Court dismisses challenge to SFC's investigative powers

18 Feb 2020

The Court of First Instance has dismissed judicial review applications against the Securities and Futures Commission (SFC) in connection with a search operation it conducted for ongoing investigations into suspected breaches of the Securities and Futures Ordinance (SFO) (Note 1).

The judicial review applications were brought separately and concurrently by Mr Cyril Cheung Ka Ho, Mr To Hang Ming, Mr To Lung Sang, Mr Jacky To Man Choy and Mr Wan Wai Lun. They sought to challenge search warrants issued by two Magistrates in July 2018 on the basis that they were unlawful or invalid for want of specificity.

They also alleged that seizures of the digital devices pursuant to the search warrants, the SFC's continued retention of the devices and notices issued by the SFC under the SFO for the production of emails or passwords for the devices or email accounts were unlawful, and interfered with their right to privacy under the Basic Law and the Hong Kong Bill of Rights.

The Hon Mr Justice Anderson Chow rejected their applications and held in his judgment that:

- the search warrants plainly authorised digital devices to be seized by the SFC. The words "document" or "record" 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;
- the right to privacy is not absolute. The seizures and retention of the digital devices were rationally connected to a legitimate aim. They were no more than reasonably necessary in the circumstances of the cases and they did not result in an unacceptably harsh burden on the five applicants on the facts of the present cases; and
- the SFC is empowered, under the SFO, to require the applicants to provide means of access to email accounts and digital devices which contain, or are likely to contain, information relevant to its investigations even though the email accounts and digital devices would likely also contain other personal or private materials which are not relevant to the SFC's investigations.

The applicants were ordered to pay the SFC's legal costs.

The SFC's investigations are ongoing.

End

Notes:

1. The judgment is available on the Judiciary's website (Court Reference: HCAL 2132, 2133, 2134, 2136 & 2137/2018).

Page last updated : 18 Feb 2020

HCAL 2132, 2133, 2134,

2136 & 2137/2018

[2020] HKCFI 270

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO 2132 OF 2018

BETWEEN

CHEUNG KA HO CYRIL	Applicant
and	
SECURITIES AND FUTURES COMMISSION	1st Putative Respondent
VERONICA HEUNG SHUK-HAN A MAGISTRATE SITTING AT THE EASTERN MAGISTRACY	2nd Putative Respondent

AND

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO 2133 OF 2018

BETWEEN

TO HANG MING	Applicant
and	
SECURITIES AND FUTURES COMMISSION	1st Putative Respondent

VERONICA HEUNG SHUK-HAN A MAGISTRATE SITTING AT THE EASTERN MAGISTRACY	2nd Putative Respondent

AND

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO 2134 OF 2018

BETWEEN

TO LUNG SANG	Applicant
and	
SECURITIES AND FUTURES COMMISSION	1st Putative Respondent
VERONICA HEUNG SHUK-HAN A MAGISTRATE SITTING AT THE EASTERN MAGISTRACY	2nd Putative Respondent

AND

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO 2136 OF 2018

BETWEEN

TO MAN CHOY JACKY	Applicant
and	
SECURITIES AND FUTURES COMMISSION	1st Putative Respondent

VERONICA HEUNG SHUK-HAN A MAGISTRATE SITTING AT THE EASTERN MAGISTRACY	2nd Putative Respondent

AND

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO 2137 OF 2018

BETWEEN

WAN WAI LUN	Applicant
and	
SECURITIES AND FUTURES COMMISSION	1st Putative Respondent
VERONICA HEUNG SHUK-HAN A MAGISTRATE SITTING AT THE EASTERN MAGISTRACY	2nd Putative Respondent
LI CHI-HO A MAGISTRATE SITTING AT THE EASTERN MAGISTRACY	3rd Putative Respondent

(Heard together)

Before: Hon Chow J in Court

Dates of Hearing: 30 & 31 July 2019

Date of Judgment: 14 February 2020

J U D G M E N T

INTRODUCTION

1. This is the rolled-up hearing of five applications by:

(1) Cheung Ka Ho Cyril ("**Cyril Cheung**") – the Applicant in HCAL 2132/2018;

(2) To Hang Ming ("**Spencer To**") – the Applicant in HCAL 2133/2018;

(3) To Lung Sang ("**L S To**") – the Applicant in HCAL 2134/2018;

(4) To Man Choy Jacky ("**Jacky To**") – the Applicant in HCAL 2136/2018; and

(5) Wan Wai Lun ("**Wan**") – the Applicant in HCAL 2137/2018,

for judicial review of a number of search warrants issued by magistrates authorizing the Securities and Futures Commission ("**SFC**") to search their premises and related decisions made by the SFC arising out of the execution of the search warrants.

2. The following issues arise for determination in these applications:

(1) whether the decisions of the SFC to seize various digital devices belonging to the Applicants in the course of execution of the search warrants and thereafter to retain them were *ultra vires* the Securities and Futures Ordinance, Cap 571 ("**SFO**") or the search warrants, unlawful and/or unconstitutional;

(2) whether the decisions of the SFC to issues notices pursuant to s 183(1) to the Applicants requiring them to provide to the SFC the passwords to their email accounts or digital devices 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.

3. For reasons which I shall explain in this judgment, my answers to these questions are "no".

4. In what follows, unless otherwise expressly indicated, references to sections shall be to the SFO.

BASIC FACTS

5. The present applications arose out of the SFC's ongoing investigations concerning (i) Aeso Holdings Ltd ("**Aeso**") and its listing in 2017 ("**the Listing**") ("**the Aeso Investigation**"), and (ii) bond placements by Skyfame Realty (Holdings) Ltd ("**Skyfame**") and China Agri-Products Exchange Ltd ("**China Agri**") ("**the Skyfame/China Agri Investigation**"). The background facts of those investigations are of some considerable complexity. For the present purposes, the following brief summary should suffice.

(i) The Aeso investigation

6. Aeso was listed on the Growth Enterprise Market Board of the Stock Exchange of Hong Kong ("**SEHK**"), with stock code 8341, on 13 January 2017 by way of a private placing of a total of 50 million shares. Of those 50 million shares, 49 million shares were allotted to 22 placees ("**the 22 Placees**") through Cinda International Securities Co Ltd ("**Cinda**"), one of the sub-placing agents. On 13 April 2017, 5 of the 22 Placees ("**the Requisitionists**"), including L S To, who together held more than 10% of Aeso's issued share capital, made a written requisition ("**the Requisition**") to Aeso to convene an extraordinary general meeting ("**the EGM**") on 12 June 2017 to remove all the existing directors of Aeso, and appoint five individuals as new directors thereof.

7. Thereafter, disputes publicly broke out between two camps of shareholders of Aeso, one headed by Jones Chan (the controlling shareholder of Aeso), and the other headed by Wilson Liu (a pre-listing investor of Aeso owning 49% of the company[1] prior to its listing).

8. On 18 May 2017, Wilson Liu wrote to the SFC complaining about serious misconduct allegedly committed by Jones Chan, including an allegation that Jones Chan had used various unlawful means to coerce him to sign a letter of undertaking to vote against all proposed resolutions at the EGM.

9. On the other hand, Jones Chan complained that "*the transfer and/or placement of shares to W&Q/Wilson Liu and the Requisitionists, and the Requisition itself, are simply instruments of fraud*", and "*the Requisition was really a device in a larger fraudulent scheme and the shares placed to the Placees were sham transactions*"[2].

10. The disputes between the two camps of shareholders gave rise to no less than 8 sets of civil proceedings in Hong Kong, including a winding up petition against Aeso presented on 10 July 2017 (HCCW 218/2017). Joint and Several Provisional Liquidators of Aeso were also appointed[3].

11. At the direction of the SEHK, trading in the shares of Aeso was suspended on 12 June 2017[4] pending clarification of conflicting announcements published by Aeso on 11 and 12 June 2017, in particular an announcement alleging market manipulation by placee(s) of shares in Aeso in connection with the Listing and misconduct of certain professional parties.

12. The EGM was held, or purportedly held, on 12 June 2017. One of the resolutions passed at the EGM concerned the appointment of 3 individuals as independent non-executive directors of Aeso ("**the Disputed INEDs**"). One of the Disputed INEDs was Jacky To (who was also one of the 22 Placees). The validity of the EGM, and of the

resolutions passed thereat, was challenged by Jones Chan in HCA 1496/2017.

13. Following a referral from the SEHK, the SFC started an investigation into possible breaches or contraventions of the SFO in relation to Aeso and the Listing.

14. On 27 October 2017, and 6 February, 8 March, 12 June, 28 June and 4 July 2018, the SFC issued directions under s 182(1) to investigate whether:

(1) during or around the period from 12 January 2017 to 12 June 2017 –

(a) Aeso and/or persons connected with it might have committed offences contrary to s 300;

(b) Aeso and/or persons connected with it might have committed offences contrary to s 384; and

(2) during or around the period from 13 January 2017 to 26 October 2017, persons having an interest in the shares of Aeso might have committed offences contrary to Part XV (Disclosure of Interests) of the SFO.

15. In addition, on 27 October 2017, and 12 June, 28 June and 4 July 2018, the SFC authorized, under s 179, its officers to require various parties to produce records and documents as specified by the authorized persons on the ground that it appeared to the SFC that there were circumstances suggesting that at any relevant time:

(1) persons involved in the management of the affairs of Aeso had engaged, in relation to such management, in defalcation, fraud, misfeasance or other misconduct towards it or its members or any part of its members; and/or

(2) members of Aeso or any part of its members had not been given all the information with respect to its affairs that they might reasonably expect.

16. The results of the SFC's investigation up to 3 July 2017 are summarized in §§28 to 42 of the Affirmation of Ng Chi Chun, Senior Manager of the Enforcement Division of the SFC, filed on 14 January 2019, and will not be repeated here. In short, the SFC was of the view that there were reasonable grounds to believe that there might have been undisclosed agreements under s 317, and the Requisition might have been a fraudulent device in that it failed to disclose connections between the parties, their earlier dealings and true common objectives. The SFC believed or suspected, or had reasonable grounds to believe or suspect, that:

(1) Wilson Liu, the 22 Placees, the Requisitionists (including L S To) and the

Disputed INEDs (including Jacky To) were parties acting in concert and might have breached the Takeovers Code.

(2) There might have been a fraudulent scheme or device (involving the placing of shares in the Listing to non-independent parties and the Requisition) to deceive shareholders of Aeso which might amount to a breach of s 300.

(3) Aeso's placing result announcement dated 12 January 2017, which confirmed that all the placees under the placing were independent, might have been false or misleading, contrary to s 384.

(4) If the 22 Placees were nominees of Wilson Liu or were under a common control, there might have been breaches of the disclosure of interest requirements under Part XV (Disclosure of Interests) of the SFO.

(5) PINS Capital, owned by Wan, was closely associated with Wilson Liu, his associates and some of the Applicants in these applications. In particular, (i) Wilson Liu was the CEO, (ii) Spencer To and Wan were the managing directors, and (iii) Cyril Cheung was believed by the SFC to be a director, of PINS Capital. PINS Capital was suspected to have been involved in the private placing of shares of Aeso in connection with the Listing.

(6) Wilson Liu and Spencer To were acting together in the listing exercise of Aeso. In particular, the SFC's fund tracing exercise revealed that Spencer To and a company owned by him transferred HK$20 million to Wilson Liu's personal bank account at HSBC between March and April 2016, part of which was used as payment for the transfer of the pre-listing shares of Aeso (amounting to 49% of the equity interest in the company) to W&Q Investment Limited (the company used by Wilson Liu to hold his interest in Aeso).

(7) Given that Cyril Cheung was closely connected with both Wilson Liu and at least one of the 22 Placees, namely, Denise Cheung, and he withdrew shares of Aeso from Cinda on behalf of Denise Cheung on 17 March 2017 shortly after the listing of Aeso, he might have aided or abetted the commission of offences contrary to s 300 and Part XV of the SFO. Denise Cheung was believed by the SFC to be Cyril Cheung's daughter with the same reported address as that of Cyril Cheung. She was also one of the Requisitionists.

17. On 3 July 2018, upon the SFC's applications, Magistrate Veronica Heung Shuk-man issued 5 search warrants authorizing the SFC to search for, seize and remove records and documents at:

(1) the residence of Cyril Cheung[5] (Writ No 6924/2018);

(2) the residence of Spencer To (Writ No 6896/2018);

(3) the residence of L S To (Writ No 6905/2018);

(4) the residence of Jacky To (Writ No 6909/2018); and

(5) the office of PINS Capital at Room 4602, 46/F, Convention Plaza Office Tower, 1 Harbour Road, Hong Kong ("**Room 4602, Convention Plaza**") (Writ No 6890/2018).

18. On 4 and 5 July 2018, the SFC obtained further search warrants from Magistrate Veronica Heung Shuk-man and Magistrate Li Chi-ho respectively authorizing the SFC to search for, seize and remove records and documents at:

(1) PINS Capital's office at Room 4601, 46/F, Convention Plaza Office Tower, 1 Harbour Road, Hong Kong ("**Room 4601, Convention Plaza**") (Writ No 6960/2018); and

(2) Rooms 4603-4605, 46/F, Convention Plaza Office Tower, 1 Harbour Road, Wanchai, Hong Kong ("**Rooms 4603-4605, Convention Plaza**") (Writ No 7022/2018).

The search warrants referred to in paragraphs 17 and 18 shall hereinafter collectively be referred to as "**the Aeso Warrants**".

(b) The Skyfame/China Agri investigation

19. This investigation stemmed from the SFC's inspection of Anglo Chinese Securities Limited ("**ACSL**") conducted under s 180. The SFC's inspection revealed, *inter alia*, the following:

(1) ASCL had placed private bonds issued by Skyfame, a company listed on the Main Board of the SEHK, with the principal value of HK$830 million to two overseas companies, namely, Sunbeam Universal Inc ("**Sunbeam**") and Prime Sonic Limited ("**Prime Sonic**"), which were wholly owned by Spencer To, at a substantial discount (for HK$210 million only).

(2) The private bonds were then exchanged for listed bonds issued by Skyfame pursuant to a medium-bond programme listed in accordance with Chapter 37 of the SEHK's Listing Rules ("**Chapter 37 Listed Bonds**"), with a coupon rate of

0.1% pa payable in arrears.

(3) The Chapter 37 Listed Bonds were then sold at par value without any discount to applicants of the Capital Investment Entrant Scheme ("**CIES**") of the Immigration Department of Hong Kong.

(4) Under the rules for the CIES, an applicant is required to prove that he/she has invested not less than a net amount of HK$10 million in permissible investment assets, and that the investments have been made through a designated account operated by a financial intermediary. The applicant is also required to declare in writing that he/she is beneficially and absolutely entitled to the relevant permissible investment assets. Chapter 37 Listed Bonds qualify as permissible investment assets for the purpose of the CIES.

(5) On 25 September 2017, the Immigration Department referred to the SFC a complaint received from an immigration agent alleging that some of the CIES applicants who had purchased the Chapter 37 Listed Bonds issued by Skyfame/China Agri had only paid part of the consideration and therefore did not fulfil the investment requirements under that scheme.

20. The SFC suspected that Spencer To saw a market for CIES compliant investments by potential CIES applicants and was the mastermind who operated the bond programme and the placing scheme, and that the same might constitute a fraudulent or deceptive scheme in contravention of s 300. The SFC also suspected that there might have been misconduct by Skyfame's directors or senior management in relation to the sale of the private bonds and Chapter 37 Listed Bonds.

21. On 27 October 2017, and 22 June, 28 June and 4 July 2018, the SFC issued directions under s 182(1) to investigate whether during or around the period from 4 July 2014 to 7 June 2017, Skyfame and/or persons connected with it might have committed offences contrary to s 300.

22. In addition, on 27 October 2017, and 22 June and 4 July 2018, the SFC authorized, under s 179, its officers to require various parties to produce records and documents as specified by the authorized persons on the ground that it appeared to the SFC that there were circumstances suggesting that at any relevant time:

(1) persons involved in the management of the affairs of Skyfame had engaged, in relation to such management, in defalcation, fraud, misfeasance or other misconduct towards it or its members or any part of its members; and/or

(2) members of Skyfame or any part of its members had not been given all the information with respect to its affairs that they might reasonably expect.

23. The results of the SFC's investigation up to 3 July 2017 are summarized in §§17 to 26 of the Affirmation of Chiu Yu Kei, Senior Manager of the Enforcement Division of the SFC, filed on 14 January 2019. In summary:

(1) From 22 October 2014 to 2 June 2017, Skyfame issued a series of private bonds with an aggregate principal value of HK$3.3 billion to Sunbeam and Prime Sonic via ACSL as placing agent and Angle Chinese Corporate Finance Limited as arranger.

(2) The private bonds were issued by Skyfame to Sunbeam and Prime Sonic at a deep discount. Upon the issuance of the private bonds, Sunbeam and Prime Sonic received from Skyfame pre-payment of interest on the bonds. After deducting the upfront interest payments, Sunbeam and Prime Sonic in effect only paid approximately HK$701 million to purchase the private bonds with an aggregate principal value of HK$3.3 billion.

(3) A few days after their issuance, the private bonds were exchanged for Chapter 37 Listed Bonds with a coupon rate of 0.1% pa payable in arrears. All the HK$3.3 billion worth of Chapter 37 Listed Bonds were subsequently sold to CIES applicants through Sunbeam, Prime Sonic and/or PINS Capital.

(4) As earlier mentioned, PINS Capital was wholly owned by Wan, and its managing directors were Spencer To and Wan.

(5) Spencer To financed the purchase of the private bonds (through Sunbeam and Prime Sonic) mainly from proceeds derived from his disposal of some other Chapter 37 Listed Bonds issued by China Agri, a company listed on the Main Board of the SEHK.

(6) During the period from 22 May 2014 to 24 July 2014, China Agri similarly placed private bonds with an aggregate principal value of HK$400 million at a deep discount to a company wholly owned by Spencer To called Glory Ray Inc via ACSL. The private bonds were then exchanged for Chapter 37 Listed Bonds issued by China Agri and sold to individuals who appeared to be CIES applicants. The actual amount paid by Glory Ray Inc to China Agri for the private bonds was approximately HK$147 million, after deducting the interest pre-paid in advance.

(7) On 3 April and 22 June 2018, the SFC further authorized, under s 179, officers of the SFC to require various parties to produce records and documents as specified by the authorized persons on the ground that it appeared to the SFC that there were circumstances suggesting that at any relevant time members of China Agri or any part of its members had not been given all the information with respect to its affairs that they might reasonably expect.

(8) The CIES applicants who had purchased the Chapter 37 Listed Bonds had, on the face of the matter, all paid par value for the bonds.

(9) However, fund tracing exercises revealed that substantial upfront interest which Sunbeam and/or Prima Sonic had received from Skyfame for the private bonds were transferred to some of the CIES applicants through two overseas private companies associated with Spencer To, namely, Smarte Investment Inc and Metro Expand Limited. Also, part of the sale proceeds of the Chapter 37 Listed Bonds issued by Skyfame were transferred back to various CIES applicants.

24. The SFC was of the view that:

(1) The decision of the board of directors of Skyfame to issue private bonds at a discount of up to 80% lacked commercial sense, as Skyfame had incurred a massive debt of HK$3.3 billion in its financial results, while the cash received by it was only a small fraction of the principal. The structure of the private bonds had significantly increased the debt ratio of Skyfame. The decision of the board did not appear to be in the best interests of the company.

(2) The same comment applied to the bonds issued by China Agri.

(3) The issuance of private bonds at deep discounts by Skyfame and China Agri appeared to be recurring schemes devised by their directors, Spencer To and his associates to defraud Skyfame and China Agri's minority shareholders for the purpose of transferring substantial financial value and/or benefits to Spencer To and his associates at the expense of Skyfame and China Agri.

25. Based on the aforesaid matters, the SFC believed or suspected, or had reasonable grounds to believe or suspect, that:

(1) Skyfame, China Agri, Spencer To and his associates might have engaged in fraudulent or deceptive devices in transactions in securities contrary to s 300; and

(2) the directors of Skyfame and/or China Agri might not have acted in good faith in the best interests of the companies in view of the unusual structure of the private bonds.

26. On 3 July 2018, upon the SFC's applications, Magistrate Veronica Heung Shuk-man issued 2 search warrants authorizing the SFC to search for, seize and remove records and documents at:

(1) the residence of Spencer To (Writ No 6882/2018);

(2) the office of PINS Capital at Rooms 4601-4602, Convention Plaza (Writ No 6869/2018).

27. On 5 July 2018, the SFC obtained a further search warrant from Magistrate Li Chi-ho authorizing the SFC to search for, seize and remove records and documents at PINS Capital's office at Rooms 4603-4605, Convention Plaza (Writ No 7023/2018). The search warrants referred to in paragraphs 26 and 27 shall hereinafter collectively be referred to as "**the Skyfame/China Agri Warrants**".

(c) Execution of the search warrants

28. Since the Aeso Investigation and the Skyfame/China Agri Investigation involved common parties including, but not limited to Spencer To and PINS Capital, the SFC conducted a joint operation on 5 July 2018 based on the Aeso and Skyfame/China Agri Warrants.

29. In the course of the joint operation on 5 July 2018:

(1) Digital devices (including mobile phones, tablets and/or computers) belonging to the Applicants were found.

(2) Where no password was required to access such devices, the SFC conducted keyword searches to check for relevant materials. Alternatively, where the Applicants unlocked the digital devices voluntarily, the SFC looked for relevant materials by using keyword searches or by scrolling through the contents to look for relevant materials.

(3) Based on the searches mentioned above, the SFC was able to identify materials contained in emails, contact lists and messaging applications that were relevant, or believed to be relevant, to the SFC's investigations.

(4) The SFC requested the Applicants to provide print-outs of the relevant

materials or login names/passwords to the email accounts or digital devices to enable the SFC to access the same, to which they either declined outright (in some instances by asserting legal professional privilege), or used various excuses not to provide the same.

(5) In the case of Cyril Cheung who asserted legal professional privilege, the SFC suggested that the relevant emails and attachments thereto could be printed out and kept under seal for the time being pending the resolution of the legal professional privilege claim. This suggestion was rejected by Cyril Cheung.

(6) In the circumstances, the SFC decided to seize various digital devices belonging to the Applicants:

(a) in the case of Cyril Cheung, the SFC seized an iPhone X (with a SIM Card);

(b) in the case of Spencer To, the SFC seized an iPhone X and a custom-built computer;

(c) in the case of L S To, the SFC seized a Samsung mobile phone (with a SanDisk Ultra card and a white card) and a Samsung tablet (with a SanDisk card);

(d) in the case of Jacky To, the SFC seized an iPhone 6s and a Sony VAIO notebook computer; and

(e) in the case of Wan, the SFC seized a total of 8 mobile phones.

(7) The SFC also issued notices under s 183(1) requiring the Applicants to provide the login names and/or passwords to various email accounts or digital devices.

(a) in the case of Cyril Cheung, the s 183(1) notice required him to produce all the emails in a specified email account during the period from June to July 2017, including 2 emails dated 7 July 2017 and 20 July 2017 respectively[6];

(b) in the case of Spencer To, the s 183(1) notice required him to produce the login names/IDs and passwords to 3 specified email accounts[7];

(c) in the case of L S To, the s 183(1) notice required him to produce the passwords to the mobile phone and tablet seized by the SFC[8]; and

(d) in the case of Jacky To, the s 183(1) notice required him to produce the login passwords to the mobile phone and computer seized by the SFC.

APPLICATIONS FOR JUDICIAL REVIEW

30. By his Amended Form 86 dated 9 October 2018 in HCAL 2132/2018, Cyril Cheung applies for leave to apply for judicial review of:

(1) the decision of the SFC to issue the s 183(1) notice on 5 July 2018;

(2) the decision of the SFC to seize his mobile phone on 5 July 2018;

(3) the decision of the SFC to continue to retain the digital device mentioned in (2) above from 5 July 2018 onwards; and

(4) the search warrant issued by Magistrate Veronica Heung on 3 July 2018 (Writ No 6924/2018) ("**the Cyril Cheung Warrant**").

31. By his Amended Form 86 dated 9 October 2018 in HCAL 2133/2018, Spencer To applies for leave to apply for judicial review of:

(1) the decision of the SFC to issue the s 183(1) notice on 5 July 2018;

(2) the decision of the SFC to seize his mobile phone and computer on 5 July 2018;

(3) the decision of the SFC to continue to retain the digital devices mentioned in (2) above from 5 July 2018 onwards;

(4) the search warrant issued by Magistrate Veronica Heung on 3 July 2018 (Writ No 6882/2018); and

(5) the search warrant issued by Magistrate Veronica Heung on 3 July 2018 (Writ No 6896/2018) (collectively referred to as "**the Spencer To Warrants**").

32. By his Amended Form 86 dated 9 October 2018 in HCAL 2134/2018, L S To applies for leave to apply for judicial review of:

(1) the decision of the SFC to seize his mobile phone and tablet on 5 July 2018;

(2) the decision of the SFC to issue the s 183(1) notice on 5 July 2018;

(3) the decision of the SFC to continue to retain the digital devices mentioned in

(1) above from 5 July 2018 onwards; and

(4) the search warrant issued by Magistrate Veronica Heung on 3 July 2018 (Writ No 6905/2018) ("**the L S To Warrant**").

33. By his Amended Form 86 dated 9 October 2018 in HCAL 2136/2018, Jacky To applies for leave to apply for judicial review of:

(1) the decision of the SFC to seize his mobile phone and notebook computer on 5 July 2018;

(2) the decision of the SFC to issue the s 183(1) notice on 5 July 2018;

(3) the decision of the SFC to retain the digital devices mentioned in (1) above from 5 July 2018 onwards; and

(4) the search warrant issued by Magistrate Veronica Heung on 3 July 2018 (Writ No 6909/2018) ("**the Jacky To Warrant**").

34. By his Amended Form 86 dated 9 October 2018 in HCAL 2137/2018, Wan applies for leave to apply for judicial review of:

(1) the decision of the SFC to seize 8 mobile phones on 5 July 2018;

(2) the decision of the SFC to continue to retain the digital devices mentioned in (1) above from 5 July 2018 onwards;

(3) the search warrant issued by Magistrate Veronica Heung on 3 July 2018 (Writ No 6869/2018);

(4) the search warrant issued by Magistrate Veronica Heung on 3 July 2018 (Writ No 6890/2018);

(5) the search warrant issued by Magistrate Veronica Heung on 4 July 2018 (Writ No 6960/2018);

(6) the search warrant issued by Magistrate Li Chi-ho on 5 July 2018 (Writ No 7022/2018); and

(7) the search warrant issued by Magistrate Li Chi-ho on 5 July 2018 (Writ No 7023/2018) (collectively referred to as "**the Wan Warrants**").

35. Cyril Cheung, Spencer To, L S To and Wan (represented by Mr Philip Dykes, SC and Mr Jeffrey Tam) contend that:

(1) the decisions to seize and retain the digital devices and the s 183(1) notices were *ultra vires* the SFO and/or the search warrants; and

(2) the Cyril Cheung Warrant, Spencer To Warrants, L S To Warrant and Wan Warrants were unlawful and invalid for want of specificity[9].

36. Jacky To (represented by Ms Deanna Law) contends that:

(1) the decisions to seize and thereafter to retain his mobile phone and computer were unlawful or unconstitutional on the ground that they disproportionately interfered with his right to privacy under Article 30 of the Basic Law ("**BL 30**") and/or Article 14 of the Hong Kong Bill of Rights ("**BOR 14**");

(2) for the same reasons, the s 183(1) notice was unlawful or unconstitutional;

(3) the Jacky To Warrant was invalid for want of specificity[10].

WHETHER THE DECISIONS TO SEIZE THE DIGITAL DEVICES WERE ULTRA VIRES, UNLAWFUL OR UNCONSTITUTIONAL

37. Mr Dykes argues that the decisions to seize the digital devices were *ultra vires* because:

(1) the digital devices were not "records" or "documents" which might be required to be produced under Part VIII of the SFO, in particular ss 179(1) or 183(1), as a matter of statutory construction[11];

(2) any provision authorizing the SFC to require production of digital devices under Part VIII of the SFO without a warrant would be unconstitutional[12]; and/or

(3) the seizures of the digital devices were not authorized by the search warrants because the SFC did not have "reasonable cause to believe" that they "may be required to be produced pursuant to Part VIII" of the SFO, as required by the terms of the search warrants[13].

38. Before I consider the substance of these arguments, I should mention that Mr Dykes accepts, for the purpose of the present applications, that the court is not concerned with the underlying facts of this case. He also concedes that there were proper grounds for the SFC's investigations and lawful bases for the SFC's exercise of powers under ss 179(1) and 182(1) to require the production of documents and records from the Applicants, as well as its applications to the magistrates for the search warrants under s 191(1).

39. The argument mentioned in paragraph 37(1) above raises an issue of statutory construction. For the purpose of the present discussion, the following provisions of Part VIII of the SFO (under the sub-heading of "Supervision and Investigations") are relevant:

(1) Section 179(1) provides that, in certain specified circumstances, a person authorized by the SFC may give a direction to any person requiring the production, within the time and at the place specified in the direction, of "any record and document" specified in the direction.

(2) Section 182(1) provides that, in circumstances specified in sub-paragraphs (a) to (g), the SFC may in writing direct one or more of its employees to investigate any of the matters referred to in those sub-paragraphs.

(3) Section 183(1)(a) goes on to provide that the person under investigation or a person whom the investigator has reasonable cause to believe has in his possession any record or document which contain, or which is likely to contain, information relevant to an investigation under s 182, or whom the investigator has reasonable cause to believe otherwise has such information in his possession, shall produce to the investigator, within the time and at the place the investigator reasonably requires in writing, "any record or document" specified by the investigator which is, or may be, relevant to the investigation and which is in his possession.

(4) Section 191(1) provides that if a magistrate is satisfied on information on oath that there are reasonable grounds to suspect that there is, or is likely to be, on premises specified in the information any record or document which may be required to be produced under Part VIII, the magistrate may issue a warrant authorizing a person specified in the warrant, a police officer, and such other persons as may be necessary to assist in the execution of the warrant to -

(i) enter the premises so specified, if necessary by force, at any time within the period of 7 days beginning on the date of the warrant; and

(ii) search for, seize and remove any "record or document" which the person specified in the warrant or police officer has reasonable cause to believe may be required to be produced under Part VIII.

40. Section 1 of Part 1 of Schedule 1 to the SFO provides that for the purpose of the Ordinance, unless otherwise defined or excluded or the context otherwise requires:

(1) the word "document" includes 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); and

(2) the word "record" 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.

41. It can be seen immediately that the words "record" and "document" are given very wide meanings, and are not confined to record or document in paper or traditional forms, but include:

(a) any record of information "however compiled or stored";

(b) information "which is recorded otherwise than in a legible form but is capable of being reproduced in a legible form";

(c) 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

(d) "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".

42. Having regard to the way or manner in which information and data are nowadays being created, transmitted, kept and stored by digital devices including mobile phones, tablets, computers and discs in almost all aspects of daily and commercial activities, it would, in my view, be wholly out of touch with reality to read the aforesaid provisions of the SFO, which are plainly designed to assist the SFC in the discharge of its investigative functions under Part VIII of the SFO and which authorize or require the production, search,

seizure and removal of records and documents relevant to the SFC's investigations, as excluding such digital devices from the scope of those provisions. In order that the SFC can effectively discharge its investigative functions in relating to dealings or transactions in the securities and futures markets, it is obviously essential that the SFC has the power to seize and retain digital devices containing evidence of, or relating to, the relevant dealings or transactions. I do not consider that the words "document" and "record" in the SFO should be so narrowly construed as to cripple the investigative powers of the SFC under Part VIII of that Ordinance. On the contrary, the wide definitions of those words seem to me to clearly and amply empower the SFC to seize the digital devices in this case.

43. Mr Dykes relies on the right to privacy under BL 30 and/or BOR 14 in support of his argument on construction. He points to the immense storage capacity of a mobile phone and the fact that a mobile phone may contain a huge amount of personal and private information[14], and argues that any statutory provision which purportedly authorizes a mobile phone to be seized would constitute a very significant intrusion on privacy and thus the provision must be construed narrowly. I shall deal with the issue privacy when I consider Ms Law's argument that the decisions to seize and thereafter to retain the digital devices disproportionately interfered with her client right to privacy. At this juncture, I would merely observe that while fundamental rights may be used as an aid to the construction of a statute which is unclear or ambiguous, they should not be used to change the plain meaning of a statute under the guise of construction of the statute. Different considerations arise where a statute is found to be unconstitutional because, upon its true construction, it is inconsistent with a fundamental right. In such a case, the court may give the statute a "remedial" construction to make it constitutionally compliant. However, even in such a case, the court has no power to substantially re-write the statute in a manner which would effectively be a fresh legislative exercise involving fundamental changes to the substance of the relevant provisions.

44. Mr Dykes also relies on the *ejusdem generis* principle, and argues that because of the reference to disc, tape, sound track and film in part (b) of the definition of the word "record", the reference to "device" in that part of the definition should refer only to those devices "which store a relatively small volume of information and which require to be placed in other computing devices in order to access the information stored in them"[15]. I am unable to accept this argument, for the following reasons:

(1) The word "record" is defined to mean generally any record of information (however compiled or stored). The specific items referred to in parts (a) and (b) of the definition are "included" within, but not "exhaustive" of, the definition.

(2) The suggestion that to qualify as a "record" for the purpose of the SFO, the relevant "device" can only "store a relatively small volume of information" seems to me to be plainly unworkable because of the inherent vagueness or uncertainty of the criterion itself.

(3) There is also no basis to constitute a "record" for the purpose of the SFO, the relevant device must be something which is required "to be placed in other computing devices in order to access the information stored in [it]". On the contrary, the word "record" is expressly defined to mean, amongst other things, any device in which sounds or other data are embodied so as to be capable of being reproduced "with or without the aid of other equipment".

45. In this case, the Aeso Warrants authorized the SFC's officers to enter the relevant premises and search for, seize and remove -

> "any records or documents including, but not limited to, any documents relating to the listing application of [Aeso], any documents relating to the preparation of the public announcements of [Aeso], any records or documents relating to the affairs of [Aeso], and/or persons connected with it[,] any company documents, any documents relating to the initial public offering of [Aeso], any bank documents, any ledgers, any records or data and any information processed or stored in any computers or mobile phones or other electronic devices, any registers, any agenda, minutes or notes of meetings, any draft documents or records, any books and records, emails, correspondence and records of communication found on the Premises which any employee of the Commission or any Police Officer has reasonable cause to believe may be required to be produced pursuant to Part VIII of the Ordinance".

46. The Skyfame/China Agri Warrants authorized the SFC's officers to enter the relevant premises and search for, seize and remove -

> "any records or documents, including, but not limited to, any records or documents relating to the affairs of Skyfame and China Agri, any company documents, any documents or records relating to any securities trading accounts or any bank accounts, any transaction records, any minutes or notes of board meetings or other meetings, any documents or records relating to company transactions, any accounting records, any bank documents or records, any records of data and any information relating to company transactions, any accounting records, any bank documents or records, any records of data and any information processed or stored in computers or mobile phones or other electronic devices, any registers, <u>any electronic devices in which any such records or documents are stored</u>, and any working papers, registers, books, and records, emails, correspondence and records of communication found on the Premises which any employee of the Commission or any Police Officer has reasonable cause to believe may be required to be produced under Part VIII of the Ordinance." [emphasis added]

47. In my view, the Aeso and Skyfame/China Agri Warrants plainly authorized digital devices to be seized and removed by the SFC, they being:

(a) "records or documents … [or] any records or data and any information processed or stored in any computers or mobile phones or other electronic devices" referred to in the Aeso Warrants; or

(b) "records or documents … [or] any records of data and any information

processed or stored in computers or mobile phones or other electronic devices … [or] any electronic devices in which any such records or documents are stored" referred to in the Skyfame/China Agri Warrants.

48. I pause to observe that there is no challenge to the constitutionality of any provisions of the SFO, including ss 179(1), 183(1) and 191(1). The Applicants have not sought any relief in their Amended Forms 86 seeking to strike down any provisions of the SFO on the ground that they are unconstitutional. The issue, according to Mr Dykes, is one of construction of the words "record" and "document". I consider it to be clear that, upon their true construction in the context of Part VIII of the SFO, they are sufficiently wide to cover the digital devices seized by the SFC in the present case.

49. The argument mentioned in paragraph 37(2) above, namely, that any provision authorizing the SFC to require production of digital devices under Part VIII of the SFO without a warrant would be unconstitutional does not assist the Applicants, because the seizures of the digital devices in this case were authorized and carried out pursuant to search warrants issued by magistrates, and not pursuant to any exercise of powers under ss 179(1) and/or 183(1)[16]. Further, as earlier noted, there is no challenge to the constitutionality of any provisions of the SFO. Mr Dykes' reliance on the judgment of Au J (as he then was) in *Sham Wing Kan v Commissioner of Police* [2017] 5 HKLRD 589, at §55, to the effect that "warrantless" search for the digital content of mobile phones seized on arrest is permitted only in "exigent circumstances" is, I consider, misplaced.

50. Lastly, the argument mentioned in paragraph 37(3) above, namely, that the seizures of the digital devices were not authorized by the search warrants because the SFC did not have reasonable cause to believe that they might be required to be produced pursuant to Part VIII of the SFO, is based on the same argument that the digital devices could not be required to be produced under Part VIII of the SFO and thus the decisions to seize the digital devices were vitiated by an error of law[17]. I have already explained why I do not consider there to be any error of law in this matter. For the sake of completeness, I should add that on the facts and circumstances of the present case, I am satisfied that the SFC did have reasonable cause to believe that the digital devices contained, or were likely to contain, information relevant to the Aeso Investigation or the Skyfame/China Agri Investigation.

51. In the course of his submissions, Mr Dykes raised a new point that the warrants were defective because the magistrates failed to include or set out a "protocol" in the warrants on how examination of the contents of the digital devices should be carried out by the SFC's officers in order to protect the privacy of the Applicants. This is a new point not mentioned

in the Amended Forms 86. I agree with Mr Benjamin Yu, SC that the Applicants should not be permitted to raise this new point in the present case because, amongst other things, evidence as to what went on before the magistrates when considering the applications for the warrants would be relevant for a proper consideration of this argument. In any event, as will be further discussed below, what is required to be included or set out in a warrant depends, ultimately, on the terms of the enabling statute, in this case s 191(1). There is nothing in s 191(1) which supports the argument that a warrant issued under that section must set out the "protocol" contended for by Mr Dykes.

52. I shall now deal with Ms Law's argument that the seizure of her client's digital devices was unlawful or unconstitutional as it disproportionately interfered with his right to privacy under BL 30 and/or BOR 14.

53. It is trite that the right to privacy is not absolute, but may lawfully be restricted provided that the restriction can satisfy the 4-step proportionality test established in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372, namely, (i) "legitimate aim", (ii) "rational connection", (iii) "no more than reasonably necessary", and (iv) "fair balance".

54. In the present case, the legitimate aim would be the pursuit of the Aeso Investigation and/or Skyfame/China Agri Investigation. The seizures of the digital devices, being steps taken in the course of the investigations, were rationally connected to the advancement of that aim. The first and second elements in the 4-step proportionality test are easily satisfied on the facts of the present case. Ms Law has not argued otherwise[18].

55. In respect of the third element, namely, "no more than reasonably necessary", the evidence shows that -

> (1) During the search operation on 5 July 2018, the SFC's officers would, where possible, first carry out a preliminary examination of the digital devices found in the Applicants' premises using keyword searches to check whether they contained materials relevant to the Aeso Investigation and/or Skyfame/China Agri Investigation.
>
> (2) Devices which upon preliminary examination did not appear to contain relevant materials were returned to the Applicants.
>
> > (a) In the case of Cyril Cheung, two mobile phones were found in his bedroom. The SFC's officer checked the contents of one of them which was not locked by password and returned it to him when it appeared

that it did not contain materials relevant to the Aeso Investigation[19].

(b) In the case of Spencer To, an old iPhone and a computer found in his study room which did not appear to contain any relevant materials were not seized[20].

(c) In the case of L S To, a computer found in his bedroom which did not appear to contain any relevant materials was not seized[21].

(3) The SFC did, however, seize various other digital devices found in the Applicants' premises in the following circumstances.

(a) In the case of Cyril Cheung, a mobile phone was found in his bedroom which he unlocked voluntarily at the request of the SFC's officer. The SFC's officer then scrolled through the contents of Cyril Cheung's email account quickly and found 2 emails dated 7 and 20 July 2017 respectively which appeared to be relevant the SFC's investigation. Subsequently, Cyril Cheung's lawyers arrived and claimed legal profession privilege over the contents of all mobile phones and computers (if any) found inside Cyril Cheung's premises. The SFC's officer suggested to Cyril Cheung to print out the 2 emails and the attachments thereto and that they be sealed for the time being pending the resolution of his legal profession privilege claim, but that suggestion was refused by Cyril Cheung. The SFC's officer believed that the aforesaid emails were not the only emails relevant to the SFC's investigation, and it was quite possible that other relevant emails immediately before and after the dates of the said emails might be found in Cyril Cheung's email account. However, the SFC's officer did not have the opportunity to go through in detail all the emails in the email account at the time of the search of Cyril Cheung's premises. In the circumstances, the SFC's officer decided to seize Cyril Cheung's mobile phone[22].

(b) In the case of Spencer To, a mobile phone was found in his premises which was not password locked. The SFC's officer examined it in the presence of Spencer To without objection. Through checking the call history, contact information and instant messaging applications installed in the mobile phone (including WeChat and Whatsapp), it was found that Spencer To had been communicating with persons who were

targets of the Aeso Investigation. The mobile phone was also connected to a Netvigator email account which could be accessed without any password. Upon conducting keyword searches of the Netvigator email account, the SFC's officer was able to identify materials which were relevant to the Aeso Investigation and/or the Skyfame/China Agri Investigation. It was also found that some emails in the Netvigator email account were copied to two other email accounts belonging to Spencer To. The SFC's officer believed that Spencer To's mobile phone contained further information which was or might be relevant to the SFC's investigation. However, as it was not possible to conduct a detailed examination of the mobile phone within the short timeframe of the search operation, the SFC's officer decided to seize the mobile phone. The SFC's officer also found a custom-built computer in the study room, and identified a number of documents stored in the computer which were relevant to the Skyfame/China Agri Investigation. Some 11 documents from the computer were printed using a printer in Spencer To's study room before it eventually ran out of paper. In view of the fact that the computer clearly contained information relevant to the Skyfame/China Agri Investigation, the SFC's officer decided to seize the computer as well[23].

(c) In the case of L S To, a mobile phone was found on the dining table in his premises. L S To unlocked the mobile phone voluntarily at the request of the SFC's officer but refused to provide the password to it. The SFC's officer performed keyword searches and found some chat messages and emails relating to the Aeso Investigation. The SFC's officer was, however, unable to go through the huge number of chat messages and emails in the mobile phone in any great detail or in a systematic manner while the search was going on. Later, L S To left the premises to see a doctor, and the search continued in the presence of his lawyers. The SFC's officer found a tablet in L S To's bedroom, and believed that it contained information which was or might be relevant to the SFC's investigation. The SFC's officer was, however, unable to assess the contents of the tablet, because it was password-locked and he did not have the password. L S To had also left the premises by the time that the tablet was found. In the circumstances, the SFC's officer seized the mobile phone and the tablet[24].

(d) In the case of Jacky To, a mobile phone and a computer were found on the dining table in his premises. Jacky To unlocked the mobile phone voluntarily at the request of the SFC's officer. Upon conducting keyword searches, the SFC's officer found some chat messages which appeared to be relevant to the Aeso Investigation. In respect of the computer, which was password-locked, Jacky To confirmed that it was his computer and used by him to deal with daily matters such as checking emails. The SFC's officer believed that the computer contained records, documents and/or information which were or might be relevant to the SFC's investigation. Jacky To refused, however, to unlock the computer or provide the password to the computer on the excuse that he wanted to deal with one thing at a time and the SFC's officer should finish examining the mobile phone first. Later, Jacky To's lawyer arrived at the premises, and Jacky left to see a doctor. Before Jacky To left the premises, the SFC's officer asked him to provide the passwords to the mobile phone and the computer, which he refused. In all, the SFC's officer could only conduct a preliminary review of Jacky To's mobile phone, but could not go through the huge number of chat messages contained in the phone in any great detail or in a systematic manner while the search was going on in Jacky To's premises. Further, the SFC's officer could not carry out any preliminary examination of the computer because he refused to unlock computer or provide the password to it. In the circumstances, the SFC's officer decided to seize the mobile phone and the computer[25].

(e) Lastly, in the case of Wan, the SFC's officer found 8 mobile phones in his room in the office premises of PINS Capital. The SFC's officer considered it to be highly unusual for anyone to keep so many mobile phones at the same time and location. The SFC's officer also noted that 3 of the 8 mobile phones had SIM cards inside, which the officer considered to be an indication that the person owning the mobile phones might want to use different phones and different SIM cards in order to avoid identification and/or detection. The SFC's officer was, however, unable to carry out any preliminary examination of the contents of the mobile phones because a claim for legal professional privilege was made by a solicitor (Mr Philson Ho) on the spot. As a result, the SFC's officer seized the 8 mobile phones and put them in a

sealed envelope[26].

(4) In my view, the SFC's officers had no reasonable or practicable alternative but to seize the digital devices in the circumstances of this 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.

56. In respect of the fourth element, namely, "fair balance", the SFC has all along made it clear that it is amenable to using keyword searches to identify relevant materials contained in or accessible through the digital devices and/or viewing the contents together with the Applicants so as to minimize the chance of their personal or other information which is irrelevant to the SFC's investigations being viewed by its officers[27]. Any dispute on relevance can be brought to the court for determination, with the disputed materials being sealed pending the court's decision. I do not consider that the pursuit of societal interests in this case, namely, the proper investigation of possible breaches or contraventions of the SFO and maintenance of market integrity, which plainly are matters of high importance given Hong Kong's position as a leading regional financial centre, has resulted in an unacceptably harsh burden on the Applicants on the facts of the present case.

57. In considering the third and fourth elements of the proportionality test in this case, it is also relevant to take into account the fact that the seizures of the digital devices were sanctioned by warrants issued by judicial officers, who could be expected to carefully scrutinize the sufficiency of the bases of the applications for the warrants as well as the scope or width of the warrants prior to their issue with an independent mind balancing all relevant conflicting interests.

58. In all, I am of the view that the interference with the Applicants' right to privacy occasioned by the SFC's seizures of the digital devices satisfies the 4-step proportionality test established in *Hysan*, and is thus lawful and constitutional.

59. For the above reasons, I reject the Applicants' arguments that that the decisions to seize the Applicants' digital devices were *ultra vires*, unlawful or unconstitutional.

WHETHER THE DECISIONS TO RETAIN THE DIGITAL DEVICES WERE ULTRA VIRES, UNLAWFUL OR UNCONSTITUTIONAL

60. The challenge against the decisions to retain the digital devices stand or fall together with the challenge against the decisions to seize the digital devices. Since I have rejected the Applicants' challenge against the decisions to seize the digital devices, it follows that I also reject the Applicants' challenge against the decisions to retain the digital devices.

61. I should add that s 193(3) expressly provides that any record or document removed under s 193(1) may be retained for any period not exceeding 6 months beginning on the day of its removal or, where the record or document is or may be required for criminal proceedings or for any proceedings under this Ordinance, for such longer period as may be necessary for the purposes of those proceedings. Having regard to the fact that (i) the Aeso Investigation and Skyfame/China Agri Investigation are still on-going, (ii) the SFC has not yet been able to fully review the materials contained in or accessible through the digital devices pending the outcome of the present applications and/or the unresolved legal professional privilege claims, (iii) the digital devices contain or may contain information or materials relevant to those investigations, and (iv) the digital devices contain or may contain information or materials required for future criminal proceedings or proceedings under the SFO[28], I consider that there can be no valid complaint about the continued retention of the digital devices if the decisions to seize them were lawful in the first place (which I have found to be the case).

WHETHER THE SECTION 183(1) NOTICES WERE ULTRA VIRES, UNLAWFUL OR UNCONSTITUTIONAL

62. Mr Dykes argues that the s 183(1) notices issued to Cyril Cheung, Spencer To and L S To were *ultra vires* the provisions of the SFO because:

(1) they required them to produce vast amounts of materials which were irrelevant to the SFC's investigations, thus falling outside the remit of any record or document which "is, or may be, relevant to the investigation" under s 183(1)(a)[29];

(2) to construe s 183(1)(a) as permitting the SFC to require the production of large amounts of irrelevant materials for the purpose of sifting would violate BL 30 and/or BOR 14, because that would give rise to a disproportionate restriction of the right to privacy[30]; and

(3) the SFC has no power to access the email accounts of Spencer To under the Spencer To Warrants, or the mobile phone and tablet belonging to L S To under the L S To Warrant[31].

63. In respect of the argument mentioned in paragraph 62(1) above, s 183(1), so far as material, states as follows:

> "The person under investigation or a person whom the investigator has reasonable cause to believe has in his possession any record or document which contains, or which is likely to contain, information relevant to an investigation under section 182, or whom the investigator has reasonable cause to believe otherwise has such information in his possession, shall -

> (a) produce to the investigator, within the time and at the place the investigator reasonably requires in writing, any record or document specified by the investigator which is, or may be, relevant to the investigation and which is in his possession;
>
> (d) give the investigator all assistance in connection with the investigation which he is reasonably able to give, including responding to any written question raised by the investigator."

64. By way of preliminary observation, emails and other documents stored in or accessible through the digital devices of the Applicants which are, or may be, relevant to the SFC's investigations would, as earlier noted, fall within the scope of "any record or document" which the SFC may require to be produced under s 183(1)(a).

65. As a matter of principle, where a warrant authorizes the seizure of a particular document, the officer empowered by the warrant is lawfully entitled to seize the whole file containing the document, without having to separate the individual sheet authorized to be seized, for the purpose of examination at the police station, provided that what he does is reasonable in the circumstances (see *Reynolds v Commissioner of Police of the Metropolis* [1985] 1 QB 881, at 890A-B).

66. In *Apple Daily Ltd v Commissioner of the Independent Commission Against Corruption (No 2)* [2000] 1 HKLRD 647, the relevant statutory provision (s 10C(1) of the Independent Commission Against Corruption Ordinance) provides that an officer authorized in that behalf by the Commissioner may "seize and detain anything which such officer has reason to believe to be or to contain evidence of any of the offences referred to in section 10"[32]. It was held by Keith JA that the words "or to contain" in s 10C(1) enabled the officer to seize files and filing cabinets in which the relevant documents were contained. At 670E-F, the learned Judge stated as follows:

> "Officers executing a search warrant may be confronted by a huge amount of documentary material, which may be contained in different files and filing cabinets on the premises to which the warrant relates. It may be quite impossible, having regard to the volume of the material, to trawl through the files there and then to see what documents might throw any light on whether an offence has been committed and by whom. The words 'or to contain' enable the officers to seize the files and the filing cabinets in which documents are contained, so that the documents contained in them can be inspected at a proper pace, and their ability to assist can be determined. Once those documents are found not to be able to assist, they should, of course, be returned to the occupiers of the premises from which they were taken."

67. The principle established in *Reynolds* 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 law enforcement agency's investigation (see *R (on the application of Paul Da Costa & Co) v Thames Magistrates Court* [2002] EWHC 40 (Admin), at §§19-20; *R (on the application of H) v Commissioners of Inland Revenue* [2002] EWHC 2164 (Admin), at §§37 and 39-40; *R (Faisaltex Ltd) v Crown Court at*

Preston [2009] 1 WLR 1687, at §§73-79).

68. Although the above decisions concern the validity of search warrants issued pursuant to different statutory provisions, the reasoning behind those decisions is, it seems to me, 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 the same reasons, I consider that the SFC is empowered, under s 183(1), to require the Applicants to provide means of access to email accounts and digital devices which contain, or are likely to contain, information relevant to its investigations even though the email accounts and digital devices would likely also contain other personal or private materials which are not relevant to the SFC's investigations. The SFC has offered safeguards to protect the privacy of the Applicants (see paragraph 56 above) which I consider to represent a practical and reasonable compromise of the conflicting interests of the SFC and the Applicants.

69. As regards the argument mentioned in paragraph 62(2) above, the 4-step proportionality analysis in respect of the decisions to seize and retain the Applicants' digital devices applies equally to the decisions of the SFC to issue the s 183(1) notices to the Applicants requiring them to provide means of access to their email accounts or digital devices. In support of his argument, Mr Dykes relies on certain Irish and ECHR authorities, namely, *CRH Plc, Irish Cement Ltd v The Competition and Consumer Protection Commission* [2017] IESC 34; *Vinci Construction v France* (Applications No 63629/10 and 60567/10). Those cases emphasise the need for judicial oversight as to the relevance of any materials contained in the email accounts or digital devices. As earlier noted, the SFC is amenable to such judicial oversight should there be any dispute on the issue of relevance. It is also relevant that the s 183(1) notices in this case were steps taken by the SFC in furtherance of the execution of search warrants issued by judicial officers.

70. The argument mentioned in paragraph 62(3) above does not assist Spencer To and L S To, because the SFC seeks access to the relevant email accounts and digital devices under s 183(1), and not under the Spencer To Warrants and L S To Warrant.

71. Ms Law's argument that the s 183(1) notice issued to Jacky To was unlawful or unconstitutional is based on the same grounds advanced in support of her argument that the seizure and retention of her client's digital devices were unlawful or unconstitutional as they disproportionately interfered with his right to privacy under BL 30 and/or BOR 14. I have already dealt with Ms Law's argument above, and shall not repeat the same here.

72. In all, I reject the Applicants' arguments that the s 183(1) notices issued to the Applicants were *ultra vires*, unlawful or unconstitutional.

WHETHER THE SEARCH WARRANTS WERE UNLAWFUL OR INVALID FOR WANT OF SPECIFICITY

73. The Aeso Warrants, so far as material, state as follows:

> "To each and all employees of the Securities and Futures Commission (the Commission) …
>
> I, being satisfied under section 191 of the [SFO] by information on oath laid by [an employee of the SFC] directed by the Commission under section 182(1) of the Ordinance to conduct investigation, that there are reasonable grounds to suspect that there are, or are likely to be, located at [the Premises], records or documents include, but are not limited to, any documents relating to the listing application of the Aeso Holding Limited ('the Listed Company'), any documents relating to the preparation of the public announcements of the Listed Company, any records or documents relating to the affairs of the Listed Company, and/or persons connected with it, any company documents, any documents relating to the initial public offering of the Listed Company, any bank documents, any ledgers, any records or data and any information processed or stored in any computers or mobile phones or other electronic devices, any registers, any agenda, minutes or notes of meetings, any draft documents or records, any books and records, emails, correspondence and records of communication which are or may be relevant to:
>
> (i) the investigation under section 182(1) of the Ordinance into whether during or around the period from 12 January 2017 to 12 June 2017:
>
> a. the Listed Company and/or persons connected with it may have committed offences contrary to section 300 of the Ordinance; and/or
>
> b. the Listed Company and/or persons connected with it may have committed offences contrary to section 384 of the Ordinance; and
>
> (ii) the investigation under section 182(1) of the Ordinance into whether during or around the period from 13 January 2017 to 26 October 2017, persons having an interest in the shares of the Listed Company may have committed offences contrary to Part XV (Disclosure of Interests) of the Ordinance;
>
> (iii) the authorization under section 179 of the Ordinance to give direction to certain persons to require production of records and documents pursuant to the Commission's power to require information where it appears to the Commission that there are circumstances suggesting that at any relevant time:
>
> a. persons involved in the management of the affairs of the Listed Company have engaged, in relation to such management, in defalcation, fraud, misfeasance or other misconduct towards it or its members or any part of its members; and/or
>
> b. members of the Listed Company or any part of its members have not been given all the information with respect to its affairs that they might reasonably expect.
>
> and which may be required to be produced under Part VIII of the Ordinance.
>
> You are herewith empowered to enter the Premises, if necessary by force, at any time within seven days from the date of this warrant, and search for, seize and remove any records or documents including, but not limited to, any documents relating to the listing application of the Listed Company, any documents relating to the preparation of the public announcements of the Listed Company, any records or documents relating to the affairs of the Listed Company, and/or persons connected with it any company documents, any documents relating to the initial public offering of the Listed Company, any bank documents, any ledgers, any records or data and any information processed or stored in any computers or mobile phones or other electronic devices, any registers, any agenda, minutes or notes of meetings, any draft documents or records, any books and records, emails, correspondence and records of communication found on the Premises which any employee of the Commission … has reasonable cause to believe may be required to

be produced pursuant to Part VIII of the Ordinance.

This warrant can only be executed on or before [date] after which it will automatically lapse."

74. The Skyfame/China Agri Warrants, so far as material, state as follows:

"To each and all employees of the Securities and Futures Commission ('the Commission') …

I, being satisfied under section 191 of the [SFO] by information on oath laid by [an employee of the SFC] directed and authorized by the Commission under section 182(1) and 179 of the Ordinance to conduct investigations, that there are reasonable grounds to suspect that there are, or are likely to be, located at [the Premises], records or documents including, but not limited to, any records or documents relating to the affairs of [Skyfame] and [China Agri], any company documents, and documents or records relating to any securities trading accounts or any bank accounts, any transaction records, any minutes or notes of board meetings or other meetings, any documents or records relating to company transactions, any accounting records, any bank documents or records, any records of data and any information processed or stored in computers or mobile phones or other electronic devices, any registers, any electronic devices in which any such records or documents are stored, and any working papers, registers, books and records, emails, correspondence and records of communication which are or may be relevant to:

1) the investigation under section 182(1) of the Ordinance on whether during or around the period from 4 July 2014 to 7 June 2017, Skyfame and/or persons connected with it may have committed offences contrary to section 300 of the Ordinance;

2) the authorization under section 179 of the Ordinance to give direction to Skyfame, a corporation that is or was at the material time a related corporation of Skyfame, an authorized financial institution, any auditor or any other person to require production of any records or documents specified, pursuant to the Commission's power to, require information where it appears to the Commission that there are circumstances suggesting that at any relevant time:

> (a) persons involved in the management of the affairs of Skyfame have engaged, in relation to such management, in defalcation, fraud, misfeasance or other misconduct towards it or its members or any part of its members, and/or
>
> (b) members of Skyfame or any part of its members have not been given all the information with respect to its affairs that they might reasonably expect; and

3) the authorization under section 179 of the Ordinance to give direction to China Agri, a corporation that is or was at the material time a related corporation of China Agri, an authorized financial institution, any auditor or any other person to require production of any records or documents specified, pursuant to the Commission's power to require information where it appears to the Commission that there are circumstances suggesting that at any relevant time, members of China Agri or any part of its members have not been given all the information with respect to its affairs that they might reasonably expect;

and which may be required to be produced under Part VIII of the Ordinance.

You are herewith empowered to enter the Premises, if necessary by force, at any time within seven days from the date of this warrant, and search for, seize and remove any records or documents including, but not limited to, any records or documents relating to the affairs of Skyfame and China Agri, any company documents, any documents or records relating to any securities trading accounts or any bank accounts, any transaction records, any minutes or notes of board meetings or other meetings, any documents or records relating to company transactions, any accounting records, any bank documents or records, any records of data and any information processed or stored in computers or mobile phones or other electronic devices, any registers, any electronic devices in which any such records or documents are stored, and any working papers, registers, books and records, emails, correspondence and records of communication found on the Premises which any employee of the Commission or any Police Officer has reasonable cause to believe may be required to be produced under Part VIII of the Ordinance.

This warrant can only be executed on or before [date] after which it will automatically lapse."

75. Mr Dykes and Tam argue that the search warrants were unlawful and invalid for want

of specificity, in that:

(1) they failed to specify the scope of the search, seizure and removal authorized by the warrants, or limited the records or documents authorized to be seized by reference to specific offences or misconduct to which such records or documents must relate[33];

(2) §(ii) of the Aeso Warrants failed to identify any particular offence or particular offences among a broad range of offences under Part XV of the SFO[34]; and

(3) §(iii) of the Aeso Warrants and §§(2) and (3) of the Skyfame/China Agri Warrants, which referred to authorization under s 179(1) empowering authorized persons to require production of records and documents where it appeared to the SFC that there were circumstances suggesting that -

(a) "*persons involved in the management of the affairs of [Aeso/Skyfame] have engaged, in relation to such management, in defalcation, fraud, misfeasance or other misconduct towards it or its members or any part of its members*"; and

(b) "*members of [Aeso/Skyfame/China Agri] or any part of its members have not been given all the information with respect to its affairs that they might reasonably expect*",

were vague and unspecific[35].

76. Ms Law's argument is to the same effect. Her complaint of want of specificity in respect of the search warrants relates to two particular aspects, namely:

(1) the description of the alleged offence(s) for which the search is authorized under §§(ii) and (iii) of the Aeso Warrants; and

(2) the scope of the empowering provision, ie the records or documents which are authorized to be searched for, seized and removed[36].

77. Two preliminary points should be noted. First, there is, in the present case, no constitutional challenge to the validity of s 191(1). In other words, the validity of s 191(1) empowering magistrates to issue search warrants in conformity with the expressed and/or implied requirements of that section is presumed. Second, the Applicants' arguments go, essentially, to the "form", not "substance", of the warrants. The Applicants are not

arguing, for example, that certain particular document(s), or class(es) of documents, should not have been seized because they did not come within the scope of the warrants, or were relevant to some offence(s) or misconduct which were not mentioned or referred to in the warrants.

78. 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. There is no overriding or overarching requirement for specificity outside what is mandated by the relevant statute authorizing the issue of the search warrant. That this is the correct legal position is clear from the judgment of Lord Diplock in *R v IRC, ex p Rossminster Ltd* [1980] AC 952 at 1008B-E:

> "What has to be disclosed upon the face of the search warrant depends upon the true construction of the statute. The construing court ought, no doubt, to remind itself, if reminder should be necessary, that entering a man's house or office, searching it and seizing his goods against his will are tortious acts against which he is entitled to the protection of the court unless the acts can be justified either at common law or under some statutory authority. So if the statutory words relied upon as authorising the acts are ambiguous or obscure, a construction should be placed upon them that is least restrictive of individual rights which would otherwise enjoy the protection of the common law. But judges in performing their constitutional function of expounding what words used by Parliament in legislation mean, must not be over-zealous to search for ambiguities or obscurities in words which on the face of them are plain, simply because the members of the court are out of sympathy with the policy to which the Act appears to give effect."

79. In the same case, Viscount Dilhorne also stated the following at 1005G-H:

> "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. These warrants did comply with the section and I know of no rule of law that requires that."

80. In this regard, a distinction is 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. For this distinction, see:

(1) the judgment of Viscount Dilhorne in *Rossminster*, at 1005H-1006B -

> "In the course of the argument reference was made to general warrants. Lord Denning M.R. also referred to them. In my view the old well-known cases on general warrants really have no reference to this case. Here the warrants were not general. They authorised named persons to enter named premises and to search them. On entry with such a warrant, their power of seizure and removal was limited by, controlled by and authorised by subsection (3). It may be that there are many persons who think that in 1976 too wide a power was given to the revenue. If it was, and I express no opinion on that, it must be left to Parliament to narrow the power it gave. That, in my view, cannot be done by judicial interpretation when the language of the enactment is clear and does not warrant it and when that cannot be done in accordance with any rule of law"; and

(2) the judgment of Lord Scarman, in the same case, at 1026B-F -

> "At the end of the day one fundamental issue divides the parties and calls for the decision of the House. Is it a requirement of the law that particulars of the offences suspected to have been committed be shown either on the face of the warrant or by the revenue, if challenged, in proceedings for judicial review? The statute contains no express provision spelling out such a requirement. Is the requirement to be implied? I know of no common law rule which compels the implication. Indeed, the common law supports the converse: for the nearest common law analogy is the rule, based on public policy, which protects from disclosure police sources of information: *Home v. Bentinck (1820) 2 Brod. & Bing. 130*. Talk of 'general warrants' is beside the point: these warrants make clear that they are issued by judicial authority in the exercise of the power conferred in the statute. When one turns from the common law to consider the legislative purpose of the section, it is plain that the purpose could be defeated if a warrant must particularise the offences suspected: for warrants are issued at the stage of investigation when secrecy may be vital to the success of detection."

81. In *Apple Daily*, *supra*, at 674, Chan CJHC (as he then was) summarized the effect of the judgment of the House of Lords in *Rossminster* as follows:

> "In my view, what the House of Lords decided in ***Rossminster*** was:
>
> (1) 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. The second and third matters go to what are sometimes called the essential and formal validity of the warrant respectively;
>
> (2) if it appears that a warrant falls strictly and exactly within the provisions of the empowering statute in that all the conditions have been satisfied, it would be upheld;
>
> (3) if the empowering statute does not require any particular form for the warrant, it would be held valid so long as it contains the basic details which are provided for in the statute."

82. The above summary was endorsed by the Court of Appeal in *Philip KH Wong, Kennedy YH Wong & Co v Commissioner of the Independent Commission Against Corruption (No 2)* [2009] 5 HKLRD 379, at §69 *per* Stock VP, with whom Andrew Cheung J (as he then was) and Wright J agreed. I note that at §86, Stock VP also stated the following:

> "Beyond that it is well established by the authorities to which reference has been made that the warrant must clearly identify the place to be searched and sufficiently indicate the articles which are sought and also the offence in respect of which the warrant is issued, so that, for example, merely to specify 'offences referred to in section 10' will inevitably be too broad."

83. That statement should not, however, be taken to override the general principle accepted by the learned Judge that what is required to be stated in a warrant depends on the true construction of the empowering statute, or be read to mean that there is some independent legal requirement for certain matters to be stated in a warrant. In fact, at §84 of the judgment which immediately preceded the discussion at §86, Stock VP said that the question whether certain specific conditions were required to be imposed by a magistrate in the case of a warrant to search solicitor's premises was likewise a question of statutory construction. In that case, the issue was whether various conditions designed to protect

legal professional privilege were required to be endorsed on the warrant. Stock VP held that there was no such requirement as a matter of construction of s 10B of the Independent Commission Against Corruption Ordinance, Cap 204. Section 10B is in the following terms -

> "Without prejudice to section 17(1) of the Prevention of Bribery Ordinance (Cap. 201), if a magistrate is satisfied by information on oath that there is reason to believe that there is in any premises or place anything which is or contains evidence of the commission of any of the offences referred to in section 10, he may by warrant directed to any officer authorize such officer, and any other officers assisting him, to enter and search such premises or place."

84. The Applicants rely heavily on the judgment of Sears J in *Re an Application by Messrs Ip and Willis for Leave to Apply for Judicial Review* [1990] 1 HKLR 154, where a search warrant granted by a magistrate under s 10B of the Independent Commission Against Corruption Ordinance was quashed because: (i) it did not specify the particular offence for which the warrant was issued, but merely referred to "evidence of the commission of an offence referred to in s. 10 of the Independent Commission Against Corruption Ordinance" (as pointed out by the learned Judge at 162D, s 10 referred to a large number of offences ranging from perverting or obstructing the course of justice, to theft, evading liability by deception, making off without payment, etc), and (ii) it failed to identify the documents or materials, or categories or classes of documents to be looked for, but authorized ICAC officers to "enter such premises or place, and search the same" without limitation. In reaching his decision, Sears J placed reliance on three principles stated by Davison CJ in *Rosenberg v Jaine* [1983] NZLR 1, namely:

> "1. The warrant should describe the alleged offence in respect of which the search is authorised so as not to mislead the reader as to the nature of the alleged offence.
>
> 2. The warrant may authorise the search and seizure only of such things in respect of which the District Court Judge is satisfied that reasonable grounds for belief exist that they are evidence of the commission of an offence.
>
> 3. The warrant must be in sufficiently specific terms in regard to what is authorised to be searched for and seized so as to enable to occupier of the premises to understand and, if necessary, obtain legal advice about the permissible limits of the search."

85. As pointed out by Saunders J in *A v SFC*, HCAL 84/2007 (14 December 2007), *Rossminster* was not cited to Sears J, and his judgment must now be read subject to the judgment of the Court of Appeal in *Apple Daily* (§23). This having been said, Saunders J expressed the view that the three principles referred to by Sears J remained valid, and considered that the difficulty faced by the ICAC in *Ip and Willis* was the "bland and open ended reference to 's 10 ICACO', from which it was not possible to delineate the parameters of the warrant" (§49).

86. Whatever may be said about the judgment of Sears J in *Ip and Willis*, I consider that I am bound by the judgment of the Court of Appeal in *Apple Daily*, affirmed by the

subsequent judgment of the Court of Appeal in *Philip KH Wong*, to determine the validity of the warrants in this case by reference to the requirements of s 191(1).

87. Section 191(1) states as follows:

> "If a magistrate is satisfied on information on oath laid by -
>
> (a) an employee of the Commission or, where the exercise of powers under section 180 is concerned, of the relevant authority within the meaning of that section; or
>
> (b) an authorized person within the meaning of section 179 or 180 …
>
> that there are reasonable grounds to suspect that there is, or is likely to be, on premises specified in the information any record or document which may be required to be produced under this Part, the magistrate may issue a warrant authorizing a person specified in the warrant, a police officer, and such other persons as may be necessary to assist in the execution of the warrant to -
>
> (i) enter the premises so specified, if necessary by force, at any time within the period of 7 days beginning on the date of the warrant; and
>
> (ii) search for, seize and remove any record or document which the person specified in the warrant or police officer has reasonable cause to believe may be required to be produced under this Part."

88. Accordingly, the matters required to be stated in a warrant issued by a magistrate under s 191(1) are:

(1) the magistrate's satisfaction on information laid on oath by a person specified in sub-paragraphs (a) or (b) that there is or is likely to be on certain specified premises any record or document which may be required to be produced under Part VIII of the SFO;

(2) the person(s) authorized to execute the warrant;

(3) the premises authorized to be entered and searched;

(4) the authorization given to the specified person(s) to search for, seize and remove any record or document which such person(s) have reasonable cause to believe may be required to be produced under Part VIII of the SFO; and

(5) the validity period of the warrant, being 7 days beginning on the date of the warrant.

89. The warrants in the present case satisfied these requirements:

(1) the magistrate's satisfaction on information laid on oath by an employee of the SFC of the relevant matter was stated;

(2) the persons authorized to execute the warrant (namely, each and all employees of the SFC, amongst others) were specified;

(3) the premises authorized to be entered and searched were identified;

(4) the authorization given to the specified persons to search for, seize and remove any record or document which such persons had reasonable cause to believe might be required to be produced under Part VIII of the SFO was stated; and

(5) the validity period of the warrant was given.

90. In respect of the complaint that the warrants failed to identify the particular offence or offences in respect of which they were issued, it should first be noted that the power to issue a warrant under s 191(1) does not depend on the magistrate being satisfied that some offence has been committed. Instead, the power to issue a warrant is triggered where the magistrate is satisfied that there are reasonable grounds to suspect that there is, or is likely to be, on specified premises "any record or document which may be required to be produced under [Part VIII of the SFO]". Under Part VIII of the SFO, records and documents may be required to be produced not only where an offence under the SFO has been committed, but also where, for example:

(1) "it appears to the Commission that there are circumstances suggesting that at any relevant time persons involved in the management of the affairs of [a corporation which is or was listed] have engaged, in relation to such management, in defalcation, fraud, misfeasance or other misconduct towards it or its members or any part of its members" under s 179(1)(d); or

(2) "it appears to the Commission that there are circumstances suggesting that at any relevant time members of the corporation or any part of its members have not been given all the information with respect to its affairs that they might reasonably expect" under s 179(1)(e).

91. There is nothing in s 191(1) to require a warrant issued under that section to state the relevant offence or misconduct in respect of which the warrant was applied for and granted. In any event, even if (contrary to my view) such requirement can be found upon the true construction s 191(1), the warrants in the present case did specify the grounds on which records and documents might be required to be produced under Part VIII of the SFO (see §§(i), (ii) and (iii) of the Aeso Warrants and §§(1), (2) and (3) of the Skyfame/China Agri Warrants). While some of those grounds might cover:

(1) a large number of possible offences, eg §(ii) of the Aeso Warrants refers to "*offences contrary to Part XV (Disclosure of Interests)*" of the SFO; or

(2) a potentially wide range of misconduct, eg §(iii) of the Aeso Warrants and §§(2) and (3) of the Skyfame/China Agri Warrants refer to "*defalcation, fraud, misfeasance or other misconduct towards [Aeso/Skyfame] or its members or any part of its members*" and "*members of [Aeso/Skyfame/China Agri] or any part of its members have not been given all the information with respect to its affairs that they might reasonably expect*",

I do not consider that further particulars of the offences or misconduct were required to be set out. There are good reasons for this, because (i) at the investigative stage precise information may not be known, and it may impracticable to be specific about the offences or misconduct, and (ii) secrecy considerations may come into play (see *A v SFC*, *supra*, at §37 *per* Saunders J; *Rossminster*, *supra*, at 999F-G *per* Lord Wilberforce, 1010C-D *per* Lord Diplock, and 1026D-E *per* Lord Scarman). The following observations of Chan CJHC in *Apple Daily*, *supra*, at 680, is apposite for the purpose of the present discussion:

> "I think it is worthwhile mentioning the following matters which are inherent in an operation of search and seizure. First, officers of law enforcement agencies would only apply (and are usually only permitted to apply) for a warrant in the course of making an investigation into some offences. Secondly, their objective is to gather materials which can show that suspected offences have been committed and who committed them. Such materials will hopefully be used as evidence in any subsequent trial of the suspect. Whether such evidence will be admissible is a question for the trial judge. Thirdly, the occupier of the premises under search may or may not be the suspect. Even if he is, the materials which the officers want to gather may sometimes show that he is not involved but that some other person is the real culprit. In other words, the materials to be searched or seized may incriminate a person under suspicion or they may exonerate him. Fourthly, the officers would have to make up their minds on the spot during a search and seizure operation as to what materials may be regarded as evidence and what may be used as such at a trial in future. Very often these are not easy decisions. Fifthly, some materials by themselves may not be considered as evidence at a particular stage of the investigation but their relevance and importance will only become clear when considered in conjunction with other materials gathered at some other stage of the investigation. Because of these uncertainties and difficulties, officers are not expected to be very precise and exact on what they are looking for and seize upon a search. They are even less expected to decide quickly what may in law constitute evidence for use in a future prosecution. If too strict and literal a construction is given to a power of search or seizure, this may tamper the effectiveness of an investigation. In order to make a search and seizure operation meaningful, a fair balance has to be struck between the interest in bringing criminals to justice and the interest of protecting citizens' right and privacy."

92. In this regard, it should also be noted that §(ii) of the Aeso Warrants confined the scope of the relevant offences under Part XV of the SFO by identifying (i) a specified period of the offences (namely, from 13 January 2017 to 26 October 2017), and (ii) the persons who might have committed such offences (namely, those having an interest in the shares of Aeso).

93. In respect of the complaint that the warrants failed to limit the scope of the records or documents authorized to be searched for, seized and removed, I agree with the submissions of Mr Yu that there is no requirement under s 191(1) for particulars of these matters to be set out in the warrant. What is required to be stated in the warrant is an authorization to

"search for, seize and remove any record or document which the person specified in the warrant … has reasonable cause to believe may be required to be produced" under Part VIII of the SFO. Even if (contrary to my view), there is a requirement that a warrant should particularise the records or documents authorized to be searched for, seized and removed, I consider that the classes or categories of documents covered by the warrants in this case were sufficiently described. In the nature of things, it is unlikely that, at the investigative stage, the SFC would wish to confine the warrant to a particular document or documents. It is likely that in most, or the vast majority of, cases, the SFC would be seeking authorization to search for, seize and remove documents by reference to broadly defined classes or categories. I do not consider such practice to be unlawful or unconstitutional.

94. In all, I reject that the Applicants' contention that the warrants were unlawful or invalid for want of specificity.

DISPOSTION

95. I grant leave to the Applicants to apply for judicial review in the 5 applications because the intended applications for judicial review are reasonably arguable and have a realistic prospect of success. For this purpose, I am prepared to grant the necessary extension of time to the Applicants to challenge the warrants, having regard to (i) the short period of delay, (ii) the fact that the applications are reasonably arguable, and (iii) the general importance of the issues raised in these applications.

96. I dismiss the substantive applications for judicial review upon full consideration of the merits of the applications.

97. The SFC shall have the costs of the 5 applications, including all reserved costs (if any), to be taxed if not agreed with certificate for 2 counsel.

98. Lastly, it remains for me to thank counsel for their assistance rendered to the court.

(Anderson Chow)
Judge of the Court of First Instance
High Court

Mr Philip Dykes, SC & Mr Jeffrey Tam, instructed by Alex To & Co. Solicitors, for the

Applicants in HCAL 2132, 2133, 2134 & 2137/2018

Ms Deanna Law, instructed by Tung, Ng, Tse and Lam, for the Applicant in HCAL 2136/2018

Mr Benjamin Yu, SC & Ms Eva Sit, SC, instructed by 1st Putative Respondent in all cases

The 2nd Putative Respondent in all cases, absent

The 3rd Putative Respondent in HCAL 2137/2018, absent

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[1] Wilson Liu's interest in Aeso was held through a company called W&Q Investment Limited.

[2] See the Judgment of B Chu J in *Acropolis Limited v W&Q Investment Limited* in HCA 1496/2017 handed down on 31 August 2017, at §§84 and 129.

[3] According to Aeso's public announcement on 29 April 2019, the winding up petition (as amended) was dismissed by the court with the consent of the parties on that date, and the Joint and Several Provisional Liquidators of the company were released.

[4] According to Aeso's public announcement on 31 July 2019, trading in the shares of Aeso resumed on that date.

[5] The residential addresses of Cyril Cheung, Spencer To, L S To and Jacky To are omitted from this judgment because they are not immediately relevant to the issues to be determined in these applications.

[6] Copies of the emails in Cyril Cheung's email account during the period from June to July 2017 were delivered to the SFC by his solicitors in 2 sealed boxes on 23 July 2018 and 3 October 2018 under protest.

[7] A sealed envelope containing the login names/IDs and passwords to the 3 email accounts was sent by Spencer To's solicitors to the SFC on 5 July 2018 which required 7 clear days' notice be given in the event that the SFC intended to unseal the envelope.

[8] A sealed envelope containing the passwords to the mobile phone and tablet was sent by L S To's solicitors to the SFC on 6 July 2018 under protest.

[9] See §9 of the Skeleton Submissions of Mr Philip Dykes, SC and Mr Jeffrey Tam dated 18 July 2019.

[10] See §4 of Ms Deanna Law's Skeleton Submissions dated 18 July 2019.

[11] See §§46-54 of the Skeleton Submissions of Mr Dykes and Mr Tam.

[12] See §§55-69 of the Skeleton Submissions of Mr Dykes and Mr Tam.

[13] See §§70-81 of the Skeleton Submissions of Mr Dykes and Mr Tam.

[14] See *Riley v California* 573 US __ (2014), at 17-20.

[15] See §51 of the Skeleton Submissions of Mr Dykes and Mr Tam.

[16] In relating to the seizure of Cyril Cheung's mobile phone, see the Affirmation of Kwan Wing Kim Vernon, Senior Manager of the Enforcement Division of the SFC, filed on 14 January 2019, at §§4(b), 8-12, 14, 26 and 29. In relation to the seizure of Spencer To's mobile phone and computer, see the Affirmation of Chiu Yu Kei, Senior Manager of the Enforcement Division of the SFC, filed on 14 January 2019, at §§4(c), 38-43, 49, 51, and 63-65. In relation to the seizure of L S To's mobile phone and tablet, see the Affirmation of Chi Yuk Na, Manager of the Enforcement Division of the SFC, filed on 14 January 2019, at §§4(b), 8-13, 31 and 33. In relation to the seizure of Jacky To's mobile phone and notebook computer, see the Affirmation of Wong Shui Ying Vivian, Manager of the Enforcement Division of the SFC, filed on 14 January 2019, at §§4(b), 8-13 and 32. In relation to the seizure of Wan's 8 mobile phones, see the Affirmation of Leung Ka Fai Stephen, Associate Director of the Enforcement Division of the SFC, filed on 14 January 2019, at §§4(b), 12, 17, and 20-22.

[17] See §§70-81 of the Skeleton Submissions of Mr Dykes and Mr Tam.

[18] See §5.4 of the Skeleton Submissions of Ms Law.

[19] See §13 of the Affirmation of Kwan Wing Kim Vernon.

[20] See §§52-54 of the Affirmation of Chiu Yu Kei.

[21] See §26 of the Affirmation of Chi Yuk Na.

[22] See §§13-28 and 48-49 of the Affirmation of Kwan Wing Kim Vernon.

[23] See §§43-51 of the Affirmation of Chiu Yu Kei.

[24] See §§13-15, 24-25, 28-31, 34 and 43 of the Affirmation of Chi Yuk Na.

[25] See §§12-14, 22-24, 28(b) and 43 of the Affirmation of Wong Shui Ying Vivian.

[26] See §§19-20 of the Affirmation of Leung Ka Fai Stephen.

[27] See §50 of the Affirmation of Kwan Wing Kim Vernon (in relation to Cyril Cheung),

§80 of the Affirmation of Chiu Yu Kei (in relation to Spencer To), §44 of the Affirmation of Chi Yuk Na (in relation to L S To), §44 of the Affirmation of Wong Shui Ying Vivian (in relation to Jacky To), and §27 of the Affirmation of Leung Ka Fai Stephen (in relation to Wan).

[28] See §62 of the Affirmation of Kwan Wing Kim Vernon (in relation to Cyril Cheung), §92 of the Affirmation of Chiu Yu Kei (in relation to Spencer To), §56 of the Affirmation of Chi Yuk Na (in relation to L S To), §56 of the Affirmation of Wong Shui Ying Vivian (in relation to Jacky To), and §36 of the Affirmation of Leung Ka Fai Stephen (in relation to Wan).

[29] See §§13, 34 and 39 of the Skeleton Submissions of Mr Dykes and Mr Tam.

[30] See §22 of the Skeleton Submissions of Mr Dykes and Mr Tam.

[31] See §§37 and 39 of the Skeleton Submissions of Mr Dykes and Mr Tam.

[32] Section 10 of the Independent Commission Against Corruption Ordinance refers to a large number of different offences, see *Re an Application by Messrs Ip and Willis for Leave to Apply for Judicial Review* [1990] 1 HKLR 154.

[33] See §§92-93 of the Skeleton Submissions of Mr Dykes and Mr Tam.

[34] See §§94-96 of the Skeleton Submissions of Mr Dykes and Mr Tam.

[35] See §§97-98 of the Skeleton Submissions of Mr Dykes and Mr Tam.

[36] See §11 of Ms Law’s Skeleton Submissions.

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