Application No. 12 of 2006

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

IN THE MATTER OF Decisions dated 8 August 2006 made by the Securities and Futures Commission Ordinance under section 194(1) of the Securities and Futures Ordinance, Cap. 571

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

BETWEEN

CHEUNG WAH FUNG CHRISTOPHER 1st Applicant

CHRISTFUND SECURITIES LIMITED 2nd Applicant

and

THE SECURITIES AND FUTURES COMMISSION (the 'SFC') Respondent

Tribunal: Hon Mr Justice Stone, Chairman
Dr Bill Kwok Chi Piu, Member
Mr Vernon Francis Moore, Member

Dates of Hearing: 19 & 20 December 2006

Date of Determination: 16 April 2007

DETERMINATION

The applications

1. These are applications for review by the 2nd applicant ('Christfund'), a licensed brokerage, and also by the 1st applicant, Mr Cheung, a Responsible Officer of that brokerage, against Decisions of the SFC, respectively dated 8 August 2006, whereby the SFC publicly reprimanded Christfund, and fined it HK$450,000, and further publicly reprimanded Mr Cheung, fining him personally HK$50,000.

2. The applicants were and are dissatisfied with these Decisions, which are founded upon breaches of the Financial Resources Rules, and on 29 August 2006 filed application for review of the Decisions in question pursuant to section 217 of the Securities and Futures Ordinance, Cap. 571.

3. This is the Determination of the Tribunal upon that review.

The factual background

4. The 2nd applicant, Christfund, was granted a full licence to engage in Type 1 regulated activity, that is, dealing in securities, under the Securities and Futures Ordinance, Cap. 571 ('the SFO'), on 28 July 2004.

5. Mr Cheung, who is approved as a Responsible Officer of the brokerage pursuant to sections 125 and 126 of that Ordinance, was granted a full licence to engage, as securities dealer's representative, in Type 1 regulated activity, on 29 July 2004.

6. On 1 April 2003, the Securities and Futures (Financial Resources) Rules, subsidiary legislation passed under the SFO came into force: these Rules provide, *inter alia*, that brokerages must at all times maintain a threshold level in terms of available financial resources.

7. On 22, 23 and 26 May 2003 Christfund's liquid capital fell below the required liquid capital level, the deficit ranging from HK$2.2 million to HK$3.2 million; and on 26 and 27 November 2003 Christfund's liquid capital again fell below the required level, the deficit ranging from HK$2 million to HK$4 million.

8. Warning letters were written by the SFC in this regard.

9. There then followed activity by Christfund in three Initial Public Offerings: these were with reference to Chia Hsin Cement, Great Wall Auto and China Life Insurance, for which Christfund was to subscribe on behalf of its customers and, pursuant to which subscriptions, Christfund was to obtain bank loans/credit facilities.

10. Between 8 and 11 December 2003, Christfund's liquid capital fell below the statutorily required liquid capital base for four days, the deficit ranging from HK$9.098 million to HK$22.022 million.

11. This state of affairs stimulated correspondence with the SFC.

12. On 10 December 2003, in response to an inquiry from the SFC, Ms Wendy Ho, an accountant with Christfund, emailed liquid capital computations for 8 and 9 December 2003 to the SFC, indicating liquid capital deficits of HK$9.583 and HK$9.098 million respectively.

13. This was followed by a letter of the same date from Christfund to the SFC, the substance of which read:

> "We regret to inform you that our Company's records showed that our liquid capital requirement fell short by HK$9 million as of 8 December 2003. The shortage was purely due to the IPO subscriptions taking place. Owing to the high level of client response, banks have been very willing and eager to extend the credit accommodation for the IPO subscription purposes.
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> Attached please also find the Forms showing our financial position as of 10 December 2003. Kindly be informed that the shortage of our liquid capital was a temporary phenomenon because of the IPO's. Please rest assured that we are exerting our best efforts to ascertain the healthy position of our financial requirements. We will definitely bring our liquid capital back to the required level within a very short period of time."

14. On the following day, 11 December 2003, the SFC wrote to Christfund requiring rectification of the position, and at about 10.15am, Messrs Leo Lam and Felix Chan of the SFC spoke on the telephone with Mr Cheung, the 1st applicant herein.

15. In that conversation Mr Cheung said that Christfund had overlooked the requirement to include 5% of total liabilities as required liquid capital; remedial measures were discussed and Leo Lam of the SFC raised the possibility of Christfund applying for a subordinated loan.

16. At a meeting of the Board of Directors of Christfund held on 8 December 2003 and chaired by Mr Cheung, it had been resolved to accept a short term facility from the Liu Chong Hing Bank of HK$135,541,000 in connection with the application by Christfund for 10 million shares in China Life for a period from 11 to 17 December 2003, and by an IPO Financing Agreement dated 11 December 2003, Liu Chong Hing Bank agreed to advance to Christfund the loan facility relating to the China Life IPO for a period of 6 days from 11 to 17 December 2003, an agreement which was signed by the 1st applicant, Mr Cheung.

17. Pursuant to an undated loan letter, Christfund further drew down a loan of HK$294,680,000 from Hang Seng Bank to finance the application for 90 million shares in China Life.

18. On 12 December 2003 Ms Wendy Ho provided the SFC with liquid capital computations showing a deficit on 10 December 2003 of HK$9.383 million, and a deficit on 11 December of HK$21.022 million; this was followed, on 13 December 2003, by Christfund notifying the SFC that it had excess liquid capital of HK$3.2 million.

19. On 15 December 2003, Christfund wrote to the SFC explaining that the liquid capital deficiency had been due to overlapping subscriptions, and on the next day, 16 December 2003, Christfund again wrote to the SFC saying that they would be careful with overlapping issues in future: in relevant part, this letter responded to the SFC request for details of measures to be implemented to prevent a recurrence of similar breaches, and, in relevant part read:

> "As you know, the "breach" happened because of the recent initial public offerings (IPO's) involving Chiahsin Cement, Great Wall Auto and China Life Insurance. These IPO's were hot and sizeable. The response from the investing public was zealous. The support of the bankers was full-fledged. Furthermore the listing dates for these hot issues were so closely scheduled that the frozen periods for subscription funds overlapped each other. We believe that we were not the only stockbroker that encountered this sort of liquid capital deficiency due to our eagerness to service the clients and to satisfy their requests in connection with these IPO's.
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> To prevent similar situation from happening again, we are resolved to:
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> (1) observe carefully the listing dates of sizeable IPO's to avoid too much funds being frozen; and
>
> (2) calculate accurately the total amount of our client's subscriptions to meet the new issues so as to set a clear guideline for the preparation of sufficient funds to meet the liquid capital requirement.
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> It does not happen too often that several hot issues are listed together in a short period of time. We believe that the incident of overlapping frozen periods for funds used to subscribe Chiasin Cement, Great Wall Auto and China Life Insurance was an isolated case. However, we will be more cautious in observing the listing dates of hot and sizeable issues in the future. We will also carefully monitor the amount of our clients' subscriptions to the new shares in order to avoid drawing too huge a margin loan from our bankers that may affect our liquid capital computation…"

20. On 17 December 2003 the applicant brokerage wrote to Mr Lam of the SFC indicating "disappointment" about being "warned" by the regulator regarding the deficiency in liquid capital computation, and noting that the November breach was a "technical breach" which was unavoidable in the particular circumstances, but that the situation quickly had resolved itself. The letter concluded that the brokerage was "candid enough" to report this incident to the SFC, and concluded that "We have therefore fulfilled our obligations and certainly we cannot agree that a

warning should be served on us", requesting that the letter in this regard from the SFC dated 5 December 2003 should be "withdrawn".

21. The SFC investigated the December 2003 breach, and conducted interviews with Ms Wendy Ho, Mr Cheung, the 1st applicant, and with Ms Cynthia Tsang, Marketing Manager of Christfund, and Ms Donna Chan, a director of Christfund responsible for arranging bank finance and loans for the brokerage.

22. As the result of these investigations, on 15 August 2005 the SFC issued Notices of proposed disciplinary action to the brokerage and to its Responsible Officer, Mr Cheung.

23. On 27 September 2005 the applicants herein submitted representations to the SFC, which on 16 June 2006 were supplemented by further representations made on their behalf by Messrs Richards Butler, their solicitors.

24. On 8 August 2006, the SFC issued Notices of Decision to the 1st and 2nd applicants. In respect of both applicants, the SFC found:

(1) misconduct in failing to ensure that the required level of liquid capital was maintained from 8 to 11 December 2003 inclusive in breach of rule 6 of the Financial Resources Rules, General Principle 7 and paragraph 12.1 of the Code of Conduct;

(2) failure adequately to supervise the staff member(s) responsible for monitoring the liquid capital level in breach of paragraph 4.2 of the Code of Conduct;

(3) that these failures and breaches had called into question the applicants' fitness and properness to remain licensed under Cap. 571.

25. In terms of penalty the SFC decided to impose a public reprimand on the 1st and 2nd applicants, to fine the 2nd applicant HK$450,000 and the 1st applicant HK$50,000.

26. On 29 August 2006 the applicants gave joint notice of application for review – hence these proceedings.

The evidence

27. This review was not heard on the papers alone.

28. On behalf of the applicants a total of 3 witnesses were called to give *viva voce* evidence: the 1st applicant, Mr Cheung, Ms Wendy Ho, the accountant with the 2nd applicant, and Ms Cynthia Tsang, the brokerage marketing manager.

29. No witness was called on behalf of the SFC.

The argument on this review

30. On behalf of the applicants, Mr Rimsky Yuen SC did not dispute, and mounted no appeal against, the finding of the SFC that the applicants had failed to ensure that the required level of liquid capital was maintained for the 4 days from 8 to 11 December 2003 inclusive in breach of the Financial Resources Rules, in particular rule 6 thereof.

31. Mr Yuen focused his attack in this case on the allegations, which he castigated as unfounded and unjustified, that the liquid capital shortfall was caused by a failure to supervise staff, and by a failure to implement and to maintain adequate measures to ensure compliance with the FRR.

32. Mr Yuen submitted that, to the contrary, the shortfall in liquid capital requirement was caused by "unforeseeable circumstances", namely the extraordinarily high level of market interest in certain IPO's, causing the brokerage to incur additional bank loans to finance its clients' margin requirements, which in turn had increased its liquid capital requirement, with the result that when three very large IPO's "bunched up", with overlapping offer periods, an even higher level of financing and liquid capital was required.

33. Mr Yuen's alternative position was that even *if* this Tribunal were to take the view that there was inadequate internal control and/or insufficient supervision of staff, it was the applicants' further case that the penalties imposed were and are excessive; in particular, it was his case that the 1st applicant, Mr Cheung, should not be publicly reprimanded in the prevailing circumstances, and that it could not properly be said that the 1st applicant had been responsible for not adequately supervising Wendy Ho or Cynthia Tsang (whom the SFC accepted were the relevant management and compliance staff who were required to know the FRR requirements) which was now the gravamen of the complaint against him.

34. Mr Yuen suggested that, when looked at overall, it was crucial to bear in mind that the fact that there was a breach of the FRR did not necessarily connote internal control problems, nor did it necessarily

mean that there had been a failure of supervision on the part of the 1st applicant. In this context he stressed that hindsight did not have a role to play, and that whilst a Responsible Officer should undoubtedly be responsible for the failure on the part of his company or his staff, the issue of adequate or inadequate supervision was a different matter.

35. This company, he said, was but a medium sized securities company, with only 54 employees, and that for a business of this size it was acceptable to have issues concerning liquid capital requirements handled by staff such as Ms Ho and Ms Tsang; there was, after all, no suggestion by the SFC that they were not qualified to handle the job, nor that there were an insufficient number of staff to handle such issues.

36. Moreover, he argued that whilst there were no written rules concerning the manner in which liquid capital requirements should be monitored, this was not to say that no steps had been taken to deal with the level of liquid capital.

37. In this regard Ms Ho had been assigned the task of calculating liquid capital levels, and to monitor the situation on a daily basis by reference to the brokerage's financial position and the volume of business; in turn, Ms Ho's work was supervised by Ms Tsang who, whilst having no experience in the securities industry before she had joined the 2nd applicant in January 2002, nevertheless had an MBA and had undergone relevant training. Moreover, it was established on the evidence that there were daily credit reports prepared by the brokerage's settlement department, which reports were provided to the 1st applicant.

38. This system, said Mr Yuen, had clearly worked quite well until the "IPO frenzy" of December 2003 and, apart from the two prior incidents in May and November 2003 – which had been cited by the SFC as previous breaches, notwithstanding the explanations therefor – there had been no sign that the system as was in place was insufficient properly to monitor the 2nd applicant's liquid capital requirements.

39. In fact, he continued, the breach which undoubtedly (and admittedly) had occurred during the short period from 8-11 December 2003, was a combination of various factors, mainly being the overlapping IPO's and the "totally unexpected" market reaction. In this connection he pointed out that in her evidence Ms Ho had admitted to being "overwhelmed" by the volume of work consequent on the IPO's, which indicated not a breach of the FRR arising by virtue of a systemic defect, but to the contrary, a clear case of "human failure".

40. As the Responsible Officer, the 1st applicant did not deny that he had the responsibility of supervising his staff, but in this case, on the evidence, there was, Mr Yuen submitted, no proper basis to conclude that he had failed to discharge his duties. Mr Cheung had been occupied by a delegation to the mainland, and as he had two qualified staff in place, there was "no reason" why he could not have relied on them and, in any event, the breach had not taken place before he had left Hong Kong for a visit to Beijing. Moreover, whilst the SFC had analogized the position of a Responsible Officer to a company director, even a director may "reasonably rely" on others to perform their duties, and he or she is in no sense presumptively at fault because something has gone wrong.

41. On behalf of the SFC, Mr Roger Beresford was short and to the point.

42. On the evidence before the Tribunal he maintained that the SFC was fully entitled to conclude that there had been a manifest failure on the part of the applicants to supervise the staff members responsible for monitoring the liquid capital level of the 2nd applicant under the FRR, in breach of paragraph 4.2 of the Code of Conduct.

43. He observed that, even now, there was no evidence of any policy, administrative procedure, bulletin or employee handbook identifying compliance with liquid capital requirements even as an objective of the applicants, who well knew from the FRR and from prior experience that the required liquid capital limit was likely to increase in approximate proportion to their borrowings; indeed, in cross-examination Mr Cheung had admitted that he had known, in the context of IPO financing, that they would need approximately HK$5 million liquid capital for every HK$100 million borrowed from the bank.

44. Thus it was clear, said Mr Beresford, that whilst the applicants had identified the risk to the maintenance of liquid capital in providing margin finance to customers, which in turn was financed by the banks, equally there had been no or no sufficient assessment of that risk, particularly since there had been no control over the amount of margin finance as in fact was granted to clients, and thus no control over the corresponding amount borrowed from banks in terms of the 2nd applicant's actual liquid capital.

45. Mr Beresford submitted that the 1st applicant could have asked Wendy Ho to report on the liquid capital position to him on a daily basis, as it appeared he now was minded to accept; nor had there been any daily liquid capital reports, so that no-one really knew what the available liquid capital was, nor had there been anyone responsible for reconciling the margin finance granted with the liquid capital requirement. In this context it would have been simple, he said, to have called for a daily liquid capital report, and to have imposed a limit upon the grant of margin finance in proportion to the available excess liquid capital; this was no 'Goldman Sachs' gold standard in terms of compliance, but simply an obvious and straightforward method of compliance with the Rules, which were in place for the safety of investors on our markets.

46. In the present case, Mr Beresford noted that the evidence was that the 1st applicant, Mr Cheung, knew that he had an excess only of in the region of about HK$5 million – which might have justified borrowings of HK$100 million – at a time when he had approved borrowings of HK$370 million. Nor did provision appear to have been made for corrective action in the event that the liquid capital requirement was threatened, whether by ceasing to accept subscriptions from customers or by an injection of capital, or, for that matter, had any system been in place for communicating to any relevant company officer information relevant to the maintenance of required liquid capital; apart from the monthly FRR returns to be filed with the SFC, the 1st applicant simply had relied on Wendy Ho to compute the liquid capital about once a week only, which she said she had done if she was "not busy".

47. Thus, Mr Beresford concluded, if by the time of such computation the indications were that there was any breach of the FRR, by definition by then it would be too late.

48. Accordingly, counsel submitted, the SFC was fully entitled to take the view that the 1st applicant, the relevant Responsible Officer, manifestly had failed to implement and to maintain measures, in terms of satisfactory internal controls, appropriate to ensuring the 2nd applicant's compliance with the Rules.

Decision on liability

49. We consider the issue of liability at the outset, and deal with the issue of penalty subsequently in this Determination.

50. As to the 'liability issue', on the evidence before us we find it very difficult to come to any view other than that this application for review must fail, and, in our view, fail clearly.

51. At this stage we should observe that we were unimpressed with the quality of the *viva voce* evidence which was placed before us. In this regard doubtless Mr Yuen felt that he had no option but to call the witnesses that he did, but we are bound to comment that such evidence not only failed to support the argument he was attempting to run, but in some instances had precisely the contrary effect.

52. The 1st applicant in particular failed to make a favourable impression on the Tribunal. We do not wish to be unfair, but he struck us as having only the vaguest idea of what this case was about, and

demonstrated but the faintest grasp of the detail involved; in short, the style in which he gave evidence seemed to us to mirror precisely the lack of supervision and attention to detail which formed the subject-matter of this case, and at one stage Mr Cheung even managed to convey the impression that in his view simply to report a breach of the FRR was sufficient, and that such breach did not require an immediate cessation of dealing until relevant corrective action had been put in place.

53. Mr Cheung's insistence that his was a commercial firm "which had to survive" led to the impression, we hope incorrect, that he was of the view that breach of the FRR was technical only, and that the commercial ends justified the means, and we regret to say, also, that we found risible his contention, apparently seriously put forward, that he had not known the date of the China Life IPO: "I was too busy to notice such things" and that he was "too busy planning to go to Beijing". We are constrained to remark that if indeed this was the case, he must have been the only broker in Hong Kong at that time who was not in possession of such information.

54. Mr Cheung further stressed that the defaults that had occurred were errors which were not to be laid at his personal door, observing that "the accounts department was negligent", which seemed to us a bit rich when he apparently had left Hong Kong at the time, thereby being unable directly to supervise his staff, who had been given instructions to report to an unregistered director – a clear breach, as Mr Beresford crisply observed, of his obligations *qua* Registered Person under section 118, Cap 571.

55. As for the other witnesses who were called on behalf of the applicants, the tenor and content of their evidence did little to redeem the applicants' position on this review; to the contrary, in our view it served only to emphasise the defects the subject of the SFC complaint.

56. Ms Wendy Ho, the accountant employed by the 2nd applicant, candidly conceded that in terms of keeping a watch on the liquid capital requirements she had "overlooked the matter", and she confessed that she had been "overwhelmed by the volume" arising from the enormous IPO turnover. She also accepted that at the time she had "lacked experience", and her practice now was to keep a daily log monitoring compliance with the FRR. If we may say so, her evidence provided a paradigm example of when *not* to put a witness into the witness box.

57. For her part, also, Ms Cynthia Tsang, the marketing manager/compliance officer of the 2nd applicant, who at the time had little prior experience in the securities industry, suggested that she too had overlooked the problem, and that it was "my fault".

58. Looked at in the round, we do not consider that the evidence called on behalf of the applicants did anything but to reinforce the notion, which on this evidence seems to us to be writ large, that in terms of ensuring compliance with the FRR the situation at this brokerage at this time was loose and disorganized, to say the very least; indeed, the facts which are before us do not, and cannot, lead to any other legitimate conclusion.

59. We consider the protestations made on behalf of the 1st applicant, Mr Cheung, to be particularly hollow. He was the

Responsible Officer, who knew that the amounts that the brokerage was borrowing to extend margin finance to clients necessarily would increase the amount of required liquid capital to be in place, but who appears to have made no assessment of the risk of the required liquid capital exceeding the HK$5 million excess that was available, nor did he identify any action which would be necessary in the event of that risk materializing.

60. Instead, he clearly failed to exercise day to day control to ensure that matters proceeded in correct fashion in light of the level of borrowings associated with the IPO's, and left for Beijing; in fact, we think that Mr Beresford is correct in his contention that when he returned, in clear disregard of the rules, and knowing that his efforts to correct the position were insufficient, he agreed to even more borrowing in relation to the China Life Insurance IPO, thereby increasing the aggregate borrowings of the 2nd applicant to HK$739 million.

61. We do not consider that in these circumstances it is open to the 1st applicant to lay the blame on his staff; nor, for that matter, do we consider that it is appropriate or just to do so.

62. We accept the contention put forward on behalf of the SFC that a licensee for securities dealing and its Responsible Officer are expected to possess the necessary knowledge and expertise to ensure the proper and lawful conduct of the licensee's operations, and that the Responsible Officer has, as the name implies, the responsibility for ensuring that the licensee's activities are in full compliance with the FRR, notwithstanding that within this area certain activities are delegated to employees; this is why, in order to discharge this responsibility, the

Responsible Officer is expected to exercise the requisite degree of control over employees in order to ensure that nothing is done which would lead to contravention of the regulatory requirements.

63. Absent such control, the regulatory system fails, as indeed it did in this case in terms of this documented breach of the FRR. These Rules have been put in place for the protection of the investing public, and in our firm view represent far more than merely some form of 'technical' or 'doctrinaire' obstruction to the pursuit of commercial interest.

64. On the facts of this case, it is difficult to avoid the conclusion that, on the part of the applicants there was, at the least, a manifest indifference to the possibility – in the circumstances we would say inherent probability – of failure to maintain the required level of liquid capital. It seems to us to be entirely clear that the root cause of the regulatory breaches as took place was the agreement to provide margin finance to clients which effectively committed the 2nd applicant to borrowing far more than it ought to have done on the basis of its available liquid capital, and we agree with Mr Beresford's observation that the circumstances of this case reflect a *de facto* policy of giving priority to the commercial interests of the brokerage at the expense of compliance with liquid capital requirements at a time of huge market turnover connected with the three IPO's in question.

65. We appreciate that as soon as Ms Ho and Ms Tsang realized, on 10 December 2003, that the 2nd defendant had a liquid capital shortfall, that they had reported it to the 1st applicant, who had returned to the office on that day, and we further appreciate that the 1st applicant then

informed the SFC of the situation, in addition to taking immediate remedial action to shore up the brokerage's liquid capital level by selling stocks from his personal account and causing HK$5 million in cash to be injected into the 2nd applicant as liquid capital.

66. However, this seems to us essentially to be reacting after the horse has bolted from the stable, and that, given appropriate supervision and systemic operation, this problem ought not to have arisen, nor to have been permitted to have arisen.

67. Nor do we consider, as has been submitted, that the SFC has been guilty of an unfair shift of position in the manner in which it has approached this case.

68. We have reviewed the history and the development of this case. We have noted the SFC representations on the matter, and have traced through the interview sequences and the content of the SFC Notice of Proposed Disciplinary Action, dated 15 August 2005.

69. We take the view that at all times it was open to the applicants, and in particular the 1st applicant, to traverse the specific matters of detail that were raised by the regulator in the context of the breach of the FRR, and that there were no 'hidden' allegations, particularly in the context of the existence of a spreadsheet which, during interview, Cynthia Tsang informed the SFC that she had prepared, but which the 1st applicant indicated that he was unsure he had seen, in addition to denying that he had been aware of the loan facilities the 2nd applicant had obtained, despite having apparently signed the documents for two such facilities on 5 December 2003.

70. In summary, we see nothing in the sequence of events in this SFC inquiry to lead us to the conclusion that the investigation process has been unfairly conducted or subverted.

71. In our view these applications on behalf of the 1st and 2nd applicants are without merit, and that in the circumstances the SFC, as market regulator, was entirely justified in taking the view that it took.

72. It follows that, in terms of substantive liability, these applications for review must be dismissed.

Decision on penalty

73. The view which we have taken on the substantive issue of liability necessarily informs and colours our view as to appropriate penalty.

74. On behalf of the applicants Mr Yuen has submitted that there were ample mitigating factors present in this case, emphasizing the short duration of the breach, the steps taken to rectify the position, and that no loss was caused to anyone and there was no damage to market integrity. He also prayed in aid the good character and history of public service of the 1st applicant, the lack of prior disciplinary record, and that fact that there is "no likelihood of history repeating itself".

75. Mr Yuen suggested that in light of the panoply of extenuating circumstances that the SFC in sentencing in this case either had overlooked such matters, or, at the very least, had accorded them insufficient weight.

76. He forcefully suggested that in the circumstances, so far as the 1st applicant was concerned, a fine *without* a public reprimand was sufficient to achieve the purpose of any disciplinary action, observing that a public reprimand would damage the 1st applicant's reputation and "adversely affect his future service to the securities industry in Hong Kong as a whole."

77. Mr Yuen further rehearsed earlier SFC decisions in terms of penalty, and under the rubric of "like cases being treated alike", provided particular instances of lesser sentences in respect of FRR breaches; once again, the thrust of this line of argument was that there should be no public reprimand, in terms either of the 1st and 2nd applicants herein, and in this regard it was hard to avoid the impression that the *raison d'etre* of these applications related to the decision to impose a public reprimand on the applicants.

78. For the SFC Mr Beresford was unmoved.

79. He submitted that the decisions currently in place were justified in the circumstances of the case and were not inconsistent with penalties imposed in other cases.

80. So far as the penalty imposed on the 1st applicant was concerned, he said, it was absurd to suggest, as had been mooted, that the SFC would not move to discipline a Responsible Officer unless there were serious complicating factors, and in any event the previous cases did not suggest a pattern of not disciplining a Responsible Officer for FRR

breaches; in fact, he said, of 15 recent cases, in only 5 had the Responsible Officer *not* been disciplined.

81. As to the fine and public reprimand imposed upon the brokerage, the 2nd applicant, Mr Beresford said that a review of past cases indicated the fine to be entirely consistent with other cases which, as here, had not been settled, in such latter instances the SFC according up to a 30% discount for such settlement.

82. He further pointed out that notwithstanding previous warnings, the applicants still appeared *not* to have established relevant written policies, controls and procedures, or any relevant risk assessment process to reduce the risk of non-compliance.

83. Accordingly, Mr Beresford concluded, a public reprimand in each instance, together with the respective fines imposed, if anything erred on the side of generosity, and should not be disturbed.

84. We agree.

85. We have reviewed the present case, together with earlier cases. Each case obviously depends on its own facts, and the particular considerations at play therein.

86. We have not come to the conclusion, in light of the evidence in this case, that the SFC has manifestly erred in the sanctions thus handed down to the 1st and 2nd applicants.

87. To the contrary. Our view was that the sanction visited on the 1st applicant in the circumstances probably was on the light side, particularly in terms of the quantum of the fine, and had we been in the position of the SFC we may well have been tempted to have increased the sum in that regard.

88. Indeed, at the hearing of these applications we further considered whether, in pursuance of the jurisdiction so to do, we should move to increase the financial penalty on the 1st applicant in light of what we considered a particularly unmeritorious application for review, and given the view we took of that which we can only describe as his seemingly indifferent attitude towards the FRR requirements in the circumstances arising in this case.

89. For our part we do not consider correct, as Mr Yuen was pleased to submit, that the breaches of the FRR in this case readily were alleviated, and thus that, as he put it, there had been "no damage to market integrity".

90. We do not accept that market integrity was undamaged. It strikes us, in context of the FRR, and the obligations thus arising upon brokerages and Responsible Officers to ensure compliance therewith, that any breach thereof must by definition represent an assault upon market integrity, whether or not loss ensued consequent upon such breach.

91. For the avoidance of doubt, this Tribunal takes the view that the FRR represent significant statutory safeguards for the interests of investors in the market, and it should not be thought that any argument mounted along the lines of mere "technical" default is in principle likely

to be sympathetically received. In short, the FRR are in position for very good reason, and their requirements are flouted or ignored or overlooked at the peril of the defaulter, who should be in no doubt but that in the view of this Tribunal the regulator rightly regards, and rightly chooses to enforce, such Rules as embodying important safeguards within the proper functioning of the Hong Kong market.

92. In the event, notwithstanding that we agree with Mr Beresford's classification of the sanctions in this case as "erring on the generous side", we have resisted the very real temptation in the circumstances to interfere by raising the penalty, in particular upon the 1st applicant.

93. This Tribunal, at least in its present form *qua* Tribunal (as opposed to the earlier Panel), now has been in existence for fully 4 years, and has said on numerous occasions that it is *not* a regulator, and will not interfere with regulatory decisions, in terms of liability or penalty imposed, save in situations in which something appears to have gone badly wrong, or if unfairness clearly has transpired within the SFC disciplinary process; in short, unless there is something badly 'out of whack' the Tribunal will not step in.

94. In this instance, therefore, this Tribunal is minded to adhere to this principle. It occurs to us, however, that in the area of costs there is some latitude to reflect that these are applications for review which, in our judgment, ought not to have been mounted.

Order

95. The Order of this Tribunal on the applications for review of the 1st and 2nd applicants thus is in the following terms:

(1) The applications for review of the 1st and 2nd applicants are dismissed;

(2) There is to be an order *nisi* that the costs of and occasioned by these applications are to be to the SFC, the respondent thereto, such costs, if not agreed, to be taxed and paid upon a common fund basis.

Hon Mr Justice Stone (Chairman)	Dr Bill Kwok Chi Piu (Member)	Mr Vernon Moore (Member)

Mr Rimsky Yuen SC and Mr Laurence Li,
instructed by Messrs Cheung, Chan & Chung, for the applicants

Mr Roger Beresford, instructed by the SFC, for the respondent