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Application No. 2 of 2015

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

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

BETWEEN

THE PRIDE FUND MANAGEMENT LIMITED — Applicant

and

SECURITIES AND FUTURES COMMISSION — Respondent

Tribunal: The Hon Mr Justice Hartmann, NPJ, Chairman

Date of Ruling: 21 August 2015

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RULING ON COSTS

1. Reasons For Determination in respect of this application for review were handed down on 30 June 2015. In concluding its Reasons, this Tribunal made an order *nisi* as to costs in the following terms:

> "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."

2. On 10 July 2015, the Applicant filed an application for the review of the Tribunal's provisional order, submitting that in all the circumstances an order that there be no order as to costs would be appropriate. The Respondent ('the SFC') opposed the application, submitting that the order *nisi* as it stood should be made the final order.

3. In order to avoid the costs of a further oral hearing, it was agreed that – subject to each party being giving the opportunity to make further written submissions – the Tribunal's final determination on the issue of costs should be made 'on the papers'. This has been done.

4. Before turning to the particular issues of the present matter, it is to be noted that costs lie within the discretion of the Tribunal. It should further be noted that the discretion is not to be exercised on the basis that costs are to be broken down and awarded in accordance with each argument won or lost, resulting in some sort of detailed profit and loss account. Costs are to be awarded on the broader basis of where the justice of the matter demands.

5. The nature and extent of the Applicant's original application for review were summarized in the Tribunal's Reasons For Determination in the following terms:

> "2. The Applicant, The Pride Fund Management Limited, seeks the review of a decision of 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.
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> 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.
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> 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' – 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."

6. In making a full merits review of the SFC's decision, the Tribunal was required to determine whether the Applicant's breach of the Financial Dispute Resolution Scheme ('the Scheme') had been merely a 'technical breach', as asserted by the Applicant, or whether the breach had been more fundamental and therefore deserving of the penalties imposed by the SFC. This in turn required, first, a relatively detailed analysis of the terms and conditions of the Scheme itself and, second, a consideration of the Applicant's actions in the light of those terms and conditions.

7. In doing so, the Tribunal rejected the Applicant's contention that its breach had been merely 'technical', doing so in the following terms:

> "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.
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> 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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> 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.
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> 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 all licensed or registered persons which requires them to comply with its terms and conditions."

8. As to whether, in the circumstances, the penalty of a public reprimand was warranted, this Tribunal concluded:

> "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. The Tribunal accepts, therefore, that a public reprimand is entirely warranted."

9. As to the nature of a public reprimand, the Tribunal held it to be a 'salutary penalty', one that diminishes the public reputation of a licensed or registered person and reduces its financial prospects: see paragraph 61 of the Reasons For Determination.

10. In summary, in respect of the important issue of whether a public reprimand should have been imposed or whether a warning notice would have sufficed, the Tribunal rejected the Applicant's submissions, holding that its calculated actions constituted a 'serious breach' and that, in the circumstances, the SFC could not be criticized for its decision.

11. In respect of the Applicant's challenge to the imposition of a financial penalty of $700,000, while the Tribunal accepted that the imposition of a financial penalty would meet the justice of the matter – thereby rejecting the Applicant's contention that a warning notice alone would be sufficient – it came to the finding that the penalty of $700,000 was excessive and should be reduced to $400,000.

12. It did so, however, not on the basis of particular matters advanced by the Applicant, but on the basis that these were the first disciplinary proceedings arising out of the Financial Dispute Resolution Scheme and that some recognition had to be given to the difficulties presented to lay persons such as the Applicant in respect of such untested aspects of the Scheme as its criteria for determining the eligibility of claimants and the eligibility of their claims. However, having recognized

that, this being the first case to be formally considered by the SFC, some room for leniency was appropriate, the Tribunal went on to say:

> "59. …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 basis architecture."

13. When arguing its original application for review, and again when making submissions in respect of legal costs, the Applicant emphasized its limited financial resources. Clearly, the ability of the Applicant to meet financial penalties imposed is a relevant factor and, as such, was taken into account in the Tribunal's Reasons For Determination. The award of costs, however, is to be viewed through a different prism. It is a long-standing principle that a successful party is entitled to its costs. In light of that principle, the Tribunal does not see that the SFC, having been predominantly successful in opposing the application for review, should be denied its costs simply because the Applicant may face a measure of stress in paying those costs. In any event, on the evidence put before the Tribunal, at the time the SFC made its decision, the Applicant had liquid capital in excess of $4 million and in addition, so it would appear, had net assets of some $13 million. An award of costs, therefore, while no doubt it will impose a financial burden on the Applicant, should not undermine its ability to continue in business.

14. Accordingly, for the reasons given, the Tribunal is satisfied that the order *nisi* awarding costs to the SFC, should be made final. The Applicant's application for an amended order is dismissed. It follows that the costs of this application must also be awarded to the SFC.

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(The Hon Mr Justice Hartmann, NPJ)

Chairman, Securities and Futures Appeals Tribunal

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

Ms Amy Lam, Associate Director (Enforcement) of SFC,
for the Respondent