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Application No 11 of 2009

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IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

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IN THE MATTER of a Decision
made by the Securities and Futures
Commission pursuant to s
195(1)(a)(i) of the Securities and
Futures Ordinance, Cap 571, (the
Ordinance)

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IN THE MATTER of s 217 of the
Ordinance

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BETWEEN

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TSANG WAH NAM

Appellant

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and

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SECURITIES AND FUTURES COMMISSION

Respondent

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Before: Hon Saunders J, Chairman

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Dates of Hearing: 20 January 2010

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Date of Decision: 20 January 2010

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DECISION

Background:

1. On 9 October 2009, the Securities and Futures Commission, (the SFC), made a decision, pursuant to s 195(1)(a)(i) of the Ordinance, to suspend Mr Tsang's licence as a representative for such period as a bankruptcy order made against him on 17 February 2009, remains in effect.

2. Mr Tsang has appealed against that decision to this Tribunal. With the consent of both Mr Tsang and the SFC, pursuant to the provisions of s 31, Schedule 8 of the Ordinance, the hearing was conducted by the Tribunal consisting of the Chairman alone.

The power to suspend:

3. Under s 129(1) of the Ordinance, the SFC, in considering whether a person is fit and proper to remain licensed, is obliged to look at, amongst other things, that person's:

- (a) financial status or solvency;
- (b) ability to carry on the regulated activity, competently, honestly and fairly; and
- (c) reputation, character, reliability and financial integrity.

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4. Under s 195(1)(a)(i) of the Ordinance the SFC has a specific discretionary power to suspend a licensed person’s licence if a bankruptcy order is made against that person. This power is in addition to the power of the SFC to suspend a person’s licence under s 194 of the Ordinance for misconduct or failure to satisfy the SFC that that person is a fit and proper person to hold a licence.

5. The SFC has issued formal guidelines, called the “Fit and Proper Guidelines”, (the Guidelines), containing matters which are likely to give rise to concerns about a person’s fitness and propriety to hold a licence. The Guidelines contain the following particular provisions:

Para 1.3: “In simple terms, a fit and proper person means one who is financially sound, competent, honest, reputable and reliable.”

Para 4.1.1(a) “The SFC is not likely to be satisfied that a person is a fit and proper person if that person... is an undischarged bankrupt...”

Para 8.1 “A person licensed or registered under the SFO... must continue to be fit and proper.”

6. Having learned of Mr Tsang’s bankruptcy, and following representations made by him, and properly following the appropriate procedure, the SFC made its decision to suspend his licence during the period of the bankruptcy.

7. Mr Tsang was first registered as a dealer’s representative under the Securities Ordinance and Commodities Trading Ordinance on 18 February 1994, and under the Leveraged Foreign Exchange Trading

Ordinance on 23 December 1994. He is currently licensed to carry out Types 1, 2 and 3 regulated activities under the Ordinance. He has been employed by Celestial Commodities Securities Ltd and Celestial Commodities Ltd as a dealer's representative since 12 September 1996.

8. Mr Tsang petitioned for his own bankruptcy on 31 December 2008. According to the Statement of Affairs his debts amounted to \$1,278,771, principally credit card debt and personal loans.

9. It is appropriate to note here that there are two means by which a person may be discharged from bankruptcy. First, he may pay off all his debts, in which case he will be entitled to an immediate discharge. Second, he may pay as much as he can, or indeed nothing at all, and at the end of a 4 year period he will be entitled to a discharge.

The grounds of appeal:

10. First to the SFC, and again today before me, Mr Tsang has explained the reasons for his bankruptcy in the following way:

(a) first, it was necessary to undertake extensive and expensive socialising with his clients in order to build up a client network;

(b) second, a house property purchased by him became subject to negative equity as a result of a collapse in the property market, and he was forced to sell it at a discount;

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(c) in order to deal with his financial difficulties he took a part-time job and devised a repayment plan in the hope of clearing the loans, but;

(d) the arrival of the financial tsunami caused many of his clients to suffer substantial losses, with a consequent reduction in their investment activity and a consequent reduction in his income;

(e) he then sought to make an arrangement with his creditors, but they refused leaving him with no option but bankruptcy.

11. Mr Tsang is the breadwinner of the family. He says that he ought to be able to continue to hold a licence in order that he may support his family, make a contribution to the reduction of his debts, and not be forced onto CSSA.

12. Mr Tsang offers two principal reasons why, notwithstanding the bankruptcy he ought to be able to continue to hold a licence. First, he says that in his work he is simply responsible for executing client orders and does not have access to client cash or securities. Second, he says he has been in the industry for 16 years during which time he has not received any client complaint. He submits that this demonstrates his ability to provide professional advice to clients on investment strategies.

13. He is supported in his application by his employer who, by letter sets out steps taken which it believes will adequately protect clients in these circumstances.

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14. Mr Tsang says that if he is able to continue to work in the securities industry he will be able to earn and will contribute to the reduction of the debts that he has accumulated. He says that his bankruptcy was unrelated to his work, and arose solely because of his persona lifestyle decisions, which in part were adversely affected by factors beyond his control. He argues that a person who goes into bankruptcy, by reason of personal factors, unrelated to his work situation, ought not to be discriminated against by the SFC.

Discussion:

15. Inevitably, one has a deep sense of sympathy for the position in which Mr Tsang finds himself. It is undoubtedly most unfortunate that, as a result of his bankruptcy, and the suspension of his licence during the period of the bankruptcy, Mr Tsang is likely to lose his job.

16. But notwithstanding that sympathy, I am obliged, as was the SFC, to have regard to the fact of the bankruptcy. It is simply not possible to separate that bankruptcy, albeit a personal matter, from Mr Tsang's professional position. That is because bankruptcy is a personal financial matter, and the personal financial integrity of persons in the financial industry is inevitably a matter with which the SFC and the general public are entitled to be concerned.

17. That is a concept that applies widely; it applies equally to professionals such as lawyers or accountants, each of whom deal with financial matters on behalf of members of the public.

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18. The SFC is of the view, correctly in my view, that bankruptcy casts doubt on the financial integrity, reputation and reliability of a person, consequently placing in question that person's fitness and propriety to remain licensed.

19. A person in bankruptcy, in the securities industry, with the opportunity to be discharged from that bankruptcy by the immediate repayment of his debts, is necessarily exposed to the temptation to use clients funds or stocks inappropriately in order to gain access to funds to enable himself to discharge his debts and thereby obtain a discharge from bankruptcy.

20. Unfortunately, Mr Tsang's situation is not unique. A significant number of the appeals coming before the Tribunal are appeals from persons in precisely the same situation as Mr Tsang. The Tribunal has consistently supported the SFC in its view as set out in paragraph 18 above. There is nothing special about Mr Tsang's situation that provides a basis upon which the Tribunal can say he ought not to have his licence suspended during the period of the bankruptcy.

21. It is right that Mr Tsang has been in the industry for a number of years, and that during that time there has been no complaint against his conduct. But I accept the submission of the SFC that the fact of the bankruptcy puts him at a higher risk of deviating from the high standards required of a licensed person, during the period of bankruptcy. During the period of his bankruptcy, Ms Lee says, Mr Tsang will be facing a period of financial austerity and will be under financial stress. I accept the submission that a person in those circumstances is not a proper person to

be dependent upon the generation of trading commission for income as a consequence of being in a position to advise or influence clients as to securities purchases.

22. Although Mr Tsang may not have been dealing directly with clients, he is licensed to do so, and the SFC is of the view that the interests of his employer's clients and the investing public may be placed at risk if Mr Tsang is permitted to continue as a licensed person during the period of his bankruptcy. I cannot say that that view is wrong. Consequently, although his employer is willing to retain his services, I must place the interests of the investing public first. That requires that, during the bankruptcy, Mr Tsang should not be exposed to any temptation that might arise through his employment.

23. Mr Tsang says that the causes of his bankruptcy and his financial management problems have nothing to do with his duties and expertise. That may be so, but that does not detract from the fact that a person who is bankrupt and in financial austerity ought not to be exposed to the risk of inappropriate dealing with funds belonging to others. Mr Tsang, in his written submission, concedes that his spending habits were irresponsible and that he was spending beyond his means. These very facts, and his bankruptcy, are a sufficient basis for the SFC to properly have doubt as to his financial integrity and consequently his fitness to hold a licence.

24. I reject the proposition that there is an element of discrimination in the decision of the SFC. By s 4(c) of the Ordinance, the SFC is obliged, in dealing with its regulatory powers, to provide protection

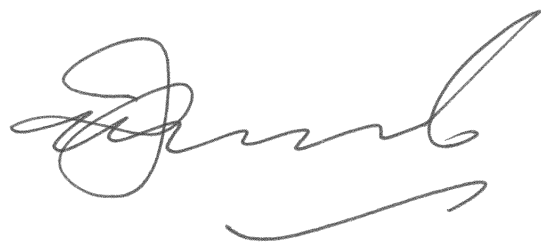
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for members of the investing public. By taking steps to ensure that bankrupt persons are not exposed to the temptation of inappropriately using clients funds or stocks, the SFC are properly meeting that objective. In those circumstances it cannot be argued the SFC is acting in a discriminatory manner when exercising its powers as it has in this case.

25. I am satisfied that the SFC has taken into account all matters raised by Mr Tsang in opposition to the decision. In so doing they have properly exercised the discretion given under s 195(1)(a)(i) reasonably and no grounds exist upon which the Tribunal may interfere with that decision.

26. The decision of the SFC must be confirmed. The appeal is dismissed. Having regard to Mr Tsang’s financial position, and in accordance with what appears to be the usual practice of the Tribunal, there will be no order for costs.



(John Saunders)
Judge of the Court of First Instance
High Court
Chairman

The Appellant, in person
Ms Annabel T M Lee, Counsel, Securities and Futures Commission for the Respondent