

Applicants win right to challenge SFC's provision of documents to Japanese regulators

Court finds it "reasonably arguable" that an important section of the Securities and Futures Ordinance (SFO) is unconstitutional, that the SFC was in breach of its own secrecy obligations and that the SFC did not do enough to keep confidential material it had demanded.

Overview

In *AA & EA v Securities and Futures Commission HCAL 41/2016*, the applicants won leave from Zervos J sitting in the Court of First Instance to bring judicial review proceedings against the SFC. This was in relation to information the SFC had obtained during the course of an investigation which it went on to disclose to Japanese regulators.

In September 2013, a Japanese company announced it would become a constituent member of the Nikkei index. The 1st applicant performed an "index rebalancing" exercise by conducting a series of trades in the company's securities. The SFC carried out an investigation into the trades including interviewing the 2nd applicant, the 1st applicant's Responsible Officer and its majority shareholder. The applicants were granted anonymity pursuant to a court order in February 2016.

The applicants said that during the course of the investigation, they had provided information and materials to the SFC under compulsion purportedly pursuant to its statutory powers.

They said that the SFC had transmitted information and materials obtained from them to the Japanese Financial Services Authority and the Securities and Exchange Surveillance Commission (the Japanese regulators) contrary to its statutory powers.

They said there had been "*wanton leaking and breaches of secrecy in the course of the investigation*" and that the SFC had failed "*to ensure appropriate secrecy and due process by the Japanese regulators before making disclosure to them of confidential materials.*"

Section 181 SFO

The applicants claimed section 181 SFO is unconstitutional. The section gives the SFC the power to require and compel disclosure of information about specified transactions, including client details and the instructions provided.

The applicants claimed that the section offends both the common law privilege against self-incrimination and the statutory protections set out in the Hong Kong Bill of Rights, particularly Article 10 (which provides for equality before the courts and the right to a fair and public hearing), and Article 11(2)(g), which deals with the

Key issues

- Applicants claim the SFO's power to compel disclosure of information is unconstitutional as it erodes the privilege against self-incrimination.
- SFC has power under SFO to provide assistance to overseas regulators.
- SFC must be satisfied disclosure of material is in the public interest and interest of the investing public.
- The substantive hearing may have consequences for the way in which the SFC assists foreign regulators.

rights of persons charged with or convicted of a criminal offence.

International Cooperation

The present regime under which the SFC can assist overseas regulators is set out in section 186 SFO.

Under this section, the SFC may assist an authority, regulatory agency or company inspector from outside Hong Kong that performs a function similar to those of the SFC or Registrar of Companies or which

regulates, supervises or investigates banking, insurance or other financial services or the affairs of corporations and which is subject to adequate secrecy arrangements.

When considering a request from a foreign regulator, the SFC must be satisfied that doing so is in the public interest or the interest of the investing public and that the assistance will enable the requesting body to perform its functions.

The applicants argued that section 186 must be considered together with the SFC's statutory secrecy obligations under the SFO. Section 378 imposes a duty of confidentiality in relation to information obtained by the SFC in the course of performing its statutory functions.

Grounds for Judicial Review

The applicants advanced three grounds in making the application:

- **Ground One:** The SFC erred in law by making disclosure of the compelled materials to the Japanese regulators without proper protection to preserve confidentiality and prevent their use in any intended criminal proceedings.
- **Ground Two:** The SFC erred in law by making disclosures to the Japanese regulators without taking adequate steps to ensure confidentiality of the disclosed matters.
- **Ground Three:** Section 181 SFO compels the production of potentially self-incriminatory materials and information without supplying any protection against their use in criminal proceedings.

The Court found there was a reasonably arguable case for review on all three grounds.

The Court's Findings

The Court was satisfied it was reasonably arguable that the SFC had *"acted unlawfully in supplying the contents of the interview of the 2nd applicant to the Japanese regulators without an embargo upon its use in criminal proceedings"*.

It was also reasonably arguable that the SFC *"failed to properly ensure that secrecy would be observed by the Japanese regulators when transmitting to them confidential materials relating to the applicants and that in consequence the applicants have suffered substantial financial loss and damage."*

Finally, the Court held it was also reasonably arguable that the fact that section 181 *"compels production of potentially self-incriminatory materials and information without supplying any protection against their use in criminal proceedings"* meant that it had a disproportionate impact upon the privilege against self-incrimination.

Comment

The substantive hearing of the application may have important consequences for the way in which the SFC goes about collating information under section 181 and assisting foreign regulators in general.

The applicants submitted that section 181 is anomalous *"as other sections in the SFO with powers for the compulsion of materials are subject to a prohibition against their use by virtue of section 187 which provides direct use immunity."* A case in point is section 183 which provides the SFC with wide powers to compel information and documents and which is not being challenged in *AA & EA*.

As this is only an application for leave, it will be interesting to see if the court finds the SFC is at fault in the way it

responds to requests for assistance under the present regime and whether it needs to build in greater safeguards to maintain secrecy over material it has obtained.

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