Application No. 1 of 2021

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

IN THE MATTER OF the 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

CHRISTOPHER JAMES AARONS Applicant

and

SECURITIES AND FUTURES COMMISSION Respondent

Tribunal: Mr Michael Hartmann, Chairman

Professor Chan Ka-lok, Member

Mr Vincent Chan Chun-hung, Member

Date of Hearing: 7, 8, 12-14 April & 10 May 2022

Date of Determination: 27 September 2022

DETERMINATION

Introduction

1. At all material times, the Applicant in this matter, Christopher James Aarons, was the Chief Executive Officer of Trafalgar Capital Management (HK) Ltd ('Trafalgar'), a corporation licensed to conduct regulated activities in the field of asset management under the Securities and Futures Ordinance, Cap 571 ('the Ordinance').

2. Pursuant to the terms of the Ordinance, the Applicant was accredited to Trafalgar as a licensed representative and was approved to act as its Responsible Officer. He was therefore a 'regulated person' pursuant to the provisions of s.194(7) of the Ordinance.

3. As part of its business, Trafalgar managed an investment fund, the Trafalgar Trading Fund ('the Trafalgar Fund'), which, among other geographical locations, conducted investment activities in South Korea ('Korea'). At all material times, the Applicant was responsible for overseeing the investment strategies of the Trafalgar Fund.

4. In terms of a notice dated 13 February 2020, the Securities and Futures Commission ('the SFC') informed the Applicant that it was considering taking disciplinary action against him on the basis that he was not a "fit and proper person" to continue to be licensed as a representative or to remain approved as a responsible officer of Trafalgar.

5. The disciplinary action contemplated by the SFC was founded on a provisional view that the Applicant had failed to comply with the 'Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission' ('the Code of Conduct'), more specifically that he had failed to live up to the requirements of General Principle 1 of the Code of Conduct, namely, a failure to conduct his business affairs fairly and in the best interests of the integrity of the

market, and also General Principle 7, namely, a failure to comply with all regulatory requirements of his business so as to promote the integrity of the market.

6. As to the issue of sanction, the SFC was provisionally of the view that the Applicant's failure to live up to the requirements of the Code of Conduct constituted a threat of sufficient seriousness to the integrity of the market that - pursuant to s.194(1) of the Ordinance – it warranted the suspension of both the Applicant's licence to act as a representative and his approval to act as a responsible officer for a period of three years.

7. The SFC's issue of the notice of proposed disciplinary action was fundamentally influenced by, if not founded on, proceedings that had earlier taken place in Korea. Those proceedings had commenced with investigations carried out by two Korean regulatory authorities: the Korean Securities and Futures Commission ('the KSFC') and the Korean Financial Supervisory Services ('the FSS'). After investigation, those two authorities had concluded that the Applicant had breached the provisions of the Korean Financial Investment and Capital Markets Act by dealing in the shares of a securities company listed on the Korean Exchange, that company being Hyundai Securities Co., Ltd. ('Hyundai') and doing so based on material non-public information in circumstances that prohibited such dealing. The Applicant had been fined a sum of KRW377.6 million, this being the equivalent of the profits calculated to have been generated by the impugned transactions.

8. The Applicant had appealed those regulatory determinations to the Seoul Administrative Court. This judicial body, however, in a reasoned judgment, had dismissed the appeal, confirming the monetary penalty[1]. The Applicant, who had been legally represented in Korea, had chosen not to seek any further appeal

[1] In its judgment, the Seoul Administrative Court had spoken of the offence of acting on 'material non-public information' contrary to Article 178-2(1)1.B.(2) of the Financial Investment Services and Capital Markets Act.

and had paid his fine. The judgment of the Seoul Administrative Court had therefore constituted the final and conclusive determination in that jurisdiction.

9. In its Notice of Proposed Disciplinary Action of 13 February 2020, the SFC informed the Applicant that –

> 'On the basis of the information before us, the SFC is of the preliminary view that you are not a fit and proper person to remain licensed, in that the Seoul Administrative Court found that you dealt in the shares of Hyundai based on material non-public information, in breach of Articles 178-2(1) and 429-2 of the Korean Financial Investment Services and Capital Markets Act.
>
> Your contravention of the Capital Markets Act suggests that you have breached General Principles 1 (honesty and fairness) and 7 (compliance) of the Code of Conduct.'

10. In his response to the Notice of Proposed Disciplinary Action issued by the SFC, the Applicant denied being culpable of any form of conduct in respect of his dealings in Hyundai shares that offended the Code of Conduct. It was his assertion that the proceedings in Korea which had found him culpable of market misconduct had been vitiated by procedural unfairness and had, in any event, been wrong in their findings.

11. The Applicant's submissions were not accepted. In its Decision Notice of the 29 January 2021, the SFC confirmed its provisional findings both as to culpability and sanction.

12. The Applicant has now come before this Tribunal seeking a "full merits review (on both culpability and sanction)"[2] against the disciplinary decision of the SFC.

[2] This adopts the wording of the application for review.

An initial overview

13. As to the activities in respect of which the SFC found the Applicant to be culpable, they concerned a block trade of Hyundai shares which took place on 7 January 2016. The shares that made up the block trade exceeded 22.5 million in number.

14. Credit Suisse (Hong Kong) Limited ('Credit Suisse') was one of the underwriters of the block trade. Credit Suisse employed a man by the name of Kelvin Leung on its marketing team for this particular block trade and it was Kelvin Leung who, on 6 January 2016, at about 5.30 in the evening, telephoned the Applicant at his office to seek his participation as a buyer in the block trade of the shares scheduled for the following day.

15. Block trades can be described as large, privately negotiated securities transactions. Block trades are arranged in private to circumvent the almost inevitable downward pressure on the price of the securities when such large numbers are traded on the open market. Block trades are often promoted by investment banks (such as Credit Suisse). Depending on their size, block trades may be broken down into a number of orders with institutional investors, those investors invariably purchasing the shares at a discount.

16. Before a block trade is made generally known, identifying knowledge of that block trade - by reason of its ability to materially influence the market - is invariably considered to constitute material non-public information.

17. In the context of this application for review, it can be said that material non-public information is information concerning a company – in the present case, Hyundai – that has not yet been made public but, if made known generally to the market, would likely have a material impact on its share price. It is

therefore - considered in principle, but not necessarily in each of its constituent elements[3] - the equivalent of what in Hong Kong is called 'inside information'.

18. Importantly for the purposes of this review, such information would include information that does not specifically identify the company but which allows for such identification and which therefore gives an advantage to an investor in possession of that information.

19. That being the case, persons such as Kelvin Leung of Credit Suisse (sell-side brokers) who are seeking the participation of investors such as the Applicant (buy-side participants) in a block trade, and offering to impart to them information that will enable them to identify the shares making up the block trade, will invariably require those potential investors to agree to be 'wall-crossed', that is, to agree to keep the information they are about to receive confidential until the block trade has been publicly announced.

20. To be wall-crossed therefore in respect of an intended block trade is to be formally committed to confidentiality and – importantly - that includes a commitment to refrain from dealing in any way in the shares which are the subject of the block trade until that trade has been made known to the market.

21. It follows, of course, that the initial responsibility of ensuring that a potential participant in a block trade is wall-crossed at the appropriate time, that is, invariably, before identifying information is imparted, lies on the shoulders of the sell-side broker.

[3] In this respect, for example, it was submitted by the Applicant's leading counsel, Mr. Peter Duncan SC, that there appeared to be no requirement of knowledge under the Korean legislation, that is, that, to be found culpable, it was not necessary to know at the time of dealing that you had material non-public information in your possession. For reasons which appear later in this determination, the Tribunal has not found it necessary to resolve this issue (which is essentially one of Korean law).

22. In this regard, during the course of the hearing, the Tribunal was informed that best practice often was to ensure that sell-side brokers adhere to pre-prepared wall-crossing scripts. In the present case, when Kelvin Leung telephoned the Applicant on the evening of 6 January 2016 to canvas the Applicant's interest in the block trade, there is no evidence of the use by him of any pre-prepared wall-crossing script[4].

23. What must be emphasised, however, is that even if Kelvin Leung himself fell below acceptable standards in the discharge of his duties that evening, the obligation to maintain the strictures of confidentiality when material non-public information is passed is a mutual obligation, one shared by the sell-side broker *and* the buy-side participant.

24. It is no surprise of course that, for a host of reasons, best practice may not always be followed. In this regard, by way of illustration, Ms. Yak Chau Wei, the expert witness called by the SFC, testified that the United Kingdom Financial Conduct Authority in 2015 had published a paper titled "Asset Management Firms and the Risk of Market Abuse" which spoke of there being a lack of effective policies in many asset management firms to identify unintentional inside information being received in the course of the investment process.

25. It was also said in the report of the Hong Kong Market Misconduct Tribunal into the dealings in the shares of *Chaoda Modern Agriculture (Holdings) Limited*[5], that, notwithstanding the circumstances in which inside information is imparted during calls sounding out financial investments, if inside information is received, the party receiving it is constrained from dealing on the basis of that information.

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[4] As it is, Kelvin Leung played no part in the hearing before the Tribunal; he did not give evidence nor was any statement by him admitted into evidence. There was, however, evidence of him sending the Applicant a written confirmation of wall-crossing *after* the Applicant had been given full details of the intended block trade and that confirmation is referred to later in this determination.

[5] Dated 20 April 2012.

26. Accordingly, if material non-public information is passed in the course of a conversation of the kind initiated by Kelvin Leung on the evening of 6 January 2016, even if the sell-side broker neglects to formally read out a wall-crossing script or to seek consent to be wall-crossed from the buy-side participant, that of itself does not free the buy-side participant from the obligations of confidentiality. During the course of such conversations, a party being approached – a buy-side participant - has the obligation at all times to consider the nature of the material being imparted and whether the nature and extent of that information binds him or her to confidentiality. Put simply, a buy-side participant cannot take advantage of the delay or negligence of a sell-side broker by acting for purposes of gain on what he knows to be material non-public information received. Such conversations embody mutual good faith and adherence to fair conduct. If it was otherwise, the essential integrity of these important dealings would be undermined.

27. At this juncture, it should be observed that at no time did the Applicant dispute the principles just explained and outlined.

28. In the present case, it is agreed that, when Kelvin Leung telephoned the Applicant on the evening of 6 January 2016 to inform him of the intended block trade of equities and to canvas his interest in participating in that sale, he did not at any time state the name of the shares that were the subject of the block sale, that is, that they were Hyundai shares. However, in the course of that conversation, it is in no way disputed – all such conversations being audio recorded - that Kelvin Leung gave the following information to the Applicant –

(a) that there was to be a secondary sell down of shares [a form of block trade] in a Korean securities company, that sell down being scheduled for the following day, that is, within about the next 24 hours;

(b) that, by way of incentive to participants, the secondary sell down [the block trade] was expected to be subject to a high single digit discount or higher;

(c) that the block trade itself would have a value of approximately US$100 million;

(d) that, in respect of the securities company itself, it had a market capitalisation of 'over' US$1 billion; and

(e) it also had daily transactions – a daily gross revenue – 'close' to US$5 million.

29. It has further been agreed that, very shortly after the Applicant had been given this information – indeed, within seconds of being given it - he informed Kelvin Leung that he would have to briefly interrupt their telephone conversation as he had an urgent piece of business to complete. He said that he would telephone back "in a moment" to complete the conversation. The break in the conversation was therefore – on the basis of what was said by the Applicant – intended to be no more than a few minutes.

30. As it transpires, however, the Applicant failed to make his promised return call, either that evening or the following morning. Indeed, the Applicant and Kelvin Leung did not speak to each other again until late morning the following morning and it was then Kelvin Leung who made the call in order to complete his exchange with the Applicant: including wall-crossing him.

31. As to why the Applicant did not make his return call, it was his case that he simply forgot to do so. He became occupied with other matters. What then was the nature of those other matters?

32. It was the Applicant's unchallenged evidence that, when he interrupted his telephone conversation with Kelvin Leung, he immediately dealt with the time-sensitive business that was at hand. In this regard, the Applicant placed papers into evidence showing that he had that evening been involved in a transaction relating to Thailand[6] .

33. That piece of business, however, only took a few minutes. What then happened? The Applicant said that, as he was interested in participating in the block trade but was aware of the volatility of the Korean market, he decided to give consideration to relevant data available to him related to the 'securities company' sector of the Korean market: he described it as 'eye-balling' the data available to him on his computer terminal.

34. It was, however, the Applicant's case that, notwithstanding what he had been told by Kelvin Leung, at no stage in his consideration of that data did he believe himself to be to be in possession of what constituted – or could well constitute – material non-public information.

35. The Applicant said that, while he could not be certain that the block trade would go ahead as predicted by Kelvin Leung, he thought it likely that it would go ahead and, if so, it also likely that he would participate. However, as a counter to the unpredictability at that time of the Korean market, he needed an effective hedge. His concern, therefore, was to seek out that effective hedge and, in doing so, he was principally concerned with issues of liquidity. His whole mindset, therefore, was focused on matters relevant to hedging, it was not focused on the issue of identifying the company that was the subject of the intended block trade.

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[6] It is to be noted that these materials had not been placed before the Korean authorities. In light of that lacuna, as counsel for the SFC put it, it was not open to the Applicant to criticise the findings of the Korean investigative authorities and the court that he had terminated the conversation with Kelvin Leung on a 'pretext'.

36. As it was, after he had considered the data available to him, the Applicant executed short swaps in the shares of two Korean securities companies. The first company, the one that was central to the Applicant's strategy, was Hyundai itself, the company that was the subject of the intended block trade. The second company, which played a far lesser role in the Applicant's strategy, was Kiwoom Securities Co., Ltd ('Kiwoom').

37. It was the Applicant's case that, once he had identified these two companies, he took immediate steps to execute his hedging strategy.

38. It was implicit in his evidence that he did not think first to make his promised telephone call to Kelvin Leung. He had forgotten that obligation. Of course, as the Applicant himself accepted, if he had remembered and made his return call, and if he had then been formally wall-crossed by Kelvin Leung - or had been given additional information which constituted material non-public information - he would then *that same evening* have been prevented from dealing in any way with the shares of Hyundai, even for purposes of hedging.

39. What then, in outline, were the Applicant's dealings? The Applicant's dealings consisted of entering into a number of short swaps. As the Tribunal understands it, short swaps may be employed equally as a hedge or as a mechanism for short selling.

40. By way of a broad conceptual understanding, it can be said that short selling is a bet by a dealer that the price of an equity will fall and, if that event occurs, a profit is made. It has been the SFC contention that, knowing that the block trade would inevitably lead to a decline in the value of the shares in the market once knowledge of it was generally known, and discovering – by way of the information imparted to him by Kelvin Leung – that the subject of the block trade was Hyundai, the Applicant abused that information by shorting Hyundai shares.

41. Contrary to this assertion, it is the Applicant's case that, as he has consistently maintained, at the time of entering into the short swaps he did not know the identity of the company which was to be the subject of the block trade. His actions were in no way impermissible but, to the contrary, were, on a correct understanding, taken as a recognised means of hedging the position of the Trafalgar Fund without in any way relying on what in Hong Kong would be termed 'inside information'.

42. What then were the actions taken by the Applicant? The following is a summary (taken largely from the Agreed Statement of Facts filed by the parties) –

(a) At about 5.50pm, some 20 minutes after he had truncated his telephone conversation with Kelvin Leung, the Applicant checked with BNP Paribas Securities Services ('BNP Paribas') on the available inventory of Hyundai shares and Kiwoom shares for short swaps.

(b) At around 7.40pm, BNP Paribas confirmed short swap orders for 500,000 shares in Hyundai and just 35,000 shares in Kiwoom.

(c) The order was formally placed at about 7.40am the following morning by Andy Scott, a manager of Trafalgar.

(d) At 8.02 that same morning, the Applicant checked with Merrill Lynch Asia Pacific Limited ('Merrill Lynch') as to its inventory of the two shares for short swaps. Merrill Lynch confirmed that it held 2,000,000 Hyundai and 100,000 Kiwoom.

(e) At about 10.36am, on the Applicant's instructions, Andy Scott confirmed with Merrill Lynch an order for short swaps of 500,000 Hyundai shares.

(f) In the result, the Applicant ordered one million Hyundai shares for short swaps.

(g) As to execution, that morning, between 8.00 and 11.00am, 500,000 Hyundai shares via short swaps were executed through BNP Paribas and a further 54,493 Hyundai shares were executed through Merrill Lynch, this being the first tranche of the one million shares due by it.

43. The Applicant therefore arranged short swaps involving 1,000,000 Hyundai shares and just 35,000 Kiwoom shares, that exercise commencing about 20 - 25 minutes after he had broken off his conversation with Kelvin Leung and ending at about 11.00 the following morning.

44. When the Applicant's short swap dealings in the shares of Hyundai were analysed by the Korean regulatory authorities, it was determined that, even though the name of Hyundai was never imparted in the telephone conversation that took place with Kelvin Leung, there was nevertheless sufficient particularity in the information that was imparted to enable the Applicant, once he was off the telephone, to employ data available to him in his office to satisfy himself that the information he had received from Kelvin Leung must relate to Hyundai. It was further the findings of the Korean regulatory authorities that the Applicant had then proceeded to make a financial gain by overseeing a short-swap exercise, effectively, therefore, by shorting Hyundai shares, an exercise which was at no time divulged to Kelvin Leung, the sell-side broker. These findings were, on appeal, supported by the Seoul Administrative Court.

45. When the matter of the Applicant's actions was considered by the SFC, it was satisfied that it could take into the account the findings of the Korean regulatory authorities and also the Seoul Administrative Court, giving all necessary weight to those findings.

46. That said, the SFC did not seek to find the Applicant culpable of a specific offence under the Ordinance. Instead, it found that the manner in which the

Applicant had used the information imparted to him by Kelvin Leung was "less than forthright and contrary to the requirement to act fairly and in the best interests of the integrity of the market"[7].

47. As for the Applicant, it has always been his assertion that his single concern at the relevant time was to ensure that, if he did decide to participate in the block trade, he wanted to ensure that the risk he was undertaking was satisfactorily hedged. Although he was not actively involved in the Korean securities sector, he could see that there were seven securities companies listed on the Korean Exchange that met the market capitalisation and trading volume criteria imparted to him by Kelvin Leung. Those seven companies were: Hyundai, Kiwoom, Meritz Co. Ltd, ('Meritz'); Korea Investment Holdings ('KIH'), Daewoo Securities ('Daewoo'); NH Investment & Securities Co. Ltd. ('NH') and Samsung Securities Co. Ltd ('Samsung').

48. As the Applicant put it, according to his understanding, therefore, with the limited information available to him at the time, Hyundai was just one of seven companies that might be the subject of the block trade.

49. Colin Knight, who was called as an expert witness by the Applicant, explained the rationale of short swapping (by way of hedging) in these circumstances –

> "Once a trader becomes aware of the possibility of a block trade in which he may participate then it is common practice for the trader to hedge his anticipated exposure *by taking a short position*. As a large holding may take several hours, or even weeks, to sell, it is accepted practice to put on some type of hedge, either in the general market index via futures, or on the underlying, or a similar stock. [Emphasis added]

[7] In this regard, see paragraph 45 of the SFC's Notice of Proposed Disciplinary Action of 13 February 2020.

50. Colin Knight explained how, in these circumstances, short positions may be taken –

> "Short positions may be taken in many ways, either directly by borrowing stocks and selling these to gain the short exposure to the share price, by purchasing the put options, by selling call options, or by executing a short swap."

51. To state the Applicant's position, it was his case that at no time did he consider that the information that was passed to him constituted material non-public information. It was common for him to receive similar calls from brokers trying to gauge his interest in potential financial deals: 'sounding calls', as he described them. However, wall-crossing conversations – when he was about to be brought into a circle of confidentiality - were usually more rigorous and would be opened with an invitation to agree to be wall-crossed. It was the Applicant's contention that, at the time and thereafter, he had no reason to alter his view that Kelvin Leung's call had been merely a 'sounding call'.

52. Contrary to the Applicant's assertion, it was the SFC case that, viewed realistically, Hyundai alone (or together with a second securities company, Kiwoom, as a back-up) was the only securities company listed on the South Korean Exchange that met the requirements of the information imparted by Kelvin Leung and that the Applicant, having investigated matters, must have appreciated that fact.

53. There had in particular been two items of identifying information imparted by Kelvin Leung; first, that the company had a market capital of over US$1 billion and, second, that it had a daily trading value of close to US$5 million.

54. In its Decision Notice, which was based on data put forward by one of the South Korean investigative agencies which was consistent with data accepted by the Seoul Administrative Court, the SFC said[8] –

[8] See paragraph 21 of the Decision Notice.

(a) Based on the 6 January 2016 market data, one-month and three-month average market data, Hyundai was the only company which had a market capitalisation over US$1 billion and daily trading volume close to US$5 million; and

(b) Although Kiwoom's market capitalisation was closest to US$1 billion and Meritz had a market capitalisation of around US$1.58 billion, their average daily trading volumes were not close to US$5 million based on 6 January 2016 market data, that is, the one-month and three-month average market data.

55. The Applicant denied any suggestion that, in his study of relevant data given to him by Kelvin Leung, which, he said, would not have taken him longer than 15 minutes, he had come to the conclusion that Hyundai (or Kiwoom) must be the subject of the block trade and had acted in accordance with that conclusion, seeking to disguise it later as a legitimate hedge and not as improper use of material non-public information. It was the Applicant's case, therefore, that Hyundai, together with Kiwoom as a back-up, were not chosen in order illicitly to seek to make a profit by seeking to short both stocks but, on the imprecise information available to him, were chosen as legitimate hedges. As to his consideration of relevant data on the evening of 6 January 2016, the Applicant said the following in the course of his testimony before the Tribunal –

> "I think I went through seven [slides containing performance data] and it may have taken me a little bit longer, given the reduced functionality on the relative value screen, but I would have got there."

56. As to the purpose of this exercise, the Applicant continued –

> "… the purpose of the exercise [was] to get sense of what the sector looks like and what potentially would be appropriate from a

> hedging perspective. If you recall, I think that you need to hedge the country and the sector risk in particular. But I also think that the liquidity risk is important and so I want something that is going to be similar."

57. As to why he chose Hyundai and, to a far lesser extent, Kiwoom, the Applicant testified as follows –

> "I chose [Hyundai] because it fitted, in essence, those three hedging headings that I've mentioned. It was Korean, of course. It was in the brokerage sector, and it fitted, like, the liquidity criteria that we were looking to hedge."

58. He used the same criteria, he said, in respect of Kiwoom.

59. As to why he chose two companies only, the Applicant said the following in the course of his evidence –

> "I mean, our hedge is going to be on for a very short period and so I think that two gives you sufficient diversification but adding more is not, in my opinion, going to add a great deal, given that I am looking to hedge for a very short period…"

60. At this juncture, it should be noted that the expert witness called by the SFC, Ms.Yak Chau Wei, did not agree with the evidence of Colin Knight that it was common practice for a fund manager to hedge his anticipated exposure to a likely (but not certain[9]) block trade. By way of a general comment, Ms. Yak said:

> "I do not see the need for a hedge fund manager to do any sort of hedging in a typical block trade, whether on the subject security or the sector, especially if the trade would be unwound in just a few days."

[9] As stated earlier, the Applicant testified that on the evening of 6 January 2016, although he believed that the block trade promoted by Kelvin Leung was likely to go ahead, he could not be certain that it would.

61. The Applicant's actions in setting up his short swaps were not therefore accepted without opposition as being the standard way to proceed in such circumstances.

62. As earlier observed, during that extended period of time between the ending of the first telephone conversation and the commencement of the second, the Applicant made no attempt to contact Kelvin Leung as he had undertaken. As already stated, it was his case that he forgot to do so.

63. When Kelvin Leung himself was able to reach the Applicant on the morning of 7 January, he wasted no time in seeking to wall-cross the Applicant. An invitation to be wall-crossed was virtually the first matter he canvassed. Once the Applicant had agreed to be wall-crossed, Kelvin Leung informed him that the shares that were the subject of the intended block trade were Hyundai shares.

64. Kelvin Leung further explained to the Applicant that the block trade had arisen because the second largest shareholder in the company was disposing of his full position.

65. At that time, the Applicant was still seeking to complete his share swap exercise using Hyundai shares. However, he said nothing concerning this activity, nothing to ensure that there could be no misunderstanding between them, nothing along the lines of: "I feel I must tell you that I have just shorted Hyundai as a hedge." Kelvin Leung therefore would have remained ignorant of the Applicant's activities of the night before and that same morning.

66. The Applicant did agree, however, that he wished to participate in the block trade and the Trafalgar Fund was later allocated 3.8 million Hyundai shares.

67. Later that morning, Kelvin Leung sent a formal (largely pro forma) email to the Applicant confirming that the information that had been passed to the Applicant had been confidential and may constitute 'inside information'.

68. Kelvin Leung's telephone call - duly audio recorded - meant that the intended size of the Applicant's share swap now had to be reduced. Now that he had been informed in direct terms that Hyundai was the subject of the block trade, he could not deal in its securities (in any way) until the block sale was made public. In this respect, immediately after his second telephone call with Kelvin Leung, the Applicant gave internal instructions that any further acquisition of Hyundai shares should be cancelled.

69. When the Stock Market opened on 8 January 2016, with the news of the block sale now in the public domain, Hyundai's share price experienced a material drop, one of 7.19%.

70. Over the following days, the Applicant closed his positions. In this regard, in the statement of agreed facts, the following was recorded –

> "From 8 January 2016 to 11 January 2016, the Applicant sold 3,245,507 of the allotted Hyundai shares for the Trafalgar Fund (i.e. 3.8 million less 554,493 short swaps).
>
> On 12 January 2016, the Applicant sold the remaining 554,493 Hyundai shares off-market at the closing price, and requested the same amount of long swaps with BNP and Merrill Lynch."

71. As a result of the short swap activity, a profit of KRW337.6 million (approximately HK$2.6 million) was generated for the Trafalgar Fund[10].

72. It was more than a year later, in June 2017, that the Applicant was informed that the two Korean regulatory bodies responsible for safeguarding the

[10] That was the sum which the South Korean authorities determined to be an appropriate penalty.

integrity of the Korean financial market - the FSS and the KSFC – were investigating the propriety of his short swap dealings in the shares of Hyundai.

73. Those investigations ended in September 2017 when notices of enforcement action were issued against the Applicant on the basis that on the evening of 6 January 2016, the Applicant, having come into possession of material non-public information in respect of Hyundai shares, had traded in the shares of that company in breach of Articles 178-2(1)(b) and 429-2 of the Korean Financial Investment Services and Capital Markets Act. In the result, as stated earlier, an administrative fine was levied against the Applicant in a sum of KRW377.6 million (approximately HK$2.6 million)[11].

74. The Applicant appealed these decisions to the Seoul Administrative Court. In its judgment dated 10 January 2019, the Seoul Administrative Court came to the following findings, dismissing the Applicant's appeal –

(a) That the information given to the Applicant in the first telephone call from Kelvin Leung had constituted material non-public information under the Korean legislation.

(b) That Hyundai had been the only securities company which satisfied the various identification markers contained in that material non-public information.

(c) That an examination of time-lines showed that the Applicant had confirmed the availability of Hyundai shares with BNP Paribas just 20 minutes after ending his conversation with Kelvin Leung and had confirmed the availability of the same shares with Merrill Lynch the following morning.

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[11] As the Tribunal understands it, it was not open to the Korean institutions to impose any form of suspension on the Applicant.

(d) However, when he had spoken to Kelvin Leung on the morning of 7 January 2016, the Applicant said he had forgotten to make his promised return call.

(e) That the Applicant had used the material non-public information imparted to him by Kelvin Leung to make the short swaps and had done so before knowledge of the block trade had been released to the market.

(f) That the Applicant's assertion that he had entered into the short swaps as a standard hedging strategy was in all the circumstances incredible, that is, manifestly not credible.

Should the Korean proceedings be given any weight by this Tribunal?

75. On behalf of the Applicant, his leading counsel, Mr. Peter Duncan SC, has submitted that no weight should have been given to the Korean proceedings by the SFC which fell into error by relying on findings that arose from those proceedings. It has followed, of course, that, in Mr. Duncan's submission, this Tribunal should also give no weight of any kind to the findings made in those proceedings. As the Tribunal has understood it, this submission has had two bases -

(a) First, that the Tribunal, while it may admittedly take into account the findings of the Korean authorities, has the obligation under Hong Kong law to conduct a *de novo* review of the Applicant's conduct as if it was the original tribunal of trial.

(b) Second, that, in the circumstances, the Korean proceedings were so flawed (procedurally and in the findings made) that they were, in this instance, not worthy of being taken into account, that is, of being given any weight.

76. The Tribunal accepts, of course, that it must determine this application for review *de novo*, as if it was the original tribunal of trial. That said, however, it remains able, as a matter of law, to take into account the findings of the Korean proceedings. In this regard, s.129(2)(a)(iv) of the Ordinance provides that, in determining whether a person is a "fit and proper person", the SFC may "take into account" decisions made in respect of that person by -

> "any other authority or regulatory organisation, *whether in Hong Kong or elsewhere,* which, in the Commission's opinion, performs a function similar to the functions of the Commission." [emphasis added]

77. In this age of borderless financial dealings, when the reputation of Hong Kong's securities and futures industry rests not only on the essential integrity of the conduct of its regulated members within Hong Kong but also outside of it, the need for such a provision is understandable. The provision is not singular to Hong Kong. Other jurisdictions have adopted similar measures.

78. Accordingly, in determining whether the Applicant has remained a "fit and proper person" pursuant to the provisions of the Ordinance, both the SFC and this Tribunal have had the statutory power, if they wish to use it, to take into consideration the decisions emanating from the Korean proceedings, giving such weight to those decisions (or any aspect of them) as is appropriate.[12]

79. On behalf of the Applicant, however, it has been submitted that, in this particular case, the Korean proceedings were so fundamentally flawed that it

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[12] By way of an illustration in extremis (simply to illustrate the point), the SFC would be failing in its duty to protect the standing and integrity of the Hong Kong financial profession if it permitted persons duly licensed in Hong Kong to use the jurisdiction of Hong Kong to commit financial fraud in other jurisdictions. It speaks for itself, of course, that, in determining whether such financial frauds had taken place, the SFC would invariably (to such degree as it thought appropriate) be required to rely on investigations conducted in those other jurisdictions in accordance with the laws and practices of those other jurisdictions and to rely also on pronouncements given by judicial bodies in those other jurisdictions made in accordance with the laws and jurisprudence of such jurisdictions. Indeed, in such cases the SFC may have no choice other than to place such reliance in order to obtain substantive evidence.

would be wrong to give any weight to the findings that came out of those proceedings.

80. As it is, the Tribunal has been able to arrive at its necessary determinations from a consideration of the primary evidence, both oral and written, that has come before it in this application for review. In arriving at its necessary determinations, it has not therefore been necessary for the Tribunal to adopt any of the findings made in the Korean proceedings. That said, however, as the two sets of proceedings have essentially canvassed the same evidential matters, the Tribunal has from time to time spoken of evidence that arose in the Korean proceedings either by way of comparison or to cite such findings as being supportive of the findings independently reached by the Tribunal.

81. The fact, however, that the Tribunal has reached its own independent findings based on the primary evidence put before it in this application for review does not mean that it accepts that, in the circumstances of this particular case, it would have amounted to a fundamental misdirection if it had taken into account any of the primary findings that arose in the Korean proceedings to the extent of adopting those findings as primary findings.

82. In the Applicant's Amended Notice of Application for Review, much emphasis was placed on assertions that the Korean proceedings, more especially the judgement of the Seoul Administrative Court, had been deeply flawed. Particular emphasis was placed on the following assertions, namely, that there had been no basis, or an insufficient basis, for the following determinations -

(i) The rejection of the Applicant's evidence (and/or/submissions) that he believed that any one of seven securities companies could have been the subject of a possible block trade;

(ii) The rejection of the Applicant's evidence that, while a block trade was possible. it would not definitely go ahead;

(iii) the rejection of the Applicant's evidence that, if material non-public information was being communicated to him by Kelvin Leung, this would have been made clear to him at the time by Kelvin Leung;

(iv) the rejection of the Applicant's evidence that his entering into the short swaps was a legitimate hedging strategy, given the possibility of Trafalgar participating in a block trade.

(v) the finding that an issue of "beta co-efficients" was relevant, and should be given weight, when that mathematical methodology had not been used by the Applicant and was therefore irrelevant.

83. It was further submitted that the Seoul Administrative Court had ignored fundamental precepts of justice by reaching its judgement without due and proper consideration of *viva* voce evidence.

84. All of these matters appear to be matters that were argued but found no favour before the Seoul Administrative Court. As such, in the ordinary course of events, they should have been matters forming the basis of an appeal within the Korean jurisdiction from the judgement of the Seoul Administrative Court. As it was, however, with the benefit of local legal advice, the Applicant made the decision not to lodge an appeal and paid the fine that the Seoul Administrative Court confirmed was due and payable. In short, he made the decision that the judgement of the Seoul Administrative Court should be the final and binding decision in that jurisdiction.

85. The principle in Hong Kong law is that a foreign judgement may be impeached if it offends against Hong Kong's views of substantial justice; in other words, if it is demonstrated that there has been in the foreign jurisdiction - in this case, Korea - a substantial miscarriage of justice. In the present instance, however, the Applicant, with the benefit of professional legal advice, chose not to avail

himself of an avenue of appeal within Korea, a process of appeal that appears to have been fully open to him and through which, in accordance with the relevant law, his submissions as to any denial of justice, procedural or substantive, could have been considered.

86. One matter was raised as constituting a substantial miscarriage of justice that was not open to being rectified on appeal within the jurisdiction of Korea, that being because knowledge of the matter only arose *after* the Applicant's right of appeal had expired. In respect of this matter, it was said that the Seoul Administrative Court had had access to, and had relied upon, relevant materials which had not been made available to the Applicant. What were these papers and what matter did they speak to? Regrettably, nothing was put before the Tribunal to demonstrate that this procedural failure, if that is what it was, constituted a substantial miscarriage of justice.

87. But that said, as the Tribunal has said earlier, it did not in any event choose to rely on any of the primary determinations made by the Korean regulatory authorities or the Seoul Administrative Court.

Relevant matters of law

88. In order to better understand the context in which the Tribunal has reached its determination of the merits of this application, it is necessary first to make reference to certain fundamental matters of Hong Kong law.

A. This application constitutes a 'de novo' hearing

89. As earlier indicated, in determining an application for review of the kind brought by the Applicant, the Tribunal conducts a hearing *de novo,* undertaking a full merits review, its core duty therefore being to act not as a court of appeal but

as a court of first instance[13]. The duty to conduct a hearing *de novo* extends also to matters of possible sanctions.

B. The burden of proof

90. On the basis that this application is conducted as a hearing *de novo*, it follows that the burden of proof remains on the SFC, it being the body that has made the allegations that the Applicant is no longer, in terms of the Ordinance, a fit and proper person.

C. The standard of proof

91. Section 218(7) of the Ordinance directs that the standard of proof required to determine any question or issue in this application is the standard applicable to civil proceedings. Put more directly, matters must be proved on a balance of probabilities.`

92. In *Re H & Others (Minors) (Sexual Abuse: Standard of Proof)*[14], Lord Nicholls said:

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability…"

[13] See *Tsien Pak Cheong David v Securities and Futures Commission* [2011] 3 HKLRD 533.
[14] [1996] AC 563.

D. Drawing inferences

93. In this application for review, almost all of what may described as the background facts have been uncontested. However, as is often the case in matters related to the investigation of possible market impropriety, the Tribunal has been drawn to consider whether certain further findings of fact may be inferred from those uncontested facts. In this regard, the Tribunal, of course, must guard against indulging in conjecture under the guise of drawing an inference where the primary evidence does not logically and reasonably justify the particular inference in question.

94. It is, however, to be emphasised that, these present proceedings being civil in nature, it would not be right to say that any inference of impropriety that may be drawn must be the only inference that can be drawn. That is the standard which applies according to the criminal standard of proof. In a civil matter, such as this, the Tribunal must be satisfied, however, that an inference has been established as a compelling inference[15].

95. In the present case, therefore, the Tribunal has only drawn inferences when it has been satisfied that it has been established by the Respondent, that is, the SFC, to be compelling inferences.

E. Good character

96. During the course of the hearing, it was emphasised that the Applicant is a man of good character. The Tribunal has taken this into account in

[15] See *HKSAR v Lee Ming Tee* (2003) 6 HKCFAR 336, the dicta of Sir Anthony Mason NPJ: "It would not be right to say that the requisite standard prescribes that the inference of wrongdoing is the only inference that can be drawn (cf *Sweeney v Coote* [1907] AC221 at 222 per Lod Loreburn) for that is the standard which applies according to the criminal standard of proof. In the particular circumstances, it was for the Respondent to establish as a compelling inference that very senior officers of the SFC had deliberately and improperly terminated the investigation into Meocre Li's conduct for the ulterior purpose alleged, sufficient to overcome the inherent improbability that they would have done so…"

the following manner; namely, that a person of good character is less likely than otherwise might be the case to have committed the misconduct alleged and, in addition, good character supports his credibility in respect of both his evidence before the Tribunal and provided in records of interview, letters and other statements.

F. Expert evidence

97. During the course of the hearing, the Tribunal received evidence from two persons who were accepted as expert witnesses. The Tribunal received their evidence because it was likely to be outside the knowledge and experience of the Tribunal. That being said, the Tribunal has recognised that it is not bound to accept the evidence of an expert witness insofar as it forms an expression of opinion. The Tribunal is entitled to accept or reject all or part of that evidence, coming to its own conclusions on such matters based on a consideration of all the evidence. The Tribunal is also in a position to prefer the evidence of one expert to another.

G. Looking to the Code of Conduct

98. The Applicant has not been found culpable of any specific offence under the Ordinance, for example, insider dealing. Instead, in considering the total nature and extent of his actions, the SFC has come to the determination that he has instead failed to live up to the requirements of General Principles 1 and 7 of the Code of Conduct. In this regard –

> General Principle 1 directs that –
>
> "In conducting its business activities, a licensed or registered person should act honestly, fairly, and in the best interests of its clients and the integrity of the market."
>
> General Principle 7 directs that -
>
> "A licensed or registered person should comply with all regulatory requirements applicable to the conduct of its business activities so

as to promote the best interests of clients and the integrity of the market."

99. Section 4 of the Ordinance sets out the regulatory objectives in respect of which the SFC is constituted. These objectives include maintaining and promoting the fairness, efficiency, competitiveness, transparency and orderliness of the securities and futures industry. Pursuant to section 5 of the Ordinance, the SFC is given the following relevant powers, namely –

(a) To take such steps as it considers appropriate to maintain and promote the fairness, efficiency, competitiveness, transparency and orderliness of the securities and futures industry; and

(b) To promote and enforce the proper conduct, competence and integrity of those who discharge regulated activities in the industry.

100. The Code of Conduct, therefore, seeks to ensure the integrity of all regulated persons and by that means to secure the overall integrity of the securities and futures industry. By definition, integrity requires adherence to ethical principles and to both fair and honest conduct. It is fundamental, therefore, that the SFC is not required to establish that a regulated person is culpable of a specific offence under the Ordinance or indeed culpable of a specific offence in another jurisdiction which is equivalent to a Hong Kong offence. As counsel for the SFC put it in the course of submissions, it is sufficient if the conduct is such that, having regard to the provisions of the Code of Conduct, the SFC is justified in determining that the regulated person can no longer be trusted (as a fit and proper person) to discharge the responsibilities imposed by the Code of Conduct.

101. In this regard, in its Decision Notice, the SFC recognised that there had been no express finding of dishonesty made by the Korean authorities. However,

in this regard it commented[16] that its view of the nature of the Applicant's conduct did not have to be based on a finding of dishonesty by the South Korean administrative or judicial authorities. Whether, in terms of the Hong Kong legislation, a person is deemed to be a fit and proper person is founded on that person's ability to discharge regulated responsibilities not only honestly but also competently and fairly and in this regard the SFC was entitled to look at the whole of a person's conduct, assessing whether that conduct was the conduct of a person who is fit and proper.

102. Section 194 of the Ordinance gives to the SFC the power to take disciplinary action against a regulated person when it is satisfied that the person is no longer a fit and proper person, that is – in respect of this particular application – when it is satisfied that a person can no longer be trusted to adhere to principles of conduct that meet the strictures of financial integrity.

103. To ensure that regulated persons understand the responsibilities to which they are subject, section 399 of the Ordinance gives to the SFC the power to publish codes of conduct together with appropriate guidelines. The 'Fit and Proper Guidelines' published by the SFC to complement the Code of Conduct emphasises that a regulated person must be able to demonstrate the ability to carry on regulated activities in a way that is competent, honest and fair and in compliance with all relevant laws codes and guidelines promulgated by the SFC and also by other regulators when applicable. The guidelines also emphasise that the SFC is not likely to be satisfied that a person is, or remains, fit and proper if that person is found to be lacking in financial integrity.

104. In respect of the Applicant, therefore, by way of summary, he was found no longer to be a fit and proper person by reason of his asserted failure, when discharging certain of his regulated financial activities, to adhere to principles of

[16] See paragraph 50 of the FSC Decision Notice.

honest and fair conduct; that is, to adhere to principles of conduct that the integrity of the market required. But simply, he was found to be lacking financial integrity.

This Tribunal's findings arising out of the events of 6 and 7 January 2016

105. As already emphasised, the Tribunal has conducted a full merits review, conducting the review as if it was the original decision maker. In discharging this obligation, the Tribunal has been drawn to the conclusion that the propriety of the Applicant's conduct falls to be determined first by the Tribunal having close regard to what was said and done on evening of 6 January and the morning of 7 January 2016.

A. The first telephone conversation

106. The opening exchange commenced at about 5.30 on the evening of 6 January 2016, just a couple of weeks into the New Year. In respect of this opening exchange, the Tribunal considers it important to note that the parties were clearly known to each other and appeared – at least on a work-a-day basis - to be on friendly terms. There was a marked absence of formality, this itself indicating some degree of trust between the parties. By way of illustration, the opening exchange was as follows[17] -

Leung:	Hi, Chris? It's Kelvin from CS. Happy new year.
Applicant:	Hullo mate. Same to you, mate. How are you?
Leung:	Very good, how are you?
Applicant:	I'm not too bad, not too bad.
Leung:	That's good.

[17] In the ordinary course of business, calls of this kind are invariably audio recorded. The portions of transcript cited in this judgment were drawn from such audio recordings. Their accuracy has not been disputed.

107. The Applicant knew full well, of course, that he was being approached to test his interest in some form of financial offer. His next words were –

> Applicant: What exciting things have you got for us today?
> Leung: Well, um Korea.

108. The two then exchanged some short banter which, viewed objectively, is ambiguous in its meaning. Kelvin Leung then returned to the business at hand by describing the company which was the subject of his call –

> Leung: It is a broker. Securities company.
> Applicant: That one is not on my radar but there we are.

109. Kelvin Leung expanded on his brief, saying –

> "It is a secondary sell down. Market cap over a billion dollars. So wondering if, um - "

110. The Applicant asked if the secondary sell down – that is, the block trade - would carry a good discount and Kelvin Leung replied –

> "We are thinking high single digit but maybe more."

111. Kelvin Leung then continued to expand on his brief, informing the Applicant that –

> "The trade is probably about 100-ish bucks and the trade's sort of, call it close to 5 bucks a day."

112. It is not disputed that this industry jargon meant, first, that the block trade would be worth about US$100 million and, second, that the securities company in question had a daily trading average of about US$5 million.

113. Colin Knight, the Applicant's expert witness, said the following in his report as to typical procedures adopted by banks when promoting a block trade –

> "The bank puts together a pre-marketing (also known as a wall-crossing) script for an initial discussion with a limited number of investors. The script keeps the security name confidential, just giving general details of the trade size, the size of the company and the daily liquidity of the securities. The bank should carefully consider what information is necessary to disclose and whether indeed it constitutes inside information… It is important to be sure that the details revealed do not provide enough information to identify the company under discussion unless the potential investor confirms that he agrees to be wall-crossed."

114. It was at about this stage of the telephone conversation that the Applicant sought an interruption, saying -

> "Alright, okay. Can I come back to you in a moment? I'm just between the middle of something. I've just got to close off Thailand."

115. Kelvin Leung had no trouble with that and agreed to the break in the conversation on the basis that the Applicant would call him back.

116. Before ending the conversation, the Applicant sought one last piece of information about the intended block trade, namely, when it was intended to take place. Kelvin Leung replied: "It's going to be tomorrow."

117. The conversation was then wrapped up with the following words –

Applicant:	Not a problem. Let me come back to you as soon as I can.
Leung:	Awesome. Thank you.
Applicant:	Thanks buddy, take care.

118. When this first exchange ended, as detailed earlier in this determination, it was accepted that the following information had been imparted to the Applicant by Kelvin Leung:

(a) that, there was to be a secondary sell down of shares [a block trade] in a Korean securities company, that sell down being scheduled for the following day; therefore, within about the next 24 hours;

(b) that, by way of incentive to participants, the secondary sell down [the block trade] was expected to be subject to a high single digit discount or higher;

(c) that, the block trade would have a value of approximately US$100 million;

(d) that, in respect of the unnamed securities company itself, it had a market capitalisation of over US$1 billion; and

(e) that, as a further measure of its size, it had daily transactions – a gross daily revenue - close to US$5 million,

119. Was the request for a break in the conversation genuine? Was there a "Thailand matter" that needed to be closed off with such urgency that it necessitated a truncation of the conversation? As indicated earlier in this determination, evidence was put before the Tribunal to support the Applicant's contention. It is a pity that this evidence was not put before the South Korean authorities and may explain – in part at least – why they drew the inference (based on all the surrounding facts) that the request for a break in the conversation was some form of pretext on the Applicant's part.

120. In considering the matter *de novo*, the Tribunal accepts that - in any busy office - interruptions to a particular course of business may be necessitated from time to time. The Tribunal has no grounds for rejecting the "Thailand matter"

as a ploy. That said, however, the Tribunal does not consider that a great deal turns on it.

121. In the judgment of the Tribunal, what is a matter of greater concern is the fact that, no matter how genuine the Applicant's reason for interrupting the telephone conversation with Kelvin Leung may have been, within minutes, instead of returning the call to Kelvin Leung as he had undertaken to do as soon as possible, and even though he was then in a position to make that call, the Applicant instead had begun investigating the very matters which had been the subject of Kelvin Leung's marketing pitch instead of making his promised call.

122. As it is, at no time did the Applicant make a return call to Kelvin Leung even though he, and at least one other member of his staff, were engaged in the short swap exercise arising directly out of Kelvin Leung's call both that evening and the following morning.

123. That the "Thailand matter" must have been finalised within a matter of minutes is demonstrated by the fact that, on the uncontested transcript, the conversation with Kelvin Leung ended at 5.32pm and yet at about 5.50pm, less than 20 minutes later, instead of returning his call to Kelvin Leung, the Applicant, having investigated relevant data available to him, was activating his short swap strategy in respect of two shares; first, and almost entirely, in Hyundai shares and, second, in a comparatively small number of Kiwoom shares.

124. It was the Applicant's case that he only had a limited period of time within which to study the data on his Bloomberg terminal and that he used that limited period of time to get an idea of trading volume: that is 'liquidity'. Mr Duncan, his counsel, submitted that, in that brief period of time allowed to him on the evening of the 6 January 2016, the Applicant did not have access to any of the 'readily comparable figures' contained in the tables later prepared for the purposes of the litigation in South Korea and in this jurisdiction.

125. That the Applicant perhaps wished to get a better idea of the nature and extent of the securities sector on the Korean Exchange before making his return call to Kelvin Leung may be understandable. But, if so, if the purpose was to get a better impression of relevant matters in order to speak to Kelvin Leung on a surer basis, it is difficult to comprehend how, having investigated relevant matters for the very purposes of the telephone call, the Applicant should then have forgotten to make the call itself.

126. It is also to be remembered that, as the Applicant accepted, that there appeared to be a limited number of companies to look to, just seven in number, and it is clear that, even on his own version of events, he must have considered relevant data in some detail. If not, he would not have been in a position within a relatively short period of time to set up his share swaps.

127. When the Applicant spoke to Kelvin Leung the next morning – after Kelvin Leung had made the return call – the Applicant apologised for not making his own return call as he had undertaken. He said that he had simply forgotten to do so. Even after he had been informed by Kelvin Leung in that second telephone conversation that Hyundai was the subject of the block trade, he said nothing of the fact that he had been diverted because he had been seeking to set up a hedge by way of a short swap arrangement in respect of two securities companies listed on the Korean Exchange – and that one of those companies, by happenstance only and without any ill intent on his part, had been Hyundai itself.

128. The Tribunal accepts that we all have lapses of memory. That said, no suggestion was made that some other pressing third-party matter had intervened; perhaps a hurried conference. Nor was any suggestion made that, when he had finished his "Thailand matter", the Applicant then turned his attention to some entirely unrelated matter. To the contrary, it is uncontested that the Applicant then

turned his attention to investigating the very matter which had been the subject of his telephone conversation with Kelvin Leung just a few minutes earlier.

129. In respect of the short swaps, it is uncontested that the Applicant sought to do so principally, indeed almost entirely, in Hyundai shares. In this regard, in respect of the Applicant's actions on the night of 6 January 2016, the Statement of Agreed Facts filed by the parties (paragraph 6) said as follows[18] –

> "From around 5:50pm to 5:54pm on 6 January 2016, the Applicant, via Bloomberg messages, checked with BNP Paribas Securities Services (BNP) the inventory of Hyundai and Kiwoom Securities (Kiwoom) shares for short swap. After BNP confirmed that Hyundai was available for short swap at around 5:53pm on the same day (Hong Kong time), the Applicant asked BNP if it had 500,000 Hyundai shares for short swap. At around 5:54 PM on the same day (Hong Kong time), BNP also reported that it was "checking" Kiwoom."

130. What must also be taken into account is that, if the Applicant is to be believed, his memory lapse related to contacting Kelvin Leung would have been further extended through until the middle of the following morning even though he continued that following morning to oversee the short swap exercise, an exercise which, according to him, was put in place to hedge his risk in participating in the block trade which was still to be detailed by Kelvin Leung himself: indeed to be detailed at any moment.

131. In this regard, the Statement of Agreed Facts (paragraphs 8, 9 and 10) said as follows –

> *Para 8* At around 7:40am on 7 January 2016, BNP Paribas confirmed with the Applicant short swap (pay-to-hold) orders of 500,000 shares in Hyundai and 35,000 shares in Kiwoom.
>
> *Para 9* At around 8:02am to 8:05am on 7 January 2016, the Applicant, via Bloomberg messages, checked with Merrill Lynch its inventory of

[18] The fact that each time given is said to be 'Hong Kong time' has been deleted from the citations.

Hyundai and Kiwoom shares for short swap. At 9:48am on the same day, Merrill Lynch confirmed that it held inventory to short sell US$5 million Kiwoom and US$10 million Hyundai. At 10:39am on the same day, Andy Scott (for and on behalf of the Applicant) placed an order of short swaps for 500,000 Hyundai shares with Merrill Lynch.

Para 10 Between 8:01am and 11:04am on 7 January 2016, 500,000 and 54,493 shares of Hyundai via short swaps were executed through BNP Paribas and Merrill Lynch respectively for the Trafalgar fund. These short swaps were closed on the total (gross) sale price of KRW3,269,293,920.

B. The second telephone conversation

132. As mentioned earlier, it was only at 11.00 the following morning that Kelvin Leung was able to speak to the Applicant a second time.

133. It should be said that the evening before, about an hour after his first call with the Applicant had been cut short, Kelvin Leung had attempted to contact the Applicant again. On that occasion, he had been told that the Applicant was on a telephone call and would return his call. There was no return call.

134. The Tribunal has not drawn any adverse inference against the Applicant in respect of the fact that no answer was given to this second call. There is no evidence that the Applicant was ever made aware of it. It is, however, an indication of the desire of Kelvin Leung to close matters.

135. When the Applicant received Kelvin Leung's call on the morning of 7 January, he immediately apologised for his failure to make a return call himself (as he had undertaken). The opening exchange was as follows:

Applicant: I am so embarrassed. I completely forgot you.

Leung: No problem.

Applicant:	Sorry, I went to dinner and it completely slipped my mind. I'm very sorry.
Leung:	That's okay.
Applicant:	You got me now. Full attention. Go on."

136. Kelvin Leung went immediately to the matter at hand, wasting no time in making a request that the Applicant agree to be wall-crossed.

Leung:	I've a wall-crossing for you. Korea. Securities firm.
Applicant:	*Yes, it's all coming back. Okay, go on.*
Leung:	Would you like to take the wall cross?
Applicant:	You may do that.
Leung:	Awesome.
Applicant:	*Securities firm, you said, huh?*
Leung:	Brokers.
Applicant:	Okay.
Leung:	Hyundai Securities. 003450. So, if you look on HDS, they have the number two guy selling down.

137. In respect of the verbal exchange just quoted, the Tribunal has placed two particular comments in emphasis. It has done so because it is satisfied to the requisite standard that, in saying what he did, the Applicant chose to be deliberately disingenuous.

138. To a native English speaker (and the Applicant is such a person) the phrase – *"yes, it's all coming back"* - on any ordinary understanding – has a limited and specific meaning. It is said when the person uttering the words is acknowledging that something he has forgotten, or never fully stored in his memory, is now being remembered. In the present case, such a statement would have been understandable

if what had been said in the conversation the evening before had only been considered momentarily, that is, in passing, and then effectively forgotten. But that was far from the case. Indeed, over much of the time since the first conversation the Applicant had been actively involved in respect of that very matter. In the judgment of the Tribunal, to use the phrase – *"yes, it's all coming back"* – was in the circumstances clearly intended to convey a false impression.

139. Equally, although not as stark, for the Applicant to ask the essentially rhetorical question - *"securities firm, you said, huh?"* - appears on the probabilities to have been a co-joined attempt to impart an air of vagueness, as if there was an instinctive need to remind himself of the details of what passed the night before. The Applicant had, of course, on his own admission, conducted an investigation of the companies – at least what he understood to be the qualifying companies – making up the South Korean securities sector.

140. But why was it necessary for the Applicant to put up this air of vagueness? If what he had been doing was – as he has at all times protested – entirely ethical, why the need to seek to give the impression at that time that he was having to recall what had been said the night before when, in fact, he had been actively involved in investigating and indeed setting up a short swap arrangement in respect of the very matters raised in that first conversation?

141. It was inherent in the SFC case that the compelling inference to be drawn was that the Applicant well understood that morning that, if known, his financial manoeuvres between the telephone calls would have left him open to accusations of sheltering behind the fact that he had not been formally wall-crossed and had used that technicality to seek to exploit the information that he had received.

142. The Tribunal agrees. It is satisfied that, on a consideration of all relevant evidence, the compelling inference to be drawn is that the Applicant's failure to make his return call to a colleague in the profession – as he had undertaken

to do – was not a memory loss. It was instead calculated, that calculation being made in order to gain a financial advantage ahead of the market and to gain sufficient time – without being wall-crossed – in order to secure that financial advantage. In this regard, the Tribunal is satisfied that the Applicant must have known full well that, if he made his return call, he would almost certainly - within the parameters of that call - be asked to be wall-crossed and, if that happened, with the call being recorded, he would instantly be prevented from any further action to secure his advantage.

143. Whether, on an objective assessment, the Applicant had knowingly come into possession of material non-public information in the course of that first telephone conversation with Kelvin Leung still falls for consideration. That said, in the view of the Tribunal, the following matters point strongly to the conclusion that the Applicant himself was of the view that evening that the information given to him by Kelvin Leung *may* be sufficient for him to identify the subject of the block trade. First, he had within minutes of the first telephone conversation ending, turned to a consideration of relevant information, holding back on an obligation that he knew he should have met, namely, to contact Kelvin Leung in order to finish his conversation with him. Second, when he had completed his investigation of relevant data – all of it based fundamentally on what he had learnt from Kelvin Leung – instead of then contacting Kelvin Leung as he knew he was obliged to do – he instead set up a short swap exercise, one which would enable him to short Hyundai shares and, to a far lesser degree, the shares also of Kiwoom. The following morning, in order to complete the share swap exercise, the Applicant had to set further arrangements in place and this he did, again without meeting the obligation which the Tribunal is satisfied he could not have forgotten, namely, to contact Kelvin Leung.

144. Returning briefly to the content of the second telephone conversation, with Hyundai now identified as being the subject of the block trade, the Applicant proceeded to discuss matters with Kelvin Leung concerning the worth of the share and the state of the Korean market. This technical, market-oriented

discussion ended with the Applicant saying: "Let me have a look. We will definitely give you something and I will give you our colour on pricing momentarily. You're on your normal line, I assume. I will get back to you as soon as I can. I'll try and be no more than five, ten minutes. Given I forgot you. I do apologise. Even though I've been here all the time. An example of new year's head."

145. Shortly thereafter Kelvin Leung sent an essentially pro forma email to the Applicant confirming that the Applicant had agreed to be wall-crossed. The email commenced:

> "It was good chatting just then. Please reply and confirm your understanding of the below. This email is to confirm that on 7 January 2016, Credit Suisse discussed providing you with certain information relating to an issuer listed on the Korean Stock Exchange ('the company'), a shareholder of the company ('the vendor') and a potential transaction involving securities of the company by the vendor ('the potential transaction'). This information is confidential and may be inside information or the equivalent as defined under the applicable securities laws or regulations. In consideration of you being provided with such information and being offered the opportunity to evaluate a potential transaction, you, on behalf of yourself and your firm, agree that the information will be kept confidential and shall not be disclosed, in whole or in part, to any person …

146. The email continued -

> "You will not deal in any securities of the company, the vendors or their derivatives while you have inside information in relation to the company and the vendors…"

147. The email confirmed that these obligations -

> "… will continue until such information is publicly announced and is no longer relevant."

148. When considering the second telephone conversation between Kelvin Leung and the Applicant, and when looking also to the very obvious purpose

of Kelvin Leung's pro forma email, it was at all times open to the Applicant to inform Kelvin Leung that he had unwittingly created a potential ethical difficulty, namely, that, having forgotten to make a return call to Kelvin Leung the evening before, as he had undertaken, but intending to participate in the block sale, he had then gone on to acquire Hyundai shares by way of an anticipatory hedge. The Applicant, however, chose not to engage Kelvin Leung in any manner in this regard.

Did the Applicant know that the information concerning the block trade was not yet in the public domain?

149. During the course of the hearing it was suggested that, until Kelvin Leung cross-walled him at the beginning of the second conversation, the Applicant had no way of knowing whether the details of the intended block trade were in the public domain or not. That is not a matter which has concerned the Tribunal. If the details of the intended block trade were already in the public domain, if they were already known in the market, why would Kelvin Leung, on behalf of the sell-side broker, have been coy in withholding the name of Hyundai in the course of his first conversation? Whether, in what he said, Kelvin Leung strayed beyond the limits of propriety, it is a clear on any ordinary reading of the conversation that he was seeking to hold back essential details and that would not have been necessary if details of the intended block trade were already in the public domain. Indeed, it is clear – on any common sense appreciation of what was said during that first conversation - that both parties were proceeding on the basis that, at that moment, the detailed fact of the intended block trade constituted material non-public information.

The Applicant's culpability arising from his failure to make his promised return call

150. In the judgement of the Tribunal, for the reasons already amplified, it is satisfied that the Applicant did not forget to make a return call to Kelvin Leung

on the evening of 6 January 2016 or the following morning. The Tribunal is satisfied that the failure to make a return call was calculated.

151. That, of course, gives rise to the question: what was to be gained by failing to make a return call? The answer is that - as in fact proved to be the case - the Applicant must have appreciated that, if he made the return call, he would almost inevitably during the course of that call be formally wall-crossed by Kelvin Leung or placed in possession of further confidential information that would place beyond doubt the fact that he was now drawn into a bond of confidentiality. And that, of course, would immediately have closed down all options.

152. In short, whether the Applicant was seeking simply to hedge his position ahead of the market or whether he was looking to identify the equities in question in order to profit by way of shorting, he must have appreciated that, if he made his return call, it was highly likely, indeed almost inevitable, that his options would immediately be closed down.

153. The Tribunal is satisfied that he therefore chose not to make the return call. He chose instead to deceive Kelvin Leung, a fellow member of the profession, in order to glean what advantage he could by way of that deceit. It was essentially in that deceit, therefore, that the Applicant sought to gain an unfair advantage and, in the opinion of the Tribunal proved himself not to be a fit and proper person under the Code of Conduct.

154. As to the nature of the Applicant's culpability, the Tribunal notes (in passing) that it was the provisional view of the SFC that the Applicant had used the information given to him by Kelvin Leung to "work out" that Hyundai shares were to be the subject of the block trade. With the information gained from that analysis - information that was not yet in the public domain - he had commenced setting up short swap transactions with the two financial institutions which became

the counter-parties in those dealings. In setting up those short swaps, it was the SFC assertion that the Applicant had taken unfair advantage of both those institutions.

155. In the opinion of the Tribunal, it is not necessary to determine the extent of the Applicant's culpability based on his dealings with the two financial institutions. It is sufficient, in the view of the Tribunal, that the Applicant deceived Kelvin Leung. Often, as is the case here, a single deceit poisons the actions that follow.

Did the information supplied to the Applicant enable him to identify Hyundai as the subject of the intended block sale and to short sell its shares ahead of that fact being known to the market?

156. As already spelt out, during the course of his first telephone conversation with Kelvin Leung, the Applicant was supplied with three items of information concerning the identity of the company that was to be the subject of the block trade. First, it was a securities company. Second, it had a market capitalisation of over US$1 billion[19]. Third, it had a daily gross revenue close to US$5 million[20].

157. In respect of Kelvin Leung's descriptions of the two metrics of market capitalisation and daily gross revenue, what is to be noted is that he did not place either of those metrics into a specific historical context. He did not give any specific date or period of time to qualify his descriptions. They were instead placed essentially into the present context and, as the descriptions were of collected data, that must have included the recent past.

A. Market capitalisation

158. The market capitalisation of a company is a standard of

[19] The words spoken were: "Market cap over a billion dollars".

[20] The words spoken were: "… and the trade's sort of, call it close to 5 bucks a day".

measurement: a metric. As such, it measures the approximate size and value of a company by calculating the total market value of its issued shares. By way of a simple illustration, a company with 10 million issued shares priced (at the time) at $100 each will have a market capitalisation of $1 billion. As an everyday standard of measurement, there is nothing particularly esoteric about it. During the course of the hearing it was never disputed that it is, in the finance industry, a well understood metric.

159. When the Applicant testified before the Tribunal, he said that during his telephone conversation with Kelvin Leung, when Kelvin Leung spoke of market capitalisation, it was his impression that Kelvin Leung was trying to set a 'bar of liquidity' and accordingly, as he understood it, it didn't matter whether the market capitalisation was "one, five or twenty five". The real question was: is this stock liquid enough for your fund? The Applicant accepted, however, that, whether or not that was Kelvin Leung's true intention, was supposition on his part.

160. In the judgment of the Tribunal, whatever else the Applicant may have surmised, as an experienced manager in the financial industry, indeed managing a hedge fund, he would still have understood what market capital value, as an everyday standard of measurement, was intended to mean. Accordingly, when Kelvin Leung informed him that the company had a "market cap [of] over a billion dollars", the Tribunal is satisfied that, whatever the more esoteric undertows that may, or may not, have been surmised by him, the Applicant would also have understood that 'market cap' was fundamentally a metric of value and size.

161. As such, the Tribunal is satisfied that, when a market capitalisation of over a billion US dollars was mentioned by Kelvin Leung, that would have indicated, on any ordinary understanding, a value in the region of – but 'above' - one billion dollars. A market capitalisation below a billion US dollars would not qualify but equally a market capitalisation exceeding two or three billion dollars would not have been intended.

162. As earlier indicated, it was the Applicant's case that, at the time when he considered available data on his computer terminal on the evening of 6 January 2016 in order to consider an appropriate hedging strategy, it appeared to him that the data underlying Kelvin Leung's broad descriptions could apply to any one of seven securities companies listed on the South Korean Exchange. To repeat, these seven companies were: Hyundai, Kiwoom, Meritz, KIH, Daewoo, NH and Samsung.

163. By way of an introduction only, and for comparative purposes, the Tribunal considers it relevant to consider certain of the data that was put before the Seoul Administrative Court. This data was contained in a spreadsheet in which the market capitalisation of the seven companies (rounded down and calculated in millions of US dollars) was as follows –

Hyundai:	1,211
Kiwoom:	1,136
Meritz	1,584
KIH:	2,254
Daewoo:	2,409
NH:	2,217
Samsung:	2,616

164. On the basis of these figures, on an ordinary understanding of what Kelvin Leung had said, only the first three companies – Hyundai, Kiwoom and Meritz – would fall within the parameters he had set. The remaining four companies had market capitalisations in excess of two billion US dollars and would have fallen outside the parameters of his description.

165. When proceedings commenced in Hong Kong, both the Applicant and the SFC produced analyses of the relevant market capitalisation of the seven companies. There were marked differences in a number of the results but, as emphasised by counsel for the SFC, only the three companies named above –

Hyundai, Kiwoom and Meritz - fell within Kelvin Leung's parameters in respect of both market capitalisation and daily gross turnover.

166. For the SFC, the analysis was compiled by a senior manager in the Enforcement Division, Mr Tai Wing Lok. In his witness statement, Mr Tai summarised the data contained in the Applicant's written representations[21] made to the SFC. The accuracy of the summary, set out below, was not contested –

Stock	Issued Shares Outstanding (Million Shares)	Closing Price on 6 Jan 2016 (KRW)	USD/KRW on 6 Jan 2016	Market Cap (Million USD)
Hyundai Securities	236.6	6,080	1,197.2	$ 1,202
Kiwoom Securities	22.1	61,100	1,197.2	$ 1,128
Meritz	605.6	3,760	1,197.2	$ 1,902
KIH	55.7	48,050	1,197 2	$ 2,236
Daewoo	666.3	8,760	1,197.2	$ 4,875
NH	281.4	9,360	1,197.2	$ 2,200
Samsung	89.3	39,429	1,197.2	$ 2,941

167. In order to bring the relevant data together, Mr Tai, for the SFC, used a Bloomberg terminal on the basis that most financial institutions and regulators have subscribed to the market data services provided by Bloomberg. Mr Tai further sought to verify the data by comparing them with data retrieved from another financial services website, KRX, which, he said, was at all material times the sole securities exchange operator in Korea, its website providing market data. That said, he was unable to obtain data relating to Hyundai as it had been delisted in November 2016. With that exception, however, Mr Tai said that the data obtained from Bloomberg and from KRX was almost identical with the exception of some immaterial 'rounding variances'. The following is the schedule compiled by Mr. Tai –

[21] Dated 23 April 2020.

Stock	Market Capitalisation Calculation			
	Issued Shares Outstanding (Million Shares) as at 6 Jan 2016	Closing Price on 6 Jan 2016 (KRW)	Closing Price of USD/KRW at 7pm HKT on 6 Jan 2016	Market Cap (Million USD) as at 6 Jan 2016
Hyundai Securities	236.6	6,080	1,197.3	1,201
Kiwoom Securities	22.1	61,100	1,197.3	1,128
Meritz	496.6	3,790	1,197.3	1,572
KIH	55.7	48,050	1,197.3	2,235
Daewoo	326.7	8,760	1,197.3	2,390
NH	281.4	9,360	1,197.3	2,200
Samsung	76.4	40,650	1,197.3	2,594

168. A comparison of the two schedules reveals marked differences in respect of certain of the companies. That said, however, the Tribunal accepts that, in respect of the metric of market capitalisation, on an ordinary understanding of Kelvin Leung's description, only three companies - Hyundai, Kiwoom and Meritz - fall within the market capitalisation parameters. In this regard –

(a) Both schedules give Hyundai a market capitalisation on 6 January 2016 of US$1.2 billion.

(b) Both schedules give Kiwoom a market capitalisation on 6 January 2016 of US$1.1 billion.

(c) In respect of Meritz, the Applicant's schedule gives a market capitalisation figure of US$1.9 billion (close to falling outside of Kelvin Leung's parameters) while the SFC schedule gives a figure of US$1.57 billion.

169. In respect of the remaining companies, both the Applicant's schedule and the schedule provided by the SFC puts their market capitalisation calculations at above US$2 billion.

B. Daily gross turnover.

170. The second metric that was given by Kelvin Leung related to the daily trading volumes of the company. This standard metric measures the performance of a company's business by measuring its gross revenue over a specified period of time. In the present case, it was indicated by Kelvin Leung that the company had a daily gross revenue 'close' to US$5 million.

171. Again, for illustrative purposes, in the spreadsheet used by the Seoul Administrative Court, the daily gross revenue was considered in a number of different contexts. These included the gross revenue [traded value] on 6 January 2016; over the previous one month, three months and twelve months. The figures were as follows -

Name	*6th*	*One-month*	*3 months*	*12 months*
Hyundai	5.65	4.51	4.88	11.43
Kiwoom	1.58	2.28	2.07	4.79
Meritz	6.37	6.14	6.12	9.24
KIH	6.73	6.92	6.07	7.31
Daewoo	21.55	17.32	15.43	28.98
NH	12.94	11.32	10.24	17.63
Samsung	7.21	8.73	11.18	19.10

172. At the closure of trading on 6 January 2016, Hyundai's gross turnover stood at US$5.65 million and calculated over one month (trailing) the figure was US$4.51 million. It required only a glance at such a schedule to see that, with regard to Kelvin Leung's daily gross turnover parameter, only Hyundai had figures close to US$5 million. Indeed, the Seoul Administrative Court, in its judgment, commented that "it was possible to specify Hyundai Securities just based on trade quantity information".

173. In respect of the Hong Kong proceedings, the summary of the Applicant's data is as follows –

Stock	Traded Value on 6 Jan 2016 (Million USD)	1-Month Trailing ADV in Million USD	3-Month Trailing ADV in Million USD	12-Month Trailing ADV in Million USD
Hyundai Securities	$ 5.56	N/A	$ 4.36	$ 7.86
Kiwoom Securities	$ 1.57		$ 2.15	$ 4.37
Meritz	$ 6.26		$ 4.97	$ 6.65
KIH	$ 6.71		$ 5.28	$ 5.75
Daewoo	$ 21.21		$ 12.53	$ 18.67
NH	$12.71		$ 9.30	$ 13.46
Samsung	$ 7.12		$9.94	$ 14.62

174. This is to be compared with the schedule of data prepared by the SFC –

Stock	Traded Value on 6 Jan 2016 (Million USD)	1-Month Trailing ADV (Million USD) (7 December 2015 – 6 January 2016)	3-Month Trailing ADV (Million USD) (7 October 2015 – 6 January 2016)	12-Month Trailing ADV (Million USD) (7 January 2015 – 6 January 2016)
Hyundai Securities	$ 5.58	$ 4.54	$ 5.01	$ 12.17
Kiwoom Securities	$ 1.56	$ 2.29	$ 2.12	$ 5.10
Meritz	$ 6.29	$ 6.18	$6.28	$ 9.72
KIH	$ 6.65	$ 6.96	$ 6.21	$ 7.66
Daewoo	$ 21.27	$ 17.45	$ 15.83	$ 30.68
NH	$12.77	$ 11.40	$ 10.50	$ 18.64
Samsung	$ 7.12	$ 8.78	$11.51	$ 20.19

175. It will be seen that each schedule contains a calculation of the daily gross turnover calculated over a period of 12 months. Those figures have been given for the sake of completeness. However, having heard submissions from counsel, the Tribunal has not given much weight to those figures. The Tribunal is satisfied that, in giving short indications of the nature and size of a stock, as happened in the present case, a dealer would be expected to give data relating to the recent past. Kelvin Leung gave the Applicant no indication that his descriptions were to be considered over a one-year period. As it was put by Mr Chan, for the SFC: it would have been misleading in the circumstances of this present case for Kelvin Leung to speak of Kiwoom as having a daily trading value close to US$5 million when the recent performance of that company came nowhere near US$5 million.

176. In respect of the trading day itself, and remembering that the relevant conversation would have taken place at the end of that trading day, the Applicant's figure for Hyundai was US$5.56 million, the closest to US$5 million. The Kiwoom figure was just US$1.57 million while the figure for Meritz was considerably higher, standing at US$6.26 million.

177. It will be seen that the Applicant's schedule does not contain figures for the previous one month. The figure of the SFC for Hyundai for the previous month is US$4.54 million, again (clearly) the closest to US$5 million. The figure for Kiwoom is US$2.29 million and for Meritz the figure is US$6.18 million: both of those calculations being some distance removed from the 'indicator' of US$5 million.

178. Over a three-month period, however, the Applicant's schedule shows a figure of US$4.36 million for Hyundai (to be compared with the SFC figure of US$5.01 million).

179. As for Kiwoom, on the trading day itself the Applicant assessed its gross turnover at US$1.57 million while the SFC figure stood at US$1.56 million.

Over three months, the Applicant assessed the figure at US$2.15 million daily gross turnover per day while the SFC figure stood at US$2.12 million. These figures are far removed from Kelvin Leung's parameters.

180. The Tribunal notes that it was only, when looking back over a full year, that the daily gross turnover for Kiwoom – according to the Applicant's calculations and those of the SFC - came close to US$5 million, the figure given by the Applicant being US$4.37 million and the SFC being US$5.10 million.

181. In respect of Meritz, the Applicant's calculations showed that it had a daily gross turnover of US$6.26 million on the trading day, this to be compared with the SFC calculation of US$6.29 million. The Applicant gave no figure for the previous month. However, the SFC figure showed a daily gross turnover for that period of time of US$6.18 million, a figure well in excess of the parameter given by Kelvin Leung. Over a three month period, however, the Applicant's figure was US$4.97 million – close to the parameter of US$5 million while the SFC figure was US$6.28 million. In respect of that single figure, it can be said that Meritz fell well within Kelvin Leung's parameter.

182. That said, however, what must be remembered is that, on the Applicant's own figures, Meritz had a market capitalisation of US$1,902 million.

183. In these circumstances, on the data put before it, the Tribunal is satisfied that only one company would fall well within the parameters set out by Kelvin Leung in his conversation with the Applicant, that company being Hyundai.

184. On behalf of the Applicant, Mr. Duncan submitted that, even assuming that the Applicant had all these figures before him at the time, they would not have served to clearly and unequivocally establish that the Hyundai had to be the only company which satisfied the criteria enunciated by Kelvin Leung. Mr Duncan submitted that counsel for the SFC appeared to have conceded the point. In

this regard, *inter alia* he made mention of the following statements by counsel for the SFC made in the course of closing submissions –

> First: "In all, only Hyundai and Kiwoom could possibly have come within the description in the subject information, objectively and realistically understood."
>
> and
>
> Second: "…Mr Aarons engaged in short swaps when he knew that Hyundai (or at least Hyundai or Kiwoom) would be the target company involved in the block trade and that he had thereby received material non-public information from Mr. Leung."

185. The Tribunal accepts that the information imparted by Kelvin Leung to the Applicant in the course of their first telephone conversation was not so precise and unambiguous as to enable the Applicant unerringly to identify the subject of the block trade as being Hyundai.

186. If more precise identifying information had been passed before the Applicant had sought a break in the conversation, it is almost inevitable, despite the friendly banter and what appears to have been a degree of trust existing between the parties, that Kelvin Leung would have asked the Applicant to agree to be wall-crossed. In addition, of course, if more precise identifying information had been passed before that break in the conversation, the Applicant may well have understood that he was now for all practical purposes bound by confidentiality.

187. There was always, therefore, going to be some degree of uncertainty that presented itself if the information imparted by Kelvin Leung was to be exploited. The fact remains, however, that a level of uncertainty does not of itself necessarily negate the probabilities, perhaps the very strongest of probabilities.

188. What must also be taken into account is that, within minutes of the break in the telephone conversation, the Applicant was considering the data that lay behind the information imparted to him by Kelvin Leung. As the Tribunal has noted

earlier, the standards of measurement that lay for consideration were not esoteric in nature nor, if the raw figures were available, highly complex in their integration into the standards of measurement. To that must be added the fact that the Applicant was a senior member of his hedge fund, he was a man with many years of experience in the field. Even accepting that the data available to the Applicant on the evening of 6 January 2016 may not have been as extensive as the figures put before this Tribunal (and the court in South Korea), when considered in the round by an experienced financier such as the Applicant, the Tribunal is satisfied that the overall content of the data that was available would have pointed relatively quickly – and clearly - to the fact that there were not seven qualifying companies. There were in fact only three securities companies which fitted the standards of measurement imparted by Kelvin Leung; namely, Hyundai, Kiwoom and Meritz.

189. In respect of that far more limited number of just three companies, when the standards of measurement imparted by Kelvin Leung were considered in conjunction with each other, and although the decision would not have been without some measure of risk, the Tribunal is satisfied that the Applicant would have come to appreciate that only one company could be said with confidence to fit those two standards of measurement, especially the standard of daily gross turnover. That company was Hyundai.

190. As it was put by Mr Chan, counsel for the SFC, when the data was considered in the round by an experienced financier, a man familiar with such assessments, even given the limited time available, Hyundai was the only 'realistic candidate'. The Tribunal agrees with that assessment.

191. On a consideration of all the evidence, the Tribunal is satisfied that the Applicant then proceeded to short Hyundai on the basis that, on what he had been informed by Kelvin Leung and what his own investigations revealed, Hyundai was the only realistic candidate to be the subject of the block trade. That was the reason for his disingenuous conduct towards Kelvin Leung: he knew that, he was engaging in deceitful conduct.

192. In the light of these findings, it is not necessary to determine whether the information given to the Applicant by Kelvin Leung in their first telephone conversation constituted 'inside information' as that term is understood in Hong Kong law. That has never been the issue. The issue has been whether the Applicant's conduct breached the Code of Conduct.

193. What then of the fact that Kiwoom, albeit to a very limited extent, was also chosen by the Applicant for the share swap exercise? The evidence before the Tribunal was never been substantial enough to enable it to draw an inference, one that is compelling in its nature, as to why Kiwoom exactly Kiwoom was also chosen. That said, any uncertainty as to why this company was also chosen, albeit to an insignificant extent, has not caused this Tribunal any concern as to the correctness of its findings concerning the decision made by the Applicant to short the shares of Hyundai.

194. For the reasons given, therefore, the Tribunal is satisfied that the Applicant did fail to comply with General Principles 1 and 7 of the Code of Conduct.

Looking to an appropriate sanction

195. In considering appropriate sanctions, it must be emphasized that they are not designed simply to punish an individual for his or her wrongdoing. They are not, therefore, to be equated with punishment under the criminal law. In the context of this matter, sanctions are designed as a defensive measure, that is, they are designed to protect the integrity of the market. They are designed to better ensure that the market operates in an honest and fair manner, each of these descriptions being essential to the maintenance of public confidence.

196. Of course, sanctions that are imposed in order to protect the integrity of the market will inevitably cause hurt to culpable individuals. By way of illustration, if a person judged to constitute a threat to the market is removed from

his or her position within the market, that will inevitably cause financial hurt and no doubt also harm to reputation. But these are the inevitable consequences of ensuring that the integrity of the market itself is maintained.

197. That said, the Tribunal is aware that any sanction, or set of sanctions, imposed must take into account relevant mitigating factors particular to the individual who has been found culpable.

198. On behalf of the Applicant, Mr. Duncan challenged the sanction of suspension for three years as being entirely disproportionate. Mr. Duncan submitted that no period of suspension was required.

199. As to the Applicant's personal circumstances, Mr. Duncan pointed to his distinguished career record and the damage that a period of suspension would have on that career; more importantly perhaps, the damage that may be occasioned to the investment funds managed by him.

200. As to the Applicant's seniority in the profession, the Tribunal is not prepared in the present circumstances to give this any weight. The Applicant's seniority and his distinguished career record should have acted as sure and certain insulation against the temptation to act in the deceitful manner that he did. Regrettably, it did not. The Applicant's seniority in the profession acted as no protection to the integrity of the market. Put bluntly, he should have known better.

201. As to the Applicant's removal from the helm of his business, nothing has been put before the Tribunal to suggest that an experienced and capable substitute cannot be found.

202. It was said on behalf of the Applicant that his conduct had not been motivated by personal gain. This the Tribunal rejects. The Applicant held his position of high seniority in Trafalgar in order to ensure the profitable workings of

the corporation and the greater the profit the more the Applicant, whether directly or indirectly, must have stood to gain.

203. In assessing the seriousness of the Applicant's conduct, the SFC commented that, having considered the totality of his conduct, it was of the view that his conduct was not the conduct of a person who remained fit and proper to hold a licence. As to any comparison with the outcome of the Korean proceedings, the following was said:

> "The fact that under Korean law, your conduct resulted in enforcement action that is administrative in nature and did not impact the regulatory status of the Trafalgar fund (or you) as a foreign investor … does not, in our view, inform the appropriate disciplinary outcome that should ensue from such conduct as a matter of Hong Kong law."

204. The SFC continued by stating that, in any event, it understood that the Applicant did not hold a licence in Korea capable of being suspended or revoked by the Korean regulatory authorities.

205. The core factual basis for the SFC's imposition of the penalty of suspension lay in the unethical manner in which it was satisfied that the Applicant had exploited the information that he had received from Kelvin Leung in the course of their first telephone conversation. In this regard, the SFC said the following in its Notice of Proposed Disciplinary Action:[22]

> "There is no express finding of dishonesty in the Decision, but the purpose of your conduct was making profit based on the information you received in confidence. Such conduct was contrary to the requirement to act fairly and in the best interests of the integrity of the market and calls into question your ability to conduct regulated activities competently, honestly and fairly…"

[22] See paragraph 50 (c).

206. It was the SFC's view that a deterrent message needed to be sent to the market so that there could be no misunderstanding as to the manner in which it viewed the unfair exploitation of the sounding out process.

207. As to the core of the Applicant's culpability, the Tribunal agrees with the findings of the SFC that it is to be found in the deceitful manner in which he sought to manipulate matters in respect of his dealings with Kelvin Leung, doing so because he believed that he could exploit the information imparted to him. The Tribunal is satisfied that, even if he originally broke off his conversation with Kelvin Leung for good faith reasons, once he appreciated the possibility of being able to exploit the information that he now had in his possession, he then sought in an underhand way to seek a financial gain by manipulating matters, principally by taking the necessary steps to avoid having to speak to Kelvin Leung, doing so in the knowledge that he had not yet been formally wall-crossed.

208. To the understanding of the Tribunal, 'sounding out' calls of the kind initiated by Kelvin Leung on the evening of 6 January 2016 are integral to the efficient running of the financial industry. There are, of course, guidelines issued by financial institutions to try and ensure that such calls do not compromise regulatory constraints. That said, however, in the swift exchange of information in financial matters, unless such calls are to be reduced to the level of cumbersome 'box-ticking exercises', those who initiate such calls must be armed with a level of discretion as to how best to approach counter-parties and how best to market whatever financial instrument it is that they have to sell. That is why, as the Tribunal has noted earlier in this determination, in the course of such conversations, a party being approached - somebody, therefore, in the position of the Applicant in the present case - has the obligation to consider the nature and extent of the information being imparted and to determine whether that information binds him or her to confidentiality.

209. In respect of the Applicant's actions, it is a cause for real concern that a man of the Applicant's seniority and experience, a man more particularly who

had earned his high level of responsibility, should have seen fit, while maintaining a front of bonhomie, to have acted in such a disingenuous, manipulative manner towards a colleague in the profession.

210. Throughout the evening of 6 January 2016 and well into the morning of the following day, it is evident that the Applicant sought to exploit the information he had obtained (first direct from Kelvin Leung and then through the analysis of that information) while remaining at a distance from Kelvin Leung and not being drawn back into a situation of confidentiality which would then have prevented him from using the information in any manner at all, either by way of hedging or by way of short selling.

211. In the circumstances, bearing in mind the position of high responsibility held by the Applicant at the time, and the fact that he abused that responsibility, the Tribunal is satisfied that a period of suspension is required. The more difficult question is the length of that suspension.

212. The Tribunal has been informed that, once the matter of his misconduct arose, the Applicant took early steps to ensure that internal systems in his company were fortified. That is all to the good and is to be recommended. It is to be remembered, however, that it was not so much a system that was at fault in this instance, the fault lay rather in the personal conduct of the Applicant.

213. The Tribunal does, however, take into account that, as matters turned out, the Applicant's culpable conduct had very little impact on the market. The threat that his actions actually posed was, therefore, minimal. This it considers to be a material factor.

214. In all the circumstances, the Tribunal has come to the determination that a period of suspension of two years is the most appropriate sanction. An order to that effect is made accordingly.

Costs

215. Bearing in mind that the Tribunal has reduced the Applicant's period of suspension from three years to two years, and adhering to the principle that costs are assessed on a broad, equitable basis, there will be an order nisi that costs will follow the event and be awarded against the Applicant but only as to 80% of those costs. For the avoidance of doubt, in the calculation of costs, both the SFC and the Applicant shall be entitled to a certificate for two counsel. Should either party wish to challenge this order nisi, application shall be filed with the Tribunal within 30 days of the date of this determination.

(Mr Michael Hartmann)
(Chairman)

(Professor Chan Ka-lok)
(Member)

(Mr Vincent Chan Chun-hung)
(Member)

Mr Peter Duncan, SC leading Mr Ho Ching Him, instructed by Sidley Austin
for the Applicant

Mr Abraham Chan, SC, leading Mr Harrison Miao, instructed by the SFC
for the Respondent