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Application No. 2 of 2010

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

IN THE MATTER of a Decision made by the Securities and Futures Commission pursuant to s 194 & 198 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

TSIEN PAK CHEONG, DAVID Applicant

and

SECURITIES AND FUTURES COMMISSION Respondent

Before: Chairman, Hon Saunders J,

Members, Ms Chan Yuen Fan, Florence, and Mr Tsang Sui Cheong, Frederick,

Date of Hearing: 23 July 2010

Date of Decision: 22 September 2010

D E C I S I O N

Introduction:

1. Following an enquiry by the Securities and Futures Commission (SFC) and subsequent Market Misconduct proceedings, in a report dated 8 July 2009, the Market Misconduct Tribunal (MMT) determined that Mr Tsien had engaged in insider dealing in shares of China Overseas Land and Investment Ltd (COLI) contrary to s 270(1)(c) of the Securities and Futures Ordinance (SFO).

2. On 21 October 2009, the SFC issued to Mr Tsien a Notice of Proposed Disciplinary Action (NPDA) informing him that it was considering taking disciplinary action against him under the SFO.

3. Mr Tsien made submissions to the SFC in response to the NPDA, and on 27 January 2010, having considered those submissions, the SFC, by a Notice of Final Decision, (NFD) notified Mr Tsien that it found him not to be a fit and proper person to be licensed, in that he failed to:

1. act honestly, fairly and in the best interests of the integrity of the market by engaging in market misconduct, in breach of General Principle 1 of the Code of Conduct for Persons Licensed by or Registered with the SFC; and

2. comply with all legal and regulatory requirements applicable to the conduct of his business activities by engaging in market misconduct, in breach of General Principle 7 of the Code of Conduct.

4. As a result of that finding, the SFC concluded that Mr Tsien was not a fit and proper person to be or to remain licensed under s 194 of the SFO. He was accordingly prohibited for life, pursuant to s 194(1)(iv) of the SFO from doing all or any of the following in relation to any regulated activities:

i applying to be licensed as a representative;

ii applying to be approved as a responsible officer of a licensed corporation;

iii applying to be given consent to act or to continue to act as an executive officer of a registered institution under s 71C of the Banking Ordinance; and

iv seeking through a registered institution to have his name entered into the register maintained by the Monetary Authority under the Banking Ordinance as that of a person engaged by the registered institution in respect of a regulated activity.

5. Mr Tsien now appeals to this Tribunal, confining his appeal to the decision on penalty.

The factual background:

6. The MMT found that Mr Tsien, as a 'connected person' in respect of COLI, had disclosed to two fund managers, price sensitive information about negotiations between JP Morgan and COLI for a top-up placement of COLI's shares, he having reasonable cause to believe that the fund managers would use the information to sell COLI shares.

7. The placement would result in a dilution of COLI shares, and accordingly it was anticipated by those involved in the placement that upon announcement of the placement, the share price would drop. By disclosing the information as he did to the two fund managers, they were able to dispose of COLI shares before the price drop, thereby avoiding a loss for the funds they managed.

8. Mr Tsien accepts the findings of the MMT in all respects.

Is insider dealing dishonest conduct:

9. In his submissions in support of the application for review, Mr. Rogers, for Mr Tsien, emphasised that he did not seek in any way to challenge the findings of the MMT. What he did seek to do however was to, as he described it, give "appropriate characterisation" to Mr Tsien's conduct as established by the findings set out by the MMT.

10. Mr. Rogers said that the finding of insider dealing by the MMT did not constitute a finding of dishonest conduct on the part of Mr Tsien. He said that Mr Tsien accepted that his conduct may be regarded as

wholly unacceptable, very serious, and a flagrant disregard of elementary rules, but submitted that the conduct did not involve outright dishonesty, but rather something more in appropriately described as very serious negligence or reckless acts.

11. We unhesitatingly reject the proposition that insider dealing does not involve dishonest conduct. The matter was put in its proper perspective by Mason NPJ in the decision in *Koon Wing Yee v Insider Dealing Tribunal* [2008] 3 HKLRD 372 at § 42 where he said:

> "That insider dealing amounts to very serious misconduct admits of no doubt. It is a species of dishonest misconduct. It consists of using price-sensitive information (which is not in the public realm) about public company for private gain in circumstances where the wrongdoer's misconduct is based on knowledge of, or his having reason to believe, critical prescribed elements of misconduct described by s 9 of SIDO."

12. That is so, even in a case such as this where, as we accept, no immediate personal gain in monetary terms was made by Mr Tsien. The fact that no immediate personal gain in monetary terms was made does not serve to make conduct that is dishonest, conduct that is honest. By giving the information, as he did, to the fund managers, to use that information to their advantage to avoid a loss, Mr Tsien has gained the confidence and appreciation of the fund managers, and may reasonably expect, in the future, a quid pro quo from the fund managers. The dishonest advantage to Mr Tsien is of the "keeping sweet" nature, so well known to the law relating to bribery and corruption.

13. That said, we accept that within the concept of dishonesty there is a range of activity which will attract different sentences. For

example, both a shoplifter and a fraudulent solicitor are dishonest. But the shoplifter who steals a $15 bottle of shampoo will plainly not be facing the same sentence as a solicitor who steals $15 million from his clients.

The jurisdiction for the power to prohibit:

14. The jurisdiction of the SFC to take disciplinary action in respect of licensed persons is contained in s 194 of SFO. The disciplinary action includes the following power:

> "prohibit the regulated person from doing all or any of the following in relation to such regulated activity or regulated activities, and for such period or until the occurrence of such event, as the Commission may specify-"

15. A fundamental plank of Mr. Rogers' submission was that the expression "such period" s 194(1)(iv) should be construed narrowly rather than broadly, and accordingly should be interpreted as meaning a fixed amount of time, the exact duration or length of which is known at the outset. Consequently, he said, there was no jurisdiction in the SFC to prohibit a person for life.

16. Mr. Beresford argued that the power to impose prohibition until the occurrence of such events as the Commission may specify included the power to impose a prohibition until the death of the registered person, in other words, the occurrence of an event. A prohibition for life, he said, meant the same thing.

17. For the reasons we set out below we have come to the conclusion of a prohibition for life is clearly not warranted in the present

case. It would only be appropriate to consider Mr. Roger's submission that there is no jurisdiction in the SFC to prohibit a person for life, in the context of an application for review where it may arguably be said that prohibition for life might be justified.

Discussion:

18. As we demonstrate in paragraph 13 above, in any class of offending there will be a range of offences which vary significantly in severity. There are two factors in the present case which in our view set this case of insider dealing towards the bottom end of the range of cases of insider dealing.

19. First, the capital sums involved in the insider dealing, whilst substantial, were not nearly as substantial as those in other cases. For example, in the case of Mr. Du Jun, a Morgan Stanley director, the insider dealing related to $86 million worth of shares. Mr Du was sentenced to 7 years imprisonment. In the present case, the notional loss avoided was only $1.4 million.

20. Second, without detracting from the matters raised in paragraph 13 above, we accept that no immediate personal gain in monetary terms was made by Mr Tsien, as a result of the information he gave to the fund managers. Further, although at the end of the day the fund managers would have benefited in respect of the remuneration for the management of the funds, which remuneration was potentially enhanced by the loss avoided, other than in that respect, the fund managers did not personally benefit from the insider dealing.

21. That this case was the lower end of the range of insider dealing cases is, we believe, demonstrated in part by the fact that the SFC chose to bring Mr Tsien and the fund managers before the MMT, rather than laying criminal charges. By that decision Mr Tsien was not exposed to either imprisonment or a monetary penalty, but instead only to the limited range of steps open to the Market Misconduct Tribunal, of a finding that he was an insider dealer, being barred from being concerned in taking part in the management of the company for a certain period, and liability for costs. That decision, on the part of the SFC, itself demonstrates that this case was at the lower end of the range.

22. Next, there are a number of mitigating factors which ought to be taken into account in fixing the appropriate prohibition in this case.

23. First, although he was in possession of, and passed on, relevant information, Mr Tsien did not personally deal in the shares in COLI.

24. Second, there is no evidence to suggest that this was other than a one-off event. Mr. Rogers was entitled to say that Mr Tsien's conduct was not repetitive.

25. Third, Mr Tsien has reached an age where it may be said that even a modest period of prohibition will take him close to the end of his working life. We were not told his precise age, but we note that he graduated in England in 1985, and we estimate to be in his early 50s. Having regard to his age, we accept that any prohibition will be a substantial penalty, likely to make it a very difficult task for him to re-enter

the workforce in the financial fields in which he has been engaged for the whole of his working life.

26. We accept that, when considering a person whether is likely to seek re-entry to the financial workforce, a factor which we must take into account having regard to the demand that disciplinary proceedings are, in part, to protect the investing public, a modest period of probation will have a more significant impact of a middle-aged person than it will on a young person.

Conclusion:

27. For the foregoing reasons, we are satisfied that prohibition for life in the present case is manifestly excessive.

28. The application for review succeeds. The order prohibiting Mr Tsien for life is set aside.

29. In determining the appropriate order we have weighed into account all of the foregoing matters. In place of the order prohibiting Mr Tsien for life, there will be order that Mr Tsien be prohibited, in terms of paragraph 4 (i)-(iv) above, for a period of 10 years.

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

Ms Florence YF Chan
Member

Mr Frederick S C Tsang
Member

Mr. Martin Rogers of Clifford Chance for the Applicant

Mr. Roger Beresford, instructed by the Securities and Futures Commission for the Respondent