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Application No. 4 of 2011

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 an Application for Review pursuant to s 217 of the Securities and Futures Ordinance

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Between:

Ramesh SADHWANI Applicant

and

SECURITIES AND FUTURES COMMISSION Respondent

Before: Chairman, Hon Wright J

Date of applicant's written submissions: 12 December 2011

Date of respondent's written submissions: 17 January 2012

Date of applicant's supplementary submission: 8 February 2012

Date of decision: 23 March 2012

DECISION

1. The applicant had been accredited to Citigroup Global Markets Asia Ltd and Citigroup Global Markets Hong Kong Futures and Securities Ltd (CITI) and had been licensed, under the Securities and Futures Ordinance, Cap. 571, to carry on Type 1 and Type 2 regulated activities.

2. After the conduct which the respondent determined demonstrated that the applicant is not a fit and proper person to remain licensed came to light, the respondent gave Notice of Proposed Disciplinary Action to the applicant on 2 February 2011 pursuant to the provisions of s 194 of the Ordinance. The applicant submitted written representations dated 23 March 2011 in response. In a Decision Notice dated 14 October 2011 the respondent advised the applicant that it had resolved to:

> …prohibit you for life under s 194(1)(iv) of the SFO from doing all or any of the following in relation to any regulated activities:
> i. applying to be licensed as a representative;
> ii. applying to be approved as a responsible officer of a licensed corporation;
> iii. applying to be given consent to act or continue to act as an executive officer of a registered institution under section 71C of the Banking Ordinance; and
> iv. seeking through a registered institution to have your 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.

3. The applicant applied, by letter dated 7 November 2011, for review of that decision by this Tribunal. His subsequent written submission dated 12 December 2011 incorporated by reference the contents of his representations of 23 March and 7 November 2011 and was itself supplemented by way of email dated 8 February 2012. The respondent opposed the application.

4. The applicant sought to resign his employment in February 2009. This was refused by his employer which terminated his services. The applicant left Hong Kong in March 2009 and has since remained outside its jurisdiction.

THE TEST ON APPEAL

5. Tang ACJHC, with whom Stock V-P and Hartmann JA agreed, in *TSIEN Pak Cheong David v Securities and Futures Commission* [2011] 3 HKLRD 533 held, in regard to the nature of a review by this Tribunal, at §32:

> Here, we are not concerned with the decision of a self-regulating profession. We are concerned with the decision by a regulator. It is true that the regulator has been given substantial disciplinary powers by statute. No doubt, for good administrative reasons. I must remember that many disciplinary proceedings would not proceed beyond the SFC because the SFC accepted the explanation of the regulated person. Or, because the infraction is trivial (and penalty, if any, equally so). Or the conduct is so gross that any application for review would be pointless. That the SFC has been given such disciplinary powers does not mean that in the event of a review by the SFAT, the review is not a full merits review. The contention that a person's reputation or livelihood could be so seriously affected by a regulator, acting as prosecution and judge, without a genuine full merits review by an independent tribunal, is so abhorrent to our system, that I reject it unhesitatingly.

continuing, at §52:

> But I reject Mr. Strachan's submission that the SFAT should regard a decision of the SFC as a court would regard a decision of, say, the Law Society's disciplinary tribunal. There is a short answer. If I am right that the review is a full merits review, so that SFAT may conduct the review as if it were the original decision maker, Mr. Strachan's submission must be rejected.

6. Consequently it is the task of this Tribunal to approach the question of sentencing afresh and to form its own opinion of the appropriate period of prohibition, if any.

THE CONDUCT OF THE APPLICANT

7. The applicant had been licensed in various capacities, and under different Ordinances, relating to regulated activities since March 1991. He took up employment with CITI in December 1998. Between 2002 and 2009 he serviced a total of 289 accounts involving 189 clients.

8. The respondent summarized the applicant's conduct in these terms in its Notice of Proposed Disciplinary Action:

> ... during the period from or around April 2004 to January 2009, you have:
>
> (a) operated a Ponzi Scheme which involved, inter-alia:
>
> (i) misrepresenting to your clients that you and/or CITI could provide an investment scheme with guaranteed investment return and principal protection;
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> (ii) misrepresenting to your clients that you had invested their moneys in United States Treasuries (UST) or other AAA rated securities; and
>
> (iii) causing your clients to deposit money into their own accounts and/or other people's accounts for you to invest on a discretionary basis in reliance upon your misrepresentations described in (i) and (ii) above;

(b) breached CITI's internal policies; and

(c) misled CITI and prevented it from identifying and preventing your fraudulent activities

which demonstrates a serious lack of honesty and integrity, unacceptable standards of conduct and a failure to comply with applicable regulatory requirements.

9. A complaint had been made to CITI in November 2008 concerning a promise made by a financial adviser who guaranteed a return of 18% together with principal protection on an investment. Investigations revealed that adviser to be the applicant. The applicant was interviewed on three consecutive days in January 2009 during which he denied any wrongdoing at all. In February 2009 a further interview was conducted in which the applicant accepted that, in respect of two identified transactions, he had "incorrectly informed" the clients that their funds had been transferred into a bigger pool of accounts for investment purposes: he continued to deny, however, any wrongdoing in respect of 23 similar transactions.

10. In April 2009 an independent firm of accountants was appointed by CITI to perform a forensic investigation into the applicant's conduct of his clients' accounts. A total of 15 clients was found to have been affected, concerning 28 suspicious transfers involving USD1,701,284.00 during the period 28 June 2004 to 14 January 2009.

11. From the investigations conducted it was established that during that period the applicant had operated a scheme which involved clients granting him discretionary authority over their accounts where he had guaranteed investment returns and principal protection, misrepresenting that this could be achieved by investing in UST or other

investment products for a certain period of time; clients were told to transfer amounts into a "pooling account" in order to make investments which involved using other, unwitting, clients' accounts for those deposits; the promised returns/principal protection were wholly or partially met by funds ostensibly deposited for investment purposes.

12. Although there was no direct evidence that the applicant had received any funds from this scheme there was circumstantial evidence that he may have benefited by earning commissions through "frequent and active trades" in certain accounts, it being noted that whilst commission from the accounts of the affected clients initially comprised a relatively low percentage of his total commission, from 2007 onwards it increased substantially to make up a significant portion of his commission, at times exceeding 60% thereof. Those commissions amounted to approximately USD140,947.00. Eight of his previous clients subsequently lodged complaints with CITI claiming a total amount of approximately USD2.3 million.

13. The respondent also provided details to the applicant of the manner in which he had breached CITI's internal policies as well as the way in which he had sought to mislead CITI: in this latter respect, it detailed instances in which the appellant had lied to CITI when it was making enquiries of him on three separate occasions concerning the furnishing of guarantees to clients. The respondent also noted that the applicant, prior to his departing Hong Kong, had coached clients to lie to CITI if they were interviewed in connection with any internal investigation: the applicant accepted in his written submissions that he had done so.

THE APPLICANT'S SUBMISSIONS

14. It is to be noted that in none of the representations he has made, either in person or via his legal representatives, has the applicant sought to suggest that his conduct is not deserving of disciplinary action. He noted in his submissions of 7 November 2011 that he "... accepted responsibility of [his] misrepresentations" and characterised his "... submission and appeal for leniency to the SFC as a clarification of [his] activities, not a justification." It suffices for me to say that it plainly is conduct fully deserving of the conclusion that he is not a fit and proper person to be licensed. I accept the findings of the investigations by CITI and the forensic report of the auditors as an accurate description of the applicant's conduct and as the factual basis of any prohibition to be imposed.

15. Neither does the applicant challenge the scope of the prohibition imposed which, in my judgment, is proportionate to his conduct. His complaint is the duration of the prohibition, which he seeks to have reduced - specifically, to 2 years.

16. His first and apparently main complaint is the label attached by the respondent to the scheme he operated, that it was a "Ponzi Scheme". The applicant obtained a definition of that phrase which he then analysed and challenged, piece by piece, as describing or relating to the scheme operated by him. That was an approach devoid of any merit.

17. What the applicant appears to have chosen to ignore is that the respondent patently used the term as a convenient label, a shorthand description of the essential features of the scheme operated by him. The

concern of the respondent self-evidently was not in the name that might or might not be attached to the conduct, but in the conduct itself: misrepresenting to clients the nature of the investments that would be made and that those investments would pay a guaranteed minimum return coupled with guaranteed capital protection when, in truth, the returns and the capital protection were funded from the capital of further funds made available for similar investment purposes.

18. Whatever descriptive label one applies to that conduct it remains fraudulent - which word I use in the everyday sense rather than in the sense of any criminal determination - reprehensible and cynically in breach of the trust reposed in the applicant by his clients as well as in breach of the internal policies of CITI.

19. In the course of his representations the applicant suggests that mitigating features include: that

(a) he acted "... in the hour of desperation" rather than embarking upon "an outright intentional fraud.": whatever the nature or the cause of the hour of desperation to which the applicant alludes does not change the dishonesty of his conduct;

(b) the first instance of offering guarantees was supposed to be a "one-off" instance but he "... got sucked into the vicious cycle of making a guarantee good by hunting funds to make up for the losses": even assuming that he had originally intended there only to be one transaction, that justifies neither that single act nor any of the subsequent multiple acts;

(c) the "only benefit" which he received from the "activities in the accounts in question was adjusted compensation from the brokerages generated in trades in legitimate instruments": first, the adjustment was no doubt one in his favour and, second, the lack of receipt of a direct gain from his conduct constitutes simply an absence of an aggravating feature, rather than constituting a mitigating feature;

(d) none of his clients experienced any delay or difficulty in encashing their investments: that may be, but the hard fact remains that the moneys to repay those clients came not from investments by them but from funds made available, as a result of his misrepresentations, by other clients;

(e) his conduct in misleading CITI, he contends, "... were all unintended reflective reactions on my part..." and the coaching clients to lie to CITI was a result of "... purely a judgemental error": it cannot sensibly be suggested that an ongoing course of lying was unintended or that actively encouraging others also to lie was simply an error of judgment;

(f) in some instances he had actually followed CITI's internal policies: it is hard to see how complying with his duty in some instances can mitigate his conduct in consciously disregarding that duty in many others;

(g) he had valid reasons to overstating an account valuation in respect of one client, one of those reasons being that he had

"erroneously bought only part of the original intended quantity of... put options" which he seeks to brush aside by referring to it as resulting in "... a discrepancy between the valuation I reported to [the client] and the actual valuation of the portfolio that time": the reality is that he lied to that client concerning the portfolio valuation;

(h) prior to these events, he had been a law-abiding citizen and taxpayer in Hong Kong to 20 years: these are attributes society expects of income-producing Hong Kong residents and hardly deserving of an accolade although the fact that he has had no previous disciplinary proceedings against him during a substantial portion of a long career is a factor to be taken in his favour;

(i) as a result of these events a 30 year career has been destroyed, it has been necessary for him to leave Hong Kong as he would not have been able to find employment here to sustain his expenses and his activities have "cost him everything": these are not mitigating features but self-generated, direct consequences of his voluntary conduct;

(j) he has expressed his remorse for his conduct: in my judgment, first, in the course of his representations that is not so rather the applicant has sought to excuse his conduct, and to portray himself as a victim of circumstances overwhelmed by matters beyond his control and, second, in misleading CITI he demonstrated his willingness to say whatever he thought might prove to be in his immediate interests; and

(k) he can only "do justice" and "give something back to the community" if he remains licensed and brings his experience in the financial industry into play: it is precisely the applicant continuing to inhabit the Hong Kong market against which it is necessary, in the light of his recent conduct, to guard and from which to protect the public.

20. There were a number of other minor matters to which the applicant alluded in his various representations: I have taken them into account but do not regard it as necessary to lengthen these reasons by repeating them, as they are of no assistance to him.

THE PURPOSE OF DISCIPLINARY SANCTIONS

21. Tang ACJHC in *TSIEN Pak Cheong David* quoted with approval from the decision of this Tribunal in *CHU Kwok Shing Godwin v Securities and Futures Commission* (unreported, SFAT1/2009, 30 June 2010) at §77:

> ... the purposes of disciplinary sanctions... are, first, punishment; second, deterrence; third, where suspension, revocation or prohibition is involved, to ensure that the offender does not have the opportunity to repeat the offence, either for a limited period or indefinitely; and finally, and fundamentally, to maintain and promote confidence in the securities and futures industry.

THE POSITION OF THE SFC

22. The representations submitted on behalf of the respondent point out that no error of law or fact has been demonstrated in its decision which has not been shown to be either arbitrary or unfair. Since the decision in the Court of Appeal in *TSIEN Pak Cheong David* referred to in §§5 and 6 above review proceedings do not turn on these issues although, of course, were any to be present they would be a factor

properly to take into account on a full merits review. None is present in instant matter.

23. After summarising the factual background and then analysing and commenting on the applicant's representations the respondent submits:

> There are a number of aggravating factors in this case: the breach of trust, the extended period of time over which [the applicant] operated his scheme, the numerous acts and pattern of misconduct, the abuse of his licensed status, the impact on his supervisor and principal as well as his clients, the impact on the integrity of the market and [the applicant's] attempts to conceal his misconduct.

24. Those are factors which I regard as being proper to take into account.

25. The applicant refers to the decision in *TSIEN Pak Cheong David* in which the lifetime prohibition was reduced to one of 10 years. The respondent points out, correctly, that there were material factual differences which fell for consideration in those proceedings the most significant of which was that the conduct there did not involve the misuse of clients' moneys.

DECISION AS TO PENALTY

26. In my judgment there is an important fundamental distinction to be recognised between a prohibition for a finite period and a lifetime prohibition which is that in the former it will be open to a person to make application for registration after the expiry of the ban whereas a lifetime ban precludes such an opportunity.

27. Whether or not such an application will be granted will depend upon the individual circumstances of each case and may include the consideration of issues such as payment of full compensation to any who have suffered loss; demonstrable rehabilitation; a significant change in personal circumstances; legislative changes; and many other factors. It is as easy to envisage a situation where, even after a substantial period of prohibition, circumstances exist which justify granting an application as it is to perceive of situations where such an application would be refused.

28. Such a course is not open when a lifetime ban has been imposed. Prohibition for life, means just what it says. The respondent is not vested with any powers to vary or waive its decisions, thus closing the door once and for all on a person prohibited for life. That, it seems to me, is a singularly drastic course to follow - to preclude a person from ever again being able to follow his chosen path of earning a living even where a change of circumstances might make permitting him to do so a viable option.

29. There may well be circumstances in which such a ban is entirely appropriate. This is not one of them when one considers all the factors in the round. I take that view without in any way detracting from the seriousness of the applicant's conduct which is fully deserving of condemnation and a meaningful penalty.

30. Inevitably any penalty which falls to be imposed in proceedings of this type will be fact sensitive in every instance. Reference to earlier penalties imposed will be of limited assistance other than to provide a range of penalties or to indicate a trend.

31. Although, of course, the applicant conducted the scheme over an extended period it does have to be recognised that he did so to a comparatively limited extent involving a small number of his clients: there is no evidence to suggest that he sought to expand beyond them. It is self-evident that any loss, or even risk of loss, occasioned to a client is a cause for real concern yet such loss as there may have been in the present matter is not of the greatest order.

32. In all the circumstances I judge that prohibition for a period of 10 years is appropriate.

THE RESULT

33. The order of the respondent is set aside and, in its stead, the following order is made:

> The applicant be and is hereby prohibited pursuant to the provisions of s 194(1)(iv) of the Securities and Futures Ordinance, Cap 571, for a period of 10 years from the date of this order from doing all or any of the following in relation to any regulated activities:
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> i. applying to be licensed as a representative;
> ii. applying to be approved as a responsible officer of a licensed corporation;
> iii. applying to be given consent to act or continue to act as an executive officer of a registered institution under section 71C of the Banking Ordinance; and
> iv. 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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COSTS

34. The applicant asserted in his representations that there had been no indication to him that if he was unsuccessful in his application to review he might be ordered to pay the costs occasioned by and, further, that had been so aware he may have reconsidered his position. Such a submission is naive.

35. There will be an order *nisi*, returnable within 21 days, that the applicant pay the costs of the respondent, such costs to be taxed on a party and party basis.

(A R WRIGHT)
Chairman, Securities and Futures Appeals Tribunal
Judge of the Court of First Instance
High Court

The Applicant in person

Mr. Roger Beresford, instructed by the Securities and Futures Commission for the Respondent