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Application No. 1 of 2009

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

IN THE MATTER of a Decision made by the Securities and Futures Commission pursuant to s 194 of the Securities and Futures Ordinance, Cap 571,

And

IN THE MATTER of s 217 of the Securities and Futures Ordinance

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BETWEEN

CHU KWOK SHING, GODWIN — Applicant

and

SECURITIES AND FUTURES COMMISSION — Respondent

Before: Chairman, Hon Saunders J,

Members, Mr Kwan Pak Chung, Edward, and Mr Chan Kam Wing, Clement,

Dates of Hearing: 10, 11 September, 25 November 2009

Written Submissions: 17 December 2009, 8 & 22 January 2010

Date of Decision: 30 June 2010

DECISION

Introduction:

1. On 30 January 2009, the Securities and Futures Commission, (the SFC), made a decision, by way of a Notice of Final Decision, (NFD), pursuant to s 194 of the Securities and Futures Ordinance, Cap 571, (SFO), to suspend Mr Chu's licence as a representative for a period of 3 years.

2. Mr Chu has made application for review of that decision to this Tribunal.

The facts:

3. Mr Chu joined Goodwill Investment Services Ltd and Goodwill Commodities Ltd, (subsequently SBI E2-Capital Brokerage Ltd and SBI E2-Capital Securities Ltd, collectively, SBI) in August 1999. He was first registered as a securities dealer's representative and a commodity dealer's representative under the now repealed Securities Ordinance in October 1994, and has been with SBI since August 1999. He is currently licensed to carry on Type 1 (dealing in securities), and Type 2 (dealing in futures contracts), regulated activities under the SFO.

4. A detailed analysis of the trading pattern in three stocks, the subject of disciplinary action, was contained in Appendix 2 to the Notice

of Proposed Disciplinary Action, (NPDA). In the NPDA the SFC summarised the trading pattern in some detail in paragraphs 31-63.

5. Counsel for the SFC further summarised the factual background in the terms set out below. In so far as those terms reflect the facts, we understand that they are not challenged by counsel for Mr Chu. In so far as it may be said that the following paragraphs contain inferences drawn from facts, we acknowledge that counsel for Mr Chu does not accept that those inferences may necessarily be drawn and we must examine the basis upon which those inferences have been drawn ourselves:

> "24. SW Chu is Godwin Chu's sister and KW Wong is Keyman Wong's sister. Each of the sisters had an account with SBI Securities. As summarised in the expert report of Stella Fung, at paras 22-25, a comparison of their daily statements of account with SBI Securities (SF-3 and SF-4 respectively) disclosed identical buy and sell transactions in three stocks:
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> (1) Jilin Chemical # 368 on 31 March and 1 April 2005 (Fung report paras 26-44);
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> (2) Sinopec # 338 on 18 and 19 April 2005 (Fung report paras 45-67); and
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> (3) China Overseas # 688 on 19 April 2005 (Fung report paras 68-78).
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> 25. There is no dispute that this trading represented trading by Godwin Chu and Keyman Wong through their respective sisters' accounts and that Godwin Chu and Keyman Wong were trading for their own benefit. Godwin Chu initiated and placed all his orders through the account in the name of his sister SW Chu and Keyman Wong initiated and placed through an account in the name of his sister KH Wong. Some of the trades were farmed out to two other brokers, Friedmann Pacific and Polaris Securities.

26. The orders so placed by Godwin Chu and Keyman Wong exhibited the following patterns (cf in NPDA para 29):

(1) They placed orders relating to the same stock on the same days, resulting in trades executed for identical quantities at the same price (see table in para 22, Fung report).

(2) They adopted a short-term and tight-spread trading strategy of buying shares and then inputting "ask" orders at a price of one or two spreads higher: Fung report, para 79(a).

(3) Shortly after one of them had placed an "ask" order, they repeatedly placed, cancelled and re-inputted numerous very large bid orders. The effect of this activity was to keep moving their bid orders to the back of the queue whilst inflating and maintaining the aggregate demand at the top five bid queues above the aggregate supply at the top five ask queues. See Fung report, para 79(c) and (d).

(4) When their "ask" orders were fully executed, they cancelled all or most of the outstanding bid orders, after which the demand dropped substantially, usually to below the supply; Fung report, para 79(e).

(5) They made the same amount of profits from the trading of the three stocks: Fung report para 79(b).

27. In relation to Jilin Chemical, their cancellation and re-input of bid orders occurred 63 times on 1 April 2005: Fung report, para 38. Of the 63, 52 occurred before Friedmann Pacific had fully executed an ask order placed that morning on behalf of "Wong/Chu". Friedmann Pacific's ask order was fully executed by 15:21:26 and the profit was split equally between Godwin Chu and Keyman Wong. At 15:31:22, Godwin Chu placed an "ask" order which was fully executed by 15:45:45 and the transaction was split equally between Godwin Chu and Keyman Wong. Shortly thereafter, Godwin Chu and Keyman Wong cancelled most of their outstanding bid orders. On that day, they purchased 204,000 (shares) in two transactions, one by Godwin Chu taking up 200,000 shares and one by Keyman Wong taking up 4,000 (shares). The two transactions were split equally between them. None of the large bid orders they had entered into the system were executed.

> 28. In relation to Sinopec, when their ask orders were matched, they split the transaction between them equally. Notwithstanding the large bid orders placed in the morning of 19 April 2005, neither Godwin Chu nor Keyman Wong bought a single share of Sinopec on that day.
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> 29. In relation to China Overseas, it began with a purchase of 500,000 shares at $1.60 followed by the placing of an ask order for 500,000 shares at $1.61. Following the placing of the ask order, Keyman Wong placed 30 bid orders in the space of 2 minutes and 18 seconds. Keyman Wong then submitted a bid order for 500,000 shares at $1.59, of which 448,000 were matched. Godwin Chu and Keyman Wong then placed 20 bid orders at prices between $1.55 and $1.58, cancelling and re-inputting two at the same price but with 2,000 more shares each. Between 15:05:08 and 15:44:25, their cancellation and re-input of bid orders occurred 23 times, during which they lost their time priorities whilst maintaining the level of demand. Matching of Keyman Wong's ask order began at 15:45:00 and it was fully matched by 15:48:29. The transaction was split equally between Godwin Chu and Keyman Wong. At 15:54:16 Keyman Wong sold the 448,000 shares at $1.60. These shares were split equally between Godwin Chu and Keyman Wong. They then began to cancel a total of 58 outstanding bids. At 15:57:26, when the share price was $1.62, Keyman Wong placed a bid for 500,000 at $1.60 which remained unexecuted at market close."

The SFC Decision:

6. On the basis of these facts, the SFC found that Mr Chu had:

> "failed to act honestly, fairly and in the best interests and the integrity of the market by having created a false or misleading appearance in active trading in, or with respect to the market for, three stocks, in breach of General Principle 1 of the Code of Conduct."

7. The decision recorded that the disciplinary action was taken by virtue of s 194 SFO. The decision further recorded that the following submissions had been made:

> "(a) (that Godwin Chu and Keyman Wong) had the intention to execute the orders in question and that it would be incorrect for the SFC to conclude that Keyman Wong and (Godwin Chu) had engaged in such conduct, in the absence of any evidence showing the mental element or intention to engage in scaffolding;
>
> (b) (that) those trades were conducted independently without any intention to engage in "scaffolding"; and
>
> (c) (that Godwin Chu) challenged the accuracy with the SFC's assessment of the financial data." (sic)

8. The decision recorded that the SFC was not convinced by the argument that Mr Chu and Mr Keyman Wong (Mr Wong) had intended to execute the orders in question, the SFC finding, first that the events under investigation were: "well-planned", and second, that Mr Chu and Mr Wong had been "acting in concert".

9. The SFC noted that the combined dollar value of the joint orders in the top 5 bid queues in Sinopec amounted to HK$139 million, and that if Mr Wong's orders were disregarded, Mr Chu's orders alone had a total value of HK$19,538,000. The SFC found that Mr Chu did not have the financial ability to settle those trades if the orders were executed.

10. The SFC reached the conclusion:

> "On balance, we find that (Mr Chu) and Keyman Wong had constructed a large number of false bid orders to mislead the investing public about the actual demand and supply situation of the relevant shares on the three days in order to facilitate (Mr Chu) and Keyman Wong's selling of the relevant shares at (their) desirable price level."

11. Having considered factors in mitigation, Mr Chu's license was suspended for a period of three years. Against both the decision finding

him liable for disciplinary penalty, and the penalty imposed, Mr Chu now seeks review by this Tribunal.

The role of the Tribunal on an appeal:

12. First, Mr Westbrook SC, for the SFC, properly reminded us of the role of the Tribunal, and the principles under which it acts in reviewing decisions of the SFC. He drew our attention to the decision of the Tribunal, in *Wong Ting Choi, Joe* 5/2007, 8 May 2008, (Stone J presiding), and in particular paragraphs 52-71 thereof. The Tribunal is not a regulator of the market; it plainly does not have the competence to act as such. At paragraph 53, Tribunal said:

> "The Tribunal will interfere with the discretion of the regulator in its disciplinary function only when it considers that, for whatever reason, something clearly has gone badly wrong and/or where the applicant can demonstrate clear injustice."

13. Mr Westbrook further reminded us that this was a case in which Mr Chu elected not to give evidence before us. Under s 219 SFO, the Tribunal has a wide power to receive and consider any material by way of evidence. That must include oral evidence from an applicant for review. Mr Westbrook said this in his opening submissions:

> "23 Where an applicant seeks review for insufficiency of evidence, he faces a high hurdle if he gives or calls no evidence on the review. SFO section 219 provides for this Tribunal to receive evidence, but if the applicant does not avail himself of this, the Tribunal is left in the same position as an appellate court hearing an appeal from a court of first instance. The SFC having made its findings after seeing and hearing the witnesses and reviewing their statements, the Tribunal would not be justified in interfering unless it is satisfied that the SFC was plainly wrong in that there was no evidence or basis to support such a finding or

> the SFC had overlooked any material evidence in favour of the applicant or that it had misdirected itself as to the effect of the evidence."

In the present case the applicant confined himself to calling expert evidence, for two purposes. First, his expert sought to demonstrate that expert evidence from the SFC was unreliable. Second, the expert sought to demonstrate that the SFC had misdirected itself as to the effect of the primary evidence.

14. Mr Chu, was perfectly entitled to conduct the case in this way, and not give evidence himself. As will be seen, we have carefully considered the expert evidence called. But in so far as the application for review sought to challenge a finding of fact, Mr Westbrook was entitled to make the submission he did as to the absence of evidence from Mr Chu or any other witness challenging the fundamental facts found upon which the decision was made. An expert witness, with no personal knowledge of fundamental facts is not in a position to make a challenge to those facts. In reaching our conclusions on the review we have taken this matter into account.

15. The submission was made that the SFC was required to take into account Mr Chu's "clear and consistent" denials that he had engaged in any market manipulation. We were further invited to have regard to Mr Chu's explanations of his intention to execute the orders when performing the trades.

16. There is nothing in the evidence, and nothing was put to us, to suggest that the denials, or the explanations contained in the course of his

records of interview, were not taken into account by the SFC in their consideration.

17. Because Mr Chu did not give evidence, the assertions by way of denial and explanation made by him in those interviews have not in any way been tested in cross-examination. The fact that those denials were consistent does not, when the denials are not tested in cross-examination, greatly assist an appellant. The fact that explanations might have been given, again does not, when the explanations have not been tested in cross-examination before us, assist an appellant.

The legislative basis for the disciplinary action:

18. Mr Scott SC, for Mr Chu said that in order to establish grounds for disciplinary action, it was necessary for the SFC to establish, to the appropriate standard of proof, that Mr Chu had engaged in market manipulation contrary to s 274 SFO. In other words, Mr Scott said the form of market misconduct defined as "False Trading" must be established. That misconduct is created by s 274 SFO, in the following terms:

> "**274 False Trading**
>
> (1) False trading takes place when, in Hong Kong or elsewhere, a person does anything or causes anything to be done, with the intention that, or being reckless as to whether, it has, or is likely to have, the effect of creating a false or misleading appearance-
>
> (a) of active trading in securities or futures contracts traded on a relevant recognized market or by means of authorised automated trading services; or

> (b) with respect to the market for, or the price for dealings in, securities or futures contracts traded on a relevant recognised market or by means of authorized automated trading services."

We note also, that in identical terms, s 295, Part XIV SFO, makes False Trading a criminal offence.

19. That submission was not accepted by Mr Westbrook. Instead, he argued that the disciplinary action took place under s 194 SFO. Under that section, he said, there are alternative two triggers for disciplinary action. They are first, misconduct under s 194(1)(a), or second, an absence of the personal quality meeting the requirement that a person is a "fit and proper" person to hold a licence. The relevant provision is:

> "**194 Disciplinary action in respect of licensed persons, etc**.
>
> (1) Subject to section 198, where-
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> (a) a regulated person is, or was at any time, guilty of misconduct; or
>
> (b) the Commission is of the opinion that a regulated person is not a fit and proper person to be or to remain the same type of regulated person:
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> the Commission may exercise such of the following powers as it considers appropriate in the circumstances of the case-"

20. The procedural requirements in respect of the exercise of disciplinary powers under Part IX are set out in s 198. There is no suggestion that those procedural requirements were not properly followed.

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21. Mr Westbrook then referred to the definition of “misconduct” in s 193 SFO, and in the particular context of this case, s 193(d), which defines “misconduct”. The section provides:

> “**193 Interpretation of Part IX**
>
> (1) In this Part, unless the context otherwise requires-
>
> “misconduct” means-
>
> (d) an act or omission relating to the carrying on of any regulated activity for which a person is licensed or registered which, in the opinion of the Commission, is or is likely to be prejudicial to the interest of the investing public or to the public interest.”

22. By s 169 the SFC may publish a code of conduct for the purpose of giving guidance relating to the practices and standards with which licensed persons are ordinarily expected to comply and carrying on the regulated activities. It is not necessary to set out that provision in detail. The relevant provision of the Code of Conduct that has been published is set out in paragraph 24 below.

23. Conduct contrary to General Principle 1 of the Code of Conduct was, Mr Westbrook argued, imported into the assessment of s 193(d) misconduct by two other provisions. The first is s 169 itself which establishes the validity of the Code of Conduct. The second is s 193(3). That provision reads:

> “For the purposes of paragraph (d) of the definition of “misconduct” in subsection (1), the Commission shall not form any opinion that any act or omission is or is likely to be

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> prejudicial to the interest of the investing public or to the public interest, unless it has had regard to such of the provisions set out in any code of conduct published under section 169 or any code or guideline published under section 399 as are in force at the time of occurrence of, and applicable in relation to, the act or omission."

24. General Principle 1 of the Code of Conduct provides:

> "**GP1 Honesty and fairness**
>
> In conducting its business activities, a licensed or registered person should act honestly, fairly, and in the best interests of its clients and the integrity of the market."

25. Having considered the submissions, the Chairman directed the Members that, as a matter of law, it was not necessary for the criminal offence or the market misconduct offence of "False Trading" to be established for there to be misconduct on the part of Mr Chu. The Chairman directed the Members that it would be sufficient to establish misconduct liable to disciplinary action if, to the appropriate standard of proof, the SFC established that Mr Chu's conduct was in breach of General Principle 1 of the Code of Conduct.

26. That ruling was made for the following reasons.

27. First, the SFO devotes a particular division, Part IX, to the question of discipline, and, in s 193, as may be seen in paragraph 21 above, provides a specific definition of "misconduct" for the purposes of Part IX of the Ordinance. The use of the expression "means" in that definition constitutes the definition as an exhaustive definition of the expression "misconduct": see Craies on Legislation, 9th Edn, paragraph 24.1.3.

28. The offence of False Trading may be dealt with either civilly, by the Market Misconduct Tribunal by way of s 274 Part XIII SFO, or by the criminal courts by way of s 295 Part XIV SFO. Insofar as they describe the conduct dealt with, the two sections are identical. Mr Scott's submissions did not extend to explaining why, in disciplinary proceedings, it was necessary to establish the market misconduct offence under s 274, but not the criminal offence under s 295.

29. There is nothing in the definition of misconduct in s 193 which requires the SFC to have recourse to the civil market misconduct offences established under Part XIII of the SFO, or criminal market misconduct offences under Part XIV SFO. The mere fact that the expression "misconduct" is used in Part XIII and Part XIV of the SFO does not require misconduct for disciplinary purposes to fall within a specific type of market misconduct which may be dealt with by the Market Misconduct Tribunal, or the criminal courts.

30. It will probably always be that conduct which constitutes market misconduct, which may be dealt with by the Market Misconduct Tribunal or the criminal courts, will constitute misconduct under s 193 and which may be the subject of disciplinary proceedings under Part IX SFO. But it need not be the case that, at the same time, misconduct which may be the subject of disciplinary proceedings, must also be capable of being put before the Market Misconduct Tribunal or the criminal courts.

31. Second, there is nothing in the context of s 194 which requires recourse to any other provision in the SFO, than those in s 193, in order to define the concept of "misconduct". The expression in s 193(1), " except

the context otherwise requires" is described by Craies on Legislation, 9th Edn, Daniel Greenburg, 2008, para 24.1.5.1, in these terms:

> "This is a general gloss of a kind that would have to be inferred in any event, where a provision elsewhere in the legislation to which the definition purported to apply showed by express provision or necessary implication that the definition was not intended to apply there.
>
> Too much weight should not be put on this general gloss which is merely 'a standard device to spare the drafter the embarrassment of having overlooked a differential usage somewhere in his text'."

The expression used in the SFO is "unless the context otherwise requires". There is no material difference arising from the use of the expression "unless", instead of "except".

32. Consequently, while the facts that are alleged against Mr Chu may constitute the civil market misconduct offence of False Trading contrary to s 274 SFO, or even the criminal market misconduct offence of False Trading contrary to s 295 SFO, in order for there to be a proper statutory basis for the SFC to discipline Mr Chu, neither of those market misconduct offences need not be established.

33. It will be sufficient if the conduct complained of is conduct which is, after having had regard to provisions of the Code of Conduct, likely to be prejudicial to the interests of the investing public or to the public interest, or is conduct which justifies the SFC becoming of the opinion that the regulated person is not a fit and proper person to be or to remain regulated.

34. The question of whether or not a person is fit and proper is to be determined having regard to the matters set out in s 129 SFO. These include, s 129(1)(c), the ability of a person to carry on the regulated activity competently, honestly and fairly. While a market misconduct offence would almost certainly demonstrate that a person was not able to carry on the regulated activity honestly and fairly, it is not necessary to establish such an offence, if in other ways a person's conduct can be seen to be either dishonest or unfair.

35. It is accordingly not necessary for there to be a positive finding of the market misconduct offence of False Trading to be established. The SFC are perfectly entitled to look at the whole of the conduct of a regulated person and make an assessment as to whether that conduct is the conduct of a person who is fit and proper to hold a licence.

36. To develop the submission made for Mr Chu in reply, the "peg" upon which the SFC "hangs its case" is the conduct of Mr Chu, which conduct the SFC has determined is not the conduct of a fit and proper person. Because that conduct was considered by the SFC *likely* to have the effect of creating a false or misleading appearance in active trading in, or with respect to the market for, the three relevant stocks, the SFC was entitled to find that conduct constituted misconduct. It matters not whether that conduct falls within some other category in some other provision in some other Part of the SFO.

The appropriate standard and burden of proof:

37. The starting point in determining the appropriate standard of

proof to be applied by the SFC in disciplinary proceedings is s 387:

> "**387 Standard of proof**
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> Where it is necessary for the Commission to establish or to be satisfied, for the purposes of any of the relevant provisions (other than provisions relating to criminal proceedings or to an offence), that-
>
> (a) a person has contravened-
>
> (i) any provision of any Ordinance;
>
> it is sufficient for the Commission to establish, or to be satisfied as to, the matter referred to in paragraph (a), (b), (c), (d), (e) or (f) (as the case may be) on the standard of proof applicable to civil proceedings in a court of law." (irrelevant provisions omitted)

38. The standard of proof before the Tribunal is dealt with by s 218(7) SFO:

> "Subject to s 221(3), the standard of proof required to determine any question or issue before the Tribunal shall be the standard of proof applicable to civil proceedings in a court of law."

The provisions of s 221 relate to the power of the Tribunal to deal with contempt, and is not relevant in the present proceedings.

39. Proceedings under s 194 SFO are, by description and nature, disciplinary proceedings. The interpretation and application of the expression "the standard of proof applicable to civil proceedings in the court of law" in disciplinary proceedings is settled in Hong Kong by the decision of the Court of Final Appeal in *A Solicitor (24/07) v Law Society of Hong Kong* (2008) 11 HKCFAR 117. The Court of Final Appeal held

that that standard is the civil standard of a preponderance of probability under the *Re H & Others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, approach. The more serious the act or omission alleged, the more inherently improbable must be regarded. Consequently the more inherently improbable that was to be regarded, the more compelling would be the evidence need to prove that on a preponderance of probability.

40. The decision in *A Solicitor* has been subsequently, concisely, explained the judgement of Sir Anthony Mason NPJ in *Koon Wing Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 170 at paragraphs 88-89:

> "88 The use of the expression "standard of proof to a high degree of probability" must now be understood in the light of this Court's recent judgement in *A Solicitor (24/07) v The Law Society of Hong Kong* where Bokhary PJ (with whom the other members of the Court agreed) said:
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> > ….it is misleading to speak of "a high degree of probability"
>
> 89 In that case, this Court accepted the correctness of the approach to the civil standard of proof expressed by Lord Nicholls of Birkenhead in *Re H & Others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 when his Lordship said:
>
> > 'The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability…'."

41. The Chairman directed the Members as to the standard of proof accordingly. Past decisions of the Tribunal as to the standard of proof, delivered prior to the decision in *A Solicitor*, (13 March 2008), must be read in the light of the decision in *A Solicitor.*

42. In proceedings before the SFC, it is clear that the burden is on the SFC to establish, to the appropriate standard of proof, the facts upon which a decision is to be based. That follows from the words, used twice, in s 387, set out in paragraph 37 above: "*for the Commission to establish*".

43. However, on a review of a decision of the SFC by this Tribunal, although the procedure is by way of rehearing, the burden is on the Applicant to demonstrate that the decision of the SFC should be varied or set aside: see *Ng Chiu Mui, Law Kai Yee and Tang Yuen Ting*, SFAT 7, 8 & 9/2007, 15 May 2009, paragraphs 32-34, and 84. The Chairman directed the Members accordingly.

44. The decision in *Ng Chiu Mui, Law Kai Yee and Tang Yuen Ting*, was considered by the Court of Appeal in *Ng Chiu Mui, Law Kai Yee v SFC*, (unreported) CACV 141/2009, 26 May 2010, in which counsel for the appellants criticised the following passage from paragraph 84 of the decision of the Tribunal:

> "84 It seems to me that in this situation, *unless* it can be shown -which in my view in these two instances it cannot -that the regulator is plainly wrong in coming to its conclusions in light of the available materials, bearing in mind that such conclusions are untrammelled by any positive contrary testimony on behalf of the applicant, or that the material which has been evaluated cannot reasonably support the inference/conclusion as drawn, then in my view there is and can be no proper basis for review intervention by this Tribunal; to the contrary, for what it

> be worth, the clear probability is that the SFC, *qua* reasonable regulator acting in good faith, in fact drew wholly appropriate conclusions/inferences from the data available to it, including the various records of interviews."

45. The passage was criticised by counsel for the appellants on the basis that the Tribunal had proceeded on the assumption, without having examined the material underlying the assumption, that everything the SFC had done must be right, and that the burden was on the appellants to show that the SFC was wrong. The criticism was rejected. The Court of Appeal found that the Tribunal's conduct of the review was perfectly proper and entirely beyond reproach.

46. In all of those circumstances Mr Westbrook was perfectly entitled to say that Mr Chu had "*failed to show that the SFC got it wrong*", and "*that there was no credible evidence to suggest….an intention to execute the bids*". That was not, as counsel for Mr Chu put it, demonstrating an *a priori* assumption that Mr Chu was guilty of misconduct, but merely a correct expression of where the burden of proof lay on an application for review.

The contentions advanced:

47. On behalf of Mr Chu five points were advanced in support of the contention that the SFC did not have a proper basis upon which it could be satisfied that the conduct complained of constituted misconduct. They were:

(a) that Mr Chu and Mr Wong were not acting in concert;

(b) that Mr Chu had a genuine intention to execute the orders that had been made;

(c) that Mr Chu's activities were consistent with those of a day trader;

(d) that Mr Chu's actions did not have the effect of creating a false or misleading appearance with respect to the market;

(e) that Mr Chu had no economic incentive to engage in scaffolding.

Acting in concert:

48. In paragraphs 29-63 of the NPDA the SFC set out at length the factual circumstances demonstrating the trading pattern in shares on the part of Mr Chu and Mr Wong. The trading pattern was summarised in the following terms in paragraph 29:

> "29 We observed that:
>
> (a) after you/Keyman Wong bought shares, you/Keyman Wong would input an ask order at a higher price. Sometimes, the ask orders were farmed out to other brokers;
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> (b) while the ask orders were being matched during the day you and Keyman Wong would take turns to input a number of bid orders of large quantity (usually at the maximum quantity of 600 lots) which inflated the depth of the top five bid queues significantly;

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> (c) most of these bid orders were quickly cancelled and replaced by orders at the same price but of different or the same quantities. These acts were done either by you or Keyman Wong alone or one of you cancelled a buy order and the other simultaneously placed a new buy order at the same price and quantity. Such actions pushed back the matching priorities of your bid orders so that they were not executed yet maintained an inflated level of demand;
>
> (d) as soon as the ask orders were fully executed, you and Keyman Wong immediately cancelled most if not all of your outstanding bid orders; and
>
> (e) you and Keyman Wong bought and sold exactly the same amount of shares at the same prices for all the three stocks (as shown in Appendix 1) and each made the same profit of around $51,674 during the three days."

In subsequent paragraphs the SFC set out the factual basis upon which the findings in that paragraph were based.

49. The SFC had due regard to the explanation as to the trading pattern offered by Mr Chu and Mr Wong. That explanation was set out in paragraphs 64-69 of the NPDA.

50. In paragraph 74 of the NPDA the SFC recorded:

> "In the light of the fact that you and Keyman Wong had the same transactions on the three stocks and had conducted trading activities in such a similar pattern, it seems to us that the two of you were acting in concert in order to manipulate the relevant stocks."

51. In response to the NPDA the solicitors for Mr Wong made submissions to the SFC. The relevant passage of the submissions is as follows:

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> "16 Save and except that Wong and our Client had separately engaged in the trades in the accounts of WKW and CSW, our Client denies that any such trades were conducted in concert. He maintains that those trades were conducted independently and without any intention to engage in "scaffolding".
>
> 17 It is submitted that:-
>
> (1) (Mr. Chu) takes issue with the SFC's assessment of the financial data and challenges the accuracy thereof.
>
> (2) (Mr. Chu) has consistently maintained that he fully had the intention to execute the orders in question. In the absence of any evidence showing the mental element or intention to engage in scaffolding it would be incorrect for the SFC to conclude that Wong and (Mr. Chu) had engaged in such conduct."

52. Other than the assertion that the trades had been conducted separately, no submissions were made in relation to the conclusion by the SFC that the two men had acted in concert. The submission was acknowledged by the SFC in the Notice of Final Decision, (NFD), in paragraph 23(b), and the essential facts were reiterated at paragraph 24(b). The SFC were not persuaded by the submissions made and maintained the position that the trading was conducted in concert.

53. The challenge before the Tribunal to the finding that Mr Chu and Mr Wong had acted in concert relied principally upon an assertion that the SFC had relied upon the evidence of Ms Stella Fung to reach that conclusion. Ms Fung was cross-examined on this aspect before us, but no evidence was called before us from Mr Chu as to the trading pattern.

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54. We are satisfied that the SFC were perfectly entitled, upon the primary evidence before it, without any regard to Ms Fung's report, to reach the conclusion that Mr Chu and Mr Wong were acting in concert. Indeed we are of the view that the evidence, answered really only by a bare denial, was overwhelming.

55. The essence of the response by both Mr Chu and Mr Wong to the suggestion that they acted in concert was simply a submission that it was purely coincidental that the bids, orders and cancellations, occurred as they did.

56. First, Mr Westbrook was entitled to rely upon the fact that both Mr Wong and Mr Chu disposed of their records in relation to this trading. No explanation was offered for that act. In all the circumstances the plain inference, unanswered by any explanation, is that they wished to conceal their trading. That both should dispose of their records in this way simply cannot be a coincidence. Next, the bid, order and cancellation pattern, with the highly co-ordinated way in which instructions were input and cancelled, the precise equality in the profit made, the joint instruction of Friedmann Pacific, the concealment of the trading through other person's accounts, and later disposal of the records by both, all pointed to a circumstance which simply could not be the result of pure coincidence.

57. The trading pattern was such that it cried out for a proper explanation from Mr Chu, which ought to have been supported by evidence from Mr Wong, if there was to be any basis to all upon which it could be said that they acted independently from each other and that it was

a pure coincidence that trading had taken place in the manner disclosed by the evidence. There was no such evidence.

58. It is right that Ms Fung reached the same conclusion. Neither we, nor the SFC, took into account her *conclusion* in reaching the conclusion that the trading was in concert. It is right that the SFC had regard to the analysis of facts elicited by Ms Fung, but it is plain from the decision that the SFC applied its own mind to the consequences of those facts when it drew the inference of acting in concert. The SFC was perfectly entitled to do that. In the whole of the circumstances the inference of acting in concert was irresistible.

59. We are satisfied that the SFC were perfectly entitled to reach the conclusion it did, on the evidence that was presented, namely that the two men had acted in concert. No further evidence was led before us that might in any way impact upon the conclusion reached by the SFC. Accordingly that there is no basis at all upon which the conclusion reached by the SFC that the two had acted in concert, might be subject to review by this Tribunal.

60. It having been demonstrated that Mr Wong and Mr Chu were acting in concert, it can be no criticism of an analysis of the trading, that that analysis has been undertaken of the conduct of both. Having found they were acting in concert it would be wrong to then ignore the trading undertaken by Mr Wong when analysing the trading undertaken by Mr Chu.

A genuine intention to execute the orders:

61. In finding that Mr Chu had no genuine intention to execute the orders, the SFC relied principally upon two factors, first the pattern of inputting and cancellation of bid orders, which it found tended to ensure that priority for matching was lost, and second, the absence of an established financial ability on the part of Mr Chu and Mr Wong to settle the trades if the orders were executed. It is important to remember when considering this aspect, that the SFC relied upon both of these factors, not merely the financial inability it found existed, as was put to Ms Fung.

62. In the NFD, at paragraph 24(d), the conclusion that the pattern of inputting and cancellation raised the inference that Mr Chu did not want the orders to be met was reiterated. No satisfactory explanation was offered by Mr Chu to counter the inference that thereby arose. The evidence of Mr White, led to counter the inference, was that the pattern was nothing more than that of a day trader. That aspect of the evidence is discussed below.

63. It is beyond argument that the cancellation and re-input process adopted had the effect of ensuring that priority for matching was lost.

64. In paragraph 70 of the NPDA the SFC found that it was:

> ".. questionable if you and Keyman Wong had the financial ability to settle the trades if these orders were executed."

Following the NPDA, no submissions were made to the SFC as to the financial ability of Mr Chu to meet the trades if the orders were executed.

65. In the NFD, at paragraph 26 the SFC set as follows:

> "The combined dollar value of Keyman Wong's and your bid orders in the top 5 bid queues was as high as $139 million in the stock of Sinopec Shanghai Petrochemical Company Ltd (Sinopec) as at 15:58:31 on 18 April 2005. Even if we disregard the bid orders placed by Keyman Wong, the 17 bid orders on the stock of Sinopec cancelled by you alone between 10:46:36 and 10:47:23 on 18 April 2005 have a total dollar value of $19,538,000. We do not believe that you had the financial ability to settle the trades if these orders were executed."

66. The only evidence adduced as to the ability of Mr. Chu to meet these trades was a schedule showing the trading limits available on the various accounts through which Mr. Chu was operating at SBI. Only one of those accounts, that in the name of his sister, Chu Shun Wa, was operative at the relevant time. The trading limit on that account was $8 million. Even allowing for the fact that, on a strict contribution basis, between Mr. Chu and Mr Wong, Mr. Chu's share of the liability of $139 million, was only $20 million, a trading limit of $8 million is a very long way short of the amount required to meet the liability potentially incurred.

67. As Ms Fung pointed out, if, as a day trader, it was Mr. Chu's intention to clear his position by the end of the day, he potentially faced a great deal of difficulty in disposing of such a substantial number of shares. The situation was one which again cried out for evidence from Mr. Chu. Not only was there no evidence as to his personal financial position, other

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than the schedule referred to, neither was there any evidence as to the willingness of SBI to carry any position Mr. Chu may have held.

68. In the absence of any evidence from Mr Chu either as to his financial ability to meet these very substantial sums, or any intention on his part to complete the trades, and immediately dispose of the shares, the SFC were perfectly entitled to reach the conclusion that Mr. Chu did not have the financial ability to meet the liability potentially incurred, having regard to the appropriate standard of proof. Nothing was said to us as to Mr Chu's financial ability to meet those sums. There is no evidential basis whatsoever upon which this Tribunal can review that conclusion.

69. We are satisfied that the SFC was correct in its conclusion that Mr Chu did not have the financial ability to settle the trades if the orders were executed. The SFC were perfectly entitled to rely on both the steps taken to ensure that priority to the orders was lost, thereby greatly reducing the risk that the orders would be matched, and the financial inability to settle the trades if executed, to conclude that Mr Chu had no genuine intention to execute the orders.

70. It is right, and we accept, that theoretically there was a risk that the orders might be matched. But in reality they were not, that demonstrating the theoretical nature of the risk. The existence of that risk does not detract from the conclusions reached by the SFC.

Activities consistent with a day trader:

71. The submission that Mr Chu's activities were consistent with

those of the day trader, was the central feature of the case advanced on his behalf.

72. It is right, and we accept, that at least some of Mr Chu's trading activities in the relevant period resemble those of a day trader. But that is a description which may only properly be applied to the executed trades that had been undertaken by Mr Chu. Mr White said that the market mechanism of cancelling and amending orders is used by day traders in order to position themselves either side of the spread and move in accordance with the market. The evidence demonstrated in his report substantiated that assertion. We accept Mr White's evidence that:

> "on a particular day (a day trader) might cancel 100% of the orders that they put in because they are just not sure that they want to buy the stock"[1]

and

> "It is a dynamic process…. This is how day traders position themselves in the market-place, this is what they do."[2]

73. But Mr Chu's actions must also be seen in the light of the following propositions advanced by Ms Fung and relied upon by Mr Westbrook in reply:

a. While a day trader may place ask orders and bid orders at the same time and at different prices, thus creating a bid-ask spread, the quantity would not vary so substantially between the bid and ask sides as it did with Mr Chu;

[1] Transcript, 11 September 2009, p 23
[2] Transcript, 11 September 2009, p 22

b. Whereas day traders may modify their orders to meet market conditions or perceptions, they would rarely modify their order with a slight increase in quantity every few seconds so as to push it to the back of the queue;

c. Still less would they cancel an order, only to re-input it at the same quantity and price;

d. It was rare for other brokers to input and then cancel a bid order when an ask order was still outstanding.

74. These factors demonstrate that while Mr Chu's trading may have had characteristics of a day trader, they were not in fact the activities of a day trader. They are factors which demonstrate that the activities were designed to create a false impression in the market. We are satisfied that the SFC was entitled to come to the conclusion that Mr Chu was not a day trader but that he was a person engaged in conduct deliberately designed to influence the market but without any proper intention to execute trades into which he purported to offer to the market.

75. We accept, as Mr. White demonstrated, that others in the market input, and subsequently cancel, trading positions. But the whole of the circumstances of those trading positions was not examined, and it was accordingly not possible to say that the mere fact that others enter and cancel trading positions establishes that Mr. Chu's conduct in the circumstances did not constitute misconduct. What establishes Mr. Chu's trading pattern as misconduct are the whole of the surrounding circumstances in which the trading pattern occurred. It is no answer in the

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circumstances to demonstrate that others have entered and cancel trading positions.

76. We have carefully considered the statistics and matters put to us by Mr. White. We have come to the conclusion that the matters set out in paragraph 74 above are such that, even having regard to the validity of the general propositions advanced by Mr. White, it cannot be said that Mr. Chu was acting merely as a day trader in conducting himself in the market as he did in respect of the shares at issue.

No effect of creating a false or misleading market:

77. Mr Scott relied upon the decision of the Market Misconduct Tribunal in an Inquiry relating to QPL International Holdings Ltd, in which the Tribunal, at paragraph 62, set out the following explanation of the concept of "scaffolding" from the evidence of the SFC expert who gave evidence in that case:

> "Mr Shek said that the term "scaffolding" was unique to Hong Kong, elsewhere it being described in phrases such as: "the creation of a false appearance of a strong demand". It is a type of market manipulation in which the perpetrator's attempts to distort the picture of supply and demand of a stock by inputting a large number of orders of the big size without the intention of executing those orders. The orders are usually cancelled before they are matched. He explained that if the market manipulator wishes to sell shares, a large number of orders on the "Buy" side would create the appearance of a strong demand for the stock. That information was available to the market through stock market terminals provided by information vendors, for example displaying five price queues on the "Buy" side, namely the highest bid price in the next four price queues separated by one spread between each queue together with the total amount of shares and number of orders in each of the "Buy" and "Sell" queues. The quantity of shares in the respective queues provides

> a good indication of existing market demand/supply and possible direction of the share price. By inputting large orders on the "Buy" side, the manipulator can create a false and misleading impression that there is a strong demand for the shares, so that potential buyers of the shares may consider raising their bid prices. In consequence, "scaffolding" on the "Buy" side has the effect of supporting, or even pushing up the price of the stock."

78. It was argued for Mr Chu that the concept of scaffolding was ill-defined and in any event misplaced. Just how the concept was "ill-defined" was not explained with any precision. The explanation of the concept given by the Market Misconduct Tribunal is perfectly plain, and entirely consistent with the conduct that has taken place in the present case. In that respect we cannot see how the concept can be described as being "misplaced" in these disciplinary proceedings.

79. We were invited by Mr. Scott to formulate a definition of "scaffolding". However he did not go so far as to formulate a definition himself which would exonerate Mr. Chu's trading pattern. He confined himself to relying upon the QPL definition. We are of the view that Mr. Chu's trading pattern fell within the description used in QPL.

80. Methods of market manipulation are many and varied and can often be variations on a particular theme. We do not think that setting out a finite definition of a particular form of market manipulation is particularly useful. No doubt, as soon as such a definition is formulated, a variation on that definition will be argued to not constitute market manipulation. We think it better that the SFC and the Tribunal should be free to examine conduct in the context of the statutory strictures as to acceptable behaviour, and to determine whether or not the particular conduct falls within or without the statutory criteria. Whether a particular

form of conduct falls within the description used by the MMT in the QPL case as "scaffolding" matters not. What is important is whether or not particular conduct has, or is likely to have, the effect of creating a false or misleading appearance with respect to the market, or is conduct which can be described as conduct on the part of a person acting honestly, fairly and in the best interests of the integrity of the market.

81. Insofar as it was argued that it is necessary for it to be established that the conduct has actually had the effect of supporting or pushing up the price of the stock, we accept the submission of the SFC is that that is not necessary. The proper test is that contained in s 193(1)(d), namely whether or not the trading "is or is likely to be prejudicial to the interest of the investing public or to the public interest".

82. It is plainly not necessary for the conduct complained of to have actually had the effect of misleading the market. It is sufficient that it is conduct which is *capable* of misleading the market. We accept the submission of the SFC that even if they were required in these disciplinary proceedings, (and they are not), to establish all of the elements of market misconduct under s 274(1) SFO, what needs to be proved is the doing of an act either recklessly or with the intent that is *likely* to have the effect of creating a false or misleading appearance with respect to the market. Mr Westbrook was right when he said that proof that someone was actually misled is neither necessary nor is it an element of the offence.

83. Mr Westbrook went so far as to say that if a regulated person creates a false appearance of active trading, without the intention of so doing, for personal profit, that is ample ground to the SFC defined in

breach of General Principle 1, and to discipline him for misconduct and/or for not being a fit and proper person. We agree.

84. It is beyond argument that the activity partaken in by Mr Chu had the effect of creating an appearance of active trading.

85. Further, the purported trading was not a genuine trading. That is demonstrated by the total lack of evidence of financial ability on the part of Mr Chu to settle the orders had they been executed and the steps taken to ensure that the risk of the orders being met was minimal. Had he put before us financial information demonstrating that had those orders being executed he could have settled them, it might be open to him to contend that the activity reflected in the orders was genuine trading activity. Had he offered to us an explanation for the co-ordinated pattern of trading that he undertook with Mr Wong, it might be open to him to contend that the activity reflected in the orders was genuine trading activity.

86. But in the absence of such evidence the overwhelming inference is that the trading activity was activity undertaken with no intention whatsoever to meet and settle any orders that were accepted. The trading was not a genuine if it was not intended that transactions should be completed. If that was not intended, there must have been some other purpose. The overwhelming inference was that that purpose was to create a false impression of the extent of the activity in the market in the particular shares.

87. That conclusion is reinforced by the disposal of the records. If the trading was genuine, there is no reason to dispose of the records of that trading.

88. The foregoing analysis serves also to rebut the submission that there is insufficient evidence to establish that Mr Chu had the requisite intention in relation to the misconduct alleged. The submission was predicated upon the basis that it must be established that Mr Chu's actions in fact influenced the market. As has been shown, that is not required. What is clear on the evidence is that the trades inputted were not genuine, in the sense that there was no intention to execute them, and it cannot be denied that such actions are capable of influencing the market.

89. We accept that there are many factors upon which traders may rely to determine the direction of the market and other factors may take a more pre-eminent role in that determination. But Mr White was obliged to accept that the movement of the queues was a factor which could be taken into account. Movement in the queues is not a pre-eminent factor but it cannot be denied that it is a fact.

90. Conduct that may properly be described as trading that is not genuine must, plainly, constitute misconduct. Equally it must plainly constitute conduct that a person who is fit and proper to remain regulated, would not carry out. False trading could never be described as an honest or fair act, or in the best interests of the market. We accept the submission of the SFC that if false trading is established, the persons engaging in such trading will be liable to disciplinary action for misconduct, as that

expression as defined in s 193, SFO, or a breach of General Principle 1 of the Code of Conduct.

No economic incentive:

91. The submission was made for Mr Chu that as his activities would have had "little if any" effect on the market, there was little economic justification to engage in scaffolding.

92. In reply the SFC says first, that if that was the situation, what explanation is there for a trader to spend all day at a terminal, engaged in the activities that were admittedly engaged in, if there is no economic incentive. Mr Chu has elected not to explain himself to us. In the absence of any evidence from him, the overwhelming inference is that there must have been an economic purpose to the carefully constructed trading pattern in which Mr Chu and Mr Wong were involved together. No other purpose to the time spent by them in undertaking the conduct complained of, other than a personal economic purpose, was suggested to us by Mr Chu.

93. Second, the SFC says, Mr Chu made a profit of $51,674. We accept that that is not a significant amount, but it is nevertheless a profit, and a profit is an economic incentive. While, as we have said, we accept there was a risk that the very substantial orders might have been executed, we see that risk is being minimal in the extreme, having regard to the trading pattern, and not such as to detract from the inference of the activity stemming from economic incentive.

Conclusion:

94. In paragraph 5 above we noted that it would be necessary for us to examine the basis upon which the inferences set out in description of the conduct in the submissions of counsel for the SFC, were drawn. We are satisfied, having regard to the foregoing analysis of the matters raised that those inferences were perfectly justified in the circumstances.

95. We have weighed all of these matters into account in giving consideration to the submissions and the evidence advanced on behalf of Mr Chu. Having done so, we are not satisfied that there is any basis at all upon which we might interfere with the decision of the SFC, which is accordingly confirmed.

The independence of the experts:

96. Mr Scott asserted that there were limitations on Ms Fung's independence as an expert. He pointed out that she was an employee of the SFC who was seeking to uphold her own report as the basis of the disciplinary proceedings. This, he said, went at the least, to the weight to be attached to Ms Fung's evidence, and at best demonstrated a possible bias or lack of fairness of procedure.

97. We reject this criticism entirely.

98. Ms Fung was in no different position to Mr White. Just as Ms Fung was paid by the SFC, so was Mr White paid by Mr Chu. Just as Ms Fung sought to justify in cross-examination by Mr Scott, the conclusions

reached by her, so did Mr White seek to justify in cross-examination by Mr Westbrook the conclusions reached by him.

99. We are in no doubt at all that both were fully aware of the obligations of expert witnesses. We are quite satisfied that both experts approached their task with appropriate independence, and with a view to assisting the Tribunal.

The penalty imposed:

100. Mr. Westbrook correctly set out the purposes of disciplinary sanctions. They are, first, punishment; second, deterrence; third, where suspension, revocation or prohibition is involved, to ensure that the offender does not have the opportunity to repeat the offence, either for a limited period or indefinitely; and finally, and fundamentally, to maintain and promote confidence in securities and futures industry.

101. In the present case, in the NPDA, a penalty of revocation of Mr. Chu's licence was proposed. That penalty was considered appropriate for the following reasons given by the SFC in the NPDA:

> "(a) it seems that you were dishonest in concealing your personal trading from SBI;
>
> (b) the concealment lasted for more than five years;
>
> (c) the use of 'scaffolding' trading strategy is very serious misconduct as it misleads investors and damages market integrity;

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(d) you have worked in the securities industry for over 10 years and should be well aware of the need for honesty in the financial services field;

(e) you used the concealed accounts for manipulative activities that were intended to artificially affect the genuine demand for and supply of the relevant stocks. Your concealment evaded the monitoring by SBI and severely damaged the integrity of the market;

(f) you have worked in the securities industry for over 13 years and should have known what you did was seriously wrong; and

(g) you have no previous disciplinary record."

102. The decision of the SFC not to maintain the complaint of concealment of personal trading must mean that items (a), and (b), of the above list fell away completely. The aspect of "concealment" in item (e), also fell away. We note that items (d) and (f) constitute an inconsistent duplication.

103. Following the submissions, the SFC reduced the penalty from revocation to suspension for a period of three years. Mr. Scott argued that having regard to the mitigating factors that had been put before the SFC, and the comparative cases, a suspension of three years was not justified.

104. A principal justification advanced by the SFC for the three-year suspension was that the cases relied upon to justify a lesser suspension were older cases, most more than three years older. Although it arose as a result of concealment, it is appropriate to note that the trading, the subject of complaint, occurred in 2005, more than three years prior to

the disciplinary action. It is right that a more serious view is now taken by the SFC of the conduct under question, but it is also right that a person should be sentenced upon the basis prevailing at the time of the offence, even if the offence has been concealed.

105. We think Mr. Scott is on good ground when he says that it was unfair and unreasonable on the part of the SFC to equate Mr. Chu's situation with the heavier end of the spectrum, and in particular to cases where there were criminal convictions for market manipulation. We are obliged to note that there was no criminal conviction in the present case.

106. We think it is appropriate to have regard to the previous decisions in the following three cases relied upon by Mr. Scott:

(a) Chin Man Chung, SFC News, 20 August 2007, suspension for 18 months and a fine imposed for manipulation of the price of two warrants on three occasions, traded through his father's account;

(b) Tsoi Bun, Press Release, 12 October 2006, suspension for 15 months for manipulating the calculated opening price of HSI futures contracts;

(c) Ng Yu Hon, SFC News, 7 July 2008, suspension for 18 months for manipulating the closing price of certain shares.

107. Weighing the mitigating factors put to us, together with those three authorities, we are satisfied that it is appropriate for us to intervene in the sentence imposed.

108. The period of suspension will be reduced to a period of 18 months.

Unused material:

109. At the commencement of proceedings Mr Scott raised an issue of unused material, contending that the SFC were in possession of material which they may not intend to use in the proceedings but which may be relevant to the position of Mr Chu. The position of the SFC was that they had disclosed all relevant matters. Submissions were prepared by both parties with a view to arguing the extent of the obligation of disclosure on the part of the SFC.

110. As matters transpired it appeared that Mr Scott accepted that all relevant matters had been disclosed, and that there was no unused material in possession of the SFC which might assist Mr Chu in the conduct of the proceedings. In those circumstances oral argument on the issue did not proceed. Despite that, the SFC acknowledged that this is an area which is in need of review.

111. In the absence of a specific issue between the parties, and proper oral argument, we are reluctant to express a final view on this matter.

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112. It is sufficient if we say that it is presently the view of the Chairman, without the benefit of full argument, that, having regard to the disciplinary, or quasi-criminal, nature of the proceedings, there would be a strong argument to be mounted on the part of an applicant for review that the disclosure obligation on the SFC, before the Tribunal, is equivalent to that on a prosecutor in criminal proceedings.

113. In this respect it is important to remember the rationale behind the right of a person charged with a criminal offence to the disclosure of unused material. That unused material, while relevant to the matter in hand, is not considered by the prosecutor to advance his case. But there may be, in the material which the prosecutor does not wish to use, material which might advance the case of the person charged. He is entitled to access to that material and to use it in his defence if he believes it will advance his case.

114. It may well be that a statement has been made to the SFC in the course of the investigation which does not advance the case of the SFC, but does advance the case of the subject of the investigation. It is unlikely that the SFC would want to use such a statement itself. It is difficult to see why such a statement should not be disclosed by the SFC to the subject. Further, it may well be that the subject of an investigation has in some other, unrelated SFC matter, been the subject of either investigation into his own conduct, or, has made a statement in relation to the conduct of another person. It is arguable that documentation arising from those circumstances might assist the subject of an investigation in advancing his case. An argument may be made that such documentation ought to be disclosed.

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B 115. In all the circumstances we prefer to reserve the matter for full argument when a direct issue of disclosure arises.

Costs:

116. We have not had any submissions from the parties on the question of costs. In so far as the review related to the finding of misconduct that has failed. In so far as the review related to the penalty imposed, the application has succeeded in part. We think it is fair to say that the great bulk of the preparation for, and the hearing of, the application of the review related to the finding of misconduct.

117. There will be an order nisi that two thirds of the costs of the application for review must be paid by Mr Chu to the SFC, such costs, if not agreed, to be taxed on a party and party basis. There will be a certificate for two counsel.

118. If the parties wish to make representations as to costs, the Tribunal will receive and consider any such representations, in writing, first from Mr. Chu, within 21 days from the date on this Decision, and in reply from the SFC seven days thereafter. Should any representations not be received by the expiry of that period, the costs order will be made absolute.

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

Mr Chan Kam Wing, Clement
Member

Mr Kwan Pak Chung, Edward
Member

Mr John Scott SC, leading Ms Rachel Lam, Counsel, instructed by Messrs Hastings & Co for the Applicant

Mr Simon Westbrook SC and Mr Roger Beresford, instructed by the Securities and Futures Commission for the Respondent