

**IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL**

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IN THE MATTER OF the Decisions made by the Securities and Futures Commission under sections 204, 205 and 208 of the Securities and Futures Ordinance, Cap. 571

AND IN THE MATTER OF section 217 of the Securities and Futures Ordinance, Cap. 571

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BETWEEN

MS LEUNG YUK KIT

Applicant

and

SECURITIES AND FUTURES COMMISSION

Respondent

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Tribunal: Mr Ian Charles McWalters, Chairman

Date of Ruling: 25 April 2022

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**RULING**

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*Introduction*

1. By written notice dated 12 October 2021, Ms Leung Yuk Kit (“the applicant”) applied to the Securities and Futures Appeals Tribunal under section 217(1) of the Securities and Futures Ordinance, Cap 571 (the “SFO”) to review specified decisions<sup>1</sup> of the Securities and Futures Commission (“SFC”) contained in two Notices it sent to her stockbroker, Kingkey Securities Group Limited (“Kingkey”). The first Notice, dated 18 February 2021, the content of which was revised on 16 March 2021, was issued under sections 204 and 205 of the SFO. It imposed prohibitions and requirements on Kingkey in respect of its dealing with specified client accounts.<sup>2</sup>

2. The applicant then applied to the SFC to withdraw, substitute or vary the revised February Notice and, on 21 September 2021, the SFC declined to do so in a Notice that the SFC issued on that date under section 209(3) of the SFO. The second decision the applicant seeks to review is the decision of the SFC as set out in its Notice of 21 September 2021, not to withdraw, substitute or vary its revised February Notice.

3. The applicant is a member of the public who between 11 September 2020 and 26 November 2020, purchased and subsequently sold the shares of a company listed on the Main Board of the Stock Exchange called Macau E&M Holding Limited (“Macau E&M”). After the sale of the shares was concluded the proceeds from the sale were deposited into the applicant’s client account with Kingkey.

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<sup>1</sup> “Specified Decision” is defined by section 215 of the SFO, as read with Schedule 8 of the ordinance.

<sup>2</sup> There is a legal issue as to whether the applicant has the standing under section 217 to review the first notice, but that legal issue is not relevant to this ruling.

A 4. The effect of the revised February Notice and the Notice of  
B 21 September 2021 was to freeze monies held by Kingkey in the client  
C account of the applicant. These monies could not then be disbursed by  
D Kingkey to the applicant and they remain frozen in the applicant's client  
E account with Kingkey to this day.

F *The preliminary legal point*

G 5. A legal point has arisen in respect of the powers of the SFC under  
H the SFO and the parties agree that it is desirable that this legal issue be  
I resolved prior to embarking upon a full hearing of the Application for Review.  
J The parties have agreed that I may determine this preliminary legal point alone  
K and for this purpose have placed before me a set of Agreed Facts<sup>3</sup>.

L 6. The means by which the SFC has purported to freeze the  
M applicant's accounts with Kingkey is by exercising the powers granted to it  
N by sections 204 and 205 of the SFO, to which it gains access by section 207.  
O In a nutshell, the legal point raised by those acting on behalf of the applicant,  
P is an assertion that these provisions of the SFO cannot be used against a client  
Q of a corporation licensed by the SFC but can be used only against the licensed  
R corporation when that corporation is suspected of having committed or been  
S involved in particular contraventions of the SFO.

T 7. The question of law which has been drafted and agreed by the  
U parties as arising from the arguments advanced by the applicant, is as follows:

V "Whether on the true and proper construction of sections 204 and 205 of the  
Securities and Futures Ordinance (Cap 571)("SFO"), the Securities and  
Futures Commission's power to impose prohibitions and/or requirements

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<sup>3</sup> Agreed only for the purpose of the hearing of the preliminary issue.

on a licensed corporation under the two sections is exercisable as against the account of a particular client with the licensed corporation on the basis that the client (as opposed to the licensed corporation) is suspected of having committed or been involved in one or more instances of market misconduct under Part XIII of the SFO, offences under Part XIV of SFO, and/or breaches of Part XV of the SFO.”

*The Agreed Facts*

8. The facts which the parties have agreed for the purpose of my determination of this legal issue are as follows:

- “1. Kingkey Securities Group Limited (“**Kingkey**”) is a corporation licensed under the Securities and Futures Ordinance (Cap 571) (“**SFO**”) to carry on Type 1 and Type 4 regulated activities (dealing in securities and advising on securities).
2. Ms Leung Yuk Kit (“**Ms Leung**”) is a member of the public. She is not a licensed representative accredited to a licensed corporation under the SFO. She is a client of Kingkey, holding a securities account no. M02217 (the “**Account**”).
3. The Securities and Futures Commission (“**SFC**”) has not made any allegation of wrongdoing against Kingkey in either:
  - 3.1 the notice issued to Kingkey pursuant to sections 204 and 205 of the SFO (“**1<sup>st</sup> Notice**”) and the accompanying statement of reasons specifying the reasons for imposing the 1<sup>st</sup> Notice dated 18 February 2021 (“**1<sup>st</sup> SOR**”); or
  - 3.2 the notice issued to Ms Leung under section 209(3) of the SFO (“**2<sup>nd</sup> Notice**”) and the accompanying statement of reasons specifying the reasons for the refusal of her application made under section 208 of the 21 September 2021 (“**2<sup>nd</sup> SOR**”).
4. On 11 September 2020, the shares of Macau E&M Holding Limited (“**Macau E&M**”, stock code: 1408) were listed on the Main Board of The Stock Exchange of Hong Kong Limited at the offer price of HK\$1 per share.
5. Ms Leung subscribed for 4,900,000 Macau E&M shares through her Account in September 2020.

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B	6. On 24 November 2020, Mr Leung sold 900,000 of her Macau E&M shares at an average price of HK\$4.4578.	B
C		C
D	7. On 26 November 2020, Macau E&M's share price dropped to close at HK\$0.79.	D
E	8. On the same day, Ms Leung sold the remaining 4,000,000 Macau E&M shares at an average price of HK\$0.83.	E
F	9. On 18 February 2021, the SFC issued the 1 <sup>st</sup> Notice to Kingkey, pursuant to which Kingkey was, <i>inter alia</i> :	F
G		G
H	9.1 prohibited from disposing of or dealing with, or assisting, counselling or procuring another person to dispose of or deal with, any assets in any way in 18 of its client accounts (" <b>Kingkey Client Accounts</b> ") (one of which was the Account) up to the specified restriction amount listed in the table in the 1 <sup>st</sup> Notice, including:	H
I		I
J	9.1.1. entering into transactions in respect of any securities;	J
K	9.1.2. processing any withdrawals or transfers of securities and/or cash on the instructions of any authorized person of the Kingkey Client Accounts or by any person acting on their behalf;	K
L		L
M	9.1.3. disposing of or dealing with any securities and/or cash on the instructions of any authorized person of the Kingkey Client Accounts or by any person acting on their behalf; and/or	M
N		N
O	9.1.4. assisting another person to dispose of any relevant property or deal with any relevant property in a specified manner; and	O
P	9.2 required to notify the SFC immediately upon receipt of any instruction from any authorized person of the Kingkey Client Accounts, and/or by any person acting on their behalf, regarding:	P
Q		Q
R	9.2.1. any request to withdraw or transfer any securities and/or cash from the Kingkey Client Accounts; and/or	R
S	9.2.2. any requests to dispose of or deal with any securities and/or cash which concern those assets subject to the prohibitions in §9.1 above.	S
T		T
U	10. Insofar as Ms Leung was concerned, the specified restriction amount in respect of the Account was HK\$4,012,000 (" <b>Restriction Amount</b> "), being	U
V		V

A the gross proceeds (before the deduction of stamp duty, transaction levy,  
B trading fees, brokerage and other charges) for the sale of her 900,000 shares  
C in Macau E&M on 24 November 2020.

D 11. All of the reasons stated in the 1<sup>st</sup> SOR relate to the alleged conduct of  
E Ms Leung and other traders in the shares of Macau E&M, some of whom  
F were also clients of Kingkey. No suggestion has been made by the SFC in  
G the 1<sup>st</sup> Notice or the 1<sup>st</sup> SOR that Kingkey has acted in any inappropriate  
H manner.

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F 14. On 3 March 2021, the SFC received a letter from Ms Leung's former  
G solicitors, Shum & Co Solicitors ("**Shum & Co**"), whereby Ms Leung gave  
H written notice under section 208(1) of the SFO and requested that the SFC  
I withdraw, substitute or vary the prohibitions and/or requirements imposed  
J by the 1<sup>st</sup> Notice ("**208 Application**").

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I 18. On 21 September 2021, SFC wrote to Ms Leung enclosing the 2<sup>nd</sup> Notice to  
J refuse her 208 Application and the 2<sup>nd</sup> SOR specifying the reasons for  
K refusing the 208 Application. As with the 1<sup>st</sup> SOR, all of the reasons stated  
L in the 2<sup>nd</sup> SOR relate to the alleged conduct of Ms Leung (and other traders  
M in the shares of Macau E&M) and none of the reasons relate to any conduct  
N of Kingkey."

### L *The legislation*

M Sections 204 and 205 provide:

#### N "**204. Restriction of business**

- N (1) Subject to section 207, the Commission may by notice in writing—
- O (a) prohibit a licensed corporation from—
    - P (i) entering into transactions of a specified description or other than  
Q of a specified description, or entering into transactions in  
R specified circumstances or other than in specified circumstances,  
S or entering into transactions to a specified extent or other than to  
T a specified extent;
    - U (ii) soliciting business from persons of a specified description or  
V from persons other than of a specified description;
    - (iii) carrying on business in a specified manner or other than in a  
specified manner;
  - (b) require a licensed corporation to carry on business in, and only in, a  
specified manner.
- (2) A prohibition or requirement imposed on a licensed corporation under this  
section may relate to either or both of the following—
- (a) transactions entered into in connection with the business which  
constitutes a regulated activity for which the licensed corporation is  
licensed;

- (b) transactions entered into in connection with any other business which is carried on by the licensed corporation in connection with the business which constitutes a regulated activity for which it is licensed.

**205. Restriction on dealing with property**

- (1) Subject to section 207, the Commission may by notice in writing—
- (a) prohibit a licensed corporation—
    - (i) from—
      - (A) disposing of any relevant property;
      - (B) dealing with any relevant property in a specified manner or other than in a specified manner;
    - (ii) from assisting, counselling or procuring another person to—
      - (A) dispose of any relevant property;
      - (B) deal with any relevant property in a specified manner or other than in a specified manner;
- (2) In this section, *relevant property*, in relation to a licensed corporation, means—
- (a) any property held by the licensed corporation, acting within the capacity for which the licensed corporation is licensed, on behalf of any of the clients of the licensed corporation, or held by any other person on behalf or to the order of the licensed corporation acting within such capacity;
  - (b) any other property which the Commission reasonably believes to be owned or controlled by the licensed corporation.”

9. Access to the powers contained in these two sections is through satisfying the requirements of section 207. Section 207 provides:

**“Imposition of prohibition or requirement under section 204, 205 or 206**

The Commission may impose a prohibition or requirement under section 204, 205 or 206 in respect of or with reference to any licensed corporation if it appears to the Commission that –

- (a) any property of the licensed corporation or its clients, or any property connected with the business which constitutes a regulated activity for which it is licensed, might be dissipated, transferred or otherwise dealt with in a manner prejudicial to the interest of any of its clients or creditors;
- (b) the licensed corporation is not a fit and proper person to remain licensed or is not a fit and proper person to carry on any regulated activity for which it is licensed (having regard, among other matters, to

A the matters specified in section 129);

B (c) the licensed corporation has failed to comply with the requirement  
C specified in section 180(2) or, in purported compliance with such  
D requirement, has furnished the Commission with information which  
E was at the time when it was furnished false or misleading in a material  
F particular;

D (d) the licence of the licensed corporation may be revoked or suspended  
E on any of the grounds specified in section 194(1) or 195(1) or (2); or

E (e) the imposition of the prohibition or requirement is desirable in the  
F interest of the investing public or in the public interest.”

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G *The submissions of the applicant*

H 10. Mr Charles Manzoni SC, for the applicant, argues that on a true  
I and proper construction of sections 204, 205 and 207, it is clear that they can  
J be used against the licensed corporation only when there has been some kind  
K of SFO misconduct by that licensed corporation. Sections 204 and 205 cannot  
L be used, so his argument goes, when it is the client, a member of the public  
M not subject to regulation by the SFC, who is alleged to have been guilty of  
N SFO wrongdoing and nothing improper is alleged against the licensed  
O corporation.

N 11. Mr Manzoni says that such a construction does not leave the SFC  
O without a remedy against a member of the public as it still has section 213  
P which empowers it to apply for an injunction against *any person*. This section,  
Q Mr Manzoni argues, is the appropriate section for the situation where there  
R has been SFO misconduct by a member of the public who has a client account  
S with a licensed corporation.

S 12. The two key distinctions between sections 204 and 205, on the  
T one hand, and section 213, on the other, and the foundation on which Mr  
U Manzoni constructs his submission are, firstly, that the former sections  
V empower the SFC to take the various actions set out in the sections only



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against a licensed corporation whereas section 213 empowers the SFC to deploy the powers created by the section against “any person”. Thus, under sections 204 and 205 the SFC cannot prohibit the applicant from disposing, or dealing with, the monies in her client account with Kingkey; yet by prohibiting Kingkey from dealing with the money in her account, the SFC achieves, by an indirect and improper use of sections 204 and 205, what it is not empowered by the sections to directly do.

13. The second distinction between sections 204 and 205 and section 213 is that the powers in the former sections are immediately available to the SFC, can be imposed by it as an administrative measure and for non-compliance with which there is no punitive offence provision. Section 213, on the other hand, can only be accessed by application to the Court of First Instance and that application provides for an affected party all the rights and safeguards of an independent judicial hearing. Additionally, there is the sanction of contempt of court should there be non-compliance with any order of the Court.

14. In order to understand the context and purpose<sup>4</sup> of the provisions being interpreted, Mr Manzoni argues that the primary focus of the SFC’s role under the SFO is the regulation of licensed persons. He asks me to note that the provisions in the SFO dealing with the continuity of existence of the SFC and its objectives, functions and duties, as set out in sections 4 to 6 of the Ordinance, only concern the regulatory role of the SFC. The subject of the SFC’s regulatory role is the “securities and futures industry”, a defined term which includes the “securities and futures market” (another defined term).

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<sup>4</sup> Mr Manzoni relied on the summary of legal principles by Ma, CJ in *Town Planning Board v Town Planning Appeal Board* (2017) 20 HKCFAR 196 at [29] concerning the use of context and purpose when construing statutory provisions.

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However, and very importantly, the definition of “securities and futures industry” specifically excludes from its ambit those who are investors in a “securities and futures market”.

15. Mr Manzoni makes the point that in these early sections dealing with the role of the SFC there is no general duty to investigate crime and misconduct by any person; rather section 4(d) confines the regulatory objective of the SFC in this area to being “to minimize crime and misconduct in the securities and futures industry”. Likewise, all the other “Regulatory objectives of the Commission” are similarly confined to the “securities and futures industry”.

16. Section 5 of the SFO sets out the “Functions and powers of the Commission” and employs the same term, “securities and futures industry” when describing the functions of the SFC. Thus section 5(1)(n) states:

“(l) The functions of the Commission are, so far as reasonably practicable – ...  
(n) to suppress illegal, dishonourable and improper practices in the securities and futures industry;”

17. This is not to say that the SFC does not have the power to investigate the conduct of investors. It clearly does and its powers of investigation are set out in Division 3 of Part VIII of the SFO. The point Mr Manzoni makes is that, as reflected in these early sections of the SFO, the primary role of the SFC is to regulate the industry and the conduct of those working in it and its investigations of investors is very much secondary to this role. This, he emphasizes, is an important contextual element when it comes to identifying the purpose, and interpreting the scope, of sections 204 and 205 in their operation in conjunction with section 207.

18. Because regulation of the industry is the SFC's primary focus, he argues that a contextual and purposive interpretation of the powers given to it would confine sections 204 and 205 to being exercisable only against a licensed corporation when it is alleged to have breached the provisions of the SFO. The more broadly expressed power contained in section 213 that is exercisable against all persons would then operate against non-licensed persons when such persons are alleged to have been involved in a contravention of the SFO. The key contextual element which points the way to the intended, and limited, operation of the sections 204 and 205 is the existence of section 213. The separation of sections 204 and 205 from section 213 and the location of them in separate divisions of Part X indicates that sections 204 and 205, which are interventionist in nature, are intended to apply only in circumstances where the behaviour of the licensed corporation is under scrutiny.

19. Furthermore, Mr Manzoni submits that such an interpretation is borne out by a textual analysis of the sections which, in their drafting, "both place a heavy emphasis on imposing prohibitions or requirements on a *licensed corporation* - the restrictions are not expressed to be imposed on the clients of such a corporation."<sup>5</sup> In support of such a textual analysis, Mr Manzoni relies upon section 207 which, he says, addresses the circumstances in which sections 204 and 205 may be triggered and those, he submits, are clearly targeted towards protection of the clients or creditors of licensed corporations or the investing public.

20. The only pre-condition in section 207 that could apply to the circumstances of the applicant is section 207(e), in its reference to the imposition of the prohibition or requirement appearing to the SFC as being

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<sup>5</sup> Written Arguments of the Applicant at [33].

A “desirable...in the public interest”. Relying on the *ejusdem generis* principle  
B of statutory interpretation, Mr Manzoni argues that section 207(e) should be  
C interpreted narrowly so that it is consistent with section 207(a) – (d) and to be  
D consistent with these paragraphs it should be limited to behaviour by the  
E licensed corporation. This would narrow the ambit of section 207(e) to the  
F *genus* of behaviour of a licensed corporation that is contrary to the interests of  
G the investing public or the public interest. Within this narrow *genus*, the  
H concept of the public interest can operate with the full breadth that it normally  
I possesses. However, it can’t be given a breadth of operation which takes it  
J outside the scope of the *genus*.

I 21. Finally, Mr Manzoni argues that such an interpretation is  
J consistent with both legal policy and legal principle. Preventing persons from  
K accessing their private property is a serious interference with their legal rights  
L and such an important power must contain safeguards against improper  
M exercise. Section 213 contains the safeguard of judicial oversight; sections  
N 204 and 205 contain no such safeguard. Indeed, to require the applicant to  
O follow the procedures required of her by the SFC only victimises her with  
P inbuilt systemic delay. To treat sections 204 and 205 as permitting the SFC  
Q to, in effect, exercise a *Mareva*-like power is to enable the SFC to by-pass  
R section 213 and all the safeguards it contains.

P 22. Allied with this argument is a further argument that construing  
Q sections 204 and 205 in the broad way contended by the SFC would breach  
R the principle of legality, which requires that statutory provisions should be  
S construed in a manner compatible with fundamental rights. Here the rights of  
T the applicant that are contained in articles 6 and 105 of the Basic Law (“BL 6”  
U and “BL 105”) have been interfered with and that interference would not have  
V been in the contemplation of the legislature when it enacted these sections.

Furthermore, to allow the SFC to use sections 204 and 205 in the way it wishes would constitute a disproportionate interference with the property rights of members of the public. Whilst not inviting me to rule on the constitutionality of the sections, as employed by the SFC, he asks me to have regard to the constitutional implications of acceding to the SFC's construction of them. Those implications, he argues, are a reason why I should reject the SFC's construction of the sections.

*The submissions of the SFC*

23. Mr Norman Nip SC, for the SFC, submits that the question of law should be answered in the affirmative as on either a contextual or textual analysis of the sections, by application of the relevant, and uncontested, legal principles of statutory interpretation, it is clear that the sections encompass the situation of the SFC harbouring suspicion that a client of a licensed corporation, but not the licensed corporation itself, has committed market misconduct. In support of this argument Mr Nip emphasises that an important contextual element in the interpretation exercise is that the legislative purpose in granting the SFC the powers of intervention that are contained in Part X, Division 1 of the SFO was to enable the SFC to take immediate action to protect the interests of the investing public generally as well as the interests of a licensed person's clients and creditors. He notes that sections 204 and 205 are subject to section 207 which sets out the conditions precedent to the use of the two sections and in this respect relies upon section 207(e).

24. Mr Nip argues that the fact that section 213 can apply to the situation of an investor being involved in market misconduct does not mean that this section is given exclusive responsibility for this scenario.

A 25. In coming to an understanding of the context and purpose of the  
B two sections Mr Nip submits that it is relevant to have regard to the previous  
C legislative provisions in this area. The history of these provisions demonstrate  
D that the purpose of the new provisions was to broaden the SFC's powers, not  
E to narrow them, and to enhance its ability to act for the public good, not to  
F constrain that ability. In respect of the legislative provisions themselves,  
G Mr Nip argues that three important conclusions can be derived from his  
H historical exercise, namely:

I (i) the purpose of the powers was to enable the SFC to act  
J expeditiously where quick action was necessary to protect  
K investors;

L (ii) the section 207 conditions precedent to the exercise of the powers  
M were intended to be free standing; and

N (iii) the section 207(e) public interest condition was intended to  
O operate with the full breadth of meaning that this term normally  
P bears and that its breadth of meaning was not to be constrained  
Q by the other conditions that are listed in section 207.

R 26. These purposes and conclusions, he argues, are consistent with  
S the long title of the SFO and the regulatory objectives and functions set out in  
T sections 4 and 5 of the ordinance.

U 27. Applying principles of statutory interpretation to section 207(e),  
V Mr Nip submits that the *ejusdem generis* principle is excluded or, if prima  
facie applicable, is displaced. He argues that section 207(e) was intended as  
a general provision which may be resorted to when the case falls into none of

A the categories described in section 207(a) – (d). B

C 28. Furthermore, there is nothing in the words used in the drafting of D sections 204 – 207 to suggest that their application is restricted to situations E where it is only the licensed corporation that has committed regulatory F wrongdoing. Specifically, there is no reason to construe the words in section G 205(1)(a)(ii) of “assisting ... another person” as not applying to a licensed H corporation acting in furtherance of a client’s instructions to sell shares or I withdraw money as a means of disposing or dealing with this property. J

K 29. Finally, it is said that a “fair large and liberal”<sup>6</sup> interpretation of L section 207(e) would not leave affected persons without any avenue to M challenge the SFC’s decision. In this respect, Mr Nip relies upon section 208 N in providing a right to an affected person to apply to the SFC for it to withdraw, O substitute or vary the prohibition, as was done in the present case. Of course, P it is the very refusal of this application which brings the current application Q before me. Mr Nip refers me to a previous ruling by the SFAT in *Zhou Ling* R *v SFC*<sup>7</sup> which has not been challenged by Mr Manzoni, which held that the S regime laid down by sections 208, 209 and 217 provides a remedy to an S aggrieved person. Thus, Mr Nip argues, there is no Bill of Rights issue created T by upholding the SFC’s interpretation of sections 205 and 207(e). U

V 30. He also relies on section 211(2) of the SFO. Section 211 is relevant because Part X does not contain any punitive offences for non-compliance with the Notices issued under sections 204 and 205. Consequently, if the SFC wishes to compel compliance with its Notices it must make an

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T <sup>6</sup> These are the words used in section 19 of the Interpretation and General Clauses Ordinance, Cap. 1.

U <sup>7</sup> Application No. 5 of 2020; per Mr Michael Lunn, Chairman.

A application under section 211<sup>8</sup> to the Court of First Instance for an order to  
B compel compliance, either where there has been non-compliance or there  
C exists “a reasonable likelihood that a person will fail to comply with a  
D prohibition or requirement in force in respect of him as a result of the exercise  
E of any of the powers under sections 204, 205, 206 and 208 ...”. The orders  
F that the Court of First Instance may make also include orders against “any  
G other person who the Court is satisfied is able to procure the person to comply  
H with the prohibition or requirement (as the case may be), to take such action  
I or refrain from taking such action as the Court directs.”  
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H 31. Mr Nip argues that because the notices are purely an  
I administrative measure which do not override the existing contractual  
J relationship between the client and the licensed corporation, the applicant  
K could demand repayment of her monies from Kingkey as it has a contractual  
L duty, legally enforceable by the applicant, to pay her, on demand, the monies  
M which it holds in its account to her order. The applicant could ask Kingkey to  
N inform the SFC that it will, after the lapse of a certain number of days, fail to  
O comply with the SFC’s notice and this will force the SFC to take the matter to  
P the Court of First Instance under section 211(2). The SFC would then have  
Q to decide whether to avail itself of section 211(2) on the reasonable likelihood  
R of non-compliance basis. If it did so, it could then ask for an order against  
S Kingkey injuncting it from releasing the monies of the applicant to her. In  
T this situation Kingkey would have a reasonable excuse for indicating its  
U intention not to comply and so would be able to avoid any adverse order from  
V the court.

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<sup>8</sup> The option available to the SFC of having recourse to the Court of First Instance where there has been a failure to comply with a requirement it has imposed in the course of its investigation is also provided for in section 185 of the SFO. In fact this mechanism for compelling compliance and punishing non-compliance is employed on a number of occasions in the SFO in provisions dealing with the SFC carrying out its investigative function.



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B 32. Should the SFC avail itself of section 211(2), then a person such  
C as the applicant would be a party to the court application and would have a  
D right to be heard. This is because Section 211(2) makes clear that the court  
E application would, in circumstances such as the present, be not just against the  
F licensed corporation but also against “any other person who the Court is  
G satisfied is able to procure the person (i.e. the licensed corporation) to comply  
H with the prohibition or requirement (as the case may be), to take such action  
I or refrain from taking such action as the Court directs.”  
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H 33. Mr Nip argues that, in this way, section 211 is a power which can  
I have a similar effect to section 213 in terms of the injunctive orders that could  
J be obtained by the SFC against the applicant in order to freeze the monies in  
K her client account with Kingkey. Section 211 provides the judicial oversight  
L which Mr Manzoni seeks and it is not necessary to have recourse to section  
M s.213 in order to obtain the safeguards and protections which judicial  
N oversight provides.  
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M 34. Mr Nip then went on to consider the interaction of section 213  
N with sections 204 and 205. It is the SFC position that sections 204 and 205  
O complement section 213 by providing the SFC with powers to act immediately  
P when the situation requires it.  
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Q *Discussion*  
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R 35. The gateway to accessing the powers contained in sections 204 –  
S 206 is through satisfying one of the pre-conditions set out in section 207.  
T There are five conditions but as they are drafted in the disjunctive, only one  
U needs to be met. But if one of them cannot be met then the SFC cannot make  
V

A use of any of the powers contained in sections 204 – 206. B

C 36. Of the 5 conditions, 4 are specific in their scope and one is D general in its scope. Of the 4 specific conditions only the first, in paragraph E (a), refers to the client of the licensed corporation and it is concerned with F protecting the client from the licensed corporation dissipating any property G belonging to it or to the client. The other 3 specific conditions set out in H paragraphs (b) to (d) of section 207 are all concerned with the licensed I corporation’s integrity, failure to comply with section 180(2) or being at risk J of having its licence revoked or suspended under sections 194(1) or 195(1) of K the SFO. Then, in paragraph (e), there is the general condition of the L imposition of the prohibition or requirement by the SFC being “desirable...in M the public interest”. N

O 37. Mr Manzoni argues that “the public interest” in paragraph (e) P should be interpreted as being confined to any public interest consideration Q arising from the four preceding specific pre-conditions in paragraphs (a) – (d). R In respect of sections 204 – 205 he argues that they should be limited to where S the licensed corporation is at fault in some way and should not be interpreted T as encompassing the situation of a licensed corporation which is without fault U but which is inadvertently caught up in the misconduct of one of its clients. V This latter situation can be addressed by the SFC employing the powers of section 213.

38. If I were to accede to Mr Manzoni’s argument in respect of the interpretation of section 207(e), then it would mean that there is no pre-condition available to the SFC that would suit the circumstances of the present case and as a consequence the SFC would not have been entitled to issue the Notice of 18 February freezing the applicant’s account with Kingkey. Should

A I not accede to Mr Manzoni’s argument in respect of section 207(e) then I  
B must proceed to consider his further argument that sections 204-205 should  
C be interpreted as being confined in the scope of their operation to the situation  
D where the licensed corporation is at fault in the way it has conducted itself in  
E carrying out its regulated activities.

F 39. I shall, therefore, first deal with the construction of the phrase  
G “the public interest” in section 207(e).

H *Context and a purposive interpretation (i): the role of the SFC*

I 40. Mr Manzoni argues that the primary or dominant aspect of the  
J SFC’s role is to focus on the conduct of the persons whom it was created to  
K regulate and such persons are those working in the securities and futures  
L industry. The SFC has no direct role in supervising investors and its inter-  
M action with them in its regulator role is only as a person involved in one of its  
N investigations, either as a prospective witness or as a suspect in an  
O investigation.

P 41. In support of these contentions Mr Manzoni refers to the  
Q definition of “securities and futures industry” that is contained in section 1 of  
R Schedule 1 of the SFO and, which, specifically excludes investors. The  
S definition is as follows:

“*securities and futures industry* means the securities and futures market and  
participants (*other than investors*) therein (including ...) and any activities  
related to financial products that are carried on in such securities and futures  
market or by such participants.” (Emphasis added)

T 42. In order to address Mr Manzoni’s argument it is necessary to  
U remind ourselves that the SFC existed prior to the SFO and to have regard to

A the legislation that actually created it. A

B  
C 43. The SFO was the successor of the Securities and Futures  
D Commission Ordinance, Cap 24, (SFCO) which it repealed. The SFCO  
E consisted of 64 sections and a schedule and its Long Title was as follows: E

F “To establish the Securities and Futures Commission and to amend the law  
G relating to dealing in securities and trading in futures contracts, and to  
H provide for connected or incidental matters.” F

G 44. In contrast to this quite short ordinance is the much more lengthy  
H SFO which consists of 409 sections and 10 Schedules. Part of the reason for  
I its length is because it is a consolidating ordinance and after it came into force  
J it repealed not just the SFCO but nine other ordinances. J

K 45. Section 4 of the SFCO set out the functions of the SFC and  
L paragraph (g) of this section contained a function similar to that set out in  
M section 5(n) of the SFO. Section 4(g) of the SFCO described this function as  
N follows: N

O “(g) to suppress illegal, dishonourable and improper practices in dealing in  
P securities, trading in futures contracts, entering into property investment  
Q arrangements or securities margin financing transactions, and the provision  
R of investment advice or other services relating to securities, futures contracts,  
S property investment arrangements and securities margin financing.” P

Q I do not see in this description of the SFC’s function any intention to exclude  
R from its regulatory scope the misconduct by investors in any of the specified  
S activities. R

S 46. In the SFO this function has been abbreviated by use of the  
T drafting device of encapsulating all the activities set out in section 4(g) into  
U one defined term and that term is the “securities and futures industry”. Thus  
V U

A section 5(n) of the SFO is: A

B  
C “(n) to suppress, illegal, dishonourable and improper practices in the securities and futures industry.” C

D 47. The same device is used in section 4 of the SFO when setting out D  
E the “Regulatory objectives of Commission”. This section provides: E

F “The regulatory objectives of the Commission are – F

G (a) to maintain and promote the fairness, efficiency, competitiveness, G  
H transparency and orderliness of the securities and futures industry; H

I (b) to promote understanding by the public of financial services including I  
J the operation and functioning of the securities and futures industry; J

K (c) to provide protection for members of the public investing in or holding K  
L financial products; L

(d) to minimise crime and misconduct in the securities and futures industry; K

(e) to reduce systemic risks in the securities and futures industry; and L

(f) to assist the Financial Secretary in maintaining the financial stability of M  
N Hong Kong by taking appropriate steps in relation to the securities and futures industry.” N

O 48. Notwithstanding the definition of “securities and futures O  
P industry”, and despite the emphasis placed on it by Mr. Manzoni, I do not P  
Q think that the exclusion of investors from the definition is of any significance. Q  
R I certainly do not think that it was intended to exclude investors from the ambit R  
S of the SFC’s regulatory role. S

T 49. I say this because it is clear from the regulatory objectives that T  
U the regulatory role of the SFC encompasses far more than just licensing those U  
V working in the industry, monitoring and investigating *their* conduct and, V  
where appropriate, disciplining or prosecuting them for their misconduct. The

A regulatory objectives include educating the public (section 4(b)) and assisting  
B the Financial Secretary in maintaining the financial stability of Hong Kong.

C 50. The regulatory objectives of the SFC are all repeated in one form  
D or another in section 5 of the SFO. If I were to attempt to summarise the effect  
E of sections 4 and 5 of the SFO it would be to say that the role of the SFC is to  
F promote, protect, preserve and advance the integrity of the securities and  
G futures industry for the benefit of *all* who may, in some form or another, be  
H involved in it *and for the benefit of Hong Kong as a whole*. It must be  
I remembered that the industry does not exist just for the benefit of those  
J working in it and those wishing to participate in it as investors. It exists as a  
K vital part of Hong Kong's financial and commercial sector and contributes  
L significantly to Hong Kong as a leading financial centre on the world stage.  
M To say that the public of Hong Kong has a very real interest in maintaining  
N the integrity and international reputation of its securities and futures industry  
O may be stating the obvious but, in view of the arguments being advanced in  
P the present case, the obvious needs to be repeated.

Q 51. The SFC is given substantial powers of investigation and even  
R the right to prosecute. Thus, it could be said that the SFC is a law enforcement  
S agency, one of whose many functions is to regulate the securities and futures  
T industry. But whether one views its regulatory role in a broad way or only as  
U an element of its status as a generic law enforcement agency is simply an  
V academic, and, ultimately, irrelevant, argument over linguistics for the reality  
is that the SFC is expected to monitor, investigate and prosecute, the conduct  
of investors that is in breach of the SFO. I do not see anything in the scope of  
the role of the SFC, whether one describes it as regulator or law enforcer, that  
lends support to Mr Manzoni's argument.

*Context and a purposive interpretation (ii): Parts VIII – IX of the SFO*

52. I am reinforced in the view I take of the broad role of the SFC by the contents of Parts VIII – IX of the SFO which deal with the SFC’s role as supervisor of the securities and futures industry and investigator of any misconduct within it.

53. In Part VIII, Division 2, the SFC is given, in section 179, a power to investigate fraudulent conduct arising from the operation of a listed corporation by requiring the production of documents and records and the provision of an explanation or statement. Criminal offences are created for failing to comply with the requirements of the SFC. These requirements, it is important to note, can be exercised against not just the listed corporation but against an auditor or “any other person”.

54. In section 180 the SFC is given a power to enter the premises of intermediaries (i.e. licensed corporations) and to inspect and make copies of any record or document and to require the answer of questions relating to the business of the intermediary. This power can only be employed to ascertain whether the intermediary is, inter alia, complying with the provisions of the SFO. Criminal offences are created for failing to comply with the requirements of the SFC or by giving false or misleading information to the SFC. Again, this power can, in certain specified circumstances, be used against any person.

55. Section 181 empowers the SFC, “for the purpose of enabling or assisting the Commission to perform a function under any of the relevant

A provisions”,<sup>9</sup> to require any person who is registered as the holder of securities  
B or any person who holds any securities or an interest in any securities or any  
C person who has acquired or disposed of any securities and the persons  
D involved with them, to furnish certain specified information. A key purpose  
E of this power would appear to be to enable the SFC to identify the true owner  
F of any security. Such a power is needed precisely because the SFC has been  
G given the responsibility of protecting the integrity of the whole of the industry  
H as opposed to the more narrow responsibility of simply licensing those  
I working within it, monitoring their conduct and, when appropriate,  
J disciplining or prosecuting them.

I 56. Division 3 of Part VIII is entitled “Commission’s Powers of  
J Investigation” and sets out the circumstances when the SFC may investigate.  
K The scope of those circumstances are described in section 182(1)(a) – (g) and  
L they encompass every form of criminal and regulatory misconduct by any  
M person in respect of their participation in the securities and futures industry  
N and their non-compliance with or contravention of the provisions of the SFO.

O 57. Section 183 empowers the SFC to require the person under  
P investigation, or any other person, to produce records and provide any  
Q explanation in respect of them, to attend for interview and to provide  
R assistance to the investigation. Section 184 creates a number of offences for  
S non-compliance by a person with the various obligations that can be imposed  
T under section 183.

R 58. Division 4 is headed “Miscellaneous” but it contains a very  
S interesting provision in section 185 as that section contains a similar power to

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T <sup>9</sup> “Relevant provisions” is defined in Schedule 1 quite broadly and includes, inter alia, the provisions of the  
U SFO.



A that contained in section 211. This is a power to, in effect, compel compliance  
B with requirements the SFC has made of a person under sections 179, 180, 181  
C and 183. This is done by the SFC applying to the Court of First Instance for  
D the court to inquire into the case and, if satisfied there is no reasonable excuse  
E for the non-compliance, to order the person to comply and to punish the person.  
F However, this power to apply to the Court cannot be used if criminal  
G proceedings have already been instituted against the person for non-  
H compliance.

G 59. Section 185 makes clear that it is an alternative remedy to  
H prosecution under the criminal offence provisions contained in sections 179,  
I 180, 181 and 184 and, presumably, it is employed where the primary objective  
J of the SFC is to secure compliance with its requirements under these sections  
K as opposed to only punishing a person for non-compliance with them. This  
L double-barrelled approach to compelling compliance and punishing for non-  
M compliance is in contrast to the approach in Division 1 of Part X which  
N contains in section 211 the equivalent of section 285 but which fails to include  
O any offence provisions equivalent to those contained in section 179 – 181 and  
P 184.

O 60. The provisions of Part IX of the SFO contain the disciplinary  
P powers that the SFO may exercise against a licensed person when the SFO  
Q finds that the licensed person has been guilty of misconduct. Part IX does not  
R contain any separate powers of investigation and the finding that a licensed  
S person has been guilty of misconduct will, presumably, flow from the results  
T of an investigation it has conducted and in which it may have deployed the  
U powers of investigation granted to it in Part VIII.

A 61. What is interesting about Part IX is that it takes a different  
B approach to the way it drafts the foundation for the exercise of the disciplinary  
C power. It creates an all-embracing term called “misconduct” which is defined  
D in section 193(1). There are five categories of misconduct described in  
E paragraphs (a) to (e) of the definition. Paragraph (d) defines it as meaning:

F “(d) an act or omission relating to the carrying on of any regulated activity  
G for which a person is licensed or registered which, in the opinion of  
H the Commission, *is or is likely to be prejudicial to the interest of the*  
I *investing public or to the public interest;*” (Emphasis added.)

J The italicized words are also employed in paragraph (e)(ii) of the definition  
K of “misconduct”.

L 62. Also interesting is the way that subsection (3) of the definition  
M provides guidance on how the SFC is to go about forming the opinion that an  
N act or omission “is or is likely to be prejudicial to the interest of the investing  
O public or to the public interest”. It provides:

P “(3) For the purposes of paragraphs (d) and (e) of the definition of  
Q misconduct in subsection (1), the Commission shall not form any  
R opinion that any act or omission is or is likely to be prejudicial to the  
S interest of the investing public or to the public interest, unless it has  
T had regard to such of the provisions set out in any code or guideline  
U published under section 112ZR, any code of conduct published under  
V section 169 or any code or guideline published under section 399 as  
are in force at the time of occurrence of, and applicable in relation to,  
the act or omission.”

63. From this brief discussion of the contents of these Parts of the  
SFO, it is clear that the SFC’s investigation function arises when it encounters  
criminal or other misconduct *by any person* in any of the activities it was  
created to regulate and when it does so it can deploy its powers against any  
person.

64. I, therefore, find within Parts VIII – IX of the SFO further reason to reject Mr Manzoni’s narrow view of the regulatory responsibility of the SFC. The SFC’s duty of regulating the industry involves, indeed requires, the SFC to investigate misconduct within it by any person, and this goes well beyond performing a narrow regulatory role of licensing those working within the industry and monitoring only their conduct. Its responsibility to promote, protect, preserve and advance the integrity of the industry and its duty to investigate misconduct by any person means that, in a very real sense, it also regulates the conduct of investors in the market.

*A textual analysis of Section 207 of the SFO*

65. I turn now to a consideration of the content of section 207 of the SFO, bearing in mind the context provided by its location within Part X and the role of Part X as part of the armoury of powers provided to the SFC to enable it to effectively and efficiently discharge its investigatory function.

66. In a nutshell, Parts VIII – X deal with the SFC’s conduct of investigations, the disciplinary process and the power of the SFC to intervene in a regulated intermediary’s affairs. They all have in common an SFC investigation as their foundation. The disciplinary process occurs as an outcome of the investigation and may take place as an alternative to, or in addition to, an MMT inquiry or a criminal prosecution. However, the Part X powers are more likely to be used as the investigation proceeds in order to preserve a *status quo* or to protect the interests of third parties or the public interest.

67. The object of the Part X powers is the licensed corporation and they are concerned with what the licensed corporation is doing and in

A intervening in some way in what it is doing. Hence section 204 bears the  
B heading “Restriction of business”, section 205 the heading “Restriction on  
C dealing with property” and section 206 the heading “Maintenance of property.”

D 68. Of course, to intervene in someone’s business and impose  
E restrictions on the conduct of their business is a very serious infringement of  
F their civil and Basic Law rights. There must be a justification for it, and this  
G is where section 207 becomes relevant. Yet, notwithstanding the substantial  
H nature of the powers, the trigger for their exercise is merely that one of the  
I paragraphs of section 207 “appears to the Commission” to be fulfilled.  
J Furthermore, for paragraph (a) what has to “appear” is only that the specified  
circumstances “might” occur. It is difficult to imagine a lower threshold for  
the trigger of powers of such magnitude as those contained in Part X.

K 69. However, it is not just the low threshold of the trigger that is  
L surprising about section 207; the way the pre-conditions for access to the  
M powers are expressed is also surprising.

N 70. I note that nowhere in section 207 is there a requirement that it  
O appear to the SFC that the licensed corporation must have been involved in  
P criminal conduct and paragraphs (a), (b) and (e) do not require even  
Q misconduct of a non-criminal nature, or, in respect of paragraph (a), that the  
R prospective dealing with the property of the licensed corporation or its client  
S would be unlawful. Having gone to great lengths to define “misconduct” in  
T section 193(1) the legislature has eschewed any reference to it in section 207.  
U Instead, the legislature has chosen to employ in section 207 (b) the broader  
concept of being a fit and proper person. Paragraphs (c) and (d) are the only  
pre-conditions which allege actual impropriety by the licensed corporation but  
it should be noted that (d), unlike (c), refers to a pre-condition that, at some

A future time, may occur.

71. What this drafting tells me is that it was envisaged that the powers would be used at an early stage of investigation when the outcome of that investigation could not be known but that it could be foreseen there was a real possibility of an outcome unfavourable to the licensed corporation or it could be foreseen there was a need to act in order to safeguard the rights of others *and to protect the public interest*. The fact that the powers are to be deployed at an early stage of an investigation, and with a low threshold trigger, also explain why the powers are granted by way of administrative measure rather than by judicial authorization. The administrative basis reflects a recognition of a need for expedition in circumstances where no final rights to property are being determined and the SFC is trying to do no more than preserve the property until more can be known from the investigation. This is the purpose of section 207 and this is the context in which section 207(e) is intended to operate and in which it falls to be construed.

*Interpreting section 207(e) of the SFO*

72. In my view, paragraph (e) sits very comfortably within section 207. The section has been drafted in a way which very deliberately creates a low threshold trigger and provides pre-conditions expressed in broad and vague language with no certainty that the pre-conditions will occur. A further pre-condition expressed as broadly as it appearing to the SFC to be “desirable ... in the public interest” fits in well with the overall tone and content of the section.

73. Mr Manzoni argues that the *ejusdem generis* principle should be used to limit the scope for operation of the phrase “the public interest”. He

A accepts that when a draftsman adds to a list of circumstances that can trigger  
B a particular course of action, the circumstance that the course of action is  
C considered to be in the public interest, the intention in so doing is to broaden,  
D not narrow, the ability of the decision maker to exercise a power or pursue the  
E course of action. Nevertheless, he argues that even though the intention of the  
F draftsman is to broaden the scope for action, this intention can still be  
G accommodated when the *ejusdem generis* principle is employed to create a  
H *genus* of circumstances within which the public interest pre-condition is to be  
I determined.

H 74. The use of the *ejusdem generis* principle to narrow the operation  
I of the concept of the “public interest” circumstance or criteria is not something  
J I have previously encountered and Mr Manzoni has not been able to cite any  
K case where a court has applied the principle to narrow the scope of the public  
L interest to a particular *genus* of activity or circumstance. Here the scope of  
M the “public interest” pre-condition has been drafted in particularly broad terms  
N as the SFC does not have to determine that the public interest will be  
O prejudiced by it not imposing the prohibition or requirement; it merely has to  
P *appear* to the SFC that the imposition of the prohibition or requirement is  
Q *desirable* in the public interest. Given this very broad drafting I am satisfied  
R that it was intended that the public interest precondition be available to the  
S SFC to broaden the scope of matters to which it could have regard and that,  
T consequently I should not apply any principle of statutory interpretation that  
U would defeat that intent unless it is clear that the particular principle of  
V statutory interpretation was intended to apply.

S 75. In this respect I note what was enacted by the legislature in the  
T definition of “misconduct” in section 193(1) in stipulating a mandatory  
U guideline in subsection (3) that the SFC must follow when determining  
V

A whether, in its opinion, an act or omission is, or is likely to be, prejudicial to  
B the public interest. This suggests that the legislature was aware of the breadth  
C of the concept of “the public interest” and, at least in respect of its use in  
D paragraphs (d) and (e) of the definition of misconduct, thought it desirable to  
E provide guidance on its application by laying down specific requirements that  
the SFC had to follow when forming its opinion.

F 76. Throughout the SFO there is quite heavy use by the legislature  
G of the phrase “in the interest of the investing public or in the public interest”.  
H However, apart from section 193(3), I cannot find any other occasion where  
I the legislature has sought to provide assistance on how the requisite opinion  
J should be formed. Of course, no such guideline as is found in section 193(3),  
K or any other form of assistance, is provided to the SFC on how it should make  
L the section 207(e) determination. This absence of any such guideline or other  
limitation on the scope of its operation.

M 77. I also note the emphasis that is provided by section 8 of Part 1 of  
N Schedule 1 of the SFO to the distinction between “the interest of the investing  
O public” and “the public interest”. Section 8 is as follows:

P **“8 References to interest of investing public**

Q In this Ordinance, a reference to the interest of the investing public does not  
R include any interest the taking into consideration of which is or is likely to  
S be contrary to the public interest.”

T 78. Enacting a provision which specifically draws attention to the  
U distinction between the operation of the two phrases emphasises the additional  
V breadth of the interests being protected by the phrase “the public interest” in  
contradistinction to the phrase “the interest of the investing public.” This is

A very significant as the other pre-conditions in paragraphs (a) to (d) of section  
B 207 impact in one way or another on the interest of the investing public. In  
C my view, the emphasis that is given to the distinction between the two phrases  
D is an important indicator that what is encompassed by the public interest is far  
E more than the interests involved in paragraphs (a) to (d).

F 79. It is against the backdrop of all these considerations that I have  
G mentioned that the section 207(e) pre-condition to the exercise of the section  
H 204 and section 205 powers falls to be construed.

I 80. I start by referring to the conclusion I have reached in respect of  
J those sections of the SFO dealing with the regulatory objectives and functions  
K of the SFC. As I have previously said, it is my view that those sections reveal  
L the SFC to have a very broad role as regulator and one which clearly involves  
M interaction with the public and requires it to have regard to the public interest.  
N There is nothing in these provisions which support an argument that they  
O provide a contextual basis for interpreting section 207(e) in the narrow way  
P urged by Mr Manzoni.

Q 81. Secondly, the provisions of Parts XIII – IX show that although  
R the SFC does not license investors and, therefore, cannot discipline them, it  
S has a very substantial interaction with them when investigating anything  
T impacting upon the integrity of the industry. At the end of its investigation it  
U can refer their conduct to the MMT or it can prosecute them. I do not see  
V anything in Parts VIII – IX that provides a contextual basis for finding an  
intent that the phrase “the public interest” is to be applied in section 207(e) in  
the narrow way for which Mr Manzoni contends.



A 82. Thirdly, I have considered the purpose of Part X and the role of  
B paragraph (e) in the context of the other elements of section 207. After  
C conducting a textual analysis of the section I conclude that a broad  
D interpretation of the public interest is consistent with the context of the section  
E as a whole.

F 83. Fourthly, I have considered the practical consequences of giving  
G the phrase the narrow construction which Mr Manzoni urges. Mr Nip argues  
H that Mr Manzoni's narrow construction would render paragraph (e) otiose, a  
I contention which Mr Manzoni denies. However, I am in no doubt that  
J whether or not there would still be room for paragraph (e) to meaningfully  
K operate, it would be very small room indeed; so small as to effectively  
L neutralise the catch-all role which "the public interest" would normally play  
M in decision making.

N 84. In my view, when the legislation contains strong pointers to a  
O broad interpretation of the phrase "the public interest" and when the  
P consequences of not giving the phrase that broad interpretation are detrimental  
Q to the public interest, there would have to be a clearly expressed intent within  
R section 207, or the provisions of Part X, that the phrase was not to bear that  
S broad meaning. That has led me to consider whether there was anything in  
T section 207 which indicated an intent to limit the scope for applying the phrase  
U "the public interest" by the *ejusdem generis* principle.

V 85. For all the reasons earlier set out, I conclude that there is nothing  
in the section, whether it is considered in isolation or in the context of the  
other provisions of the ordinance, that evidences such an intent. I conclude  
that there is nothing about the context or purpose of section 207 which  
suggests the public interest was ever to be limited in the scope of its operation.

Quite the contrary; everything about the context and purpose of section 207 suggests to me that paragraph (e) was deliberately drafted with the intention of providing the SFC with a further very broad basis for intervening in the affairs of the licensed corporation. I cannot, therefore, see any justification for employing the *ejusdem generis* principle and reject the construction that Mr Manzoni would have me place on the words “the public interest” in section 207(e).

86. Both parties have gone to considerable effort in researching the background to the enactment of the SFO in general and Part X in particular. As interesting as it has been to read the results of their researches, I have not found it necessary to take them into account as an aid to interpreting section 207(e). I say that because, as I have indicated, the context and purpose of section 207 is perfectly clear. Its role as the gateway to the powers in Part X is obvious. Furthermore, when placed in the context of the role of the SFC and regard is had to textual elements of the section, such as the low threshold of the trigger and the contents of each of the paragraphs, it becomes equally clear that the purpose of section 207 was to provide a broad basis for the SFC to intervene in the affairs of a licensed corporation and to do so whenever it appears to the SFC to be desirable in the public interest.

87. However, giving these words the full breadth of meaning that they would normally have is not determinative of the final issue, namely the scope or sections 204 and 205. It merely means that should I find against Mr Manzoni on his construction of the scope of these sections then, there is, within section 207, a pre-condition which would enable the SFC to use those sections in the very way they have used them against the applicant.

*Part X of the SFO*

88. Part X of the SFO is headed “Powers of Intervention and Proceedings” but, significantly, it contains two Divisions within it. Sections 204 – 206 are within Division 1 and this Division bears the heading “Powers of intervention”, whilst section 213 is within Division 2 which bears the heading “Other powers and proceedings”.

89. The powers in sections 204 – 206 are all about intervening in the business of the licensed corporation and imposing controls on its operations. The powers are broad and very substantial ones. Section 207 makes clear that the need for such a right to intervene and to exercise these powers may arise in a broad range of circumstances under the public interest criteria. They could arise from the SFC’s narrow regulatory role of monitoring the activity and conduct of licensed corporations or from its broader regulatory role of promoting, protecting, preserving and advancing the integrity of the industry.

90. Section 204 is concerned generally with the way the licensed corporation conducts its business and empowers the SFC to impose restrictions on a licensed corporation by prohibiting it from entering into transactions that, inter alia, are in connection with the business which constitutes a regulated activity for which the licensed corporation is licensed. Regulated activity is a defined term but for present purposes suffice it to say that it would include Kingkey advising the applicant on securities and dealing in securities on her behalf.

91. “Transaction” is not defined but it is an ordinary English word that in its everyday use has a fairly broad meaning and in a commercial context would certainly extend to the payment of monies owed. In my view, it is

A unarguable that returning to a client the proceeds of a securities dealing must  
B qualify as a transaction that is “in connection with the business which  
C constitutes a regulated activity for which the licensed corporation [i.e.  
D Kingkey] is licensed.”<sup>10</sup>

E 92. What stands out from section 204 is the breadth of the scope of  
F the prohibition and requirement that the SFC may impose on a licensed  
G corporation. By contrast, section 205 is more specific in that it concerns itself  
H solely with the property of the licensed corporation.

I 93. Section 205, to some extent, overlaps with section 204 in the  
J sense that section 204 would encompass transactions with property that relate  
K to the business of the licensed corporation.

L 94. Where section 205 goes further than section 204 is in the scope  
M of the conduct it can prohibit and in the definition of relevant property. In  
N addition to prohibiting the licensed corporation from disposing of relevant  
O property, section 205(1)(a)(ii) enables it to prohibit a licensed corporation  
P “from assisting, counselling or procuring another person” to dispose of or deal  
Q in any relevant property. As to the meaning of “relevant property”, it is  
R defined to mean, in addition to property held by the licensed corporation, “any  
S other property which the Commission reasonably believes to be owned or  
T controlled by the licensed corporation”.<sup>11</sup> Mr Nip relies on section  
U 205(1)(a)(ii) and argues that “another person” can include the client of the  
V licensed corporation whereas Mr Manzoni says it only refers to third parties,  
such as nominees, who are being used to obscure the ownership of the  
property. Mr Manzoni relies on what was said in a Bills Committee paper to

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<sup>10</sup> Section 204(2)(a) of the SFO.

<sup>11</sup> Section 205(2)(b) of the SFO.

A support his construction. B

C 95. I do not agree with Mr Manzoni that “another person” should be  
D construed so that it did not apply to the client of the licensed corporation. It  
E is clear from the definition of relevant property that it includes the monies held  
F by a licensed corporation on behalf of clients. Thus, the SFC may, under  
G section 205, prohibit Kingkey from disposing or dealing with the money that  
H it holds in the applicant’s client account. There is no reason why the term  
I “another person”, if given its natural meaning, should not include the client.  
J Furthermore, it is clear from the legislative materials that the policy intention  
K of the provision was to preserve property against wrongful dissipation when  
L the true owner of it may not be clearly known. Allowing the SFC to use this  
M provision against client accounts of a licensed corporation is consistent with  
N and advances this policy intention. I can see nothing in the Bills Committee  
O materials to suggest that it was intended to exclude the account of the client  
P from the operation of the section or limit its operation to only those who are  
Q being used to conceal the identity of the true owner.

R 96. Thus, it is my view that the powers the SFC exercised under  
S sections 204 and 205 entitled it to do what it did in respect of the applicant’s  
T account with Kingkey, subject only to the question of whether these powers  
U can be used when it is the client of the licensed corporation, and not the  
V licensed corporation itself, who is suspected to have been involved in a breach  
of the provisions of the SFO.

97. Section 206 is also a very specific provision which is designed to  
ensure that a licensed corporation maintains sufficient property to meet its  
liabilities. Property is widely defined in Part 1 of Schedule 1. The discretion  
given to the SFC to assess what description and value of property is to be

A maintained is broad. It is such kind of property and of such value as “appear  
B to the Commission to be desirable”.<sup>12</sup> C

D 98. Section 208 enables the SFC to vary or withdraw any prohibition  
E or requirement imposed under section 204 – 206. The section makes it clear  
F that it can be used by the SFC of its own volition or in response to a request  
G by any person affected by the prohibition or requirement. Thus, a person  
H affected by a notice issued under section 204 or 205 can rely on the  
I administrative remedy provided by section 208 and apply to the SFC to  
J withdraw, substitute or vary the prohibition or requirement.

K 99. If a person is aggrieved by the decision of the SFC under section  
L 208, that person may appeal the decision to the SFAT. This right of appeal is  
M contained in section 217 of the SFO, as read with the definition of “specified  
N decision” in section 215 and Schedule 8, and this, of course, is how the matter  
O comes before me.

P 100. Thus, an affected person has available to him, two remedies. He  
Q has the administrative remedy under section 208 and, if unsuccessful, the right  
R to appeal that decision of the SFC to the SFAT under section 217.

S 101. Section 209 contains a number of provisions relating to the  
T obligations of the SFC when employing sections 204 – 206 and section 208.

U 102. Section 210 makes sure that the revocation or suspension of a  
V licence does not affect the exercise of the SFC’s powers under sections 204 –  
206 and section 208.

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<sup>12</sup> Section 206(1)(a) of the SFO.

A 103. Section 211, which I have described in detail earlier in this ruling,  
B enables the SFC to apply to the Court of First Instance for an order compelling  
C compliance with any prohibition or requirement it has made under sections  
D 204 – 206 and section 208.

E 104. Division 2 is entitled “Other powers and proceedings” and  
F consists of sections 212 – 214B.

G 105. Section 212 empowers the SFC to apply to the Court of First  
H Instance to wind up a corporation, other than a bank or deposit taking  
I company, if it appears to the SFC to be desirable in the public interest that it  
be wound up.

J 106. Section 213 I shall shortly discuss in detail.

K 107. Section 214 empowers the SFC to apply to the Court of First  
L Instances for orders to be made in respect of a listed company whose business  
M or affairs have been conducted in a manner, inter alia, oppressive to its  
N members or involving defalcation, fraud or other misconduct. The section  
O then sets out the various orders the court can make. Sections 214A and B  
P concern a similar application and the orders that can be made by the Court of  
First Instance in respect of open-ended fund companies.

Q *The role of section 213 within Part X of the SFO*

R 108. Mr Manzoni argues that because the SFC does not regulate  
S members of the public it is given limited powers to adversely affect them.  
T Other than the SFC’s powers of investigation that can be exercised against  
U any person, the only power the SFC has that can adversely affect a member of  
V

A the public is the *Mareva* injunction like power that is contained in section 213  
B and that is a power that is exercised by the Court of First Instance on the  
C application of the SFC.

D 109. There is no dispute that section 213 supplements the Part X,  
E Division 1 powers. The question is how it was intended to do that. Does  
F section 213 supplement the Division 1 powers in a complementary way, being  
G a different power able to be used against the same class of persons, or does it  
H supplement these powers only in the sense that it is additional to them but  
I targets persons who the Division 1 powers could not be deployed against  
J because those powers were limited in their operation to licensed corporations?

K 110. In answering this question it should, firstly, be noted that powers  
L can overlap in their sphere of operation with other powers. Given the breadth  
M of the SFC's statutory responsibilities and the importance to Hong Kong of it  
N being able to effectively discharge them, it is not surprising that it is given an  
O array of powers and also not surprising that there may be occasion when more  
P than one of the powers is capable of serving the same purpose or achieving  
Q the same end. The fact that this can happen does not, in my view, have any  
R particular significance and, on its own, does not persuade me to construe  
S sections 204 and 205 in a way that would prevent this from happening.

T 111. That the two powers may overlap is likely, in practice, to be more  
U theoretical than actual. There is a world of difference between them in terms  
V of the threshold for their exercise. I have already referred to the threshold for  
the Division 1 powers as set out in section 207. But the threshold for section  
213 is much higher. The trigger for the Court of First Instance to make an  
order is for it to "satisfy itself, so far as it can reasonably do so, that it is  
desirable that the order be made and that the order will not unfairly prejudice



A any person". This trigger is set out in section 213(4). It will only be desirable  
B for the court to make an order if one of the pre-conditions to the making of an  
C order that are set out in section 213(1) is satisfied. This was described by  
D Kwan J in *Securities and Futures Commission v A*<sup>13</sup> as follows:

E "26. In considering whether it is desirable that an order should be made,  
F the court should ask if the injunction would have some utility or serve  
G some purpose within the contemplation of the statute ....

H "28. Before any interim injunction could be granted, there must be  
I established a *prima facie* case of contravention of a relevant provision  
J of the statute and there is an appreciable, not a fanciful, risk that  
K without the injunction, proper compliance under the statute would be  
L frustrated (*Tang Yoke Keng*, supra 19, 20)."

M 112. Kwan J recognised that that the section 213 power could be used  
N in an early stage of an SFC investigation but that would still require evidence  
O to be placed before the court sufficient to satisfy the judge. As to what might  
P be sufficient, she adopted the following statement of Waddell CJ in *Corporate*  
Q *Affairs Commission (NSW) v Walker & Ors*<sup>14</sup>.

R "In the case of a application made shortly after an investigation has begun,  
S the evidence may be regarded as sufficient if it establishes the general  
T circumstances, the nature of the investigation and the reason why it is  
U thought that there may be some liability on the part of a relevant person."

V 113. Secondly, the Part X powers are clearly powers to be employed  
by the SFC in the course of an investigation by it. I have already discussed  
how the SFO makes clear that in investigating market misconduct, the SFC  
has a broad remit and in performing this aspect of its regulatory role it is, in  
effect, regulating everyone. In order that it could perform this important role  
effectively, the SFO expanded the powers of the SFC.

<sup>13</sup> [2008] 1 HKC 89, 98 at [28].

<sup>14</sup> (1986 – 87) 11 ACLR 884, 888.

A  
B 114. In *Securities and Futures Commission v C*<sup>15</sup> the Court of Appeal  
C was addressing a submission that sought to limit the effect of section 213(2)(c)  
D of the SFO and prevent it from operating as a form of *Mareva* injunction. In  
E rejecting this submission the Court of Appeal referred to submissions made  
F by Mr John Scott SC on behalf of the SFC and said:

F “24. The effect of an order under s.144 would be to freeze the securities  
G specified. Mr Scott submitted that where the legislative intention was  
H to expand rather than to cut down the powers of the SFC, it makes no  
I sense to construe s.213(2) as having the effect of cutting down the  
J powers of the SFC.

H 25. Mr Scott’s submissions is amply supported by the consultation  
I document which accompanied the White Bill (which became the  
J Ordinance). The executive summary stated that the primary purpose  
K of the reform of the securities and futures market was “to create a  
L modern regulatory and legal framework [that] promotes market  
M confidence; secures appropriate investor protection; and reduces  
N market malpractice and financial crimes; and to facilitate innovation  
O and competition”. Then in paras.8.10-11, after referring to existing  
P powers (eg s.144 of the Securities Ordinance and corresponding  
Q provisions in the Leveraged Foreign Exchange Trading Ordinance) to  
R obtain orders including restraining orders, it explained that Pt.X  
S (being a reference to, inter alia, s.213 of the Ordinance as enacted)  
T “preserves each of the existing powers ... and, where appropriate,  
U expands them to allow for a more effective discharge of the SFC’s  
V functions.”

O Like the Court of Appeal, I must be wary of adopting an interpretation of  
P Part X that could have the effect of defeating the intention of the legislature.

Q 115. Thirdly, I find no textual indication from the Division 1  
R provisions that indicate that the powers in sections 204 and 205 were not  
S intended to be available to the SFC in respect of the property held in the  
T accounts of the licensed corporation’s clients which has been acquired by the  
U client through some form of market misconduct. Nor is there anything in the  
V

<sup>15</sup> [2009] 4 HKLRD 315, 326 at [24] – [25].

A drafting of section 213 which supports Mr Manzoni's argument. A

B  
C 116. However, I do derive assistance from the legislative materials  
D that have been provided to me. The Consultation Document on the Securities  
E and Futures Bill, which was published by the Government in respect of its  
F proposed legislation, makes clear that section 213 was intended to supplement  
G the Part X Division 1 powers in order to cater for circumstances where the  
H Division 1 powers were likely to be either inadequate or inappropriate. At  
I paragraph 8.2 of the document, the purpose of the different provisions in Part  
J X was explained as follows:  
K

I "8.2 The two categories of powers supplement one another. The SFC's  
J powers to intervene enable it to take immediate action to protect the  
K interests of the investing public generally as well as those of a licensed  
L person's clients and, to a limited extent, its creditors. However,  
M where –

K (a) more drastic measures are called for (for instance, an injunction is  
L required to enjoin any breach of the relevant Ordinances); or

L (b) the SFC encounters resistance or obstruction in exercising its powers  
M of intervention; or

M (c) it is appropriate or necessary to take steps which have a more  
N permanent or long lasting effect (for instance, where for the  
O preservation of a licensed person's assets for the protection of its  
P clients and creditors, a winding up order should be made),

O  
P the SFC's powers to intervene may not suffice and recourse to the Courts  
Q provides a critical means of protecting the interest of investors and creditors.  
R The SFC's ability to apply to the Court for a range of orders and other relief  
S in such circumstances is therefore crucial."

R 117. There is nothing in these comments which suggests the  
S interpretation of section 204 and 205 for which Mr Manzoni contends. It is  
T particularly noteworthy that there is no mention of the powers applying to a  
U different or limited category of person, and there being a need, therefore, for  
V the section 213 power. Rather, the description of the powers is of each of

A them serving different purposes and addressing different needs and not of  
B them targeting different persons. It is in this complementary sense that they  
C are said to supplement the Division 1 powers.

D 118. As to that different purpose and different need, I have already  
E indicated that the nature of the Part X Division 1 powers and the low threshold  
F which triggers their deployment, suggest that they are ideally suited for use at  
G an early stage of an investigation when the SFC may not yet have gathered all  
H its evidence but, in the public interest, cannot afford to delay further in  
intervening in the business of a licensed corporation

I 119. Mr Manzoni places great emphasis on the fact that the Division 1  
J powers target the licensed corporation. That is true, but the licensed  
K corporation exists to service clients; that is its business; that is what it does.  
L The fact that the prohibition or requirement is only imposed on the licensed  
M corporation does not mean that the power to intervene was not intended to be  
used when client misconduct was suspected to have occurred.

N 120. It is recognised by Mr Manzoni that the SFC is given powers to  
O impose prohibitions or restrictions on the licensed corporation in respect of  
P the property of the client and, in section 205, this power is given explicitly in  
Q the definition of "relevant property". However, he asserts that control over  
R the client's property can only be exercised for the purpose of protecting the  
S client from any adverse consequences that might flow to the client from  
T misconduct by the licensed corporation. But, I do not see Part X as being  
U concerned only with the SFC's role of regulating licensed persons. As I have  
V said, it is part of the armoury of powers given to the SFC in order for it to  
more effectively carry out its investigatory role and its role of promoting,  
protecting, preserving and advancing the integrity of the securities and futures

A industry. I reject the submission that because licensed corporations are subject  
B to the regulatory regime administered by the SFC, the Division 1 powers are  
C more appropriate for licensed corporations or should be construed as  
D pertaining only to the investigation of misconduct by licensed corporations.

E 121. In answering the question I have set out at [109] of this ruling, I  
F am of the view that section 213 is complementary to the Division 1 powers  
G and that it was intended that it would be left to the discretion of the SFC to  
H decide in the particular circumstances of any specific case which power would  
I best advance the public interest of the SFC most effectively and efficiently  
J performing its statutory duties. The fact that section 213 could be used in the  
K same circumstances does not mean that it should be used in preference to the  
L Division 1 powers. Where overlapping powers are to be exercised by a public  
M body in the public interest it will be for that public body to decide which power,  
N in the circumstances before it, best advances the public interest.

O 122. Consequently, this is not a case of there being two provisions  
P capable of encompassing the same conduct, one of which is general and one  
Q specific, with the result that the former power should give way to the latter.  
R Although these powers in sections 204 and 205 can be applied in a way which  
S can affect persons other than licensed corporations, they, and section 213 are  
T different in the purpose that each serves.

U *The purpose of sections 204 -205*

V 123. What distinguishes Division 1 from Division 2 is that Division 1  
powers are administrative powers whereas Division 2 powers are judicial ones.  
The section 213 power, being a judicial power, requires evidence of a certain  
level of persuasion and proof to be placed before the court and is part of a

A regime in which final orders can be given as to the disposition of the property.

124. The Division 1 powers are interim powers, exercised administratively, to achieve expeditiously an immediately needed goal or to deal with a problem which has urgently arisen. The powers have no sanction in support of them and should there be non-compliance with them, the SFC must seek the assistance of the Court of First Instance, either via section 211 or section 213.

125. The common thread in the Division 2 sections is that they all concern applications by the SFC to the Court of First Instance and this distinguishes them from the Division 1 powers which are deployed administratively. In my view, the purpose of the powers in Division 1 is to provide the SFC with administrative powers that will enable it to more effectively carry out its statutory duties in the early stages of an investigation when it is handicapped by not having a complete picture of the misconduct that may have occurred, is lacking in formal evidence to prove its suspicions and it faces a problem or situation of some urgency that requires it to act expeditiously.

*The impact of human rights law on the competing interpretations*

126. When examining the impact of human rights law on the competing interpretations, I am not making a ruling on the constitutionality of sections 204 and 205 should the SFC's interpretation of them be correct. What I am doing is making an assessment of whether, if I upheld the SFC's interpretation I would, as a consequence, be upholding an interpretation which would cause the sections to be seriously vulnerable to a constitutional challenge. An interpretation which could render the sections unconstitutional

A cannot be the correct interpretation. In order to address this argument, I have  
B to assess whether the SFC interpretation would have the effect asserted by  
C Mr Manzoni and I can only do that by conducting a constitutional analysis of  
D the section with, of course, particular reference to the applicant's arguments.

E 127. Mr Manzoni's argument, based on the principle of legality, is that  
F statutory provisions have to be construed in a manner which is compatible  
G with human rights. In support of his contention that the construction relied on  
H by the SFC is not so compatible he advances two arguments. The first is that  
I to support what the SFC has done is to construe the SFO in a way that was  
J never envisaged by the legislature and who, therefore, would not have been  
K consciously intending the legislation to have the adverse impact on investors'  
L rights under BL6 and BL105 that the SFC's construction of it would now have.  
M This is contrary to the principle that human rights and fundamental principles  
N of law, even where derogable, cannot be overridden except by express words  
O or necessary implication. The second is that the derogation from the right to  
P property is so clearly a disproportionate response to the problem being  
Q addressed that the interpretation of the SFC could never have been intended.  
R I do not agree with either of these arguments.

S 128. In respect of the first limb of his argument, I note that the powers  
T of intervention in sections 204 – 206 are very substantial interferences with a  
U licensed corporation's rights under BL6 and BL105. The legislature would  
V certainly have been aware of this and it is inconceivable that it would not have  
been aware that clients' rights under these provisions would also be affected.  
Indeed Mr Manzoni concedes that the powers can be used to freeze the client's  
account when it is being done to protect the client from the misconduct of the  
licensed corporation. Thus, on Mr Manzoni's own construction of the section,  
the legislature would have been aware that it was empowering the SFC to

A freeze a client's account of a licensed corporation but that it was not aware it  
B was empowering the SFC to take this action when the client was involved in  
C misconduct, notwithstanding that the use of the power would be to advance  
D the public interest such as by preventing a person from enjoying the proceeds  
E of their crime. I do not find such a scenario credible.

F 129. Mr Manzoni relies on the availability of section 213 with its  
G procedural and substantive safeguards, to argue that it is extremely unlikely  
H that the legislature would have intended the use of section 204 and 205 in the  
I way the SFC has used them against the applicant. I have already indicated  
J that section 213 should be seen as complementing the Part X, Division 1  
K powers. It is to enable final orders to be made concerning the rights to  
L property and the disposition of property once the investigation is completed,  
M the dust has settled and a clear picture is revealed of what has taken place.  
N The interference with a person's property that takes place when the Division  
O 1 powers are exercised is neither permanent nor final; it is a temporary  
P freezing of the *status quo* that will ensure that when the appropriate time is  
Q reached for permanent and final orders to be made in respect of the property,  
R the orders will be meaningful and effective because the property against which  
S they are made still exists and is readily available.

T 130. Mr Manzoni also argues that the situation of the applicant is  
U analogous to the use by the police of no consent letters under the Organized  
V and Serious Crimes Ordinance to indirectly freeze the bank accounts of  
persons under investigation instead of achieving this end by the statutory  
restraint powers that the ordinance affords them. He asks me to adopt the  
reasoning of Coleman J in *Tam Sze Leung & Ors v. Commissioner of Police*<sup>16</sup>  
to find that what the SFC seeks to do with the Part X Division 1 powers is not

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<sup>16</sup> [2021] HKCFI 3118.



A available to it because construing those powers in the light of human rights  
B considerations, results in the construction for which he contends. Again I do  
C not agree.

D 131. I have already found that the legislation specifically allows the  
E SFC to freeze a client account of a licensed corporation and Mr Manzoni  
F accepts that is so. But his acceptance is qualified. He argues that the SFC can  
G use this power only to protect the client against the misconduct of the licensed  
H corporation and cannot use it to protect the public interest from misconduct  
I by the client. Because there is specific statutory power for the SFC to do what  
it did, the analogy with the use of no-consent letters, which had no statutory  
foundation to freeze an account, is not apt.

J 132. The second limb of Mr Manzoni's argument is that the  
K administrative measures are a disproportionate response to the problem they  
L seek to address because of the extent to which they interfere with an investor's  
M rights to private property as protected by BL 6 and BL 105 without the judicial  
safeguard that is contained in section 213.

N 133. Relying on the test articulated by Ribeiro PJ in *Hysan*  
O *Development Co Ltd v Town Planning Board*<sup>17</sup>, he argues that allowing the  
P SFC to use sections 204-205 in the way they have done is a disproportionate  
Q interference with property rights as it can freeze a client's account for a  
R prolonged period of time and thereby cause irreparable damage to individuals  
S and businesses. There is no justification he says "for the SFC to wield such a  
T draconian power over members of the public" and that, given the protection  
of the Basic Law, "that cannot have been the legislative intent behind sections

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U <sup>17</sup> (2016) 19 HKCFAR 372 at [134] – [135].

A 204 and 205.”<sup>18</sup>

B  
C 134. I shall first deal with section 211 as the SFC relies on that  
D provision as a means by which a person adversely affected by a Notice under  
E sections 204-205 can quickly obtain an appearance before a judge of the Court  
F of First Instance. I agree with Mr Manzoni that section 211 has an ability to  
G create a level of judicial oversight, but in practice it is not likely to be engaged.  
H That is because it depends entirely upon the willingness of the licensed  
I corporation to work cooperatively with its client. But that cooperation is not  
J likely to be forthcoming for two reasons. First, because the licensed  
K corporation may not be willing to risk incurring the wrath of its regulator and,  
L secondly, because the reasons of the SFC for imposing the prohibition or  
M requirement may reveal an allegation of criminal wrongdoing with the  
N consequence that any dealing with the client’s money may be a dealing with  
O the proceeds of an indictable offence.

L 135. Although section 211, through subsection (2), enables a licensed  
M corporation to, indirectly, gain access to a Court of First Instance hearing, I  
N am not persuaded that it was enacted with this purpose in mind. The  
O Division 1 powers are purely administrative and it is not made an offence to  
P fail to comply with a Notice issued under them. As a consequence, there is  
Q nothing to compel compliance with them and nothing to punish a person for  
R failing to comply with them. That is where section 211 comes into play. In  
S my view, it was enacted to provide the SFC with a mechanism for compelling  
T compliance and for punishing non-compliance.

S 136. Apart from section 211 the only remedy available to the client of  
T the licensed corporation is the review mechanism of section 208 and the right

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U <sup>18</sup> Written Arguments of the applicant at [54].

A to appeal the outcome of that review, provided by section 217 which, as this  
B case demonstrates, may not be an expeditious means of resolving a dispute  
C over a person's right to property. Nevertheless, they are the remedies that the  
D legislature has enacted and for present purposes it is not for me to decide  
E whether, having regard to the overall content of the regime, it is a  
F disproportionate, and therefore unconstitutional, response to the problem the  
G legislature seeks to address. That is a decision for a court. Rather, my  
H approach must be to consider whether the interpretation advanced by  
I Mr Manzoni must be correct because the SFC interpretation has such adverse  
implications for the Basic Law and civil rights of persons other than licensed  
corporations. However, the only way I can do that is to assess the  
proportionality of the regime by reference to the four *Hysan* steps.

J 137. The four steps set out in *Hysan* for determining the  
K proportionality of a restriction on human right are:

- L (1) the restriction or limitation must pursue a legitimate aim;  
M (2) the restriction or limitation must also be rationally  
connected to that legitimate aim;  
N (3) the restriction or limitation must also be no more than is  
O necessary to accomplish that legitimate aim; and  
P (4) whether a reasonable balance has been struck between the  
Q societal benefits of the encroachment and the inroads made  
R with the constitutionally protected rights of the individual  
and in particular whether pursuit of the societal interest  
resulted in an unacceptably harsh burden on the individual.

S 138. In respect of Part X the legitimate aim is the protection of  
T investors, creditors of the licensed corporation and the public interest. In  
U respect of the public interest one aspect is the preservation of monies that

A might otherwise be dissipated, pending the results being known of an  
B investigation into misconduct within the securities and futures industry.  
C Should the SFC investigation reveal that misconduct has indeed taken place  
D then other aspects of the public interest come into play. They include the  
E deterrence of misconduct through effective law enforcement and prosecution;  
F the prevention of acts of dealing in the proceeds of an indictable offence and  
G the confiscation of such proceeds. In my view, it is unarguable that the  
restriction or limitation that is a consequence of the SFC's interpretation of  
sections 204 and 205 pursues a legitimate aim.

H 139. The restriction or limitation that flows from the SFC's  
I interpretation temporarily deprives a client of a licensed corporation of access  
J to the funds in their account but, in doing so, it ensures that those funds remain  
K available for orders to be made in respect of them should a case be made out  
L for depriving the client of them. The restriction or limitation preserves the  
M *status quo* pending the outcome of the SFC's investigation. Again, in my view,  
N the restriction or limitation is rationally connected to the legitimate aim.

O 140. I turn now to the third step. The third step involves the  
P application of a standard. There are two standards by which the third step can  
Q be determined. The first standard is whether the intruding measure is no more  
R than is reasonably necessary to achieve the legitimate aim. The second  
S standard asks whether the encroaching measure is manifestly without  
T reasonable foundation. Because I am not determining whether the measure is  
U constitutional, I should not be choosing between the two standards and will  
V consider step 3 by reference to both standards.

141. I accept that the remedy afforded an affected person, other than  
the licensed corporation, could have been drafted differently and could have

A provided such persons with more expeditious means of having their rights to  
B property adjudicated upon by a person independent of the SFC. But, my role  
C is to consider whether the availability of a significantly less intrusive but, for  
D the SFC, equally effective measure, in the form of section 213, points to the  
E interpretation advanced by Mr Manzoni as being the one that must be correct.

F 142. The fact that section 213 could serve this purpose begs the  
G question of what role the section plays within Part X and the SFO as a whole.  
H That, I have already discussed earlier in this judgment. Mr Manzoni's  
I argument essentially is one of:

- J (1) the remedies afforded a third party affected by a  
K restriction or prohibition under section 204 or 205 are not  
L adequate protection of such a person's property rights;
- M (2) section 213 provides: (i) adequate protection of such a  
N person's property rights; and, (ii) an equally effective  
O power for the SFC; and therefore
- P (3) the interpretation of the applicant must be the correct  
Q construction of the ambit of operation of the two sections.

R 143. However, I do not agree with (1) above, the major premise on  
S which Mr Manzoni's argument is founded. I do not see how it can be said  
T that granting a person affected by the exercise of the Division 1 powers the  
U two rights, one of review and one of appeal to an independent tribunal, clearly  
V provides affected persons with remedies that are, by their nature, so  
inadequate, that a significantly less intrusive and equally effective measure  
must be found and can be found in section 213. They are both very real  
remedies and they are not so inadequate as to cause the regime to be  
transparently disproportionate to the problem it seeks to address. It is true that  
they do not provide an investor with an immediate opportunity to seek redress

A from an independent tribunal but I do not see that the lack of such a right  
B causes the review regime that the legislature has enacted to be  
C disproportionate. In so saying I do not have regard to the delay that has  
D occurred in the present case in the exercise by the applicant of first her  
E administrative right of review and secondly her right of appeal to the SFAT.  
That delay is not an inevitable feature of these remedies in every case.

F 144. I also do not agree with (2)(ii) above. As I have already  
G demonstrated, the threshold for accessing the Division 1 powers and section  
H 213 is different and so it cannot be said that section 213 is just as effective for  
I the SFC as the Division 1 powers.

J 145. I turn now to the fourth step of *Hysan*. In the circumstances of  
K the present case, I do not think the fourth step adds much to the third step. I  
L accept, as I have said, that the legislation could have been drafted to ensure  
M that an affected person could obtain a Court of First Instance hearing within a  
N stipulated period of time but the remedies that the legislation does provide do  
O not produce a result that can be described as extremely unbalanced or  
P extremely unfair or oppressively imposes an unacceptably harsh or excessive  
Q burden on the affected individual.

R 146. For all these reasons I do not find any human rights law  
S considerations that would cause me to construe the powers in sections 204 and  
T 205 in the way in which the applicant contends.

R *Practical consequences of the competing interpretations*

S 147. Finally, Mr Manzoni urges me to have regard to the practical  
T consequences of the opposing constructions and argues that the legislature  
U

A must be assumed not to have intended consequences which are absurd,  
B objectionable, undesirable or unworkable. In this respect he relies on the  
C adverse impact that the SFC's interpretation would have on the human rights  
D of third parties and the effect it would have on the constitutionality of the two  
E sections.

F 148. I have already dealt with the Basic Law rights and constitutional  
G ramifications the SFC's interpretation of the two sections. But, a slightly more  
H nuanced version of the same argument is that even if the sections could  
I withstand a constitutional challenge the SFC's interpretation of sections 204  
J and 205 cannot be correct as it has such a harsh impact on a member of the  
K public's property rights – effectively riding roughshod over them without  
L providing the affected person a right of immediate recourse to the Court of  
M Final Instance where that person can assert and litigate his or her legal rights.  
N Whilst it is true that the applicant has no immediate opportunity to litigate her  
O right to her property, she is not wholly without rights and there are very strong  
P countervailing public interest benefits to be gained by allowing the SFC to do  
Q what it has done. By preserving the *status quo* and preventing the dissipation  
R of the monies in the applicant's Kingkey account it ensures that those monies  
S remain available should it become clear that the applicant is not entitled to  
T them and it enables the SFC to prevent any dealing with these monies should  
U it become clear that they are the proceeds of an indictable offence. These are  
V very substantial benefits indeed and the corollary of the SFC not having the  
powers is that there is the potential for very substantial harm being done to the  
public interest.

S 149. I am not persuaded, therefore, that the SFC interpretation results  
T in consequences which are absurd, objectionable, undesirable or unworkable.

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*Conclusion*

150. For all the reasons set out in this ruling I answer the question of law affirmatively and rule that on a true and proper construction of sections 204 and 205 of the SFO, the SFC's powers to impose prohibitions and/or requirements on a licensed corporation under the two sections is exercisable as against the account of a particular client with the licensed corporation on the basis that the client (as opposed to the licensed corporation) is suspected of having committed or been involved in one or more instances of market misconduct under Part XIII of the SFO, offences under Part XIV of the SFO, and/or breaches of Part XV of the SFO.





Ian Charles McWalters

(Chairman)