

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

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

CHIM CHAI SHAN JOVIN

Applicant

And

SECURITIES AND FUTURES COMMISSION

Respondent

Tribunal: Hon Mr Justice Stone, Chairman

Date of Hearing: Tuesday, 28 March 2006

Date of Reasons for Determination: 31 March 2006

REASONS FOR DETERMINATION

The application

1. This was an application by Miss Jovin Chim Chai Shan, a securities investment representative, who sought a review by this Tribunal of the decision of the Securities and Futures Commission, pursuant to its Notice of Decision and Statement of Reasons dated 23 September 2005, to suspend for a period of 4 months the applicant's licence to engage in regulated activity Type 4 and its approval of the applicant as a responsible officer of Thornton Global Wealth Management Ltd ('Thornton').

2. With the consent of the parties this review was heard by the Chairman sitting alone, pursuant to the provisions of section 31, Schedule 8, of the Securities and Futures Ordinance, Cap 571.

3. At the conclusion of the hearing of this review, the Tribunal dismissed this application, with costs to follow the event, and now gives its reasons for so doing.

The factual background

4. The applicant, Miss Chim, was first registered as a securities investment representative on 14 November 1995. Between 5 July 1997 and 1 May 2003, the applicant was accredited to TG Holborn (HK) Ltd, ('TGH') engaging in regulated activities Type 4 and Type 6. It was during this period that the incidents giving rise to the SFC disciplinary action arose.

5. The applicant left TGH and was granted a full licence for engaging in regulated activity Type 4 since 24 September 2003, and has since that time become a responsible officer of Thornton.

6. The incidents the subject of the SFC disciplinary proceedings arose as a result of a routine inspection of TGH by the SFC in August 2002, when it was found that staff of TGH were remunerated for selling unit trusts to clients when they were unregistered under the Securities Ordinance.

7. The applicant was at the material time the person in charge of two branches of TGH at Lippo Centre, and was responsible for the daily operations of the two branches, including

sales marketing, appointment of consultants, training and administration.

8. The SFC inquiry gave rise to disciplinary action taken against the applicant as the result of unregistered dealing activities of one Theodore Moy, in the period March 2001 to February 2002, one Joseph Wong, in the month of May 2001, and one Wong Lee Chun, in the period between April and May 2003, whereby these persons had been acting as investment representatives by promoting and advising clients on unauthorized funds.

The SFC findings

9. In its preliminary conclusions dated 18 February 2005, the SFC found that the Miss Chim was guilty of misconduct and proposed to suspend the applicant's registration for a period of 6 months.

10. After considering representations made by the applicant, the decision of the SFC was communicated to the applicant by Notice of Final Decision dated 23 September 2005, wherein the SFC suspended the applicant's licence for engaging in regulated activity Type 4, and as a responsible officer of Thornton, for a reduced period of 4 months.

11. The SFC found that:
- (1) In May 2001, whilst unregistered, Joseph Wong, a person employed by the applicant, acted as investment representative to Clara Ma and Ho Fai Hung;
 - (2) In June 2001, whilst unregistered, Theodore Moy, a person employed by the applicant, acted as investment representative to Fanny Fan and one Chu;
 - (3) In May 2003 (after the date of the applicant's first interview with the SFC on 11 March 2003), when not licensed, one Chris Wong, another person employed by the applicant, gave advice on and sold an unauthorized fund to Selina Wong;
 - (4) That in respect of these offences the applicant had failed to take reasonable steps to ensure that the persons employed by her to conduct business were fit and proper and otherwise qualified to act in the capacity so employed, contrary to paragraph 4.1 of the Code of Conduct;

- (5) Further, that the applicant had failed to assert proper supervision over people employed by her, contrary to paragraph 4.2 of the Code of Conduct;
- (6) Further, that the applicant had failed to ensure that there were internal control procedures and financial and operational capabilities which would be reasonably expected to protect the clients of Lippo Branches of TGH from financial loss arising from, among other things, professional misconduct for omissions, contrary to paragraph 4.3 of the Code of Conduct;
- (7) That the applicant's honesty was called into question when she signed the Client Administration Forms for Fanny Fan and Chu, thereby holding herself out as the consultant for these clients when she knew that she was not, in breach of General Principle 1 of the Code of Conduct.

12. Consequent upon these findings, the SFC concluded that the applicant had been guilty of misconduct, and that her honesty and her fitness and properness as a licensed person had been called into question.

13. Hence the 4 month suspension the subject of this review.

14. As was recognized in the Notice of Final Decision, the applicant admitted her supervisory failures and did not dispute the allegations of misconduct against her, save and except that she contended that she had not acted dishonestly when she had signed the Client Administration Forms.

Reasons for determination

15. This was effectively an appeal against sentence.

16. Mr Selwyn Yu, who appeared for the applicant, contended that in the circumstances it was appropriate for this Tribunal to review, and to interfere with, the 4 month period of suspension imposed by the SFC upon his client.

17. Mr Yu suggested that the appropriate penalty for the infractions which had taken place should be a public reprimand, or alternatively, a suspension for a period of 2 months.

18. I was unable to accept this submission.

19. Mr Yu's primary attack was upon the SFC findings (at paragraphs 14-17 of the Reasons for Decision) which involved the finding that Miss Chim's honesty was called into question.

20. He made particular complaint about the questioning of his client's honesty, and pointed to the SFC conclusion (at paragraph 17) that Miss Chim had signed the Client Administration Forms *either* knowing that Theodore Moy and Joseph Wong were unregistered, and thereby falsely declaring that she was the consultant present *or* that Miss Chim had turned a 'blind eye' and had failed to investigate the matter, and had just signed the forms without thought to the consequences, thereby failing to carry out her supervisory functions as branch manager.

21. This was inherently unsatisfactory, said Mr Yu; in the circumstances his client was entitled to know as to which of these alternatives she was being disciplined.

22. For my own part I failed to see the gravamen of Mr Yu's objection, given his specific concession – in response to a direct question from the Tribunal – that in terms of the falsity inherent in the signing of these forms there clearly was before the

regulator material upon which it was open to the SFC to take the inferential view to which it had come.

23. In light of this concession, therefore, there was little point in embarking upon an academic discursus upon the burden of proof, which had figured large in the pre-hearing skeleton argument.

24. However, the Tribunal invited Mr Yu to make his argument as to sentence on the basis that the infraction was as the result of 'Nelsonian blindness' rather than proactive fraud on the part of his client, and on this basis to attempt to demonstrate that the sentence meted out, and the inferential conclusion as to dishonesty, clearly was ill-founded.

25. Despite his best efforts, Mr Yu was unable to convince me of the validity of either argument.

26. It seemed to me, on the available evidence, that it was as plain as a pikestaff that Miss Chim had obeyed the instruction to sign these forms well knowing that, absent such representation, the SFC internal audit of THG would have discovered the obvious infractions in terms of the activity of these unauthorized persons,

and if this is correct it seems to me not to be of any great consequence whether this was a case of turning a ‘blind eye’ to the obvious or whether it was straightforward dishonesty on Miss Chim’s part; in either instance there was ample scope for the SFC to draw the inference which it did on the basis of the undisputed facts.

27. However, assuming for the sake of argument that this truly was a ‘blind eye’ situation, Mr Yu was unable to demonstrate to me, with reference to earlier SFC disciplinary cases, that the sentence meted out to Miss Chim plainly was wrong; to the contrary, it struck me as very much within the available ballpark.

28. This Tribunal has said on countless occasions that it will interfere with a sentence for a disciplinary offence only where something has gone plainly wrong, for example, in the sense of taking into account matters which should not come into the equation, or in not taking account of relevant matters which should be considered, or where a particular sentence is clearly ‘out of whack’ (an inelegant phrase, but one which suffices for descriptive purposes) such that it cannot be permitted to stand.

29. In my view this demonstrably was *not* one of those cases.

30. Mr Yu's other main point, which was more attractive on its face, was that the sentencing tariff imposed on his client was a reflection of current 'hardening' on the part of the regulator, and did not reflect the relevant tariff for this sort of offence as at the date of the commission of the offences in question.

31. Conceptually this was a little more promising, save that as a factual matter Mr Yu failed to make good this contention; to the contrary, as Mr Beresford, for the SFC, pointed out, in one of the earlier cases which Mr Yu had cited for this type of offence, one of the persons thus disciplined also had received a sentence of 4 months.

32. At the end of the day, therefore, after reviewing the available evidence, and after taking into account the fact that these forms clearly had been signed by Miss Chim for the purpose of representing an entirely different situation than the one which in fact had pertained – doubtless with the specific aim of not presenting the true picture to the SFC – it struck me that there really was nothing of substance in this appeal.

33. I further had little sympathy with the refrain that Miss Chim was instructed by Head Office to do what she did with these 'internal documents'.

34. In circumstances where, as here, the object of the exercise evidently was to misrepresent the situation to the inspecting regulator, this seems to me to be no excuse at all.

35. Nor was I persuaded by the argument that those in Head Office who had been disciplined arising out of these events had been dealt with on a 'pure negligence' basis; I know nothing of the facts of the other case to which Mr Yu made reference (or indeed whether that case was correctly decided), and I considered this case on the basis only of the information placed before me in relation to the circumstances of the present applicant, Miss Chim.

36. I reminded myself, also, that in this case the original sentence of 6 months had been reduced by 30% to reflect Miss Chim's factual admission and co-operative attitude, and in these circumstances I failed to see any proper basis for this Tribunal to be persuaded that it was appropriate to interfere.

37. I take this opportunity to reiterate that the SFAT is *not* an alternative regulator; it is a review tribunal, and it will be minded to interfere with the regulator's conclusions only when it is clear that the regulator plainly has gone wrong, either in its conclusions as to liability, or in terms of the sentence for disciplinary infraction.

38. In short, the regulator, which contains within it the necessary professional expertise to regulate the markets and the participants therein, must be permitted to exercise its professional judgment in normal course, and applicants for review should not expect that the conclusions drawn by the regulator after due investigation, and the punishment underlying such findings, will be lightly disturbed.

39. The instant case struck me as a particularly good example of an unmeritorious application which, on the undisputed facts, had little if any chance of success; whilst I do not wish to be unfair, it is hard not to draw the conclusion that the present appeal was motivated, in part at least, by reason of the fact that the penalty handed down was not to come into operation until after the conclusion of this review application.

40. It seems to me that when the Tribunal forms a view of this nature, there is a good deal to be said for imposing a costs order to be taxed and paid upon a higher scale than the usual party and party basis. In the event, I did not adopt this course in this case, but in principle applicants should be aware that this Tribunal takes a dim view of applications for review which have little or no substance.

41. It is for the foregoing reasons, therefore, that this application was dismissed with costs.

Hon Mr Justice Stone
Chairman

Mr Selwyn Yu, inst'd by M/s Chung & Kwan, for the applicant

Mr Roger Beresford, inst'd by the SFC, for the respondent