The Takeovers Appeal Committee

In the Appeal Of Danny Chan and Jim Wong

DECISION

Background

1. This is an appeal from a decision of the Takeovers and Mergers Panel ("the Panel") published on 20th December 1993 ("the Decision") concerning the activities relating to the takeover of Shun Ho Resources Holdings Limited ("Shun Ho") between November 1988 and June 1991.

2. By reason of the timing of the relevant events, the relevant Code applicable is the 1987 edition **of the Hong Kong Code on Takeovers and Mergers** ("the Code").

3. At the material time, the 1st Appellant, Danny Chan, was the Executive Director of Mansion House Securities Limited and Managing Director of Mansion House International Limited. The 2nd Appellant, Jim Wong, was a Director of Shun Ho.

4. By reason of their respective positions, and in any event we do not believe it is in dispute, both Appellants were persons to whom the Code applied at the time of the events in question: see para. l of the Introduction to the Code.

5. The relevant events are set out in a List of Agreed and Disputed Findings of Fact which is annexed to this Decision and we will not repeat them here, suffice to say that by the Decision, each of the Appellants was found by the Panel to be in breach of the Code and should be publicly censured.

6. The present appeal was brought under the Code as amended in 1992 ("the 1992 Code") although the Code since then had been revised again in 1994 and 1998. It was agreed by the parties that the 1992 Code was relevant to the question of jurisdiction and procedure to follow as far as this appeal is concerned.

Function and Jurisdiction of This Committee

7. The Appellants submitted their respective first submissions in March and in the case of the 1st Appellant, again in July 1998. The original grounds of appeal in the case of the

2nd Appellant suggested that challenge was being made to the basis of the conviction of the 2nd Appellant. The matter was brought before us in October 1998 on a preliminary point as to the extent of our jurisdiction. We ruled that our jurisdiction was confined to reviewing whether any sanction imposed was unfair or excessive and both appeals then proceeded on that basis.

8. However, in view of some of the arguments raised in further submissions by the Appellants, we feel that it is necessary to set out precisely what we consider to be our function and the extent of our jurisdiction.

9. Para. 7.2 of the Introduction to the 1992 Code provides:-

> "The Takeovers Appeal Committee reviews disciplinary rulings of the Panel for the sole purpose of determining whether any sanction imposed by the Panel was unfair or excessive based upon the Panel's finding of facts."

10. Para. 13.1 further provides:-

> "The jurisdiction of the Takeovers Appeal Committee is limited to reviewing the appropriateness of any sanction imposed by the Panel following a disciplinary proceeding ..."

11. Finally, para. 17.1 further provides:-

> "Like the Panel, the Takeovers Appeal Committee directs its own proceedings and may make any inquiries which it considers relevant or appropriate. The Takeovers Appeal Committee will be guided in the way it conducts its proceedings by the procedural rules applicable to hearings of the Panel."

12. In our view, it is plain from the above that our jurisdiction is confined to reviewing the appropriateness of any sanction imposed by the Panel but not the basis of the conviction. It is not within our power to consider whether the conviction was bad in law or on the facts. Our function does not thus include a review of the decision of the Panel on the merits. Insofar as an appellant has a remedy in respect of a decision of the Panel which is bad in law, or unreasonable on the facts, that remedy lies elsewhere.

13. In performing our function, we are empowered to make limited enquiries necessary in the exercise of our jurisdiction. For example, we must inquire what are the facts found by the Panel based on which the sanction was imposed; and insofar as there are

mitigating factors, we must inquire as to what they are. But our powers of investigation must not be extended to questioning whether the conviction was right, no matter how obvious is the error on the record.

14. It follows from the above that all the grounds of appeal relating to whether the convictions of the Appellants were justified whether in law or on the facts are beyond our jurisdiction and accordingly we have not taken them into consideration.

Facts Relevant To The 1st Appellant's Appeal

15. In the case of the 1st Appellant, the Panel found that the 1st Appellant's company was a sub-underwriter of 65.5% of the 8th June 1990 rights issue of Shun Ho and he acquired 1 million shares of Shun Ho on 11th February 1991 (see paras. 28, 60-61 of the Decision).

16. On the evidence, the Panel found that the transaction was arranged beforehand between the buyer and the seller (see para. 61 of the Decision). On 7th March 1991, the 1st Appellant granted an option to Mr. Cheng, the person then in control of Shun Ho at a price well below the then market price of the shares of Shun Ho which option was subsequently exercised by Mr. Cheng thereby triggering a general offer to be made at a price considerably below the then market price (see paras. 59 and 97 of the Decision).

17. The Panel found that the transaction was a device to enable Mr. Cheng to exceed the 35% threshold at a low price and at a time convenient to him (para. 99 of the Decision).

18. The Panel further found that while there was no evidence that the 1st Appellant knew of the previous purchases of Mr. Cheng or that the latter's shareholding had by then already exceeded 35%, the 1st Appellant must have known that the option arrangement could only have been a device to avoid the Code and that his explanation to the SFC of how the option exercise price was arrived at was untrue (see para. 100 of the Decision).

19. In these circumstances, having found that Mr. Cheng, *inter alios,* had acted in breach of Rule 33 of the Code in November 1988 (see para. 109 of the Decision), the Panel went on to hold that the 1st Appellant was not involved in any Code breach by virtue of his involvement in the share purchase of 11th February 1991 or the option arrangement of 7th March 1991. However, the Panel also found that the 1st Appellant

was prepared to cooperate in an arrangement with Mr. Cheng that could only have been a device to allow Mr. Cheng to cross the threshold without having to make a genuine offer to shareholders and that the 1st Appellant's explanation of how the option price was arrived at was false, misleading and incomplete (see para. 140 of the Decision).

20. It was submitted on behalf of the 1st Appellant that having found the 1st Appellant not in breach of the Code, the Panel had no jurisdiction to or should not convict the 1st Appellant and imposed a penalty on him.

21. This submission, however, ignores two things. First, as we already have ruled above, we have no jurisdiction to question the basis of the conviction.

22. But secondly and in any event, the Code makes it quite clear that:-
    (a) the Code does not have, nor does it seek to have, the force of law (see para. 1 of Introduction to the Code) and thus should not be construed as a statute; and
    (b) any person affected by the Code should observe the spirit as well as the language of the Code (see para. 1 of the General Principles of the Code).

23. We can only construe the Panel's findings as having found that although the 1st Appellant was technically not in breach of the letter of the Code, he must be in breach of the spirit of the Code in attempting to assist Mr. Cheng to contravene the Code.

24. The question must be: while the 1st Appellant was strictly speaking not in breach of the Code, what punishment should be imposed on him for attempting to breach the Code.

25. We have considered the submissions of the 1st Appellant most carefully. No mitigating circumstances were put forward. He showed no sign of remorse. Indeed, he attempted to mislead the SFC by providing false and incomplete information. The reason why there was no breach of the Code was not due to any effort on the part of the 1st Appellant but rather that Mr. Cheng was already in breach of Rule 33 and he was attempting to 'regularize'' the position by making a general offer at a time convenient and at a price acceptable to him with the assistance of the 1st Appellant.

26. In these circumstances, is the penalty of public censure unfair or excessive? We think not. This was a serious and calculated attempt to breach of Code. The 1st Appellant's attempt to conceal his guilt by providing false information can only be an aggravating

factor.

Delay

27. It was argued by the 1st Appellant that there was considerable delay. So there may be. But there is nothing to suggest that it was caused solely by the SFC. We do not think this is a relevant factor. In any event, the delay may well be in the interest of the 1st Appellant in that it tends to lessen the severity of the public censure.

28. In our view, the 1st Appellant's appeal must be dismissed.

Facts Relevant To The 2nd Appellant's Appeal

29. In June 1990, Mr. Cheng persuaded Mr. Chuang, a person in control of a substantial shareholder of Shun Ho to support the rights issue of Shun Ho announced on 8th June 1990 (see para. 37 of the Decision). In so doing, Mr. Cheng agreed to take up half of the purchases made by Chuang (see paras. 27 and 39 of the Decision).

30. Pursuant to this arrangement, the 2nd Appellant participated by proposing a nominee purchaser, a company by the name of Star King to receive half the shares purchased by Chuang (see paras. 39, 41 and 58 of the Decision).

31. The transaction was completed between 3rd and 6th September 1990 (see paras. 39, 43 and 58 of the Decision).

32. The Panel rejected the denial of knowledge on the part of the 2nd Appellant. Instead, the Panel found that the 2nd Appellant was prepared to be involved in what would have been a clear breach of Rule 33 in September 1990. Further, he took responsibility with other Directors of Shun Ho for the offeree documents issued in May 1991 when he knew that the document did not comply with the Code (see para. 139 of the Decision).

33. The difficulty here, of course, was that the September 1990 transaction did not in fact breach the Code since Mr. Cheng was already in contravention of Rule 33 way back in November 1988. The position, however, is not any different from what the 1st Appellant did in relation to the granting of the option in March l991. The Panel found as a fact that the 2nd Appellant knew the nature of the arrangement he was participating in. The Panel also found that the 2nd Appellant was prepared to be involved with what would clearly be a breach of Rule 33 in September 1990 had it not been the peculiar situation that Mr. Cheng was already in breach of the Code in 1988.

34. Furthermore, the Panel also found that the 2nd Appellant was also responsible, as a Director of Shun Ho for the offeree document issued in May 1991 which he knew did not comply with the Code. In these circumstances, as in the case of the 1st Appellant, the sanction imposed by the Panel was plainly justified.

35. The 2nd Appellant did not put forward any mitigating circumstances or indeed any argument as to why based on these facts, the sanction was plainly unfair or excessive. In our view, this appeal should also be dismissed.

Form Of The Censure

36. Finally, the Appellants sought to argue that the publication of the Panel's Decision already amounted to a public censure and thus it was no longer necessary to issue a separate public censure.

37. It is clear from the correspondence disclosed to us that the Panel intended to issue a public censure in respect of each of the Appellants. However, the Panel was also of the view that in the event of an appeal on penalty, the publication of the Decision should not render the appeal nugatory; hence the Decision was amended in the way it was.

38. That the publication of a decision is not intended to be a form of public censure is obvious from para. 18.1 of the Introduction to the 1992 Code which provided that normally, it is the policy of the Panel to publish their important rulings, and the reasons for them, so that its action may be understood by the public.

39. In our view, there is nothing in the point advanced by the Appellants and we reject this argument.

40. For all these reasons, both appeals are dismissed.

Dated this 25th day of March 1999.

Ronny K.W. Tong, S.C.
Deputy Chairman

Mr. Liu Chee Ming

Mr. Anthony Lo