由此

Application No. 4 of 2014

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

MOODY'S INVESTORS SERVICE HONG KONG LIMITED Applicant

and

SECURITIES AND FUTURES COMMISSION Respondent

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

Date of Ruling: 31 December 2014

RULING

1. The applicant, Moody's Investors Service Hong Kong Limited ('Moody's'), is a credit rating agency. Such agencies – Moody's being one of the largest in the world – play a pivotal role in capital markets, assessing the creditworthiness of bonds issued by governments, local authorities and corporations together with other forms of debt securities and structured financial instruments. In their role as analysts, rating the ability of the issuers of debt securities to honour their obligations, credit rating agencies are relied upon by a great many investors.

2. In July 2011, the applicant published a report titled "Red Flags For Emerging-Market Companies: A Focus on China" (the 'Red Flags Report').

3. In a Decision Notice dated 3 November 2014, the Securities and Futures Commission ('the SFC') concluded that the applicant, in publishing the Red Flags Report, had breached a number of provisions of the Code of Conduct for Persons Licensed by or Registered with the SFC. By way of sanction, the SFC determined that the applicant should be subject to a public reprimand and to a pecuniary penalty totalling $23 million.

4. In an application dated 24 November 2014 made to this Tribunal pursuant to s.217 of the Securities and Futures Ordinance,

Cap 571, the applicant has sought to challenge both the findings of culpability made against it and the nature and extent of the penalties imposed.

5. The applicant has further sought a direction from the Tribunal that all its sittings in respect of the application be conducted in private and that this direction be extended to all orders and decisions arising out of the application ('the privacy direction'). The application for the privacy direction has been opposed by the SFC.

6. This ruling determines the issue of whether a privacy direction should be ordered.

7. The applicant has founded its application for the privacy direction on the basis that, as a credit rating agency, it plays a critical role in the smooth operation of Hong Kong's capital markets. That role, however, is founded on a reputation for skilled and balanced analysis and should that reputation be undermined by publicity arising out of proceedings before this Tribunal it could well have a wide-ranging impact on its operations. On behalf of the applicant, it has been contended that this would cause it serious prejudice in circumstances in which it is firmly of the belief that the findings reached by the SFC in its Decision Notice are unsubstantiated and should be overturned.

8. As to the degree to which it is said that the disciplinary proceedings instituted by the SFC are flawed, in its application for review it has been contended by the applicant that its Red Flags Report was not the result of its regulated activities, namely, the conduct of a credit rating service, and is not therefore subject to the regulatory control of the SFC.

Put shortly, it is contended that the SFC, by seeking to regulate an area of activity that is not licensed activity, has acted beyond its powers[1].

9. In determining the application, I start by recognising that the open administration of justice is a fundamental principle of common law which applies to all proceedings before the Tribunal. That fundamental principle is only to be set aside in any particular instance if the interests of justice require it, the burden being on the applicant to establish that requirement.

10. It has been said on numerous occasions that the true measure of health of capital markets is their transparency. This means not only that such markets should be regulated so that they operate in a fair and open manner - the applicant itself having chosen to operate in such a regulated environment - but that the process of regulation should itself be open to scrutiny. Market regulators hold no special position of privilege. They are not deemed infallible. Their regulatory actions before this Tribunal and the courts are at all times open to scrutiny by the public at large and by those who participate in our capital markets. Nor do other individuals, corporations or bodies whose activities may have a material impact on the day-to-day operation of our capital markets hold any such position of privilege. When they are the subject of litigation, their actions too, unless the interests of justice in any particular case dictate otherwise, are open to scrutiny.

---

[1] In paragraph 4.2.1 of the notice of application for review, the following has been asserted on behalf of the applicant: "As a person licensed with the SFC to undertake Type 10 regulated activity, Moody's is required to comply with the Code of Conduct *only* in so far as it relates to Moody's carrying on the regulated activities for which it is licensed, namely credit rating services, and the Code of Conduct does *not* apply to any other activities such as publishing commentaries on market-related issues."

11. It must follow therefore, in my view, that, while I do not dispute the contention that credit rating agencies such as Moody's play an important role in the robust and healthy operation of our capital markets, that fact alone cannot bestow on them as a class of market participants a special entitlement to the exercise of justice behind closed doors.

12. The applicant, of course, does not seek special privilege by reference only to the nature of its licenced activities. The argument that is advanced is rather to the following effect, namely, that – in the present case – the applicant must suffer the real risk of wide ranging prejudice to its business reputation (and therefore its business operations) arising out of adverse publicity generated by litigation that is said to be fundamentally misguided. That prejudice, so I read the submission, is made all the more damaging because, as a credit rating agency, the applicant survives on its reputation for balanced and accurate analysis and it is that reputation which is being directly undermined, not by a final decision reached in the litigation process, but by allegations that have not been finally adjudicated upon.

13. The submission is not new and I do not doubt that there is some substance in it. But, that being said, the principle is now well set that in the common law unwanted publicity and possible embarrassment are normal incidences of litigation and, on their own, are not a basis for seeking to have litigation conducted in private. Equally, on their own, professional embarrassment and possible damage to professional

reputation do not justify a restriction on the open administration of justice[2].

14. The applicant's reputation no doubt is founded on the accuracy of its analysis of the matters in respect of which it specialises and the wisdom of its insight in such matters. But so are the reputations of all those who make a living by advising others, among them doctors, lawyers, accountants, engineers, management consultants and experts of all kinds. Should this application be granted on the grounds advanced (and no more) it sets a precedent for an exercise in accretion in terms of which an increasingly large number of professionals will be able to claim the privilege of conducting litigation in private.

15. In the present case of course the application is underscored by the contention that the case against the applicant is fundamentally flawed and it is that, so it appears to be argued, which creates the true injustice to the applicant.

16. I am unable to accept a submission to that effect. I have two principal reasons. First, if the alleged weakness of the case brought by the regulatory authorities was in all instances a basis for ordering that proceedings be held in private it would invariably mean that a preliminary decision would have to be made in respect of the dispute which forms the very basis of the proceedings themselves. Second, in an open democratic society, open justice, which carries with it the freedom of the public to attend proceedings and the freedom of the media to report on them, acts

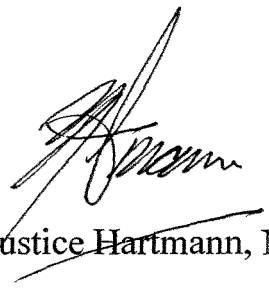
---

2 This emerges from the dicta of Cheung CJHC in *Asia Television Ltd versus Communications Authority* [2013] 2 HKLRD 354, at 361, commencing at paragraph 17.

由此

to protect reputations when merited just as it acts to reduce reputations when merited.

17. By way of summary, therefore, on the limited basis advanced on behalf of the applicant, the application for a direction that the proceedings be held in private must be refused. Nothing has been put before me which convinces me of the necessity in this case to depart from the principle of open justice.



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

Mr. Melvin Sng of Linklaters,
Solicitors for the Applicant

Ms. Monica To, Associate Director (Enforcement) of SFC,
the Respondent