

Application No. 7 of 2005

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

IN THE MATTER OF a Decision made
by the Securities and Futures
Commission Ordinance under
section 195(1)(a)(i) of the Securities and
Futures Ordinance, Cap. 571

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

BETWEEN

LAM PAK HUNG

Applicant

And

SECURITIES AND FUTURES COMMISSION

Respondent

Tribunal: Hon Mr Justice Stone, Chairman

Date of Hearing: 21 December 2005

Date of Determination: 8 February 2006

DETERMINATION

The application

1. This is an application for review by the applicant herein, Mr Lam Pak Hung, in respect of the decision of the SFC dated 27 September 2005 to revoke his licence as a dealer's representative.
2. The decision in issue was made pursuant to section 195(1)(a) of the Securities and Futures Ordinance, Cap 571, following the making of a bankruptcy order against Mr Lam in the High Court.
3. Mr Lam is aggrieved by this decision, hence these proceedings. With the consent of the parties, this review has been conducted before the Tribunal consisting of the Chairman sitting alone, pursuant to the provisions of section 31, Schedule 8 of the SFO.

The factual background

4. There is no dispute as to the primary facts of this case.
5. Mr Lam was registered as a dealer's representative of Jospa Investment Company in June 1989 under the now-repealed Securities Ordinance. His registration subsequently was transferred to Jospa Investment Company Limited on 2 August 1997.

6. Upon the commencement of the SFO on 1 April 2003 he was deemed licensed as a representative for Jospa for the purpose of dealing in securities, advising on securities, and advising on corporate finance and asset management.

7. On 18 March 2004 the Official Receiver's Office notified the SFC that a bankruptcy order had been made against Mr Lam on 10 February 2004. Mr Lam had petitioned for his own bankruptcy.

8. Mr Lam admitted in correspondence with the SFC that his bankruptcy was caused by his own trading losses and the default of one of his clients, Ms Lok Kwun Sin.

9. He further admitted in correspondence that he had breached regulations of the SFC and his employer's internal control guidelines.

10. Ms Lok had been a former colleague of his wife, who had worked in Macau at the time and had been too busy to come to Hong Kong to open an account with Jospa. The son of Mr Lam from his first marriage, Mr Lam Ka Ki, had provided Jospa with an authorization letter to allow Mr Lam to use his account for trading, and Mr Lam then had begun to conduct trades for Ms Lok via the account of Mr Lam Ka Ki in contravention of his employer's internal guidelines. Ms Lok failed to settle her trades.

11. Mr Lam also had used the margin account of Lam Ka Ki for his own trading and part of the trades in the cash account of Lam Ka Ki were conducted on behalf of Ms Lok.

12. As Ms Lok's account executive, Mr Lam Pak Hing was responsible for her unsettled trades after her default. In order to settle Ms Lok's outstanding trades, Mr Lam obtained personal loans from banks and cash advances using credit cards. As of

December 2003 he owed approximately HK\$690,000 from banks; in addition in 1998 Mr Lam had obtained a loan of HK\$500,000 from Mr Ng Ping Chu, the owner of Jospa, to settle his own trading losses.

13. The banks rejected Mr Lam's proposals for repayment of his indebtedness, and at least until December 2003 he was able to make a monthly repayment of in or about \$20,000 to the banks; however his personal circumstances, and the necessity to care for his family, meant that he no longer was able to maintain such repayment. According to his Statement of Affairs filed in his bankruptcy, his monthly income was HK\$26,000 and his monthly expenditure was HK\$24,041.

14. Given that his income appears to devolve solely upon commission, the possibility of his being able to repay his debts clearly is very low.

15. Mr Lam has accepted that his bankruptcy involved poor financial management on his part, and he has admitted that in the case of Ms Lok he failed to follow Jospa's internal guidelines, which state that a person who does not have an account with Jospa cannot borrow any client's securities account for trading unless approved by management. Jospa in fact issued a warning letter to Mr Lam on 14 April 2004.

16. Mr Lam also has accepted that he had breached SFC regulations, and that as a licensed person he was required to comply with the Code of Conduct, failure of which would impugn his fitness and properness to remain licensed.

17. Mr Lam has no criminal record or prior disciplinary infractions.

The argument

18. Mr Lam represented himself at this review.

19. He submitted a letter to the Tribunal, the substance of which was that he felt that he was being ‘discriminated’ against by the SFC by reason of his bankruptcy, and that the effect of the SFC decision which he now sought to review was that the SFC effectively had deprived him of his human right to work.

20. He made the point that his wife already is out of work and that he, his wife and his children will need to resort to CSSA for their support.

21. He apologized for that which he had done. He noted that his clients had not been implicated in his bankruptcy, and that he had been trying hard to pay off his debts. His clients had not lost their confidence in him, they had lodged no complaint against him, nor had he been in further breach of the SFO nor had he encountered further financial problems.

22. Mr Lam said that he was ‘desperate’ and did not understand why, in these circumstances, the SFC had imposed a ‘death penalty’ on him, and that no basis existed for the SFC conclusion that his continued licensing would cause prejudice to the interests of the investing public.

23. His grounds of appeal followed the like approach: namely, that he had been a stockbroker for over 20 years absent complaint from clients, that he never had cheated or misappropriated client’s money, that notwithstanding his financial difficulties, with which he had tried to deal, he had not jeopardized the interests of his clients, and that at the outset he had failed to make full disclosure by reason solely of the financial pressures and the stress that this situation had caused him.

24. On behalf of the SFC, Ms Lisa Chen disputed Mr Lam's arguments.

25. She submitted that Mr Lam's bankruptcy called into question his financial integrity and reliability, and thus his fitness and properness to remain licensed.

26. Ms Chen emphasized that Mr Lam had admitted that he had been in breach of his employer's internal guidelines by failing to inform Jospa that he was using the account of Mr Lam Ka Ki to conduct trades for Ms Lok, that it was clear that he was facing extreme financial difficulty, and that, on his own admission, he had failed to make full disclosure to the SFC. Ms Chen further submitted that Mr Lam's years of experience was a factor irrelevant to the primary issue of his financial integrity and reliability.

27. She argued that under the SFO, one of the functions of the SFC was to promote the proper competence, conduct and integrity of licensed persons, and she maintained that if Mr Lam was permitted to remain licensed, it would have an adverse effect upon public confidence in the integrity of the securities industry and licensed persons.

28. Ms Chen noted that the SFC had found it appropriate to revoke licences on the ground of bankruptcy on previous occasions; in the period November 2004 to November 2005, for example, the licences of 16 persons had been revoked on this ground, and thus this was not an unusual decision for the SFC to make.

29. Accordingly, she concluded, the only issue to be determined in this review was whether the SFC had exercised its undoubted discretion under section 195(1)(a)(i) unreasonably, and in the circumstances she suggested that the applicant's case had not

been made out, and that the tribunal should confirm the SFC's decision of 27 September 2005.

Determination

30. In the particular circumstances of this case it is difficult not to feel a degree of sympathy for Mr Lam.

31. The circumstances surrounding his conduct, and his reaction thereafter, in my view do not suggest venality. As the tribunal observed during argument, all the information now acted upon by the SFC was in fact conveyed to the regulator by Mr Lam in a series of letters respectively dated 15 April, 1 June, 28 June 2004 and 12 May 2005.

32. True it is, as Ms Chen pointed out, that this information had not emerged in full at the outset, but nevertheless it did come from Mr Lam himself and not from a third party.

33. I appreciate, of course, that the issue is clouded by Mr Lam's infractions in terms of the use of another account to conduct trades on behalf of Ms Kwok, his defaulting client, and I accept, as Ms Chen suggests, that this is a factor which must be placed into the discretionary 'mix'.

34. I remind myself, also, that this tribunal is not a regulator, and does not purport to act as such. Accordingly, it does not seek to interfere with a decision of the SFC unless in the view of the tribunal the decision in question fairly can be regarded as out of step and/or clearly disproportionate to the offence for which the disciplinary sanction has been imparted.

35. Self-evidently each case depends upon its own factual matrix, and in matters such as the present individual precedents are

of limited utility, save perhaps to provide an indication as to prevailing policy.

36. In terms of bankruptcy, for example, in response to queries raised Ms Chen has told this tribunal that licence revocation is not the inevitable result of a bankruptcy order, and that in what are regarded as ‘meritorious’ instances involving circumstances outside the applicant’s control – in cases, for example, of financial difficulties arising by virtue of family crises such as ill-health – that the SFC may not seek to revoke, but will impose conditions on the continued practice of the bankrupt absent suspension or revocation. At the other end of the spectrum, in significant cases involving bankruptcy which do not contain this element, I am informed that revocation is the sanction that frequently is handed down.

37. Turning now to the circumstances of the present case, this does not strike me as the sort of case that merits an absolute revocation, with the result that upon discharge from bankruptcy the applicant is forced to apply *de novo* for a licence to resume activity as, in this case, as a dealer’s representative.

38. In fact, in the case presently under scrutiny it appears clear that a revocation would be tantamount to dismissal from the securities industry (which Mr Lam tells me is the only career he has ever known) in that it seems to me that, against this background, the chances of the grant of any new licence application to Mr Lam upon discharge from bankruptcy (when he would be 61) would be slim indeed – a proposition with which Ms Chen fairly did not demur.

39. In the particular circumstances of this case – which strikes me as involving crass misjudgments as opposed to venality – in my view the regulator has over-egged the pudding

somewhat, and appears to have applied that which is regarded as the 'standard' sanction in instances of bankruptcy.

40. For my own part, whilst I am unable to accede Mr Lam's 'entreaty' to the tribunal to permit him to continue to work as a dealer's representative notwithstanding his bankruptcy, I am equally unable to accept the SFC position that Mr Lam should now be subject to licence revocation with little real chance of getting back into employment within the only profession in which he has participated during his working life.

41. In fact, in this regard the SFC position did alter somewhat during the course of this hearing. In response to queries raised by the tribunal, Ms Chen informed the tribunal that, after taking into consideration Mr Lam's age, and the potential difficulty of obtaining a further licence post-revocation, her position was that the SFC would not take issue with a suspension of his licence during the period of his bankruptcy, that is, a suspension until the bankruptcy order made against Mr Lam is discharged, which, subject to the residual discretion of the court, under section 30A of the Bankruptcy Ordinance, Cap. 6, would be 4 years after the date of the bankruptcy order.

42. I see merit in this approach. It is significantly less draconian than revocation *per se*, and does not shut out the applicant from rejoining his profession.

43. I confess that had the primary decision been the tribunal's to make, this tribunal may have been tempted to have been more lenient than the regulator in these particular circumstances. The tribunal cannot, however, simply assume the position whereby it substitutes its own discretion for that of the SFC, however tempting it may sometimes be so to do.

44. That said, I nevertheless have concluded that in the circumstances of this case that the SFC has gone too far in terms of sanction, and accordingly it seems to me that a suspension in the terms canvassed during argument represents a not unjust result.

45. I appreciate, of course, that it does not help Mr Lam in terms of his immediate financial difficulties – for which I have considerable sympathy – but at least such a variation of the sentence imposed holds out some hope for the future and does not close the door entirely, as effectively would have been the position had the revocation decision been permitted to stand.

46. I would express the hope, also, that notwithstanding the suspension of his licence, which is the result of this review application, that there remains some prospect of Mr Lam currently obtaining alternative employment within the industry, perhaps with his present firm, which does not entail client contact.

Order

47. The order of the tribunal upon this application for review thus is as follows:

That the application for review succeeds to the extent that the decision of the SFC, dated 27 September 2005, as to revocation be set aside and that in substitution therefor the applicant's licence be suspended for such period as the bankruptcy order dated 10 February 2004 remains in effect against him, that is, until such date as the applicant is discharged from bankruptcy.

48. As to costs, after considering the circumstances of this case, and the fact that Mr Lam is unrepresented, I make an order *nisi* that there be no order as to the costs of this application, such order to become absolute within 14 days of the date of this determination absent application so to vary this order *nisi*.

Hon Mr Justice Stone
(Chairman)

Mr Lam Pak Hung, Applicant, in person
Ms Lisa Chen, Counsel for the Securities and Futures Commission