

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

IN THE MATTER of a Decision
made by the Securities and Futures
Commission pursuant to s 194 of the
Securities and Futures Ordinance,
Cap 571,

And

IN THE MATTER of s 217 of the
Securities and Futures Ordinance

BETWEEN

LUK KA CHEUNG STEVE

Applicant

And

SECURITIES AND FUTURES COMMISSION

Respondent

Before : Chairman, Hon Saunders J,

Written Submissions: 11 October & 15 October 2010

Date of Decision: 20 October 2010

DECISION

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Introduction:

1. On 8 July 2009, at the conclusion of a hearing by the Market Misconduct Tribunal, (MMT) that Tribunal found that Mr Luk was culpable of market misconduct contrary to s 270(1)(e)(i) of the Securities and Futures Ordinance (SFO).

2. On 10 March 2010, the Securities and Futures Commission (SFC), having considered the decision of the MMT, and written representations made on the part of solicitors for Mr Luk, by a Notice of Final Decision (the Decision), concluded that Mr Luk was not a fit and proper person to be or to remain licensed under s 194 SFO. By its Decision the SFC prohibited Mr Luk for life under s194(1)(iv) of the SFO from doing all or any of the following in relation to any regulated activities:

(a) applying to be licensed as a representative;

(b) applying to be approved as a responsible officer of a licensed corporation;

(c) applying to be given consent to act will continue to act as an executive officer of a registered institution under s 71C of the Banking Ordinance; and

(d) seeking through a registered institution to have his name entered in the register maintained by the Monetary Authority under the Banking Ordinance as that of a person engaged by the registered institution in respect of a regulated activity.

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3. Pursuant to s 217 SFO, Mr Luk has a right to seek a review of the Decision and to apply to Securities and Futures Appeals Tribunal (SFAT), for that review. The Decision contained the following paragraphs:

“47. you may apply to the Securities and Futures Appeals Tribunal for a review of this decision under section 217 of the SFO.

48. If you wish to apply for a review of a decision, you must lodge a copy of the enclosed notice and a notice of review setting up the grounds relied upon with the Secretary to the Securities and Futures Appeals Tribunal, 38/F Immigration Tower, 7 Gloucester Road, Wanchai, Hong Kong within 21 days of receiving this notice, i.e. on or before 31 March 2010. Please also send a copy of the notice of review to us.”

4. Mr Luk did not lodge an application for review. An application not having been lodged, the SFC duly published the decision. In the absence of an application for review, the decision took effect on 1 April 2010.

5. Pursuant to s 217(4) SFO, the SFAT has jurisdiction to extend time within which an application for review may be filed. However, s 217(5) SFO provides that the SFAT:

“Shall not grant an extension.... unless-

- (i) the person who has applied for the grant of an extension.... and the relevant authority have been given a reasonable opportunity of being heard; and
- (ii) it is satisfied that there is good cause for granting the extension.”

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6. On 11 October 2010, Mr Luk, through his solicitors, made application for an extension of time pursuant to s 217(4) SFO to permit an application for review to be filed out of time.

7. On 15 October 2010, the SFC made written submissions in opposition to the application for extension of time. Consequently, the provisions of s 217(5)(i) having been complied with, it falls to me to determine whether there is good cause for granting the extension of time.

8. The explanation for the delay on the part of Mr Luk was set out in the following terms:

“7. Due to the fact that our client, as an individual, has limited financial resources, he was not in a position to apply to the Tribunal for a review of the Disciplinary Decision within the time stipulated in section 217(3) of the SFO (our client has lost his job due to the Disciplinary Decision and his wife also lost her job shortly thereafter) even though our client objects to the Disciplinary Decision.

8. The recent decision of the Tribunal on 22 September 2010, *Tsien Pak Cheong David v Securities and Futures Commission* (SFAT Application No. 2 of 2010), which concerns one of the co-specified persons in the MMT proceedings, clearly demonstrates that the SFC’s decision to ban the specified persons in the MMT proceedings for life under section 194(1)(iv) of the SFO is “*manifestly excessive*” and inappropriate. The Tribunal decided in that case that the appropriate order was a ban for a period of 10 years. The Tribunal further indicated that there was a serious issue as to whether the SFC has jurisdiction to prohibit a person for life.

9. Our client is now in a position to meet the costs of the application to the Tribunal for a review of the Disciplinary Decision and wishes to apply for an extension of time.

10. We respectfully submit that the following reasons set out below give rise, collectively or individually, to a “good cause”

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for allowing our client further time to submit his application for review of the Disciplinary Decision:

- (a) the Disciplinary Decision was in any event inappropriate and manifestly excessive. Any application submitted to the SFC to apply to be, amongst other things, a licensed representative, should be considered by the SFC in the light of the circumstances at the time when the application was made. The Tribunal’s decision in *Tsien Pak Cheong David v Securities and Futures Commission* clearly demonstrates that the SFC does not have the jurisdiction to ban the specified persons in the MMT proceedings (including our client) for life from (amongst other things) applying to be a licensed representative under section 194(1)(iv) of the SFO; and
- (b) The fact that our client’s failure to apply for review within the time period stipulated in the SFO was driven by his limited financial resources and seriousness of the matter.”

9. In response, the SFC assert, first, that financial difficulties do not constitute a proper justification for delay, and second that no good cause has been made out for granting an extension of time.

10. I am satisfied that the SFC are correct in their assertion that financial difficulties, by itself do not constitute a sufficient basis to excuse a delay. I was referred to the decision of the Court of Appeal in *Lam Sze Ming, Yeung Yat Wing v The Commissioner of Police* (unreported, CACV 912/2000 23 July 2010) when the court held, in relation to an application for leave to appeal out of time to the Court of Final Appeal that the relevant considerations were the length of the delay, the reason for the delay, the merits of the appeal, and prejudice to the other party if the application were to be granted.

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11. Cheung JA was plainly correct when he said at para 6:

“... the explanation for the delay was due to the financial difficulties of the applicants. However this could not be a justification for the delay. Even recognising that they are lay persons, the applicants could have acted in person and pursued the application much earlier had they really wished to pursue the appeal.”

12. If the application for extension of time relied solely upon lack of financial resources to justify the extension of time I would have refused the application.

13. The delay, from the expiry of time to the application for extension, is 28 weeks. While a significant delay, it is certainly not as long as the 7 year delay in *Lam Sze Ming*. Although the submissions in support of the application do not specifically state so, it is implicit from paragraphs 7 & 9 thereof that had Mr Luk the appropriate financial resources at the time, he would have lodged an application for review of the Decision.

14. It is abundantly plain that Mr Luk’s interest in the matter has been revived by the success of the decision of the Tribunal in Mr Tsien’s application for review, a matter which rose out of the same factual circumstances.

15. The SFC, correctly in my view, submit that the decision in Mr Tsien’s case does not justify a submission that the SFC does not have jurisdiction to ban for life under s 194 (1)(iv) SFO. But it cannot be said that the decision in *Hung Chi Wah* (SFAT No 5/2009) is confirmation by the Tribunal of that jurisdiction. Whether there is jurisdiction to ban for life was an issue that simply did not arise in that decision.

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16. But there can be no doubt that a decision to ban a person from the industry for life is an onerous decision, and, if the jurisdiction does in reality exist to impose such a penalty, it must be arguable that it is a penalty that would only be imposed in exceptional circumstances.

17. Having regard to the conclusion reached by this Tribunal on Mr Tsien's case I am satisfied that it must at least be arguable that the penalty imposed on Mr Luk was manifestly excessive. Having regard to the onerous nature of a life ban, and the relatively short duration of the delay, I am satisfied that there is good cause for granting an extension of time to permit Mr Luk to make application for review.

18. I accordingly order that time be extended to 4 PM on Friday, 29 October 2010, within which time Mr. Luk must submit his Notice of Application for Review, and serve the same upon the SFC.



John Saunders
Judge of the Court of First Instance
High Court
Chairman