

Application No.1 of 2003

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

IN THE MATTER OF Section 55(2)(a)(ii)
of the Securities Ordinance and
section 217 of the Securities and Futures
Ordinance

AND IN THE MATTER OF an
application by MAN KIN WAI RICKY
for a review by the Securities and
Futures Appeals Tribunal

BETWEEN

MAN KIN WAI RICKY

Applicant

and

SECURITIES AND FUTURES COMMISSION

Respondent

Tribunal: Hon Mr Justice Stone, Chairman

Mr Vincent Lee, Member

Mr Stephen Hui, Member

Date of Hearing: Friday, 26 September 2003

Date of Reasons for Determination: 10 December 2003

REASONS FOR DETERMINATION

The Application

1. This is an application for review of a decision of the Securities and Futures Commission issued on 26 June 2003 whereby the applicant's registration as a dealer's representative was revoked.

2. This decision was made pursuant to section 55(2)(a)(ii) of the Securities Ordinance, and followed upon the making of a bankruptcy order in the High Court against Mr Man, the applicant herein.

3. By a Notice of Appeal dated 17 July 2003 addressed to the Securities and Futures Appeals Panel, Mr Man appealed against this decision, which appeal came before this tribunal (as statutory successor to the panel) pursuant to section 217 of the Securities and Futures Ordinance, Cap.571, and the transition provisions therein.

The Determination

4. At the conclusion of the hearing before this tribunal, wherein Mr Man appeared in person and the SFC was represented by Miss Elizabeth Coupe, the tribunal dismissed Mr Man's application, with no order as to costs.

5. We now give our reasons for such dismissal.

The Background

6. Mr Man was first registered as a dealer's representative under the Securities Ordinance on 19 May 1997, and was registered as a dealer's representative of Yicko Securities Ltd on 2 April 2001. After resigning from that company on 17 October 2001 he thereafter rejoined, and was again registered as a dealer's representative on 14 November 2001.

7. It was this latter registration that was the subject of the SFC revocation.

8. On 5 December 2002 the SFC was notified by the Office of the Official Receiver that a bankruptcy order had been made that day against Mr Man in Bankruptcy Proceedings No.17893 of 2001.

9. Mr Man had petitioned for his own bankruptcy. His Statement of Affairs, as filed in those proceedings, indicated a total indebtedness, to various banks, financial institutions and individuals, in the sum of HK\$1,792,053.62.

The Regulatory Response

10. On 16 December 2002 the SFC wrote to Mr Man indicating that by reason of the bankruptcy order which had been made against him it was considering exercising its power under section 55(2)(a)(ii) of the Securities Ordinance to revoke his registration as a dealer's representative of Yicko Securities, and invited his representations.

11. Mr Man replied by letter dated 30 December 2002 to the effect that his bankruptcy was due to "investment failure and over-borrowings from banks and relatives". In this letter he stated that he understood that "my fitness and properness to remain a registered person have been impugned", but he maintained that his bankruptcy would not affect his ability to perform his duties as a registered person. He had a good relationship with his employer and his clients, he said, and his clients would be transferred to Yicko Securities as company clients and he would be offered a position with the company as an Account Executive on a fixed

salary if he could remain registered, thus enabling him to continue to render trading services for the company clients.

12. In this latter connection the dealing director of Yicko Securities wrote to the SFC on Mr Ma's behalf, stating that he was diligent and provided quality services to clients and that "his misfortune has nothing to do with his honesty and ability".

13. On 6 January 2003 the SFC requested a "detailed explanation" from Mr Man as to the circumstances of his bankruptcy, together with the provision of associated documentation, to which Mr Man responded by letter dated 9 January 2003, in which he noted that his debts had accumulated over the years, and acknowledged that he had been careless in managing his financial situation, which had deteriorated year by year.

14. His employer, Yicko Securities, sent a further letter to the SFC on 20 January 2003 outlining what was said to be the "policy/mechanism" now in place to protect client's assets, and outlining activities that Mr Man was prevented from carrying out. In this letter Yicko again expressed their faith in Mr Man, and

expressed the hope that his registration as a dealer's representative could be retained.

15. On 26 June 2003, following consideration of Mr Man's representations, the SFC decided to revoke his registration under section 55(2)(a)(ii) of the repealed Securities Ordinance, and on the same date the SFC issued a Notice of Decision and Statement of Reasons.

16. The Statement of Reasons recited the representations which had been made by and on behalf of Mr Man, and noted that the Commission had thoroughly and carefully considered those representations. Nevertheless, the Commission stated (at paragraph 15) that as an undischarged bankrupt Mr Man had little or no real prospect of settling his indebtedness in the foreseeable future, that the bankruptcy was the result of "recklessness in spending and investment losses", and that serious doubt was thus cast upon Mr Man's financial integrity and reliability.

17. The Commission's conclusion was that the propriety of Mr Man remaining registered was seriously impugned, and that whilst there was no suggestion of fraud or dishonesty in this case,

his “weak financial status and dubious financial reliability” may place his client’s interests at risk.

18. For this reason the decision was made that Mr Man was not a fit and proper person to remain registered as a dealer’s representative, and accordingly that his registration was to be revoked.

19. It is this decision that Mr Man seeks to persuade this tribunal to quash.

The Argument

20. In his careful address, Mr Man submitted that his financial status was now stable since his employer had given him a fixed income job as a companies account dealer, and thus he disputed the core finding that his bankruptcy cast doubt upon his financial integrity and reliability. He further disputed that he was reckless in spending and investment, noting that many people become bankrupt no matter how careful they are, and stressed that his financial position would not place client’s interests at risk because of the strict policies now put in place by his employer to protect clients. He stated that if he was now to have his

registration revoked, he could not then perform the duties of a dealer's representative, and would become unemployed.

21. For the SFC, Miss Coupe emphasized that it was the bankruptcy and the circumstances leading to it that cast doubt upon Mr Man's financial integrity and reliability, and stressed that this was a situation in which the bankruptcy in question was directly attributable to the conduct of Mr Man over a period, and was not, as on occasion occurred, the product of some calamitous event overtaking a person and rendering him bankrupt. She further argued that despite the restrictions purportedly imposed by Yicko Securities upon Mr Man's activities — as to which, she noted, there was no satisfactory explanation as to how Mr Man's compliance could be ensured — the fact remained that clients' interests may be placed at risk were this registration not to be revoked.

22. Miss Coupe further drew our attention to the relevant statutory power conferred upon the SFC to revoke the registration of a registered person in the event of bankruptcy, and also to the 'Fit and Proper Criteria', as issued by the SFC in December 2000 and March 2003, which provide, *inter alia*, that the status of undischarged bankrupt is a factor which may be taken into account

when consideration is given by the SFC to whether a person remains fit and proper to remain licensed.

Basis for Determination

23. There was some degree of personal sympathy on the part of the tribunal for Mr Man, who presented his case with dignity and made no attempt to gloss his situation or to conceal the true situation.

24. Personal empathy apart, however, the hard fact remains that under the relevant legislation the SFC is statutorily charged with taking all reasonable steps to safeguard the interests of persons dealing with securities, and more specifically, under section 5 of the Securities and Futures Ordinance (which was in force at the time that the SFC made its decision to revoke Mr Man's registration), the SFC is required, amongst other things, to promote the integrity of registered persons, to maintain confidence in the securities industry, and to secure an appropriate degree of protection for members of the investing public.

25. It is against this statutory background that the SFC exercised its undoubted jurisdiction to impose this sanction upon Mr Man, and on the evidence it can be seen to have arrived at its

decision on the basis of relevant considerations and after taking Mr Man's representations into account.

26. In other words, it seems to us that a case cannot be made by Mr Man that in the performance of its statutory functions the regulator either erred in principle or unreasonably or wrongfully exercised its statutory discretion to come to the conclusion that it did, however unfortunate or inconvenient this decision may appear from Mr Man's personal perspective.

27. In principle a regulator must be permitted to discharge its function and to regulate. The function of a tribunal such as this essentially is to review the legitimacy and propriety of the exercise of such regulatory power, whether as a matter of jurisdiction or discretion, and it is not for this tribunal simply to substitute its own view of the sanction that it may itself have been minded to impose had it been seized with the task.

28. It is equally clear, also, that as regulator of the securities industry, wherein supervision of that industry is required upon an ongoing daily basis, that the SFC is best qualified to consider and evaluate the appropriate sanction for any particular infringement, and further, to ensure a necessary element of

consistency of treatment for like transgressions; in this context we bear particularly in mind Miss Coupe's submission that in the two years from April 2001 to March 2003 the SFC has revoked the registration of 37 persons on the ground of bankruptcy, and thus that the decision to revoke Mr Ma's registration on this basis is neither oppressive nor unusual.

29. At the end of the day, therefore, argument upon this review amounted to a contest between special pleading on the one hand as against a decision made on the basis of defined principles and a detailed consideration of relevant circumstances on the other.

30. That Mr Man understandably found it unpalatable is, at bottom, nothing to the point. The point is that the decision to revoke Mr Man's registration was one which it was open to the regulator to make, and in this review we have found no basis upon which, in our judgment, that decision should be impugned. As has been observed in the Reasons given in an earlier case (see *Application No.2 of 2003, at paragraph 42*) it should not be thought that a tribunal of this nature readily will move to interfere with the exercise of the discretion of the regulator in the field and

to substitute its own judgment unless it can readily be demonstrated that good and cogent reason exists for so doing.

31. No such reason was established in this case, and accordingly, as was indicated at the outset, Mr Man's application for review was dismissed immediately at the conclusion of the hearing.

32. We would add, finally, that Miss Coupe's decision not to press for an order for costs in the particular circumstances of this case was in our judgment an entirely appropriate course to adopt.

Hon Mr Justice Stone
(Chairman)

Vincent Lee
(Member)

Stephen Hui
(Member)

The Applicant in person

Miss Elizabeth Coupe, of the Securities and Futures Commission,
for the Respondent