

## Court confirmed SFC's investigative powers extend to digital devices



### *Cheung Ka Ho Cyril v SFC [2020] HKCFI 270*

#### Introduction

In its recent decision in *Cheung Ka Ho Cyril v SFC [2020] HKCFI 270*, the Court confirmed that the SFC has power under s. 179 and s. 183(1) of the Securities and Futures Ordinance (Cap. 571) ("**SFO**") to seize and retain digital devices, as opposed to only records and documents in their literal meaning.

#### Background

*Cheung Ka Ho Cyril v SFC [2020] HKCFI 270* is one of a series of cases, whereby judicial review applications were made against the SFC's investigative power under s. 183(1) of the SFO.

As part of its investigations concerning Aeso Holdings Limited, Skyfame Realty (Holdings) Ltd and China Agri-Products Exchange Ltd, the SFC applied for search warrants authorizing it to search for, seize and remove records and documents at, *inter alia*, the Applicants' residence.

In the event, the SFC seized various digital devices of the Applicants, including their smart phones and notebook computers.

The SFC also issued notices under s. 183(1) of the SFO requiring the Applicants to provide login names and/or passwords to their smart phones and notebook computers ("**the s. 183(1) Notices**").

The Applicants applied for leave for judicial review of, *inter alia*, the SFC's decisions to issue the s. 183(1) Notices, and seize their digital devices.

The Applicants argue, *inter alia*, that:

1. the digital devices were not "records" or "documents" which are required to be produced under s. 179(1) or s. 183(1) of the SFO;
2. the seizure of their digital devices was unconstitutional on the ground that it disproportionately interfered with their right to privacy under Article 30 of the Basic Law.

#### SFC's Investigative Powers

Under **s. 179 of the SFO**, the SFC has powers to require production of "any record and document" concerning listed companies, if it appears to the SFC that the companies or their officers have engaged in any unlawful, fraudulent or oppressive conducts.

**S. 183(1)(a) of the SFO** provides that if the SFC has reasonable cause to believe that any person has "any record or document" relevant to its investigation, the SFC may require that person to provide the requested information by way of s. 183 notice.

**S. 1 of Part 1 of Schedule 1 of the SFO** provides for the meaning of "record" and "document".

By "record", it means:

"any record of information (however compiled or stored) and includes:

- (a) any books, deeds, contract or agreement, voucher, receipt or data material, or information which is recorded otherwise than in a legible form but is capable of being reproduced in a legible form; and
- (b) any document, disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of other equipment) of being

*reproduced, and any film (including a microfilm), tape or other device in which visual images are embodied so as to be capable (with or without the aid of other equipment) of being reproduced"*

By "document", it means "any register and books, any tape recording and any form of input or output into or from an information system, and any other document or similar material (whether produced mechanically, electronically, magnetically, optically, manually or by any other means)".

### Court's Ruling

The Court ruled that:

1. it would be out of touch with reality to construe these provisions as excluding digital devices having regard to the practical reality nowadays that information and data are being created, transmitted, kept and stored by digital devices;
2. hence, the meaning of "record or document" is not confined to record and document in paper and traditional forms, and includes digital devices;
3. for the same reason, s. 183(1) of the SFO empowers the SFC to require the Applicants to provide means of access to email accounts and digital devices;
4. the seizure of the digital devices does not disproportionately interfere with the Applicants' right to privacy, considering that:
  - a. the SFC had no reasonable or practical alternative in seizing the devices in the circumstances of this case;
  - b. the SFC had already offered to use key word searches to identify the relevant material contained in the digital devices and/or to view the contents together with the Applicants, with a view to minimize the chance of seeing the Applicants' personal materials. This provided a fair balance between the SFC's duty and the Applicants' right.

### Conclusion

This case yet again confirms the wide investigative powers of the SFC. It also shows the Court's attitude in favour of the SFC to assist it in carrying out its statutory investigative functions with a view to maintain market integrity, which is important to safeguard Hong Kong's position as a leading international financial center.

## Get in touch



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