

Application No. 9 of 2004

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

IN THE MATTER OF a Decision made
by the Securities and Futures
Commission under section 36(2)(b) of
the Commodities Trading Ordinance,
Cap. 250

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

BETWEEN

CHENG WAI SHAN

Applicant

and

SECURITIES AND FUTURES COMMISSION

Respondent

Tribunal: Hon Mr Justice Stone, Chairman

Date of Hearing: 9 December 2004

Date of Determination: 23 December 2004

DETERMINATION

The Application

1. This is an application for review by Mr Cheng Wai Shan against the decision of the Securities and Futures Commission dated 30 August 2004 to suspend his registration under the Commodities Trading Ordinance for a period of 9 months.

2. Mr Cheng has taken issue with this decision, and with the consent of the parties this review has been conducted before this Tribunal consisting of the Chairman sitting alone, pursuant to the provisions of section 31, Schedule 8, of the Securities and Futures Ordinance, Cap 571.

The Background

3. Mr Cheng was first registered as a licensed dealer's representative on 22 March 2000. He started work at the Tanrich Group, before switching to his current position as a futures broker with Sun Hung Kai Commodities Ltd. His title at Sun Hung Kai is that of Assistant Vice President.

4. Whilst at Tanrich, he had as a colleague there a Miss Shirley Au, who subsequently joined him at Sun Hung Kai; Miss Au is the person who has played a significant role in the factual background leading to the present disciplinary action against Mr Cheng.

5. The present case stemmed from the SFC investigation into unauthorized trades executed in the futures trading account of one Lydia Lam, a client of Sun Hung Kai, on dates between June and September 2002.

6. These trades, the cumulative effect of which apparently resulted in losses in excess of the capital within the account, were effected by Miss Shirley Au who, when she was working for Sun Hung Kai, was effectively unlicensed. Although Miss Au had been a licensed dealer's representative in her previous employments, it was a condition of her licence that when she changed employment, she had to apply to the SFC for a transfer of her accreditation. When she had left Celestial Commodities Ltd and had joined Sun Hung Kai in June 2002 she had applied to the SFC for a change of her accreditation, but her application was not approved at the time of the events in question.

7. Mr Cheng, the applicant herein, was Miss Au's supervisor at Sun Hung Kai, and the gravamen of the SFC disciplinary action is that, in effect, he had abrogated his responsibility in this regard and had left Miss Au to deal with the client, Miss Lydia Lam, who was Miss Au's friend and whom Miss Au had introduced to Sun Hung Kai for the purpose of opening a futures trading account.

8. The SFC complaint was that Mr Cheng had dishonestly represented to his employer, Sun Hung Kai, that he had met the client, Miss Lam, and that he had explained the account opening documents to her and the risk profile of futures trading, that Mr Cheng had failed to exercise due skill and diligence in supervising Miss Au, in particular in allowing her to handle orders whilst she was not a licensed representative accredited to Sun Hung Kai, and thus had assisted her to breach her licence condition and facilitated her conduct of trades, at least some of which are alleged to have been unauthorized.

9. Against this background, by a Letter of Mindedness dated 31 May 2004 the SFC proposed to suspend Mr Cheng's licence for a period of 12 months.

10. In response, in his representations dated 29 June 2004 Mr Cheng admitted that he had been dishonest to his employer in falsely representing that he had met Lydia Lam and explained the account opening documents to her, and that he had failed to use skill and diligence in supervising Shirley Au in permitting her to handle this client account absent her accreditation to Sun Hung Kai. He stated that he truly regretted that he had allowed such a serious matter to occur, assured the SFC that such would never happen again, and requested that a fine be imposed in lieu of a suspension because he would not be able to continue with his job at Sun Hung Kai without a licence.

11. After considering these representations, the SFC decided to reduce the suspension period to 9 months, and it is against this decision that Mr Cheng lodged his application for review on 16 September 2004.

The Argument

12. The ambit of the argument in this review has been in short compass.

13. Mr Cheng has been disarmingly frank. He made no attempt to obscure his admitted responsibility for what has taken

place in terms of the operation of Lydia Lam's account, and his plea for a penalty reduction effectively reduced to two main points: first, in terms of personal circumstances that meant that he was the only one supporting his family financially, and that he would be in difficulty in maintaining a minimum living standard should he be suspended; and second, that at the time of the events in question at the beginning of 2002 that he had had very little, if any, experience in managerial supervision, and that he simply had not handled the situation properly.

14. In fact, Mr Cheng had proffered alternative submissions in terms of that which he maintained was the appropriate penalty. In his succinct written argument, he had stated that the correct period of suspension for his misdeeds was 3 months' suspension, but in oral argument he suggested that a licence suspension of 6 months was appropriate, and when taxed on the disparity he opted to nail his colours to the longer period.

15. For the SFC, Mr Liang noted Mr Cheng's frank admission of guilt, and based his submission upon the deterrent effect of disciplinary sanction within a regulatory environment in which a licensing regime had been put in place to ensure that those participating in a market – in the instance of futures trading a

particularly risky market – can expect to deal with properly registered and licensed persons who will abide by the relevant regulations and Codes of Conduct issued by the regulator of that market.

16. He submitted that misconduct and oversight of the type that had occurred in this instance must be discouraged and punished, and that whilst the issue of financial/personal hardship may be the regrettable consequence of SFC sanction, such did not minimize or excuse the actions of which complaint had been made. Moreover, he said, the purpose of the SFC's disciplinary action was the legitimate one of setting standards for the profession, and was necessary to sustain public confidence in the integrity of the investing profession.

17. In the premises, Mr Liang argued, the reduced sentence of 9 months, which took into account Mr Cheng's frankness and co-operation, was the appropriate penalty, and one which should remain undisturbed.

Determination

18. This tribunal has said on a number of occasions that, as a matter of general approach, in terms of penalty it does not readily

seek to substitute its own judgment for that of the market regulator unless it appears that something has gone wrong, or that the sanction attributed to a particular course of conduct may legitimately be characterized as unfair or unreasonable such as to merit review intervention.

19. That said, this case has given this tribunal some pause for reflection. What this case demonstrates, and indeed that which the applicant does not attempt to hide, is a considerable degree of stupidity and supervisory neglect – although not, I think, venality – in terms of his misplaced trust in Miss Shirley Au, whom the tribunal has been told now has had her licence revoked. Quite clearly, in his dealings with her, Mr Cheng foolishly took that which doubtless was the easy way out, and neither demonstrated his authority nor did that which clearly was required of him.

20. I suspect that the difficulty was that Miss Au had been a former colleague, whom he had known and worked with in previous employment, and whom he knew, also, was no newcomer to the business or to the position of dealer's representative, although of course, *qua* her employment at Sun Hung Kai, he also was aware that she was not accredited; in this regard he has told this tribunal that he had thought that this 'accreditation gap' would

soon be remedied, and that permitting Miss Au to handle her friend, Miss Lam's, affairs, albeit whilst technically unlicensed, would be a relatively short term difficulty.

21. This tribunal has not had the opportunity of hearing either from Miss Lam or from Miss Au, and so it is difficult accurately to gauge Mr Cheng's complaint, in effect, that these women had been colluding in saying that which was perceived to be necessary in order to bolster Miss Lam's attempt to extract compensation from him or from Sun Hung Kai; in any event, although he maintained that in a sense he, too, was a victim of these events, Mr Cheng frankly recognized also that in the circumstances he had, as he put it, "victimized himself".

22. There is no doubt, of course, that the supervisory aspect of this case – that is, absence of a proper supervisory element by a company officer seized with that task – is an exacerbating feature, and is a matter meriting significant deterrent penalty.

23. In this regard Mr Liang has submitted that the suspension handed down to Mr Cheng is consistent with past disciplinary decisions of the SFC, and he has drawn my attention to four cases wherein the suspension of registration ranged from 3 months to

one year; in this context he has argued that the present case must be placed at the upper end of the spectrum in light of Mr Cheng's supervisory role and his clear failure of managerial duty in permitting Miss Au to act as she did. Moreover, said Mr Liang, commodities trading poses high risks, and thus it was the more important that there be adherence to strict risk disclosure requirements.

24. All this is true, of course, and if I may say so Mr Liang put his case eminently fairly. Nevertheless, after taking account of the particular facts of this case, this tribunal is left with a lurking sense of unease.

25. Mr Cheng found himself in a situation in dealing with a former colleague which he handled badly and foolishly in permitting Miss Au to act as if she were accredited to Sun Hung Kai; he anticipated, and indeed was told, that this accreditation would soon occur, and clearly he should not have proceeded as he did. This tribunal has heard little about Miss Au, but it appears that she was not inexperienced, and she had of course been licensed when at her previous employer. It is also evident from the papers that she had a closer relationship with Miss Lam, the client, than perhaps is often the case; from the statements it appears that

Miss Lam was not only her friend, but also the tenant of Miss Au's flat.

26. In the circumstances, therefore, I find some difficulty in accepting at face value the idea that Miss Lam was quite as uninformed as is said to have been the case, and there may well be something in Mr Cheng's concern that these two ladies were close, both in terms of the ill-judged trading activities, and in the aftermath of these trades, in which the issue of compensation clearly loomed large.

27. Looking at the case broadly I consider that this is an application for review of sentence which is very much on the borderline. There is no question but that Mr Cheng's actions merit a significant period of suspension, but on the other hand, on the facts of this case – and each case must be fact-sensitive – I have concluded, albeit not without considerable reflection, that in the sentence initially handed down the SFC have somewhat over-egged this particular pudding, and that in terms of the previous disciplinary decisions cited that this applicant did not deserve to be placed at the upper end of the scale.

28. I have therefore decided that it is appropriate to allow this application, and that the sentence of 9 month's suspension imposed upon Mr Cheng be varied to a suspension of 6 months. I so order.

29. As to costs, Mr Cheng was unrepresented, and in the circumstances I consider it appropriate to make no order as to the costs of this application.

Hon Mr Justice Stone
(Chairman)

Mr Cheng Wai Shan, Applicant, in person

Mr Lucas Liang, of the Securities and Futures Commission, for the Respondent