

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

IN THE MATTER OF a Decision made
by the Securities and Futures
Commission Ordinance under
section 56(2) of the Securities Ordinance,
Cap. 333 and section 36(2) of the
Commodities Trading Ordinance,
Cap. 250

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

BETWEEN

SO CHI MING

Applicant

and

SECURITIES AND FUTURES COMMISSION

Respondent

Tribunal: Hon Mr. Justice Stone, Chairman
Professor HO Shun Man, Simon
Professor HO Yan Ki, Richard

Date of Hearing: Thursday, 27 October 2005

Date of Reasons for Determination: Thursday, 17 November 2005

REASONS FOR DETERMINATION

The application

1. This is an application by Mr So Chi Ming, who seeks to review the decision of the SFC dated 27 June 2005 to suspend his registration as a dealer's representative under the Securities Ordinance and the Commodities Trading Ordinance for a period of one (1) month.

2. At the conclusion of the hearing of this application this Tribunal unanimously dismissed the application, with costs, and indicated that it would give reasons for its determination at a later date.

3. This we now do.

The procedural background

4. The applicant was registered as a dealer's representative under the Securities Ordinance and the Commodities Trading Ordinance and was accredited to Kingston Securities Limited and to Kingston Commodities Limited. Since

1 April 2003 he was licensed as a representative to perform regulated functions for these entities under the Securities and Futures Ordinance.

5. On 17 January 2005 the SFC issued the applicant with a Letter of Mindedness proposing to suspend his registrations for one month for the applicant's failure to account for the sum of HK\$3 million purporting to be 'compensation' to the applicant's clients, and for failure to keep an adequate audit trail for the purpose of such compensation payments.

6. It was alleged that these failures constituted a breach of General Principles 7 and 8 and paragraphs 11.1 and 12.1 of the Code of Conduct for persons registered with the SFC (2001 and 2003 editions).

7. The applicant submitted his representations dated 3 March 2005 in response to the Letter of Mindedness. He denied breaching the relevant provisions of the Code of Conduct, and contended that the penalty imposed upon him was disproportionate to the gravity of the offence. He asked the SFC to withdraw its disciplinary action.

8. On 27 June 2005 the SFC issued the applicant with a Notice of Decision and Statement of Reasons underpinning its decision to suspend his licence as a representative for one month, and on 18 July 2005 the applicant lodged his application for review of this decision.

The factual matrix

9. This matter arose in the course of an investigation by the SFC into the listing of a company known as Codebank Limited ('Codebank') on the Growth Enterprise Market of the Hong Kong Stock Exchange, wherein it was discovered that the applicant herein, Mr So, had received from one Lawrence Lok Yuen Ming the sum of HK\$3 million, which purportedly represented part of the proceeds of sale of the Codebank shares.

10. This gentleman, Lawrence Lok Yuen Ming, had introduced Codebank, through the applicant, to Kingston Securities, which thereafter had acted as the lead manager/underwriter for the Codebank listing.

11. A company known as Super Code Limited, for which the applicant had been the account executive at Kingston Securities, had been a substantial shareholder in Codebank, and had placed for sale some 44.67 million shares in the listing underwritten by

Kingston Securities, receiving therefore a sum of HK\$21,459,889 in sale proceeds at its account with Kingston Securities.

12. Out of these funds \$3 million had been deposited in the applicant's bank account with the assistance of the aforesaid Lawrence Lok. The mode of depositing these funds was odd, to say the least: on 21 December 2001, the day upon which Codebank was listed, Kingston Securities had issued five cash cheques totalling HK\$21,459,889 to Ahead Investment Limited, a company said to have been sold by the brother of Lawrence Lok to a PRC national by the name of Liu Xiao, and after collecting these cheques Lawrence Lok had been accompanied by Mr So to present the cheques for payment at the Liu Chong Hing Bank; it was from the funds thus obtained that the sum of HK\$3 million thereafter had been deposited into Mr So's account.

13. The applicant claimed that the \$3 million in question was compensation he had sought for his clients consequent upon complaints he had received from them regarding the fall in Codebank's share price on the first day of listing. In his statements to the regulator he said that he had called Codebank's chairman for an explanation of this fall in the share price, and had asked for compensation, and as a result he had been referred to the aforesaid Lu Xiao. It was apparently the case that Liu Xiao had agreed to

the compensation figure, and it was Liu Xiao who had determined the amount of compensation for each of his clients.

14. We are told that the SFC has been unable to contact this Liu Xiao.

15. On 2 July 2003 the SFC issued a notice to the applicant requiring him to produce records and documents in relation to such 'compensation' and, inter alia, to identify the clients who had received such compensation, the amount of such compensation paid to each, and how much compensation in fact was paid.

16. By letter dated 22 July 2003 the applicant represented that 25 clients out of the 54 Kingston Securities clients who had subscribed to the Codebank issue had received compensation, that the compensation was paid either in the form of cash or (in six cases) by cheque, that clients, who were taken to have incurred a 40% loss on the Codebank shares, had received varying proportions of compensation for such loss, and that he was unable to locate full records of the amount of compensation received by each client, and was unable to provide a full account to the SFC as to such compensation. He maintained that only 25 clients of his own clients had received compensation, and not the other 29 of the Kingston Securities clients who had invested in Codebank.

17. We are told that the applicant was in position to explain/account only for the sum of HK\$1.068 million out of the sum of \$3 million which he had received.

18. We are further told that, after having interviewed 4 of these clients who had been in receipt of monies, the SFC identified discrepancies between that which the interviewees said that they had received and the information imparted by the applicant.

19. The applicant subsequently confirmed, contrary to the initial representation, that there were clients of Kingston Securities who had received compensation whom in fact were not his clients, and he further acknowledged that no audit trail was kept for the monies that had been paid by way of cash.

20. After considering the applicant's wide-ranging representations of 3 March 2005, some of which mirrored the arguments placed before this tribunal, the SFC took the view that the \$3 million received by the applicant represented monies received for and on behalf of clients, and that in dealing with such monies the applicant was acting as a registered person at the relevant time.

21. Accordingly, given that it was common ground that the applicant had failed properly to account for the use of these monies nor to maintain an adequate audit trail, the SFC took the view that it did as to the applicant's failures, which conclusion led to the suspension of 1 month which is the subject of the present application for review.

22. In imposing this sanction, the SFC took into account the fact that previously the applicant had been publicly reprimanded by the regulator on 19 July 2001, and had regarded this fact as an aggravating factor when determining the issue of penalty.

The evidence

23. In addition to the evidence contained within the considerable volume of material collected in the four agreed bundles prepared for the purpose of this application, the tribunal heard *viva voce* evidence from one witness called on behalf the applicant, namely Mr Wong Yiu Chiu, the managing director of Interchina Securities Limited, a client of Kingston Securities, but not, it appears, of the applicant personally.

24. Mr Wong's evidence added very little to the sum of knowledge in this case. He told how he had subscribed for 3 million Codebank shares by paying \$1.5 million therefor and how

he had telephoned Mr So to complain about the drop in price. He further told how he had received a subsequent telephone call from the applicant, and had been told that he would be compensated for part of his loss in the Codebank shares, and that payment would be arranged in due course. He said that some two or three weeks later he had met Mr So in a coffee shop in Central and that he had been given a personal cheque in the sum of \$400,000 as the compensation which he had been told he would be paid.

25. Mr Wong was surprised, but gratified, as he fully understood that investing in the market might bring profit or loss, and he had recognized that he had no claim against Kingston or Mr So for the fall in the share price. He accepted that whilst originally he had told the regulator that the ‘compensation’ was about \$150,000, subsequent checking revealed that it had been \$400,000. His witness statement, which was drafted by the applicant’s lawyer, made references to this money not being his money “until I received it”.

26. We did not consider that Mr Wong’s evidence, which was in very short compass, materially assisted the tribunal in its deliberations.

27. That which we did bear firmly in mind, however, was that whilst the applicant had chosen to call *viva voce* evidence from a third party investor, he evidently was not prepared to go into the witness box himself. In an exchange with his legal representative, we were told that this was for ‘strategic’ reasons. In a case as factually extraordinary as this, it might be thought to be no surprise that Mr So declined to submit himself to cross examination under oath.

The argument

28. Mr Henry Wong, the solicitor representing the applicant in this application for review, launched a vigorous defence of his client.

29. We do not here repeat all that was contained within his skeleton argument, which, we note in passing, did not reflect all the matters raised in the Notice of Application for review; there was, for example, no submission made as to the standard of proof in disciplinary proceedings, albeit the first ground within the formal application was that the respondent had “misconceived” such standard of proof.

30. Suffice to say that, as we understood it, on the issue of liability two principal propositions were advanced: first, that when

acting as he had, Mr So had been acting in a purely personal capacity, and not in his capacity as a registered person within the jurisdiction of the SFC; and second, that as the monies thus passed to the ‘compensated investors’ were ‘ex gratia’ payments they could not be considered as clients’ monies, and accordingly that such a compensation arrangement would not form part of an audit trail - which latter point had its echo in the witness statement which had been prepared for Mr Wong Yiu Chiu.

31. Thus, concluded Mr Wong, who conducted his argument untrammelled by authority, the actions of the SFC in disciplining Mr So in the manner in which it had were “misconceived”, and this Tribunal should set aside the suspension. The SFC, he said, was punishing his client for suspected misconduct arising from the disbelief of the regulator in the genuineness of the compensation arrangement.

32. Further, he submitted, none of the clients who received compensation payments had made any complaint about these events, and that the SFC had imposed a “disproportionate level of penalty” upon him for the “alleged failure to keep an adequate audit trail”.

33. Mr Alex Lok, on behalf of the respondent in this application, firmly refuted these arguments and relied upon a lengthy and detailed skeleton argument which the tribunal found to be of assistance.

34. The thrust of his submission was that it was entirely appropriate to characterize the sum of \$3 million as representing assets which were held by the applicant for and on behalf of these clients, not least because it was the applicant's own case that this sum had been received by him precisely for the purpose of passing these monies on to them (or, it now seemed, certain of them), and thus clearly in such circumstance he was acting in a fiduciary capacity; and second, that it was evident that the applicant throughout had been acting as a registered person in obtaining and thereafter in handling this money, which (again on his own case) had been sourced from the sale proceeds of Codebank shares and had been paid to certain clients specifically in connection with the dealing in that security.

35. Mr Lok further submitted that the SFC was entitled to consider the applicant's conduct, and in particular the admitted failure to account and to maintain adequate records and an audit trail, within the context of the entirely unusual circumstances of this case. He pointed out that discrepancies existed between the

evidence given by 4 clients in fact interviewed by the SFC when compared with the applicant's version of events, and noted the applicant's conflicting evidence regarding the explanation as to why some of the clients of Kingston Securities had received compensation whilst others had not. Mr Lok also emphasized the necessity to ensure market integrity, and the necessity for the regulator to supervise the conduct and integrity of persons carrying on regulated activities so that representatives within the industry were accountable for their acts and conduct.

Decision

36. We stated at the outset of these 'Reasons for Determination' that at the conclusion of this application we immediately announced our decision that this application was dismissed with costs.

37. We are constrained to say that we regarded the arguments mounted on behalf of the applicant as containing no merit whatever. In the circumstances as revealed in the evidence the concept that the applicant in some way had notionally cast aside his representative's hat, and in a non-representative capacity had engaged in some private frolic of his own, with the correlative proposition that consequently no duty had arisen to account for monies which, on his own case, were said to have been given to

him for the express purpose of distribution to clients (and as to which he was unable in any event properly to account), were arguments which engaged neither our interest nor sympathy.

38. On the quite extraordinary (in fact, perhaps unprecedented) facts of this case we had no difficulty in accepting the arguments canvassed on behalf of the SFC, both as to liability and as to sentence; in the latter regard we further rejected Mr Wong's suggestion as to proportionality and his argument that the prior disciplinary offence was of a sufficiently different character so as not to be proper for the fact of such prior infraction to be taken into account.

39. We are further minded to say that we consider this to have been an egregious and time-wasting application which we are surprised that it was seen fit to pursue. Not only do we say that the SFC was plainly *not* wrong in coming to the decisions that it did in this case, but, to the contrary, we consider that the regulator was entirely justified in terms of the conclusions that it formed and in the actions that it took.

40. We go further. In the very particular (and highly peculiar) circumstances of this case we contemplated whether in fact we should exercise our undoubted statutory power to *increase*

the sentence handed down by the regulator in this case. Whilst ultimately we determined not to follow this course, legal advisers who counsel appeals may wish to note that transparently unmeritorious applications placed before this tribunal in the future may run this risk.

Hon Mr Justice Stone	Simon Ho Shun Man	Richard Ho Yan Ki
(Chairman)	(Member)	(Member)

Mr Henry Wong, of M/s Michael Li & Co, for the applicant

Mr Alex Lok of the Securities and Futures Commission, for the respondent