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Application No. 8 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

CHAN Pik Ha Jenny — Applicant

and

SECURITIES AND FUTURES COMMISSION — Respondent

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

Dates of Hearing: 10 February 2014 and 19 May 2014

Date of Determination: 9 June 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, Ms Chan Pik Ha, Jenny, seeks the review of a decision of the Securities and Futures Commission ('the SFC') dated 21 October 2013 in terms of which it was ordered that her licence to conduct Type 1 and Type 2 regulated activities, namely, dealing in securities and in futures contracts, be suspended for a period of six months. The applicant has not challenged the findings of culpability made against her. She has, however, sought to put those findings into a context which, she says, lessens her moral blameworthiness. Accordingly, this review is limited to the issue of penalty.

2. On behalf of the applicant, it has been submitted that a suspension of six months imposed by the SFC is - in all the circumstances of this case - manifestly excessive. The Tribunal is asked to consider in its place a reprimand accompanied by a monetary penalty or effectively a nominal suspension of one month.

The role of this Tribunal

3. 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.

The principle underlying this Tribunal's approach when considering matters of personal mitigation

4. It has consistently been the approach of this Tribunal, when considering matters of personal mitigation, to apply the principle elucidated by Sir Thomas Bingham MR (as he then was) in the English Court of Appeal judgment of *Bolton v Law Society*[1], a case concerning the imposition of disciplinary sanctions upon a solicitor; in short, upon the member of a profession. The principle emerges from the following passage:

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

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1 [1994] 1 WLR 512

5. Sir Thomas Bingham was there talking about the solicitors' profession but it has consistently been the view of this Tribunal[2] that the principle must apply with equal force in respect of Hong Kong's securities industry. A profession may be described as a calling that requires advanced knowledge or training in some branch of learning or science[3]. In Hong Kong a licence is required to deal as an intermediary in securities and futures because it is considered necessary that such people are able to demonstrate a level of competence in the exercise of that occupation together with an adherence to a code of conduct sufficient to maintain the trust of the investing public. The securities industry is of incalculable importance to Hong Kong. This has been remarked upon 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. Accordingly, whether licensed members of the securities industry can with technical accuracy be described as members of a profession or not is not to the point. The point is that, as with the members of a profession, the public is entitled to expect of them "unquestionable integrity, probity and trustworthiness". That is why Sir Thomas Bingham's principle is applied. In the view of this Tribunal, that is why the reputation of the securities industry is more important than the fortunes of any individual member.

Background

6. The applicant has been employed in the securities industry in Hong Kong for over 25 years. She has a previously unblemished record.

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2 See, for example, Mr. Wong Wing Fai Eric v SFC, SFAT Application No. 4 of 2004 and Mr. Peter Leung v SFC, SFAT Application No. 7 of 2013

3 See The New Shorter Oxford English Dictionary, 4th edition

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7. The applicant joined ICBC International Securities Limited ('ICBC') as a sales director (a senior position) in June 2011. Prior to that she had worked for some 20 years at Lippo Securities Limited ('Lippo') and at the time of her departure had held the post of Chief Executive Officer with that company.

8. The applicant's time at ICBC was short and, on the face of it, unsettled. She left ICBC in October 2011 after only four months. This review focuses on this limited time period.

9. In August 2011, those responsible for regulatory compliance at ICBC noticed that the applicant had failed fully and accurately to record dealing instructions received from clients. The applicant received a verbal reminder. A few weeks thereafter it was discovered that the applicant had paid a sum of HK$300,000 of her own money into a client's trading account without declaring that fact. This led to an internal investigation and in November 2011 a report was made to the SFC.

10. In a Notice of Proposed Disciplinary Action dated 25 July 2013 the SFC informed the applicant that her fitness to remain licensed was being called into question in respect of three matters, more particularly in that she had –

i. failed fully and accurately to record and keep a proper audit trail of the dealing instructions given to her by at least 14 of her clients;

ii. accepted trading instructions from a third party in relation to the accounts of three clients when she had no written

authority from the clients enabling the third party to trade on their behalf;

iii. deposited a sum of HK$300,000 of her own funds into the trading account of a client without declaring the true source of the funds and indeed indicating on the face of the documentation that it was the client's own deposit.

11. It was the preliminary view of the SFC that, by reason of her culpable conduct, the applicant had breached General Principle 2 and paragraph 3.9 of the 2011 Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission ('the Code')[4].

12. General Principle 2 of the Code, which carries the heading 'Diligence', requires that:

> "In conducting its business activities, a licensed or registered person should act with due skill, care and diligence, in the best interests of its clients and the integrity of the market."

13. Paragraph 3.9 of the Code concerns the full and accurate recording of dealing instructions. It requires that –

> "… 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

[4] S.169 of the Securities and Futures Ordinance, Cap 571, gives the power to the SFC to publish codes of conduct for the purpose of giving guidance relating to the practices and standards with which intermediaries are ordinarily expected to comply in carrying on the regulated activities. In the opening paragraph of the explanatory notes which introduce the Code of Conduct, the following declaration is made: "The Commission [the SFC] will be guided by this Code of Conduct ("the Code") 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."

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.

Notes

The Commission notes that mobile telephones are widely used in Hong Kong. In this regard, the Commission expects licensed or registered persons to arrange for the use of a telephone recording system in their offices. Although use of mobile phones for receiving client order instructions is discouraged, where orders are accepted by mobile phones, the time of receipt and the order details should be recorded immediately (e.g. by a call to the office system or in writing by hand).”

14. In the Notice of Proposed Disciplinary Action, the applicant was informed that the SFC proposed to suspend her licence for 9 months.

15. On 26 August 2013, the applicant’s solicitors, Messrs Reed Smith Richards Butler, submitted representations to the SFC on her behalf.

16. Having considered those representations, and taking into account particularly the applicant’s admissions of culpability, in its Decision Notice of 21 October 2013 the SFC reduced its proposed penalty from a suspension of nine months to one of six months.

17. On 11 November 2013, the applicant filed the present application for review of that penalty.

A preliminary issue: the relevance of breaching the ICBC Handbook

18. When the applicant joined ICBC as a sales director, she was given a copy of a document called the Account Executive Handbook which provided employees of the company with detailed guidelines as to how they should fulfil their duties as dealers. For example, the Handbook prohibited a dealer permitting a third party from operating the account of

a client without prior written authorisation received from the client. The Handbook further prohibited ICBC dealers from paying their own funds into client accounts. Both of these breaches were committed by the applicant. The Handbook, of course, regulated the relationship between ICBC and its employees. In that sense it was a private document. However, in finding culpability and assessing penalty, the SFC took into account the admitted breaches of the Handbook.

19. When considering its judgment in this review, the Tribunal became concerned as to the extent to which, if at all, purely *internal* guidelines, binding only on employer and employee, may trigger the power of the SFC to take public action of a disciplinary nature. The Tribunal therefore sought the assistance of counsel on the issue[5] and oral submissions were received.

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[5] In seeking the assistance of counsel, the Tribunal spoke of the potential difficulties in the following terms:

> "In the present case, it is only in respect of the failure to maintain a proper record of dealing instructions (the first breach) that the SFC has been able to point to a direct failure to adhere to its 2011 Code of Conduct. The remaining two breaches do not appear to fall under any specific provision of the 2011 Code and, subject to submissions by counsel, must therefore be based on a breach of general principle, namely, that of diligence (General Principle 2).
>
> It may be of course that a failure to adhere to an internal guideline reveals that a licensed person has failed to act with due skill, care and diligence in the best interests of his clients and the integrity of the markets but that will not always be the case. In my view, if the SFC is relying on a failure to adhere to an internal guideline rather than a specific provision of the Code itself or some other rule or regulation then the burden is on it to demonstrate much more than a mere breach of the internal guideline. It must show that the breach constitutes a failure of such dimension that it is not only actionable by the employer on a private basis (for example, by way of reprimand or the giving of notice) but triggers the powers of the SFC to take public action of a disciplinary nature.
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> …
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> While, on a consideration of all the evidence, the issue may or may not be determinative in the present case, it seems to me that it is nevertheless an issue which must be considered and which, if dealt with wrongly, may set an unfortunate precedent."

20. Counsel for the SFC, Mr Laurence Li, put forward a set of comprehensive submissions which were not substantially challenged by counsel for the applicant, Mr David Morrison. In essence, Mr Li put forward three submissions which may be summarised as follows.

21. First, if reliance is placed on purely internal controls then the nature and extent of the controls must be determined. For example, if they relate to such matters as hours of work, mode of dress and the like, they will clearly be treated as being relevant only to the relationship between the employer and employee and having no broader reach. However, if purely internal controls seek reasonably to regulate procedures ensuring competency and integrity in the manner in which employees carry out their dealing responsibilities so that a failure to honour those controls will threaten the best interests of clients and the integrity of the market then such controls may be taken into account by the SFC in its role as a regulator. This is because a failure to honour such controls may indicate, for example, that there has been a breach of General Principle 2 of the 2011 Code of Conduct, namely, that, in conducting his or her business activities, a licensed dealer shall act with due skill, care and diligence in the best interests of his or her clients and the integrity of the market.

22. Second, internal controls, in so far as they seek to ensure competency and integrity in dealings, are not purely private but constitute an integral part of the regulatory system. In this regard, for example, paragraph 4.3 of the 2011 Code of Conduct requires that licensed dealers who employ staff should put into place:

> "… internal control procedures and financial and operational capabilities which can be reasonably expected to protect its operations, its clients and other licensed or registered persons from financial loss arising from theft, fraud, and other dishonest acts, professional misconduct or omissions."

23. In addition, in April 2003 the SFC promulgated a set of guidelines given the title of 'Management, Supervision and Internal Control Guidelines for Persons Licensed by or Registered with the SFC' which recognised that, while internal control guidelines are fundamental, it is not possible to create a single set of universal applicability. That being the case, the internal control needs of a licensed or registered employer will vary from firm to firm depending on each firm's particular structure, business operations and needs.

24. In summary, at all material times it has been intended that internal control guidelines should form an integral part of the regulatory framework.

25. Third, as in all major jurisdictions, Hong Kong's regulatory framework seeks to provide principles-based guidance as to expected practices and standards rather than copiously detailed procedural standards which, in fast changing market circumstances, can rapidly become redundant. In this regard, in paragraph 24 of a document published in June 2011 entitled 'Regulatory Framework for Intermediaries' the SFC said:

> "The Commission's regulatory activities are not designed to protect investors from all business risks, substitute the responsibilities of senior management of intermediaries, or guarantee "zero-failure" of intermediaries. Rather, they are designed to secure an appropriate degree of protection for the investing public by requiring intermediaries to remain fit and proper at all times and to comply with all relevant requirements. Such requirements include acting honestly, fairly, diligently and in the best interest of clients, having sound controls and systems commensurate with their risk profile, and ensuring that client assets are properly safeguarded."

26. The SFC continued (in paragraphs 29 and 30):

> "To address the fast changing market circumstances and practices, the Commission believes that, generally speaking, principles-based regulation that focuses on our higher level articulation of what the Commission expects intermediaries to do is more appropriate than a large volume of detailed standards. In particular, completely prescriptive standards are unlikely to be appropriate for governing business conduct as they may not be able to cover all the possible scenarios and complexities in today's financial markets. The above notwithstanding, prescriptive rules setting the minimum standards are still necessary for critical areas of the regulatory framework, such as segregation of client assets, to ensure adequate levels of consistency, certainty and investor protection.
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> With principles-based regulation, intermediaries are responsible for deciding how best to align their business objectives within the boundaries of applicable rules and regulations. This requires exercise of proper judgement by intermediaries, having due regard to the nature, size and complexity of their business."

27. In this Tribunal's opinion, the three principles set out above, correctly summarise the approach that must be adopted when considering a breach of internal controls prescribed by an employer. Such a breach may be the subject of disciplinary action of a public nature, that is, action instituted by the SFC, because internal controls, in so far as they seek reasonably to regulate procedures ensuring competency and integrity in the manner in which employees carry out their dealing responsibilities, are not shut off from but are instead integrated into the regulatory framework that governs the securities industry. It is however not the breach of internal controls *per se* that renders an employee liable to SFC disciplinary action. It is rather the fact that that breach constitutes a failure to comply with the public principles-based regulations governing intermediaries imposed by the SFC. An example of such a principles-based regulation, which is directly applicable in the present case, is General Principle 2 of the 2011 Code of Conduct which requires that a licensed dealer, in conducting his or her business activities, must do so

with due skill, care and diligence in the best interests of clients and the integrity of the market.

The failure to maintain full and proper records of dealing instructions

28. The need for full and accurate records of all dealing instructions received by an intermediary (such as the applicant), and especially the need to be scrupulously accurate in recording the time when instructions are received, is central to the statutory and regulatory regime put in place by the Ordinance, its Rules and the Code of Conduct. In a recent judgment, this Tribunal made the observation that the time stamping of instructions is not merely a bureaucratic imposition; it is "a bulwark against abuse".

29. Paragraph 3.9 of the 2011 Code of Conduct specifically requires a licensed dealer to "immediately time stamp" orders that are received. If such orders are received by mobile telephone when the dealer is out of the office, the time of receipt must be "recorded immediately", if necessary in writing by hand.

30. The requirements of the Code of Conduct are reflected in ICBC's Account Executive Handbook. As to the receipt of dealing instructions outside of the office, Chapter 3 of the Handbook (in s.3.4.3 under the heading of 'Receipt and record of client orders') directs that –

> "When a client's order is accepted outside office, *the time of receipt and the order details should be recorded immediately* and correspondingly and such record should be totally and fully re-created on the dealing ticket as it was received." [the Tribunal's emphasis]

31. The Handbook qualifies this direction (in s.3.12.1.2(b) under the heading 'Time Stamping of dealing tickets') by saying:

> "Should time stamp be omitted inadvertently at the time of the order being received, it should be rectified by marking the approximate order receiving time and the reason for omission on the dealing ticket in writing, and endorsement from either the Dealing Manager or Head of Investment Services Department or their designates should be obtained…"

32. During her time at ICBC the applicant failed to record and maintain a full and accurate audit trail of the orders that she received from clients. Regrettably, failings in this regard were not isolated. A sample survey revealed some 47 occasions in respect of which there was no telephone or written record of the receipt of instructions. Of 144 dealing tickets which related to trades on behalf of clients (or for her own account) between June and October 2011, 11 tickets were discovered which were not time stamped while a further 10 were only time stamped after the close of the market.

33. In addition, a further incident of a failure to maintain a complete record was highlighted by the SFC. It concerned an order placed by a client (that client being the applicant's husband) to purchase one million shares in China Resources Microelectronics Limited. The applicant amended the dealing ticket by reducing the buy order to 600,000 shares. There was however no telephone record of the instructions to reduce the order, this being directly contrary to s.3.15.1 of the ICBC Handbook. As Mr Laurence Li, counsel for the SFC, emphasised in his written submissions to the Tribunal, whether the order had been placed by her husband or not, the need for an accurate record was particularly important as the order had in fact been fully executed, the price of the stock had risen and the applicant had sought her husband's consent to 'give up' some of his shares to other clients.

34. While the applicant did not dispute these various failures to maintain proper records, it was submitted on her behalf that, when viewed in proper context, there were a number of mitigatory circumstances which materially reduced her moral blameworthiness and to which the SFC had failed to give due account.

35. First, it was said that the failings had all occurred during the applicant's limited sojourn at ICBC, a period of some four months. In short, the failings were all contained within a short span of time. In her 20 years at Lippo Securities, her previous employer, the applicant had risen to the post of Chief Executive Officer without a regulatory blemish on her name. Why then the sudden failure to follow what for a seasoned dealer must have been rudimentary procedures?

36. On behalf of the applicant, it was submitted that at Lippo Securities she had enjoyed the administrative support of experienced and licensed assistants. The applicant, in her evidence, said that her assistants had taken telephone orders from her clients - her job being more strategic - and had attended to the time stamping. On her arrival at ICBC, however, she had not enjoyed the same level of assistance, receiving support from a secretary only who was not a licensed dealer. It was said on her behalf that this lack of support was compounded by a lack of training at ICBC in the appropriate procedures. On the applicant's behalf, it was submitted that after so many years of receiving a full and highly efficient back-up at Lippo Securities, she had struggled to acclimatise. As it was put, she had become rusty.

37. Second, it was said that the clients in respect of whom she had failed to maintain proper records while at ICBC had all been long-term clients, old friends or close family members including her husband,

daughter and brothers and sisters. It was said that she had brought them all across from her previous employer and during the course of the change they had grown used to contacting her on her mobile telephone.

38. While, of course, it still remained her responsibility to make an accurate record of the instructions, especially the time of receipt of orders, no losses were demonstrated and those persons in respect of whom she had failed to keep accurate records still maintained their trust in her and still today (in her new employment) gave her the benefit of their trading instructions.

39. On behalf of the applicant, it was submitted that the SFC, in determining penalty, failed to give due weight to these matters of mitigation. With respect, on a reading of the decision notice, this Tribunal cannot accept that the SFC failed to take them into account. The reduction of the penalty from nine months to 6 months clearly takes into account all the mitigatory circumstances advanced on behalf of the applicant's by her solicitors.

40. While the matters set out above do constitute mitigation and have therefore been taken into account, this Tribunal does not find them to be particularly compelling. When the applicant joined ICBC she may well have been unaccustomed to recording the details of orders received directly by her and ensuring they were immediately time stamped. But that process was not a difficult one. It was simply a case of remembering on each occasion to record certain basic details. While not at all difficult, it was nevertheless of fundamental importance throughout the industry. The applicant had been appointed a responsible officer at Lippo and admitted in the course of her evidence that she had always understood the importance of making a record. That importance was of equal

significance throughout the industry, again a fact which she must have understood.

41. On the basis of the applicant's explanation, it is understandable that in her early days at ICBC, after so many years of not having to record matters herself, she may on one or two occasions have overlooked the need to make an immediate detailed record of orders received. However, her admitted omissions were not limited to the odd isolated occasion. They were far more substantial.

42. The fact that no losses were incurred as a result of the applicant's omissions is of course important but the fact that her long-term clients, old friends and family still placed their trust in her is less so. Through the eyes of such persons, if they suffered no loss, the failure to accurately record dealing instructions may seem essentially technical. It would be a different question, however, if they did suffer loss. Put simply, the failure to make full and accurate records of dealing instructions puts clients at risk whether those clients have a close personal relationship with the dealer or not. When clients generally are put at risk then the integrity of the market is threatened.

43. In its Notice of Proposed Disciplinary Action dated 25 July 2013, the SFC spoke of the importance of maintaining accurate records of dealing instructions in the following terms which this Tribunal adopts:

> "Keeping proper audit of clients' orders is a basic and fundamental requirement expected of licensed persons. A proper audit trail helps the management of intermediaries to detect, and possibly prevent, any irregularities or fraudulent activities. It also ensures that there is reliable evidence to fall back on when assessing any dispute between the broker and its clients concerning the particulars of a trade order."

In the absence of written authority to do so, accepting instructions from a third party to deal in client accounts

44. Section 2.7.2 of the ICBC Handbook directs that a third party should never be permitted to operate a client's account without written authorisation from the client. There is nothing unusual or esoteric in this instruction, it is a common sense directive aimed at preventing unauthorised trading.

45. In July 2011, the applicant accepted three different sets of instructions from a Madam Chan to purchase shares for one or more of her three adult children. The orders were duly executed even though at the time the applicant was aware that none of the children had signed the necessary forms authorising their mother to operate their accounts.

46. In an interview with the SFC, the applicant said that she had known Madam Chan for over 30 years and, being very close to the children, she believed that Madam Chan would in fact have had oral permission to trade in their accounts. On the applicant's behalf, it was said that all the children confirmed their permission when approached in respect of the SFC investigation. Indeed, in October 2011, two of the children had executed powers of attorney appointing their mother to operate their trading accounts in order to regularise the position.

47. It was the applicant's case that, knowing the family, she believed that Madam Chan would have advised her children of the trades she had made on their behalf. She further said that she believed that in the ordinary course of events she would herself have confirmed the trades with the children. In this latter regard, however, there were no records of any conversations between the applicant and the children.

48. On one view, it may perhaps be contended that, knowing the family so well, the applicant was guilty of no more than a technical oversight. Being so close to the family and understanding its internal dynamics, a more casual approach was understandable. Understandable? Yes, perhaps that submission has some substance. Acceptable? In the view of this Tribunal, it is however not acceptable.

49. The ICBC Handbook prohibits a third party operating a client's account without written authorisation regardless of how close the relationship between the third-party and the account holder. There is good reason for this. First, it offers protection to the dealer and the dealer's employer in the event of a family dispute arising from poor trading decisions and the accusation being made that such 'unauthorised' trading should never have taken place. Second, even in the event of such a dispute remaining within the family, the fact that such 'unauthorised' trading had been permitted by the dealer can increase the depth of that internal dispute and the enmity it creates between family members. This in turn must reflect badly on the individual licensed dealer and must thereby undermine the reputation of the securities industry.

50. Again, it is not so much a question of whether there was any loss suffered or any complaint made, the issue is more fundamental than that. Again, it goes to the question of risk. What if the trades made without written authority had been disastrous, what if they had caused substantial loss to the children? It is on such occasions that the damage occasioned by a failure to ensure adherence to well-established processes is revealed. On such occasions, it leaves the dealer vulnerable as well as the dealer's employer and in that consequence undermines the integrity of the industry as a whole.

Depositing personal funds into a client's account without making the fact known

51. S.4.2.5 of the ICBC Handbook prohibits dealers from depositing funds on behalf of clients. Contrary to this prohibition, on 2 August 2011 the applicant issued a personal cheque in the sum of HK$300,000 which then, on the following day, she deposited into the trading account of Ms Kot, an ICBC client.

52. In making the deposit, an ICBC 'withdrawal/deposit request form' was completed. However, the information recorded was not accurate. In the top half of the form, the question was asked: 'Is this the client's own fund deposit?' Next to the question was a box to be ticked if 'yes' and a box to be ticked if 'no'. As the funds to be deposited came from the applicant herself and not the client, clearly the 'no' box should have been ticked. Instead the 'yes' box was ticked, indicating that the funds belonged to Ms Kot. Elsewhere in the form, the fact that third party deposits were discouraged was evident. First, the warning was printed that only third-party payments between immediate family members (for example, husband-and-wife) would be accepted. In short, the applicant, not being an immediate family member of Ms Kot, indeed no blood relative at all, was prohibited from making any such deposit. Second, at the foot of the form there was a declaration to the effect that ICBC discouraged third-party payments and if it was discovered that false information had been provided, the matter would be reported to the regulators.

53. How was it that the applicant came to use her own funds to make a relatively substantial deposit into the account of Ms Kot?

54. Ms Kot, it appears, had been the applicant's teacher at school. Their friendship had spanned some 35 years and, so it was said on behalf of the applicant, she treated Ms Kot like her own mother. At the time, Ms Kot, a retiree, was some 69 years of age and not particularly affluent. Over the years Ms Kot had maintained a trading account with the applicant and had followed her to ICBC. It was said on behalf of the applicant that she would from time to time use her own dealing experience to try and help Ms Kot earn a little extra. This had occurred in early August 2011. Regrettably, however, on this occasion the applicant's recommendations had turned sour and had threatened to harm Ms Kot financially. The deposit of HK$300,000 had been made to prevent that harm. In short, it had been a measure taken to protect a dear friend; misguided, yes, and against the dealing restrictions laid down by ICBC but motivated by the best of intentions.

55. Briefly, the background may be described as follows. Shortly before 1 August 2011, the applicant recommended that Ms Kot sell certain shares that she held in Chaoda Modern Agriculture (Holdings) Limited ('Chaoda') and use the proceeds to buy shares in another company, International Mining Machinery Holdings Limited ('IMM'). It seems that the principal reason for suggesting the switch was the fact that it had been announced that IMM was to be acquired by a United States public corporation, the suggested purchase price per share being substantially higher than the current market price. According to the applicant, Ms Kot instructed her to make the switch, the applicant having

discretion as to exactly when she bought and sold and at what prices. It is to be noted, however, that no record of these instructions was found.

56. On 1 August 2011, the applicant purchased 50,000 IMM shares for Ms Kot at $7.72 per share, the expected premium when the acquisition took place being $8.50 per share. The purchase was to be financed by the concurrent sale of the Chaoda shares. However, as the price of Chaoda fell that day, the applicant made the decision not to sell the Chaoda shares but to hold them for a short period of time in anticipation of the price rising. At this time, Ms Kot was in Canada caring for an elderly relative and could not easily be contacted. The applicant's decision was made therefore in the exercise of her discretion without any direct instruction (it seems) from Ms Kot. As Chaoda shares did not rally the following day or the day thereafter, the applicant made the further decision to deposit her own funds in the sum of HK$300,000 into Ms Kot's trading account to pay for the IMM shares.

57. As to why it was that the ICBC 'withdrawal/deposit request form' did not reveal that the money was being paid in by the applicant and not Ms Kot herself, the applicant said that the form was completed by her secretary and, as she was under pressure of work, she did not check it. It was put to her when she gave evidence at the hearing that, as such a payment by a broker must be unusual, did she not think of attaching a note to the form to explain the position? The applicant agreed that in retrospect it was a good idea but said that she did not think of it at the time as this was the one and only time she had ever deposited funds on behalf of a client.

58. In the view of this Tribunal, the completion of this form containing, as it did, materially incorrect information is not so easy to

dismiss. As a licensed dealer with so many years' experience, having herself been the CEO of a corporation dealing in securities, the applicant must have appreciated (or at the bare minimum should patently have appreciated) that paying $300,000 of her own funds into a client account was a matter of some moment and, unless clearly explained, may well give the impression that the client account was being used by her for disguised dealing. As the SFC observed in its document entitled 'Regulatory Framework for Intermediaries' published in June 2011 (paragraph 29):

> "… prescriptive rules setting the minimum standards are still necessary for critical areas of the regulatory framework, *such as segregation of client assets*, to ensure adequate levels of consistency, certainty and investor protection."[6] [this Tribunal's emphasis]

59. The applicant admitted that this was the very first time she had made a payment of her own money into a client account. It was therefore, in her many years of working in the industry, a unique happening for her. As such, she must have appreciated that it was her responsibility to ensure that clear instructions were given to her secretarial staff so that there could be no to misrepresentation as to the true source of the funds. This she failed to do. Whether she was under pressure of work or not, and even if her motive for paying in her own funds was well-intentioned, it was a serious lapse on her part.

60. Returning briefly to consider the event itself, as it was, trading in Chaoda shares was suspended shortly after the applicant had purchased the IMM shares. At the time of this review, dealing in the shares remained suspended. In the result, the value in the shares (if there

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[6] Cited earlier in this judgment: paragraph 26

is any) remains locked up. The outcome in respect of IMM purchased for Ms Kot is better. The acquisition proceeded - by way of a privatisation - at the price of $8.50 per share, the proceeds being paid to Ms Kot. It would appear, therefore, that Ms Kot benefited from the purchase of the IMM shares while the applicant's HK$300,000 remains locked up.

Conclusion

61. There is no suggestion that the applicant at any time acted dishonestly. Nor is there any suggestion that, by her omissions, the applicant caused any financial loss. It is further accepted that her omissions all took place within a limited period of time after she had taken on a new job. These factors must be given due weight.

62. That being said, the 2011 Code of Conduct (General Principle 2) demands that a licensed dealer must act with necessary skill and diligence, doing so in the best interests of clients and the integrity of the market. This the applicant failed to do. While it is true that she had had a previously unblemished record and was attempting to cope with the lack of support in her new job, two matters cannot be ignored. First, she was already a very experienced licensed dealer. As such, almost instinctively, she should have appreciated the seriousness of her omissions. Second, her omissions went to matters of fundamental importance in protecting the integrity of the securities industry.

63. As such, this Tribunal is firmly of the view that, when her omissions are considered in their totality, a period of suspension is

demanded. The core purpose is well-established, one example of its enunciation of being in *Mr. Wong Wing Fai Eric v SFC*[7]:

> "27. …the overriding principle remains clear, … the purpose of such disciplinary actions is not only to sanction the individual but also to set standards for the profession and to sustain public confidence in the integrity of the profession."

64. If it was not for the one issue set out below, this Tribunal would have had no difficulty in finding that, in all the circumstances, an appropriate period of suspension was one of six months, the same as that imposed by the SFC in its Decision Notice.

65. The issue in question relates to the fact that the applicant left ICBC in October 2011, accepting a position as Sales Director at another company. As such, it was necessary for her to apply to the SFC to transfer her accreditation to the new employer. It is understood that, when there are no issues that need to be investigated, such an application should take no more than seven business days. In the present case, however, because the SFC had received the report from ICBC as to the applicant's apparent misconduct, it took some four and a half months for the application to be processed. During the course of the hearing before this Tribunal, it was submitted that this delay in the transfer of accreditation amounted to a *de facto* four-month 'transfer suspension' and that this was a factor which should have been taken into account but which the SFC failed to do.

66. In its Decision Notice (paragraph 26 c.) the SFC said:

> "We do not agree that the time taken in processing your application to transfer your accreditation… should be regarded as a *de facto* suspension. Your application was submitted shortly after we had

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> received ICBC's investigation report regarding possible breaches of the SFC's rules and regulations by you, and into which we had to make further enquiries. As the regulator of the securities industry in Hong Kong, we were duty bound to consider your application thoroughly before we could approve it."

67. This Tribunal accepts without equivocation that the SFC, once it had received the investigation report from ICBC, was bound to conduct investigations before agreeing to the transfer of accreditation. That, however, is not the issue. The issue is whether, having been unable to work as a licensed dealer in the securities industry for a period of at least four months longer than would normally have been the case because of her now admitted omissions, that period of suspension should be taken into account when assessing an appropriate formal penalty for those same omissions.

68. It is the view of this Tribunal that the earlier period of *de facto* suspension should be taken into account when assessing penalty. That is not to say that there must be a form of mathematical set-off. It should be taken into account, however, as a relevant factor and given such weight as this Tribunal deems appropriate in the circumstances of the case. In this regard it is to be remembered that, if a licensed dealer leaves employment to take up another job while investigations into alleged regulatory misconduct are taking place, delays in the approval of transfer of accreditation may be inevitable. It is part of the price to be paid for the necessary protection of the industry.

69. In the present case, this Tribunal is of the view that the period of six months determined above should be reduced by two months to take into account the period of *de facto* suspension.

70. In the result, therefore, it is the finding of this Tribunal that the applicant's licences should properly be suspended for a period of four months.

71. As to costs, as the applicant was partially successful, it being necessary for her to bring this application for review in order to obtain that success, it seems (without the benefit of argument) that the most equitable order to make would be one that there be no order as to costs; in short, that each party bears their own costs. There will be an order *nisi* to this effect, the order to be made final if there is no application is made for a different order within 14 days of the handing down of this judgment to the parties.

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

Mr. David Morrison, instructed by Reed Smith Richards Butler Solicitors for the Applicant

Mr. Laurence Li, instructed by the Securities and Futures Commission, for the Respondent