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Court dismisses challenge to SFC's search warrant and provision of information to Mainland regulator

8 Dec 2017

The Court of First Instance has made a decision dismissing a challenge lodged by Mr Tang Hanbo against the search warrant obtained by the Securities and Futures Commission (SFC) for an ongoing investigation into suspected breaches of the Takeovers Code and suspected offences under the Securities and Futures Ordinance (Note 1).

Tang sought to challenge in a judicial review application that the search warrant issued by a Magistrate in July 2016 to search his residence and the subsequent SFC decision to transmit some of the materials seized from the execution of the warrant to the China Securities Regulatory Commission (CSRC).

He also argued that the SFC had informed the Magistrate the warrant was for investigating suspected breaches of Hong Kong laws and codes, but in fact the purpose was to assist the CSRC in its investigation of suspected breaches of Mainland laws.

The Hon Mr Justice Anthony Chan, in a decision delivered today, rejected Tang's case as inherently improbable and contrary to common sense and stated that the SFC's case is fully supported by the contemporaneous documents.

Mr Thomas Atkinson, the SFC's Executive Director of Enforcement, said: "The SFC welcomes the court's decision. The SFC is empowered by law to, in appropriate circumstances, exchange information and intelligence with other securities regulators. Cross-boundary cooperation is of paramount importance for safeguarding the integrity of our markets and our hard-earned reputation as an international financial centre."

Tang was ordered to pay the SFC's costs in relation to these proceedings.

The SFC's investigation is ongoing.

End

Note:

1. The judgment will be available on the [Judiciary's website](#) (Court Reference: HCAL 229/2016).

Page last updated : 8 Dec 2017

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法庭駁回就證監會搜查令及向內地監管機構提供資料的決定而提出的反對

2017年12月8日

原訟法庭已頒下判決駁回唐漢博（男）針對證券及期貨事務監察委員會（證監會）在一項仍在進行的調查中取得的搜查令而提出的反對，而該項調查是涉及《收購守則》的涉嫌違規行為及在《證券及期貨條例》下的涉嫌罪行（註1）。

唐在一宗司法覆核申請中，就2016年7月裁判官發出有關搜查其居所的搜查令，以及其後證監會將執行搜查令所獲取的部分材料轉交中國證券監督管理委員會（中國證監會）的決定提出反對。

他亦辯稱證監會曾告知裁判官，該搜查令的目的是調查涉嫌違反香港法律及守則的案件，但實際上卻是為了協助中國證監會就涉嫌違反內地法律而作出的調查。

陳健強法官在今天頒布的判決書中，以本質上不可能及有違常理為由駁回唐的個案，並指出證監會的個案能充分地得到反映當時情況的文件支持。

證監會法規執行部執行董事魏建新先生（Mr Thomas Atkinson）表示：“證監會歡迎法庭的判決。法律賦權證監會，在適當的情況下，可與其他證券監管機構交換資料及情報。跨境合作對維護市場的廉潔穩定，以及香港作為國際金融中心這得來不易的聲譽，至為重要。”

唐被命令繳付證監會於有關法律程序所涉的費用。

證監會的調查仍在進行中。

完

備註：

1. 判決書將載於[司法機構網站](#)（法院參考編號：高院憲法及行政訴訟2016年第229號）。

最後更新日期：2017年12月8日

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 229 OF 2016

BETWEEN

TANG HANBO	Applicant
and	
THE SECURITIES AND FUTURES COMMISSION	1 st Respondent
A MAGISTRATE SITTING AT THE EASTERN MAGISTRACY	2 nd Respondent

Before: Hon Anthony Chan J in Court

Date of Hearing: 15 November 2017

Date of Decision: 8 December 2017

DECISION

1. This is an application for judicial review. By his Amended Form 86, the Applicant (Tang) seeks to quash :

(1) A search warrant dated 27 July 2017 (Warrant) which the 1st Respondent (SFC) had obtained to search his residence and to seize relevant records and documents;

(2) The decision of the SFC to transmit materials seized during the search of Tang's residence (Search) to the China Securities Regulatory Commission

(CSRC).

Tang's case

2. Tang contends that the Warrant had been obtained by material non-disclosure and a misleading description of the true purposes behind it.
3. The SFC investigator who applied for the Warrant, Mr Pau Siu Ming (Pau), informed the Magistrate that the Warrant was for investigating suspected breaches of Hong Kong laws and regulatory codes in relation to two Hong Kong listed companies. In fact, it was primarily or at least significantly for assisting the CSRC in their investigation of alleged breaches of Mainland laws in relation to Mainland stocks.
4. Tang became aware of this after materials seized from the Search were deployed by the CSRC against him in Mainland regulatory proceedings.

Issue

5. There is no dispute that material non-disclosure would render the Warrant liable to be set aside by the court. Further, it is not controversial that if in fact the primary or a significant purpose of the application for the Warrant was to assist the CSRC in their investigation, it was a material fact which the Magistrate should have been told (see *Keen Lloyd Holdings Ltd v Commissioner of Customs and Excise* [2016] 2 HKLRD 1372).
6. The issue in this application is a narrow one of fact, namely, whether Tang can discharge his burden of proving that the Search was primarily or at least significantly to assist CSRC's investigation and not the SFC's own investigation, contrary to its professed purpose which Pau had represented to the Magistrate.
7. There is no independent ground advanced to challenge the transmission of materials to the CSRC. That challenge is based on the same illegality which Tang says had tainted the Warrant.
8. It should be noted that Tang's case is that the non-disclosure was deliberate. Although in the course of their submissions, both of Tang's leading counsel, Mr Chan SC and Mr Dykes SC, who appeared with Mr Li and Mr Chow, might have tried to temper their case by suggesting that Pau had made a mistake in not informing the Magistrate of the material facts, there can be no escape that, in light of the unequivocal evidence from 3 of the responsible officers of the SFC, Tang is challenging the integrity of these deponents.
9. With respect, the arguments made on behalf of Tang are primarily forensic analysis of various parts of the contemporaneous records.

10. I shall proceed to set out the uncontroversial background, and in the analysis which follows I shall deal with the contemporaneous records and address the arguments advanced on behalf of Tang.

Background

11. Tang is a PRC national resident in Hong Kong. In March 2016, the SFC started an investigation involving him and the trading of shares in Aluminium Corporation of China Ltd (Chalco), a company listed on the Stock Exchange of Hong Kong (SEHK).

12. The investigation relating to Chalco led to the identification of Tang and his wife (Li) as traders in the shares of 2 other companies listed on SEHK, namely, Heng Xin China Holdings Ltd (Heng Xin) and Tian Ge Interactive Holdings Ltd (Tian Ge).

13. The SFC became concerned that the trading by Tang and Li in Heng Xin and Tian Ge during the period from 1 August 2015 to 24 June 2016 might have breached the Hong Kong Codes on Takeovers and Mergers and Share Buybacks, the requirements of disclosure of interests under Part XV of the Securities and Futures Ordinance, Cap 571 (SFO) and s. 300 of the SFO.

14. At the same time, the CSRC was investigating Tang and one Mr Wang Tao (Wang) for alleged market misconduct in the Mainland in relation to trading in the shares of Zhejiang China Commodities City Group Co Ltd (Zhejiang China), a company listed on the Shanghai Stock Exchange, during the period from 4 February 2016 to 26 April 2016.

15. By a document dated 14 June 2016, the CSRC sent a request for investigatory assistance to the SFC (1st Request). The Request was made pursuant to :

(1) The International Organization of Securities Commissions Multilateral Memorandum of Understanding (MMoU) which provided for mutual investigatory and other assistance and exchange of information between securities regulators^[1].

(2) The Memorandum of Understanding between the CSRC and the SFC on Strengthening of Regulatory and Enforcement Cooperation under Shanghai-Hong Kong Stock Connect (MoU), which established an enhanced platform for the CSRC and the SFC to provide mutual assistance to combat cross-boundary trading crime and misconduct in both the Hong Kong and Shanghai Stock Exchange.

16. By the 1st Request, CSRC sought the assistance of SFC to obtain various information

in Hong Kong, including “IP(s) through which each order was placed under authorization, MAC address[2], serial number of the hard-disc, trading journals of executed trades”.

17. The 1st Request was initially dealt with by Mr Jimmy Kwok Ho Chan (Chan), who was and is a solicitor and was at the material times a director of the Enforcement Division (ENF) of the SFC, and head of the team responsible for international enforcement cooperation with overseas and Mainland regulators. In due cause, Chan passed the Request to Mr Tong Hon Fai (Tong), whose team within the ENF was responsible for cross-border assistance.

18. On 15 June 2016, Tong issued a Direction to Investigate for the purpose of rendering assistance to CSRC and assigned the case to one of his managers, Mr Tam Wai Ho. Tong then learned that another team within the ENF was looking at Tang’s trading in Heng Xin and Tian Ge. On 24 June 2016, a decision was made to reallocate the SFC’s own investigation to Tong’s team and for Mr. Tong’s team to commence formal investigation. On the same day, Tong issued another Direction to Investigate for SFC’s own case and assigned it to another one of his managers, Pau.

19. Chan, Tong and Pau all provided detailed evidence for this application.

20. The relevant events between the 24 June 2016 and the application for the Warrant will be dealt with in the Analysis below.

21. On 27 July 2016, Pau went to the Eastern Magistracy and obtained the Warrant. Tang says that Pau did not mention to the Magistrate anything about a joint investigation with the CSRC, the CSRC’s interest in him and in the materials to be seized, or any cross-border element to the case. There is no dispute that no such things were said to the Magistrate.

22. The Magistrate granted the Warrant which referred to reasonable grounds to suspect that there were materials located in Tang’s residence which were or might be relevant to the SFC’s investigation into the Heng Xin and Tian Ge matters during the period from 1 August 2015 to 24 June 2016.

23. The Warrant authorized the employees of the SFC as follows :

“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 record or document including but not limited to, any records or documents relating to any securities trading activities, any records or documents relating to the filing of Disclosure of Interests notices, any accounting records, any account opening forms, any documents relating to transfer or receipt of funds, any bank records, any registers, any company documents or books and records, any records or data and any information processed or stored in computers or mobile phones or other electronic devices, any electronic devices in which any such records or documents are stored and any emails, correspondence and records of communication found on the Premises which any employee of the [SFC] or any Police Officer has reasonable cause to believe may be required to be produced under Part VIII of the [SFO].”

24. On 28 July 2016, Pau and a team of SFC officers executed the Warrant. The execution of the Warrant resulted in the seizure of, inter alia, 7 notebook computers and some mobile phones.

25. In the course of the Search, and in the present of Tang's lawyer, Pau asked him to meet with CSRC officers, who had come to Hong Kong on 26 July 2016. After Tang refused and having left the premises, Pau later returned on Tong's instruction to the premises to try to get Tang to speak with the CSRC officers on the phone. Tang again refused. There is no argument that these requests by SFC were made on voluntary basis.

26. During the Search, Pau also kept Tong informed by telephone. On his part, Tong updated the CSRC officers about what had been seized and what appeared to be in the computers.

27. Tang subsequently learned that on the day of the Search, CSRC officers went to Wang's former office and to his sister's home to look for him.

28. The SFC arranged for forensic examination of the seized computers and mobile phones in mid-August 2016. After the discovery of materials which appeared to be relevant to CSRC's investigation, they were informed and arrangements were made for CSRC officers to come to Hong Kong to inspect the information[3]. This took place on 12 September 2016.

29. There was a 2nd Letter of Request from the CSRC to the SFC dated 23 August 2016 in relation to the former's investigation over Tang and Wang. By that Request, the SFC was asked to obtain further information from securities companies.

30. On 9 September 2016, the CSRC sent to SFC a 3rd Letter of Request by which the former request the latter to contact Tang with the view to arranging an interview.

31. By a letter dated 14 September 2016, the CSRC made a 4th Request seeking the transmission of some of the seized materials (4th Request) to it. The parts of that letter which are relied upon by Tang are set out below :

“关于第四次协助调查“唐汉博”账户组涉嫌操纵市场案的函

...

三、需要协助的具体事项

请贵会将前期协助我会调取的相关资料移交我会 并由我会赴港调查组带回内地。证据资料清单详见附件。

...

证据资料清单

...

7、搜查现场照片(包括电脑MAC 地址信息图片、券商系统登陆界面、借条信息、银行卡及转账记录、手机联系人信息、微信讯息等)。

8、电脑、手机取证报告。

9、香港证监会调查人员关于搜查经过的情况说明。”

32. Under cover of a letter of the same day, the SFC forwarded to CSRC the requested materials.

33. On 16 and 18 November 2016, the CSRC issued 2 Notices entitled “Advance Notification of Administrative Penalty” to Tang about the Mainland matter and proposed to confiscate from him profits of RMB240 million and fine him RMB800 million. The terms of the 1st Notice referred to the SFC’s search of Tang’s residence and materials seized therefrom.

34. On 2 March 2017, after a trial pursuant to the 2 Notices, both Tang and Wang were convicted and penalties totalling RMB1.2 billion were imposed by the CSRC in the 2 cases.

Analysis

35. I agree with Mr Yu SC, who appeared with Mr Chang for the SFC, that there was no reason for senior officers of the SFC to have deliberately misled the Magistrate by withholding from her the true purpose of the Warrant when they were entitled to render assistance to the CSRC: see *HKSAR v Lee Ming Tee & SFC* (2003) 6 HKCFAR 336 at para 72.

36. It is of course the duty of the court to evaluate the SFC’s evidence in light of Tang’s contentions. However, for the reasons set out below, I am unable to find substance in such contentions. Tang’s case is inherently improbable, contrary to common sense and against the weight of a number of contemporaneous documents.

37. I start with a few references to the MMoU and the MoU. Under the former, the regulatory authorities would provide each other with the “fullest assistance permissible” (para 7(a)). Requests for assistance would be made in writing (para 8(a)), but in urgent circumstances the requests might be effected by other means provided that the communication was confirmed through an “original, signed document” (para 8(c)).

38. Under the MoU, CSRC and SFC would alert one another immediately to any information concerning suspected misconduct in the other’s market once it was identified

(para 3). Each of them would notify the other when it commenced an investigation with a cross-boundary element (para 4). In respect of significant and urgent cases relating to both jurisdictions, or where the suspects, witnesses or evidence were located in both jurisdictions, the parties might commence a joint investigation. Once a joint investigation was commenced, a joint task force should be set up. The joint task force should normally convene an initial coordination meeting (para 6). When engaging in cross-boundary enforcement cooperation, the parties must comply with the existing laws and regulations in their respective jurisdiction. The parties would actively facilitate, provide support and coordination with each other in respect of the use of information (para 7).

39. The SFC only became involved with CSRC's investigation pursuant to the 1st Request.

40. It appears from an email from Chan to his superiors dated 29 June 2016 (Chan Email) that the case being investigated by CSRC was one of their most important cases. It was the first case involving manipulation via the Stock Connect, and CSRC would like to be given SFC's full assistance^[4]. Tong's team had been treating the CSRC matter as a top priority.

41. The information sought under the 1st Request (and the 2nd Request) was to be obtained from third parties. In particular, the computer related information, which was the focus of much of Mr Chan's submissions, was to be obtained from securities companies and internet service providers. It is important to note that para 5 of the Request stated that if CSRC required the SFC's assistance to conduct searches at premises habitually resided by Tang or Wang to obtain information regarding the placing of orders, it would write separately to the SFC.

42. It is the SFC's evidence that even though it had the power to conduct search operations as part of the assistance to overseas regulators, the SFC would require them to make a written request, especially in view of the advance preparation and resources required. Such evidence is consistent with common sense. It is undisputed that the CSRC had never made any written request to the SFC to conduct a search operation to assist with its investigation.

43. On behalf of Tang, it is alleged that there was an oral request by CSRC for a search and the Warrant was obtained for that purpose. I am unable to see any trace of such a request in any of the documents before the court. It would have been extraordinary for a request to search Tang's residence to be made willy-nilly without any written confirmation.

44. One of the forensic points made was that the 1st Request (dated 14 June 2016) bore a receipt chop dated the 16 June 2016, but the SFC acted on it on the 15 June 2016.

Therefore, the SFC must have acted on an oral request. It is very difficult to accept the submission, especially in the absence of support in any of the other documents. In this day and age, it is hardly unusual to have received a document electronically which preceded the receipt of the hard copy. Hence, the later date on the latter (see also para 8(c) of the MMoU referred to in para 37 above).

45. The evidence of Chan, supported by Tong, is that the 1st Request was received on 14 June 2016. As an example, page 433 of Bundle B2 of the Hearing Bundles is a letter from SFC to the CSRC which referred to the transmission of materials via email.

46. On 29 June 2016, there was a meeting between the two regulators (Meeting). According to the evidence of Chan: “Since [Tang] was a common suspect for both the [SFC’s] own investigation and the CSRC’s investigation, in June 2016 I proposed a meeting between the two regulators to update the CSRC about our response to [the 1st Request] and to strengthen our cooperation in the [Tang] case in accordance with the [MoU].”

47. Considerable reliance is placed by Tang on the agenda for this meeting (Agenda). The document referred to the following :

“双方就执法协作安排沟通交流

1、双方介绍各自案件工作进展

(1) CSRC介绍内地案件调查情况。

(2) SFC介绍在港案件调查情况。

2、下一步工作安排研究

(1) 在港询问、搜查、冻结等执法手段使用问题。

(2) 提供证据的形式和效力问题。

(3) 外罚执行的问题。

(4) 其他。”

48. It was submitted that the Agenda bore a great similarity to paras 6 and 7 of the MoU (see para 38 above), and that it could be inferred from what took place at the Meeting and the related documents that there was indeed a joint task force for the investigation of Tang. Before I analyse this submission, I shall set out the related documents.

49. Firstly, there is a set of short and very cryptic Chinese handwritten notes of the Meeting by Chan (Notes). The Notes referred to “[Tong]: 95% completed”, which was a reference to the SFC having obtained 95% of the information sought under the 1st Request. There were also what appears to be some propositions recorded with arrows, including

“→Joint investigation”; “→Interviewing the target →At the same time”; and “→To publicise information at the same time”.

50. Secondly, there is the Chan Email which provided a summary of the Meeting. Para 5 of that document stated: “We told (sic) Tang is also a suspect in one of our cases and that we are arranging a search operation of Tang’s residential address. CSRC officers may not be able to attend the search but they are welcome to come to our office so that we can communicate with them.” Para 7 recorded that CSRC raised the issues of notarisation of evidence and expert evidence. Para 7(c) stated: “Interviewing Tang – they would like us to arrange an interview with Tang. Tang is a Mainlander but resides here now.” Para 8 recorded CSRC’s gratitude for SFC’s efficient response to their request and that the two regulators “can make this case a perfect example of our good cooperation”.

51. Thirdly, CSRC had produced a set of minutes for the Meeting (Minutes). The document recorded a suggestion by SFC that “the case could be investigated jointly by the two regulators”. Under section II, “Work arrangements for the next step forward”, the issues of notarisation of evidence and expert evidence were discussed (paras (1) and (2)). In addition, CSRC hoped that the SFC would assist in interviewing the person(s) concerned in this case in Hong Kong, and SFC explained the practical difficulties with an involuntary interview (para (3)).

52. Under para (4), “Assistance in a search in Hong Kong”, CSRC said that “it hoped that SFC could assist in a search in Hong Kong and consulted the SFC about the conditions for rendering assistance in a search. The SFC expressed its willingness to coordinate with the CSRC on a search in Hong Kong. As the SFC had established a case on [Tang], after reaching a consensus with the CSRC, [the SFC] could apply to court for a search warrant as soon as possible to carry out a search ... and to seize crucial evidence such as computers, mobile phones, etc.”

53. Under para (5), “Interview of the person(s) concerned immediately after the search in Hong Kong”, CSRC asked “whether [the SFC] could interview the person(s) concerned immediately after the search in Hong Kong. The SFC expressed its willingness to try to assist the CSRC in interviewing the person(s) concerned immediately after the search. In Hong Kong, interviewing the person(s) concerned was subject to strict legal procedures. If the person(s) concerned was present during the search and willing to be interviewed, the interview could proceed immediately ...”.

54. On proper analysis, the 4 contemporaneous documents, the Agenda, the Notes, the Email and the Minutes, were consistent. They recorded, as one may expect, the discussions between two regulatory authorities over the investigations of a common subject. It should

be added that, given that it was the first case of the kind, it is unsurprising for there to be such a meeting.

55. What would be surprising would be the formation of a joint task force, or an agreement reached to conduct the investigations jointly or to conduct a joint search without any explicit record of the same. In particular, Chan would probably have to obtain approvals from his superiors about such important decisions, and he would have reported any such agreements reached at the Meeting. The absence of any such report in the Email strongly refutes the suggestion of the formation of a joint task force or the agreement to conduct a joint search.

56. Mr Chan was asked by the court why the Minutes should be read as containing the agreements reached between SFC and the CSRC as opposed to the discussions which took place at the Meeting. It was submitted that the court should consider what took place after the Meeting. I shall deal below with the Search and the important subsequent events. However, the contents of 4 contemporaneous documents, in particular the Minutes, are more consistent with an exploratory discussion between the two regulatory authorities where they exchanged information on their respective investigations.

57. Further, as pointed out by Mr Yu, the only commonality between the two investigations was that Tang was the subject of SFC's investigation and one of the subjects of that of CSRC. It should also be noted that there was no joint task force formed (see para 38 above). Mr Yu also placed considerable emphasis on Pau's Briefing Note (BN) to the search team to refute any suggestion of joint investigation. To this document I now turn.

58. In the BN, under "Case background", there was one paragraph headed "More background information on TANG" which referred to the Mainland matter. Only limited information was provided. The readers would have a general idea that the Mainland matter related to trading in Zhejiang China and the SFC was providing assistance to CSRC. Apart from that paragraph, the BN was entirely about SFC's own investigation. Importantly, the BN did not task the search team to look for evidence to assist CSRC's investigation^[5]. In my view, if the Warrant was primarily or significantly for the investigation of CSRC, it is inconceivable that the team was not briefed to look for evidence relevant to CSRC's investigation.

59. The fact that the evidence (or part of the evidence) produced in the Search was relevant to CSRC's investigation and later supplied to it under the 4th Request cannot by itself be used to justify Tang's serious allegations. I agree with Mr Yu that such allegations are based on hindsight.

60. I believe that the 2nd, 3rd and 4th Requests militate against the suggestion of joint investigation or joint search, but are consistent with the SFC's case that it was conducting its own investigation and at the same time trying to cooperate with CSRC on their investigation.

61. Pau's evidence is that had there been a request from CSRC to carry out a search for their investigation, he would have included full details of its investigation, SFC's powers to assist the CSRC and the documents and records that SFC would be searching for in the information provided to the Magistrate, and the scope of the Warrant would have been expanded to cover both the SFC's investigation and that of the CSRC. Pau also confirmed that all the items seized under the Warrant were or might be relevant to the SFC's investigation.

62. It is not disputed that under the law the SFC was entitled to assist CSRC in carrying out a search of Tang's home. I am unable to see why the SFC (or Pau) would conceal what they could legitimately do from the Magistrate, and there is no viable explanation put forward for the alleged concealment. I see no reason not to accept the evidence of Pau.

63. Mr Chan also referred to: (a) the presence of CSRC officers at the office of the SFC during the Search; (b) after Pau reported to him by telephone about the Search, Tong updated the CSRC officers about what the team had seized and what appeared to be in the computers (see para 26 above); (c) the requests made to Tang to make contact with CSRC officers (para 25 above); and (d) the actions taken by CSRC in the Mainland to look for Wang on the day of search (para 27 above).

64. The presence of the CSRC officers in Hong Kong is consistent with their wish to interview Tang. The evidence is that Tang had agreed with the CSRC to attend an interview, but he could not later be found. The requests made on behalf of CSRC were above board and made in the presence of Tang's lawyer.

65. Mr Chan submitted that an interview of Tang by CSRC immediately after the Search must be about the Search. I see no reason to draw that inference, which appears to be contrary to common sense because one would expect the CSRC to have to digest the materials yielded in the Search before using them.

66. It should be noted that that in the course of the Search the SFC had served an interview notice on Tang. That notice referred only to the SFC's investigation over share dealings in Heng Xin and Tian Ge (the interview was refused by Tang after consulting his lawyer). This lends support to the SFC's case that the Search was solely for their own investigation.

67. I see nothing sinister in providing information about the Search to CSRC. Chan's evidence referred to the sharing of intelligence between the regulatory authorities[6]. In any case, it is doubtful if the information could have been immediately used or was of much value to CSRC without proper examination and, where applicable, forensic analysis.

68. As for the Mainland actions taken by CSRC against Wang, firstly, CSRC was informed in advance by the SFC about the Search. Secondly, these were operational matters for the CSRC. There is no good reason for the court to try to second-guess the reason(s) behind the operational matters. Besides, given the connection between Tang and Wang, one can see that the CSRC might have wanted to preserve the element of surprise by acting at the same time as the SFC.

69. Finally, I do not believe that the 4th Request suggested that there was any joint investigation or joint search. The 4th Request, in conjunction with the attached list of materials requested, referred to 2 categories of materials, namely, those previously requested and some of the materials obtained in the Search.

70. On the evidence before the court, I must agree with Mr Yu that the SFC's case is fully supported by the contemporaneous documents and inherent probabilities.

Conclusions

71. For the above reasons, Tang's case has not been made out. This application is refused. I make an order nisi that the costs of and occasioned by the application be to the SFC with a certificate for 2 counsel.

72. I am grateful to counsel for their assistance.

(Anthony Chan)

Judge of the Court of First Instance
High Court

Mr Edward Chan SC, Mr Philip Dykes SC, Mr Laurence Li and Mr Tony Chow, instructed by C L Chow & Macksion Chan, for the Applicant

Mr Benjamin Yu SC and Jonathan Chang, instructed by the Securities and Futures Commission, for the 1st Respondent

Attendance of the Department of Justice, for the 2nd Respondent, was excused

[1] This is reflected in s.186 of the SFO which empowers the SFC to exercise its investigatory powers to obtain information and documents requested by non-Hong Kong regulators, and s.378 of the SFO which allows the SFC to share confidential information and documents in its possession with such regulators.

[2] A unique electronic identifier of each computer.

[3] There is a suggestion made in para 35 of Tang's Skeleton Submissions that various information of the computers seized in the Search was supplied to CSRC prior to the forensic examination. I agree with the SFC that the submission is based on a misunderstanding of its evidence.

[4] According to a press announcement of CSRC dated 10 March 2017, it was the first case of cross-border investigation of market misconduct.

[5] See also Pau's evidence at A/tab 14/145, §41.

[6] Bundle A/Tab 103/§39.

HCAL 229/2016

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 229 OF 2016

BETWEEN

TANG HANBO	Applicant
and	
THE SECURITIES AND FUTURES COMMISSION	1 st Respondent
A MAGISTRATE SITTING AT THE EASTERN MAGISTRACY	2 nd Respondent

Before: Hon Anthony Chan J in Chambers

Date of Hearing: 14 November 2017

Date of Decision: 14 November 2017

DECISION

1. This is an eleventh hour application for leave to cross-examine two of the deponents of the 1st Respondent (SFC) at the hearing of the Applicant's (Tang) application for judicial review (JR) which is to begin tomorrow.
2. The Summons in question was only filed on 1 November 2017. There is no indication in the Summons on the parameters of the proposed cross-examination.
3. In the JR, Tang seeks to challenge: (1) a search warrant dated 27 July 2016 (Warrant) issued by a Magistrate which allowed the SFC to search his residence; and (2) the

subsequently transmission by SFC of some of the materials seized from the execution of the Warrant to China Securities Regulatory Commission (CSRC).

4. The ground of challenge in the JR is that the SFC investigator had informed the Magistrate that the Warrant was for investigating suspected breaches of Hong Kong laws and codes in relation to a Hong Kong listed company, but in fact it was primarily or at least significantly for assisting CSRC in their investigation of alleged breaches of Mainland law in respect of Mainland stocks.

5. Given the imminence of the hearing of the JR, it is necessary to deal with this application swiftly. It must be mentioned that this application has taken up the precious time which this court has in preparing for the said hearing. I shall provide my reasons for the determination of this application in succinct terms.

6. Firstly, the issue of potential factual disputes was raised by this court with Tang's team of counsel at the hearing of the application for leave to apply for JR on 2 May 2017, and the court queried whether it was more appropriate to ventilate Tang's grievances in a private action when the Warrant had been executed and the transmission of materials already taken place and resulted in penalty imposed by CSRC on Tang. However, senior counsel repeatedly assured the court that there would be little scope for factual dispute.

7. Whilst it is right that Tang's legal advisors did not have sight of the evidence of the SFC until a later stage when it was filed (7 August 2017), it is equally right that Tang had been forewarned about the potential factual conflicts. I fail to see any valid excuse for bring this application at the 11th hour.

8. It is disputed that if this application is allowed, the hearing of the JR inevitably would have to be adjourned and re-fixed.

9. Secondly, I accept that there is prejudice to the SFC (more accurately, to public interest) caused by the delay in this application if it is allowed. The reason is that on 30 August 2017 the SFC had agreed with Tang to put on hold the use of the materials seized in the execution of the Warrant in the intended interviews with Tang and his wife. Consequently, SFC's investigation of Tang for breaches of Hong Kong laws and codes is hampered. The agreement was reached when the hearing of the JR was fixed. Any delay in the resolution of the JR would be detrimental to public interest.

10. Thirdly, it is trite that cross-examination in a JR will only be ordered in the most exceptional cases: see *Dembele Salifou v Director of Immigration* [2015] 4 HKC 297 at §11.

11. Further, I agree with the dicta of Mr Justice Reyes in *Yue Yuen Marketing Co Ltd v Commissioner of Inland Revenue* [2012] 4 HKLRD 761 at §45 that the court should not allow any cross-examination in a JR without well-defined boundaries. Undisciplined cross-examination is unhelpful to the court, and an applicant is not allowed to flesh out a speculative case by way of cross-examination.

12. There is no well-defined boundaries for the cross-examination in question. The submissions made on behalf of Tang suggest that the court should not accept what was stated in the documents produced by the SFC without cross-examination. In blunt terms, the suggestion is that they might have been generated to cover the tracks of the officers in question. Cross-examination along this line would be very extensive, involving matters of nuts and bolts.

13. I am unable to accept that there are real or substantial inconsistencies and contradictions in the evidence which justify this application. The criticisms advanced in support of this application are largely forensic analysis of parts of the evidence of the SFC. I agree with the submissions of the SFC that the evidence must be evaluated as a whole and in its proper context. There are ample contemporaneous documents which will assist the court to determine the merits of Tang's case.

14. This application must be properly justified. The court looks at the substance of the assertions that the deponents are untruthful. The exercise is not one of combing through the evidence with a microscope and say, eg, that X had failed to mention in his evidence the presence of Y^[1]. There can be a number of explanations for the omission. Unless there is adequate reason to believe that the omission was something sinister, cross-examination would only serve the purpose of a fishing exercise.

15. For these reasons, this application is declined. I make an order nisi that the costs of and occasioned by it be paid by Tang.

(Anthony Chan)

Judge of the Court of First Instance
High Court

Mr Edward Chan SC, Mr Laurence Li and Mr Tony Chow, instructed by C L Chow & Macksion Chan, for the Applicant

Mr Benjamin Yu SC, instructed by the Securities and Futures Commission, for the 1st
Respondent

[\[1\]](#) See para 24 of Tang's Submissions on cross-examination.