

Application No. 21 of 2004

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

IN THE MATTER OF a Decision made
by the Securities and Futures
Commission under section 56(2)(b) of
the Securities Ordinance, Cap. 333

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

BETWEEN

LAU YIN YING BONNIE

Applicant

and

SECURITIES AND FUTURES COMMISSION

Respondent

Tribunal: Hon Mr Justice Stone, Chairman

Date of Hearing: Monday, 24 January 2005

Date of Determination: Friday, 28 January 2005

DETERMINATION

The application

1. This is an application by Miss Bonnie Lau Yin Ying, a licensed securities dealer's representative currently accredited to Berich Brokerage Limited, for review of a Decision of the SFC, pursuant to its Notice of Decision and Statement of Reasons dated 1 November 2004, to suspend Miss Lau's licence for a period of four months under the powers provided for in section 56 of the Securities Ordinance, such powers remaining exercisable after 1 April 2003 pursuant to section 64 in Part I of Schedule 10 of the Securities and Futures Ordinance, Cap 571.

2. This has been a plea in mitigation. Miss Lau represented herself, and sought to call no evidence. The thrust of her submission was that, in the particular circumstances of this case, a suspension for four months was excessive, and that in lieu thereof she should receive a 'warning' in the form of a public reprimand.

3. With the consent of the parties, this review has been conducted before this Tribunal consisting of the Chairman sitting alone, pursuant to the provisions of section 31, Schedule 8 of the Securities and Futures Ordinance, Cap 571.

The background

4. The applicant was first registered as a dealer's representative from April 1982 to 1984, and thereafter she was reregistered in January 2001. Since August 1995 she has been working at Berich Brokerage Ltd.

5. This case has its genesis in complaints made as to allegedly unauthorized trading in the accounts of clients of the applicant. Such complaints in fact were withdrawn, but the investigation so stimulated revealed a situation whereby a Miss Grace Mak had been employed by the applicant as her assistant, and whilst thus employed, had assisted Miss Lau in dealing in securities at Berich in the period from May 2000 to September 2002.

6. The problem with this arrangement was that Miss Mak was unlicensed and unregistered.

7. In interviews with the SFC, Miss Mak stated that she had been the applicant's friend for more than 20 years, and in early 2000 Miss Lau had recruited her to work for her at Berich, which she did for a period of some 2 years and 4 months. Miss Mak stated that when she was at Berich assisting her friend Bonnie Lau, who had more than 300 clients, she would answer phone calls from clients when Miss Lau was not around, record the orders thus placed, fill out the dealing tickets, and place the orders with the dealing room, and thereafter inform Miss Lau about what she had done when Miss Lau returned.

8. The applicant's evidence, at least as given in her interviews with the SFC, was broadly consistent with Miss Mak's account.

9. The burden of this evidence was that Miss Mak had only been employed by Miss Lau in the first place because of time constraints upon Miss Lau which had arisen because, in late 1999, her boyfriend had been suffering from terminal liver cancer, and she had had to take care of him. Thus she did not have time to handle all the tasks that she needed to do, and hence had hired Miss Mak. In this context, the position appears to have been that

Miss Mak was not employed by Berich, but that her salary was paid by Miss Lau out of the commission payments due to Miss Lau from her employer.

10. That which seems to have happened is that the scope of Miss Mak's 'assistance' to Miss Lau grew from small beginnings, wherein Miss Mak had helped the applicant deposit cheques at the bank and handle other purely clerical duties, to the position whereby after several months Miss Mak had begun to answer phone calls from Miss Lau's clients, complete dealing tickets and place orders for securities transactions and to confirm orders with clients.

11. It is clear on the face of the interview records that Miss Lau not only knew what was happening but was, of course, aware that Miss Mak was not a registered security dealer's representative. Miss Lau states that as time went by and after Miss Mak had started to do this work for her that "nothing went wrong all along", and that in allowing Grace Mak to act as she did she did not consider that these actions had damaged the interests of her clients, that it was more convenient for her clients, and that "if I was away

or on leave, Grace Mak could handle their accounts” and that “their phone calls would not be left unanswered”.

12. Miss Lau stated to the SFC that since she had to visit her boyfriend, and thus could not remain at the office to service her clients after market close – a market that in 1999 was very busy – her boss had suggested that she hire an assistant to help with her workload. She did, however, accept to the SFC that it was wrong to permit Grace Mak to act as she did in terms of handling dealing work, but that she had had no intention to jeopardize anyone’s interests, and further stated that if she were reprimanded or suspended her career would come to an end.

The SFC decision

13. On 3 April 2004 the SFC sent to Miss Lau its Letter of Mindedness, detailing its concern over the unregistered dealing activities of Grace Mak and questioning Miss Lau’s fitness and properness to continue to perform her functions. That letter noted that by allowing Miss Mak to deal in securities Miss Lau had been in breach of section 50 of the Securities Ordinance (precluding any person from acting as a dealer’s representative unless registered) together with General Principle 7 and paragraph 12.1 of the Code

of Conduct, which sound to the necessity for compliance by registered persons with all regulatory requirements.

14. The preliminary conclusion of the SFC was that Miss Lau had been guilty of misconduct, which in turn called into question Miss Lau's ability to perform her functions honestly and fairly.

15. As a consequence the SFC proposed suspending her licence for 9 months having taken into account Miss Lau's clean disciplinary record, her co-operation and admission of wrongdoing, and the fact that her boyfriend had terminal cancer at the relevant time and that she had had to take care of him.

16. To this Miss Lau made written representations dated 4 May 2004, a translation of which has been made available to the Tribunal, and "earnestly requested" that the SFC factor into its decision her specific circumstances at the time when she made that which she described as "an ignorant decision" when she felt "helpless and had no other choices". Had it not been for her boyfriend's illness, she maintained, this case would never have

happened, and that she had “deep regrets and remorse about the matter”.

17. In its Notice of Decision and Statement of Reasons of 1 November 2004 the SFC rehearsed the mitigation that Miss Lau had advanced, and specifically accepted the contention that Grace Mak had been hired solely because of the terminal cancer of Miss Lau’s boyfriend, that she needed more time to take care of him, and further accepted that originally Miss Lau had not intended that Grace Mak was to assist her in conducting regulated activities.

18. After taking all matters into consideration, however, it was not considered that the mitigating circumstances were sufficient to remove the need for a licence suspension, given that the licensing regime is a cornerstone of the Hong Kong securities regulatory system, and given that Miss Lau had acquiesced in Grace Mak’s unregistered dealing activities for more than two years, thus recklessly disregarding the licensing regime.

19. The SFC conclusion, therefore, was that Miss Lau had been guilty of misconduct in breaching section 50 of the Securities Ordinance by aiding or abetting the unregistered dealing activities

of Grace Mak, and that such conduct was, or was likely to be, prejudicial to the interest of members of the investing public, and called into question her fitness and properness.

20. Accordingly, after taking into consideration the mitigating factors advanced, the SFC decided to reduce the period of suspension to 4 months from the 9 months originally mooted.

21. With this decision Miss Lau remains aggrieved, hence this application.

Decision

22. The mitigation advanced to this Tribunal by Miss Lau, who conducted her own case, did not in substance vary from that which had been pressed upon the SFC, save in one material particular.

23. This was Miss Lau's assertion that the unregistered dealing activities of Grace Mak had been confined to trading stocks on behalf of Miss Mak's family members, in particular her sister and ex-husband, and did not extend to servicing Miss Lau's clients generally – albeit, when asked by the Tribunal if she

considered that it was possible that Miss Mak had been doing more than Miss Lau had thought was the position, Miss Lau responded “possibly”.

24. Somewhat curiously, as a matter of history the initial complaint which had brought this matter to the attention of the SFC itself appears to have originated from family members of Grace Mak, who apparently queried trades (and, I assume, consequent losses) which had been made by Grace Mak, although upon clarification this complaint was later withdrawn. Nevertheless, as Mr Chan, who appeared for the SFC, pointed out, the version of events now proffered by Miss Lau, effectively seeking to confine Miss Mak’s known dealing activities to those in respect of her family members, is *not* an assertion that has ever found its way into the accumulated papers.

25. I am inclined to agree with Mr Chan’s point, which I assume was that the credibility of this new contention, as now advanced, must be regarded against the backdrop of what hitherto had been said. In this regard the unassailable fact is that Miss Lau made statements to the SFC, in terms of the interview records,

which contain no such assertion, nor is there any such reference to be found in Miss Lau's response to the Letter of Mindedness.

26. I have concluded that the truth of the matter is as has hitherto been told to the SFC by both Miss Mak and by Miss Lau, and represents a situation in which Miss Mak's role effectively expanded as time went by, and as she demonstrated to Miss Lau that she could be relied upon. In this regard, therefore, in my view in addressing the Tribunal Miss Lau has yielded to the temptation to go further than she should have permitted herself to go, although at the same time it is fair to observe that she struck me as basically honest and in fact, when asked direct questions by the Tribunal, did not attempt to dissemble to her advantage. In this sense, therefore, it seems to me that the SFC was entirely correct in according credit for the frank admissions made to them, and for Miss Lau's expressions of remorse.

27. In her address to the Tribunal Miss Lau rehearsed the background to the situation whereby Miss Mak had been permitted to come into the picture, and stressed that she had initially hired her to do "small jobs". She emphasized also that in terms of the history of events that there had not been "a single victim" and that

no-one had lost any money as a consequence of her actions. She stressed also that were she to be disciplined as the SFC had envisaged, in her view her career would effectively be at an end, and that all that she had worked for over the past 20 years would be, as she put it, “down the drain”.

28. In his helpful skeleton argument Mr Chan noted that the Hong Kong regulatory system required people working as intermediaries within the securities industry to be licensed, and that in the absence of licensing requirements there would be little effective regulatory control over persons such as Grace Mak, who in this case had been permitted to act as she had absent either licence or registration. He noted that, although this had not occurred in this case, investors’ money may be at great risk in the hands of unregistered dealers.

29. Mr Chan also helpfully provided some precedents of previous decisions in which the regulator had had to deal with the facilitation of unregistered dealing activities: these ranged from licence suspensions of three weeks (*Siu So Fun, Sendy, 4 September 2003*) to 2 months (*Tam Yui Man, 14 March 2002*) to 6 months (*Li Fung Kuen, Maggy, 3 June 2004*).

30. He submitted that the length of unregistered dealing in this case, that is, for a period in excess of 2 years, was comparable to that in *Li Fung Kuen, Maggy, op.cit.*, and that even accepting that Grace Mak initially had not been recruited by the applicant to conduct dealing activities, she had begun to do so several months later, and that as soon as the applicant had discovered what was happening she should immediately have put a stop to the situation, as indeed Miss Lau subsequently had recognized.

31. Looking at this case in the round, it is clear that the SFC already has endeavoured to take fully into account the applicant's frank admissions and the personal mitigating factors. In my view, there can be no question in this case but that a period of suspension is warranted: it strikes me that a mere public reprimand would be an inappropriate sanction in circumstances such as these.

32. The only question thus remaining is whether, in making its decision in this case, the regulator in fact has hit the correct balance?

33. In considering this aspect the Tribunal has particularly in mind that a disciplinary penalty is designed not only to sanction the particular individual, but also to send a message to the market and to maintain a degree of public confidence in the profession. In this regard, whilst I have a degree of sympathy with Miss Lau's protestations about the effect of a period of suspension on her personal career/future prospects, this can never be a valid objection if an order for suspension otherwise is appropriate – as in my judgment is the position in this instance.

34. In its consideration of this case the Tribunal also bears in mind its published reluctance to interfere in normal course with regulatory decisions, not least in matters of sentence for particular infractions. If and in so far as it does so in any particular instance, this generally will be only by reason of the fact sensitivity of the particular case at hand. Hence, a decision to interfere and to vary is not to be interpreted other than as a response to a specific set of fact which in the view of the Tribunal merits some intervention.

35. On reflection, this case is one such instance. In my judgment on the facts the SFC was correct to make the very significant reduction that it did, although the initial starting point

of 9 months – subsequently reduced to 4 months – strikes me as somewhat on the high side when compared, for example, with the 6 months imposed in *Li Fung Kuen, Maggy, op cit*, wherein for a period of some thirty months an unregistered clerk of Selina & Co solicited clients, received orders and passed orders to Li, a dealer's representative at that firm, for execution, Ms Li in addition wrongfully signing *qua* witness upon the account opening forms of 5 clients thus solicited, and receiving the commission generated thereon.

36. True it is, as Mr Chan observed, that there was no evidence that the unlicensed clerk in that case was specifically recruited to assist Ms Li, whereas in this instance Grace Mak had been thus recruited. However, I bear in mind that the situation with Grace Mak was something that developed – initially the assistance sought and obtained was not improper – and the gravamen of the misconduct of Miss Lau is that given the difficulties that she was experiencing elsewhere, she yielded to the temptation to permit Grace Mak to continue with such unlicensed conduct when it suited her to do so, and when no problems were occurring as a result.

37. At the end of the day I have decided, after some hesitation and after taking all factors into account, to interfere with the decision of the SFC and to reduce the suspension of 4 months to a suspension of 3 months.

38. In my judgment in the circumstances of this case such intervention is both merited and justifiable, and that a variation in such terms does no violence to the established principle to the effect that unregistered dealing activities will not be tolerated. It must be stressed, however, that it is only upon the very particular facts of this case that the Tribunal has been persuaded that there should be the variation thus ordered.

Order

39. This Tribunal thus orders that the decision of the SFC, as communicated in its Notice of Decision dated 1 November 2002, is to be varied by the substitution of a suspension period of 3 months for the period of 4 months as originally imposed.

40. There is to be no order as to the costs of this application, and an order *nisi* is made to this effect.

Hon Mr Justice Stone
(Chairman)

Applicant, Miss Bonnie Lau Yin Ying, in person

Respondent represented by Mr Jimmy Chan of the SFC