Application No. 4 of 2004

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

IN THE MATTER OF a Decision made by the Securities and Futures Commission Ordinance under 56(2)(b) of the Securities Ordinance (Cap. 333)

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

BETWEEN

WONG WING FAI, ERIC — Applicant

and

SECURITIES AND FUTURES COMMISSION — Respondent

Tribunal: Hon Mr Justice Stone, Chairman

Mrs LEE WONG Pui Ling, Angelina, JP, Member

Mr TSIEN Samuel Nag, Member

Date of Hearing: 9 July 2004

Date of Reasons for Determination: 2 August 2004

REASONS FOR DETERMINATION

The Application

1. This is an application for review by Mr Eric Wong Wing Fai, a securities analyst, against the decision of the Securities and Futures Commission ("SFC") dated 29 March 2004 to suspend his registration for a period of 18 months.

2. At the conclusion of the hearing we dismissed this application, thereby affirming the decision of the SFC, and undertook to provide our reasons therefor at a later date. This we now do.

The Background

3. The applicant was first registered as a securities dealer's representative on 26 March 1997. From June 2001 to early October 2002 he worked for Dao Heng Securities as a research analyst. It was during this period that the matters the subject of the present case occurred. After leaving Dao Heng in early October 2002, Mr Wong became Head of Research at Shun Loong Securities Co Ltd, ceasing to work for that entity on

24 April 2004. We are told that Mr Wong is no longer employed within the securities industry.

4. This particular case stemmed from an SFC investigation into the short selling of 20,000 shares in a company known as Neolink Cyber Technology (Holding) Ltd. For present purposes the details of the investigation do not greatly matter. Suffice to say that the SFC suspected that there had been a breach of section 80 of the Securities Ordinance concerning short selling of securities. Their inquiries led them to interview a lady by the name of Clara Ho Chung Wah, a dealing director of CU Securities Ltd, who had carried out the transactions in question on 30 September 2002 for the account of one Wong Man Woon.

5. It transpired that Clara Ho is the wife of the applicant herein, and MW Wong is his father. SFC investigations thereafter focused upon the margin account statement of MW Wong for the month of August 2002. This investigation revealed that, by means of the operation by the applicant of his father's account at CU Securities, a number of securities had been traded which had been the subject of his recent research reports.

6. After receiving representations from the applicant on 6 January 2004 in response to a Letter of Mindedness, on

29 March 2004 the SFC formally found that the applicant had breached the staff dealing policy of Dao Heng Securities Ltd by dealing in shares within 3 weeks of the publication of his research reports on such shares, that he had breached GP1 of the Code of Conduct for Persons Registered with the SFC by failing to act honestly, fairly and in the best interests of his clients and of the market, and that he had breached GP 6 of the Code of Conduct by failing to avoid conflicts of interest.

7. Consequent upon these findings, the SFC concluded that the applicant had been guilty of misconduct, that his failings were, or were likely to be, prejudicial to the interests of the investing public, and that his fitness and properness as a licensed person had been called into question, as had his honesty, reputation, character and reliability.

8. Accordingly the SFC made the decision to suspend the applicant's licence for a period of 18 months under section 56(2)(b) of the Securities Ordinance, Cap 333.

Ambit of this application

9. The issue of liability has *not* been in question. The sole matter for the consideration of this tribunal upon this application

has been to review the 18 month period of licence suspension as imposed upon Mr Wong.

The Argument

10. On behalf of the applicant Mr Yim put his argument attractively and in a variety of ways, although at bottom his submission returned to his one basic proposition, namely that the penalty meted out by the regulator to Mr Wong was manifestly excessive, and that the period of 18 months' suspension as was handed down could not be justified.

11. When pressed upon the issue of the appropriate penalty for a regulatory infraction of this nature Mr Yim was constrained to accept that for the offence in question a suspension of 12 months would be "about right", and indeed that if this had been the penalty this application would not have been mounted.

12. One specific theme running through his submissions, in fact the argument which became his central premise, was that it was common ground that the share purchases in question had taken place in the period 9 August to 30 August 2002, and that the dealing in securities contiguous to the research reports in question constituted an offence which had been committed in a different

climate, and at a time when securities communities, be they domestic or international, were less concerned than at present by conflicts of interest on the part of securities analysts.

13. His argument was that his client, Mr Wong, with only a few years' experience under his belt, had committed the offences in question at a time when these matters were not regarded as serious, and that, in short, he was "a victim of his times". Accordingly, in considering the appropriate penalty for Mr Wong, Mr Yim maintained that the regulator should not have regard to the current market environment, but should restrict itself, when considering penalties for regulatory infractions, to the less censorious climate prevailing at the time when the offence was committed. In this regard he prayed in aid the spirit if not the letter of Article 12(1) of the Bill of Rights – which of course has no application, since it refers exclusively to criminal cases – the point here sought to be made by analogy being that in sentencing for a criminal offence regard is to be paid to any less serious view taken of that offence as at the date of its commission, with this more lenient view thus reflected in the sentence.

14. If this be right, said Mr Yim, then the material variously relied upon by the SFC in exacting the present penalty of 18 months, such as international responses to analyst conflicts of

interest, and actions taken in other jurisdictions, represented matters which should not have been taken into account, or otherwise accorded the degree of significance which clearly had been the case in reaching the decision under review.

15. In response Mr Chan of the SFC vigorously defended the regulator's position. He emphasized the SFC's duty to regulate the securities industry in Hong Kong, and the apparent public concern over analyst conflict of interest. He maintained that in order to restore investor confidence and as a deterrent to others, a lengthy suspension was warranted, and that the applicant had failed to demonstrate good and cogent reason why the penalty as imposed was manifestly excessive, nor why it should not be permitted to stand.

Decision

16. As we have stated, the result of this application was decided at the end of the hearing before us, the members of this tribunal having come to the view that the application should be immediately dismissed.

17. If we may say so, we were wholly unpersuaded by Mr Yim's arguments, enthusiastically though they were propounded.

18. Given that Mr Yim had conceded at the outset that a period of 12 months' suspension in any event would have been justified, it seemed to us that the characterization as "manifestly excessive" of the 18 months in fact handed down was somewhat ambitious. It struck us that arguments as to sentence which are based upon the principle of 'manifest excess' are generally made in the context of significantly greater levels of disparity than is apparent in this instance.

19. This tribunal, albeit differently constituted, has seen fit to stress in a number of previous cases that in matters of professional misconduct within the securities industry that it requires a strong case indeed to induce us to interfere, given that the regulator is clearly in the best position to weigh the seriousness of the professional misconduct in question, and to determine the penalty for any particular misconduct.

20. If we may say so, this case provides a paradigm example. We are told that this is the first case in Hong Kong in which a research analyst has been disciplined by the SFC for trading in securities before and after publication of his research reports upon such securities. Indeed, Mr Yim expressly adverted to the absence of any 'sentencing guidelines' in this area, which is the reason, no doubt, that he endeavoured to interest us, without

conspicuous success, in sentencing decisions in other types of enforcement action wherein, he said, it was rare for there to be imposed a suspension in excess of 12 months.

21. Be that as it may. It is precisely because this is the first such case of its kind, and it is precisely because the SFC is the securities regulator within an international financial center, and thus peculiarly is aware of the dangers posed by conflicts of interest on the part of analysts, that we consider that the penalty handed down for such infraction – unless wholly and patently unjustifiable – should be permitted to stand, and should not be the subject of interference in light of what seems to us, in this case, to be no more than an instance of 'special pleading' on the part of this applicant.

22. We also take this opportunity to state, as firmly as we may, that we are wholly unsympathetic to the argument of counsel for the applicant that, in effect, because the infractions in this case occurred at a time when the influence of securities analysts was or may have been less fully recognized than is the case today – a proposition which, if we may say so, we find difficult fully to accept – that such situation (even if established) should effectively preclude the regulatory body from dealing with the case as it thinks fit at the material time.

23. With respect, this strikes us as nonsense. A regulator does not regulate in a time-warp. The regulator's duty is to respond speedily and efficiently to correct regulatory infractions, and to act accordingly in terms of penalties handed down for such infractions. So far as the role of the research analyst is concerned, in practice the analyst acts as the bridge between investor and listed company. Notwithstanding the manifest and much publicized excesses that occurred during the securities 'dot com' boom, many investors still consider analysts an important source of information, and couch their investment decisions accordingly. Clearly it is vital for the maintenance of investor confidence in a securities market that such analysts act with integrity when producing their reports, and an important check and balance in terms of the maintenance of such integrity, and the avoidance of conflicts of interest, lies in the temporal trading restrictions imposed upon analysts contemporaneous with publication of a research report.

24. Against this background, therefore, we consider it absurd to suggest that the suspension invoked in this case by the regulator against this analyst, who does not dispute the primary findings against him, can seriously be characterized as "manifestly

excessive". It seems to us that the public interest demands firm action of this type on the part of the regulator.

25. In his mitigation, Mr Yim also made play of the fact that in reaching its decision on penalty the SFC had failed to take into account the applicant's "helpful, frank and truthful attitude" in interviews, and that for that reason alone the penalty should be reduced.

26. Once again we are unimpressed by this argument. Disciplinary actions are punitive, and are intended to have a deterrent effect. "*Pour encourager les autres*" is not an inappropriate maxim for a regulator to espouse. Moreover, the point remains that in principle mitigating factors have less resonance within domestic disciplinary regimes as compared with the influence of such factors within the criminal system. In this connection we take the opportunity to refer to the words of Sir Thomas Bingham MR (as he then was) in the English Court of Appeal decision in *Bolton v Law Society [1994] 1 WLR 512* wherein the learned judge expressed the salient distinction thus:

> "It is important that there should be full understanding of the reasons why the tribunal makes orders which might otherwise seem harsh. There is, in some of these orders, a punitive element: a penalty may be visited on a solicitor who has fallen below the standards required of his profession in order

to punish him for what he has done and to deter any other solicitor tempted to behave in the same way. Those are traditional objects of punishment. But often the order is not punitive in intention… In most cases the order of the tribunal will be primarily directed to one or other or both of two other purposes. One is to be sure that the offender does not have the opportunity to repeat the offence. This purpose is achieved for a limited period by an order of suspension; plainly it is hoped that experience of suspension will make the offender meticulous in his future compliance with the required standard. The purpose is achieved for a longer period, and quite possibly indefinitely, by an order of striking off. The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth… A profession's most valuable asset is its collective reputation and the confidence which that inspires.

Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again… All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears likely, to be so the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member. Membership of a

> profession brings many benefits, but that is a part of the price."

27. Although *Bolton, op cit.,* was a case involving a dispute as to disciplinary sanction within another profession, namely upon a solicitor, the overriding principle remains clear, whereby the purpose of such disciplinary actions is not only to sanction the individual but also to set standards for the profession and to sustain public confidence in the integrity of the profession.

28. Members of the investing public are entitled to expect that members of the securities industry are trustworthy and are persons of integrity. In this connection we agree with the observation of Mr Chan, who conducted his case with eminent good sense, that the impact of the decision upon the regulation of research analysts in Hong Kong assumes greater importance than the personal fortunes of the applicant, whom unfortunately placed himself in a conflict of interest situation, and who now must bear the consequences.

Costs

29. At the conclusion of the application before us the issue of costs was raised.

30. Mr Chan asked for the SFC's costs of the application, and in light of the decision to dismiss the application, and to affirm the decision made by the SFC, Mr Yim did not demur in principle.

31. However, he did raise objection to, and ask for his costs of, the preliminary directions hearing in this case which took place before the Chairman alone on 4 May 2004. His basis for this request was that at that hearing the SFC had taken the point that as Mr Wong no longer was employed within the securities industry, having left his last employer, Shun Loong Securities Co Ltd, on 24 April 2004, as a consequence this tribunal no longer had jurisdiction to entertain this application for review.

32. This point did not meet with the approval of the Chairman at the time that it was made, and the matter was left over to be raised at the substantive hearing of the application, if such was thought appropriate. In fact, said Mr Yim, the point had been abandoned and had not re-emerged, but he wished to secure his costs in successfully opposing the argument at the time.

33. It seems clear that Mr Yim had been instructed to attend the directions hearing in any event. Absent this argument having taken place, directions in any event needed to be made, and in normal course the order at such directions hearing would be that

costs are to be in the application. In the circumstances, however, it seems to us that the most appropriate order is that there be no order as to costs of that directions hearing.

34. Accordingly, the costs order of this tribunal is that the costs of this application, to be taxed if not agreed, are to be to the respondent thereto, save that there be no order as to costs of the hearing on 4 May 2004.

Hon Mr Justice Stone (Chairman)	Mrs Lee Wong Pui Ling (Member)	Mr Tsien Samuel (Member)

Mr Valentine Yim instructed by Messrs Lam & Lai, Solicitors, for the applicant

Mr Jimmy Chan of the Securities and Futures Commission, for the respondent