

Application No. 3 of 2004

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

IN THE MATTER OF Section 23 of
the Securities and Futures Commission
Ordinance (Cap. 24) and Section 56 of
the Securities Ordinance (Cap. 333)

AND IN THE MATTER OF an
application by KWOK WAI SHUN for
a review by the Securities and Futures
Appeals Tribunal

BETWEEN

KWOK WAI SHUN

Applicant

and

SECURITIES AND FUTURES COMMISSION

Respondent

Tribunal: Hon Mr Justice Stone, Chairman

Mr Roger K H Luk, Member

Mr K N Tang, Member

Date of Hearing: Monday, 7 June 2004

Date of Reasons for Determination: 11 June 2004

REASONS FOR DETERMINATION

The Application

1. This is an application for review of a decision of the Securities and Futures Commission ("SFC") issued on 3 February 2004 whereby the applicant's registration, as a Registered Person, was suspended for three (3) months.

2. This decision was made pursuant to section 56 of the Securities Ordinance, the powers of the SFC under that section remaining exercisable after April 1 2003 pursuant to sections 64 and 65 in Part 1 of Schedule 10 to the Securities and Futures Ordinance, Cap 571.

3. By a Notice of Review dated 25 February 2004, as thereafter amended, this tribunal was moved to review the decision of which complaint was made, and an order was sought seeking to set aside this decision, and to substitute therefor an order that the applicant be publicly reprimanded, alternatively that the applicant's registration with the SFC be subject to a two months' sentence suspended for 18 months.

4. At the hearing of this application, the application for a suspended sentence was not pursued, and argument proceeded solely upon the basis that there should be a variation of the existing penalty.

5. At the conclusion of the hearing, wherein the applicant, Mr Kwok Wai Shun was represented by Mr Duncan Tse, and the SFC by Miss Doris Pak, the tribunal dismissed the application, and awarded the costs of the application to the SFC.

6. We now give our brief reasons for such dismissal.

The Background

7. The applicant, Mr Kwok, is currently licensed with the SFC and accredited to Magnum International Securities Ltd. He was first registered as a dealer's representative under the Securities Ordinance, Cap 333, on 6 December 1999. Between 9 May 2002 and 23 May 2003 the applicant was a dealer's representative of Ong Asia Securities (HK) Ltd.

8. In July 2002, the applicant was told by one of his clients, a Mr Hui, that a friend of his would place orders with the applicant for trading through Mr Hui's account. It is undisputed that the applicant had never met Mr Hui's friend, and he did not ask Mr Hui to give him a written authorization for this person to place orders through Hui's account at Ong Asia Securities.

9. This account was used for the placing of orders by this person on about ten occasions, but the applicant kept no record either of the identity of this 'friend', nor of the details of the trading instruction thus given to him. Nor was the matter reported to his employer, Ong Asia Securities.

10. In August 2002 the SFC began an investigation into dealings in the shares of Luen Cheong Tai International Holdings Ltd (now known as Baker Group International Holdings Ltd) during the period from 1 March to 31 July 2002, and in particular whether offences had been committed contrary to section 135 of the Securities Ordinance.

11. As there had been active trading in the Luen Cheong Tai shares from the account maintained in Mr Hui's name, the SFC

inquired into his trading activities, and on 28 October 2002, in connection with its investigation into market manipulation, the SFC interviewed the applicant as the account executive at Ong Asia Securities responsible for handling the Hui account.

12. During this interview the applicant admitted the use to which Hui's account had been put by the 'friend' of the account holder, and in light of this the SFC initiated an inquiry under section 56 of the Securities Ordinance to determine whether the applicant was a fit and proper person to remain registered.

13. On 23 October 2003 the SFC sent a 'letter of mindedness' to Mr Kwok setting out grounds for its concern arising from the fact that the applicant had received orders from a person unknown to conduct trading through Hui's account at Ong Asia Securities. This letter stated the SFC's preliminary conclusion that the applicant's fitness had been called into question, and that it proposed to suspend his registration for a period of 4 months.

14. In a letter dated 13 November 2003 the applicant's solicitors, Messrs Yu, Chan & Yeung made representations on

behalf of their client, which representations did not dispute the substance of the complaint in the letter of mindedness, but submitted mitigating factors, and requested that the proposed licence suspension be substituted by a public reprimand.

15. By a letter dated 3 February 2004 the applicant was notified of the eventual decision of the SFC, after consideration of the mitigating factors put forward, namely a three month suspension of the applicant's registration. The SFC concluded that Mr Kwok had failed to take reasonable steps to establish the identity of Hui's 'friend' and his interest in Hui's account, in contravention of the Code of Conduct of persons registered with the SFC, that he failed to keep information as to the instructions which were given as to the operation of the account, nor to obtain any proper written authorization from Hui before he accepted the instructions from this person who was using Hui's account, and that he failed to report this matter to his employer, Ong Asia Securities, which was thus in the position of being unable to fulfil its regulatory obligations under the Code of Conduct.

16. This decision in turn led to the present application for review which is the subject of the present Determination.

The Argument

17. It is fair to say that the argument on this application was more truncated than that which had been foreshadowed in the grounds set out in the Notice of Review.

18. The core theme of the attack made by Mr Tse on the SFC decision to suspend the registration of Mr Kwok for the three month period was that there should be consistency in sentencing, and that like cases dealt with during the 'relevant period' of 1 March to 21 July 2002 appeared to have attracted merely a public reprimand as opposed to a suspension. The cases in which a suspension had been invoked, he said, for this sort of offence had been cases involving more serious elements of dishonesty and deception. Accordingly the fundamental submission was that in the particular circumstances his client had been unduly harshly treated, that the possibility of a change in regulatory approach had not been sufficiently communicated to the market, and that the suspension currently in place should be replaced with a public reprimand. The submission made by Mr Tse was wide-ranging, but that at least was its broad thrust.

19. For the SFC Miss Pak submitted that the earlier cases which had attracted the penalty of a reprimand as opposed to a suspension could be identified as relating to this type of misconduct which had taken place at a considerably earlier period – some of these incidents, she noted, had dated as far back as 1994 – and that as a matter of principle the SFC should be able to adjust its disciplinary regime to market conditions prevailing as at the date of the decision in question. She observed that non-compliance with the ‘client identity’ rule leads to problems of market manipulation and securities fraud, and whilst it was clearly appropriate where possible for the regulatory body to telegraph to the market its change of stance towards areas of regulatory infraction – as indeed it had endeavoured to do in this context – this was not essential if in the judgment of the regulator the punishment otherwise was warranted. In this instance, she said, the SFC had been responsive to the mitigating factors put forward on behalf of Mr Kwok, and in fact had reduced the proposed penalty by one month. Accordingly, Miss Pak sought to uphold the penalty as it now stood.

Basis for the Determination

20. Notwithstanding Mr Tse's submissions, we saw no basis for interfering with the penalty handed down by the SFC upon Mr Kwok. As earlier indicated, this application for review was dismissed immediately at the conclusion of argument, and we formally confirm the decision of the SFC as contained in its 'Notice of Decision and Statement of Reasons' dated 13 November 2003.

21. Having reviewed the admitted facts, and the treatment by the SFC of those facts together with the regard which was accorded to the representations made to the SFC on behalf of Mr Kwok, in our judgment no cogent reason has been identified which would justify interference with the regulator's conclusion in this case.

22. This tribunal, albeit differently constituted, has previously stated that it is in general reluctant to move to interfere with a disciplinary decision handed down by a market regulator *unless* it can be satisfied that something clearly has gone wrong, either in principle or as a matter of fact, which would merit alteration of the view of the professional regulator involved in

overseeing market behaviour and in ensuring compliance upon a daily basis: see, for example, observations in *Wong Pui Hey, Duncan v SFC, Application No 2 of 2003 (at p. 18)*; also in *Man Kin Wai, Ricky v SFC, Application No 1 of 2003 (at pp. 10-12)*.

23. Absent clear error, it is no part of this tribunal's function to substitute another view for that of a regulator which, seized with all the relevant facts of a particular case, has exercised its professional judgment on the appropriate penalty for a particular market infraction occurring at a particular time. Whilst it is clearly desirable to attempt to maintain consistency of treatment in like disciplinary situations, it cannot be the case, as Mr Tse came perilously close to suggesting, at least by necessary implication, that the regulator is in a sense 'hamstrung' by precedent, and thus is unable to respond to prevailing market conditions by subsequently adopting a different disciplinary approach towards types of market misconduct.

24. A regulator must, of course, neither act unfairly nor capriciously in the assessment of appropriate penalty, but in principle the regulator is in the best position to assess the appropriate level of regulatory response to disciplinary infraction,

and we have been able to identify no element in the present case which serves to persuade us that in its treatment of Mr Kwok the SFC has exceeded the legitimate exercise of its regulatory power.

25. We appreciate that as a man with a clear record Mr Kwok is disgruntled by the decision, and would have preferred the public reprimand which it is accepted has been imposed in past cases for this type of infraction, but the hard fact is that the status of ‘registered person’ carries both benefits and burdens, and if compliance obligations are flouted it should occasion no surprise if such behaviour attracts legitimate regulatory response. Mr Tse’s comparison with the greater personal detriment to his client arising from a licence suspension as compared to a public reprimand is, with respect, self-serving and nothing to the point, and we are unable to agree with his contention that in this instance the SFC failed properly to take into account whether a deterrent penalty was necessary.

26. To the contrary. The SFC clearly took the view that behaviour such as that of Mr Kwok facilitates precisely the type of market misconduct – as apparently occurred in this case – that the ‘client identity’ provisions are there to prevent, and given the

opinion of the regulator in the field that in the prevailing climate an increasing element of deterrence is merited in instances such as the present, it strikes us that this tribunal should not be quick to disagree with a regulatory judgment of that nature.

27. At the end of the day, therefore, we were able to discern no good reason to interfere with the decision in this case, and we dismissed the application accordingly.

Hon Mr Justice Stone
(Chairman)

Roger K H Luk
(Member)

K N Tang
(Member)

Mr Duncan Tse of Messrs Yu, Chan & Yeung, for the Applicant

Miss Doris Pak of the Securities and Futures Commission,
for the Respondent