Application No. 5 of 2007

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

IN THE MATTER OF a Decision made by the Securities and Futures Commission under sections 194 and 198 of the Securities and Futures Ordinance, Cap. 571

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

BETWEEN

WONG TING CHOI, JOE — Applicant

and

SECURITIES AND FUTURES COMMISSION — Respondent

Tribunal: Hon Mr Justice Stone, Chairman
Mr Kwok King Man, Clement, Member
Mr David Graham, Member

Date of Hearing: 5 December 2007

Date of Determination: 8 May 2008

DETERMINATION

The application

1. By an application dated 27 August 2007, the applicant herein, Mr Joe Wong, applied under section 217 of the Securities and Futures Ordinance, Cap 517 ('the SFO') for review of the decision of the SFC, made pursuant to section 194 of the SFO, to suspend his licence for a period of two (2) years.

2. Amended Grounds for Review were filed on 14 September 2007. Unlike the original Grounds, which now have been superseded, the Amended Grounds make it clear – and this position has been confirmed by the applicant's counsel at this review, Ms Pauline Leung – that that which is at issue at this hearing of the application *solely* is the issue of the sanction which has been levied by the regulator against this applicant, and that Mr Wong no longer disputes the findings of fact of the SFC which underpin the penalty as handed down.

3. The written submissions filed on behalf of Mr Wong, contend that a period of two years is considerably more than should have been handed down, and Ms Leung maintains that when considered in light of previous decisions of this Tribunal, the penalty imposed on her client is, and could be seen to be, "manifestly wrong and excessive".

4. Whether this submission is well-founded is thus the subject of this Determination.

The factual background

5. The applicant presently is a licensed representative of Shun Loong Securities Co Ltd (dealing in securities) and of Shun Loong Futures Ltd (dealing in futures contracts).

6. He was first registered as a commodities dealer's representative on 25 September 1980, and is now 51 years old. He has no prior record of securities' infraction.

7. This disciplinary action arises out of misconduct taking place during his employment as a licensed representative of Emperor Securities Ltd and Emperor Futures Ltd in the period between 1997 and 2004.

8. By a Notice of Proposed Disciplinary Action ('NPDA') dated 18 December 2006, the SFC gave the applicant an opportunity to make representations in writing on or before 17 January 2007; at his request a translation in Chinese was provided of this Notice, and the time in which he was permitted to make representations against the view expressed within the NPDA was extended to 24 January 2007.

9. No representations in fact were made, and on 17 April 2007 the SFC telephoned the applicant to confirm that he had not submitted any

representations, and that in consequence the Notice of Final Decision would be issued shortly; in response the applicant apparently had said that he was illiterate in both English and Chinese and thus that he had not submitted any written representations, an excuse not accepted by the regulator in light of the applicant's licensing application and the fact that he had attained a Form 5 education, and further, that two letters, dated 10 and 17 January 2007, as sent by the applicant to the SFC, had been in Chinese.

10. Accordingly, on 8 August 2007 the SFC sent to the applicant its Notice of Final Decision; in light of the relevant circumstances, the appropriate penalty was considered by the regulator to be a suspension of Mr Wong's licence for 2 years under section 194 of the SFO.

11. The relevant circumstances had been summarized in paragraph 3 of the NPDA of 18 December 2006, and, absent any representations to the contrary, these circumstances thus became the basis of the sentence as now handed down by the SFC upon the applicant.

12. Paragraph 3 of the NPDA stated that as a result of its investigations, the SFC had formed the opinion that Mr Wong was guilty of misconduct, and was not fit and proper to remain licensed, in that during his employment as a licensed representative of Emperor Securities Ltd ('ESL') and Emperor Futures Ltd (EFL') he had:

- failed to comply with account opening procedures stipulated within the internal rules and regulations of ESL and of EFL;

- facilitated unlicensed activities, in breach of General Principle 7 and Principle 12.1 of the Code of Conduct for Persons Licensed by or Registered with the SFC;
- breached the internal rules and regulations of ESL and EFL relating to staff dealing and associate accounts;
- allowed a client to use a nominee account for her own personal trades, and to operate other clients' accounts without written authorization, in breach of the internal rules and regulations of ESL and EFL, and General Principle 2 of the Code of Conduct;
- failed to ensure that client assets are promptly and properly accounted for and adequately safeguarded, in breach of General Principle 8 and paragraph 11.1 of the Code of Conduct.

13. The story lying behind this recitation of categories of wrongful conduct has its genesis in the hiring by the applicant, in about 1998, of his girlfriend, one Ms Wendy Lau Fung Yee, who also was a client of ESL and EFL, to be his personal assistant, and that it was Ms Wendy Lau who had performed account opening procedures for certain of Mr Wong's clients, who, *inter alia*, were a Ms Tang, a Ms Tse, a Ms Lam and a Mr Jazz Lau.

14. Ms Wendy Lau had never been licensed by the SFC in any capacity, and that which appears to have occurred is that in addition to opening accounts for Mr Wong's clients, that she also had taken telephone calls for Mr Wong and had handled settlement matters on his behalf.

15. It also was the case that if Mr Wong was not in the office and if and when his clients had urgent orders, that Ms Wendy Lau would receive such orders and pass them on to his supervisors with the request that these orders immediately be placed, and she further confirmed with Mr Wong's clients when their orders had been successfully executed.

16. In short, the SFC case was that Ms Wendy Lau, whilst totally unlicensed, in effect acted as a 'shadow broker' in lieu of Mr Wong.

17. Other allegations, not now disputed, as were pursued by the SFC, and as again are laid out in some detail in the NPDA, against Mr Wong was that since about 1997, he had admitted to using Ms Wendy Lau's personal accounts at ESL and EFL in order to conduct his own trades in securities and futures, and that he had traded through his girlfriend's accounts because his employers did not permit him to have his own accounts, although it appears that at all material times ESL and EFL did have a 'staff account' policy in place which prohibited personal trades by account executives *unless* they had the permission of senior management so to do – which consent Mr Wong did *not* have; to the contrary, he had been expressly disallowed such a 'staff account'.

18. As to this situation, the SFC took the view that such personal dealing in securities and futures via a client's account, or even a relative's account, was unacceptable as it "blurs the audit trails for these transactions", and that Ms Lau's consent was no excuse, notwithstanding Mr Wong having

told the SFC that Ms Wendy Lau was his '*de facto*' spouse at the material time – to which the SFC response was that since Ms Lau apparently had had this status that Mr Wong should have declared to his employers that Wendy Lau was his 'associate' for the purpose of supervising what was known as the brokerage's 'Associate Account Policy'. Instead, however, Mr Wong had concealed this fact from ESL and EFL and had stated that, his brother apart, that he was not aware of any other 'associates' who had opened trading accounts with ESL or with EFL.

19. The SFC also discovered, from interviewing Wendy Lau, that Jazz Lau was her brother, Ms Lam was Jazz Lau's girlfriend, that Ms Tse was the wife of her other brother, and that they had agreed to open trading accounts at ESL at Wendy Lau's request, and verbally had authorized Wendy Lau to operate their accounts, and that orders in these accounts had been placed through the applicant, Mr Wong, who knowingly further had allowed Wendy Lau to operate Ms Lam's account at ESL as her nominee account for the purpose of her (Wendy Lau's) own personal trades, notwithstanding the rule that one client can only open one single account to trade various products. Nor was there in existence any form of written authorization of Jazz Lau, Lam and Tse permitting the use of their accounts by Wendy Lau.

20. The position thus created by the activities of Wendy Lau, which formed the foundation of the allegations as made by the SFC against the applicant, began to unravel in July 2004, when Ms Tang complained to ESL

that she had deposited a sum of HK$120,000 into the bank account of ESL on 28 April 2003, it later being discovered that this sum incorrectly had been credited to the account of Ms Lam, and subsequent interviews by the SFC with, *inter alia*, Ms Tang, Wendy Lau and the applicant began to reveal what had been happening in terms of Wendy Lau's involvement at the brokerage.

21. In the NPDA the SFC was moved to observe to the applicant that "the apparently sloppy attitude that you demonstrated towards the handling of client money is appalling", and that General Principle 8 of the Code of Conduct (and also paragraph 11.1) provided that a licensed person should ensure that client assets are promptly and properly accounted for and adequately safeguarded, and that permitting Wendy Lau to act in the manner in which she had towards client monies "without keeping yourself abreast of the flow of such funds" was unacceptable to the regulator.

22. Hence the content of the NPDA, which anticipated a licence suspension for the applicant for 2 years, a provisional view which remained undisturbed in the Notice of Final Decision in the absence of any representation by the applicant.

23. The SFC made it clear (at paragraph 39 of the NPDA) that it believed the penalty of 2 years was "the most appropriate" after taking into account all relevant circumstances including:

- the seriousness of the applicant's misconduct, and the negative impact they would have on the investing public;
- the applicant's intention, when he believed, albeit incorrectly, that he was not permitted personally to open a staff account, to deceive his employer by conducting personal trades in Wendy Lau's account, and also in allowing Ms Lau to operate a nominee account for her own trading activities;
- the loss suffered by his client, Ms Tang, as the result of the applicant's failure to safeguard client assets;
- his experience in the industry; and
- his previous clean disciplinary record.

The mitigation advanced

24. No *viva voce* evidence was called, and the Tribunal thus did not have the opportunity to hear from, nor to make any assessment of, the applicant himself.

25. However, Ms Pauline Leung, mitigating on his behalf, asked the Tribunal to bear in mind the fact that as the result of complaints made by Ms Tang, Wendy Lau had stated that she had repaid to Ms Tang a sum of in or about 1 million dollars, whilst according to Ms Tang herself, Wendy Lau and the applicant had repaid her a sum of about HK$2 million; moreover Wendy Lau had been convicted of the charge of Using a False Instrument in May 2005, and had been sentenced by the magistrate to 240 hours of Community Service.

26. Ms Leung said that in considering the penalty imposed upon the applicant the SFC had taken into account loss suffered by the applicant's clients as a result of his failure to safeguard client assets, and that there was no allegation or finding by the SFC that either of Lam, Jazz Lau or Tse had suffered loss as the result of the admitted misconduct of the applicant. Indeed, she said that there was no specific finding by the SFC in the Letter of Mindedness as to the amount of loss actually suffered by Ms Tang, which was unsubstantiated, and that, if anything, in the reparations made to her that Ms Tang may well have been "overcompensated".

27. Moreover, said Ms Leung, although the SFC had referred (at paragraph 39 of its NPDA) to the fact that her client had "chosen to deceive" his employers by reason of his use of Wendy Lau's account to conduct his own trades, and also had allowed her to operate a nominee account for her own trading activities, nevertheless this activity fell within the "lower spectrum of dishonesty or seriousness" given that in 1997 it had been permissible for the applicant, *qua* employee, to have opened his own trading account upon obtaining approval from senior management, that the applicant had been mistaken in thinking that he was not allowed to have his own trading account, and that the applicant had not dealt in securities based on information obtained in connection with his employment or dealing on behalf of his employers, which would have rendered his conduct "more serious".

28. Ms Leung submitted further that the degree of dishonesty in the applicant permitting Wendy Lau to trade via nominee accounts was "not the most serious of its type", and argued that such misconduct had to be distinguished from cases wherein a licensed person allows another to operate a nominee account to facilitate market manipulation, as had been the case, for example, in *SFC v Hung Hing Chuen, SFAT No 10 of 2006.*

29. Counsel emphasized that the applicant had been working as a licensed representative of ESL and EFL since 1994 and 1995 respectively, and that his supervisor, Mr Lee Wai Shing, had confirmed that he had a good working record and that there never had been any complaint against him by his clients prior to Ms Tang's complaint.

30. In addition, she said, the applicant had been co-operative with the SFC during its enquiries and had accepted that there was "room for improvement" in his work. He no longer was hiring Ms Wendy Lau as his personal assistant, and in light of his record it was unlikely that he would commit misconduct in the future.

31. Ms Leung noted that by the time the present period of suspension of 2 years expired, it would be doubtful if her client would be in position to return to work as a licensed representative, and in itself this fact underlined the severity of the present period of 2 years, which in effect was as draconian a penalty as a revocation of the applicant's licence.

32. In the course of her submission, Ms Leung made reference to a number of previous decisions of this Tribunal – see: *Kwok Wai Shun, SFAT No 3 of 2004* (3 months suspension); *Cheng Wai Shan, SFAT No* 9 *of 2004* (9 months suspension); *Wong Kwok Fan, Rico, SFAT No 2 of 2005* (2 months suspension, reduced on review to 5 weeks); *Chim Chai Shan,Jovin, SFAT No 5 of 2005* (4 months suspension); *Ng Shun Fu, SFAT No 3 of 2005* (9 months suspension); *Hung Hing Chuen, SFAT No 10 of 2006* (6 weeks suspension) – and submitted that the periods of suspension in these cases were more in line with the defalcations of her client.

33. Whilst Ms Leung accepted that for the type of misconduct committed by the applicant, a period of licence suspension *was* called for, nevertheless she asked the Tribunal to find that the penalty presently imposed by the SFC was excessive and plainly in error, and she asked for a variation of such period.

34. When pressed by the Tribunal upon the length of suspension she had in mind, it appeared that she had in mind something in the region of 9 months to one year, although, for obvious forensic reasons, she was somewhat reluctant to commit to a precise figure.

The SFC response

35. In reply to the mitigation advanced on behalf of the applicant, Mr Roger Beresford, counsel appearing on behalf of the SFC, was distinctly

hard-nosed, and in the course of his submission made a number of telling points.

36. If we may say so, the tenor of his helpful and well-researched argument was that, if anything, in this particular case this applicant had been dealt with relatively lightly by the regulator.

37. He noted at the outset that in a situation such as this, wherein the applicant has not taken advantage of the opportunity afforded him to make representations to the SFC in response to the content of the NPDA, it is correspondingly the more difficult to review a carefully considered decision, in this connection citing the observations of the Tribunal in *Yu Ming Investment Management Ltd*, *SFAT No 2 of 2007*, at paragraph 36. We agree.

38. Mr Beresford also commented upon the six prior Determinations of the Tribunal as had been prayed in aid by Ms Pauline Leung on behalf of the applicant, and observed that all those cases were distinguishable from the present by the duration and frequency of the misconduct, and further by the nature of the misconduct, in that none of them had involved the opening or operation of 'phantom accounts', and in most of them there was no venality. To the contrary, he said, the misconduct in the present case was most certainly *not* a 'one off' incident, and had continued for more than six years from 1997.

39. On the facts now before this Tribunal, Mr Beresford noted that whilst it was contended on behalf of the applicant that his conduct had caused no loss, with reference being made to Ms Lam, Jazz Lau and Ms Tse, none of these persons were real clients of the brokerage or of the applicant – they merely had lent their names for Wendy Lau's use. They did *not* invest or trade, and neither the applicant nor Wendy Lau had acted on their behalf, although they were exposed to the risk of loss because Wendy Lau personally was trading their accounts with the benefit of credit lines apparently advanced to them by the brokerage.

40. In any event, said Mr Beresford, there were at least three clients who *did* suffer loss, namely Ms Tang, a Mr Garie Yau and Wendy Lau herself.

41. However, the extent of such losses had not been established precisely. Mr Beresford noted that in Sally Tang's case, for example, the task was made the more difficult, if not impossible, by the use of what in effect were 'phantom accounts' and payments in cash; Wendy Lau had said that Ms Tang's money was mixed with that of others, so that it simply was not possible properly to analyse these accounts, whilst Wendy Lau had not disputed that she had traded on a daily basis, and that Sally Tang did not recover her profits.

42. In fact, said Mr Beresford, the facts of this case, and in particular the statement of accounts, are complex, and in this context he

referred to detailed tables which had been prepared by the SFC and helpfully annexed to his skeleton argument, which themselves demonstrated the frequency of trading by the applicant and Wendy Lau through the various accounts during the period April 2003 to June 2004.

43. The statements of account thus summarized in the attached schedules demonstrated that the applicant and Wendy Lau were day traders, conducting about 10-30 trades per day involving huge numbers of contracts through these accounts, mostly in warrants rather than futures. As an example, in mid-November 2003 Wendy Lau had given Sally Tang three pages of a purported Statement of Account (the false statement for which Wendy Lau was later prosecuted and convicted) which purported to show profits on futures trades of HK$1,313,800, HK$144,000 and HK$320,000 respectively, and at the end of November Wendy Lau had given Sally Tang four personal cheques aggregating some $2 million, which cheques in fact had 'bounced'. Subsequently, the evidence was that in January 2005 the two women had met and Wendy Lau had agreed a settlement figure with Ms Tang of HK$800,000, a large part of which now apparently had been paid.

44. As for Mr Garie Yau, it appears that he had lost some HK$80,000, which apparently now is being repaid by Wendy Lau at the rate of HK$4,000 per month, albeit, Mr Beresford noted, had it not been for the applicant's misconduct in permitting this state of affairs to enure, there would have been no such losses in the first place.

45. In any event, counsel submitted, whatever the repayment situation – and he acknowledged the fact that Wendy Lau has said that she has lost her apartment – the absence of loss to clients is, at bottom, nothing to the immediate point, and does little to mitigate the seriousness of the use of 'phantom accounts', because of their impact upon market integrity, their potential to undermine the protection of the investing public, and their potential to facilitate crime (for example, money laundering) and market misconduct (for example, market manipulation).

46. It was statutory function of the SFC, he submitted, to take such steps as it considered appropriate to maintain and to promote the fairness, efficiency, competitiveness, transparency and orderliness of the industry (see section 5(1)(a), SFO), and to promote, encourage and enforce the proper conduct, competence and integrity of regulated persons – such as this applicant – in the conduct of their regulated activities (see section 5(1)(d), SFO).

47. Against this statutory backdrop, the opening and operating of phantom accounts, traded by a person other than the named account holder, was fundamentally dishonest, improper and incompatible with those objectives, and in permitting this to occur the applicant's integrity and fitness and properness must be considered to be seriously impaired.

48. It was clear that, contrary to the applicant's claim, the SFC had taken into account the applicant's hitherto clean disciplinary record.

49. Moreover, said Mr Beresford, whilst this applicant apparently contends that he had been co-operative with the SFC, nevertheless he had sought to 'distance' himself from Wendy Lau's activities, whilst at the same time claiming that all orders had been made through him; in particular, he had claimed not to have known about Ms Sally Tang's payment of HK$120,000 until December 2003, although Ms Tang's evidence to the SFC had been quite different: she had said that she had been constantly in touch with both the applicant and with Wendy Lau, and that the applicant was fully cognizant with and involved in the trading through her account – a version of events that was the more probable and believable because of the sheer volume of trading in the phantom accounts, and the claim by the applicant that all such trading was done through him.

50. Mr Beresford commented that far from a plea of Guilty to the disciplinary charges as properly had been laid against him – which would have attracted the usual 30% discount in sentence – the applicant instead had chosen to blame Wendy Lau entirely, and initially had claimed that his interviews were 'involuntary' – a claim *not* repeated at this review – and in any event in coming to the conclusions that it did the SFC had not relied solely upon the applicant's statements but upon evidence obtained from Wendy Lau and the other 'account holders'. In addition, said counsel, the concern of the SFC at what very obviously had been happening in this case could only have been increased by the applicant's letter of 5 July 2005, written subsequent to the investigation, in which he had stated that all five accounts had been "operating smoothly and properly".

51. In the course of his submission Mr Beresford produced schedules of cases before the SFC involving similar types of conduct, namely cases of secret accounts, cases of accounts operated by third parties without written authorization, cases of facilitation of unlicensed dealing, and cases of failure in handling client assets, and concluded that these decisions demonstrated that, especially in cases involving secret accounts, the present two year suspension imposed on the applicant was "by no means" out of line.

Applicable principle

52. In light of the circumstances of, and argument within this application, this Tribunal considers it worthwhile revisiting, yet again, the principles under which the SFAT is minded to act in interfering with the decisions of the statutory regulator of our markets.

53. From the time of its establishment in 2003, this Tribunal consistently has taken the position that it is *not* a regulator, that it does not have the competence to act as such, and thus will seek to 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.

54. We feel constrained further to observe that whilst there are cases in which the SFAT indeed has seen fit to interfere – and these decisions speak for themselves – for the most part the SFC disciplinary process appears to be carefully considered, monitored and operated, and that

ample opportunity (as in the present case) is accorded by the regulator for representation by the regulated person prior to the imposition of penalty. Put shortly, there is no evidence that 'due process', to employ an overworked American term, is not accorded and adhered to by the regulator, which itself is constrained to adhere to specific statutory provisions governing its functions.

55. In connection with the disciplinary process, which represents but part of the regulator's statutory tasks, our attention also has been drawn in this case to an SFC pamphlet entitled *"Disciplinary Proceedings at a Glance"*, published in September 2004, which explain the process; in fact, a copy of this document was enclosed with the NPDA as sent to the applicant in this case.

56. This pamphlet states that the SFC will, when making disciplinary decisions, have regard to its previous decisions unless changed circumstances warrant an adjustment to its penalties, and that the SFC aims to impose sanctions which are considered 'proportionate' to the gravity of the alleged improper conduct in any particular case.

57. It also provides a non-exclusive indication of the factors which the regulator will take into account in determining the level of sanction, including the impact of the conduct in question upon market integrity, the degree of losses caused to clients, the duration and frequency of the conduct, whether such conduct is widespread within the industry, whether there has

been a breach of fiduciary duty, the manner of reporting the conduct by the applicant and the degree of co-operation with the SFC as demonstrated by the applicant, the applicant's previous disciplinary record, experience and position, and SFC action in similar cases.

58. As a statement of principled approach to sentencing for disciplinary offences we are unable to find fault with this categorization of relevant matters.

59. If, therefore, the regulator has adopted such an analytical approach to the imposition of penalty, how should this Tribunal react upon application for review against such a disciplinary decision?

60. This has been subject of frequent *dicta* in earlier SFAT decisions: see, for example, *Wong Pui Hey, Duncan*, *SFAT No 2 of 2003*, Determination dated 8 October 2003, at paragraph 42; *Man Kin Wai, Ricky, SFAT No 1 of 2003*, Determination dated 10 December 2003, at paragraph 30; *Kwok Wai Shun, SFAT No 3 of 2004*, Determination dated 11 June 2004, at paragraph 23; *Chim Chai Shan, Jovin, SFAT No 5 of 2005*, Determination dated 31 March 2006, at paragraphs 37-38.

61. In the broader terms of the correct approach to disciplinary actions for professional people, the relevant principle was restated by the Privy Council in *Gupta v General Medical Council* [2002] 1 WLR 1691, at 1702 – wherein the earlier Court of Appeal case of *Bolton v The Law Society*

[1994] 1 WLR 512, at 517-519, was cited with approval – a principle which expressly was applied in this Tribunal in *Wong Wing Fai, Eric, SFAT No 4 of 2004*, Determination dated 2 August 2004, at paragraphs 26-27.

62. A principal purpose of the powers conferred under section 194 of the SFO is the preservation and maintenance of public confidence in the securities and futures industry rather than the administration of retributive justice, which is a matter of judgment vested in the SFC as the regulator statutorily charged with overseeing operation of the Hong Kong markets.

63. The recent case of *Raschid v General Medical Council and Fatnani v GMC* [2007] 1 WLR 1460 in the English Court of Appeal serves to underscore this important and fundamental approach.

64. In that case, the Court of Appeal was dealing with two appeals by the GMC against orders imposed by a High Court judge, who had significantly varied the penalties handed down against Dr Raschid and Dr Fatnani by the Fitness to Practice Panel of the GMC.

65. The facts were that in *Raschid*, the disciplinary panel had found that he had behaved inappropriately towards a young female patient such as to constitute serious professional misconduct, and pursuant to section 36(1) of the Medical Act 1983 had directed the suspension of his registration for a period of 12 months and had directed a review of his case toward the end of that period.

66. On Dr Raschid's appeal to the High Court under section 40(7) of the Act, the judge, Mr Justice Collins, after accepting the facts as found by the Panel, had substituted the 12 month suspension with a suspension of one month, and had directed that there should be no further hearing or review.

67. In *Fatnani*, Dr Fatnani was a 70 year old female doctor convicted on 4 counts of assisting her daughter to retain a large sum of money obtained by fraud, and had been sentenced to 6 months' imprisonment suspended for 2 years. Pursuant to section 36 of the 1983 Act, the Fitness to Practise Panel of the GMC had directed the erasure of Dr Fatnani's name from the medical register.

68. On her appeal to the High Court, Collins J had substituted a suspension of 12 months for the erasure order.

69. In allowing both appeals by the GMC, and in reversing the orders of Collins J, the English Court of Appeal held that a principal purpose of the Fitness to Practise Panel was the preservation and maintenance of public confidence in the profession rather than in the administration of retributive justice, and that it was necessary to accord special respect to its judgment; and that accordingly, on appeals under section 40 of the Medical Act 1983, the High Court, while correcting material errors of fact and law, should exercise "a distinctly and firmly secondary judgment", and that the

exercise undertaken by the judge in the present cases came very close to an exercise in resentencing, and that there was no proper basis in either case for overturning the sanctions initially imposed by the Fitness to Practice Panel.

70. In delivering the decision of the Court of Appeal in *Raschid* and *Fatnani*, Laws LJ applied the earlier decisions within the sphere of domestic disciplinary action of *Ghosh v GMC* [2001] 1 WLR 1915, *Gupta v GMC* [2002] 1 WLR 1691 (PC) and *Marinovich v GMC* [2002] UKPC 36, and observed, *op cit.*, at para 26, page 1473:

> "I acknowledge without cavil that Collins J's judgments are careful and humane. But I have to say that they do not remotely offer sufficient recognition of the two principles which are especially important in this jurisdiction: the preservation of public confidence in the profession and the need in consequence to give special place to the judgment of the specialist tribunal. Applying these principles I am driven to conclude that there was not in either of these cases any proper basis established for overturning the sanctions set by the Fitness to Practise Panel."

71. It seems to us, therefore, that the jurisprudence thus established, both in England and in Hong Kong, in principle must accord primacy to the views of the professionals 'on the ground' – in this case the SFC – whose contemporary views upon the appropriate disciplinary sanction in any given case ought not lightly to be disturbed.

72. With this in mind, we turn, finally, to our conclusion on the merits of the application presently before us.

Decision

73. We have been at some pains to review the circumstances of this case, as revealed on the evidence, and we have carefully scrutinized the approach of the SFC.

74. In our view the disciplinary process was properly conducted, and that in deciding this case the SFC has not taken into account anything that it should not, nor, conversely, has it omitted to take into account anything that should have gone into the discretionary 'mix'. Accordingly, we are of the firm opinion that the present application was but an exercise in special pleading, no more and no less, albeit graciously and most capably conducted by Ms Pauline Leung, counsel on behalf of the applicant, who has said as much as she was able within the confines and circumstances of this application.

75. We decline, as firmly as we may, any invitation to 'tinker' with the penalty as handed down, and we can discern no basis for finding, upon the facts as established, that the present period of suspension of 2 years can be considered to be 'out of whack' with other disciplinary decisions as previously imposed by the SFC in analogous factual situations.

76. We recognize that in declining to interfere in this application for review that the applicant, who now is in his early 50's, may encounter a degree of financial hardship consequent upon his licence suspension, but in our view that regrettable fact cannot, and should not be permitted to, obscure

the essential nature of our supervisory function, nor to obscure the necessity for the SFC to oversee and to regulate the operation of the Hong Kong markets in the proper discharge of its statutory duties.

77. In the circumstances, therefore, in our judgment this application for review must be dismissed, and we so order.

78. As to costs, we can see no reason in the circumstances why costs should not follow the event, and we make an order *nisi* to this effect, such order to become absolute unless application is made so to vary it within a period of 28 days from the date of publication of this Determination. Whether steps be taken to enforce such order for costs in the present circumstances is, of course, solely a matter for the SFC.

Hon Mr Justice Stone	Clement Kwok	David Graham
(Chairman)	(Member)	(Member)

Ms Pauline P. L. Leung, instructed by Messrs S. H. Chan & Co., for the applicant

Mr Roger Beresford, instructed by the SFC, for the respondent