Application Nos. 13 and 14 of 2007

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

IN THE MATTER OF a Decision made by the Securities and Futures Commission under sections 194 and 198 of the Securities and Futures Ordinance, Cap. 571

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

BETWEEN

CHUANG YUEHENG, HENRY	1st Applicant
CHUNG NAM SECURITIES LIMITED	2nd Applicant
and	
SECURITIES AND FUTURES COMMISSION	Respondent

Tribunal: Hon Mr Justice Stone, Chairman
Mr. Pang Yuk Wing, Joseph, Member
Mr. Tsai Wing Chung, Philip, Member

Date of Hearing: 23 September 2008

Date of Determination: 10 October 2008

DETERMINATION

The applications

1. There are two applications for review before the Tribunal.

2. The 1st applicant, in SFAT No 13 of 2007, is one Mr Henry Chuang Yue Heng, who at the time of the events in question in this case held no official position in Chung Nam Securities Limited ('Chung Nam'), the 2nd applicant, in SFAT No 14 of 2007, albeit on the facts the SFC concluded that Mr Chuang was a person involved in the management of the business of Chung Nam, which was, and is, a securities dealer licensed by the SFC, and which has been in business since 1987.

3. At the date of the matters under scrutiny, Mr Chuang held the position of Chairman of Chung Nam's ultimate holding company, Willie International Holdings Limited, and had until 2001 been a dealing director of Chung Nam; however, he maintained an office in Chung Nam's premises, and it was this physical proximity which caused his very particular involvement in the factual matrix which has given rise to this SFC disciplinary action, and hence the subject of the present applications for review.

The factual background

4. This factual background is curious, not least because the progenitors of the fraud as was perpetrated upon Chung Nam, and upon

Henry Chuang, never have been identified either by the SFC or by the police, to whom this matter was reported.

5. The details are many and various, but for present purposes there is no need to do other than to describe them in broad outline.

6. In a nutshell, this case focuses upon the failure of the 1st and 2nd applicants properly to safeguard client assets, to whit, some 112,073,125 shares in a listed company known as Lai Fung Holdings Limited (stock code 1125) owned by one Winwest Investment Limited ('Winwest').

7. The SFC began to conduct an investigation into the relevant facts when it received a complaint from Winwest, a corporate client of Chung Nam, about the misappropriation, in March 2005, from Chung Nam of the aforementioned tranche of Lai Fung securities, which at market prices prevailing at the time were worth somewhere in the region of HK$30 million.

8. Winwest is, and was, a BVI company, and its authorized signatory was one Mabel Lam, the adopted daughter of Mr Lim Por Yen, a gentlemen of significant means who had died in February 2005.

9. What had happened, it transpired, is that on a day in early March 2005, after trading hours Mr Henry Chuang took a telephone call at the desk of one of Chung Nam's responsible officers, one Mr Glenn Wong, who was the broker in charge of the account of Winwest, and heard a woman's voice saying that she represented Winwest, and that Winwest

wanted to withdraw the entirety of its shares in Lai Fung as then were held by Chung Nam; in fact, the sole content of the Winwest account with Chung Nam consisted of this tranche of 112 million odd of Lai Fung shares.

10. After receipt of the phone call Mr Henry Chuang, whom, we understand, had agreed to oversee Mr Glenn Wong's affairs in his absence on leave, then set in train the internal procedures within Chung Nam to facilitate such withdrawal request; in fact, Mr Chuang told Chung Nam's financial controller, Cecil Chan, to follow up on the withdrawal request.

11. For present purposes the precise details do not greatly matter: Suffice to say that these shares were then not held on Chung Nam's premises but the physical scrip was held by the Central Clearing and Settlement System ('CCASS') of the Hong Stock Exchange; suffice to say, also, that there was in place at Chung Nam an established written internal protocol – intituled 'Procedures for Client Withdrawal of Securities' – governing the detailed procedures to be followed prior to releasing client assets, the specific requirements of which self-evidently were *not* followed in this case.

12. But this is to get ahead of the story. In the event, Cecil Chan, the gentleman within Chung Nam initially delegated the task by Henry Chuang, in turn instructed a settlement clerk within the firm, one Gilbert Lam, to arrange for the withdrawal of the physical scrip of Lai Fung Holdings from CCASS.

13. The evidence appears to be that Cecil Chan subsequently informed Henry Chuang that *physical* withdrawal (as opposed to simple

electronic transfer of title) of this very considerable volume of scrip of Lai Fung Holdings from CCASS would incur a significant cost in itself – in fact, the amount charged to Chung Nam by CCASS, which sum would then require to be recouped from the client upon physical delivery to the client by Chung Nam, amounted to HK$392,255.50 – and although Henry Chuang indicated that the withdrawal nevertheless should proceed, it transpires that Mr Chuang did not inform the client (or, more accurately, the person he perceived to be the client) of this charge. As a matter of fact, it is established that Chung Nam in fact met this CCASS charge, but did not recover this sum from Winwest.

14. In order to facilitate the handover of the physical scrip to client, Gilbert Lam, the settlement clerk, was required to prepare a Delivery Order which was to be filled out and signed by the client; however, Cecil Chan informed Gilbert Lam that a signed and chopped Delivery Order was not then available, and so, under instruction, Mr Lam prepared a Delivery Order dated 10 March 2005 which bore the handwritten remark 'Signed original to follow'.

15. Thereafter, on 11 March 2005 Gilbert Lam found in his in-tray another Delivery Order dated 11 March 2005, which apparently bore on its face both the company chop of Winwest and the signature of its authorized signatory, Mabel Lam; it transpires that the form appeared in Mr Lam's in-tray before 10am, but he did not know who had put it there.

16. In the event, Gilbert Lam by now had received from CCASS the bundle of Lai Fung scrip (which was well in excess of one inch thick),

together with the relevant 'Stock Withdrawal Receipts' from CCASS, and had reported this fact to Henry Chuang, who had instructed him to put all the papers/scrip into Chung Nam's safe. This he did.

17. Somewhat oddly in the circumstances, whilst this withdrawal process was being effected, Chung Nam also had received, on 14 March 2005, a resignation letter dated 10 March 2005 from the aforesaid Glenn Wong, whom hitherto it had been thought was merely on a short period of leave, and whose resignation was not anticipated; as earlier noted it seems that Henry Chuang had agreed to try and 'cover' for Mr Wong during his anticipated short absence from work, which no doubt explains why initially the same Mr Chuang had picked up the ringing telephone on Mr Wong's desk from the unidentified woman whose withdrawal request had started this particular ball of deception rolling.

18. This may also explain why, two or three days after the Lai Fung scrip, as retrieved from CCASS, was placed into the Chung Nam safe, Henry Chuang again took another phone call at Glenn Wong's desk.

19. Once again, an unidentified woman at the other end of the line said that she was from Winwest and wanted to arrange to collect the Lai Fung shares. It seems that Henry Chuang introduced himself, and said to this caller that if Miss Lam herself was to come to collect the scrip that she would have to bring the Winwest company chop, and that if she were to send a representative, there would have to be an authorization letter.

20. We are told that after this phone call, on or around 15-16 March 2005 Henry Chuang had instructed Gilbert Lam to hand him the shares and the related documents.

21. Shortly thereafter came the denouement, the actual 'sting' which then apparently was underway by persons currently unidentified.

22. Two or three days later, a man came to Chung Nam's office and asked to see 'Mr Chuang'. This man purported to represent Winwest and wanted to collect the Lai Fun shares. He produced two 'Stock Withdrawal Receipts' – which were internal Chung Nam documents which had been issued by CCASS to Chung Nam – which purportedly bore both Winwest's company chop and Mabel Lam's signature, but significantly no authorization letter was forthcoming.

23. It is not in dispute that after taking a photocopy of this man's identity card abstaining his signature, Henry Chuang handed over the shares. Nor, apparently, did he ask the man – or indeed the woman who previously had called about the imminent collection – to settle the sum of HK$390,000 odd which it had cost Chung Nam physically to retrieve these shares from CCASS.

24. Clearly, the man receiving the shares was a fraudster, and equally clearly, it seems to us, he was part and parcel of a wider conspiracy to defraud Chung Nam and/or Winwest and/or Mabel Lam, given the forged signature of Mabel Lam and either a forged Winwest chop or a purloined genuine chop, it matters not.

25. At this juncture comes the strangest part of the whole affair, certainly from the viewpoint of an hitherto smoothly transacted commercial fraud.

26. Because although these Lai Fung shares were publicly listed, there appears to have been no attempt immediately to sell them on the market, and thus to obtain the HK$30 million or so which they then were worth at current market prices.

27. Whether the rogues involved got cold feet, and feared detection via a paper trail upon any attempted sale, we know not.

28. Suffice to say that subsequently this fraud was discovered upon the 'real' Mabel Lam genuinely requesting delivery of her shares from Chung Nam, and thereafter the original purloined Lai Fung scrip was cancelled, and substitute shares duly issued, with the result that, amazingly in the circumstances, the client in fact suffered no actual loss – albeit Chung Nam (and, we apprehend, also Mr Henry Chuang) suffered not only signal loss of face, but also the regulatory attention of the SFC, to which eventuality we now turn.

The SFC investigation/reaction

29. The SFC conducted an investigation into this incident after receiving a formal complaint from Winwest about the misappropriation of its securities.

30. During its investigation, the SFC interviewed 9 persons on a total of 13 occasions; the police also took statements from 3 of those persons. We have been provided with an extremely useful set of summaries of the interviews and records of the 9 persons seen by the regulator, which we have found to be of great assistance in identifying the progress of the investigation and the factual background; indeed, the outline summary we have given in this Determination of this incident is derivative from the information as thus supplied, and represents, we believe, a distillation of the undisputed facts leading up to this share misappropriation, and to its subsequent discovery.

31. Following its own investigation, the SFC issued 2 Notices of Proposed Disciplinary Action ('NPDA'), each dated 16 August 2007, to Mr Henry Chuang and to Chung Nam.

32. As to Mr Chuang, the SFC indicated that, after taking into account the relevant circumstances, its intention was to publicly reprimand him and to fine him HK$500,000 under section 194(1)(iii) and 194(2) of the SFO; with regard to Chung Nam, the SFC proposed a like public reprimand together with a fine of HK$1 million under the same statutory provisions.

33. The contents of these documents speak for themselves: as the result of events as thus investigated, the SFC took the view that Chung Nam had been guilty of misconduct, and that its fitness and properness had been called into question by reason of its failure to ensure the adequate safeguarding of client assets by allowing its internal procedures governing the withdrawal of client securities to be "flouted", and by failing to establish

an effective procedure which protected client securities from being misappropriated by a dishonest third party.

34. Thus, the regulator concluded, Chung Nam had breached General Principle 8 and paragraphs 4.3 and 11.1(a) of the Code of Conduct for Persons Licensed or Registered with the SFC, and its activities had been prejudicial to the interest of a client, and had called into question its fitness and properness to carry out regulated activities.

35. In terms of the conduct of Mr Henry Chuang, the SFC formed the view (ultimately undisputed) that he was a person involved in the management of the business of Chung Nam, and that Chung Nam's misconduct, as specified, also should be regarded as misconduct on its part pursuant to section 193(2)(a) of the SFO "because Chung Nam's misconduct was attributable to neglect on [Mr Huang's] part".

36. By two letters from their legal representative, Andrew Lam & Co, each dated 12 September 2007, Mr Chuang and Chung Nam made powerful submissions to the SFC disputing the allegations and the preliminary views as expressed by the regulator in the respective NPDA's.

37. These letters pleading their clients' cases are detailed documents, the content of which we do not intend to repeat in this Determination.

38. Something of the flavour of the debate can be gleaned from the initial assertion, made on behalf of Henry Chuang, that he was not involved

in the management of Chung Nam and that the SFC's conclusion as to Mr Chuang's conduct was "unfair, unreasonable and biased", and that Chung Nam was not guilty of misconduct. A conspiracy also was alleged, involving Glenn Wong's sudden absence from duty on the afternoon of 10 March 2005, and it was said on behalf of Chung Nam that Chung Nam may well have been 'set up', and that in light of the possible conspiracy against it between Glenn Wong, Mabel Lam and Eric Ling [Mabel Lam's half-brother] to defraud Chung Nam, Chung Nam had "evaluated such operational procedures and controls to ensure the safeguarding of both the firm's and its clients' assets, in particular against fraud and theft, by assigning our client [Henry Chuang] with the task". Finally, the penalty as proposed was said to be "excessive".

39. With regard to Chung Nam, the conspiracy theory was repeated, involving Madam Lam and Eric Ling, it was said that the evidence did not support the conclusion that the man who had taken the shares was an unauthorized third party, that Chung Nam's decision to appoint Henry Chuang to handle the withdrawal of the Lai Fung shares was "appropriate", that Chung Nam had not failed to ensure that the client assets were adequately safeguarded, that the SFC could not criticize Chung Nam's internal protocol for withdrawal of client securities, and that in any event the penalty was excessive in light of the fact that in the event there had been no loss to Winwest, the appointment of Henry Chuang to handle the withdrawal and delivery of the shares was but a "one off" incident, and that Chung Nam's internal procedures had been approved by the SFC and the Hong Kong Stock Exchange.

40. By its Notice of Final Decision rendered under sections 194 and 198 of the SFO, dated 19 November 2007, addressed to Henry Chuang, and by another Notice of Final Decision, pursuant to the like provisions and of the same date, addressed to Chung Nam, the regulator confirmed its provisional view as to penalty against both Mr Chuang and Chung Nam.

41. As is usual in these cases, the Notice of Final Decision is a detailed and carefully argued document, following what by now is recognized as a standard format: the history of the matter and the provisional view of the regulator is set out as to its view of the conduct of the applicant, its proposed disciplinary action is restated, a summary of the submissions made on behalf of the applicant is outlined, and the SFC view of such submissions thereafter follows.

42. Once again, this document speaks for itself.

43. After a review of the entirety of the evidence, and after analyzing in detail the actions taken by Mr Henry Chuang in relation to the withdrawal/delivery of the Lai Fung shares, the SFC remained of the view that Mr Chuang's conduct was "grossly negligent" in the circumstances, that the severity of the misconduct as revealed on the face of the undisputed evidence was "astounding", that the submissions which had been made on his behalf did not demonstrate any valid mitigating circumstance detracting from the severity of the misconduct, and thus justifying an adjustment in the sanction originally proposed, and that a public reprimand and a substantial fine "are commensurate with the severity of [his] misconduct and therefore appropriate in the circumstances".

44. Accordingly, the SFC stood by its provisional decision on penalty, namely a public reprimand in terms of the press release enclosed with the Notice of Final Decision, and an order that Mr Chuang pay a fine of HK$500,000.

45. In similar vein, the SFC remained unmoved by the submissions which had been made by the solicitors on behalf of Chung Nam in response to the notice of its preliminary conclusions, and its Notice of Final Decision as issued against Chung Nam essentially followed a like pattern.

46. The SFC evaluated its view of the submissions made on behalf of Chung Nam upon an itemized basis: the regulator considered the submission that Madam Lam had instructed Henry Chuang to withdraw the Lai Fung shares and may have conspired with Eric Ling to deceive Chung Nam, it considered the representation on behalf of Chung Nam that the evidence did not support the conclusion that the man who had taken delivery of the Lai Fung shares was an unauthorized third party – "Chung Nam considers that [the CCASS Stock Withdrawal Receipts] sufficient proof of the man's authority to take delivery of the Lai Fung shares", it considered the submission that Chung Nam's decision to appoint Henry Chuang to handle the withdrawal of the Lai Fung shares was appropriate, and that Chung Nam had not failed to ensure that client assets had been adequately safeguarded, together with collateral submissions as to the SFC being unable to criticize Chung Nam's 'Procedures for Client Withdrawal of Securities', and finally the contention that in any event the magnitude of the penalty was 'excessive'.

47. After this review, which we are constrained to say was an wholly careful and thorough exercise in terms of the representations as made, the SFC came to the view that it did not consider that there was any valid mitigating circumstance which detracted from the severity of Chung Nam's misconduct and thus justified an adjustment in sanction as originally proposed. At paragraphs 48 and 49 of this Notice of Final Decision the regulator pointedly observed:

> "A strong message needs to be sent to the market that the SFC views failures to account for and safeguard client assets most seriously, and that licensed corporations which have inadequate procedures and/or which allow its proper procedures to be disregarded leading to such failures will face disciplinary action.
>
> A public reprimand and a substantial fine are commensurate with the severity of Chung Nam's misconduct and therefore appropriate in the circumstances."

48. Accordingly, the public reprimand (in the form of the proposed Press Release) and the fine of HK$1 million were affirmed.

49. Chung Nam and Henry Chuang are aggrieved at these final conclusions – hence these applications for review.

The argument

50. Both the applicants and the regulator were represented by senior and junior counsel: Mr Neville Sarony SC leading Ms Angel Lau for the applicants, and Mr Simon Westbrook SC leading Mr Laurence Li for the regulator/respondent.

51. Initially this case had been set down for a two day hearing, and originally it had been envisaged on behalf of the applicants that 3 *viva voce* witnesses would be called.

52. At the outset of the hearing Mr Sarony indicated that he had amended this to but one witness, namely his client, Mr Henry Chuang, whom he intended to call after his opening.

53. However, given the professionalism and fairness demonstrated by both leading counsel, in the event the course of this hearing was substantially truncated, and ultimately no *viva voce* evidence was led at all.

54. This was because after hearing Mr Sarony at the outset, and in particular regarding the thrust of his argument, which was to dispute, on behalf of both applicants, the issues *both* of liability and sanction, the Tribunal took the opportunity to indicate to leading counsel that it was *not* minded to find that the SFC was in error in disciplining his clients for the events that had taken place, which, of course, had culminated in the undisputed handing over to this unidentified man of this large tranche of Lai Fung shares.

55. We apprehend that this indication of the Tribunal's view enabled Mr Sarony, who had done his persuasive best on behalf of his clients to convince us that although clearly "something had gone wrong", this was a unique set of circumstances which did not justify the disciplinary action on the part of the regulator – indeed, that his clients, both the brokerage and Mr Chuang, effectively had been 'set up' by criminal activity

of persons unidentified – thereafter to concentrate upon the issue of appropriate penalty.

56. It followed, therefore, in the procedural circumstance as had arisen that Mr Sarony perceived no need to put Mr Henry Chuang in the witness box – in our view an entirely appropriate course, given that in light of the undisputed facts there appeared to be little that Mr Chuang personally could have said to have improved his position – and thus Mr Sarony continued his submissions on the basis that, when all things were considered, in these particular circumstances the SFC had pitched the penalty imposed on his clients at far too high a level.

57. For his part Mr Westbrook firmly disagreed. He strongly sought to uphold the penalty as passed upon both applicants, in the course of which he reviewed in graphic detail the sequence of events which had led to the most unfortunate handover of these Lai Fung shares by Mr Chuang to this unknown man.

Decision

58. At bottom, therefore, this case ultimately became an exercise in mitigation, and we have taken a few days in which to reflect upon the excellent submissions made to us in this regard from both sides of the Bar table.

59. At the outset, however, in light of the circumstances of this somewhat curious case, the Tribunal wishes to make one aspect of our

considerations very clear, and indeed this reflects the substance of that which passed between the Bench and Bar during this hearing. It is this.

60. We have no intention whatever of descending into the arena of 'whodunnit', and of who did, or who did not, conspire and/or plot to effect the transfer of the shares to the unidentified man who collected them from Henry Chuang in the Chung Nam premises in mid-March 2005.

61. We note that the SFC and the police investigations have been characterised by allegation and cross-allegation as to who may, or may not, have been responsible for that which transpired. The tenor of the debate can be gauged by the highly tendentious nature of some of the (it seems to us) unnecessarily speculative and provocative allegations made by the solicitors for the applicants, Andrew Lam & Co, in their representations to the SFC.

62. The fact remains that notwithstanding the detailed scrutiny of the facts and documents, both by the regulator and by the police, no person has been charged or even, so far as we are aware, has been identified as a formal suspect.

63. Against this backdrop, therefore, this Tribunal approaches the issue of penalty on the specific basis that there clearly *was* negligence on the part both of Mr Henry Chuang and of Chung Nam, and that at the end of the day, the *only* salient question which requires to be answered is in terms of the appropriate penalty for that which transpired in terms of the degree of negligence thus demonstrated.

64. In this regard we are bound to observe that we do not consider that this can, or should, simply be dismissed as a trifling or relatively unimportant matter.

65. There is no doubt but that that good faith has to be assumed on the part of Chung Nam/Henry Chuang – had the regulator thought that Mr Chuang personally had been implicated in the deception that took place then self-evidently the applicable penalty would have been very considerably greater than a 'mere' fine and public reprimand – and equally there is no doubt on the undisputed facts that nevertheless within Chung Nam something clearly went procedurally badly awry.

66. This conclusion cannot be gainsaid.

67. In fact, one of the members of this Tribunal was particularly concerned that in the circumstances prevailing that a senior executive such as Mr Chuang should have allowed himself to become involved in the relatively pedestrian (and demonstrably mechanical) process of the withdrawal of client securities from Chung Nam.

68. We bear in mind, of course, that Mr Chuang was said to have been 'covering' for Glenn Wong, the executive whose account this was and who was absent at the time, ostensibly for a few days only, but whose resignation letter was received on 14 March 2005, and who indeed never again returned to work at Chung Nam.

69. However, assuming, as we must, the innocence of Mr Chuang and that fact that for present purposes he is to be regarded as an innocent 'dupe' within this whole regrettable sequence of events, it strikes us to have been potentially fraught with danger for a senior executive, who clearly did not have at his fingertips the existing Chung Nam protocol to ensure safe withdrawal of client securities, to have permitted himself to play such a leading role within this process.

70. True it was that, after receipt of the initial phone call from an unidentified woman announcing Winwest's intention to withdraw the Lai Sung scrip, that Mr Chuang had set the process in motion by instructing Mr Cecil Chan, the financial controller, to follow up on the request, given that the scrip then was residing in CCASS.

71. What is less easy to follow is why, when Gilbert Lam, the settlement clerk, had the bundle of Lai Fung shares in his hands, together with the CCASS Stock Withdrawal Receipts, and that after Henry Chuang had told him to put the scrip in the safe, that Mr Chuang thereafter should have personally re-involved himself consequent upon receipt of yet another phone call which he took at the absent Glenn Wong's desk, and thereafter, on or around 15-16 March 2005, to have instructed Gilbert Lam to hand him the shares and related documents.

72. The actual handover of the Lai Fung scrip by Mr Chuang to the man who subsequently came to the Chung Nam office was, we regret to say, redolent with a lack of basic precaution.

73. It seems that the shares were handed over solely on the strength of this unidentified man being in possession of the two CCASS 'Stock Withdrawal Receipts', which, whilst chopped with the Winwest chop and purportedly signed by Mabel Lam, were upon any basis purely internal Chung Nam documents, which surely should have raised the question as to how this stranger had come to have these documents in his possession, let alone that they constituted, or could possibly have constituted, an indicia of genuine entitlement.

74. Admittedly the 'collecting agent' was asked by Mr Chuang to write his name and ID card number on these documents, although we apprehend that in the circumstances little faith could be invested in this 'information', and, perhaps most damningly, no Letter of Authorisation from Winwest was produced, or, it seems, even was requested by Mr Chuang, nor for that matter was any phone call made at the time to Mabel Lam to inquire as to the validity of the signature that appeared within the Winwest chop, nor whether she was aware of the purported 'collection' as then was occurring.

75. Basic precautions such as this do not strike us a rocket science; to the contrary, they strike us as normal and readily anticipated actions of anyone who is charged with releasing valuable client assets to third parties, and the hard fact is that they simply were not done.

76. Nor apparently was there any reference to the not insignificant cost, just shy of HK$400,000, which had to be paid by Chung Nam to CCASS for the physical withdrawal of the scrip, and which in normal course

would have had to be collected from the recipient of the shares prior to their formal release.

77. At the end of the day, therefore, however charitably one may attempt, with the benefit of hindsight, to view this sequence of events, there can be no doubt but that, as negligent acts go, this was relatively high on the scale of seriousness, and cannot simply be consigned to mere negligent oversight of insignificant detail.

78. That said, of course, Mr Sarony was correct in emphasising – in our view, this was his best point – that demonstrably this was but a 'one off' transactional error, infused with negligence it is true, but *not* part of a sequence of such negligent events over a period of time.

79. For example, one of the prior and recent SFAT cases which was prayed in aid on behalf of the SFC in seeking to uphold the level of the fines imposed in this case concerned that of Radland Securities (*vide* SFAT No 3 of 2008, Reasons for Determination dated 7 August 2008), wherein the Tribunal dismissed the application by Radland, which the SFC had fined HK$1.5 million, noting that the period of misappropriation of client assets as had occurred in that case had stretched over a period of fully 8 years prior to detection.

80. A further consideration which has to be placed into the disciplinary equation is the fact that it was highly fortuitous (and, we are tempted to say, somewhat incredible, given that obtaining delivery of these shares was clearly part of a venal enterprise between persons as yet

unidentified) that ultimately there was no loss to client, Winbest, to which replacement shares were issued in place of those abstracted from Chung Nam, which themselves presumably were cancelled, when there had been no attempt to 'cash in' and to sell the original shares on the market. True it is that the fact that there was no direct loss is a serendipitous circumstance which cannot directly be attributed to the applicants, but nonetheless we see no reason why this fact cannot be borne in mind and placed within the discretionary 'mix'; we are prepared to assume, for present purposes, that if indeed there had been a loss to client as a result of these events that Chung Nam would have reimbursed the client as the result of this entirely negligent behaviour, and thus that the absence of actual client loss at the least cannot be regarded as wholly irrelevant.

81. At the end of the day, the Tribunal has to balance the competing demands of a primary disinclination to interfere with the judgments of the regulator seized with regulating the market in the best way that it sees fit, and the interests of perceived justice in individual cases; this Tribunal has said on many occasions that it will refuse to interfere unless something strikes it as obviously 'out of whack', to employ a colloquialism which is functional, if somewhat inelegant.

82. However, this case is one of those instances when members of this Tribunal instinctively felt uncomfortable at the level of the penalty thus imposed upon the applicants. Notwithstanding a degree of negligence which counsel for the regulator variously characterised as "astounding" and "blatant", there was a strong feeling on the part of the Tribunal that, upon the assumed basis that Mr Chuang/Chung Nam had been the unwitting,

albeit highly careless victims of a successful ‘scam’, that nevertheless in deciding upon the level of financial penalty the SFC on this occasion has somewhat ‘overegged’ the pudding, and has pitched the sanction at too high a level, bearing in mind particularly that this is, at least on the face of the papers before us, an isolated incident in which there is no finding by the regulator that the conduct of these applicants was other than highly negligent.

83. We bear in mind, of course, that in the case of both Mr Chuang and Chung Nam that in the respective Notices of Final Decision the regulator went out of its way to stress its decision as to penalty was not only to deter these particular applicants from future conduct of a similar type, but also to deter others similarly involved in the management of a brokerage business from committing similar misconduct, and that, as the passage expressly reproduced (at paragraph 47 above) makes evident, the imposition of significant financial penalties is designed to send “a strong message” to the market that the regulator views failures to account for and to safeguard client assets most seriously.

84. At the end of the day, however – and, we stress, upon the only basis available to us, which is the assumption of innocence on the part of Chung Nam/Mr Chuang – we consider that in this instance we should move to reduce the level of financial penalty, and that such reduction, to a level which remains not insignificant, will not derogate from conveying the desired message to the market to the effect that sloppy and wholly negligent behaviour, of the type as has been evidenced in this case, as to the safeguarding of client assets will not be tolerated and is not regarded as acceptable.

Order

85. Accordingly, after some reflection the Order of the Tribunal upon this application is that these applications each must succeed in part, and that there will be the following variation to the final decision of the SFC in terms *solely* of the respective financial penalties as initially levied upon each of these applicants:

(i) the fine to be levied upon the 1st applicant herein, Mr Henry Chuang, is to be reduced from HK$500,000 to **HK$350,000**;

(ii) the fine to be levied upon the 2nd applicant herein, Chung Nam Securities Limited, is to be reduced from HK$1 million to **HK$700,000.**

Absent agreement between the SFC and the applicants herein, these fines are to be paid **within 28 days** of the date of this Determination.

86. We make no change to the decision of the SFC as to the formal issuance of a **public reprimand** against both applicants in terms of an appropriately amended Press Release.

87. As to costs, we have indicated to leading counsel that we are minded to make an order *nisi* which is to be made absolute unless application be made by either side to vary the same within 21 days of the date of this Determination.

88. As we see it, the parameters of the costs' argument essentially is thus:

> On the one hand the applicants will say that their applications for review have borne fruit, at least to the extent of a not insignificant dimunition in the respective fines they were ordered to pay by the SFC in the Notices of Final Decision, which formed the catalyst to the present applications for review.
>
> On the other hand, for its part the respondent regulator will say that the applicants have met with partial success only, and have not been remotely successful upon the important issue of liability; moreover, there remains in place the public reprimand, whilst there has been but a monetary reduction in the respective fines. In addition, Mr Westbrook made the point, prior to the Tribunal rising at the end of the hearing, that the abandonment of calling the 3 anticipated witnesses in favour of but one, Mr Chuang, who then himself was not called, had rendered otiose the preparatory work initially perceived by the respondent as necessary upon the issue of liability.

89. We fully appreciate both sides of the argument, and, as the Commercial Court is fond of saying, albeit in a different context, the issue of costs sometimes is as difficult, if not more so, than the substantive issue for decision.

90. At the end of the day, however, after putting everything into the discretionary melting pot, we consider that the most appropriate order for the

costs of and incidental to these applications for review is that there be **'no order as to costs'**, and we so hold upon an order *nisi* basis.

91. If and in so far as either side wishes to object to this order *nisi*, we see no requirement formally to reconvene a hearing, and will, if necessary, entertain written submissions *not in excess* of two pages from the respective parties. In our view, little is more unproductive than spending considerable additional costs in order to argue about costs.

92. Finally, we wish to thank both teams of counsel for their signal assistance both at the hearing and in the preparation of these applications.

Hon Mr Justice Stone (Chairman)	Mr Pang Yuk Wing, Joseph (Member)	Mr Tsai Wing Chung, Philip (Member)

Mr Neville Sarony QC, SC and Ms Angel W Lau,
instructed by Messrs Andrew Lam & Co, for the 1st and 2nd applicants

Mr Simon Westbrook, SC, and Mr Laurence Li,
instructed by the SFC, for the respondent

costs of and incidental to these applications for review is that there be '**no order as to costs**', and we so hold upon an order *nisi* basis.

91. If and in so far as either side wishes to object to this order *nisi*, we see no requirement formally to reconvene a hearing, and will, if necessary, entertain written submissions *not in excess* of two pages from the respective parties. In our view, little is more unproductive than spending considerable additional costs in order to argue about costs.

92. Finally, we wish to thank both teams of counsel for their signal assistance both at the hearing and in the preparation of these applications.

Hon Mr Justice Stone (Chairman)

Mr Pang Yuk Wing, Joseph (Member)

Mr Tsai Wing Chung, Philip (Member)

Mr Neville Sarony QC, SC and Ms Angel W Lau,
instructed by Messrs Andrew Lam & Co, for the 1st and 2nd applicants

Mr Simon Westbrook, SC, and Mr Laurence Li,
instructed by the SFC, for the respondent