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Application No. 6 of 2010

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IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

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BETWEEN

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CHUNG NAM SECURITIES LIMITED, Applicants

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NG KWAI CHO AND CHENG WAI CHUNG

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And

SECURITIES AND FUTURES COMMISSION Respondent

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Before : Chairman, Hon Saunders J,

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Written Submissions : 17 & 19 August 2010

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Date of Decision : 26 August 2010

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DECISION

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V*Introduction:*

1. On 19 July 2010, the Securities and Futures Commission (the SFC), by a Notice of Final Decision (the “Decision”), publicly reprimanded Chung Nam Securities Limited, Mr. Ng Kwai Cho, and Mr. Cheng Wai Chung (the “Applicants”) and fined the Applicants collectively the sum of HK\$1,300,000 under s 194 of the Securities and Futures Ordinance, Cap 571 (the SFO).

2. Pursuant to, s 217 of the SFO, the Applicants have a right to seek a review of the Decision and to apply to the Securities and Futures Appeals Tribunal (“SFAT”) for the review. The Decision contained the following paragraph:

“If you wish to apply for a review of our decision, you must lodge a copy of this notice and a notice of review setting out the grounds relied upon with the Secretary to the Securities and Futures Appeals Tribunal, 38/F, Immigration Tower, 7 Gloucester Road, Wanchai, Hong Kong **on or before 9 August 2010**. You should also send a copy of the notice of review to us.” (original emphasis)

3. The Secretary of the SFAT received the Applicant’s notice of review in the afternoon of 10 August 2010, that is, outside the 21 day period stipulated within s 217(3) of the SFO thus one day out of time. The SFC received a faxed copy of the Applicants’ notice of review, according to the fax transmission header, at 19:00, on the evening of 9 August 2010.

4. Pursuant to s 217(4) of the SFO the Applicants have the right to apply to extend time. That application was made by letter dated 17 August 2010.

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Background:

5. As a result of an investigation under s 182 of the SFO by the SFC, the Applicants were found to be guilty of non-compliance with the SFC’s Code of Conduct and Internal Control Guidelines in handling client orders, which called into question the Applicants’ fitness and properness to remain a licensed person.

6. After considering the Applicants’ representations in regards to the proposed disciplinary actions by the SFC, the SFC made the Decision to publicly reprimand and to fine the Applicants under the SFO.

7. The Applicants by right may apply to the SFAT for a review of the Decision within 21 days beginning on the day after the day the Applicants have been served with the notice of the Decision, i.e. on or before 9 August 2010. However, the Applicants’ application for review was not received by the SFAT until the afternoon of 10 August 2010, although a faxed copy received by the SFC at 19:00 in the evening of 9 August 2010.

The Statutory Position:

8. The SFAT has jurisdiction to extend the time under s 217(4) of the SFO. However, under s 217(5), SFO provides that the SFAT:

- “shall not grant an extension...unless –
- (i) the person who has applied for the grant of an extension...and the relevant authority have been given a reasonable opportunity of being heard; and
- (ii) it is satisfied that there is good cause for granting the extension.”

A 9. The legislative intent of this provision is two-fold, see Stone J, A
B *Mona Wong Wai-king*, SFAT 4/2003, para. 12: B

- C (i) to allow for cases of excusable delay; and C
D (ii) to impose an element of certainty in terms of D
E commencement of service of such penalties as are meted E
F out by the SFC. F

G *The Representations from the Applicants:* G

H 10. The SFAT, on 16 August 2010, invited the Applicants to make H
I an application in writing and give reasons to the tribunal for time to be I
J extended on their application for review. J

K 11. The Applicants submitted their application for extension on 17 K
L August 2010. The reasons they gave can be summarized as follows: L

- M (i) they wish to make the application for time extension M
N on the grounds of practicality; N
O (ii) their application was submitted to the SFC by fax O
P close to the end of business on 9 August 2010; P
Q (iii) they asked the SFC for the fax number for SFAT, but Q
R were informed that an application to the SFAT can R
S only be submitted by post or by hand. They, S
T therefore, delivered the application to SFAT by hand T
U on 10 August 2010. U
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The Representations from the SFC:

12. The SFAT, on 16 August 2010, also invited the SFC to make representations on the issue of extension of time.

13. In response to the submission made by the Applicants, by letter dated 19 August 2010, the SFC opposed the Applicants' application for an extension of time for filing application for review on the basis that no good cause has been made out, as required by s 217(4) of the Ordinance.

14. The SFC's reasons for opposing the application can be summarized as below:

- (i) The SFC had given clear instructions in the Decision to the Applicants as to the time within which the application for review must be lodged with the SFAT;
- (ii) According to SFC's incoming call records, the Applicants contacted the SFC at 18:13 on 9 August 2010. They then indicated that they would apply for a review. The Applicants asked whether they need to send a copy of the review application to the SFC. The SFC informed the Applicants that a copy of the application should be sent to the SFAT and the SFC in accordance with the instructions set out in the Decision. The SFC also said that normally the application should be sent to the SFAT's mailing address as set out in the Decision;
- (iii) The Applicants indicated that they will send a copy of the review application to the SFC by fax. Accordingly, the

A SFC received the fax transmission at 19:00 on 9 August A
B 2010; B
C (iv) In light of the circumstances, the Applicants' allegation C
D that they submitted their application by fax to the SFC D
E "close to the end of business day on 9 August 2010" is not E
F true; F
G (v) Both the Applicants' telephone call and subsequent fax G
H transmission to the SFC occurred after office hours on 9 H
I August 2010; I
J (vi) Further, the fax number of the SFAT is public information J
K which can be easily located on its website. The Applicants K
L should have been able to contact the SFAT by fax, if L
M necessary, without calling the SFC to seek such M
N information; N
O (vii) Finally, there was no explanation put forth by the O
P Applicants as to why they have waited until after office P
Q hours on 9 August 2010 to attend to the matter. Q
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15. Accordingly, the SFC invites the SFAT to reject the application for extension of time by the Applicants.

Discussion:

16. There could have been no mistake as to the final day upon which the application for review could be filed. That date by which the application must be filed was plainly stated, even emphasised in bold type, in the Decision.

A 17. The Applicants have put forward no explanation by way of A
B excuse as to why they have waited until after office hours on the last day on B
C which it was open to them to file an application for review, to attend to the C
D matter. No reason has been suggested why it was not open to them, during D
E office hours, on or before 9 August 2010, to deliver, or transmit by fax, an E
F application for review to the offices of the SFAT.

F 18. The statement made in the Decision makes it clear that a F
G physical copy of the notice of review must be with the SFAT at its address, G
H which was given, before 9 August 2010. If it was intended to submit the H
I application by fax, the fax information for the SFAT is public information I
J that is easily accessible on the SFAT's website, which is simply accessible, J
K and even available through a Google search. There was nothing in the K
L Decision indicating that the application for review must be submitted only L
M by post or hand, although the SFC was correct to say that that is the usual M
N means of lodgement. N

O 19. In these circumstances I reject the proposition that the SFC had O
M "misinformed" the Applicants that the submission to the SFAT must be by M
N hand or by post only. N

O 20. The Decision was quite plain, both as to the last date on which O
P an application for review may be filed, and the date upon which the Decision P
Q would take effect. Q

R *Conclusion:* R

S 21. For the foregoing reasons, the Applicants' application for S
T extension of time fails and is dismissed. Consequently, the Applicants' T
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application for review of the Decision dated 9 August 2010, having been
 filed out of time to the SFAT, is of no effect. The penalties imposed by the
 SFC are accordingly of full effect.



John Saunders
 Judge of the Court of First Instance
 High Court
 Chairman
 Securities and Futures Appeals Tribunal

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