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Application No. 7 of 2010

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IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

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BETWEEN

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KO'S BROTHER SECURITIES CO. LTD. Applicant

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And

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SECURITIES AND FUTURES COMMISSION Respondent

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Before : Chairman, Hon Saunders J,

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Written Submissions : 17 & 18 August 2010

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Date of Decision : 26 August 2010

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DECISION

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Introduction

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1. On 22 July 2010, the Securities and Futures Commission (the SFC), by a Notice of Final Decision (the "Decision"), publicly reprimanded

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A Ko's Brother Securities Company Limited ("Ko's Brother") and fined it A
B HK\$250,000 under s 194(1)(a)(iii) and (2)(b)(i) of the Securities and Futures B
C Ordinance, Cap. 571 (the SFO). C

D 2. Pursuant to, s 217 of the SFO, Ko's Brother has a right to seek a D
E review of the Decision and to apply to the Securities and Futures Appeals E
F Tribunal (the SFAT) for that review. The Decision contained the following F
paragraph, (with original emphasis):

G "If Ko's Brother wishes to apply for review of our decision, it must G
H lodge a copy of this notice and a notice of review setting out the H
I grounds rely upon with the Secretary to the Securities and Futures I
Appeals Tribunal, 38/F, Immigration Tower, 7 Gloucester Road, Wanchai, Hong Kong **on or before 12 August 2010**. Ko's Brother should also send a copy of the notice of review to us." (sic)

J 3. The Secretary of the SFAT received Ko's Brother's notice of J
K review on 13 August 2010, that is, one day out of time and outside the 21 day K
L period stipulated within s 217(3) of the SFO. L

M 4. This is an application from Ko's Brother for an extension of M
N time to lodge its application for review, pursuant to s 217(4) of the SFO. N

O *Background* O

P 5. As a result of an investigation by the SFC, Ko's Brother was P
Q found to have internal control deficiencies which called into question its Q
R fitness and properness to remain licensed. The SFC found that Ko's Brother: R

S (i) failed to implement adequate internal control procedures S
T to detect and prevent short selling; T
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- (ii) failed to keep adequate audit trail and put in place proper internal control procedures; and
- (iii) failed to adequately and diligently supervise its employee.

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

7. Ko’s Brother by right may apply to the SFAT for a review of the Decision within 21 days beginning on the day after the day Ko’s Brother has been served with the notice of the Decision, i.e. on or before 12 August 2010. However, Ko’s Brother’s application for review was received by the SFAT on 13 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) of the SFO, it further 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.”

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

- (i) to allow for cases of excusable delay; and

A (ii) to impose an element of certainty in terms of A
B commencement of service of such penalties as are meted B
C out by the SFC. C

D *The Representations from Ko's Brother* D

E 10. The SFAT, on 16 August 2010, invited Ko's Brother to make an E
F application in writing and give reasons for time to be extended on their F
G application for review. G

H 11. Ko's Brother submitted their application for extension on 17 H
I August 2010. The reasons they gave to the tribunal can be summarized as I
J follows: J

K (i) they mistook the "review date" of 13 August 2010 as the K
L "dead line date" for submission of the application for L
M review; M

N (ii) they focused their attention to the "serious points" of the N
O Decision, i.e. how to rectify their computer system with O
P which they are "helplessly ignorant". P

(iii) hence, it is their fault of carelessness that they Q
R overlooked the deadline date. R

Q *The Representations from SFC* Q

R 12. The SFAT, on 16 August 2010 by the same letter to Ko's Brother, R
S also invited the SFC to make representations on the issue of extension of S
T time. T

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A 13. In response by letter on 18 August 2010, the SFC opposed Ko's A
B Brother application for extension of time on their application for review on B
C the basis that no good cause has been made out as required by s 217(4) of the C
SFO.

D 14. The SFC submitted that the reason given, of focusing attention D
E on rectifying their computer system, and hence being careless and E
F overlooking the expiry date for submission of the application to the SFAT F
G for review of the Decision was not sufficient good cause. G

H 15. The SFC invites the SFAT to reject the application for extension H
I of time by Ko's Brother. I

J *Discussion:* J

K 16. I am not satisfied that there is good cause for granting an K
L extension of time. There could have been no mistake as to the final day upon L
M which the application for review could be filed. That date was plainly stated, M
N even emphasised in bold type, in the Decision. On 22 April 2010, in their N
O submission to the SFC in response to the Notice of Proposed Disciplinary O
P Action, Ko's Brother acknowledged that the effective solution to their P
Q problems was to upgrade their computer system. Consequently the need to Q
R upgrade the system had been known for 3 months before the Decision was R
received. In these circumstances, I reject the proposition that the need to

S 17. On Ko's Brother's own admission, the application for review, S
T albeit only one day late, was late because of carelessness. Carelessness T
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A cannot constitute a good cause for granting an extension of time. The
B Decision was quite plain, both as to the last date on which an application for
C review may be filed, and the date upon which the Decision would take effect.

D *Conclusion:*

E 18. Therefore, Ko's Brother's application for extension of time
F fails and is dismissed. Consequently, Ko's Brother's application for review
G of the Decision dated 13 August 2010, as served out of time, is of no effect.

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L John Saunders
M Judge of the Court of First Instance
N High Court
O Chairman
P Securities and Futures Appeals Tribunal
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