

Application No. 11 of 2005

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

IN THE MATTER OF a Decision made
by the Securities and Futures
Commission Ordinance under
section 120(3) of the Securities and
Futures Ordinance, Cap. 571

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

BETWEEN

FUNG KWING LAU EVENS

Applicant

And

SECURITIES AND FUTURES COMMISSION

Respondent

Tribunal: Hon Mr Justice Stone, Chairman

Date of Hearing: Friday, 12 May 2006

Date of Determination: Tuesday, 16 May 2006

DETERMINATION

The application

1. This is an application for review by Mr Evens Fung Kwing Lau in respect of the decision of the SFC to refuse his application for a representative licence.

2. This decision was made pursuant to section 120(3) of the Securities and Futures Ordinance, Cap. 571, and was communicated to Mr Fung by Notice of Decision dated 24 November 2005, wherein the SFC indicated that Mr Fung had not satisfied the Commission that he was a fit and proper person to be so licensed.

3. Mr Fung is aggrieved at this decision, and has made application to this Tribunal, by letter dated 8 December 2005, for a review of this decision. Hence these proceedings.

4. With the consent of the parties, this review has been conducted by the Chairman sitting alone, pursuant to the

provisions of section 31, Schedule 8 of the Securities and Futures Ordinance, Cap. 571.

The factual background

5. Whilst Mr Fung is not currently working within the securities' industry – it is the specific refusal by the regulator to sanction his re-entry which is the sole issue in this review – he was previously registered as a commodity dealer's representative under the Commodities Trading Ordinance in 1994, a licence which was revoked in May 1995 upon his resignation from his then employer; prior to that he had been registered as a securities dealer's representative, under the now-repealed Securities Ordinance, in June 1993, a licence which also was revoked, upon his resignation from his then employer, in May 1995.

6. Mr Fung again was registered as a securities dealer's representative, under the former Securities Ordinance, from October 1995 until July 2003, when he was dismissed by his then employer, China Everbright Securities, a dismissal that he has told the Tribunal was linked to significant trading losses suffered by a client of that firm consequent upon Mr Fung's advice.

The present application

7. On 14 March 2005 the SFC received Mr Fung's application for a representative licence to conduct Type 1 regulated activity accredited to Taiwan Concord Capital Securities (Hong Kong) Ltd; had this application been allowed, Mr Fung would have become a customer service manager, servicing clients.

8. On 4 November 2005 the SFC, by letter of that date, informed Mr Fung that it was not satisfied that he was a fit and proper person, and that it was minded to refuse his application for a representative licence.

9. The basis for this refusal was outlined within paragraphs 6 and 7 of that letter of 4 November 2005. The regulator was concerned that on 16 January 2004 Mr Fung had been convicted, at the Fanling Magistracy, of the offences of possession of a forged Identity Card and of using a forged Identity Card, and that he had been ordered by the magistrate to perform 200 hours of community service, which penalty was completed by Mr Fung in August 2004.

10. In its letter the SFC further referred to Mr Fung's own letter dated 16 June 2005 to the SFC. In that letter Mr Fung had

admitted using a “fraud ID to open a cash securities account in a bank”, this ID Card having contained his personal information but with the name changed to that of his sister; apparently Mr Fung had wished to use her name to trade stocks in an attempt to prevent his mother from knowing that he was again trading because in the past he had “made her very disappointed” by his suffering severe losses in futures trading. However, Mr Fung maintained that when he had committed this offence he was not working for any securities house, and that he felt ashamed and regretful for what he had done, and begged for “kindness” in order that he be allowed to continue his career in the securities industry.

11. The SFC also recorded, in its letter of refusal, that during a telephone conversation with Commission staff on 2 September 2005 Mr Fung had said that he did not know that forging an ID card was so serious.

12. Based on these facts the SFC had indicated that it was minded to refuse Mr Fung’s application by reason of the fact that the conviction of the offences in relation to the ID card cast serious doubt upon his integrity, that he had failed to realize the gravity of the forgery offence, which in turn raised “significant concern on your conduct and ability to carry on the regulated activity

honestly”, and that the applicant’s reputation and character also had been called into question.

13. Consequent upon this letter Mr Fung was invited by the SFC to make representations and to provide by, 18 November 2005, an explanation of the matters outlined in their letter of 4 November 2005.

14. However, Mr Fung made no representations to the SFC, and accordingly on 24 November 2005 the SFC issued its Notice of Decision to refuse his application.

15. This was followed, on 8 December 2005, by Mr Fung’s application for review of the SFC decision.

The argument

16. Mr Fung was unrepresented upon this review.

17. He made a short oral presentation, the gist of this being that whilst he accepted that he deserved his punishment for the admitted ID card offences, this did not merit the effective termination of his career within the financial industry.

18. He said that he had received his punishment and had served his sentence, the implication being that as far as he was concerned that should be that, and he should now be permitted by the regulator to re-enter the industry.

19. He did not have a great deal to add to that submission, the basic tenor of which had appeared in his initial letter to the Tribunal of 8 December 2005.

20. This was not a case of fraud, he said, no loss had occurred to any clients as a result of his wrongdoing, and he noted that throughout his earlier brokerage career he had received no complaint from clients.

21. Mr Fung said that he had to look after his aged parents, his savings were running out, that he had “no survival skill and knowledge other than in this profession”, and that he had had no job since June 2003. In short, he asked for another chance.

22. For the SFC Miss Lisa Chen was sympathetic, but firm in her opposition to this review.

23. Her basic submission was that the offences for which Mr Fung had been convicted were serious and bore direct

relevance to the position he was now applying for a licence to undertake. The SFC, she said, had a primary role to perform not only in terms of regulation of those in the industry, but also as a “gatekeeper” in terms of ensuring that only those persons were admitted to the industry who satisfied the regulator that they were ‘fit and proper’ so to enter, and were of good character.

24. The duty of the SFC, she argued, was to look after the interests of the investing public, and it would hardly engender confidence in market participants and investors if the regulator were to exercise its discretion to grant a licence to someone with a criminal record of dishonestly possessing and using a forged ID card.

25. She pointed out that the SFC had a statutory function to licence only those individuals that were considered ‘fit and proper’ to conduct regulated activities, and that under section 120(3) of the Securities and Futures Ordinance the SFC was *obliged* to refuse to grant a licence to carry on a regulated activity if the applicant for such failed to discharge the onus upon him of demonstrating ‘fitness and properness’ so to act.

26. Regrettably, she said, Mr Fung manifestly had failed to discharge this onus.

27. Ms Chen, who conducted this application with ability and common sense, also prayed in aid of her argument the terms of section 129(1) of the SFO, subparagraph (c) of which makes express reference to a person's ability to "carry on the regulated activity competently, *honestly* and fairly...", and she further referred to the 'Fit and Proper Guidelines', issued by the SFC under section 399 of the SFO, paragraph 1.3 of which provides that 'a fit and proper person' means one that is financially sound, competent, honest, reputable and reliable, whilst paragraph 7.1.1(a) of the Guidelines states that the SFC is not likely to be satisfied that a person is a fit and proper person if, *inter alia*, a person has been found to be dishonest, and that one of the instances, if unexplained, in which a person might be regarded as having failed this test include where a person has been :

“(i) found by a court or other competent authority for fraud, dishonesty or misfeasance;

(ii) convicted of a criminal offence...of direct relevance to fitness and properness”.

28. In this latter connection Ms Chen made it clear on behalf of the SFC that she did not accept Mr Fung's submission that he had done what he had done merely to defray/prevent his mother's dismay at his renewed foray into stock trading, and she

emphasized, if such was needed, that such an offence could hardly be of greater relevance when considering the suitability of someone to be licensed as a front-line brokerage employee.

Determination

29. This is an unfortunate case. It is also something of an oddity in terms of an application seeking to compel the SFC to admit someone to the ranks of licensed person when that regulatory body has exercised its discretion to refuse such application in circumstances such as the present.

30. I suspect, although I do not know, that the offences for which Mr Fung was convicted were a product of sheer stupidity and do not represent that quality of venality usually associated with actions of this type.

31. In essence Mr Fung's plea is one based solely upon considerations of sympathy for his alleged predicament, although I am bound to say that, given that he is a person with a Master's degree in Actuarial Science from a reputable US college, I am disinclined to believe that the financial services industry effectively constitutes Mr Fung's sole employment option, as he has intimated to this Tribunal.

32. However, the hard fact is that, at bottom, this submission nothing to the point.

33. This Tribunal is *not* an alternative regulator. It cannot, and will not, change the decision of the regulator upon the basis that, for example, it may have a greater degree of sympathy with the individual concerned, or that in the circumstances it might have come to a different decision to be the one being reviewed.

34. The short point is that this is a Tribunal that will interfere *only* when it is demonstrated that in terms of a regulatory decision/sanction the regulator has erred, and erred clearly, in arriving at such decision.

35. Manifestly this is *not* the situation in the present case. Indeed, the man on the Shaukeiwan tram might well feel that on the present facts the SFC would have been expected to take the view that it has, and to prevent someone who has been found guilty of criminal offences of this nature from taking up the type of 'front line' brokerage position that he now seeks.

36. In this regard, Ms Chen's submission that if Mr Fung were to be licensed, notwithstanding his record, and if similar

types of offences thereafter were to be committed, the SFC rightly would be severely criticized for opening the gate to such possibility, and for failing to safeguard the integrity of the industry and the interests of investors, has considerable resonance.

37. This no doubt is regrettable for Mr Fung, who may well now have recognized the error of the very significant mistake that he has made (to his credit he did not seek to obscure what had occurred when he had made his licence application to the SFC), but it cannot possibly be said in this case that the SFC has done other than to fulfil its statutory function in the protection of the public interest, however unfortunate such result may be in terms of this particular individual and of his prospects of re-entering the financial services industry.

38. For the SFC to have acted in any other manner than it did when dealing with this application would have been surprising, and in my judgment the regulator cannot be criticized for the decision that it has chosen to take in this case.

39. It follows from the foregoing that this application for review must be dismissed, and I so order.

40. As to costs, there is no reason why such should not follow the event, and if and in so far as the SFC is interested in pursuing Mr Fung for costs (and in the circumstances it might be felt that little would be gained by so doing), I make an order *nisi* that the costs of this application are to be to the respondent, to be taxed if not agreed.

Hon Mr Justice Stone
Chairman

Applicant, Mr Evens Fung, in person

Ms Lisa Chen, of the SFC, for the respondent