

# Constitutionality of Restriction Notice Upheld by Court

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# Factual Backdrop

In *Tam Sze Leung & Ors* (the “Applicants”) *v Secretary for Justice and Securities and Futures Commission* HCAL177/2022; [2022] HKCFI 2330, the Applicants sought leave to apply for judicial review to challenge the constitutionality of statutory power vested in the Securities and Futures Commission (the “SFC”) to issue the Restriction Notices (the “RNs”) under sections 204 and 205 of the Securities and Futures Ordinance (Cap. 571 of the Laws of Hong Kong) (the “SFO”) by virtue of section 207(e) of the SFO to freeze assets held by the Applicants with certain licensed corporations. The Applicants are members of the same family who are investigated by the SFC for a large-scale ramp-and-dump scheme conducted by a syndicate. The rolled-up hearing was conducted before The Honorable Mr. Justice Coleman at the Court of First Instance (the “CFI”). The judicial review application was dismissed.



## Issues in Dispute

In this case, the issue in dispute is whether the SFC’s statutory power to issue the RNs under sections 204 and 205 pursuant to section 207(e) of the SFO interferes with the constitutional rights to property under Articles 6 (“BL6”) and 105 (“BL105”) of the Basic Law on the grounds that it (a) is not prescribed by law; and (b) fails the proportionality test. The CFI observed that no fact-specific challenge was made by the Applicants and it is a purely systematic challenge.

## CFI’s Rulings

As to the issue of “prescribed by law”, the CFI ruled that sections 204 and 205 of the SFO satisfy the “prescribed by law” requirement, albeit the CFI agreed with the Applicants that the relevant administrative intervention powers granted to the SFC are highly intrusive to the individual’s property rights under BL6 and BL105.

In determining the above, the CFI had, inter alia, considered the followings:

- (i) There is sufficient guidance from the statutory context to give contours to the meaning of “public interest” in section 207(e) of the SFO;
- (ii) The review mechanism in the Securities and Futures Appeals Tribunal (the “SFAT”) provides an infrastructure which is conducive to the gradual development or clarification on the meaning of section 207(e) of the SFO; and
- (iii) There are sufficient safeguards provided by the SFAT and by the courts in judicial review.

With respect to the issue of “proportionality”, it was also ruled that the restriction or limitation under the RNs is rationally connected to the legitimate aim. On balance, it is no more than is necessary to accomplish legitimate aim, strikes a reasonable balance between the societal benefits of the encroachment and inroads made with the constitutionally protected rights of the individual. In addition, it does not trigger an unacceptably harsh burden on the individual.



This explanatory note is not, and should not be regarded as, legal advice. Should you have any enquiries, please seek specific advice from legal advisers.

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