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Court Confirms SFC's Investigative Powers to Seize and Retain Digital Devices and Require Production of Passwords

The Securities and Futures Commission ("SFC") is an independent statutory body set up to regulate Hong Kong's securities and futures markets. It is empowered by the Securities and Futures Ordinance (Cap. 571) ("SFO") to carry out its functions. The SFO sets out a number of statutory offences such as involving fraudulent or deceptive devises, etc in transactions in securities (section 300), provision of false or misleading information (section 384), and breaches of the disclosure of interests requirements (Part XV). In *Cheung Ka Ho Cyril v SFC* [2020] HKCFI 270 and a number of related cases, the Court has confirmed that the circumstances of the cases warranted the SFC to seize and retain digital devices (including mobile phones, tablets, and computers), and require the suspects (i.e., the Applicants of the case) to provide the login passwords to their email accounts and digital devices.

I. Background

1. The background facts of those investigations are of some considerable complexity. In a series of investigations, SFC suspected that a number of listed companies were involved in recurring schemes by their directors and other individuals to defraud minority shareholders for the purpose of transferring substantial financial value and/or benefits to those individuals at the expense of the listed companies.

2. The SFC had reasons to suspect that these listed companies were placing private bonds to parties at a substantial discount, which were exchanged for listed

bonds[1], and then sold at par value without any discount to applicants of the Capital Investment Entrant Scheme[2] of the Immigration Department of Hong Kong.

3. The SFC was of the view that such acts would significantly increase the debt ratio of the listed companies, might not have been carried out in good faith in the best interests of the companies, and were in contravention of, *inter alia*, sections 300, 384 and Part XV of the SFO.

4. The SFC obtained search warrants issued by magistrates authorizing the SFC to search for, seize and remove records and documents at the specific premises of the suspects. Notices requiring the Applicants to provide the login names and/or passwords to various email accounts or digital devises were also issued under section 183(1) of the SFO.

5. The Applicants applied for judicial review of the search warrants and related decisions made by the SFC arising out of the execution of the search warrants, on the basis that they were unlawful and/or invalid for want of specificity.

II. Key Points

1. The words "records" and "documents" under the SFO are given very wide meanings, and they were sufficiently wide to cover the digital devices seized by the SFC in this case.

2. The right to privacy is not absolute, but may lawfully be restricted provided that the restriction can satisfy the 4-step proportionality test, namely (i) "legitimate aim", (ii) "rational connection", (iii) "no more than reasonably necessary", and (iv) "fair balance".

3. As a matter of principle, what is required to be set out in a search warrant is to be determined by reference the terms of the empowering statute. A warrant issued under the section will be invalid if the provisions of the section are not complied with or if there is some rule of law independent of the section that requires the particular offence or offences to be stated.

[1] Bonds offered for subscription and listed under Chapter 37 of the Main Board Listing Rules.
[2] The Scheme was suspended from 15 January 2015 until further notice.

4. A distinction should be drawn between (i) "general" warrants, for which there is a requirement that the relevant offence or offences should be stated, and (ii) other warrants which authorize named persons to enter and search named premises and where the power of seizure and removal is limited and controlled by the enabling statute. For such warrants, there is no requirement to state the relevant offence or offences, unless it is required by the enabling statute.

III. Findings

In relation to the Applicants' arguments that the search warrants were *ultra vires* the SFO, as a matter of the statutory construction of the SFO, the judge found that the search warrants authorized digital devices to be seized by the SFC. The words "records" or "documents" in the SFO should not be narrowly construed, having regard to the manner in which information and data are nowadays being created, transmitted and stored in digital devices. In *obiter*, the judge did not consider that the warrants was defective in failing to set out a "protocol" in the warrants on how examination of the contents of the digital devices should be carried out by the SFC in order to protect the privacy of the suspects. He did not find anything in section 191(1) of the SFO to support the contention that such "protocol" must be set out.

In relation to the Applications' arguments that the seizure was unlawful or unconstitutional as it disproportionately interfered with his right to privacy under Article 30 of the Basic Law, and/or Article 14 of the Hong Kong Bill of Rights, the judge found that the SFC's officers had no reasonable or practicable alternative but to seize the digital devices in the circumstances of the case. Also, the interference with the Applicants' privacy occasioned by the seizures of the digital devices was no more than reasonably necessary in the circumstances. He found the fact that the SFC was amenable to using keyword searches and/or viewing the contents together with the Applicants, which amounted to safeguards in protecting the privacy of the Applicants, and in the circumstances represented a practical and reasonable compromise of the conflicting interests of the SFC and the Applicants. In the circumstances, the judge found that the 4-step proportionality test was satisfied.

Driven by the practical reality that information, documents and records are

nowadays mostly kept in digital or electronic forms and stored in email accounts and digital devices, which (i) would almost inevitably contain large amounts of personal or private, but irrelevant, materials, and (ii) are often protected by specific login names/IDs and passwords. The judge considered that the SFC is empowered, under section 183(1) of the SFO to require the Applicants to provide means of access to email accounts and digital devices.

In respect of the want for specificity argument, the judge found nothing in section 191(1) of the SFO to require the warrants to (i) particularize the relevant offence or misconduct, or (ii) limit the scope of the records or documents authorized to be searched for, seized and removed. Even if there are such requirements, the judge considered that they were sufficiently provided for in this case.

IV. Considerations

Search warrant – before cooperating with any authorities or enforcement agencies to carry out investigations, the sources and scopes of their powers should be carefully examined. It is a matter of construction of the empowering statute to decide (a) the scope of the powers of the issuing authority, (b) the conditions which have to be satisfied for the issue of the warrant, and (c) what is to be stated in a warrant.

Relevance and privilege – any dispute on relevance and privilege can be brought to the Court for determination, with the disputed materials being sealed pending the Court's decision.

Safeguards – appropriate measures could be set to limit the search terms and results, and in environment which the contents are viewed could be required to safeguard the right to privacy.

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