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Application No. 2 of 2015

# IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

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

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

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BETWEEN

THE PRIDE FUND MANAGEMENT LIMITED — Applicant

and

SECURITIES AND FUTURES COMMISSION — Respondent

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Tribunal: The Hon Mr Justice Hartmann, NPJ, Chairman

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Date of Hearing: 19 June 2015

Date of Determination: 30 June 2015

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## REASONS FOR DETERMINATION

*The application*

1. This is an application for review made in terms of s.217(1) of the Securities and Futures Ordinance, Cap. 571 ('the Ordinance').

2. The Applicant, The Pride Fund Management Limited, seeks the review of a decision of the Securities and Futures Commission ('the SFC') stated in its Decision Notice dated 4 February 2015 in terms of which, pursuant to s.194(1)(iii) and s.194(2)(i) of the Ordinance, the Applicant was made subject to a public reprimand and ordered to pay a pecuniary penalty of $700,000.

3. The penalties imposed on the Applicant are founded on its alleged failure to comply with the terms of a scheme – the Financial Dispute Resolution Scheme - set up in order to resolve monetary disputes between clients and financial institutions, avoiding the cost and delay of litigation through the courts. Licensed and registered persons are obliged to comply in good faith with the scheme, a failure to do so being grounds for disciplinary action.

4. While the Applicant accepts a degree of culpability for its failure to comply with the terms of the resolution scheme – seemingly, to employ its language, it being a 'technical breach'[1] – it is of the view that, when considered in the context of all relevant circumstances, a public reprimand and a pecuniary penalty of $700,000 are grossly excessive and that a simple 'warning notice' would meet the justice of the matter.

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1 In this regard, see the Applicant's letter to the SFC dated 19 September 2014, more particularly paragraph 7(i).

*The role of the Tribunal*

5. It is now settled law that this Tribunal is required to make a full merits review, conducting the review as if it is the original decision-maker: see *Tsien Pak Cheong David v Securities and Futures Commission*[2].

*The setting up of the Financial Dispute Resolution Scheme*

6. In December 2010, the Government published the conclusions to a consultation paper which had sought the views of the public on the establishment of a scheme which would provide "financial institutions and their customers with an independent and affordable avenue, as an alternative to litigation, for resolving monetary disputes"[3]. The public response being positive, the scheme came into force in June 2012.

7. To give effect to the resolution scheme, the Financial Dispute Resolution Centre Limited ('the FDRC'), a company limited by guarantee, was established to administer a two-stage resolution scheme. In terms of the Scheme ('the FDRS' or 'the Scheme'), the parties would in the first instance attempt to settle their disputes by way of mediation. Should mediation not be successful, and should the party seeking redress from the financial institution wish to proceed further, the dispute would then be resolved by a process of arbitration governed by the rules of the Scheme.

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2 [2011] 3 HKLRD 533.

3 See paragraph 4.1 of the February 2014 Terms of Reference of the Scheme.

8. To prevent financial institutions simply side-stepping the Scheme, two amendments were made to the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission ('the Code'), both obliging licensed or registered persons to bind themselves to and comply with the Scheme.

9. The new paragraph 12A of the Code (headed 'Obligations under the FDRS') provides that –

> "A licensed or registered person should comply with the Financial Dispute Resolution Scheme ('FDRS') for managing and resolving disputes administered by the Financial Dispute Resolution Centre Limited ('FDRC') in full and be bound by the dispute resolution processes provided for under the FDRS."[4]

10. The new paragraph 12.6 of the Code (headed 'Co-operation under the FDRS') provides that –

> "A licensed or registered person should:
>
> (a) make honest and diligent disclosure before mediators and/or arbitrators in connection with the FDRS; and
>
> (b) render all reasonable assistance to the FDRS."

11. In addition to the amended terms of the Code, the Terms of Reference which govern the Scheme are also constructed so as to bind financial institutions. In this regard, paragraph 9 (headed 'Membership of the FDRS') provides –

> "9.1 Under the licensing conditions imposed on financial institutions authorised by the HKMA, or the Code of Conduct for Persons Licensed by or Registered with the SFC, financial institutions are to be members of the FDRS operated by the FDRC.

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[4] Paragraph 12A goes on to state that the Scheme will apply to licensed or registered persons other than firms which carry on Type 10 regulated activity under the Ordinance, that is, the provision of credit rating services.

> 9.2 The financial institutions agree to abide by these Terms of Reference and to follow the procedures and processes prescribed by the FDRC for the FDRS. The financial institutions will enter into mediation and/or arbitration with the aim of resolving an eligible dispute if –
>
> (a) the eligible claimant so wishes, and
>
> (b) the eligible dispute was not resolved directly between the parties prior to the applicant making an application."

12. Paragraph 10 obliges financial institutions to "comply with and be bound by these Terms of Reference at all times, including any and all such amendments, modifications and/or updates that may be made from time to time..."

13. Paragraph 10.2 sends a warning to financial institutions that, if they fail to fulfil their obligations under the Terms of Reference, the FDRC is obliged to issue a non-compliance notice which must be copied to the SFC for follow-up action. The paragraph reads –

> "The FDRC shall issue a non-compliance letter/notice to the financial institutions, with a copy to the Regulators[5] for follow-up actions, where necessary, if the financial institutions failed to fulfil any of their obligations under these Terms of Reference."

14. Read in context, the 'follow-up actions' contemplated in paragraph 10.2 are clearly disciplinary actions.

*The power to accept or reject applications made pursuant to the FDRS*

15. In terms of Clause 18.3, it is for the 'Case Officers' employed by the FDRC to determine the eligibility of claimants and the eligibility of their claims. Clause 18.3.2 permits an applicant, that is, a

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[5] Clause 2, the definitions clause, states that 'Regulators' shall mean those bodies responsible for the regulation of financial services in Hong Kong, such as the SFC and the HKMA.

person who seeks to submit a claim pursuant to the Scheme, to object to a decision made by a Case Officer. No such basis for objection is given to a financial institution if a claim is accepted.

16. Should an applicant raise an objection, Clause 18.3.3 provides that "a senior staff member within the FDRC shall review the decision of the Case Officer to accept or reject any Application where necessary."

17. Clause 18.3.4 goes on to provide that "for the avoidance of doubt, all decisions made by the senior staff member shall be final and conclusive and shall not be challenged by the applicants or the FIs [the Financial Institutions]."

18. In summary, all licensed or registered persons are bound to the FDRS in terms of the Code that governs their conduct and in terms of the Terms of Reference that govern the Scheme itself. They cannot unilaterally opt out on the basis, for example, that mediation is meant to be a voluntary process. While mediation may in most instances be a voluntary process, there are today in many common law jurisdictions schemes which make it obligatory for parties to attempt mediation in good faith.

19. Clause 18.3 of the Terms of Reference, while it is structured essentially to cater for objections raised by applicants who have been informed that either they or their claims are in some way ineligible, does appear to allow a licensed or registered person at least to be heard on the issue of eligibility: see paragraph 17 above. That said, the decision of a senior staff member on the issue is final and not open to challenge.

*How was it that the Applicant was made the subject of a non-compliance notice?*

20. In or around March 2008, a woman by the name of Ha Sze Wan ('Ms Ha') was introduced to an investment opportunity by a man named Ku Ka Tat ('Mr Ku'), with whom she had been friendly for some time and who she understood to be knowledgeable in the area of investments. Mr Ku recommended that Ms Ha invest in a fund named 'The Pride Opportunities Fund – Series 11' ('the Fund').

21. Ms Ha asserted that she wanted to invest in a fund in which her capital was protected and that Mr Ku informed her that this was just such an investment. The Fund was in fact a closed-end private equity fund that made no such promise. Once invested, money paid into the Fund could not be redeemed at will. It was not a financial product authorised by the SFC.

22. According to Ms Ha, she was informed that the minimum investment in the Fund was US$100,000. The evidence shows that Ms Ha made out two cheques in Hong Kong dollars equalling the minimum required. The first was for $663,000 made out to the Fund. The second was for $117,000 made out to a company called Lizauli Investments Limited. Ms Ha asserted that to her understanding the full sum of $780,000 was intended to be paid into the Fund. As it was, however, only $663,000 was paid into the Fund. As to the second cheque, according to Ms Ha, when she confronted Mr Ku, he informed her that the second constituted a commission of 15%.

23. In addition to this potential loss by way of a 15% commission, Ms Ha's investment turned out to be a very poor one for her.

When, eventually, in January 2013, Ms Ha was able to redeem that portion of her money that had actually been paid into the Fund, it had been reduced to US$31,442.4. This constituted a total loss to her (including the amount that she had paid by way of alleged commission) of US$68,557.6.

24. Ms Ha sought redress, first by reporting the matter to the SFC, the ICAC and the Police. Later, by seeking to make good a civil claim against the Applicant under the FDRS.

25. As to the basis for her claim, although Ms Ha did not know it at the time, Mr Ku was at the time he introduced her to the Fund a licensed representative of the Applicant, working apparently on a commission only basis. The Applicant itself was an investment adviser of the Fund and was licensed to carry on Type 4 (advising on securities) and Type 9 (asset management) regulated activities.

26. The Fund itself was managed by a company named The Pride Investments Group Limited. It appears that, for tax reasons, neither the Fund nor the fund manager had any presence in Hong Kong. For that reason an 'administration services agreement' had been entered into between the Applicant and The Pride Investments Group in terms of which, among other responsibilities, the Applicant was obliged to "answer client enquiries".

27. It appears that Ms Ha was found eligible to proceed against the Applicant under the FDRS pursuant to Clause 12.1(f) of the Terms of Reference on the basis not that she had a formal investment contract with the Applicant but rather that her dispute with the Applicant arose out of acts or omissions of the Applicant acting as an agent in the provision of

financial services to her, such services including advice in respect of a financial product.

28. Mr Wan Mun Wah ('Mr Wan'), who at all material times held just over 90% of the issued shares in the Applicant as well as 50% of the issued shares in The Pride Investments Group, the other 50% being held by his wife, appeared in person to argue the Applicant's application for review.

29. Mr Wan informed this Tribunal that he had been dealing with Ms Ha's complaints for a protracted period of time. According to him, the investigations made by the SFC, the ICAC and the Police had been long and arduous. However, as Mr Wan emphasised, no proceedings of a criminal nature had been instituted by the ICAC or the Police; equally, no proceedings of a regulatory nature had been instituted by the SFC prior to the proceedings which form the subject of this review.

30. It was in March 2013 that Ms Ha submitted an application to the FDRC for her civil claim for reimbursement of her financial loss to be resolved pursuant to the terms of the Scheme. There were certain difficulties with Ms Ha's application. In particular, Clause 12.1(e) of the Terms of Reference states that the FDRC will only handle an individual claim that does not exceed $500,000. For the purposes of the Scheme, Ms Ha's claim was thereby reduced.

31. In the result, a formal letter was sent to the Applicant by the FDRC dated 2 May 2013 informing it that the FDRC had accepted Ms Ha's application and that a mediation would be the first step in the procedure. A mediation fee of $10,000 was requested together with documents necessary for the conduct of the mediation.

32. Mr Wan, representing the Applicant, was firmly of the view that the Applicant should not be made subject to the Scheme. Among other matters, he argued, first, that the matter had already been investigated by the ICAC, the Police and the SFC with no action taken; second, that Ms Ha had never been a client of the Applicant and, third, that mediation was surely optional. In the result, there were a series of telephone and written communications. By way of example –

a. On 9 May 2013, having earlier discussed the issue with a staff member over the telephone, Mr Wan, on behalf of the Applicant, sent a letter to the FDRC saying: "We stress that Ms Ha is not a client of the company and that the company has not signed any form of service agreement with Ms Ha, and has not received any service fee from Ms Ha. In addition, in respect of the alleged misconduct stated by Ms Ha in her correspondence, Ms Ha has already lodged a complaint with the SFC and the Police which have already conducted investigations into the complaint. Thus, we do not intend to use the service of your Centre."

b. In a letter dated 13 May 2013, the FDRC explained briefly why it was of the opinion that Ms Ha's claim met the relevant guidelines, concluding by saying: "The FDRC therefore considers that it is *necessary* for your company to participate in the FDRS in good faith, attend the relevant mediation meeting, and comply with relevant requirements as a member of the FDRS in accordance with the amended Code of Conduct of the SFC." [emphasis added]

c. Mr Wan remained adamant that the Applicant had no contractual relationship with Ms Ha. In an email dated

16 May 2013, Mr Wan wrote: "When the SFC investigated the matter previously, we had already indicated to the SFC that Ku Ka Tat [Mr Ku] was not providing services to Ms Ha in the capacity as a licensed person. Besides, Ms Ha did not sign any agreement with our company and did not pay any remuneration to our company."

d. In an internal memorandum dated 22 May 2013, a senior member of staff of the FDRC reported that she had spoken to Mr Wan earlier that day, and summed up her conversation with him in the following terms: "He insisted not to participate in the mediation case with Ms Ha as he had already spent too much time handling her complaints previously with the SFC, the police and the ICAC. He was unwilling to meet with us for a case management meeting. *He said he fully understood the consequences of this non-compliance with the FDRS. He was well aware that this would be reported to the SFC and he said it was fine with him.* He claimed that he understood the TOR [Terms of Reference] and the FDRC services from the website and the tele-conversations and an information seminar was not necessary at the moment."[emphasis added]

e. Inevitably, a formal letter of non-compliance dated 3 June 2013 was issued pursuant to paragraph 10 of the Terms of Reference, the letter being sent to the Applicant (addressed in person to Mr Wan) and to the SFC. The letter made the following assertion: "Despite FDRC's repeated efforts to explain to the financial institution their obligations under the

Terms of Reference and the Code of Conduct, the financial institution insisted on disregarding the same."

f. It is to be noted that nearly 2 months after the issue of this formal notice a member of the FDRC telephoned Mr Wan to ask if the Applicant now had any intention to proceed to mediation. Mr Wan apparently replied that the Applicant had no such intention. According to the internal 'attendance slip' Mr Wan accepted that the SFC would be taking "relevant actions" but indicated that he was fine with it.

33. In the result, a notice of proposed disciplinary action dated 21 August 2014 issued under s.194 of the Ordinance was sent to the Applicant by the SFC. In paragraph 47 of that notice, the SFC said that it proposed to impose two penalties, first, a public reprimand and, second, a fine of $1 million.

34. Although Mr Wan persisted in his view that the Applicant had never had a contractual relationship with Ms Ha and that therefore the Applicant was not subject to the FDRS, it was only after the notice of proposed disciplinary action was received that his stance of open defiance became more nuanced and compromising, resulting in an agreement to participate in good faith in mediation pursuant to the terms of the Scheme.

*Was the FDRC clearly wrong to determine that Ms Ha had a claim against the Applicant?*

35. Before this Tribunal, Mr Wan continued to place emphasis on the assertion that the Applicant had never had any form of contractual relationship with Ms Ha and, that being the case, there was therefore

nothing to mediate nor anything to arbitrate. Mr Wan said that in May and June 2013 he had been happy for the matter to be referred to the SFC, because at that time, he believed that the SFC would itself review its earlier investigations and be in a position to confirm this assertion by him.

36. As it is, of course, the FDRC had made the decision that, pursuant to Clause 12.1(f) of the Terms of Reference, the dispute between Ms Ha and the Applicant was one that fell within the terms of the Scheme because the dispute arose out of acts or omissions of the Applicant, acting as an agent, in connection with the provision of financial services to Ms Ha. Within the context of the Scheme, a final decision having been made in that regard, that disposed of the issue.

37. However, in making a full merits review, this Tribunal is of the opinion that consideration must be given to whether or not the FDRC was clearly wrong in its determination. If it was clearly wrong, if the decision was an irrational one, it could be argued that that would be a powerful mitigating factor, indeed one that would undermine the need for any form of penalty.

38. In considering this issue, it is to be remembered that there are two bases upon which a dispute may be brought before the FDRC pursuant to Clause 12.1(f) of the Terms of Reference –

a. the dispute must arise out of a contract between an eligible claimant and the financial institution, a contract entered into or arising in Hong Kong, and/or

b. the dispute must arise out of any act or omission of the financial institution, when it has acted as an agent, in connection with the provision of a financial service to an

eligible claimant. As to the meaning of a 'financial service', Clause 2 of the Terms of Reference defines it as being a "financial product, service or advice about a financial product or service provided by or via a financial institution."

39. On an ordinary reading of Clause 12.1(f), therefore, it is clear that jurisdiction under the Scheme is not restricted to disputes arising out of a formal contractual arrangement. In that regard, Mr Wan, representing the Applicant, had refused to acknowledge the reach of the Scheme's jurisdiction. It is sufficient if the financial institution, in this case the Applicant, acting as an agent, has undertaken any act, or been liable for any omission, in connection with the provision of some financial service, for example, the giving of advice. In this regard, the Applicant, having entered into an administration services agreement with the fund manager, was clearly acting as the fund manager's agent in providing information to clients and potential clients and in receiving applications for investment.

40. Mr Wan, on behalf of the Applicant, further placed reliance on the fact that the Applicant had received no fee/commission from Ms Ha. A 'financial service' however, is not defined in the Terms of Reference in the context of financial reward. Put simply, a financial service does not cease to be such because the provider of the service receives no payment. In the opinion of this Tribunal, in this regard too Mr Wan had refused to acknowledge the reach of the Scheme's jurisdiction.

41. As for the involvement of Mr Ku, it is not disputed that, at the time that he introduced Ms Ha to the opportunity to invest in the Fund,

he was employed as a commission agent by the Applicant, that he was licensed by the SFC and had authority to seek investments in the Fund which he recommended to her.

42. During the course of the review hearing, Mr Wan submitted that Mr Ku had not been acting as an agent of the Applicant when he introduced Ms Ha to the Fund but had been acting as an independent party. Quite how it was that Mr Ku was able to exercise his discretion to act either as an agent of the Applicant, presumably sharing his commission, or act independently, presumably keeping all the commission himself, was not explained.

43. In view of this Tribunal, the fact that Ms Ha herself may not have appreciated at the time that Mr Ku was employed as a commission agent does not mean that he was not in fact acting pursuant to his terms of engagement with the Applicant. On the basis of Ms Ha's uncontradicted evidence, whatever her state of knowledge on the day that she made the application to invest, she discovered shortly afterwards that Mr Ku had retained a 15% commission, the deduction of that commission from the amount invested suggesting that it was based on some relationship of obligation and reward with those responsible for the management and promotion of the Fund.

44. In this latter regard, it is to be noted that the commission payment was made out to Lizauli Investments, a company which, Mr Wan accepted, had been associated with The Pride Investments Group. It had not been made out to Mr Ku personally nor to some entity (personal or corporate) entirely independent of what may be described as 'the Pride Group'.

45. There is also the fact, of course, that Mr Ku assisted Ms Ha to process her application to invest and in this regard, witnessed her formal application addressed to the Applicant.[6]

46. As to the nature of the document that the two of them signed, it identifies itself in dense and difficult language as a "letter of request and indemnity for private provision of information and or subscription of unauthorised investment product(s)". The product in question is stated on the notice to be the Fund. However clumsy the wording, the notice must reasonably be understood to include a request made to the Applicant (for no other company is named on the document) to subscribe to an unauthorised investment product, that product being the Fund.

47. The evidence shows that on the same day that she signed the notice and Mr Ku witnessed it Ms Ma made out a cheque in the sum of $663,000 made payable not to some third party company but to the Fund itself. That cheque constituted Ms Ha's payment into the Fund.

48. At the very least, in putting out the notice under its name and accepting payment, it can be said that the Applicant – not Mr Ku – was in its capacity as agent for the fund manager (an associated company), providing a financial service to Ms Ha.

49. For the reasons given, therefore, without coming to a determination in law that the provisions of Clause 12.1(f) of the Terms of Reference did bestow the necessary jurisdiction, that being the responsibility of the authorised officers of the FDRC, this Tribunal is

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6 In a letter dated 3 October 2012 addressed to the SFC, Mr Wan, on behalf of the Applicant, said that Mr Ku was the licensed representative of the Applicant from 7 March 2008 to 12 October 2008. The letter goes on to say: "During the period when Mr Ku was a licensed representative of [the Applicant], *he had only referred one investor* (i.e. Ms Ha) to subscribe for the Fund." [emphasis added]

satisfied that there are no grounds for holding that the decision made by those officers was so plainly wrong as to vitiate the decision itself.

*The applicant's stated reasons for non-compliance with the FDRS*

50. In its reply of 19 September 2014 to the SFC's notice of proposed disciplinary action, Mr Wan listed a number of reasons why the decision had been made not to participate in the Scheme. The principal reasons are considered as follows:

a. Mr Wan said that, to his understanding, mediation and arbitration (which, he believed, had similar meanings) were 'optional' in the sense that they were voluntary processes. In this regard, Mr Wan was wrong in two respects. First, mediation and arbitration are not similar processes; second, both may be imposed, either by way of legislation or regulation or by way of contract.

b. Mr Wan went on to say that he believed that a referral for non-compliance to the SFC was for all practical purposes part of the mediation process. This was because, so he believed, the SFC would be obliged to consider the Applicant's objections, halting the process if it found that there was substance in them, referring the matter back to the Scheme if it found that there was no substance in them. If this was what Mr Wan truly believed at the time it was a fundamentally mistaken belief.

c. Mr Wan said that there had already been an SFC investigation in respect of which there was no finding of any wrong-doing or breach of regulations. Similarly, Police and ICAC investigations had not resulted in criminal proceedings.

> These results, he said, had further strengthened the Applicant's resolve that it was unfair to be submitted to the Scheme. While that may have been Mr Wan's opinion, again, it was fundamentally misplaced. If Mr Wan had considered the terms of the Scheme, it would have become evident to him that proceedings under the Scheme were neither criminal nor disciplinary in nature. They were of a different nature entirely, the FDRS setting out a scheme for the resolution of monetary disputes, doing so as an alternative to litigation through the courts.

51. Reading through the reasons set out in the letter of 19 September 2014, it is plain that Mr Wan did not acquaint himself with the true nature and extent of the Scheme, either by studying it or by taking advice in respect of it. Indeed, Mr Wan admitted as much in the letter, acknowledging that he may not have had a thorough understanding of the mediation procedure and may have underestimated the consequences of not participating in the Scheme.[7]

52. Mr Wan put this down to simple 'oversight'. This Tribunal rejects that explanation insofar as it suggests some mere inadvertence. As set out above, there was extended communication, both written and oral, between the members of the FDRC and Mr Wan (and, it appears, his wife) in which the members of the FDRC did their best to make the terms of the Scheme accessible.

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[7] The words used (written in bold print) were: "Therefore, we have to acknowledge that we may not have a thorough understanding on the mediation procedure and may underestimate the consequence of not participating in the mediation because of our oversight. We deserve a warning notice from the SFC, reminding us of the importance of supporting the duties of the FDRC and complying with the rules and regulations."

53. The Applicant, through its directors and authorised officers, had an obligation to be acquainted with the nature and extent of the Scheme, compellingly so when it was informed by the officers of the FDRC that it was now subject to the Scheme and had to meet its obligations in terms of it. If it had met its obligation in this regard and thereafter acted with informed prudence, it seems highly unlikely that it would have found itself in a position of admitted non-compliance. As it is, however, the reasons put forward by Mr Wan on behalf of the Applicant suggest not simply a misunderstanding of certain aspects of the Scheme but what a cynic may describe as a wilful refusal to even begin to understand its nature and extent. In this regard, the Tribunal is satisfied that the Applicant's non-compliance was not merely a result of oversight, it was deliberate.

54. Nor was the non-compliance merely 'technical'. It constituted a blank refusal to submit to the Scheme in defiance of the Code of Conduct binding on all licensed or registered persons which requires them to comply with its terms and conditions.

*The applicant's willingness to enter into mediation with Ms Ha*

55. It should be said again that, after it had received the SFC's notice of proposed disciplinary action dated 21 August 2014, the Applicant agreed to enter into mediation with Ms Ha pursuant to the terms of the Scheme. This is a material factor in mitigation.

*Considering the issue of penalty*

56. As a result of the Applicant's agreement to submit itself to the Scheme by entering the mediation process, while the SFC remained of

the view that a public reprimand was required, it reduced the fine from $1 million to $700,000.

57. That said, the SFC continued to view the Applicant's initial non-compliance with the Scheme seriously. In its Decision Notice of 4 February 2015 (paragraph 17) it commented that the Scheme "cannot be effective if licensed persons can freely choose not to participate in the dispute resolution processes administered under the Scheme". The SFC concluded –

> "We are of the view that a clear and strong deterrent message has to be sent to the market that licensed persons who fail to comply with the FDRS and render all reasonable assistance to the FDRS will be penalised. Such message serves to sustain public confidence in the securities industry."

58. This Tribunal agrees that the Applicant's initial refusal to comply with the terms of the Scheme - a calculated refusal based seemingly on a refusal to condescend to understand the terms and conditions of the Scheme - must be treated as a serious breach and not merely a 'technical' one as Mr Wan, on behalf of the Applicant, would have it. It is further agreed that a clear message must be sent to the market. This Tribunal accepts, therefore, that a public reprimand is entirely warranted.

59. However, in conducting this review as if it is the original decision-maker, this Tribunal has more difficulty in determining whether a financial penalty should be imposed and, if so, the quantum of that penalty. This Tribunal is informed that this is the first disciplinary matter arising out of the operation of the FDRS. In this regard, even though the Applicant's non-compliance was deliberate, some recognition must be given to the fact that, the Scheme being relatively new and untested, the

scope of its jurisdictional reach and, in particular, the process for determining the eligibility of claimants and their claims, may not generally have been understood. Once these Reasons For Determination are handed down and the public reprimand issued, there should be no further excuse on the part of members of the financial industry for a lack of understanding, at least, of the Scheme's basic architecture. But that being said, although of course it was open to Mr Wan to acquaint himself fully with the Scheme (which he neglected and/or refused to do), certain of his initial concerns made on behalf of the Applicant are understandable. In that regard, this Tribunal believes that some allowance is due to the Applicant.

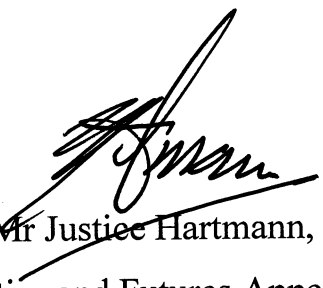
60. During the course of submissions, Mr Wan emphasised that the Applicant was not a wealthy company. It, together with its associated companies, formed a relatively modest financial business, overseen, it would seem, by Mr Wan and his wife. In this regard, the records show that the Applicant's liquid capital in February 2015 – when the SFC gave its decision – was $4,140,000.

61. It is also to be remembered that a public reprimand is of itself a salutary penalty. It diminishes the public reputation of the Applicant and no doubt, both directly and indirectly, reduces its financial prospects.

62. Although no doubt sterner penalties can be expected in the future, this Tribunal is of the view that in the circumstances of the present case, coupled with a public reprimand, a financial penalty of $400,000 meets the ends of justice.

*Costs*

63. As matters stand, this Tribunal sees no reason why costs should not follow the event. Accordingly, there will be an order *nisi* that costs are to be paid by the Applicant, such order to be made final if no application for a different order is made within 14 days of the handing down of these reasons.



(The Hon Mr Justice Hartmann, NPJ)
Chairman, Securities and Futures Appeals Tribunal

Mr Lewis Wan, Director of the Applicant,
for the Applicant

Ms Janet Ho, Counsel, instructed by the Securities and Futures Commission, for the Respondent