in particular, the term "any record and document" under ss.179(1), 183(1) and 191(1) of the SFO. It was held that the words "record" and "document" are, upon their true construction in the context of the above-said SFO provisions, sufficiently wide to cover the digital devices seized by the SFC. The words "record" and "document" are given very wide meanings in the SFO, and are not confined to record or document in paper or traditional forms. It would be wholly out of touch with reality to read the relevant provisions of the SFO, which are plainly designed to assist the SFC in the discharge of its investigative functions and which authorise or require the production, search, seizure and removal of records and documents relevant to the investigation, as excluding such digital devices from their scope. In order that the SFC can effectively discharge its investigative functions, it is obviously essential that the SFC has the power to seize and retain digital devices containing the relevant evidence. The words "record" and "document" should not be so narrowly construed so as to cripple the SFC's investigative powers. Therefore the decisions to seize various digital devices were not *ultra vires* the SFO or the Search Warrants. (paragraphs 38, 41, 42 & 50)

6. In holding that the seizure of the digital devices was not a disproportionate interference with the right to privacy under Article 30 of the Basic Law ("BL") having conducted the 4-step *Hysan* proportionality analysis, the CFI stated the following:

(a) The legitimate aim of the seizure would be the pursuit of the relevant

investigations. Such seizure, being steps taken in the course of the investigations, were rationally connected to the advancement of that aim. (paragraph 54)

(b) The seizure of the digital devices was no more than reasonably necessary as the SFC officers had no reasonable or practicable alternative but to seize them considering the circumstances as set out in paragraph 2 above (i.e. the difficulties in conducting a detailed examination at the scene and certain Applicants' refusal to unlock or provide the password allowing access to those password protected digital devices or email accounts, etc.) The interference with the Applicants' privacy occasioned by the seizure of the digital devices was also no more than reasonably necessary. (paragraph 55)

(c) On the "fair balance" limb, the CFI noted the SFC had proposed measures to minimise the chance of the Applicants' personal or other information which is irrelevant to the investigations being viewed by the SFC officers; the pursuit of societal interests, namely, the proper investigation of possible breaches or contraventions of the SFO and maintenance of market integrity, did not result in an unacceptably harsh burden on the Applicants on the facts of these proceedings. The CFI also took into account the fact that the seizure was sanctioned by search warrants issued by judicial officers, who could be expected to carefully scrutinise the sufficiency of the bases of the applications for them as well as their scope or width prior to their issuance with an independent mind balancing all relevant conflicting interests. (paragraphs 56 & 57)

7. In rejecting that the s.183(1) notices were *ultra vires* the provisions of the SFO or the Search Warrants, unlawful and/or unconstitutional because they required the respective Applicants to produce vast amounts of materials which were irrelevant to the SFC's investigation, the CFI held the following:

(a) As a matter of principle, where a warrant authorises the seizure of a particular document, the empowered officer is lawfully entitled to seize the whole file containing the document, without having to separate the individual sheet authorised to be seized, for the purpose of examination, provided what he does is reasonable in the circumstances. This principle has been extended to authorise the seizure of a computer hard disk, or the taking of an image of the hard disk, containing relevant documents even though it would almost inevitably contain vast amounts of personal or private materials which are not relevant to the investigation. (paragraphs 65 & 67)

(b) The reasoning behind such extension is driven by the practical reality that information, documents and records are nowadays mostly kept in digital or electronic forms and stored in (*inter alia*) email accounts and digital devices which (i) would almost inevitably contain large amounts of personal or private, but irrelevant, materials, and (ii) are often also protected by specific login names/IDs and passwords. For this reason the s.183(1) notices were not *ultra vires* the SFO or the Search Warrants. The same 4-step proportionality analysis also applies to this ground. (paragraphs 68 & 69)

8. Lastly, in rejecting the contention that the Search Warrants were unlawful or invalid for want of specificity, the CFI held the following:

(a) As a matter of principle, what is required to be set out in a search warrant is to be determined by reference to the terms of the empowering statute; there is no overriding or overarching requirement for specificity outside what is mandated by the relevant statute authorising the issue of the search warrant. (paragraph 78)

(b) The power to issue a search warrant is trigged when the magistrate is satisfied that there are reasonable grounds to suspect that there is, or is likely to be, on specific premises "any record or document which may be required to be produced under [Part VIII of the SFO]". There is nothing to require a search warrant issued thereunder to state the relevant offence or misconduct, and there are good reasons for this, because (i) at the investigative stage precise information may not be known, and it may be impracticable to be specific about the offences or misconduct, and (ii) secrecy considerations may come into play. (paragraphs 90 & 91)

(c) There is no requirement under s.191(1) to limit the scope of the records or documents authorized to be searched for, seized and removed. The practice of seeking authorisation to search for, seize and remove documents by reference to broadly defined classes or categories is not unlawful or unconstitutional. (paragraph 93)

9. In light of the above, the CFI granted leave to the Applicants to apply for these JR applications, but dismissed the substantive applications upon full consideration of the merits.

Civil Division
Department of Justice
February 2020