

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

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

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

BETWEEN

CHRISTOPHER JAMES AARONS

Applicant

and

SECURITIES AND FUTURES COMMISSION

Respondent

Tribunal: Mr Michael Hartmann, Chairman

Date of Ruling: 14 March 2022

RULING

(ON MODE OF HEARING)

A *Introduction* A

B
C 1. The substantive hearing of this matter before myself and two members has
D been set down for hearing over six days in April of this year, that is, on 7 and 8 April and
E thereafter from 11 to 14 April. A difficulty, however, has arisen in respect of those dates
F in that, as matters stand, I will be in Australia and unable to return to Hong Kong over that
G period of time to sit as Chairman of the review.
H

I 2. The parties have agreed that, by reason of earlier rulings made, I am now
J seized of this matter and it is no longer possible simply to ask another Chairman of the
K Tribunal to take my place. I should remain as Chairman through until this matter has been
L determined.
M

N 3. How am I to do that? As I see it, there are two options. First, the matter may
O be adjourned to a time later in the year when counsel for the parties are free to appear before
P the Tribunal. That time, it appears, is in November, a delay of some seven months. Second,
Q the hearing may go ahead in April (on the dates set out above) subject to the condition that,
R while all other parties will be physically in attendance, I will conduct the proceedings as
S Chairman by way of internet connection, that is, by way of what is now commonly called
T 'zoom'.
U

V 4. The Applicant has expressed a strong desire for the matter to be adjourned.
He considers it fundamental that this particular case be heard with all parties physically
present – most certainly myself and the two Members – in order to ensure a full, fair and
therefore just hearing.

5. The Respondent, the Securities and Futures Commission ("the SFC"), is
desirous of further delays being avoided and has submitted that, along with many other
cases being determined in different jurisdictions of the common law world in this time of
pandemic, a full and fair hearing can be secured even though, as Chairman, I will
participate by way of internet connection. In short, the SFC has submitted that the hearing
should continue in April.

A 6. The question to be determined in this ruling is which of the two options is
B to be chosen?

C *A brief background*

D 7. In about March 2020, the World Health Organization declared that the
E illness caused by the spread of what is now known as Covid-19 constituted a global
F pandemic. In seeking to combat the pandemic, many states imposed restrictions – including
G prohibition from entry and quarantine requirements - on international travel. Australia and
H Hong Kong were two such countries.

H 8. In the second half of 2021, Australia, having softened its entry requirements
I for international travellers who had been fully vaccinated and who tested negative for the
J coronavirus, began to permit international travellers to enter the country. As I perceived it
K at the time, this was in accord with a world trend.

L 9. In October 2021, I travelled with my wife to Sydney in order to spend time
M with our son and other family members. It was intended that we would return to Hong
N Kong in or about mid-January 2022, more than two months prior to the substantive hearing
O of this matter.

P 10. Regrettably, after our departure, increasingly large numbers of people in
Q Hong Kong began to fall victim to the ravages of a new strain of the Covid 19 coronavirus.
R As part of its strategy to combat the pandemic within its borders, the Hong Kong authorities
S prohibited persons from a number of designated countries where the Covid pandemic was
T believed to be particularly grave from entering Hong Kong. One of those countries was
U Australia.

V 11. Initially, the prohibitions against inbound travel were for limited periods of
two to three weeks at a time and on each occasion I ensured that my wife and I were booked
to return to Hong Kong on the first permitted date. On each occasion, upon our anticipated
return, we were required to undergo 14 days quarantine in a designated hotel and on each
occasion, in this respect, the necessary bookings were made.

A 12. In late February of this year, after I had booked to return to Hong Kong on
B 4 March, the Hong Kong authorities announced that, in order to better combat the spread
C of Covid within its borders, it was now prohibiting persons from the designated countries,
D including Australia, from returning to Hong Kong until after 20 April 2022, the period of
14 days quarantine to remain in place¹.

E 13. Although bookings were immediately secured to fly back to Hong Kong on
F 21 April, it meant that it was now no longer possible to be physically in Hong Kong over
G the period between 7 and 14 April, that is, over the period of the hearing, and it was on this
basis that I sought the views of the parties as to the best way forward.

H *The option advocated by the SFC*

I 14. The SFC has argued that there should be no delay. It has submitted that it is
J in the interests of the parties and the integrity of the market to resolve this matter without
K further delay. In this regard, I have taken note of the fact that the impugned events
themselves occurred in January 2016 – some six years ago - while the decision notice which
gave rise to these proceedings is dated 29 January 2021.

L 15. The application for review is dated 19 February 2021. Accordingly, if the
M matter is heard in November of this year, there will be a delay in excess of 20 months
N between the filing of the application for review and the substantive hearing.

O 16. It is a fundamental principle that matters in our courts should proceed to
P resolution without undue delay. That principle applies equally to matters before the
Tribunal.

Q 17. There is no suggestion that the parties will not be fully prepared for the
R hearing in April of this year; the single issue is the wholly unanticipated - and prolonged -

S _____
T ¹ It should be said that Hong Kong has permitted persons who wish to return to from ‘prohibited’ countries
U to travel first to a non-prohibited country (such as Singapore or Thailand) and spending two weeks there
before entering Hong Kong. Persons doing so are then required to undertake 14 days quarantine. The cost,
however, of hotel bookings in these ‘sanitising’ countries is high and, in addition, there is no certainty that
V these countries will not themselves be placed on the ‘prohibited list’. For those reasons, I made the decision
not to attempt this alternate way home.

A ban on travel into Hong Kong from Australia and the fact, therefore, that I, as Chairman, will not be able to be physically present when the hearing takes place.

18. It is, however, the SFC case that my physical absence can be countered by my ability to participate fully in the proceedings as Chairman by way of a now well tested and successful Internet connection; that is, by way of zoom.

19. In this latter respect, the proposed use of a video link is now a well-honed tool used to mitigate the various adverse consequences to litigants of the Covid pandemic. I am aware that it has been used in Hong Kong proceedings, that it is regularly used in international arbitration matters and indeed I have recently conducted proceedings in this Tribunal by way of the same video link. I am aware, therefore, that it can be successfully used.

The option advocated by the Applicant

20. It has been advocated on behalf of the Applicant, however, that in the present case it is particularly important that I should be physically present during the course of the substantive hearing. It has been asserted that the Applicant's credibility is a central issue in the proceedings and that his credibility should be scrutinised in the solemn atmosphere of a Tribunal hearing in my personal presence.

21. It is not a contention which I find to be persuasive.

22. Insofar as the demeanour of the Applicant during the course of his testimony may be said to be relevant², I will be able to watch him give his evidence by way of video link and able also to hear what he has to say. I will be able fully and effectively to monitor the testimony in my role as Chairman and to weigh its strengths and weaknesses. As a professional judge, I do not see that I need to be physically present to fulfil that function, not when I am able by way of a video link to have a full and immediate picture of everything said and done by the Applicant (and by all other witnesses).

² And, of course, relying too much on demeanour can itself be dangerous. Juries are commonly given warnings in that regard.

A 23. I would add that my earlier experience of chairing a substantive tribunal
B hearing by way of video link has shown me that my ability to ensure the due solemnity of
C proceedings is not in any way prejudiced by my physical absence.

D 24. As to the suggestion that a video hearing (on my part at least) would inhibit
E the normal process of face to face interaction between the Tribunal members to deal with
F matters as they arise, my involvement in the proceedings as Chairman will obviously
G include my discussions with the Members before the hearing commences and during
H appropriate intervals during the course of the proceedings. The same obviously is to be said
I for our immediate discussions at the end of the substantive hearing³. In this regard it will
J be simple enough to set up a separate confidential video link between myself and the
K members which will permit private exchanges. If any matter should arise requiring such
L discussion during the course of evidence, it will be simple enough to adjourn proceedings
M to enable such discussion to take place: in exactly the same manner as if I was physically
N present.

O 25. In any event, it is invariably the case that it is better to allow counsel to deal
P with matters of evidence first, being allowed to make their submissions, and then for the
Q Tribunal to consider such issues. Matters of law, of course, rest with me alone.

R 26. In respect of the authority placed before me - *King's Glory Educational*
S *Centre Ltd versus Tsang Woon Ming and Others*⁴ - the factual circumstances under
T consideration in that judgement by A. Chan J were fundamentally different. In that case it
U was proposed that witnesses should give evidence to a court in Hong Kong from outside
V of the Territory and therefore beyond the physical jurisdiction of the court.

27. On behalf of the applicant, a number of other submissions were put forward
which, with respect, I consider to be makeweights. For example, it has been suggested that
the hearing might be undermined by the infection of persons involved in its workings. That,
of course, is purely speculative. Having regard to the persistence of the pandemic, such

³ In this regard, it is to be remembered that I should be out of quarantine and back in circulation in Hong Kong in early May and I will then be able to meet with the Members to discuss all relevant issues on a face to face basis.

⁴ [2020] HKCFI 891

A difficulties could also arise later in the year. Should difficulties arise they can be dealt with
B at the time by way of relevant directions.

C 28. As to any difference in time zones, as I have said earlier, I have already
D conducted one hearing by way of video link from Australia and did not find that to be
E difficult. It is my understanding that I will be the only 'party' to the proceedings who will
need to be linked to it by way of video.

F *My determination*

G 29. In all the circumstances, stepping back and viewing this matter in the round,
H I am satisfied that a full, fair and just hearing can be secured if I am able to participate by
I way of video link. It is therefore my direction that the hearing will proceed, as already
scheduled, in April of this year.

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Michael Hartmann
(Chairman)