Application No. 1 of 2021

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: 13 April 2021

RULING

(AS TO AN APPLICATION FOR PROCEEDINGS TO BE HELD *IN CAMERA*)

Introduction

1. The Applicant is Christopher James Aarons. He is the Chief Executive Officer ("the CEO") of Trafalgar Capital Management (HK) Ltd ("Trafalgar"), a corporation licensed to conduct regulated activities in the field of asset management pursuant to the terms of the Securities and Futures Ordinance, Chapter 571 ("the Ordinance"). The Applicant oversees the investment strategies of a number of Trafalgar enterprises. As such, in terms of the Ordinance, and in respect of Trafalgar, the Applicant has been accredited as a Licensed Representative[1] in the field of asset management, and has also, as the CEO of Trafalgar, been approved to act as a Responsible Officer[2].

2. In terms of a Notice of Proposed Disciplinary Action dated 13 February 2020[3], the Securities and Futures Commission ("the SFC") informed the Applicant that, on the basis of information put before it, he did not appear to be a fit and proper person to hold the offices of a licensed representative or a responsible officer and that accordingly, subject to any representations he wished to make, the SFC intended to suspend his licence to act as a representative and his approval to act as a responsible officer for a period of three years.

3. The notice was founded on the SFC's provisional findings that the Applicant had breached two general principles of the SFC Code of Conduct ("the Code"). First, he appeared to have breached the first General Principle of the Code which requires that a licensed or registered person must act honestly, fairly and in the best interests of his clients and the integrity of the market. Second, he appeared to have breached the seventh General Principle which requires that a licensed or registered person must comply with all regulatory requirements applicable to the conduct of his business activities in order to promote the best interests of his clients and the integrity of the market.

4. These asserted breaches of the Code were founded on, and arose out of, administrative proceedings that had taken place not in Hong Kong but in another jurisdiction, namely, South Korea. It had been the central assertion of the South Korean proceedings that, contrary to the country's investment services and capital markets

[1] Pursuant to section 114(3) and (4) of the Ordinance.

[2] Pursuant to section 126(1) of the Ordinance.

[3] Pursuant to section 194 of the Ordinance.

legislation, in January 2016 the Applicant had used 'material non-public information' - the equivalent of, or similar to, the Hong Kong concept of 'relevant information', as that term is used in insider dealing - to profit from dealing in the shares of a South Korean corporation, Hyundai Securities Company Limited ("Hyundai Securities").

5. The South Korean proceedings had been initiated by the Securities and Futures Commission of South Korea (the "Korean Commission") and had resulted in an administrative penalty in the sum of KRW337.6 million (approximately HK$2.6 million) being imposed on the Applicant. The Applicant had appealed to the Seoul Administrative Court (the "Korean Court") which in March 2019 had dismissed that appeal, confirming the imposition of the administrative penalty.

6. Having received the SFC's Notice of Proposed Disciplinary Action, the Applicant filed representations with the SFC denying culpability. The SFC, however, in its Decision Notice of 29 January 2021, suspended both the Applicant's licence to act as a representative and his approval to act as a responsible officer for a period of three years.[4]

7. On 19 February 2021, the Applicant filed a notice of application with the Tribunal for review of the SFC's decision.

8. The notice of application for review was accompanied by a letter which sought two complementary orders from the Tribunal. First, that all proceedings before the Tribunal were to be held *in camera*, that is, in private with all members of the public being excluded, and, second, that, in order to maintain privacy, the Applicant's name was not to be published until the Tribunal otherwise ordered, this latter request covering all of the Tribunal's public records. The application, in both respects ("the *in camera* application") was opposed by the SFC.

9. With no application being made for an oral hearing, the Tribunal directed that the matter be determined by way of written submissions.

[4] Doing so pursuant to section 194 of the Ordinance.

Looking to the circumstances of the Applicant's asserted conduct

10. The Applicant's asserted conduct, insofar as it gives necessary context to this ruling, may be summarised as follows:

(a) In the early evening of 6 January 2016, the Applicant received a telephone call from a man by the name of Leung, an employee of Credit Suisse (Hong Kong) Limited. Credit Suisse was one of the underwriters for a block trade of some 22.5 million shares of Hyundai Securities. Leung told him that there was to be a secondary sell down of shares in a South Korean securities company. The name was not given but the Applicant was told that the company had a market capitalisation of over US$1 billion and daily transactions close to US$5 million. The sell down was expected to be subject to a high single digit discount or higher. Leung asked whether the Applicant would be interested in participating in the sale.

(b) The telephone conversation between the Applicant and Leung was then cut short by the Applicant who said that he was busy with other matters and had to end the call but that he would revert to Leung shortly.

(c) The Korean Commission found that, under Korean law, the information given to the Applicant during this conversation constituted 'material non-public information'. It also found that, on the basis of the information given to the Applicant in the course of this conversation, the Applicant had been able to identify the shares of the company as those of Hyundai Securities.

(d) It was further found that, on the basis of the size of the block trade, the Applicant was able - correctly - to anticipate a drop in the share price of Hyundai Securities once the terms of the block trade were known to the market.

(e) Accordingly, within 10 minutes (or so) of the telephone conversation with Leung, the Applicant set about putting a short selling strategy into place.

(f) In this regard, first, the Applicant confirmed the viability of short swaps of Hyundai Securities shares with BNP Paribas Securities Services ("BNP Paribas"), requesting an advance of 500,000 shares and, second, the following morning, that is, on 7 January 2016, the Applicant confirmed the same arrangement for the same number of shares with Merrill Lynch Asia Pacific ("Merrill Lynch").

(g) Later in the morning of 7 January 2016, the Applicant received a telephone call from Leung who informed him that he had forgotten to call him back. Leung then 'wall-crossed' the Applicant, telling him that two major shareholders of Hyundai Securities were selling a large quantity shares in the company. The Applicant agreed to participate in the block trade.

(h) On that morning, before the return call from Leung, 500,000 shares in Hyundai Securities had been transacted through BNP and 54,493 shares through Merrill Lynch.

(i) As to the balance of shares due by Merrill Lynch, after the second telephone call with Leung, the Applicant requested that these be cancelled.

(j) Over the next few days - after the terms of the block trade had been made known to the market - the Applicant instructed that the necessary short selling transactions take place. In the result, a profit of KRW337.6 million was generated.

The findings of the Korean Court

11. The Korean Court upheld the findings of the Korean Commission, holding that the Applicant had traded in Hyundai Securities shares based on 'material non-public information' in breach of Korean law and that the Korean Commission had therefore been entitled to impose a fine equivalent to the profit made.

The Decision Notice of the SFC

12. In its decision notice, the SFC informed the Applicant that it saw no basis

for disturbing the findings of the Korean Commission that had been supported by the Korean Court.

13. The SFC further informed the Applicant that the issue to be determined was whether, in light of his conduct, the Applicant remained a fit and proper person under the Code. In this regard, in its Decision Notice, the SFC said[5] –

> "Our view that you took unfair advantage of BNP Paribas and Merrill Lynch in respect of the short swaps of Hyundai Securities shares is consistent with the finding of the Seoul Administrative Court that, at the time you entered into the short swaps with BNP Paribas and Merrill Lynch, you were aware that Hyundai Securities was the subject of the block trade and you expected a plunge in its share price after the block trade. There is no evidence to suggest that BNP Paribas and/or Merrill Lynch were in possession of the same information at the time.
>
> While BNP Paribas and Merrill Lynch short sold 500,000 shares and 54,493 shares of Hyundai Securities in the market respectively after they had confirmed the relevant short swaps with you, and it can therefore be argued that BNP Paribas and Merrill Lynch were not exposed to market risk, in reality, they just shifted their risk of entering into the short swaps with you to other market players who purchased Hyundai Securities shares from the market without the benefit of the subject information."

Looking to the Applicant's submissions

14. To the extent necessary to give context to this ruling, the following, by way of a brief overview, may be said of the Applicant's grounds for denial of culpability –

(a) That the proceedings in South Korea had been materially tainted by procedural and substantive errors, one example being the reliance on certain materials not divulged to the Applicant until it was too late for him to make use of those materials.

(b) That the proceedings in South Korea had been further tainted by the rejection of the Applicant's evidence in respect of a number of crucial matters when there was no, or insufficient, basis for doing so. For example, there was no, or insufficient, basis for rejecting the Applicant's evidence that

[5] See paragraphs 60 and 61 of the Decision Notice.

he believed that any one of seven securities companies could have been the subject of the information given to him in the first phone call with Leung.

(c) That the proceedings in South Korea had been further tainted by the rejection with no, or insufficient, basis, of the Applicant's evidence that his entering into short swaps was a legitimate hedging strategy, given the real possibility of Trafalgar participating in the block trade.

(d) That the Korean proceedings had been concerned with the provisions of the Korean legislation which was not mirrored under the laws of Hong Kong.

(e) Accordingly, by relying on the findings of the Korean authorities, the SFC had itself been culpable of a material error.

(f) If it had wished to proceed with disciplinary action against the Applicant, it would have been incumbent on the SFC to conduct its own assessment of the Applicant's conduct independent of the investigations of the Korean authorities. This, however, it had failed to do.

Confidentiality of the proceedings to date

15. One further matter that is relied upon by the Applicant in support of his application for the proceedings before the Tribunal to be held *in camera* is the fact that all proceedings to date have been confidential. It appears that all the proceedings in South Korea were confidential and, even though the result of the proceedings was published, the identity of the Applicant was not revealed[6]. It is to be stressed, however, that this appears to have been standard procedure and not an exceptional course of action based on an exceptional set of facts. The investigation in Hong Kong by the SFC leading up to its decision notice of 29 January 2021 was also, of course, confidential.

The basis upon which this application is made

16. In his written submissions, counsel for the Applicant, Peter Duncan SC, put

[6] The Applicant was identified only as Person A, a male of 50 years of age, the Chief Executive Officer of a Hong Kong based asset management company.

forward two propositions that he said, when taken together, justified proceedings before this Tribunal being heard *in camera*.

17. First, bearing in mind that up until the present time the Applicant has been afforded confidentiality in respect of his conduct, and bearing in mind that the Tribunal would be called upon, on substantive grounds, to consider the conduct of the Applicant entirely afresh rather than relying substantively on the suspect findings of the Korean authorities, it had to follow, in the interests of justice, that the status quo of confidentiality should be maintained until the Tribunal issued its report.

18. Second, it was said that any public hearing prior to determination by the Tribunal was likely to cause irreparable reputational damage to the Applicant and to the various funds managed by the Applicant. More importantly, it may cause significant loss to third parties, that is, to investors in the funds, these investors being essentially innocent parties.

The guiding legal principles

19. In his book, *The Rule of Law*, Lord Bingham sought to define the core of the principle that constitutes the rule of law. In this regard, he suggested the following, namely, "that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and *publicly administered in the courts*" [emphasis added]. Lord Bingham, therefore, like so many other commentators, saw the public administration of justice as being integral to the rule of law.

20. The Court of Appeal of England and Wales in a judgment given in 2009 said the following as to the importance in the English common law system of justice being administered in public rather than behind closed doors[7]:

> "Justice requires proceedings in court to be held in public... It is only where the proper administration of justice would be affected that any derogation from this principle can be permitted."

[7] See *The Times Newspapers Ltd* [2009] 1 WLR 1015.

21. Of particular relevance in the present case are the observations of the Hong Kong Court of Appeal, in *Asia Television Ltd and Communications Authority* (per Lam JA)[8] to the effect that –

> "... inconvenience and embarrassment or even potential damages to professional reputation and financial losses arising from publicity relating to a public hearing can rarely be sufficient to outweigh the public interest in open justice."

22. As to the issue of open justice in matters of market regulation, the Tribunal itself has said the following in a ruling given in the matter of *Moody's Investors Service Hong Kong Limited*[9]:

> "It has been said on numerous occasions that the true measure of health of capital markets is their transparency. This means not only that such markets should be regulated so that they operate in a fair and open manner ... but that the process of regulation should itself be open to scrutiny. Market regulators hold no special position of privilege. They are not deemed infallible. Their regulatory actions before this Tribunal and the courts are at all times open to scrutiny by the public at large and by those who participate in our capital markets. Nor do other individuals, corporations or bodies whose activities may have a material impact on the day-to-day operation of our capital markets, hold any such position of privilege. When they are subject of litigation, their actions too, unless the interests of justice in any particular case dictate otherwise, are open to scrutiny."

23. It is not suggested of course that the principle that justice requires proceedings in our courts (and our tribunals) to be held in public must be universally applied without exception or qualification. If the interests of justice - on a close consideration and with clear justification - require any matter to be heard behind closed doors, that is, *in camera*, then an order must be made accordingly.

24. As to the burden of proof, the Tribunal in the *Moody's Investors Services* report said the following[10]:

> "In determining the application, I start by recognising that the open administration of justice is a fundamental principle of common law which

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[8] [2013] 2 HKLRD 354.

[9] The ruling was dated 31 December 2014.

[10] Paragraph 9.

> applies to all proceedings before the Tribunal. That principle is only to be set aside in any particular instance if the interests of justice require it, the burden being on the applicant to establish that requirement."

25. It is to be noted that the Applicant's counsel, Peter Duncan SC, did not dispute the fact that the relevant principles were now well established. He emphasised, however, that open justice was not an absolute and should be set aside if, in any particular case, the interests of justice required. Whether such a requirement arose would depend very much on the facts of the case.

26. As the Tribunal sees it, therefore, the matter for determination in this particular case is whether the Applicant has been able to demonstrate, the burden being on him to do so, that the interests of justice require the *in camera* application to be granted.

The confidentiality of proceedings up to this date

27. It was the first leg of Mr Duncan's argument that, bearing in mind that the Applicant had been afforded confidentiality in respect of his conduct up to the present time, and further bearing in mind that the Tribunal would be asked to consider the Applicant's conduct afresh rather than relying on the findings of the Korean authorities, it had to follow - that is, that justice required - that the status quo of confidentiality should be maintained until the Tribunal issued its report.

28. In respect of this argument, the following preliminary observation, one of fundamental importance, needs to be made. As appears to have been accepted, all applications for review made to this Tribunal are determined as hearings *de novo*. Put simply, the Tribunal has the same power as a court of first instance - a trial court rather than an appeal court - to consider and weigh *all* relevant evidence itself. The Tribunal, therefore, will have the power, if required, to consider the findings made in the South Korean proceedings in order to determine, in the context of Hong Kong's jurisprudence, what weight, if any, should be given to those findings. In exactly the same manner, the Tribunal will have the power, if required, to consider the findings made by the SFC, determining the manner in which those findings were made and what weight, if any, should be given to those findings.

29. In determining matters *de novo*, that is, as a trial court, the Tribunal will have the power, if required, to look to the integrity of process in earlier proceedings, whether held in Hong Kong or elsewhere, in order to determine what weight, if any, is to be given to any particular piece of evidence that arose out of those proceedings. That is part of its everyday work.

30. Of itself, therefore, the fact that earlier proceedings - in this instance, held outside of Hong Kong - were conducted in the ordinary course of events as confidential administrative proceedings is of no real relevance in determining how this Tribunal should conduct its own proceedings. In this regard, nothing has been put before the Tribunal to suggest that there were pressing reasons peculiar to the Applicant's matter put before the Korean authorities - personal, corporate, or (more broadly) looking to the integrity of the market - which were accepted by the Korean authorities as exceptionally warranting that proceedings be held *in camera*. As the Tribunal has noted, on the evidence before it, the Korean proceedings were different from the Hong Kong proceedings in that, as a matter of course, they were kept confidential. But that is no argument for saying that the Hong Kong proceedings, that is, the proceedings before this Tribunal, should, in the interests of justice, follow suit.

31. As to the written exchanges between the legal representatives of the Applicant and the SFC prior to the SFC issuing its Final Decision Notice, the Tribunal can find no grounds for holding that the contents of these preliminary written exchanges, once challenged in the Tribunal, should, as a matter of course, remain subject to confidentiality.

32. The Tribunal must bear in mind that, if it was to accede to such a request, it would run the risk not simply of protecting the Applicant but unwittingly of setting a precedent in terms of which, by way of a general rule, the SFC would be protected from having to divulge what it said in any of its preliminary written exchanges with persons under investigation. That would provide the SFC with a shield against scrutiny directly contrary to the principle set down by this Tribunal in its ruling in *Moody's Investors Services*[11] in which, in part, the following was said:

[11] See paragraph 22 of this Ruling.

> "Market regulators hold no special position of privilege. They are not deemed infallible. Their regulatory actions before this Tribunal and the courts are at all times open to scrutiny by the public at large..."

33. Finally, while the Tribunal accepts that the Applicant has been afforded confidentiality in respect of this matter up to the present time, it can find no grounds for holding that, by reason of that fact alone, the protection of confidentiality should continue. Mr Duncan submitted that, given the procedural irregularities in the Korean proceedings - irregularities, it was suggested, that had been wrongly relied upon by the SFC - the status quo of confidentiality should continue. The Tribunal does not accept that to be the case. Indeed, as the Tribunal understands it, the operation of the principle is to contrary effect; namely, that if, on a clear justification, justice requires that any part of legal proceeding should be held *in camera*, it is that part and only that part which must be held behind closed doors and it does not act as any form of commission for the general continuance of the proceedings in the protected manner.

Damage to reputation

34. In the second leg of his argument, Mr Duncan put forward two propositions. The first was that any public hearing prior to a final determination by the Tribunal ran the very real risk of causing irreparable reputational damage to the Applicant and to the various funds managed by him.

35. This is not, however, a novel proposition. In an earlier ruling in the matter of *Quam Capital Limited*[12], the Tribunal was informed that the applicant was in the process of negotiations concerning its acquisition and that any adverse publicity arising from proceedings before the Tribunal may well, for all practical purposes, be so damaging as to undermine any prospect of the acquisition being successful. The Tribunal accepted that there was no doubt substance in the concerns expressed on behalf of the applicant. Those concerns, however, were not of sufficient weight to move the principle, now well set, that in the common law unwanted publicity, which includes publicity that may potentially have an effect on the business prospects of an applicant for review, is a normal incidence of litigation.

[12] The ruling was given on 13 April 2016.

The risk of financial loss to innocent investors

36. Perhaps the strongest point advanced on behalf of the Applicant is that, if proceedings before the Tribunal become public knowledge prior to determination of the matter, there is a very real risk that the funds under management by the Applicant will come under pressure and that this will result in financial loss, perhaps significant loss, to investors who are, in the present context, innocent third parties.

37. Leading counsel for the SFC, Abraham Chan SC, submitted that any suggestion of significant loss was unsubstantiated. It was also difficult, he submitted, to understand why damage to the reputation of a fund manager would diminish the value of the assets in that fund.

38. The Tribunal is prepared to accept that highly rated asset managers are able both to attract investors and, in the event of loss of form or any other loss of reputation, are equally at risk of seeing their departure. If, therefore, the conduct of asset managers is under review by financial regulators, and there is a danger of their licences being revoked, it may lead to an influx of redemptions. To the layman, this is perhaps the most obvious risk, but there are others too, perhaps more venomous, that emerge out of the mathematical technicalities of asset and hedge fund management.

39. But that said, the Applicant in this matter does not find himself in a unique position. It may be said that, to a greater or lesser degree, every person in the securities industry who is licensed to hold and invest other peoples' funds stands in the same position of risk. For such a person, reputation is always important and a loss of reputation brings with it consequences, sometimes regrettably to those investors who have placed trust in the person. So what is to be done concerning those persons? Are they always to be provided the protection of confidentiality on the sole basis that, if it was otherwise, innocent investors may perhaps stand to be financially prejudiced? That cannot be the case. Investors, when they invest, always accept a degree of risk and, if they wish to follow the banner of one particular asset manager, they must accept the risk that goes with that choice. A fairly - and transparently - regulated market, one in which the process of regulation is open to scrutiny, will best protect the health of the market and through that the deserved reputation of those licensed to operate within the market.

40. In the judgment of the Tribunal, what must also be remembered is that the Applicant in this matter has not spoken of a *fait accompli* - a result already determined - he has spoken of a risk, one that, to a degree at least, must be capable of being managed.

The Tribunal's determination

41. In the course of this ruling, Mr Duncan's propositions have been considered individually. That said, the Tribunal is satisfied that, even when taken together, they fall far short of being persuasive enough to justify the Tribunal in granting the orders sought.

42. The application is therefore denied. Costs will follow the event.

Michael Hartmann
(Chairman)