Application No. 3 of 2005

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

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

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

BETWEEN

NG SHUN FU Applicant

and

SECURITIES AND FUTURES COMMISSION Respondent

Tribunal : Hon Mr Justice Stone, Chairman

Dr Au King Lun, Member

Mr Roger Thomas Best, JP, Member

Dates of Hearing : 24 – 25 October 2005

Date of Determination : 30 May 2006

DETERMINATION

The Application

1. This is an application by Mr Ng Shun Fu for review of a decision of the Securities and Futures Commission ("SFC") in its Notice of Final Decision dated 26 April 2005, whereby the SFC suspended Ng's license for 9 months under section 56 of the (now repealed) Securities Ordinance ("SO"), and pursuant to the relevant transitional provisions in the new Securities and Futures Ordinance, Cap. 571.

2. In his application for review dated 13 May 2005, Mr Ng sought to challenge the SFC's decision, both as to its substantive findings and as to the level of disciplinary sanction imposed.

3. In themselves, the facts of this case are relatively straightforward. Mr Ng was the licensed Dealing Director/Responsible Officer of Ever-Long Securities Companies Limited ("Ever-Long Securities"). One of the firm's employees committed a number of irregularities in handling certain accounts and clients' assets. The SFC discovered these matters in the course

of an investigation which initially was not targeted at Mr Ng, the firm, or the employee, Mr Tam. However, the discovery led the SFC ultimately to discipline Mr Ng.

4. Whilst in normal course this review would not have taken any great length of time to consider, a significant procedural issue arose during the course of oral argument; in fact, it came into full flower upon probing by the Tribunal. Thereafter each side sought (and was granted) leave to obtain counsel's opinion on the point, which, in turn, identified further variations of the basic issue and led to yet further written submissions. Unfortunately, this has caused some delay in the adjudication process and in the Tribunal arriving at the present Determination.

The Factual Background

5. The history to this case began in June/July 1999 with a share placement by one Sen Hong Resources Holdings Limited ("Sen Hong"), a company listed on the Stock Exchange of Hong Kong. Pursuant to an agreement dated 3 June 1999, Ever-Long Securities acted as placing agent and lead underwriter. There were 6 sub-underwriters – all of which were companies incorporated in the British Virgin Islands ("BVI") and were clients of Ever-Long Securities (the "Six Clients").

6. Sen Hong's share placement, by way of a rights issue in July 1999, was only 25.28% subscribed. Therefore the Six Clients took up the remaining 74.72% of rights shares.

7. The Six Clients were introduced to Ever-Long Securities by one Tam Cheuk Hong ("Tam"), at the time a dealer's representative of the firm. When later interviewed by the SFC, Tam said that he had met a person called 'Sam' at a social gathering. Tam did not recall Sam's full name and could not provide any contact information. According to Tam, Sam had asked him for blank account opening forms and subsequently returned six completed forms for the Six Clients. Without having met the account holders, Tam falsely declared that he had witnessed the Six Clients' signatures on the relevant forms.

8. This was merely the start of an extensive series of irregularities within Tam's handling of those six accounts, as will shortly be outlined.

9. Throughout the period of the occurrence of those irregularities, Mr Ng, the applicant herein, was the Dealing Director (later Responsible Officer) of Ever-Long Securities.

10. On 8 November 2002, the SFC commenced an investigation pursuant to section 33 of the (now repealed) Securities and Futures Commission Ordinance ("SFCO") into whether offences contrary to the (now repealed) Securities (Disclosure of Interests) Ordinance may have been committed in respect of dealing in the 'Sen Hong share placement', and whether any persons may have committed a defalcation or other breach of trust or misfeasance in dealing in the shares of Sen Hong.

11. Exercising its powers under section 33, the SFC interviewed, amongst others, both Messrs Ng and Tam.

12. In the course of this investigation, it transpired that Tam had committed a series of irregularities in handling the accounts of the Six Clients. These included :

(1) Failure to verify the identity and financial standing of the Six Clients before opening accounts for them;

(2) Falsely declaring that he had witnessed the clients' signatures on their account opening forms;

(3) Failing to ascertain the identity of persons operating those accounts by telephone;

(4) On a number of occasions, making cash cheques and/or cash withdrawals from the Six Clients' accounts without written instructions, and contrary to Ever-Long Securities' policy that the clients themselves had to attend the firm's office in order to sign cash withdrawal slips.

13. Furthermore, according to that which Mr Ng told the SFC, he had exercised little (if any) supervision over Tam, and was unaware of important aspects of the handling of the Six Clients' accounts. Therefore the SFC, after due procedure, disciplined Mr Ng. The Notice of Decision delimited the grounds of the disciplinary action thus :

(1) That Ng had failed to adequately supervise Tam or to put in place adequate internal control procedures;

(2) That Ng had failed to enquire into the financial standing of the Six Clients;

(3) That Ng had failed to be satisfied on reasonable grounds as to the identity of the person that stood to gain the economic benefit or bore the economic risk of the relevant subscription of the Sen Hong shares;

(4) That Ng had failed to safeguard clients' assets; and

(5) That Ng had failed to keep proper records to account for the clients' assets in the handling of clients' transactions and assets.

14. For our part, we are constrained to wonder whether Mr Ng, as the Dealing Director/ Responsible Officer, in truth kept as little control over his account executives, and knew as little about the Six Clients' accounts, as he had claimed to the regulator. The hard fact is that those accounts were involved in a substantial business transaction for which the firm borne primary risk as lead underwriter. Nevertheless, the SFC appears to have proceeded on the basis of Mr Ng's representations in this regard, and for the purpose of this Determination we are minded to follow the like course.

The Grounds of Appeal

15. In the Notice of Application for Review dated 13 May 2005, Mr Ng's solicitors raised 6 grounds of appeal. But later in his skeleton arguments, Mr Henry Wong, appearing for Mr Ng, relied upon but four. They are :

(1) That the SFC had failed to give due regard to Mr Ng's efforts in relation to the supervision of Tam and putting in place internal control procedures;

(2) That the SFC based its decision upon a lack of sufficient documentary evidence to substantiate Mr Ng's case without due regard to the explanation that such evidence was lost during the course of relocation of offices of Ever-Long Securities;

(3) That the SFC had confused the roles of Ever-Long Securities and its fellow subsidiary Ever-Long Finance Company Limited ("Ever-Long Finance"); and

(4) That the SFC had erred in relying upon self-incriminating evidence of Mr Ng when such evidence

was provided in a totally different context, and without proper caution or explanation of the consequence(s).

16. We deal with these grounds in turn.

(1) Internal Control Procedures

17. Mr Wong argued that Mr Ng should not be "vicariously liable" for Tam's misdeeds; he had, it was said, fulfilled his supervisory responsibility by putting in place internal control procedures.

18. As to this, the short point is that the documents demonstrate clearly that the SFC never had sought to make Mr Ng "vicariously liable" for Tam's misdeeds. It disciplined him for primary supervisory failures.

19. Second, in terms of internal control procedures, Mr Wong pointed to the existence of an Operation Manual, and to Mr Ng's statements that there were frequent internal meetings to implement the procedures.

20. However there is no corroborating evidence whatever as to such actual implementation, and in the circumstances we are

disinclined to give any weight to this argument. Moreover, by his own admission and on his own case, Mr Ng had approved the opening of the Six Clients' accounts without adhering to the procedures in the Operation Manual for the opening of accounts for BVI companies.

21. We note that in his statements to the SFC, Mr Ng himself had claimed to be unaware of certain important aspects of the handling of the Six Clients' accounts, and that on this one case, he did not check that the clients' identity and financial standing had been verified. We also bear in mind the curious fact that the Six Clients' subscription money for the Sen Hong share placement was *not* channelled through Ever-Long Securities, even though the latter was the placing agent and lead underwriter, and that, according to Mr Ng, he neither was aware nor concerned about how the money was paid to Sen Hong; he simply had left it to Sen Hong to complain if it did not get the money.

22. In our view the foregoing elements demonstrate an absence of even the most basic element of appropriate supervision. In light of this conclusion, and considering the number of serious irregularities in connection with the Six Clients' accounts, in our

judgment the SFC acted entirely reasonably in concluding that there were, in fact, no proper internal control procedures in place.

23. After reflecting upon all the circumstances, we consider that there is nothing of substance in this point.

(2) Loss of Evidence

24. Mr Ng attributed his inability to locate some of the records and materials requested by the SFC to the relocation of the office of Ever-Long Securities.

25. In our view this 'excuse' does not suffice. As the Dealing Director/ Responsible Officer, Mr Ng had a clear duty to ensure that records are kept. We give no weight to this submission, which in the circumstances strikes us as opportunistic to say the least.

26. Accordingly we reject this argument also.

(3) Ever-Long Finance

27. Mr Ng contended that the SFC has confused the role of Ever-Long Securities with that of Ever-Long Finance. It is argued

that the Six Clients' monies were channelled through Ever-Long Finance, and that since Ever-Long Finance was not licensed by the SFC, such matters could not give rise to any regulatory action.

28. We are strongly disinclined to accept this contention. The documents before us indicate that Mr Ng and the other directors of Ever-Long Securities and Ever-Long Finance in practice paid scant regard to the separation of these two entities, notwithstanding that for the purpose of this application it now clearly is convenient to attempt to draw a clear line of demarcation between them.

29. Moreover, in our view Mr Ng's contention in this regard is misconceived. The hard fact is that Mr Ng and Ever-Long Securities had a duty to safeguard their clients' assets, a duty that cannot effectively be rendered meaningless simply by the expedient of routing, or choosing to route, clients' monies through a "sister" unregulated entity.

30. So we consider that there is nothing in this point either.

(4) Use of Self-incriminating Evidence

31. It is this fourth head, and the arguments of law engendered thereby, which has caused us some concern, and has necessitated reception of written submissions upon this procedural issue.

32. The SFC interviewed Mr Ng, three times, under section 33 of the SFCO, in respect of an investigation *not* into Mr Ng specifically, but into dealing in the Sen Hong share placement.

33. Section 33 provides that:

> *"(1) Where –*
>
> *(a) the Commission has reason to believe that an offence under any of the relevant Ordinances may have been committed; or*
>
> *(b) the Commission has reason to believe that a person may have committed a defalcation or other breach of trust, fraud or misfeasance or other misconduct in connection with [certain activities] …*
>
> *the Commission may in writing direct one or more of its employees … to investigate any of the matters referred to in paragraphs (a) to (e) and report to the Commission thereon.*
>
> *…*
>
> *(4) The person under investigation or a person who is reasonably believed or suspected by the investigator to have in his possession or under his control, information relevant to an investigation under this section, or who is so believed or suspected of otherwise having such information in his possession or under his control shall –*
>
> *(a) produce … any record …*
>
> *(b) if so required by the investigator, give to him such explanation or further particulars in respect of a record …*
>
> *(c) attend before the investigator at such time and place as he may require in writing, and answer truthfully and to the best of his ability such*

> *questions relating to the matters under investigation as the investigator may put to him …*
>
> *(5) A barrister or solicitor acting for the person under investigation may*
>
> *(a) attend an examination of that person …*
>
> *(6) A person shall be obliged to answer questions put to him under this section by the investigator, but if the answers might tend to incriminate him, and he so claims before answering the question, neither the question nor the answer shall be admissible in evidence against him in criminal proceedings other than proceedings for an offence under subsection 12 or section 36 of the Crimes Ordinance (Cap. 200) or for perjury, in respect of the answer but shall be admissible for all the purposes of the Securities (Insider Dealing) Ordinance (Cap. 395); the investigator shall, before asking any question under this section, inform the person concerned of the limitation imposed by this subsection in respect of the admissibility in evidence of the questions and any answers given.*
>
> *…*
>
> *(12) Any person who*
>
> *... (c) without reasonable excuse fails to comply with a requirement under subsection 4(c) to attend before the investigator;*
>
> *(d) without reasonable excuse fails to answer any question put to him by the investigator under subsection 4(c), or in answering such a question says anything which he knows to be false or misleading in a material particular or who in so answering recklessly makes a false statement;*
>
> *… commits an offence."*

34. According to the SFC, Mr Ng was *not* a target of the investigation then afoot. He was not a "person under investigation" ("PUI") as referred to in section 33(4), but rather a "person who is reasonably believed or suspected to have in his possession or under his control information relevant to an investigation". At face value this is understandable. Mr Ng was the Dealing Director/ Responsible Officer of a brokerage; the SFC was investigating share transactions conducted by clients of that firm through accounts under Mr Ng's ultimate responsibility.

35. The SFC, therefore, did *not* say to Mr Ng that he was in any way a PUI. It also did *not* say to Ng that records of his interviews could be used in any future disciplinary action against him.

36. However, as matters transpired, the SFC later conducted a disciplinary inquiry into Ng's conduct under section 56 of the SO, and used the records of the earlier interviews as evidence against him in those disciplinary proceedings.

37. Was it entitled to do so?

38. Section 56 of the SO provides that :

> *"(1) The Commission may at any time make inquiry concerning any of the following matters –*
>
> *(a) whether a registered person, being an individual, corporation or partnership –*
>
> *(i) has provided the Commission, whether before or after being registered under the Ordinance or the [SFCO], with such information relating to him, and to any circumstances likely to affect his method of conducting business, as may be required by or under either of those Ordinance [sic];*
>
> *(ii) is or has been guilty of any misconduct in relation to the conduct of his business; or*
>
> *(iii) is a fit and proper person to be registered by reason of any other circumstances; or*
>
> *…*
>
> *(2) After making such inquiry in respect of a registered person … the Commission may if it thinks fit –*
>
> *(a) revoke the registration of the person;*

> *(b) suspect the registration of the person for such time, or until the happening of such event, as it may determine; or*
> *(c) reprimand him or, in the case of a registered person that is a corporation, reprimand any officer of the corporation.*
> *(3) The Commission shall not impose any penalty under subsection (2) without first giving the registered person … an opportunity of being heard.*
> …
> *(5) For the purposes of this section "misconduct" means –*
> *(a) any failure to comply with a requirement of or imposed by or under this Ordinance or the [SFCO] with respect to dealers, investment advisers or representatives;*
> *(b) any failure to observe the terms and conditions of a certificate of registration;*
> *(c) any act or omission relating to the conduct of business of a dealer, investment adviser or representative which is or is likely to be prejudicial to the interest of members of the investing public;*
> *(d) any failure to comply with any requirement of or imposed by or under any of the rules made by the Commission under this Ordinance or the [SFCO]."*

39. During the course of oral argument in this application, we inquired of the SFC and of Mr Ng's solicitors whether any legal issue arose in terms of the use of those records of interview. After brief initial responses, the parties sought leave to file written submissions on the point. In light of its importance, both in this case and generally, such leave was granted.

40. Thereafter, each side duly obtained counsel's advice, which each in turn was used to challenge the other's submissions. In essence, counsel advising the SFC took the view that the regulator was not under any legal obligation to inform Mr Ng that he was a PUI or that the records of his interviews could be used against him in any future disciplinary proceedings. Counsel

advising Mr Ng, on the other hand, argued that the SFC was under an obligation to give Mr Ng some form of "warning" or "caution" (about his status as a PUI and/or the possibility of the records of his interviews being used against him), and that its undisputed failure so to do had "tainted" the records of interview such that they could no longer be used against Mr Ng.

41. With the benefit of lengthy written argument, we are satisfied that the relevant issues arising have been adequately covered, and we take this opportunity to set out our conclusions below, which we have framed under the following headings.

(i) Warning or Caution necessary in Section 56 Inquiries?

42. The starting point for this debate is that section 56, governing disciplinary inquiries, does *not* in terms require the SFC to inform any person under the inquiry that he is a target or that the information he provides could be used against him.

43. This is clear from the specific wording of section 56. We note that this particular issue also was considered, and a like conclusion reached, with which we respectfully agree, in the decision of the former Securities and Futures Appeals Panel in *Re Wan Chuen Chung Joseph, Gao Ying Lun, and Goldwyn Capital*

Limited, per Robert Tang S.C. (as he then was), decision dated 15 September 1998, (at paragraphs 32 to 35).

44. This fact, of course, does not mean that any target of a disciplinary inquiry is without rights. Basic principles of fairness and natural justice, which safeguard procedural rights, come into play at the later stage when the SFC believes there to be any violation of regulatory requirements, and in turn considers relevant sanctions.

(ii) Use in Section 56 Inquiries of Records of Interview Taken During Section 33 Investigations?

45. The next point arising for consideration is that there is nothing in the provisions of section 33 of the SFCO, or within section 56 of the SO, prohibiting the use of records of interviews from a section 33 investigation in a subsequent section 56 disciplinary inquiry. Indeed, this was specifically conceded in his written opinion by counsel advising Mr Ng.

46. However, this in turn raises the narrower question of whether the SFC in fact should have warned/cautioned Mr Ng in the course of the earlier interviews that :

(1) the SFC could use the records of his interviews as evidence against him in any subsequent disciplinary proceedings; or

(2) that at some stage during the section 33 investigation into dealing in shares of Sen Hong that Mr Ng himself had become a target of potential SFC disciplinary action.

We deal briefly with each such aspect.

(iii) Warning or Caution about Use of Records of Interviews?

47. Turning to the first of these two issues, section 33(6) of the SFCO requires the SFC to warn/caution an interviewee about potential use of his evidence against him in subsequent criminal proceedings. This requirement clearly is consistent with a person's general privilege, under both common law and statute, against self-incrimination. Such warning/caution enables the interviewee to assert such privilege.

48. However, nowhere in section 33 (or indeed in any other section) is the SFC required to warn/caution an interviewee about the potential of his evidence being used against him in *disciplinary*

proceedings. To the contrary, subsection (6) only requires the SFC to "inform the person concerned of the limitation imposed by this subsection in respect of the admissibility in evidence of the questions and any answers given." Such 'limitation' refers to the inadmissibility of the evidence in criminal proceedings. There is no similar limitation in respect of disciplinary proceedings.

49. With due respect to the authors of the legislation, the form of this statutory scheme demonstrates an inherent logic. There is no privilege against self-incrimination in disciplinary proceedings, and a warning/caution to a mere interviewee would not serve any legal purpose; at this stage that person has no privilege to assert, and his evidence is admissible in any event.

(iv) Warning or Caution about 'Becoming a Target'?

50. The second of the two issues warrants a little more analysis. In essence, counsel advising Ng argued that, at some point during the three interviews under section 33 of the SFCO, the SFC must have come to regard Mr Ng as a target for potential disciplinary action. In the circumstances, it thus is submitted, the SFC should have warned Mr Ng about it.

51. The SFC disputes this as a matter of fact. According to the SFC, Mr Ng was not such a target at the time of these interviews. We have reviewed the documentary record and in this regard we are inclined to agree. In any event, however, nothing turns on this. The arguments advanced on behalf of Mr Ng fail as a matter of law. In our view there are five reasons supporting this view.

52. First, neither section 33 of the SFCO nor section 56 of the SO make any reference to an obligation upon the SFC to inform a person about being the target of an investigation or inquiry. As we have earlier observed, the warning/caution is linked to a person's privilege against self-incrimination, not to his status as a target. Indeed, such warning/caution must be given regardless of whether an interviewee is a target or not.

53. Second, a close reading of section 33 indicates that the concept of a "PUI" is used for two purposes: (1) to describe a category of people whom the SFC may compel to attend an interview and to provide information; and (2) to provide these people with a statutory right to legal counsel. There is no hint of any right to be informed as to an interviewee's status as a PUI.

54. Third, counsel advising Ng cited several Australian cases in support of his argument. Section 70(3) of the Australian Securities Commission Act 1989 specifically requires the federal regulator to state in its interview notice "the general nature of the matter" that it is investigating. In contrast, we note that section 33 of the SFCO imposes no such like obligation upon the Hong Kong regulator.

55. It is also instructive to observe that the Australian cases consistently have held that a description of 'the general ambit' of investigation would suffice. Of particular interest in this context is *Australian Securities Commission v. Avram* [1996] 70 FCR 481, wherein North J. considered, at 485G-487D, whether the relevant section 70(3) statutory obligation would require the regulator to disclose to an interviewee the identity of the targets of its investigation (even the interviewee himself). The learned judge held (at 487C) that it did not.

56. Given that Hong Kong's legislation does not impose upon the SFC the like specific obligation that the Australian legislation thus imposes, it strikes us that it would be somewhat odd to divine within our law an obligation as to disclosure of the

identity of targets (including the interviewee himself) that does not exist even under the more stringent requirements of Australian law.

57. Fourth, as North J. commented in *ASC v. Avram*, op. cit., under Australian law, an interviewee has a right to know what subject matter he might be asked about in order that he may prepare beforehand, but there is no need for him to know about the identity of any suspects (including himself). This logic equally is applicable to our present case. To be told he was a target (if in fact he was) would not have enabled Mr Ng to answer any questions during the interview more truthfully or more to the best of his ability (a statutory obligation already imposed upon him by section 33(4)(c) of the SFCO).

58. Fifth, and last, being identified as a PUI would not, in the circumstances, have changed anything for Mr Ng. He was under a statutory duty to answer the same questions.

59. We have concluded, therefore, that there could be no prejudice to Ng that the SFC had not warned/cautioned him, or identified him as a PUI.

60. The matter might have been rendered more problematic *if*, on the facts of this case, it had been alleged that the SFC used an existing investigation under section 33 in order specifically to target Mr Ng for a suspected, but unrelated, section 56 disciplinary violation. But in this case there is no challenge whatever in terms of the propriety or relevance of the questions the SFC put to Ng, nor to the authority of the SFC to commence the section 33 investigation.

61. For the foregoing reasons, therefore, we have no difficulty in holding that the SFC was fully entitled to use the records of the prior interviews with Ng as evidence against him in subsequent disciplinary proceedings.

62. Accordingly, we reject the applicant's argument to the contrary, and hold that there is nothing in this point which would justify interference by this Tribunal with the regulator's conclusion regarding the disciplinary infractions for which Mr Ng has been punished.

Appeal as to the Length of Suspension

63. However, on behalf of Mr Ng Mr Wong further submitted that a suspension of 9 months was "totally disproportionate to the degree of fault on the part of [Ng]".

64. We disagree. It strikes us that this submission possesses the twin demerits of being both ambitious and wrong.

65. In our view the facts of this case demonstrate beyond peradventure that Mr Ng manifestly failed to supervise important aspects of the brokerage operations – a duty for which he specifically was responsible. Furthermore, his prior disciplinary record indicates that this was not the first time he has been found to have failed in his supervisory capacity.

66. In light of the this firm conclusion, we took the opportunity to consider whether a *higher* level of sanction that that imposed in fact would have been more appropriate. In the event, however, we decided not to pursue the possibility of increased sanction, although at least one of our number considered such an approach was more than merited upon the particular facts of this case.

Order

67. Having found that none of the grounds of appeal advanced before us can stand, it follows from the foregoing that this application for review must be dismissed. We so order.

68. As to costs, we make an order *nisi* that costs will follow the event, and are be paid by the applicant to the SFC, such costs to be taxed if not agreed.

Hon Mr Justice Stone	Dr Au King Lun,	Mr Roger Thomas Best, JP
Chairman	Member	Member

Mr Henry Wong of Messrs Michael Li & Co., for the applicant

Mr Alex Lok of the Securities and Futures Commission, for the respondent