

Case Summary

Lai Chee Ying (黎智英) v Secretary for Security

HCMP 956/2021; [2021] HKCFI 2804; [2021] 4 HKLRD 695
(Court of First Instance)

(Full text of the Court's judgment in English at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=138813&QS=%28HCMP%7C956%2F2021%29&TP=JU)

Before: Hon Anthony Chan J

Date of Hearing: 15 September 2021

Date of Judgment: 17 September 2021

Approach to construction of NSL and IR – purposive and contextual approach – NSL 43(3) and Sch. 3 to IR be construed in light of the context and purpose of NSL – preservation of property pending confiscation / forfeiture – meaning of “deal with” under s. 3(1) of Sch. 3 – natural and ordinary meaning – wide ambit – not limited to the five acts in freezing notice – licence by S for S mitigated harshness of regime – “dealing with” shares included exercise of voting rights – reference to definition of “deal with” in UNATMO unhelpful

Property rights under BL 6 and 105 – shares in company and voting rights protected – protection of property rights not absolute – adverse impact of exercise of voting rights on purposes of freezing regime – possible depletion of assets for confiscation / forfeiture – views of law enforcement agencies be given due weight – not for Court to second guess what or how voting rights will be exercised by Plaintiff

Background

1. The Plaintiff was the controlling shareholder of Next Digital Limited (“the Company”) which was the holding company and the listing vehicle

of a group of companies. He was also the chairman of the board of directors and an executive director of the Company until he resigned on 29 December 2020.

2. The Plaintiff was arrested in August 2020 for collusion with a foreign country or with external elements to endanger national security, contrary to NSL 29(1)(4), and had also been charged with: (a) conspiracy to commit collusion with a foreign country or with external elements to endanger national security; and (b) conspiracy to pervert the course of public justice.

3. On 14 May 2021, the Secretary for Security (“S for S”) issued a notice under s. 3 of Sch. 3 (“Rules Relating to Freezing, Restraint, Confiscation and Forfeiture of Property”) of the Implementation Rules for Article 43 of the NSL (“IR”) (“the Notice”) to the Plaintiff. The Notice referred to the specified properties of his (including all shares in the Company held by him (“the Shares”), being properties which the S for S had reasonable grounds to suspect were “offence related property” for the purposes of s. 3 of Sch. 3 (“the Specified Property”). It directed the Plaintiff not to directly or indirectly “deal with” the Shares. The Notice referred to five inclusive ways in which the Shares could be said to have been “dealt with” (“the Five Acts”), namely, (a) receiving or acquiring the Specified Property; (b) concealing or disguising the Specified Property; (c) disposing of or converting the Specified Property; (d) bringing into or removing from Hong Kong the Specified Property; and (e) using the Specified Property to borrow money or as security.

4. The Plaintiff filed an Originating Summons against the S for S seeking: (a) a declaration that for the purposes of Sch. 3 of the IR and the Notice, “deal with”, in relation to the Specified Property, excluded directly or indirectly exercising any voting rights in relation to any shares in the Company; and/or (b) a licence under s. 4(2) of Sch. 3 of the IR which permitted or authorized him to directly or indirectly exercise any voting rights in relation to the Shares.

Major provision(s) and issue(s) under consideration

- BL 6 and 105

- NSL 1, 4, 5, 28 and 43
- IR, Sch. 3, ss. 1, 3 and 4
- United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) (“UNATMO”), s. 6

5. The Court had to determine:

- (a) whether, on the true and proper interpretation of the NSL, including in particular Sch. 3 of the IR, to “deal with” shares in a company held by a person alleged to be “offence related property” for the purposes of Sch. 3 and made the subject of a notice issued under s. 3 of Sch. 3, included exercising directly or indirectly voting rights in relation to such shares (“Construction Issue”);
- (b) if the answer to (a) was yes, whether it was reasonable in all the circumstances of this case to grant to the Plaintiff a licence (and if so, whether and what conditions were to be attached) to exercise directly or indirectly the voting rights in relation to the Shares under s. 4(2) of Sch. 3 for the purpose of winding up the Company (“Licence Application”). (paras. 3 and 20)

Summary of the Court’s rulings

Construction Issue: Context and purpose

6. It was reasonably clear from the wordings of NSL 43 that the powers granted thereunder were in addition to those existing at the time when the NSL was made. (para. 29)

7. A purposive and contextual approach should be adopted in the construction of the NSL. The construction of the relevant provisions of the NSL and Sch. 3 of the IR should be made in light of the context and purpose of the NSL. In this regard, the NSL came to be made at a critical moment in the history of Hong Kong when the place was engulfed in violent protests. The purpose of the NSL, as stated explicitly in NSL 1, included the prevention, suppression and punishment of NSL offences (“Stated Purposes”). Echoing NSL 1 and

pursuant to NSL 3, the executive, legislature and judiciary were to effectively prevent, suppress and impose punishment for any act or activity endangering national security in accordance with the NSL and other relevant laws. (paras. 38-43)

NSL 43 and s. 3 of Sch. 3 of the IR

8. Pursuant to NSL 43(1)(3), a property might be subject to different measures taken by the authority, namely, freezing of, applying for restraint order, charging order and confiscation order in respect of, and forfeiture of property. The property which might be subject to such actions was: (a) property used or intended to be used for the commission of an offence; (b) proceeds of crime; or (c) other property relating to the commission of an offence. It was implicit that the offence or crime referred to was intended to be NSL offence or crime. (paras. 45 and 46)

9. The power to freeze property under s. 3 of Sch. 3 of the IR might only be invoked in respect of “offence related property” which was defined in s. 1(1) of Sch. 3 as: (a) the property of a person who committed (or attempted to commit) or participated in (or facilitated) the commission of an offence endangering national security; or (b) any property that was intended to be used (or had been used) to finance or otherwise assist the commission of an offence endangering national security. (para. 48)

10. It was reasonably clear from the provisions of s. 3, read with the other provisions of Sch. 3, especially s. 9 (confiscation orders) and s. 13 (forfeiture orders), that one of the purposes of a freezing notice was to preserve the property in question so that a confiscation or forfeiture order might be obtained in the future. In addition, a freezing notice might also serve the purposes of: (a) preventing the use of the property in financing or assisting any NSL offence; and (b) preventing any dealing with the property in a manner which might prejudice on-going investigation or proceedings concerning NSL offences. (paras. 54 and 55)

“Deal with”

11. The provisions of s. 3 of Sch. 3 were drafted in wide and embracing terms. (para. 56)

- (a) The natural and ordinary meaning of “deal with” had a wide ambit.
- (b) The use of the words “directly or indirectly” was consistent with an intention that the ambit of prohibition imposed by a freezing notice was a wide one.
- (c) Read in light of the context and purpose of the NSL, in particular, the Stated Purposes, that intention was fortified.
- (d) The licence regime provided an opportunity for an affected person to obtain a licence to allow his property to be dealt with in a particular manner. This was an important constituent of s. 3 which mitigated the harshness of the freezing regime and further fortified the intention that “deal with” should be construed widely.

Voting right

12. The voting right of a shareholder in a company was a property right protected by BL 6 and 105. A freezing notice restricted the free exercise of the rights represented by the Shares. Yet, the protection of property right was not absolute. If the Shares were frozen by the Notice, it made little sense for the prohibition not to apply to an important right attached to the same. (paras. 59 and 60)

13. The existence of an avenue for the Plaintiff to apply for a licence to exercise his voting right and, if refused, to ask the court for adjudication provided a balance between the Stated Purposes and the protection of property right. It also mitigated the imprecision of the phrase “deal with”. There was no reason to read down the provisions of s. 3 to exclude the exercise of voting right. (paras. 62 and 63)

Other arguments of the Plaintiff

14. The Applicant's submission that the exercise of voting right by him would not possibly impact upon the purposes of the freezing regime adversely was rejected by the Court. (para. 64)

(a) The S for S had declined to issue a blanket licence to the Plaintiff to exercise his voting right. In considering whether to grant a licence, the S for S would consider the relevant circumstances, in particular the risk to national security, if any, which the proposed action might generate. There was a need for the court to give due weight to the views of the enforcement agencies in matters of national security and related risk assessment. (para. 56(4) fn 5 and para. 64)

(b) The Plaintiff, the Company and its subsidiaries had entered into transactions that involved very substantial assets the disposal of which would likely have impacted on the value of the Company. One of these transactions demonstrated that unrestricted exercise of voting right by the Plaintiff might result in depletion of the Company's assets, which would in turn diminish the value of the Shares which might be subject to a confiscation or forfeiture order in the future. (paras. 65-67)

(c) The Construction Issue did not depend on whether the shares which were frozen were those of a public or private company. The exercise of voting right by a controlling shareholder might endanger national security. For example, a controlling shareholder might vote to approve the use of the company's funds to finance a subversive organisation, and agents of a country hostile to China might be appointed to the board of the company. (para. 68)

(d) It was not right for the court to have to second guess what or how the Plaintiff might exercise his voting right, which might or might not be for a legitimate purpose. The following observations made by the CFA in *Mo Yuk Ping v HKSAR* (2007) 10 HKCFAR 386 should be borne in mind in the protection of national security: "It has been widely recognized that there is no limit to the ingenuity of fraudsters in engineering novel means of defrauding

others. This ingenuity leads to the conclusion that the enactment of specific offences is not an adequate safeguard unless they are accompanied by a general offence”. (para. 69)

- (e) The Plaintiff had been charged with serious offences endangering national security. He was also a man of considerable means. In such circumstances, it would be naive for the court to think that with the management vested in a board of directors which membership included independent non-executive directors, the exercise of voting right by a controlling shareholder would not possibly frustrate or hinder the freezing regime. (para. 70)

15. The Court did not accept the ancillary argument that “deal with” should be confined to the Five Acts which would be sufficient for purposes of the freezing regime. (paras. 71-73 and 80)

- (a) The Five Acts only prohibited a person from disposing of or diminishing the value of the property in question. They would not prevent a person from utilising the property to facilitate the commission of an NSL offence or to carry out acts which might prejudice the investigation of an NSL offence.
- (b) The function of the court was to decide the meaning of a provision read in light of the context and purpose of the legislation. Adequacy of a provision was primarily a matter for the legislature.
- (c) The submission that if a director acted in breach of the NSL after his appointment by the controlling shareholder, it was the action of the director and not the exercise of voting right which caused the breach was rejected by the Court; it ignored the prevention of NSL offences.

16. Counsel for the Plaintiff submitted that there was no legal basis for the S for S to have turned the Five Acts into an inclusive definition, citing s. 6(12) of UNATMO which referred to the Five Acts in an exhaustive definition for “deal with” in the context of the anti-terrorism freezing regime. However, the Court held that it was unhelpful to refer to the

definition in UNATMO. (paras. 75-80)

- (a) A definition for a particular statutory purpose did not really help one to determine the meaning of the word one had to construe in a different document, even when they involved the same or a similar expression, as the same word in different documents might take on different meanings because of the textual or factual context.
- (b) The NSL was a national law with a wider purpose than UNATMO.
- (c) Given NSL 28 which provided that the provisions of Part 3 (Terrorist Activities) “shall not affect the prosecution of terrorist offences committed in other forms or the imposition of other measures such as freezing of property in accordance with the laws of the [HKSAR]”, it was clear that the NSL regime was intended to operate as a separate regime.
- (d) Even if s. 3 of Sch. 3 was adopted from s. 6 of UNATMO, the definition of “deal with” under s. 6(12) of the Ordinance was deliberately left out, thus suggesting an intention to depart from the restrictive definition in UNATMO.
- (e) The Five Acts only prohibited a person from disposing of or diminishing the value of the property in question. They would not prevent a person from utilising the property to facilitate the commission of a NSL offence or to carry out acts which might prejudice the investigation of a NSL offence.

17. For the above reasons, the Court answered the Construction Issue in the affirmative and dismissed the declaration sought by the Plaintiff in the Originating Summons. (para. 81)

Licence Application

18. Having considered the preliminary view of the Court that the intended licence application should first be made to the S for S because

it was not the function of court, nor was it in a position, to carry out national security risks assessment, and that if there was disagreement between the parties over a fresh licence application, the Court would be in the position to adjudicate on the matter with the benefit of the parties' evidence and submissions, the Plaintiff asked for the Licence Application to be adjourned. The Court agreed to such adjournment application. (paras. 21, 22 and 82)

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