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Application No. 7 of 2013

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

IN THE MATTER OF a Decision made by the
Securities and Futures Commission under
section 194 of the Securities and Futures
Ordinance, Cap. 571

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

BETWEEN

PETER LEUNG

Applicant

and

SECURITIES AND FUTURES COMMISSION

Respondent

Tribunal: The Hon Mr. Justice Hartmann, NPJ, Chairman

Date of Hearing: 3 April 2014

Date of Determination: 23 May 2014

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REASONS FOR DETERMINATION

The application

1. This is an application for review made in terms of s.217(1) of the Securities and Futures Ordinance, Cap 571 ('the Ordinance'). The applicant, Mr. Peter Leung ('Mr. Leung'), seeks the review of a decision of the Securities and Futures Commission ('the SFC') dated 26 August 2013 in terms of which it ordered that Mr. Leung's licence to conduct Type 1 regulated activities, namely, dealing in securities, be suspended for a period of 12 months. Mr. Leung does not seek a review of the findings of culpability. His review is limited to penalty, that is, the suspension of his licence for the period of 12 months.

The role of this Tribunal

2. Since the judgment of the Court of Appeal in *Tsien Pak Cheong David v Securities and Futures Commission* [2011] 3 HKLRD 533 it is now settled that this Tribunal is required to make a full merits review, conducting the review as if it is the original decision-maker.

Background

3. At all times material to this review, Mr. Leung was employed by Vermont Securities Company Limited ('the company'), a corporation licensed to carry on securities trading. He had joined the company in July 2003, being made a director in that same year. In August 2007, he obtained his licence (Type 1) to deal in securities and at about the same time he was appointed a licensed representative and responsible

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officer of the company. He retained these responsibilities until his departure from the company in March 2010, a period of some two years and six months.

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4. The company appears to have been relatively small. By way of illustration, between August 2007 and March 2009, Mr. Leung worked in the company's dealing room, being responsible for its day-to-day operations and appears to have had under his supervision just two dealers, Ms Grace Wong Yuk Han ('Ms Grace Wong') and Ms Lonna Wong Yuk Wah ('Ms Lonna Wong'). To Mr. Leung's knowledge, neither were licensed dealers.

5. Although only of peripheral relevance to this review, it is to be recorded that Mr. Leung rejoined the company in March 2012. A month earlier the company had changed its name to China Securities Holdings Limited.

6. In October 2012, the company informed the SFC that it would cease to carry on business from the end of that year.

7. Subsequent investigations by the SFC into the affairs of the company, focusing on the years 2007 to 2011 revealed a number of serious deficiencies. More particularly, the SFC determined that the company –

- i. had failed to keep proper order records, that is, records sufficient to ensure the fair allocation of trade executions and to enable such trade executions to be traced through its trading systems;

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- ii. had consented to or connived in the performance of its regulated functions by persons who were unlicensed, namely, Ms Grace Wong and Ms Lonna Wong, and
- iii. had failed diligently to supervise dealing functions in order to ensure the maintenance of appropriate standards of conduct and adherence to proper procedures.

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8. These deficiencies revealed failures to comply with the Code of Conduct binding upon persons licensed by or registered with the SFC, more particularly, in respect of the Code, a failure to act with due skill, care and diligence in the best interests of clients and the integrity of the market (General Principle 2); a failure to comply with all regulatory requirements in order to promote the best interests of clients and the integrity of the market (General Principle 7) and a failure on the part of senior management to ensure the maintenance of appropriate standards of conduct and adherence to proper procedures (General Principle 9).¹

9. On 15 August 2013, the SFC informed the public that it had issued a reprimand to the company and fined it \$1.3 million. In the announcement, it said: “But for the firm (the company) ceasing business, the SFC would have revoked its licence given the sustained, serious and deliberate nature of its misconduct.”

¹ The Code of Conduct (under the heading ‘Explanatory Notes’) opens with the statement: “The Commission [the SFC] will be guided by this Code of Conduct in considering whether a licensed or registered person satisfies the requirement that it is fit and proper to remain licensed or registered, and in that context, will have regard to the general principles, as well as the letter, of the Code.”

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10. During the material time, there were three responsible officers at the company, Mr. Leung being the one and the other two being Ms Stephanie Liu Suk Wai ('Ms Stephanie Liu') who, it appears, was a member of the family that owned the business, and Mr Wong Yip Chuen ('Mr. YC Wong').

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11. In the announcement of 15 August 2013, the SFC said that Ms Stephanie Liu's licence had been suspended for a period of 27 months due to her serious neglect of her management responsibilities and the manner in which she had connived in permitting unlicensed persons to deal in securities. Ms Stephanie Liu had been appointed a responsible officer in 2005 but from 2006 onward had only come to the office intermittently. The SFC underscored the serious view they took of her conduct by saying that it had taken into account that Ms Stephanie Liu was no longer licensed and had not disputed the factual evidence against her. If, however, she had remained licensed, her licence would have been revoked.

12. A month later, on 18 September 2013, the SFC informed the public that Mr. YC Wong's licence had been suspended for a period of eight months. Mr. YC Wong had been the last to be appointed a responsible officer, his appointment taking place in May 2009. On the evidence, his initial responsibility was to manage the company's settlement functions. As for dealing in securities, this responsibility was only given to him sometime after May 2011.

13. The SFC had initially determined that Mr. Leung's licence should be suspended for a period of 18 months. However, having considered his representations, it came to a final decision that it should be suspended for 12 months.

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The extent of Mr. Leung's culpability in respect of the failure to keep proper order records

14. Mr. Leung took over command of the dealing room as a licensed representative and responsible officer in August 2007. He remained in the dealing room supervising activities for the next 18 months. Thereafter, until his departure in March 2010, although he was not in the dealing room, he remained a licensed representative and responsible officer. In this regard, Ms Stephanie Liu told the SFC that he remained responsible for supervising the dealing functions up until his departure from the company. The other responsible officer, Mr. YC Wong was not himself stationed in the dealing room.

15. In a relatively small company, even after he moved from the dealing room, having been responsible for its day-to-day supervision for 18 months, Mr. Leung must have appreciated that his supervisory responsibilities remained. Ms Stephanie Liu was rarely at the office, looking after a young child at home, while Mr. YC Wong did not physically take his place in the dealing room.

16. In looking to the temporal scope of his culpability, therefore, it can be said that from August 2007 until his departure from the company in March 2010 Mr. Leung allowed a manifestly deficient system of order record-keeping to prevail in the dealing room even though, as a licensed dealer himself, he must have understood the fundamental importance of maintaining proper records.

17. Mr. Leung accepted that there was no manual of dealing procedures readily available nor indeed any shortened form of checklist

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to ensure due compliance. During the course of the review hearing he said that he was simply too busy to prepare a manual or checklist, implying that it was a responsibility that should have been discharged by others in the company who had been licensed longer than him, for example, Ms Stephanie Liu. That, however, avoids the issue. Whether or not somebody else in the company should have drawn up a manual or at least a comprehensive checklist, the fact remains that Mr. Leung had direct command of the dealing room; he was responsible for ensuring that proper records were kept. Mr. Leung must have known that the most effective way of ensuring that proper records were kept - indeed, the standard way - was to ensure that all dealers had written policies and procedures immediately available to them. Mr. Leung failed in this fundamental responsibility by permitting dealing to take place over an extended period of time without any form of written policies or guidelines made readily available.

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18. Ms Grace Wong and Ms Lonna Wong worked under his immediate control in the dealing room. In their interviews with the SFC, they freely admitted that they had carried out unlicensed dealing activities while under Mr. Leung's supervision.

19. Mr. Leung, who appeared at the review hearing without the benefit of legal representation, sought to limit the extent of his culpability by saying that, during the 18 months when he was working in the dealing room, he ensured that everybody maintained full and proper records. If there was any fall-off in standards, he said, it could only have occurred after he had been removed from the dealing room. In the view of the Tribunal, this assertion has no substance. If Mr. Leung had ensured a system of meticulous record-keeping, it must have involved some form of

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training of Ms Grace Wong and Ms Lonna Wong or ‘on the job’ tuition. However, when the SFC pointed out to Ms Grace Wong and Ms Lonna Wong their failures to maintain proper dealing records, their replies were to the effect that they had not been taught otherwise.

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20. It should further be said that the extent of the deficiencies in record-keeping did not consist of occasional oversights or errors. The deficiencies were systemic, leaving the system dangerously open to abuse. If Mr. Leung, up until his physical removal from the dealing room, had, as he protested, ensured the maintenance of detailed and accurate order records in respect of all dealings that took place under his watch, the collapse in the standards of record-keeping would have been startling. There was however not a jot of evidence as to this proposed metamorphosis. Neither Ms Grace Wong nor Ms Lonna Wong suggested any change in procedures.

21. It is also to be remembered that, even after Mr. Leung, had been moved to a back-office he remained a licensed representative and responsible officer. Indeed Ms Stephanie Liu told the SFC that he also remained in charge of the dealing room even if not physically *in situ* every hour of the day. Mr. Leung must have appreciated that his responsibilities as a responsible officer could not simply be abandoned, leaving nobody to fill the vacuum.

22. In looking to the extent of the deficiencies, the probabilities suggest that they had become entrenched and were not an overnight occurrence. Correctly, in the view of this Tribunal, the SFC considered them to constitute a serious failing.

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23. The records studied by the SFC consisted of dealing tickets, trade blotters and trade journals from the Hong Kong Stock Exchange. A study of the records revealed the following:

- i. the dealing tickets were not time stamped (with the exception only of a limited number of dealing tickets prepared by an account executive);
- ii. virtually all of the dealing tickets failed to record the order instructions, recording only the order executions;
- iii. not all of the executed order instructions recorded on trade blotters had corresponding dealing tickets;
- iv. a significant number of the trades recorded on dealing tickets could not be traced to relevant order instructions;
- v. not all of the trades recorded on the trade journals could be traced back to an order instruction.

24. In her interviews with the SFC on 8 December 2011 and 16 January 2012, Ms Grace Wong said that:

- i. She recorded order instructions from clients on trade blotters and prepared dealing tickets for the orders. However, she would omit the trade blotters and simply prepare the dealing ticket if she was busy. The order details might be copied back to the trade blotter when she was less busy.

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- ii. She discarded the dealing tickets for orders that had not been executed because she did not know that those dealing tickets had to be kept.
- iii. She was unable to identify all the clients from the Order Table because her dealing tickets only recorded client order instructions without meeting the fundamentally important requirement of recording the order time.

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25. In her interviews with the SFC on 13 April 2012 and 4 May 2012, Ms Lonna Wong said that:

- i. She recorded client order instructions using the trade blotters and dealing tickets but she had never been trained how to record clients orders.
- ii. Even though there was a time stamp machine available for use, it was never her practice to register the time of an order instruction using the machine.
- iii. She only recorded order instructions on the trade blotter when she remembered to do so. Sometimes she entered the records on the trade blotters and sometimes on the dealing tickets.
- iv. She too was unable to complete the Order Table because she could no longer remember which order instructions belonged to which clients.

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26. In its letter of proposed disciplinary action dated 20 March 2013 addressed to Mr. Leung, the SFC made the observations, which this tribunal accepts, that, as a result of the deficient order record-keeping, the company could not:

- i. accurately identify for whose accounts trades had been executed;
- ii. ensure that trades executed on behalf of a number of clients were fairly allocated, and
- iii. enable the executed trades to be traced through its trading system.

27. Central to the statutory and regulatory regime put in place by the Ordinance, its Rules and the Code of Conduct is the need for the maintenance of accurate order records. In this regard, s.3 of the Securities and Futures (Keeping of Records) Rules requires that a dealer acting as an intermediary (such as Mr. Leung) must keep full and proper records of all dealings. The time stamping of instructions is not merely a bureaucratic imposition, it is a bulwark against abuse. Paragraph 3.9 of the Code of Conduct specifically requires dealers to record and immediately time stamp orders to buy or sell². Paragraph 3 of Schedule 3 of the Code speaks of the requirement in more exacting detail.

² The paragraph reads: "... a licensed or registered person should record and immediately time stamp records of the particulars of the instructions for agency orders and internally generated orders (such as proprietary accounts and staff accounts). Where order instructions are received from clients through the telephone, a licensed or registered person should use a telephone recording system to record the instructions and maintain telephone recordings as part of its records for at least three months."

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28. As a licensed dealer, Mr. Leung could not have been ignorant of the fundamental importance of maintaining full and accurate dealing records, more especially the need to time stamp orders to buy or sell.

The extent of Mr. Leung's culpability in respect of the continued dealing of Ms Grace Wong and Ms Lonna Wong, both being unlicensed

29. Mr. Leung did not dispute the fact that he knew that neither Ms Grace Wong nor Ms Lonna Wong were duly licensed. Nor did he dispute the fact that, in dealing in securities, both women were performing regulated functions permitted only of licensed persons.

30. Mr. Leung insisted that he complained to those who controlled the company that the two women should not be permitted to deal. He said that he complained on numerous occasions. Indeed, it appeared to be the thrust of his submissions that one of the principal reasons for his removal from the trading floor in or about March 2009 was because of his persistent complaints.

31. Even on his version of events, however, he was prepared to tolerate the unlicensed activities taking place in his presence in the dealing room for a period of some 18 months. In addition, as noted, even after his removal from the trading floor, he remained a responsible officer of the company for an extended period of time, working within the company.

32. In an attempt to avoid this difficulty, in the course of his submissions Mr. Leung came up with an assertion not previously made to

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the effect that, when he had been in charge of the dealing floor, he had not allowed the two women to conduct any unlicensed dealings and had restricted their activities to assisting him in such mundane matters as inputting data; in short, that he was not, in fact, culpable at all. The Tribunal is satisfied this assertion has no substance. First, nothing appears in the statements of the two women given to the SFC to the effect that, when they worked with Mr. Leung they were prohibited from carrying out any licensed activities. To the contrary, Ms Grace Wong told the SFC that she had taken instructions from Mr. Leung to carry out dealing activities from August 2007. Ms Lonna Wong, for her part, said that she was never instructed by management not to take order instructions from clients. In his own written representations to the SFC, Mr. Leung said that he had been unable to prevent the women from taking orders and all he could do was to urge them to sit their licensing examinations. He said he repeatedly stressed to those who controlled the company that the two women should not be permitted to receive client orders³.

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33. It is understandable that Mr. Leung was deeply concerned at having his licence suspended. He emphasised that he was not an affluent man, that he had a young son who had to be educated and that he himself was not a well man (hepatitis B) and would in all likelihood be unable to obtain alternative employment. His case, however, was not assisted by sudden, broad assertions that had not previously been made in any of the material available to the Tribunal. They had all the hallmarks of opportune assertions made in the desperation of the moment.

³ The translation reads: "I had repeatedly stressed and reflected to Ms Liu and Mr. Ip that the two Ms Wong could not receive client orders before receiving their SFC licences. I also insisted on having a responsible officer in the dealing room to monitor it. This offended Mr. Liu and caused my removal from the dealing room."

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34. S.114 of the Ordinance prescribes that regulated activities may only be performed by persons who are duly licensed. There may be a number of reasons why statutes or regulations made under them require persons to be licensed. By way of illustration, a licence may be an instrument for raising revenue. However, it is manifest that those who seek (as intermediaries) to deal in securities are required to be licensed for the principal, if not the sole, reason that it is only through a system of licensing that their professional competence and adherence to a code of professional conduct intended to protect the integrity of the market can be assured. In this regard, for example, the Code of Conduct published in June 2011 seeks to bind only those persons licensed by or registered with the SFC. There is no way of ensuring the knowledge and competence of unlicensed persons as this present case illustrates: unlicensed persons are not bound by any code of professional conduct. In the result, the interests of clients are in constant jeopardy and the integrity of the market is threatened. Allowing unlicensed persons to deal in securities, or conniving in their dealing, strikes at the whole licensing system and acts to undermine the integrity of the market. As Mr. Leung clearly appreciated, it is serious misconduct.

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35. While, when assessing penalty, it is not irrelevant, it serves him little therefore to say that, having registered his complaint with those above him, there was nothing else he could do but allow the unlicensed dealing to take place for fear of demotion or loss of employment. As a responsible officer, Mr. Leung was expected to take active steps to prevent such unlicensed activities. Yet, at the very least, between August 2007 and March 2009 when he was physically positioned in the dealing room and in charge of it he permitted the unlicensed dealing to go on unchecked.

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The extent of Mr. Leung’s culpability in respect of his failure to diligently supervise dealing functions and adherence to proper procedure

36. As the SFC observed in its letter to Mr. Leung of 20 March 2013⁴, as a responsible officer and a member of the management of the company, he was expected to actively participate in and supervise the business of the company, ensuring the maintenance of appropriate standards of conduct and adherence to proper procedures, especially in the dealing room. In disregard of these responsibilities, he permitted the dealing room to operate without clear policies and guidelines and must have appreciated the opportunities made available for abuse of the system.

Matters of mitigation advanced by Mr. Leung

37. Mr. Leung advanced two main grounds of mitigation, the first going to the circumstances of his employment with the company and the second to the dire consequences that will be visited upon him and his family if his licence is suspended.

38. As to the first ground, Mr. Leung asserted that he was simply under too much pressure to find the time to draw up appropriate policies and guidelines. It appeared to be his case, if only by way of implication, that others more qualified should have drawn up those documents. As earlier noted, that ignores the fact, however, that he accepted the responsibility of running the dealing room and of appointment as a responsible officer. As such, he must have known that the responsibility to put appropriate policies and guidelines in place was primarily his

⁴ See paragraph 45 of that letter.

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responsibility. Yet he appears to have taken no steps at all. Other than the bland assertion that he was too busy, he offered no explanation for how it was that over a period of a year and six months he was unable at the very least to put into place a succinct checklist of steps that had to be followed in order to maintain proper records. If he had done so, and if he had ensured that those steps were followed, the SFC investigation may have had a very different result.

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39. As to his failure to prevent and/or stop the unlicensed dealings by Ms Grace Wong and Ms Lonna Wong, Mr. Leung asserted that, having registered a number of complaints to those who controlled the company, effectively the Liu family, he felt that there was nothing further he could do. They wanted the two women to continue their unlicensed dealing. As it was, he said, those complaints resulted in him being removed from the dealing room and suffering a decrease in income. He felt he could not resign on principle for fear of not finding another job. If matters were as he asserted, it is accepted that he found himself in a difficult position. No evidence was put before the Tribunal, however, to suggest that he put his concerns in writing, for example, a letter to senior management written by him in his capacity as a responsible officer emphasising the seriousness of allowing unlicensed dealers to work in the dealing room and the possible consequences of such misconduct. Nor is there any indication that he sought to give up his appointment as a responsible officer in protest.

40. As to the second ground of mitigation, namely, the dire consequences that will be visited upon him and his family if his licence is suspended, Mr. Leung said that he was not an affluent man and that in all likelihood he would be unable to obtain any alternative employment. He

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emphasised that he had a young son to educate and that he himself was not in the best of health.

41. On behalf of the SFC, it was pointed out that prior to becoming a licensed dealer in securities Mr. Leung had worked as an accountant and that area of employment remained open to him.

42. It is accepted that in many instances the consequences of anything other than a very short suspension will put an individual and his family in difficult circumstances. That is a matter which must be taken into account. But in this context what must be remembered is that mitigating factors have less resonance in matters that arise in domestic disciplinary regimes as compared with our system of criminal law. The principle has been elucidated by Sir Thomas Bingham MR (as he then was) in the English Court of Appeal decision of *Bolton v Law Society*⁵, a case concerning the imposition of disciplinary sanctions upon a solicitor:

“Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again... All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period

⁵ [1994] 1 WLR 512

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of suspension is passed. If that proves, or appears likely, to be so the consequences for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of an individual member. Membership of a profession brings many benefits, but this is part of the price.”

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43. The securities industry is of incalculable importance to Hong Kong. This has been noted time and again by our courts. The industry, however, stands or falls on its reputation. If members of the investing public lose confidence in the integrity and professional competence of those who are employed in the industry they will cease to employ its services. To paraphrase the words of Sir Thomas Bingham just cited, the essential issue is the need to maintain among members of the investing public a well-founded confidence in the securities industry. That being the case, the reputation of the securities industry in Hong Kong is more important than the fortunes of one individual member. It is not the purpose of a suspension to bring hardship to an individual and his family. But if such hardship is likely, it does not make an order of suspension a wrong order if in all other respects it is the correct order to make.

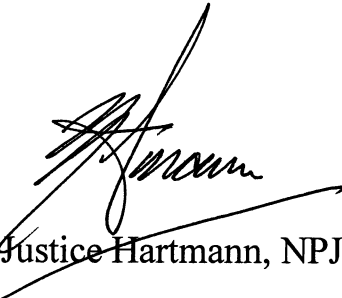
Conclusion

44. As has been said, Mr. Leung’s culpability in this matter was both serious and persistent. Whether any losses occurred or not, there can be no doubt that the misconduct identified in this judgment threatened the integrity of the securities market. Having taken into account all relevant factors, this Tribunal is of the view that a suspension for 12 months, that being the period imposed by the SFC, is the appropriate penalty.

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45. The issue of costs was not argued. However, there was no indication that the SFC was waiving any claim for costs and accordingly an order *nisi is* issued granting costs to the SFC. Should Mr. Leung wish to oppose this order, he should file notice of his intention to do so within one month of the date of this judgment. Should he not do so the order will be made final.



(The Hon Mr. Justice Hartmann, NPJ)
Chairman, Securities and Futures Appeals Tribunal

The Applicant in person
Mr. Norman Nip, Counsel, instructed by the SFC,
for the Respondent