

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

IN THE MATTER OF Decisions made by the Securities and Futures Commission under sections 204 and 205 of the Securities and Futures Ordinance, Cap. 571

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

BETWEEN

ZHOU LING

Applicant

and

SECURITIES AND FUTURES COMMISSION

Respondent

Tribunal: Mr. Michael Lunn, Chairman

Date of Hearing: 23 September 2020

Date of Determination: 28 September 2020

DETERMINATION

Notice of Application for Review

1. On 3 September 2020, on behalf of Mr. Zhou Ling (the "Applicant") DLA Piper filed a Notice of Application for Review with the Securities and Futures Appeals

Tribunal (the “Tribunal”), pursuant to section 217(1) of the Securities and Futures Ordinance (the “SFO”), of two specified decisions of the Securities and Futures Commission (the “SFC”), namely two Notices, dated 13 August 2020. One Notice was served on China Gather Wealth Financial Company Limited (“China Gather Wealth”) and the other Notice on Power Securities Company Limited (“Power Securities”), pursuant to sections 204 and 205 of the SFO.

The Notices: sections 204(1)(a) and 205

2. The Notices prohibited, except with the prior written consent of the SFC, each of the companies from:

- (i) entering into any transactions including: (a) processing the withdrawal of; (b) and/or transferring any money arising from the disposal of; and
- (ii) on the instructions of the Applicant or any persons acting on his behalf, disposing or dealing with

any of a stipulated number of shares of New Ray Medicine International Holdings Limited (“New Ray”) held in an account in the name of the Applicant at each of the two companies.

Further, the Notices required each of the companies to notify the SFC immediately of any requests made by or on behalf of the Applicant to withdraw the shares and/or to transfer monies arising from the disposal of the shares and/or any requests to dispose of or deal with the shares.

3. Each of the Notices informed the respective recipient of its right, pursuant to section 217, to apply to this Tribunal for a review of the decision and, pursuant to section 208, to apply to the SFC “to withdraw, substitute or vary” the prohibition or requirement.

Statement of Reasons: section 209(2)

4. Attached to each of the Notices was a “Statement of Reasons”, pursuant to section 209(2), each of which asserted that it appeared to the SFC the property held in the account in the name of the Applicant might be “dissipated, transferred or otherwise dealt with in a manner prejudicial to the interest of the investing public or the public interest” and that the imposition of the prohibition requirements was “desirable in the interest of the investing public or in the public interest”. Further, it was asserted that the SFC had reached that view based on its suspicion that, as the former Executive Director and Chairman of New Ray, the Applicant had committed “misconduct and obtained secret profits from

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certain transactions which he caused New Ray to enter into between 2015 and 2017.” Then, it was asserted that the SFC believed that it was necessary to prevent the Applicant from withdrawing the shares and/or money arising from their disposal “in order to ensure that he will be able to pay compensation to New Ray if ordered to do so by the court” and that the SFC considered that it was “desirable in the interest of the investing public or in the public interest” to impose the prohibition and requirement set out in the Notice on the respective recipient.

The SFC’s letter to the Applicant: section 209(4)

5. By a letter, dated 14 August 2020, the SFC informed the Applicant of the issue of the Notice and the Statement of Reason to each of the two companies “in relation to your securities accounts”, attaching copies of those documents. Also, he was informed that, pursuant to section 208 of the SFO, “any person affected by the prohibition and/or requirement” set out in the Notice may apply to the SFC that the prohibition and/or requirement be “withdrawn, substituted or varied.”

Jurisdiction of the Tribunal

6. Of the jurisdiction of the Tribunal to entertain the application, it was contended in the Notice of Application for Review that:

“10. This Tribunal has jurisdiction to review the Restriction Notices.

11. The Restriction Notices are specified decisions within the meaning of section 215 of the SFO, and more specifically, Items 62 and 63 in column 2 of Division 1 of Part 3 of Schedule 8 of the SFO.”

Then, it was asserted that the Applicant was a person aggrieved by the Notices, that he had a “direct and obvious proprietary interest in the subject matter” and that he is “the legal and beneficial owner” of the shares.

7. By a letter to the parties, dated 4 September 2020, the Chairman directed that a Preliminary Conference be held at 5 p.m. on 16 September 2020. The SFC took issue with the jurisdiction of the Tribunal in a letter to the Tribunal, dated 7 September 2020, asserting that the Applicant did not have *locus standi* to apply to the Tribunal and asking the Tribunal to vacate the hearing of the Preliminary Conference. By a letter, filed with the Tribunal on 11 September 2020, DLA Piper objected to the latter application and re-

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asserted that the Applicant had *locus standi* to file the Notice of Application for Review.

Preliminary issue

8. The parties having given notice in writing to the Tribunal that they agreed that the review may be determined by the Chairman alone as the sole member of the Tribunal, pursuant to section 31 of Schedule 8-Part 1 of the SFO, at the Preliminary Conference the Chairman directed that a hearing be fixed before the Tribunal at 2:30 p.m. on 23 September 2020 to determine, as a preliminary issue, whether the Applicant had *locus standi* to file and the Tribunal has jurisdiction to receive the Notice of Application for Review.

The Tribunal's jurisdiction

9. The Tribunal is a creature of statute, having been established by Part XI of the SFO, whose jurisdiction is stipulated by section 216(1) to be, "to review specified decisions, and to hear and determine any question or issue arising out of or in connection with any review, in accordance with this Part and Schedule 8."

10. Section 217(1) provides for recourse to this Tribunal by notice in writing for review of a "specified decision" of a relevant authority.

11. Section 215 provides that "relevant authority" in paragraph (a) of the definition of "specified decision" means the Commission and provides that:

"specified decision means—

(a) a decision of the Commission which—

- (i) is made under or pursuant to any of the provisions set out in column 2 of Division 1 of Part 2 of Schedule 8; and
- (ii) is within the description set out, opposite such provisions, in column 3 of Division 1 of Part 2 of Schedule 8;"

12. Division 1 of Part 2 of Schedule 8 stipulate 78 such specified decisions, including:

Item	Provision	Description of decision
62.	Section 204(1)(a) or (b) of this Ordinance	Prohibition or requirement imposed on a licensed corporation concerning transactions, etc.

A				A
B	63.	Section 205(1)(a) or (b) of this Ordinance	Prohibition or requirement imposed on a licensed corporation concerning relevant property.	B
C				C
D	65.	Section 208(1)(b) of this Ordinance	Substitution or variation of a prohibition or requirement under section 204, 205 or 206 of this Ordinance.	D
E	66.	Section 208(1) of this Ordinance	Refusal to withdraw, substitute or vary a prohibition or requirement under section 204, 205 or 206 of this Ordinance.	E
F				F
G		<i>The SFC's powers of intervention: licensed corporations</i>		G
H	13.	Division 1 of Part X provides powers that enable the SFC to intervene in the business and operations of licensed corporations.		H
I		<i>Licensed corporation</i>		I
J	14.	Section 1 of Part 1 of Schedule 1 provides that:		J
K		<i>"licensed corporation</i> means a corporation which is granted a licence under section 116 or 117 of this Ordinance;		K
L		<i>regulated activity</i> means any of the regulated activities specified in Part 1 of Schedule 5 to this Ordinance, and a reference to a type of regulated activity by number shall be construed as a reference to the type of regulated activity of that number as specified in that Part;"		L
M				M
N	15.	Section 116(1) provides that the Commission may grant an applicant a licence to carry on one or more regulated activity. Type I regulated activity is dealing in securities.		N
O				O
P		<i>(i) Powers of prohibition and restriction</i>		P
Q	16.	Section 204 provides that:		Q
R		“(1) Subject to section 207, the Commission may by notice in writing—		R
S		(a) prohibit a licensed corporation from—		S
T		(i) entering into transactions of a specified description or other than of a specified description, or entering into transactions in specified circumstances or other than in specified circumstances, or entering into transactions to a specified extent or other than to a specified extent;		T
U		(2) A prohibition or requirement imposed on a licensed corporation under this section may relate to either or both of the following—		U
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(a) transactions entered into in connection with the business which constitutes a regulated activity for which the licensed corporation is licensed;”

17. Of the ambit of the prohibitions and requirements that may be imposed, section 205 provides that:

“(1) Subject to section 207, the Commission may by notice in writing—

(a) prohibit a licensed corporation—

(i) from—

(A) disposing of any relevant property;

(B) dealing with any relevant property in a specified manner or other than in a specified manner;

(ii) from assisting, counselling or procuring another person to—

(A) dispose of any relevant property;

(B) deal with any relevant property in a specified manner or other than in a specified manner;

(b) require a licensed corporation to deal with any relevant property in, and only in, a specified manner.

(2) In this section, *relevant property*, in relation to a licensed corporation, means—

(a) any property held by the licensed corporation, acting within the capacity for which the licensed corporation is licensed, on behalf of any of the clients of the licensed corporation, or held by any other person on behalf or to the order of the licensed corporation acting within such capacity;”

18. Of the circumstances in which the SFC may impose a prohibition or requirement under those provisions, section 207 provides that:

“The Commission may impose a prohibition or requirement under section 204, 205 or 206 in respect of or with reference to any licensed corporation if it appears to the Commission that—

(e) the imposition of the prohibition or requirement is desirable in the interest of the investing public or in the public interest.”

19. Section 209(2) provides that, where the Commission imposes under sections 204 and 205 a prohibition or requirement, the notice given shall be accompanied by:

“...a statement specifying the reasons for the imposition...of the prohibition or requirement.”

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Section 209 (4) provides that, in those circumstances:

- “(a)... and
 - (b) the reasons for the imposition...as specified in the statement accompanying the notice given in respect thereof... relate specifically to matters which—
 - (i) refer to any person who is identified in the statement but who is not the person on whom the prohibition or requirement was imposed; and
 - (ii) are, in the opinion of the Commission, prejudicial to the person in any respect,
- the Commission shall, as soon as reasonably practicable after the imposition...take all reasonable steps to serve on the person a copy of the notice given in respect of the imposition... and of the statement accompanying it in accordance with subsection (2).”

(ii) Objections to the prohibitions or requirements

Withdrawal/substitution/variation of prohibitions or requirements imposed under sections 204 and 205

20. Section 208 provides for the withdrawal, substitution or variation by the Commission, where it considers appropriate to do so, of prohibitions or requirements, imposed under section 204 and 205 of the SFO, on the application of:

- (i) the person on whom the prohibition or requirement is imposed; or
- (ii) any other person affected by the prohibition or requirement.

It provides:

- “(1)...by notice in writing given to the person on whom the prohibition or requirement is imposed—
 - (a) withdraw the prohibition or requirement; or
 - (b) substitute another prohibition or requirement for, or vary, the prohibition or requirement.”

21. Section 209 provides that, if the Commission refuses an application made by any person under section 208 to withdraw, substitute or vary prohibitions or requirements imposed under sections 204 and 205, it shall serve on the person:

- “(3)(b)...a notice of its refusal, together with a statement specifying the reasons for the refusal.”

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The SFC's submissions

22. In written skeleton submissions Mr. Norman Nip submitted, on behalf of the SFC that the application, was misconceived. An application pursuant to section 217(1) was limited to “a person aggrieved by a specified decision of the relevant authority *made in respect of him*”. [Italics added.] Twin requirements were imposed: first, that the person be aggrieved by the decision but secondly, that the decision must be made in respect of him. Only the immediate subject of a decision can seek a review of a specified decision.¹ Mr. Nip invited the Tribunal to have regard to Papers presented in 2001 to the Bills Committee of the Legislative Council by the SFC and the Monetary Authority in its consideration of the proposed legislation of what was now the SFO. It was made clear expressly that the “policy intention” was to provide rights of appeal to persons who are “the subject of SFC decisions” of the type suitable to a merits review.²

23. The specified decisions, articulated in the two Notices, were made in respect of China Gather Wealth and Power Securities respectively. In each case the prohibitions and requirements imposed, pursuant to section 204(1)(a) or (b) and section 205(1)(a) or (b), were imposed on them as a “licensed corporation”. The contention of the Applicant that, as the owner of the shares the subject of the prohibition and requirements, the Applicant was a person “aggrieved by the decision” was, by itself, insufficient. In addition, it was required that each decision was made “in respect of him”. The decisions were not made in respect of the Applicant. Rather, they were made in respect of licensed corporations in the context of their regulated activity. The authorities on which the Applicant relied in its letter to the Tribunal dated 8 September 2020, were of no assistance. In none of those cases was it a requirement that the decision be made in respect of the person lodging the review application.³

24. Mr. Nip invited the Tribunal to note that section 371 of the SFO provided that an application that shares, which had been made the subject of an order of restriction

¹ *Securities and Futures Ordinance (Cap. 571): Commentary and Annotations* [2019 Edition], at paragraph 217.02.

² Bills Committee on Securities and Futures Bill and Banking (Amendment) Bill 2000; Paper No. 10/01 (18 April 2001); and Bills Committee on Securities and Futures Bill and Banking (Amendment) Bill 2000; Paper No. 8A/01 (Revised); Summary of public comments and Administration's Responses on Part IX of the Securities and Futures Bill (24 July 2001).

³ *AG for Gambia v N'Jie* [1961] AC 617 (Privy Council). *Eagle Queen Co. Ltd v First Bangkok City Finance Ltd* [1989] 2 HKLR 71 (CA). *Billboard Advertising Management Ltd v Building Authority* (HCAL 114/2013; unreported, 27 December 2013). *King Glare Limited v Secretary for Justice* [2008] 450.

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imposed by the Court of First Instance, might cease to be so subject may be made by “any person aggrieved” or by the corporation concerned. If the order had been made by the Financial Secretary, the application could be made by “any person aggrieved”. Mr. Nip submitted that the draftsman of the legislation had clearly intended to give section 217(1) a restrictive operation, narrowing the scope of the persons aggrieved who could lodge an application for review to this Tribunal.

25. In his oral submissions, Mr. Nip submitted that Mr. Wong’s suggestion in his written skeleton that it was relevant to have regard to the powers of the Market Misconduct Tribunal, and the avenues of appeal available to persons subjected to an order made pursuant to section 257(1)(g), was misconceived. It was irrelevant to a determination of the issue of the ambit of the jurisdiction of this Tribunal. Proceedings before the Market Misconduct Tribunal were inquisitorial in nature. That was wholly different from this Tribunal’s jurisdiction, which was limited to a review of “specified decisions” of a relevant authority.

Other remedies for the applicant

26. Mr. Nip submitted that the aggrieved Applicant was not left without any remedy. Section 208(1) of the SFO provided that, “upon the request of the person on whom the prohibition or requirement is imposed or *any person affected by the prohibition or requirement*” [italics added], the Commission could withdraw, substitute or vary the prohibition or requirement. It was open to the Applicant to avail himself of that provision. In a letter, dated 14 August 2020, the SFC had informed the Applicant of that right. Then, if he was unsuccessful, it was open to him to file a Notice of Application for Review of the Commission’s refusal, they being specified decisions identified at Items 65 and 66 of Division 1, Part 2 of Schedule 8 of the SFO.

The Applicant’s submissions

27. In his written skeleton arguments for the Applicant, Mr. Stephen Wong, submitted that the Applicant had *locus standi* to file the Notice of Application for Review. The two Notices were decisions that materially affected the Applicant’s financial interests. As such, they were decisions “in respect of him”. Although the Applicant was not the subject of the two Notices, it was his shares that were the subject of the prohibition and requirements. There was a close and substantive connection between the Notices and the

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Applicant. The alleged wrongdoing identified in the Statement of Reasons in respect of each Notice was that of the Applicant. By contrast, the recipients of the Notices were not aggrieved persons. Their assets had not been frozen. On the SFC’s argument, a legal vacuum might be created where the person actually aggrieved had no right of appeal.

28. Mr. Wong invited the Tribunal to note that the phrase “in respect of” had the “widest possible meaning of any expression intended to convey some connection or relation between the two subject-matters to which the words refer.”⁴ Further, he suggested that assistance in considering that the phrase was to be had by noting that section 257(1)(g) of the SFO empowered the Market Misconduct Tribunal to make an order, in respect of a person identified as having engaged in market misconduct, that a body which may take disciplinary action against that person “be recommended to take disciplinary action against him”. Although that was an order directed at a body which may take disciplinary action, he submitted that it was to be regarded as an order “in respect of” the culpable person.

29. Mr. Wong submitted that Mr. Nip’s suggestion that, first it was open to the Applicant to apply to the Commission to withdraw the prohibitions and requirements, pursuant to section 208 of the SFO and secondly, if unsuccessful, he could then file a Notice of Application for Review, pursuant to section 217(1) was a waste of costs and regulatory resources. Given its response to the current application, it was likely that the Commission would refuse the application and the parties would be before the Tribunal on the second application on substantively the same case. The creation of the Tribunal was to provide more thorough scrutiny and review of the decisions of the SFC.⁵

30. In his oral submissions, Mr. Wong acknowledged that there was available to the Applicant an alternative means of redress, by an application to the Commission pursuant to section 208 for withdrawal of the prohibitions and requirements. In face of refusal of such application, the Applicant could file a Notice of Application for Review of the decision to this Tribunal. However, he submitted that was not determining of his primary submission the Applicant had *locus standi* because the two Notices were specified

⁴ Fok PJ in *SFC v Pacific Sun Advisors Limited* (2015) 18 HKCFAR 138, paragraph 23, citing with approval the judgment of Mann CJ in the Supreme Court of Victoria in *Trustees Executors & Agency Co. Ltd. v Reilly* [1941] VLR 110, at page 111.

⁵ *Securities and Futures Ordinance (Cap. 571): Commentary and Annotations* [2019 Edition], at paragraph 217.07.

A decisions made in respect of the Applicant, given he was materially affected in
B consequence.

C *A consideration of the submissions*

D 31. The simple point in issue between the parties is the construction of the
E provision in section 217(1) that “a person aggrieved by a specified decision of the relevant
F authority made in respect of him” may apply to this Tribunal for a review of the decision.
G There is no dispute that the two Notices were specified decisions of the SFC and the
H Applicant is a person aggrieved by them. The point in issue was whether the two decisions
I were ones “made in respect of him”.

J 32. With respect to Mr. Wong, for the reasons that he advanced, I agree with
K Mr. Nip that no assistance whatsoever is afforded to the Tribunal in addressing that issue
L by having regard to the entirely different statutory regime of the Market Misconduct
M Tribunal.

N 33. Many of the specified decisions concern the licensing or registration of
O intermediaries, both individuals and corporations, together with decisions concerning the
P grant/withdrawal/conditions of authorizations. As the authors of *Securities and Futures
Q Ordinance (Cap. 571): Commentary and Annotations* point out⁶, the SFC and the
R Government stated in a Paper for Discussion in the Bills Committee of the Legislative
S Council, dated 24 July 2001:⁷

“The general policy is that *any person who is the subject of a decision* made
by the SFC shall enjoy a right of appeal against such decision unless there
are compelling policy reasons to the contrary.” [Italics added.]

T 34. That statement echoed the earlier statement made in a Paper, dated 18 April
U 2001, from the SFC and Hong Kong Monetary Authority for discussion by the Bills
V Committee, in its consideration of what is now Part XI of the SFO, in which it said that
“the principal policy intention” of Part XI of the then Bill was “to provide rights of appeal

⁶ *Securities and Futures Ordinance (Cap. 571): Commentary and Annotations* [2019 Edition], at paragraph 215.04.

⁷ Bills Committee on Securities and Futures Bill and Banking (Amendment) Bill 2000; Paper No. 8A/01 (Revised); Summary of public comments and Administration's Responses on Part IX of the Securities and Futures Bill.

A to persons who are the subject of various important decisions by the SFC”⁸. Also, it was
B stated that in an effort to give “subjects of SFC decisions” greater power to challenge them,
C the number of such stipulated decisions had been increased significantly.⁹

D 35. In my judgment, the expressed intent to provide for rights of appeal to this
E Tribunal for those made subject to specified decisions of the SFC, but not more widely, has
F been carried through to the legislation. Those that might be aggrieved in consequence of
G the specified decisions of the SFC imposed on others are not afforded the right to give
H notice of an application for review of those decisions to this Tribunal. Clearly, the
I draughtsman of the legislation recognised that the imposition of prohibitions and
J requirements pursuant to sections 204 and 205 gave rise to a special situation and other
K rights of redress were provided. As a result, section 209(4) requires the SFC to provide a
L copy of the Notice and the accompanying Statement of Reasons to a person who, whilst
M not the person on whom the prohibition or requirement was imposed, was a person in
N respect of whom, in the opinion of the Commission, the reasons given were prejudicial to
O that person. Then, section 208(1) provides such a person, if he falls to be regarded as “*any*
P *other person affected* by the prohibition or requirement” [italics added], the right to request
Q the SFC to withdraw the prohibition or requirement. That provision would be otiose if, as
R Mr. Wong contended, section 217(1) was to be construed as affording a right to give notice
S of an application for review to this Tribunal to a person who, whilst not the subject of the
T specified decision of the SFC, was nevertheless adversely affected, so that he was
U aggrieved.

O 36. The SFC’s decisions, reflected in the two Notices, concerned the imposition
P of prohibitions and requirements on two licensed corporations in the exercise of its
Q regulatory powers over those corporations. Those specified decisions were not made in
R respect of the Applicant who, to state the obvious, is not a licensed corporation. The SFC
S had no power to make orders of like effect against the Applicant himself. However, there
T is no doubt that his interests were adversely affected, so that he was aggrieved by the
U decision. Nevertheless, as discussed earlier, there was and is available to him an avenue of
V redress, namely, pursuant to section 208, to request the SFC to withdraw the prohibitions

⁸ Bills Committee on Securities and Futures Bill and Banking (Amendment) Bill 2000; Paper No. 10/01, paragraph 4.

⁹ *Ibid*, paragraph 5.

A and requirements. In the letter from the SFC, dated 14 August 2020, the Applicant was
 B advised of that right in terms. There is no stipulated time limit for making such a request.

C 37. There is no dispute that, if the Applicant makes that application and is met
 D with a refusal by the SFC, pursuant to section 217(1) and Items 65 and 66 of Division 1 of
 E Part 2 of Schedule 8 of the SFO, the Applicant could then file a Notice of Application of
 F Review of the refusal. So, contrary to Mr. Wong’s contention, there was no legal vacuum
 G in which the aggrieved Applicant had no remedy. It is to be noted that if the SFC was to
 H refuse such an application, section 209(3)(b) requires the SFC to serve on the Applicant “a
 I notice of its refusal, together with a statement specifying the reasons for its refusal.” It is
 J to be anticipated that in such a statement, addressed to the Applicant, it will be necessary
 K to provide more details of the SFC’s reasoning than had been provided in the relatively
 L unparticularised Statement of Reasons provided to the two brokers.

Conclusion

J 38. In the result, in my judgment there is no jurisdiction for the Tribunal to
 K entertain the Applicant’s Notice of Application for Review, which application is rejected.

Costs

L 39. At the hearing, Mr. Nip informed the Tribunal that, if his submissions were
 M successful, he would seek an order for costs. Sensibly, Mr. Wong said that, in those
 N circumstances, he did not oppose that application. Accordingly, I order that the Applicant
 O is to pay the Respondent’s costs of this application, to be taxed if not agreed.

P 

Michael Lunn
 (Chairman)



R Dated: 28 September 2020

S Mr. Stephen Wong of DLA Piper Hong Kong
 T for the Applicant

U Mr. Norman Nip, instructed by SFC
 V for the Respondent