

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

IN THE MATTER OF a Decision made
by the Securities and Futures
Commission under section 120(3) of the
Securities and Futures Ordinance, Cap.
571

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

BETWEEN

WAN YIN YING

Applicant

and

SECURITIES AND FUTURES COMMISSION

Respondent

Tribunal: Hon Mr Justice Stone, Chairman

Members: Mr HUI Chiu Chung, Stephen, J.P.

Mr LEE Kwan Ho, Vincent Marshall

Date of Hearing: 13 April 2007

Date of Determination: 17 August 2007

DETERMINATION

The application

1. This is an application for review by Ms Wan Yin Ying in respect of the decision of the SFC to refuse her application for a representative licence to carry out Type 1 regulated activity (dealing in securities).
2. The Notice of Decision by the SFC was dated 19 September 2006, and was communicated to Ms Wan, the applicant herein, by letter of like date.
3. Ms Wan's application for review of this decision was made by letter dated 9 October 2006.

Factual background

4. Ms Wan previously had been registered as a securities dealer's representative from February 1993 under the now-repealed Securities Ordinance.
5. Her registration was automatically revoked when the Securities and Futures Ordinance came into force in April 2003 as she was unable to transfer her accreditation to another licensed corporation.

6. Ms Wan had been accredited to ICEA Securities Ltd ('ICEA') from October 2001 until she was dismissed, and she had left the industry in November 2002.

7. The background to her dismissal was thus.

8. In October 2002 the SFC had received a complaint from one Lee Chi Wah, at that time one of the clients of ICEA, that Ms Wan had conducted unauthorized trades in his account.

9. Although this complaint subsequently was withdrawn, the Enforcement Division of the SFC investigated the matter, and Ms Wan was interviewed by the regulator on 5 occasions between November 2002 and 3 March 2003; in addition, the SFC interviewed clients and staff of ICEA.

10. As a result of this investigation the SFC determined that Ms Wan had conducted unauthorized trades in at least 3 of her client's accounts during 2001 and 2002 during the period of her employment by ICEA.

11. In brief, it was found that between March to July 2002, Ms Wan had conducted 60 trades in the account of the original complainant, Lee Chi Wah, without his consent or authorization, which had resulted in an unsettled deficit balance of HK\$137,000 in that account as at October 2002; between April and June 2002, she had carried out 24 trades in the account of one Wong Koon Hung without his consent or authorization, trades which were admitted in taped telephone conversation, and which caused financial

loss to Wong in the sum of approximately HK\$55,000 and to ICEA in the sum of around HK\$65,000; and that between October 2001 and June 2002, Ms Wan also had conducted trades in the account of her brother, one Wen Guang Wen, trades which never were settled, and which resulted in a deficit balance in that account of around HK\$719,800 as at October 2002.

12. The SFC investigation was concluded in September 2003. We are told by Counsel for the SFC, Ms Lisa Chen, that by this time Ms Wan already had left the industry; had she remained, we are informed that the SFC would have mounted disciplinary action against her on the basis of the findings of the investigation which had been mounted with regard to Ms Wan's allegedly unauthorized trading activities.

13. Had the matter remained thus, doubtless nothing further would have occurred, and this case would not have seen the light of day; having left the securities industry, Ms Wan no longer was under the SFC's disciplinary purview.

14. However, this situation did not continue, because on 9 May 2005 Ms Wan applied to the SFC for a representative licence to once again carry on Type 1 regulated activity.

15. The SFC responded to this new application by letter dated 20 July 2005, in which the SFC informed Ms Wan of the findings of its investigation, and warned her that such findings would be taken into account by the Licensing Department in consideration of her licensing application.

16. For its part the SFC appears to have born in mind the fact that Ms Wan had had no opportunity to respond the findings of its investigation into her conduct whilst she had been employed at ICEA, and accordingly, in order to avail her of such opportunity, the Licensing Department of the SFC had 3 meetings with her on 27 July 2005, 10 March 2006 and 12 June 2006.

17. Minutes of these meetings have been produced, the content of which Ms Wan disputes, but the SFC maintains – and we have no reason to doubt this submission – that such Minutes were prepared on the basis of contemporaneous notes taken at those three meetings.

18. This interchange resulted in a letter dated 13 April 2006 from the SFC to Ms Wan which detailed the SFC concerns over her fitness and properness to be licensed. Ms Wan was invited to respond to the matters raised in that letter, but she failed to do so.

19. Accordingly, on 28 June 2006 the SFC sent a Letter of Mindedness to Ms Wan informing her that it intended to refuse her licence application for the reasons given therein, and she was invited to make further representations by 26 July 2006 as to why her application should not be refused.

20. Ms Wan did make such representations, by letters dated 4 July, 5 August and 18 September 2006.

21. Having considered these representations, the SFC remained unsatisfied that Ms Wan was a fit and proper person to be so licensed, and

therefore sent to her the Notice of Decision and Statement of Reasons by letter dated 19 September 2006.

22. Ms Wan is aggrieved at this Decision – hence this application.

The argument

23. At the hearing of this application Ms Wan, who represented herself, did not give evidence, and simply adopted the submissions she had made to the Tribunal in writing, and those that she also had written to the SFC.

24. She maintained that she had conducted the trades investigated by the SFC with the authorization of the account holders, and that she had received (and had submitted to the SFC) certain letters of authorization from Wong Koon Hung and Wan Kwong Man.

25. She said that there were audio recordings indicating that ICEA had received the authorization letters, contrary to their claims, and maintained that the SFC “accepted unilaterally” the evidence provided by the complainant and ICEA without giving her the right to question the complainant and ICEA.

26. She further said that she had conducted stock trades in the account of Lee Chi Wah with his agreement and authorization, and that Lee Chi Wah was “totally aware” of the trading in his account.

27. The foregoing summary can be elicited from her letter to the Tribunal.

28. In terms of her prior representations to the SFC, she maintained that she had had an employment dispute with ICEA over her salary and commissions, and her employer then had “unreasonably issued” proceedings against her (the Defence in District Court Action 583 of 2004 is in the papers before us), although this case did not go further, and she herself had lodged a complaint to the Labour Tribunal (Claim No 1786 of 2005, subsequently withdrawn); accordingly, it could be appreciated that relations between herself and ICEA had not been amicable, and no doubt explained her employer’s attitude in “picking on” her and her clients.

29. Ms Wan also claimed that she had not conducted “unauthorized” trades in the accounts of Lee and Wong, but claimed that she had “mistakenly” booked trades belonging to Wen and other clients into the accounts of Lee and Wong, quoting the incorrect account number on several occasions, noting that errors were inevitable when the market was busy, as it was at that time.

30. At the hearing before this Tribunal she admitted that “I was in the wrong in dealing with these matters” in terms of her *modus operandi*, but insisted that she had not conducted unauthorized trades, and that the SFC was wrong in its conclusion as to her ‘fitness and properness’ again to work in the securities industry.

31. Ms Wan placed blame on ICEA for not permitting her to correct her “mistaken” trades, and maintained that the deficit balance in the accounts of Lee and Wong were caused by the refusal of the brokerage to allow her to rectify such mistakes.

32. In addition, she said, Wen never had settled any of his trades with ICEA because of a dispute with the brokerage, and she denied having the telephone conversation, as had been recorded, with Wong’s girlfriend (who had been posing as Wong’s elder sister).

33. She also said that ICEA already had accepted written authorizations duly signed by her clients, and on 27 July 2005 and 4 August 2005 she had produced two written authorizations signed by Wong and Wen to the SFC, which had forced her to admit mistakes she had not made.

34. For the SFC, Ms Lisa Chen submitted that the findings of the SFC investigation, and Ms Wan’s failure to provide a satisfactory response to those findings, were relevant factors to take into account when considering her licence application.

35. She submitted that Ms Wan’s explanation that she had “mistakenly” booked trades belonging to Wen and other clients into the accounts of Lee and Wong was inconsistent with her earlier claim that she had verified each trade and had confirmed the account balance with Lee and Wong on a daily basis.

36. The SFC did not accept that there had been any such confirmation with Lee and Wong, said Miss Chen; in fact, the evidence uncovered by the SFC investigation into the relevant circumstances indicated that the so-called “mistaken” trades all had been discovered by Lee and Wong themselves.

37. In fact, Ms Chen noted, in the brief period of 4 months there had been a total of 84 trades in the accounts of Lee and Wong that had been conducted without their consent and authorization, and even if (which was not accepted) such were the product of “mistakes” as claimed by Ms Wan, the sheer frequency of such itself was sufficient to raise an issue as to the competency of Ms Wan to be licensed to carry on a regulated activity.

38. Ms Chen further submitted that Lee, Wong and Wen all had opened a cash account (as opposed to a discretionary account) with ICEA, and that no written authorizations authorizing Ms Wan to deal in their respective accounts were to be found in the account opening documentation supplied by ICEA; to the contrary, according to the Terms and Conditions of Cash Client’s Agreements and the Account Opening forms so provided, Lee, Wong and Wen had named themselves as the sole authorized person who was able to deal with their respective accounts.

39. Ms Chen stated that Ms Wan had not provided the authorizations to the SFC during the investigation in 2002 and 2003. Such documents as had been provided subsequently to the SFC were not found in the account opening documents provided by ICEA, and themselves appeared incomplete, being neither dated nor counter-signed by a witness. In short,

said Ms Chen, the SFC had very real doubts as to the authenticity of such 'authorisations' concerning the Wong and Wen accounts as Ms Wan had submitted, and even if in fact they had been signed by Wong and Wen, there was no evidence that they had been signed when these clients had opened their respective accounts with ICEA.

40. Ms Wan also had failed to show that Lee had signed any similar such 'authorisation', said Ms Chen, and in any event, even if the 'authorisations' had been properly executed (which was denied), the same would only have authorized Wan to have carried out discretionary trades, which was entirely different from using client accounts for third party trading.

41. Ms Chen submitted that in the circumstances, and upon reviewing the situation, the SFC had had no alternative but to consider the unauthorized trading activities of the applicant, Ms Wan, as not only amounting to a breach of paragraph 7.1(a) of the Code of Conduct for Registered Persons – regarding the necessary authorization for a transaction or transactions – but that these events legitimately called into question Ms Wan's honesty, reliability and integrity to be a licensed representative.

42. In light of the evidence that it had uncovered as to Ms Wan's history of unauthorized trading, the SFC had the entirely appropriate concern, Ms Chen further argued, that Ms Wan clearly had failed to recognize the seriousness of her past conduct, and that she would be tempted to do the same again if she were to be granted a licence as she now wished.

Decision

43. The SFC, as regulator, has the power to refuse a licence application: under *section 120(3)* of the SFO, the SFC shall refuse to grant a licence to carry on a regulated activity unless the applicant satisfies the SFC that he/she is a fit and proper person to be so licensed, with the onus therefore being upon the applicant so to satisfy the SFC.

44. In addition, *section 128(2)* of the SFO provides that in considering a licence application the SFC may have regard to any information in its possession, whether or not provided by the applicant for such a licence, whilst *section 129(1)* provides that in considering whether a person is a fit and proper person so to be licensed, the SFC shall look at his financial status or solvency, his ability to carry on the regulated activity competently, honestly and fairly, and his reputation, character, reliability and financial integrity.

45. That the SFC has such a wide-ranging frame of reference is unsurprising; there can be few more important functions of a regulator of financial markets than to ensure that the calibre of those persons licensed to participate therein is of appropriate standard.

46. Against this statutory jurisdiction properly to ‘vet’ prospective entrants into the securities industry, it is a more than usually difficult task for a Tribunal such as this to be persuaded to overturn a carefully considered licensing decision by the Licensing Department of the SFC in the absence, for example, of clear and cogent evidence of unfairness in the decision-making process or obvious reliance upon inaccurate/incorrect

primary data, or evidence of a degree of bias against the particular applicant for a licence sufficient to merit that which in judicial review terms otherwise might be characterized as ‘Wednesbury unreasonable’.

47. Such examples of potential vitiating defects is not intended to be exhaustive, but serves simply to emphasise the point that in this, as in other significant areas relating to regulation of the operation of the financial/securities markets, the regulator must be permitted to regulate unless there is evidence that a particular disciplinary decision clearly is erroneous and cannot be justified.

48. This Tribunal has stated a number of times that is *not* a regulator, and does not purport to be so, and thus it requires a certain strength of case to persuade it to interfere with a considered and *bona fide* regulatory decision reached in face of relevant evidence.

49. In the present instance, therefore, in light of the SFC’s considered view that Ms Wan’s history in the industry gives rise to the conclusion that she is not ‘fit and proper’ now to be licensed, it strikes us that the evidence and/or arguments in support of this application would require to be compelling before we could be persuaded to order that a person should be admitted to practice in the securities industry when the regulator charged with the integrity of that industry has taken an equally firm view that such a course manifestly would not be in the interests of the industry.

50. Viewed against the backdrop of these principles – which surprisingly appear to require frequent reiteration in judgments of this

Tribunal – it seems to us that the present application by Ms Wan is doomed to fail.

51. During its lengthy history this case has generated a significant volume of documentation/evidentiary material which in itself is indicative of the considerable care with which the SFC has invested in this case, and given the *prima facie* evidence before the regulator, we entirely fail to appreciate how the SFC can be criticized for the approach that it now has taken towards Ms Wan's application.

52. Indeed, in light of the factual background as revealed on the papers before us, we think that it would have been surprising, to say the least, if in such circumstances the regulator in fact had acceded to the request to issue the new licence for which Miss Wan has applied.

53. In our judgment, therefore, there was, and is, more than sufficient material available to the SFC for the regulator to have come to the view that it took, and thus to decline this Ms Wan's licensing application.

54. We further appreciate, and have taken into account, Ms Wan's arguments, forcefully put before us. We bear in mind also that, given the sequence of events, and her departure from the industry prior to any disciplinary charges being mounted against her, that such 'charges' as would have been brought consequent upon the investigation conducted by the SFC were not, by necessary force of circumstance, formally brought against Ms Wan at the time, and that these allegations now have been brought to bear in this licensing context.

55. Nevertheless, we are able to see nothing in the arguments put forward by Ms Wan on this application which would lead to the conclusion that the SFC decision on her licensing application was in clear error.

56. No evidence was called by Ms Wan in this application serving to demonstrate that the SFC view of the relevant sequence of events, and in particular the allegation of her unauthorized trading on client accounts, was misplaced. To the contrary, the considerable volume of material as has been collated to-date suggests that there was and is, to put it at its lowest, real cause for concern on the part of the SFC.

57. True it is that on several occasions during this application, in an effort to supplement her case Ms Wan has made reference to the issuance of a subpoena by this tribunal with regard to the compulsion of certain witnesses whose evidence, Ms Wan maintained, would establish that she had made/conducted no such unauthorized trades. During a directions hearing, presided over by the Chairman alone, Ms Wan had made an application in this regard, which application ultimately was refused, the Chairman taking the view that the Tribunal was not inclined to, and would not, embark upon such an exploratory course unless Ms Wan was able both to identify those persons she wished to subpoena to give evidence on her behalf, and further was able to indicate the broad nature of the evidence which thus might be anticipated to forthcoming from any such witnesses; such information, however, was not produced, and the application proceeded in normal course, with Ms Wan personally arguing her case from the Bar.

58. For the reasons now given, however, we consider that this application cannot succeed.

59. We accept the concluding submission by Ms Chen for the SFC, which has a public duty to promote the integrity of licensed representatives and to safeguard the interests of investors, that Ms Wan has represented inconsistent versions of event to the regulator, representations which remain uncorroborated by evidence from her clients or from her former employer, ICEA, and that in the circumstances the SFC was entirely justified in concluding that Ms Wan not only had conducted unauthorized trades but had continued to fail to recognize such 'wrongdoings', and thus was not 'fit and proper' to be licensed.

60. We naturally have some human sympathy with Ms Wan's suggestions in mitigation that she should be accorded another chance, her admitted prior 'mistakes' notwithstanding, and we note that on the face of the correspondence there is at least some suggestion by the regulator that, upon satisfaction of certain stipulated conditions, Ms Wan could be permitted to be employed in a 'backroom' position within the securities industry, albeit with no client contact.

61. We understand, however, that Ms Wan, who struck as being consumed by this case, is not interested in pursuing this suggestion, and nevertheless has pressed ahead with this application for review of the SFC refusal to licence her, an application which unfortunately has not met with the success for which she obviously hoped.

Order

62. It follows for the foregoing that the Order of this Tribunal upon this application is as follows:

- (i) The application for review is dismissed;
- (ii) There is to be an order *nisi* that there be no order as to the costs of and occasioned by this review.

We have chosen to make an order *nisi* in these terms because Ms Wan was unrepresented, and, we understand, currently is unemployed. However, if and in so far as the SFC wishes to pursue the issue of costs against Ms Wan, we see no need for any further attendance before the Tribunal, and the Chairman will entertain any consequential submissions as to costs in writing.

Hon Mr Justice Stone
(Chairman)

Mr Hui Chiu Chung
(Member)

Mr Lee Kwan Ho
(Member)

Ms Wan Yin Ying, Applicant, in person

Ms Lisa Chen, Counsel for the Securities & Futures Commission,
for the Respondent