

## Court dismisses judicial review application against SFC

14 Feb 2019

The Court of First Instance has dismissed a judicial review application brought by a SFC-licensed corporation and its responsible officer (applicants) against the Securities and Futures Commission (SFC) in connection with an investigation of a suspected market manipulation in the shares of a Japan-listed company.

During the investigation by the SFC and the Japanese Financial Services Agency and Securities and Exchange Surveillance Commission (Japanese regulators), the SFC used its statutory powers to compel the applicants to provide information and materials (compelled materials) under the Securities and Futures Ordinance (SFO).

The compelled materials were then provided to and used by the Japanese regulators in proceedings in Japan under international cooperation and mutual assistance arrangements and under the SFO.

The issues raised by the judicial review centred on (i) whether the compelled materials were unlawfully obtained by the SFC from the applicants and whether the SFC unlawfully provided them to the Japanese regulators; and (ii) whether the Japanese regulators used the compelled materials in criminal proceedings.

The applicants also claimed that section 181 of the SFO contravenes the Hong Kong Bill of Rights and is unconstitutional on the basis that it violates the privilege against self-incrimination.

The Secretary of Justice (SJ) intervened in the judicial review proceedings.

The Honourable Justice of Appeal Mr Zervos, in a judgment delivered on 11 February 2019, rejected the applicants' application as the various grounds for judicial review are not sustainable in light of the evidence and submissions of the SFC and SJ.

The Court found that:

- the proceedings commenced by the Japanese regulators against the applicants in Japan were civil in nature, i.e. non-criminal in character;
- the compelled materials were lawfully obtained by the SFC pursuant to its powers under the SFO and the materials were lawfully provided to the Japanese regulators;
- the privilege against self-incrimination has not been abrogated by section 181 of the SFO. The section is rationally connected with accomplishing the legitimate aim of ensuring that the financial markets of Hong Kong operate fairly and honestly. The nature and limitation of the section provides a measure that is no more than reasonably necessary for accomplishing this purpose, and a reasonable balance has been struck between the societal benefits of the section and any inroads that there may be into the privilege against self-incrimination;
- the judicial review application was made out of time and no satisfactory or sufficient explanation was provided for the delay to justify the grant of an extension of time; and
- the evidence of the SFC was comprehensive and compelling in addressing the complaints of the applicants.

Mr Thomas Atkinson, the SFC's Executive Director of Enforcement, said: "We welcome the court's decision. It reaffirms the SFC's statutory power to exchange information and intelligence with other securities regulators in appropriate circumstances as cross-boundary cooperation is of paramount importance for safeguarding the integrity of our markets and our hard-earned reputation as an international financial centre."

The applicants' were ordered to pay the SFC's costs in relation to these proceedings.

The SFC's investigation relating to the applicants is ongoing.

End

Note:

1. The judgment will be available on the [Judiciary's website](#) (Court Reference: HCAL 41/2016).

