Application No. 5 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

I-ACCESS INVESTORS LIMITED Applicant

and

SECURITIES AND FUTURES COMMISSION Respondent

Tribunal: Mr Ian Charles McWalters, Chairman

Mr Gary Cheung Wai-kwok, Member

Ms Lorna Chen Xin, Member

Date of Hearing: 10 & 11 October 2022

Date of Determination: 13 March 2023

DETERMINATION

Introduction

1. The applicant, I-Access Investors Limited, is licenced by the Securities and Futures Commission ("SFC") and is registered as an exchange participant with The Stock Exchange of Hong Kong Limited ("the HKEx"). The applicant operated an on-line securities trading platform which its clients could use to buy and sell shares on the HKEx. As part of its service it provided clients with market information that it received from the HKEx.

2. The HKEx disseminates market information through a computer programme called Orion Market Data Platform ("OMD-C"). This programme was launched in September 2013 and to have access to it persons must sign a licencing agreement. The applicant had been an existing client of HKEx's open gateway real time data services since 2011 and once the OMD-C system commenced operation the applicant became a user of it.

3. On 6 April 2015, part of the Easter public holidays, the HKEx conducted a test of the OMD-C system without informing its licensees that it was intending to do so. If a licensee's computer system had a direct connection to the OMD-C system, and that connection remained in place during the test, then the licensee's computer system would receive the test data. The applicant was such a licensee and because it had not disconnected from the OMD-C system it received the test data and once that data was disseminated within the applicant's system it triggered certain stop loss sell standing orders of the applicant's clients. On the first trading day after the Easter holidays the triggered stop loss sell orders were executed.

4. This incident became the subject of an SFC investigation at the end of which the SFC decided to discipline the applicant by way of public reprimand and financial penalty. The applicant then applied to this Tribunal to review the SFC decision.

The SFC Investigation

5. After conducting its investigation into this incident the SFC, on 5 August 2019, issued to the applicant a Notice of Proposed Disciplinary Action ("NPDA") under section 194 of the Securities and Futures Ordinance ("the SFO"). The purpose of informing the applicant of what the SFC was proposing to do was in order to comply with section 198(1) of the SFO which prevents the SFC from exercising its disciplinary powers "without first giving the person in respect of whom the power is to be exercised a reasonable opportunity of being heard".

6. In this NPDA the SFC said that, on the information before it, it was of the preliminary view that the applicant:

> "is guilty of misconduct and/or not a fit and proper person to remain licensed, in that it appears to have failed to:
>
> (a) ensure that test data disseminated from the HKEx were not further disseminated to its clients, which resulted in clients' standing orders being incorrectly triggered and executed; and
>
> (b) promptly notify all affected clients of the incorrect triggering of their standing orders as a result of the test data."

7. In the NPDA the SFC also made the preliminary finding that the

applicant's two failures constituted a breach of General Principle 2 (Diligence) of the Code of Conduct for Persons Licensed by or Registered with the SFC ("Code of Conduct") and cast doubt on the applicant's ability to carry on regulated activities competently. General Principle 2 of the Code of Conduct states:

> **"GP 2. Diligence**
>
> In conducting its business activities, a licensed or registered person should act with due skill, care and diligence, in the best interests of its clients and the integrity of the market."

8. The sanction that the SFC proposed to impose on the applicant was a public reprimand and a fine of $600,000. The SFC is empowered to publicly reprimand a regulated person[1] by section 194(1)(b)(iii) of the SFO and to order a regulated person to pay a pecuniary penalty not exceeding $10 million by section 194(2)(b)(i) of the SFO.

9. On 4 September 2019, the applicant made written submissions in response to the SFC's NPDA and those submissions prompted the SFC to seek further information from the HKEx on its OMD-C programme. That further information, once received from the HKEx, was then communicated to the applicant who made supplemental representations in respect of it. These supplemental representations came from the applicant's solicitors and also from an executive director of the applicant.

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[1] A regulated person is defined by section 194(7) of the SFO to mean "a person who is or at the relevant time was any of the following types of person –
(a) a licensed person;
(b) a responsible officer of a licensed corporation; or
(c) a person involved in the management of the business of a licensed corporation."

The SFC's Decision Notice

10. The SFC made its disciplinary decision and communicated it to the applicant by a Decision Notice dated 11 November 2021. In that Notice the SFC set out its preliminary view as contained in the NPDA and then went on to describe, and respond to, the various representations that it had received from the applicant. After doing so, the SFC stated that it had not changed its preliminary views as set out in its NPDA and explained why.

11. In respect of the dissemination by the applicant of the test data, the SFC noted that:

(i) the applicant is required to conform to Section 2.2 of the Interface Specifications; and

(ii) a HKEx circular dated 10 March 2015 showed that 6 April 2015 would be a Hong Kong public holiday with no index dissemination;

After considering the applicant's submissions, the SFC rejected the applicant's explanations, assertions and suspicions, and concluded that there was no basis for the applicant to believe that:

(a) 6 April 2015 was a production day[2];

(b) it was necessary to stay connected to OMD-C; and

[2] As will be seen later in this Determination, the term "production day" is a term used by the HKEx to describe and identify those days when the OMD-C system is transmitting genuine market data.

(c) data received on 6 April 2015 should be treated as production data.

12. On this first area of the applicant's conduct the SFC's decision relied upon General Principle 3 (Capabilities) of the Code of Conduct. The SFC said:

> "17. General Principle 3 (Capabilities) of the Code of Conduct stipulates that a licensed person should have and effectively employ the resources and procedures which are needed for the proper performance of its business activities.
>
> 18. As a licensed corporation, I-Access is responsible for the adequacy of its system design, which should ensure that a stop loss order would not be triggered unless the relevant stock price has reached the specified price. If I-Access' system is designed such that it needs to be unplugged ahead of Non-production days and re-plugged afterwards to ensure that test data transmitted on these days would be disregarded, then it is the responsibility of I-Access to dedicate the necessary resources to do so."

13. On the second area of the applicant's conduct, the SFC noted that the applicant had shifted to the clients the responsibility for realizing that their stop loss orders had been incorrectly triggered. This stance, the SFC said, is unacceptable, because:

(i) the incorrect triggering was due to the fault of the applicant in both:

(a) not complying with the transmission specifications; and

(b) not taking heed of the HKEx's emails on 6 April 2015 to restore the latest market image;

(ii) clients of the applicant are entitled to expect that it will:

(a) have systems and controls in place to prevent stop loss orders from being incorrectly triggered; and

(b) promptly notify them when such a situation occurs so that they can pursue appropriate remedies; and

(iii) the methods by which clients could become aware of the stop loss orders being triggered would not reveal that:

(a) they were triggered incorrectly; and

(b) the incorrect triggering was due to the fault of the applicant in failing to discard test data.

14. Without in any way discouraging investors from keeping themselves informed about their investments, the SFC said that the applicant could not rely on investors doing so in order to absolve it from its responsibility to promptly notify the affected clients of the incident. In so saying, the SFC referred to General Principle 5 of the Code of Conduct which requires a licensed person to make adequate disclosure of relevant material information in its dealings with its clients.

15. In respect of the second area of the applicant's conduct, the SFC decided that the applicant's "failure to promptly notify all affected clients of the incorrect triggering of their stop loss orders as a result of the test data is clearly against the clients' best interests and falls below the standard expected of it under GP2".[3]

[3] See [66] of the Decision Notice.

16. The SFC summarised its decision on liability as follows:

> "81. For the reasons explained in this Decision Notice, the SFC finds nothing in the Representations that should change its preliminary view set out in paragraph 4 to 6 of the NPDA.
>
> 82. Having carefully considered all the circumstances of this case and the Representations, the SFC is of the opinion that I-Access has been guilty of misconduct ***and/or*** is not fit and proper to remain licensed.." (Emphasis added.)

17. What the SFC meant by the use of the phrase "**and/or**" subsequently became of concern to the Tribunal as addressed later in this Determination.

18. In respect of sanction, the SFC decided to publicly reprimand the applicant and fine it $600,000. In assessing the appropriate penalty, the SFC said that it accepted that:

(i) the applicant had not acted intentionally;

(ii) the applicant had not made any illicit gain from its conduct;

(iii) the receipt and dissemination of the test data was an isolated occurrence with limited market impact; and

(iv) the applicant had no disciplinary history.

However, it also said that it did not consider the level of cooperation demonstrated by the applicant to be sufficient for the SFC to reduce the proposed penalty.

The SFAT's Jurisdiction

19. Under section 217(1) of the SFO a person "aggrieved by a specified decision of the relevant authority made in respect of him may, by notice in writing given to the Tribunal, apply to the Tribunal for a review of the decision". The Tribunal is the Securities and Futures Appeals Tribunal and the relevant authority for the particular decisions under review is the SFC and specified decisions are decisions of the SFC "made under or pursuant to any of the provisions set out in Column 2 of Division 1 of Part 2 of Schedule 8"[4] of the SFO. The exercise of the disciplinary powers to reprimand and to fine are decisions contained in Schedule 8. The decision made under section 194(1)(b)(iii) to publicly reprimand is item 51 of the Schedule and an order under section 194(2) to pay a pecuniary penalty is item 52.

20. Being aggrieved by the SFC decisions, and those decisions being specified decisions, the applicant filed with this Tribunal a Notice of Review dated 30 November 2021.

The Notice of Review

21. The applicant's Notice of Review contains four grounds of review. Three of the grounds of review relate to the finding of misconduct (i.e. liability) and the fourth ground of review attacks the appropriateness of the sanctions.

[4] See the definition of "specified decision" in section 215 of the SFO.

Grounds relating to liability

22. The first ground relates to the misconduct of disseminating the test data and complains that the SFC's decision that the applicant was in breach of General Principal 2 of the Code of Conduct is based on a finding that there was a failure by the applicant "to ensure that test data disseminated from the Hong Kong Stock Exchange Limited ("the HKEx") were not further disseminated to its clients, which resulted in clients' standing orders being incorrectly triggered and executed ... " and that this finding is based on two wrong factual premises. The first wrong factual premise is that under paragraph 2.2. of the Interface Specifications, a technical document relating to the computer connection between the applicant's computer system and the OMD-C system, the HKEx is not under any duty or obligation to give licensees prior notice of when it would be conducting tests of its system. The second wrong factual premise is that three emails sent by the HKEx on 6 April 2015, after the test had been conducted, could have prevented the incident involving the applicant's computers from occurring.

23. The second ground of review relates to the misconduct of not promptly informing all affected clients of the incorrect triggering of their standing orders by the test data and asserts this finding of misconduct "is based on a wrong regulatory premise that it was a regulatory requirement under the Code of Conduct for the Applicant to specifically inform the affected clients promptly about the triggering of standing orders caused by the internal test of HKEx in this particular, if not peculiar case, and arising thereof, the scope of the duty by licensed persons to notify such affected clients would be uncertain as the Incident was caused by HKEx ... and no broker and information vendor participated in the Test of this

Incident".

24. The third and final ground of appeal in relation to liability simply asserts that the SFC fell into error "in finding that there was negligent misconduct by the Applicant at the material times".

Ground relating to sanction

25. This ground complains that a fine of $600,000 "in the circumstances of this case was manifestly excessive and wholly disproportionate" and asserts that the SFC:

> "had failed to consider or consider sufficiently the circumstances in this case in a pragmatic approach in particular: (1) the Incident of incorrect trigger of the clients' standing orders was solely or primarily caused by HKEx's confusing acts; (2) the Applicant's alleged conduct was not intentional or reckless; (3) the Applicant's alleged conducts caused no damage to the market integrity; (4) the Applicant's conduct in this case which produced no benefit to it; (5) the Incident was an one-off incident, short duration, an isolated case and would not recur again; (6) the Applicant co-operated fully with the Commission during the inquiry; and (7) only 12 clients affected (out of over 35,000 clients of the Applicant at the material times); (8) loss caused to the affected clients were little and the Applicant has compensated the affected clients' loss in full promptly.".

The Relevant Legal Principles to be applied by the Tribunal

26. Since the judgment of the Court of Appeal in *Tsien Pak Cheong David v Securities and Futures Commission*[5] (the "*David Tsien*" case) it is settled law that a review of a regulatory decision by the Securities and Futures Appeals Tribunal is a full merits review with the tribunal "conducting the review as if it is

[5] [2011] 3 HKLRD 533.

the original decision-maker"[6] exercising its own independent judgement, and the SFC bearing the burden of proof on the balance of probabilities[7].

27. How this full merits review is to be conducted raises a number of legal issues. The first is identifying which limb of section 194(1) of the SFO was relied on by the SFC to trigger the exercise by it of its disciplinary powers. Was it a finding of misconduct or was it the formation by the SFC of the opinion that the applicant "is not a fit and proper person to be or to remain the same type of regulated person"[8] or was it both? If one of the triggers was a finding of misconduct then that raises the second legal issue of identifying on which paragraph of the definition of misconduct that finding was made. If that finding was based on paragraph (d) of the definition of misconduct then a third legal issue is raised. The third legal issue concerns how this Tribunal conducts a full merits review when the SFC's finding of misconduct is based upon it forming the opinion, as paragraph (d) requires, that an act or omission of the applicant "is or is likely to be prejudicial to the interest of the investing public or to the public interest".

28. Both the NPDA and the Decision Notice repeats the prerequisite conditions to the exercise of the disciplinary powers that are laid down in section 194(1) of the SFO and links them together by the words "and/or". But, without identifying which of them is the trigger, or whether it is both of them, and, if one of them is a finding of misconduct, without identifying the paragraph in the definition of "misconduct" in section 193(1) of the SFO on which it relies, this bare statement reveals nothing about the route by which the SFC exercised its

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6 SFAT Application No. 3 of 2019 per the Chairman Mr M. Hartmann.
7 See section 218(7) of the SFO for the standard of proof.
8 Section 194(1)(b) of the SFO.

disciplinary powers and the basis for any finding of misconduct.

29. The definition of misconduct in section 193(1) is as follows:

> "***misconduct*** means –
>
> (a) a contravention of any of the relevant provisions;
>
> (b) a contravention of any of the terms and conditions of any licence or registration under this Ordinance;
>
> (c) a contravention of any other condition imposed under or pursuant to any provision of this Ordinance, or of any condition attached or amended under section 71C(2)(b) or (9) or 71E(3) of the Banking Ordinance (Cap. 155);
>
> (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; or (Italics added.)
>
> (e) an act or omission that –
>
> (i) relates to the carrying on of any activity, other than a regulated activity, that an intermediary may carry on for an open-ended fund company under this Ordinance; and
>
> (ii) 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,
>
> and ***guilty of misconduct*** shall be construed accordingly."
>
> (The italics in (d) above have been added for emphasis.)

30. Each of the above paragraphs (a) – (e) provides the SFC with a separate and different route by which it can find a regulated person or an intermediary guilty of misconduct. In respect of the present case we note that there is no reference in either the NPDA or the Decision Notice to a contravention of any of the relevant provisions of the SFO, (paragraph (a)), or of any terms and conditions of the applicant's licence, (paragraph (b)). Paragraphs (c) and (e) are not relevant and so that just leaves paragraph (d).

31. However, paragraph (d) cannot be relied upon unless the SFC first complies with section 193(3) which provides:

> "(3) For the purposes of paragraphs (d) and (e) 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 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 or guideline published under section 112ZR, 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."

32. Both the NPDA and the Decision Notice contain references to the Code of Conduct and both rely on breaches of the Code of Conduct to explain why the SFC found the applicant guilty of misconduct. These references have all the hallmarks of the SFC seeking to comply with section 193(3).

33. Consequently, notwithstanding that the SFC has not explained the route by which it found the applicant guilty of misconduct, it seemed to us that the SFC must have made that finding on the basis of paragraph (d) of the definition of misconduct. This necessarily means that in respect of both areas of the applicant's misconduct the SFC must have found that the applicant committed an act or omission relating to the carrying on of the regulated activity for which it was licensed and in respect of which the SFC formed the opinion, "is or is likely to be prejudicial to the interest of the investing public or to the public interest".

34. In order to remove any uncertainty as to the basis of the SFC's decision, we enquired of the parties whether they could confirm that what seemed to us to be the position is also their understanding of the situation. The applicant

indicated it is of the view that the SFC should specify which paragraph of the definition of misconduct it relied on to find the applicant guilty of misconduct. The applicant said that it is not in a position to provide the Tribunal with the confirmation it sought but had no objection to the SFC doing so if that was its position.

35. The SFC's response, in its written submission of 14 November 2022, was as follows:

> "2. The Chairman is correct in observing that sub-paragraph (d) of the definition of "misconduct" formed one of the bases of the SFC's case against the applicant.
>
> 3. In addition or as an alternative to finding that the applicant had been guilty of misconduct under section 194(1)(a) and (2)(a) of the SFO, the SFC in the NPDA (at §41[A/1/9]) and Decision Notice (at §82[A/6/186]) also found that the Applicant had not been fit and proper to remain licenced. ... Under section 194(1)(b) and (2)(b) of the SFO, the SFC is entitled to impose the proposed sanctions if in its opinion the Applicant was not fit and proper to be or to remain the same type of regulated person."

36. Thus, it is clear from [2] in the above quote that a finding of misconduct was used by the SFC as a trigger for the exercise by it of its disciplinary powers and that the particular paragraph of the definition of misconduct on which the SFC relied, in finding the applicant guilty of misconduct, was paragraph (d).

37. However, [3] of the above quoted submission prompted the Chairman to seek further clarification from the SFC on how it could form the opinion that the applicant "is not a fit and proper person to be or to remain the same type of regulated person" and not clearly state this in the Decision Notice and also not

reflect it in the sanctions by the imposition of an exclusionary penalty of some kind.

38. In further submissions dated 18 November 2022, the SFC argued that the provisions of section 194(1) and (2) do not compel the SFC to impose any exclusionary sanction upon it forming the opinion in section 194(1)(b) and (2)(b). This flexibility in the legislation, so the SFC argued, "envisages circumstances where concerns about whether a regulated person is fit and proper would and should not lead to exclusionary sanctions".

39. There are a number of matters that trouble us in respect of these submissions. The first is that it assumes the SFC is entitled to make use of the "and/or" grammatical device to avoid clearly identifying which of the two limbs of section 194(1) it is relying on, if it is only relying on one, and to avoid clearly stating that it is relying on both if that is its position.

40. There can be no doubt that the fact that the legislation is drafted in the disjunctive does not prevent the SFC from both making a finding of misconduct under section 194(1)(a) and forming the opinion under section 194(1)(b). The not fit and proper opinion may be based upon the acts or omissions underlying the finding of misconduct or it may be based upon other matters that have been revealed by the SFC's investigation. But, whatever might be the position, a regulated person who is about to be disciplined is entitled to know, with unequivocal clarity and precision, on what basis that disciplinary process is taking place.

41. The whole purpose of the NPDA is to enable a regulated person to be able to effectively exercise the right given to such persons by section 198(1) of the SFO. A regulated person can hardly do that if he does not know on which limb of section 194(1) the SFC is considering relying as the trigger for the exercise by it of its disciplinary powers and, if one of the limbs is misconduct, the paragraph in the definition of misconduct which is the basis for the SFC's finding of misconduct. Similarly, if the Decision Notice does not disclose the legal route by which the SFC has disciplined the regulated person, he, and his legal advisers, will have difficulty in deciding whether to exercise the right conferred on regulated persons by the SFO to apply to the SFAT to review the SFC's decision. Of course, should a regulated person exercise this right then it will fall to this Tribunal to review the decision of the SFC and that cannot be effectively done unless it knows what that decision is and what statutory provisions were relied on in order to make it.

42. The use of "and/or" by the SFC to describe the decision it has made is wholly unacceptable and should stop immediately. All it does is to conceal that which must be revealed and to obscure that which should be transparently clear.

43. In respect of the sanctions that can be imposed, the SFC is clearly correct in its submission that when the section 194(1)(b) limb is the trigger for the exercise of the disciplinary powers, the SFO is not compelled to impose an exclusionary sanction. But, that does not mean that when the SFC forms the section 194(1)(b) opinion it can then sanction a regulated person in an arbitrary or capricious way. Its sanction must still be a reasoned and reasonable one, taking account of the fact that it has formed a positive view that the regulated

person is not a fit and proper person to remain the same type of regulated person.

44. Because the drafting of section 194(1)(b) is in the present tense and, therefore, requires that the opinion must be formed at the time the SFC decides to exercise the SFO's disciplinary powers, there could conceivably occur between the time the opinion is formed and the time the sanction is imposed, a change of circumstances favourable to the regulated person that operates as a mitigating factor. That, for example, may explain a decision not to have resort to exclusionary sanctions. But if this was the situation it would still have to be stated and reasons given by the SFC for reaching this conclusion.

45. Whenever the SFC forms a section 194(1)(b) opinion but decides not to impose an exclusionary sanction of some kind then the SFC has a duty to explain why it has so decided. The reason this must be so is not just because as a public body exercising powers which can impact adversely on an individual it should explain, for the benefit of the individual, why it acts in the way it does. There is a further reason, namely, that in exercising these powers the SFC is carrying out its section 4 Regulatory Objectives and its section 5 functions, amongst which are objectives and functions designed to protect members of the public and the public interest[9]. Allowing a regulated person to continue in their regulated career once the SFC has formed the section 194(1)(b) opinion is, on its face, contrary to the protection of the members of the public and the public interest. If a non-exclusionary sanction can be justified, then the SFC must say so and articulate the reasons why it has reached that view.

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[9] See [56] and [57] of this Determination.

46. In the present case there is no suggestion that the SFC has considered whether the applicant should remain the same type of regulated person and no reasoned explanation for a conclusion that he should do so. In those circumstances, and given the way the SFC used the words "and/or" in articulating its decision in the Decision Notice, we view with skepticism its claim that it in fact formed the section 194(1)(b) opinion.

47. Before leaving this particular issue we should say that our comments in respect of the two limbs of section 194 apply equally to the definition of misconduct which is composed of five paragraphs with each representing a separate basis for a finding of misconduct. The SFC should make clear in their decision on what basis they have found a regulated person guilty of misconduct and, where it is paragraph (d), indicate that it finds the regulated person guilty of misconduct because it has found that the regulated person committed an act or omission relating to the carrying on of the regulated activity for which the regulated person is licenced, and that in respect of that act or omission the SFC has formed the opinion that it is or is likely to be prejudicial to be interest of the investing public or to the public interest. It should also indicate that before forming that opinion it has had regard to the provisions of the Code of Conduct issued by it under section 399.

48. Given that the decision the Tribunal has to review is, inter alia, a finding of guilty of misconduct by the SFC that is based upon paragraph (d) of the definition of misconduct and, therefore, involves the formation of a particular opinion about an act or omission of the applicant, and given that the review is a

full merits review in which the Tribunal exercises its own independent judgment and conducts the review as if it is the original decision-maker, the question arises as how the Tribunal discharges this review duty.

49. This comes down to answering the question of whether the Tribunal, after considering all the evidence, must form its own paragraph (d) opinion on the conduct of the applicant, in substitution for that of the SFC, or whether it only decides if, on that evidence, the SFC, as regulator, could reasonably form the opinion set out in paragraph (d). To draw a judicial analogy, does the tribunal conduct a rehearing of the matter, in the form of a hearing *de novo*, or does it conduct a review of the SFC's decision along the lines of a judicial review?

50. On this issue we sought the assistance of the parties. It is the unanimous view of the parties that it is for the Tribunal to form the opinion required by paragraph (d) of the definition of misconduct. We agree and we shall explain why.

51. It is clear that in the *David Tsien* case the Court of Appeal envisaged that a full merits review would involve the SFAT standing in the shoes of the SFC and performing the duty that the SFC performed. When the decision making process of the SFC involves, as it did here, a finding of misconduct based upon paragraph (d) of the definition of misconduct, that will include the SFAT forming an opinion on whether any act or omission of the applicant before it, "is or is likely to be prejudicial to the interest of the investing public or the public interest".

52. Although the Court of Appeal did not specifically address whether, in conducting its full merits review, the SFAT should also be required to form an opinion that the SFO requires be formed by the regulator, it did make a number of comments on different issues which point to it having that view. The comments it made are:

(i) the SFAT does not need to accord the decision of the SFC with special respect;

(ii) it is important that an applicant seeking to review a decision of the SFC have an independent body exercise its own judgment in respect of the SFC's decision;

(iii) the members of the SFAT possess the expertise "to determine fairly and impartially what is needed to safeguard the integrity and reputation of the financial markets of Hong Kong"[10]; and

(iv) a full merits review is not confined to factual disputes.[11]

53. I note that Coleman J in *Tam Sze Leung and Ors v Secretary for Justice and the SFC*[12] said at [41] of his judgement:

> "Hence, the SFAT has wide powers of review in an adversarial setting, applying the Court's civil standard of proof. There is also no dispute that the review by the SFAT is a *de novo* full merits review: See *Tsien Pak Cheong* v *SFC* [2011] 3 HKLRD 533."

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[10] [2011] 3 HKLRD 533, 548 at [45].
[11] 3 Ibid, at 545, [28].
[12] [2022] HKCFI 2330.

A hearing *de novo* would necessarily require that the Tribunal form the opinion required in paragraph (d) of the definition of misconduct.

54. Thus, we approach this review by considering whether, on the material presented to us, we are satisfied on the balance of probabilities that:

(i) the applicant committed an act or omitted to do an act;

(ii) its act or omission related to the carrying on of a regulated activity for which the applicant is licensed; and

(iii) that act or omission, in *our* opinion, is or is likely to be prejudicial to the interest of the investing public or to the public interest.

55. However, the formation of the paragraph (d) opinion is not done in isolation but in conjunction with a consideration of the provisions of the Code of Conduct and an assessment of the regulated person's acts or omissions against the backdrop of those provisions. In order to understand why this is so we must refer to certain provisions in the SFO and the first is section 399 of the SFO which gives to the SFC power to publish:

> "such codes and guidelines appropriate for providing guidance –
>
> (a) for the furtherance of any of its regulatory objectives;
>
> (b) in relation to any matter relating to any of the functions of the Commission under any of the relevant provisions; and
>
> (c) in relation to the operation of any provision of this Ordinance."

56. Section 4 of the SFO sets out the regulatory objectives of the SFC. It relevantly states:

> "The regulatory objectives of the Commission are:
>
> (a) to maintain and promote the fairness, efficiency, competitiveness, transparency and orderliness of the securities and futures industry;
>
> (b) to promote understanding by the public of financial services including the operation and functioning of the securities and futures industry;
>
> (c) to provide protection for members of the public investing in or holding financial products;
>
> (d) to minimize crime and misconduct in the securities and futures industry;
>
> (e) to reduce systemic risks in the securities and futures industry; ..."

57. The functions of the Commission are set out section 5(1) of the SFO. Amongst the various functions there set out are the following:

> "(a) to take such steps as it considers appropriate to maintain and promote the fairness, efficiency, competitiveness, transparency and orderliness of the securities and futures industry;
>
> ...
>
> (d) to promote, encourage and enforce the proper conduct, competence and integrity of persons carrying on activities regulated by the Commission under any of the relevant provisions in the conduct of such activities;
>
> ...
>
> (f) to take such steps as it considers appropriate to ensure that the relevant provisions are complied with;
>
> (g) to maintain and promote confidence in the securities and futures industry in such manner as it considers appropriate including by the exercise of its discretion to disclose to the public any matter relating or incidental to the performance of any of its functions;
>
> ...
>
> (l) to secure an appropriate degree of protection for members of the public investing in or holding financial products, having regard to their degree of understanding and expertise in respect of investing in or holding financial products; ..."

58. The Code of Conduct for Persons Licensed by or Registered with the SFC is one of several codes published by the SFC and there can be no doubt that the Code is in furtherance of its regulatory objectives and in relation to any matter relating to any of its functions. Equally, there can be no doubt that the Code fulfills its function of providing guidance. It is clear from section 399(8) of the SFO that the Code is not subsidiary legislation and from section 399(7) that the Code may be of general or special application and may make different provisions for different circumstances.

59. Notwithstanding that after articulating each General Principle the Code goes on to state how that General Principle will apply in certain specified situations, we are satisfied that the Code is not intended to be an exhaustive document. Every Code of this nature, that is, one that lays down ethical and professional standards, will inevitably articulate those standards in general terms and cannot be expected to particularise their application in a way that caters for every conceivable situation. Consequently, if any particular situation is not addressed within the sub-sections of the General Principle, that does not mean that the Code does not apply to that situation; rather, it means that the General Principle will still apply, but only as a general standard against which the conduct of the regulated person can be assessed. The General Principles will always have a standard setting role and apply to the way regulated persons conduct themselves in the course of their regulated activity. Over time, and with publication by the SFC of its decisions, regulated persons will gain a better feel for what these generally expressed standards may require of them when carrying out their regulated activities.

60. Apart from General Principle 2 (quoted at [7] of this Determination), other provisions in the Code that were relied on by the SFC, or which we consider are relevant, are General Principles 1, 3 and 5 which state as follows:

> "**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."
>
> "**GP3. Capabilities**
>
> A licensed or registered person should have and employ effectively the resources and procedures which are needed for the proper performance of its business activities.[13]"
>
> "**GP5. Information for clients**
>
> A licensed or registered person should make adequate disclosure of relevant material information in its dealings with its clients."

61. But the Codes and Guidelines issued under section 399 of the SFO do more than just assist regulated persons to better understand what the SFC expects of them as they carry out their regulated functions. Section 193(3) points the way to the special role that the Codes and Guidelines play in the disciplinary process. If an act or omission is or may be in breach of a provision in the Code, then that would be a relevant matter to which the SFC should have regard in determining whether that act or omission "is or is likely to be prejudicial to the interest of the investing public or the public interest".

62. For example, in General Principle 1 the Code requires that a licensed person in conducting its business activities "should act honestly, fairly, and in the best interests of its clients and the integrity of the market" and in General

[13] GP3 was mentioned by the SFC in its Decision Notice – see [12] of this Determination.

Principle 2 the Code imposes an obligation on licensed persons to "act with due skill, care and diligence, in the best interests of its clients and the integrity of the market". Clearly an act or omission, not otherwise canvassed in the sub-sections of these General Principles, that did not treat clients fairly or protect their interests would potentially be an act or omission in respect of which the SFC might form the opinion "is or is likely to be prejudicial to the interests of the investing public or the public interest". This illustrates how the Code of Conduct works in tandem with paragraph (d) of the definition of misconduct and explains why the obligation in section 193(3) is imposed on the SFC.

63. Thus, the Code of Conduct plays a very important role in:

(i) informing regulated persons what is expected of them;

(ii) requiring the SFC to have regard to its provisions before forming an opinion under paragraph (d) of the definition of misconduct in respect of a licensed person's act or omission; and

(iii) helping regulated persons to understand why the SFC has found them guilty of misconduct."

64. This brings us to the true role that the Code of Conduct plays within the disciplinary process of the SFC as laid down in the SFO. Under section 194(1) a regulated person is not subject to the disciplinary process because the person has breached the Code of Conduct but rather because the regulated person has been found guilty of misconduct. Where that finding of guilt is based on

paragraph (d) of the definition of misconduct then section 193(3) requires the SFC to consider the Code before forming the opinion required of paragraph (d).

65. Thus, for the SFC to find a regulated person guilty of misconduct under paragraph (d), the regulated person must have committed an act or omitted to do an act and that act or omission to act must:

(i) relate to the carrying on of any regulated activity for which a person is licensed or registered; and

(ii) cause the SFC, after having regard to such of the provisions set out in any code or guideline as are in force at the time of occurrence of, and applicable in relation to, the act or omission, to form the opinion that the act or omission is or is likely to be prejudicial to the interest of the investing public or to the public interest.

66. Surprisingly, the Explanatory notes to the Code of Conduct make no mention of the interaction between section 193(3) and paragraph (d) of the definition of misconduct. In the opening paragraph of the Explanatory notes the SFC states:

> "The Commission will be guided by this Code of Conduct ("the Code") in considering whether a licensed or registered person satisfies the requirement that it is fit and proper to remain licensed or registered, and in that context, will have regard to the general principles, as well as the letter, of the Code."

67. Likewise, the Code itself, when dealing with the effect of a breach of its provisions makes no mention of the breach having any relevance to a finding

of misconduct. Section 1.4 states:

> "**1.4 Effect of breach of the Code**
>
> A failure by any person to comply with any provision of the Code that applies to it –
>
> (a) shall not by itself render it liable to any judicial or other proceedings, but in any proceedings under the SFO before any court the Code shall be admissible in evidence, and if any provision set out in the Code appears to the court to be relevant to any question arising in the proceedings it shall be taken into account in determining the question; and
>
> (b) the Commission shall consider whether such failure tends to reflect adversely on the person's fitness and properness."

68. The exclusive focus of this section, and of the Explanatory notes, on the issue of a licensed person being fit and proper is curious, for a licensed person may be guilty of misconduct and still be regarded by the SFC as a fit and proper person to be licensed.

69. There is one final comment we would wish to make in respect of this review. Precisely because it is a full merits review there must be evidence presented to the Tribunal to enable it to make a finding of whether or not the applicant is guilty of misconduct. It may be that a lot of the evidence can be presented in the form of a set of agreed facts. But, where relevant facts cannot be agreed then they must be proven in the normal way; that is, by calling witnesses who can testify to them. Factual representations made in correspondence by the SFC, or legal representatives, should not be regarded as an acceptable form of proof. Any documentary assertion of fact by a person with knowledge of the facts, such as in a record of interview or, as in the present case, in a letter written by the proprietor of the applicant, can be relied upon by the Tribunal as evidence

of the facts being asserted. But if those assertions are not supported by sworn evidence, or are contradicted by other sworn evidence, then the party relying on the contents of these documents should not be surprised if the Tribunal chooses not to give those contents the weight that the party relying on them would like.

70. Also, because it is a full merits review it means that the review does not succeed just because the SFC can be shown to have made mistakes in the decision making process. The issue is not whether the SFC process is flawed but whether, on the evidence presented to it, the Tribunal is satisfied, on the balance of probabilities, that the applicant is guilty of misconduct or, in the opinion of the Tribunal is not a fit and proper person to be or to remain the same type of regulated person.

The Review Hearing

71. As the review flows from a regulatory investigation, it was necessary for the SFC to present to the Tribunal evidence which it maintains supports its findings of misconduct and the sanctions it decided to impose in respect of the misconduct.

72. A hearing bundle was prepared by the parties. It contains all the relevant documents and correspondence and two SFC records of interview with two representatives of the applicant. The first representative is Wong Ah Chiu who was employed as the Chief Information Officer at I-Access Group and the second representative was Mak Kwong Fai, the CEO of I-Access Group. I-Access Group owned I-Access Investors Limited which is the holder of a Type 1

License issued by the SFC.

73. In addition, the Tribunal received the testimony of Ms Poon Tim Fung, the Head of the Market Data Department in the Operations Division of the HKEx. Her witness statement was the basis of her examination-in-chief.

74. No oral testimony was presented to the Tribunal by the applicant.

The Background to the Applicant's Misconduct

75. The incident underlying the SFC's finding of misconduct occurred at Easter 2015. Easter also coincided with the Ching Ming Festival which fell on Easter Sunday. Consequently Easter Monday became the Public Holiday for Ching Ming and Tuesday became the Public Holiday for Easter Monday. The long weekend with the Public Holidays was as follows:

(a) Easter Friday: 3 April 2015 (Public Holiday)
(b) Easter Saturday: 4 April 2015
(c) Easter Sunday: 5 April 2015
(d) Easter Monday and the day following Ching Ming Festival: 6 April 2015 (Public Holiday)
(e) Tuesday, the day following Easter Monday: 7 April 2015 (Public Holiday)

Thus, trading on the HKEx resumed on Wednesday 8 April 2015.

76. The owner of the Exchange Square building in which the HKEx is located intended to commission a new chiller plant and complete its annual maintenance from 3 – 6 April 2015. As a consequence, the HKEx Data Centre planned to power down during this period and, when power was resumed, it would then perform a health check of its whole system. HKEx had made plans for these events since 10 March 2015.

The OMD-C System

77. The OMD-C computer system was launched by the HKEx in September 2013. Persons contract with the HKEx, through its subsidiary HKEx Information Services Limited, to use this programme by signing a Market Data Vendor Licence Agreement. The applicant had signed such an agreement on 11 February 2011 in respect of the OMD-C's predecessor open gateway real time data service and when the OMD-C system commenced operation the applicant transitioned to it. Licensees of the OMD-C system may access it directly or through the HKEx's designated third party service provider. Most OMD-C clients have direct access to it by connecting their computer systems to the HKEx. Because OMD-C is designed as an Internet Protocol multicast information distribution system, any data, whether genuine market data or test data, that is transmitted through the system will be received by all licensees that remain connected to it during the course of the transmission.

78. Pursuant to provisions in the Direct Connection Annex to the Licence Agreement, every licensee who wishes to have a direct connection to the OMD-C system must comply with the relevant Transmission Specifications. Schedule 3

to the Agreement identifies the Relevant Transmission Specifications as being the Interface Specifications – HKEx Orion Market Data Platform Securities Market & Index Datafeed Products (Binary Protocol) which is known by the short form of the title as the "Interface Specifications".

79. HKEx does not get involved with licensees in how they set up their connection to the OMD-C system and how they operate their own computer systems. It expects all licensees to be familiar with the Interface Specifications and to configure their own computer systems in a way which will enable compliance with the requirements set out in them.

80. There are two types of licensees. The first, and main group are persons licensed by the SFC, such as stockbroking firms. This group of licensees are called exchange participants. The second group are known as information vendors and an example of this category of licensee is the entity known as Bloomberg.

81. As part of its on-going maintenance of the OMD-C System the HKEx regularly conducts tests of it or involving it. There are, in fact, two types of tests of the OMD-C system. The first is called an internal test and does not involve the participation of any party external to the HKEx, such as exchange participants, or any interaction on their part with the test data being transmitted. These tests are conducted to ensure the readiness of HKEx's own systems, such as after a power resumption, and will involve the transmission of randomly generated non-genuine market data through the system. These tests would not normally become known to licensees. The second type of test is called an external test

and these involve the participation of exchange participants, from which it follows that prior notification to licensees of these tests is given.

82. Both these types of test only take place on what the HKEx calls non-production days, which is a short form of referring to those days when the OMD-C system is not disseminating from any of its sources what we shall describe as genuine market data but which the HKEx variously describes as production data, index data or index information.

83. It is important to appreciate that a non-trading day for the HKEx is not necessarily a non-production day as the HKEx also disseminates market data from the Mainland and the Mainland does not have identical public holidays to those we enjoy in Hong Kong.[14] Consequently, it is necessary for the HKEx to identify for the benefit of all licensees those days on which the OMD-C system will and will not be transmitting any market data i.e. to inform licensees of what will be production and non-production days.

84. To enable licensees to know whether a day is a production or non-production day and whether any test of the OMD-C system will take place, the HKEx relies on three key documents. The first key document is the Interface Specifications and the relevant provision in this document is section 2.2 which states:

> "OMD-C does not operate on non-trading days of the Hong Kong Securities Market except those days when there are real-time index data calculated and disseminated by the index compiler. HKEx may perform system testing on

[14] However, 6 April 2015 was in fact also a public holiday in the Mainland.

Saturdays, Sundays or days when OMD-C **is not in operation**. *Clients should treat data transmitted via OMD-C on those days as non-production data and disregard them.*" (Emphasis and italics added.)

85. It is apparent from section 2.2 of the Interface Specifications that:

(i) there is no obvious indication of there being two different types of tests, namely internal and external tests;

(ii) there is no use of the term "non-production days", but test data is referred to as "non-production data";

(iii) there is an exception to the usual position of the OMD-C system not operating on non-trading days of the HKEx and that exception is "those days when there are real-time index data calculated and disseminated by the index compiler"; and

(iv) the non-trading days of the HKEx when "real-time index data calculated and disseminated by the index compiler" may be transmitted through the OMD-C system are not identified and there is nothing in the section that informs the reader on how they can be identified".

86. The second key document is a circular issued by the HKEx on 7 October 2013 which sets out quite clearly that there will be occasions when the OMD-C system will be started up on a Hong Kong public holiday and explains why. It also provides an example of an external test. Under the heading "Clarification on Hong Kong Holiday Arrangement" it states:

> "We would like to clarify that OMD-C will be started up and running on a Hong Kong holiday for the dissemination of index information if any of the indices covered in the Index Feed is available on that day. For example, OMD-C will be running on 14 October 2013, although it is a Hong Kong holiday, for the dissemination of Mainland related indices such as CES China 120 Index (CES 120) since it is not a holiday in the Mainland. Under such situations, channels other than those for index dissemination will only transmit heartbeat messages throughout the day.
>
> In order to enable clients who are receiving OMD-C production data to verify their system's operability in dealing with the above situation, an optional test session is scheduled for Saturday 12 October 2013 where the scenario of Hong Kong holidays with real-time dissemination of indices will be simulated. Rundown for the mentioned test session is provided as per Enclosure 1.
>
> Clients who would like to participate in the test session please confirm by returning the completed Text Participation Form (Enclosure 2) by 10 October 2013 (Thur). Upon the completion of the test, please also return the Test Result Confirmation Form (Enclosure 3) on the same test day."

87. The circular of 7 October 2013 provides greater clarity to the first sentence of Section 2.2 of the Interface Specifications. But, like section 2.2, it does not identify the Hong Kong holidays when "any of the indices covered in the Index Feed is available". Identification of these days is provided by the third key document, known as the Index Feed Calendar, which shows on which Hong Kong non-trading days market data will be disseminated and the type and source of the data and, in respect of other Hong Kong non-trading days confirms that no market data will be disseminated.

88. A circular dated 31 December 2014 enclosed such a calendar and reminded licensees that OMD-C "will be disseminating index data via OMD Index Feed on non-trading days of Hong Kong if real-time index data are to be calculated and disseminated by the index compiler on that day". The calendar for 2015 indicated that on 6 April 2015 the previous closing value of the CSI

Overseas Mainland Enterprises Index would be disseminated. In other words, according to this calendar, 6 April 2015 would be a production day, falling within the exception described in section 2.2 of the Interface Specifications.

89. By way of contrast the calendar stated against the entry for 1 May 2015:

> "Labour Day Hong Kong holiday with no index dissemination. *OMD will not be started up.*" (Italics added.)

90. However, the 31 December 2014 Index Feed Calendar was revised by the HKEx on 10 March 2015 and it is this revised calendar, and the circular accompanying it, that become the third key document. In the email circular attaching the revised calendar the HKEx stated:

> "**Clarification on the transmission of index data via OMD on 6 April 2015**
>
> Our notice of 31 December 2014 (ref.: MDD/14/2426) regarding the clarification on the transmission of index data via OMD on non-trading days of Hong Kong refers please.
>
> According to the latest update from the index compiler, we would like to clarify that the previous closing value of CSI Overseas Mainland Enterprises Index (HKD) would not be disseminated on 6 April 2015 and therefore HKEx Orion Market Data Platform ("OMD") *would not be started up on that day.*
>
> We enclose herewith the updated 2015 Index Feed Calendar with the above clarification for your reference.
>
> Should you have any queries, please do not hesitate to contact our Vendor Support Team at (852) 2211 6558 or via email to IVSupport@hkex.com.hk" (Italics added.)

91. These documents, when read together, enable licensees of the OMD-C system to identify days when no index information will be transmitted and once

these days are known the licensees should be aware, from section 2.2 of the Interface Specifications, that on such days the HKEx may conduct OMD-C system tests. Hence, the HKEx sees no need for prior notification of such tests.

92. The position of the HKEx in respect of providing licensees with prior notification of internal tests is set out in the witness statement of Ms Poon where she said:

> "16. HKEX does not consider it necessary to specifically notify the OMD-C clients ahead of each Internal Test, since any Internal Tests would only be conducted on Non-production Days where no real data whatsoever would be generated and disseminated and as such, it would be obvious to any OMD-C client that any data disseminated on such days could only have been test data. The clients' real market data in their systems would not be affected by any Internal Test provided that they have properly configured their systems at the outset in accordance with Section 2.2."

93. In her witness statement and in her testimony Ms Poon described those days on which no genuine data will be disseminated as non-production days. The calendar does not use the term "non-production day" for the Labour Day holiday, but rather states that there will be "no index dissemination". The term "non-production day" does not appear to have been used in any documents prior to 6 April 2015 and it is unclear when and why it came into use.

94. The other interesting language used in the three documents are the phrases "started up" and "not started up". These phrases bring into sharp focus a perhaps obvious, but nevertheless critical, feature of the OMD-C system and that is that it is not permanently operating. It starts up at around 1:30 am – 2:00 am on a production day and shuts down at around 6:30 pm that day. Outside these times and outside production days the OMD-C system is simply not

operating in the sense of transmitting genuine data. If it is operating it will be only for another purpose, such as for a testing purpose and, from this, it follows that any data transmitted will not be genuine data. Hence, the alert to licensees in section 2.2 of the Interface Specifications:

> "Clients should treat data transmitted via OMD-C on those days as non-production data and disregard them."

95. Then, there is the further point made by Ms Poon that once the licensees know that the day is a non-production day then the licensees should realise that any data being transmitted cannot be genuine data for the simple reason that, being a non-production day, there is no genuine market data to transmit.

96. The applicant argues that using the phrases "started up" and "not started up" conveys the impression that the OMD-C system will be in operation or will not be in operation. As a matter of pure linguistics there is merit in this submission. Of course, the HKEx and the SFC argue that this paragraph has to be read in the context of the three key documents and once that is done it is clear, so they maintain, that what is being meant is that 6 April 2015 is now to be regarded as a non-production day and that necessarily means, pursuant to section 2.2 of the Interface Specifications, that there is the possibility of test data being transmitted through the system. On this issue, it should be noted that section 2.2 of the Interface Specifications does not use the words "not started up" but rather employs the words "not in operation" when describing those non-trading days when there will also be no "real-time index data calculated and disseminated by the index compiler".

97. The other piece of significant evidence in respect of the OMD-C system is the evidence of previously conducted internal tests. The Easter 2015 test was by no means the first internal test conducted by the HKEx. It had been preceded by many such tests, all of which had taken place without mishap. Between 1 April 2014 and 31 March 2015, 42 internal tests had taken place and in respect of all of them no prior notification was given that these tests would be occurring. Records now exist for only 9 internal tests that took place between 1 January 2015 and 31 March 2015 but in respect of these it is known that they all involved the dissemination of randomly generated test data.

The events of 6 April 2015

98. The internal test conducted by the HKEx on 6 April 2015 took place between 11:45 am and 12:35 pm and resulted in data in the form of simulated orders, trades and security prices being transmitted via OMD-C to clients of the system. The data is completely random and was generated by a computer programme and even included the names of non-existent companies. However, the applicant, later claiming that it was unaware that this test was taking place, failed to disconnect its computer system from the OMD-C system and as a consequence the false test data was distributed within the applicant's system and this caused certain pre-programmed stop loss sell orders of some of the applicant's clients to be triggered. 27 stop loss sell orders placed by 12 clients of the applicant were executed at the pre-opening session (auction session) of the stock market between 9:20 am and 9:43 am on 8 April 2015. Of these 12 clients, 3 lodged complaints with the applicant, 2 made enquiries of the applicant and

7 others did nothing.

99. The applicant was not alone in not recognising that test data might be transmitted through the OMD-C system on this day and not alone in disseminating it. Two information vendors made the same mistake. They were Bloomberg and a firm called AA Stocks. AA Stocks was unable to restore the correct data into its system, so the HKEx had to provide it with a copy of the market image record to allow it to restore its database. This was achieved by the HKEx transmitting this image through the OMD-C system and this was done at around 4:30 pm on 6 April 2015. As all licensees would receive this data the HKEx emailed the licensees at 4:27 pm to alert them to the fact that a test had taken place that morning in which test data had been disseminated and that HKEx would be shortly bringing up OMD-C to allow them to restore the market image if they needed to do so. There was a further email at 5:03 pm to inform licensees that OMD-C had started up and a final email at 6:11 pm to clarify what was being transmitted. These three emails assumed some importance at the hearing of this Review for two reasons. First, they were evidence that others did not realise a test might be carried out and secondly because the applicant's CEO, harbouring certain suspicions about them, misconstrued the HKEx's reason for sending them.

100. Although these emails were received by the applicant, because they were sent on a public holiday nobody accessed them and so neither Mr Mak nor Mr Wong were aware of them. Because neither was aware of them, or of the fact that test data had been transmitted by the OMD-C system, nothing was done to prevent the execution of the stop loss sell orders when trading resumed on 8 April 2015.

Developments after 6 April 2015

101. The HKEx clearly felt that the confusion experienced by AA Stocks and Bloomberg warranted a further explanation to licensees on how its computer system operated and what tests were conducted by the HKEx as part of its ongoing maintenance of its system. It, therefore, issued a circular dated 10 April 2015 and in it the HKEx, for the first time, distinguished between internal and external tests. The circular said:

> **"To : All Market Data Vendors and End-Users (collectively "Clients")**
>
> Dears Sirs,
>
> **Test Data Disseminated via OMD and IIS on Non-Trading Days of Hong Kong**
>
> Please be reminded that the HKEx Orion Market Data Platform (OMD) and Issuer Information *Feed* Service (IIS) may be brought up for HKEx's internal system testing when there is no production service. In such situations, test data may be disseminated via the OMD and/or IIS production systems.
>
> In general, such test data should be disregarded and obviously should not be further distributed by Clients to the market to cause potential confusion to investors.
>
> We would like to elaborate the guidelines for OMD and IIS Clients with regard to the handling of test data received from OMD or IIS as below:
>
> 1. Clients should observe the operation windows of OMD and IIS with reference to:
>   a. Trading calendar of Hong Kong for OMD Securities Market and Derivatives Market
>   b. Schedule for the dissemination of third party indices via OMD Index Feed as specified in client notices issued by HKEx-IS

An operation calendar of OMD for the period from April to December 2015 is enclosed for your reference. The same operation calendar is also available on the HKEx website and can be accessed here.

c. Issuer Information *feed* Service System Transmission Specification *(Section 2.2 IIS Operation Hours)* for IIS

2. If a Client brings up its feed handling system(s) on a day when there is no production service, the Client should be aware that any data received from the production system(s) are test data which must be handled with care.

3. In most circumstances, the test data result from HKEx's internal testing and such data must be discarded and should never be further redistributed.

4. In the event of market rehearsals or market-wide system tests as notified by HKEx-IS in which Clients are invited to participate, Clients are encouraged to facilitate the testing of their downstream customers by further disseminating the test data. However, it is important that Clients issue proper communications to those customers on the arrangement in advance, and the customers should be fully aware that the data so distributed are test data only.

Should you have any queries, please do not hesitate to contact our Vendor Support Team at (852) 2211 6558 or via email to IVSupport@hkex.com.hk."

102. In the course of its investigation the SFC had discussions with the HKEx about the operation of its OMD-C system. At the conclusion of these discussions the SFC recommended to the HKEx that it consider providing its OMD-C clients who had a direct connection to the system with prior notification of any system test that would involve transmission of test data. The HKEx's response, as set out in the witness statement of Ms Poon, was:

"We have indicated to the SFC that while HKEX did not consider it necessary given the clear guidelines set out in Section 2.2 and that test data had been transmitted on Non-production Days fairly frequently in the past, HKEX nevertheless agreed to notify OMD-C clients in advance of any transmission of test data to OMD-C clients on non-production weekdays (but not all Non-production Days such as weekends) starting from 2 July 2015."

The Applicant's handling of clients affected by the dissemination of the test data

103. As already indicated, the applicant's dissemination of the test data caused 27 stop loss sell orders placed by 12 clients to be incorrectly triggered. These standing stop loss orders were executed the following trading day, namely 8 April 2015.

104. In the days and weeks following the incident, the applicant made no effort to contact those clients affected by the test data and inform them of what had happened. Rather, the applicant waited for the clients to contact it and five of them did so. Of these five, three of them made complaints, and these the applicant dealt with through its complaint handling process, and two of them simply made enquiries of the applicant. The remaining seven did not contact the applicant at all.

105. On 27 September 2016 (almost 18 months after 6 April 2015), the SFC asked the applicant to provide an update on the affected client cases and only then did the applicant take steps to inform the 7 clients from whom they had received no complaint of the incident. On 28 September and 4 October 2016, the applicant emailed these other 7 clients and, once aware of what had happened, one of these seven lodged a complaint with the SFC on 10 October 2016, complaining amongst other things, of the delay by the applicant in informing him of what had happened.

The Applicant's Evidence

106. The only evidence coming from the applicant was presented by the parties in the form of two records of interview; one was from Mak Kwong Fai who was the CEO and major shareholder of the I-Access Group and the other was from Wong Ah Chiu who, though employed by the holding company, had, together with Mak, responsibility for the applicant's computer systems.

107. Mak has computer qualifications and said in his record of interview that he possessed "enough experience and qualifications to handle the demands of the computer system of the I-Access Group". Wong had worked at I-Access Group from 2011 as an information technology officer and had been promoted to Chief Information Officer at the beginning of 2014.

The applicant's dissemination of test data

108. Mak said in his interview that the HKEx would usually notify I-Access in advance before conducting a test during public holidays and would ask the licensees connected to the OMD-C system if they would like to participate. He explained what the applicant would do in preparation for the test:

> "Our usual practice is to disconnect the line with the Exchange, which is the network line, then connect it to our testing system, which is a separate system ...
> ...
> After the testing, once the report(s) and forms are submitted and confirmed by the Exchange that the data would not be sent out again, then we would switch back to our normal line and prepare for the opening of the market on the next weekday."

109. During non-trading days, the applicant's system would be connected to the OMD-C server and Mr Mak explained why:

> "547. C: Yes. I would like to make a claim first. First, even for *non-trading days* or during *non-trading hours*, there would still be *data* sent to us from the *production line* of the Exchange. For example, the closing quotations, or ex-date quotations or some static information on stocks, such as newly-listed stocks. Therefore, we need this to be connected. If we are not connected at all times by unplugging it after trading hours and plugging it back before the start of trading, then this is not a normal operation. There is also a high *operational risk* to *physically* disconnect the line and the Exchange did not encourage us to disconnect it immediately after market close.
>
> ...
>
> 551. C: For public holidays, as I have mentioned before, there would be *data* sent out from the Exchange as well. As mentioned in our *submission*, it is the same practice for some other market data vendors just in case there are *update*(s) from the Exchange. There can be *update*(s) even when it's public holidays. It can be a public holiday for Hong Kong but not for stock connect with Shanghai. Therefore, it sends information, not necessarily *trading data* but information about the system such as *news*. There is no limit for *news* to be sent only on workdays. Therefore, the Exchange doesn't encourage us to *disconnect* the line, to disconnect from its system. According to our and the Exchange's usual practice, if they have to use the *production line*, such a *risky site* to conduct the testing, then they have to let us know as early as possible in advance. Some may need two weeks of notice. We did our *planning* as some testing require preparations. Notifying us in advance is a long-running usual practice. They can't just *send data* out of the blue. Even if they *send data during holidays*, and they are authentic *data*, that won't trigger our clients' *order*(s). But the data sent was fake and the stock prices dropped by 20-30%. Therefore it triggered the stop-loss orders. Up until now, we still have no idea why such data was *sent* on that day. The Exchange did not explain at all. We don't know why they had to *send* those *data*."

110. Throughout his interview Mr Mak repeated his claim that this was the first time the applicant had received test data without prior notice and that if it had prior notice of the test it would have unplugged its system connection so as to prevent incorrect triggering of client orders.

111. As to the email alerts on 6 April 2015 that were sent out by the HKEx after the test, Mr Mak said that the staff members who would have received the HKEx's emails were not at work as it was a public holiday. I-Access first became aware of the incident from media reports and a client enquiry and only became fully aware of it from the HKEx's notice on 10 April 2015.

112. Mr Mak said that prior to the implementation of the OMD-C system there was no problem as the then system (described as an open gateway system) was not logged-on to receive data during a non-trading day. But, according to Mr Mak, with the OMD-C system, the HKEx verbally advised the applicant to stay connected to the production line in order to obtain a complete set of market data, unless there is a scheduled test. This is why the applicant did not disconnect. This belief, namely that the OMD-C connection has to be maintained outside trading hours, and that as a consequence there would always be prior notification by the HKEx of any tests being conducted, was an important element of his understanding of the operation of the OMD-C system.

113. Another reason Mr Mak gave for believing in the need to always remain connected to the OMD-C system is because the system requires a heartbeat response every 5 seconds or it will automatically disconnect. A further reason that he gave was that the connection had to be maintained in order to receive data and this was so even during public holidays as data continues to be disseminated through the system as long as the Hong Kong public holiday is not also a public holiday on the Mainland.

114. Mr Mak said that the applicant had to connect the data line to the

HKEx because:

(i) the IDX feed (the index feed for PRC stocks) was active on 3rd and 7th April when PRC stock markets were open. The connection to OMD-C had to be maintained to obtain the index data;

(ii) the applicant did not have any network I.T. staff working over the Easter holiday so the production line was connected to get the IDX feed;

(iii) on 10 March 2015 HKEx sent out an email circular advising that no data would be sent on 6 April 2015;

(iv) OMD-C data are sent at around 1:30 am every business day and so the connection should be maintained during the weekend or a holiday.

115. In support of his claim that it was the HKEx that was at fault for the incident Mr Mak referred to the change that the HKEx had subsequently made to its practice. It now gives notification of any test which involves the transmission of production data on a weekday public holiday.

116. Mr Mak said that there are reasonable grounds to suspect that the reason there was no prior notification of the test was because the test data was disseminated by mistake. If it was an internal test the HKEx should be able to turn off the data to be sent out and this would have prevented the incident on

6 April 2015. The applicant disputes that this was a normal internal test.

117. Mr Mak wrote a letter to the SFC dated 1 April 2020. The Tribunal accepts that letter as a witness statement by Mr Mak but there is little in it of a factual nature. Rather, it is more in the form of an argumentative submission. In it Mr Mak suggested that the test on 6 April 2015 must have been different from the 42 previously conducted internal tests as those tests, unlike the 6 April 2015 test, had no affect on the applicant or its clients. He also referred to the emails on 6 April 2015, the circular of 10 April 2015 and the change of practice by the HKEx of notifying licensees of tests that would be held on non-production weekdays as evidencing that HKEx recognized it was at fault for what occurred on 6 April 2015.

118. Mr Wong gave similar evidence to Mr Mak and maintained that the HKEx never did any testing over the production line without giving everyone prior notification of it. He described what the applicant did when it knew a test by the HKEx was to take place:

> "878. C: Er, as far as I know, there have always been testing on the *testing line*. If the testing is conducted on the *production line*, the Exchange must notify us in advance. Under normal situation, after they notify us, after we receive the notification, we will *disconnect* our *production* (line) with (sic)(from) them during the testing. They usually conduct the test during weekend like Saturday. So -- usually after it finishes on Saturday, we will reconnect the line to normal on Sunday, and on Monday morning, we will go back (to the office) earlier to make sure everything on production is normal. That is how (the company) handles in normal circumstances.
>
> ...
>
> 883. A: Hmm. Okay. So under normal situation, your system is connected with Exchange's side all the time. It is only when you

know that "Oh, (the Exchange) will conduct *testing*", then you will *disconnect* it?

884. C: Correct.

119. Mr Wong admitted that he had not previously seen the Interface Specifications and so was unfamiliar with its section 2.2. He explained that his role was mainly monitoring, and maintenance, of the I-Access' computer trading system. These duties included performing system upgrades, maintaining the network of the entire group and maintaining the daily operation of the I-Access Group's data centre at Kwun Tong. His duties also extended to monitoring the electricity and air-conditioning systems. The person he reported to was Mr Mak. Mr Wong said he was not involved with development and testing of the trading system which was the responsibility of Mr Mak who was also responsible for modification of software and any testing of it before production. Mr Wong portrayed himself as very much the subordinate of Mr Mak to whom he reported and from whom he took orders.

120. In respect of the HKEx's emails on 6 April 2015 he confirmed that he had not seen them until after the Easter holidays.

121. Finally, mention should be made of a claim by Ms Kay Kwan, an employee of the applicant, in an email to Ms Vivian S.C. Chan of the SFC on 6 August 2015. In this email Ms Kwan wrote:

"4. Even during non-trading days, HKEx can still feed useful data through the production line, e.g. market status, news and stock static data. *We have received verbal advice from the HKEx to connect to the production line in order to obtain complete set of market data unless there is some scheduled*

> *test using production line well notified to brokers.* Nevertheless, we have added a safety mechanism not to receive dynamic market data during non-trading days." (Italics added.)

The Applicant's handling of clients affected by the test data

122. In respect of this area of misconduct, Mr Mak said that the 12 affected clients should have been aware of what had happened if they had checked the order books online on 8 April or by reading the daily statements sent to their email addresses on 9 April 2015 and, if they had approached the applicant for an explanation, it would have been provided to them.

123. Mr Mak also said that the applicant only became fully aware of the scope of the test on 10 April 2015 when the HKEx published a notice on its website. The applicant did not inform affected clients because this notice was available to the public.

124. Mr Mak asserted that it is a market practice that when a market incident is originated at or by the HKEx most brokers do not contact clients but wait for clarification from the HKEx.

125. In his letter dated 1 April 2020 Mr Mak wrote:

> "The daily statements (consolidated with contract notes of trades executed) serve the formal and legal notification to clients at what prices and quantities their orders have been executed. One major purpose of a daily statement is to allow the recipient to identify any trade mistake made by the issuing broker."

126. He went on to assert that the content of the daily statement would alert

the investor as to whether his stop order has been triggered correctly or incorrectly. Furthermore, because the applicant is an on-line broker only with no agents serving its clients in order placements, the applicant's clients are used to managing their own orders and checking the execution of them. Mr Mak argued that the rights and interests of the clients were not affected by the applicant not contacting them as all the clients had to do to realise that their stop orders were incorrectly triggered was to look at their daily statements.

The SFC's Submissions

127. Based on the evidence of the HKEx, the SFC argues that there is no duty on the HKEx to notify the applicant, and other licensees with a direct connection to the OMD-C system, of internal tests to be conducted. This is because the applicant, and every licensee, should be aware of the possibility of such tests because:

(i) section 2.2 of the OMD-C Interface Specifications informs licensees that tests of the OMD-C system may take place on non-production days; and

(ii) according to the updated 2015 Index Feed Calendar 6 April 2015 was a non-production day.

128. It follows from this that the applicant should have realised that:

(i) 6 April being a non-production day meant there was a possibility that the HKEx may conduct a system test;

(ii) if a system test was conducted data might be transmitted through the system;

(iii) if the applicant did not disconnect from the system and if a system test was conducted then the applicant would receive any data that was transmitted in the course of the test; and

(iv) unless its computer programme was configured to prevent the dissemination within its own system of received test data, then its system might be affected by the test data.

Being aware of these possibilities, the applicant should have disconnected its computer system from the OMD-C system.

129. In respect of the submission that, as a matter of contract law, a duty to notify should be implied into section 2.2, the SFC argues that there is nothing in the section which would justify or necessitate such a duty being implied as section 2.2 specifically alerts all licensees to disregard all data transmitted through the OMD-C system on non-production days.

130. In respect of the 10 April 2015 circular, and the change in the HKEx's practice in regard to notification, the SFC argues that they do not show any confusion or error in the procedures adopted by the HKEx. There is no justification for the applicant not knowing 6 April 2015 was a non-production day. Once it knew this then it was obliged to disconnect its computer system from the OMD-C system and no proper reason has been advanced by the applicant as

justification for it not having done so.

131. It is the SFC's case that there is no basis for the applicant to believe that it had to stay connected to the OMD-C system. The applicant's belief that it had to do so was based upon an erroneous understanding of the operation of the OMD-C system. The claim of verbal advice being given to the applicant by an employee of the HKEx to stay connected at all times should be rejected.

132. In terms of the finding by the SFC that the applicant had acted negligently it is argued that General Principle 2 of the Code of Conduct creates a duty for the applicant to "act with due skill, care and diligence, in the best interests of its clients and the integrity of the market". There was a breach of this duty by the applicant, it is argued, when the applicant failed to disregard the test data in circumstances when it knew, or ought to have known, that 6 April 2015 was a non-production day and, being a non-production day, there was the possibility of tests being conducted on the OMD-C system.

133. In respect of the second area of misconduct the SFC argues that the applicant, as a licensed person, had a duty to inform those clients who were affected by the incident. In respect of the matters on which the applicant relies as justification for not having done so, the SFC argues that none of them provides a proper basis for its failure to act.

134. In respect of the sanctions, the SFC argues that they are entirely appropriate and none of the applicant's complaints about them are meritorious.

The Applicant's Submissions

135. The applicant's submissions rely heavily upon asserting and assuming that the OMD-C system operated in the way Mr Mak said he believed it operated.

136. Thus, it is submitted that the HKEx has to give prior notification of tests because the OMD-C connection has to be maintained outside trading hours. This assertion, that the OMD-C connection has to be maintained outside trading hours was a crucial element of the applicant's case as it underlay most, if not all, of the submissions being made.

137. It was submitted that section 2.2 should be interpreted under principles of construction applicable to contractual clauses to require that a prior notice be given for any test that is to be conducted on non-production days. It is also submitted that any test should not involve the transmission of any specifically designed data about the share prices of any stocks, especially data which is so out of line with genuine market data that it could affect the interests of clients.

138. The applicant argues that its claim that its computer system had to stay connected to the OMD-C system can find support in various sections of the Interface Specifications. In any event, the applicant says, 3 April 2015 and 7 April 2015 were production days (because of input from the Mainland markets) and having to disconnect for 6 April 2015 when there was no notification of a test taking place would have resource implications for the applicant and would have greatly inconvenienced its staff.

Sanction

139. The ground of review is that the fine of $600,000 is manifestly excessive and wholly disproportionate. The applicant submits that the SFC failed to consider the circumstances of the case in a pragmatic way in particular:

(i) the test and the incident were primarily caused by the HKEx's confusing acts;

(ii) the applicant's conduct was not intentional or reckless;

(iii) the applicant's conduct caused no damage to the integrity of the market;

(iv) the applicant's conduct produced no benefit to it;

(v) the incident was a one-off incident, was of short duration, an isolated case and would not recur;

(vi) the applicant cooperated fully with the SFC;

(vii) only 12 clients were affected (out of the applicant's over 35,000 clients); and

(viii) loss caused to the clients was little and the applicant compensated this loss in full and promptly.

140. It is further submitted that the matters to which the SFC normally has

regard (the SFC Disciplinary Fining Guidelines) are not present in this case.

Discussion

141. In respect of the first area of misconduct it is quite clear that the key documents are, as we have indicated, the Interface Specifications, specifically section 2.2 of it[15], the HKEx's circular of 7 October 2013[16] and the circular attaching the revised Index Feed Calendar dated 10 March 2015[17].

142. The meaning of section 2.2 of the Interface Specifications is quite clear. It can be broken down as follows:

(i) OMD-C does not operate on non-trading days in Hong Kong unless there is real-time index data disseminated by the index compiler;

(ii) HKEx may perform system testing when OMD-C is not in operation;

(iii) when OMD-C is not in operation any data transmitted by it should be treated as non-production data and be disregarded.

143. Clearly section 2.2 does not identify all the days when OMD-C is not in operation and that is because it may be in operation on Hong Kong non-trading days. For why this is so, and for which non-trading days it may still be in

[15] Set out at [84] of this Determination.
[16] Set out at [86] of this Determination.
[17] Set out at [90] of this Determination.

operation, recourse must be had to the other key documents. The circular of the HKEx dated 7 October 2013 that is quoted at [86] of this Determination explains why the OMD-C might be in operation on a Hong Kong non-trading day. We have no doubt that all licensees, including the applicant, would have been aware of this circular and understood why the OMD-C system might be operating on a Hong Kong non-trading day and, if it was, what information it would be disseminating.

144. As to the Hong Kong non-trading days the OMD-C system would be in operation, the HKEx issued Index Feed Calendars which identified all such days. These are described and partly quoted at [88] and [89] of this Determination. When the calendars need to be updated the HKEx issues a revised calendar as was done on 10 March 2015 in respect of 6 April 2015. This revised calendar was accompanied by a circular explaining the revision and this circular is quoted at [90] of this Determination.

145. Thus, section 2.2 of the Interface Specifications is intended to operate in conjunction with the Index Feed Calendar in order that the licensees will know on what days it will and will not be in operation. It tells the licensees that on days that the OMD-C system is not operating the HKEx may still perform system testing in the course of which data is transmitted.

146. Section 2.2 is drafted as a general alert to licensees that testing may be done on the OMD-C non-operating days and that they should ignore any data transmitted on these days. Precisely because it is drafted in this way it is implicit that tests may take place without prior notification of them being given. From

this it must follow, as a matter of simple logic, that if the licensees may not otherwise be aware that a test is taking place, then the tests must be of a kind which will not involve the participation of the licensees. Indeed, there would be no purpose in having section 2.2 if every test that took place involved the participation of licensees. Thus, even though there is no distinction between internal and external tests it is quite clear that section 2.2 can only be referring to internal tests conducted without prior notification.

147. There is, therefore, no justification in reading into the section an implied requirement that the HKEx give prior notice of its proposed testing. All it has to give notice of is those Hong Kong non-trading days when the OMD-C system is operating, so that licensees can know when they should remain connected to the OMD-C system.

148. The only area for confusion is in some of the language employed in the Index Feed Calendar. To say that OMD-C will not be started up may give the impression that it will not be turned on and will not, therefore, be in operation at all. Arguably it would have been a better way of expressing the matter if the same words used in section 2.2 had been employed. For example:

> "... OMD will not be in operation but may be used to perform system testing – see section 2.2 of the Interface Specifications."

Using language in a consistent way leaves less room for confusion.

149. The Index Feed Calendar makes it clear that 6 April 2015 was a day when OMD-C would not be in operation. Even though the circular expressed

the state of the OMD-C system as not being started up licensees should have realised that section 2.2 could still have application.

150. The applicant says that the public holidays made it difficult for it to deploy staff to disconnect and reconnect the system. The HKEx's simple response is, in effect, that is the applicant's problem and the HKEx does not involve itself in how licensees design their computer systems.

151. We agree that it is for every licensee to design their computer system in such a way as will enable them to comply with the transmission requirements of their licence agreement with the HKEx and at the same time fulfill the obligations imposed upon them by the Code of Conduct, such as protecting their clients' interests. Resource constraints, management difficulties and staff inconvenience cannot provide a justification for not disconnecting from the OMD-C system on a non-production day. Alternatively, the licensee must so configure its system as to eliminate the possibility of test data corrupting it. We have had no evidence presented to us by the applicant to suggest that it is not possible to configure its system so as to avoid what occurred on 6 April 2015.

152. We reject the assertion that a person from the HKEx told Ms Kay Kwan, or some other unidentified person within the applicant's staff, that they should stay connected to the production line unless notified of a test taking place. This assertion is set out at [112] and [121] of this Determination. No oral evidence was presented to the Tribunal in support of this conversation and it remains a bare and unsubstantiated allegation which was categorically denied by Ms Poon when it was put to her in cross-examination. In our view, it is not at all

credible that a representative of HKEx would make a statement that is quite contrary to the way the OMD-C system operates in conjunction with the Interface Specifications.

153. That brings us to the evidence that was presented to the Tribunal on behalf of the applicant. That evidence came from the records of interview of Mr Mak and Mr Wong. These interviews provided them both with an opportunity to place before the SFC their explanations, assertions and suspicions in relation to the matters under investigation. They were not called to give oral testimony to the Tribunal and so their evidence remained untested by cross-examination. That must affect the weight the Tribunal attaches to it.

154. From Mr Mak's evidence it is apparent that he appears to think that the OMD-C system is in operation continuously, that it is or may be constantly transmitting data or that it continuously requires a heartbeat response, and that, consequently, the applicant's computer system needs to be permanently connected to it except when the applicant is notified by the HKEx that it is conducting a test. Notwithstanding that he is a computer expert, and has a testing line for his computer system, he claims ignorance of the distinction between internal and external tests and ignorance of the 42 internal tests previously conducted by the HKEx which coincidentally, and very fortuitously, did not have any affect on the applicant's system or its clients. These assertions are not credible.

155. Another assertion by Mr Mak is that the applicant's computer system has to stay connected to the OMD-C system in order to receive a heartbeat response from it. Mr Mak was relying on section 4.3 of the Interface

Specifications which describes a retransmission facility of the OMD-C system whose purpose is "to allow clients to recapture a small number of missed messages already published on the real time channels". In respect of the need to respond to heartbeats from the OMD-C server, section 4.3 states:

> **"Heartbeats**
>
> To determine the health of the user connection on the TCP/IP channel, the Retransmission Server will send regular heartbeat packets to the user. The heartbeat frequency is 30 seconds. The client application must respond with a "Heartbeat Response" packet. The time out for this heartbeat response packet is set at 5 seconds. If no response is received by the server within this timeframe, the TCP/IP session will be disconnected."

156. In reply to Mr Mak's claim that this provision indicates a need to stay connected to the OMD-C system, Ms Poon makes the following points:

(i) this is a facility of the OMD-C system retransmitting data already transmitted and;

(ii) this facility is available only on production days when data is being transmitted through the system.

157. Why a person of Mr Mak's expertise with computers would have such a misunderstanding of this section of the Interface Specifications is difficult to understand.

158. There is no explanation from the applicant on why Mr Mak and Mr Wong have such a flawed understanding of the operation of the OMD-C system. An explanation for Mr Wong can be inferred from the way that he explained the applicant distributes responsibility for the operation of its computer

system. Mr Wong said that he was responsible only for the monitoring and maintenance of the trading system and he reported to Mr Mak. Mr Mak, on the other hand, was responsible for development and testing of the system and was in overall charge of the computer system. Mr Wong said he had never seen the Interface Specifications until they were shown to him in his SFC interview and this appears to have been due to the fact that it wasn't necessary for him to be familiar with them in order for him to discharge his particular duties. From what he said in his interview, it is apparent that he relied on information from Mr Mak for much of his understanding of the OMD-C system.

159. Thus, everything came down to Mr Mak's understanding of those specifications and of how the OMD-C system was intended to operate and if his evidence is to be believed then it is apparent that on a number of fundamental matters Mr Mak had an erroneous understanding of how the OMD-C system operated. Why he did is not something for which we have found, or been given, a satisfactory answer.

160. The applicant also relies upon a statement by Ms Kay Kwan in her email to Ms Vivian Chan of the SFC on 6 August 2015 that is quoted at [121] of this Determination. The penultimate sentence of that email is:

> "Nevertheless, we have added a safety mechanism not to receive dynamic market data during non-trading days."

161. However, as no evidence was called on behalf of the applicant the Tribunal is unable to come to any conclusion on what this sentence means. We have no information on how this safety mechanism was configured and whether

it is a post-incident reconfiguring by the applicant of its computer system so as to prevent the receipt of test data which is in the form of market data.

162. It was also submitted on behalf of the applicant that because 3 April 2015 and 7 April 2015 were non-trading production days, as the securities markets in Mainland China were open for trading, the applicant had to maintain a connection to OMD-C on 6 April 2015. This does not follow at all. It may have been convenient to the applicant to maintain the connection but there was no evidence to prove that it was necessary to do so. It is entirely for the applicant as to how it configures its system to take account of non-production days and to ensure that its clients are not affected by test data that may be disseminated on such days.

163. On the evidence presented to us we find that the following beliefs held by Mr Mak were wrong and without foundation:

(i) that the applicant had to remain connected to the OMD-C system at all times other than when notified a test was to take place;

(ii) notifying licensees of upcoming tests was a long running practice of HKEx.

(iii) this was the first time the applicant had received test data without prior notice;

(iv) the applicant had been told by a person at HKEx that it should

remain connected to OMD-C at all times unless notified of a scheduled test;

(v) that the applicant had to remain connected to the OMD-C system in order to receive, and respond to, the heartbeat from the system; and

(vi) the Easter test was not an internal test.

164. It follows from our interpretation of section 2.2 of the Interface Specifications and from the factual findings we had made that there was no duty on the HKEx to provide prior notification of internal tests. Section 2.2 needed only to be read with the Index Feed Calendar for licensees to know on which days the OMD-C system would be operating and on which days it would not. Once licensees knew on which days it would not be operating they were put on notice by section 2.2 that the HKEx may perform system testing on those days. The applicant's first ground of review fails.

165. In respect of the three emails sent out by the HKEx on 6 April 2015, Ms Poon has explained why they were sent and her evidence on this issue is perfectly credible. We have no hesitation in accepting it and rejecting the unfounded suspicions of Mr Mak that these emails were sent by the HKEx in order to cover up its mistake of either carrying out an unscheduled test that had not been, but should have been, notified to licensees, or of accidentally transmitting test data. On this basis we have no doubt that had the applicant read the emails it would have been alerted to what had happened and could have taken action to

prevent its clients' stop loss orders being executed on the first trading day after the holidays. The question then becomes whether the applicant had a duty to check its emails over the holidays.

166. Checking one's emails is not an onerous task and we would be surprised if many people do not do it as a matter of course, even on public holidays, and even in respect of workplace emails. We would not wish to impose a generalized duty on all persons to do so but in respect of licensees of the HKEx's OMD-C system who make a considered choice to remain connected to that system on a non-production day when they should know that testing of the system may take place over the course of that day, we are of the view that in these specific circumstances, the licensees have a professional duty to check for any emails from the HKEx. This element of the applicant's grounds of review also fails.

167. It will be apparent from all that we have said that we find no justification for the applicant's fundamental misunderstanding on how the OMD-C system operated. The receipt by the applicant's system of the test data was due to the applicant maintaining a connection to the OMD-C system on 6 April 2015 when there was no need to do so and no justification for doing so. As a consequence, the test data, once received, was disseminated within the applicant's system causing the clients' stop loss orders to be triggered. This, we have no doubt, was due to the applicant's negligence in not gaining a proper understanding how the OMD-C system operated and its negligence in not configuring its system to meet the requirements of the Interface Specifications. In respect of the first area of misconduct the applicant's third ground of review fails.

168. We have carefully considered the reasoning of the SFC in finding the applicant guilty of misconduct. We can find nothing erroneous in that reasoning. In finding the applicant guilty of misconduct it has not had regard to any irrelevant matter or failed to have regard to any relevant matter.

169. But, because this is a full merits review by this Tribunal, it is not enough that we find no error by the SFC, we must look at the matter afresh and determine for ourselves whether the conduct of the applicant causes us to be satisfied of all the elements of paragraph (d) of the definition of misconduct, including forming the opinion required of that paragraph.

170. Considering afresh the evidence that was presented to the Tribunal we are satisfied, on the balance of probabilities, for the reasons earlier set out, that in failing to configure its computer system so as to prevent receipt or dissemination of data transmitted through the OMD-C system on 6 April 2015, the applicant was in breach of General Principle 3 and committed an act or made an omission that related to the carrying on of a regulated activity for which the applicant was licensed and in respect of which we form the opinion that act or omission is or is likely to be prejudicial to the interest of the investing public or to the public interest.

171. In respect of the second area of misconduct, namely, the handling of clients after becoming aware of the erroneous triggering and execution of their stop loss sell orders, we have no hesitation in rejecting the second ground of appeal. This ground is based upon a misconception that there has to be a specific regulatory requirement dealing with the wrongful triggering of clients' orders by

test data transmitted by the HKEx. This is not so. As we have said earlier in this Determination when discussing the Code of Conduct, it is not necessary to find within the Code a specific provision that addresses the situation of allowing test data to be disseminated through the regulated person's computer system so as to adversely affect the clients' accounts. There is nothing improper in the generality of General Principles 1, 2 and 5 and which require the regulated person to act honestly, fairly and in the best interests of its clients and to make adequate disclosure of relevant material information in its dealings with its clients.

172. In respect of this area of misconduct we can likewise detect no error in the reasoning of the SFC but, as we have said, we must look at the matter and determine for ourselves whether, in respect of this area of the applicant's conduct, the applicant is guilty of misconduct.

173. We are in no doubt at all that in not contacting its clients after it had allowed test data to infect its computer system and to cause clients' stop loss sell orders to be improperly triggered and executed the applicant was not acting honestly and fairly with its clients and "with due skill, care and diligence in the best interest of its clients and the integrity of the market" and failed to make adequate disclosure to its clients of relevant material information. We are satisfied that, in respect of the post-incident handling of its clients, the applicant was in breach of General Principles 1, 2 and 5 of the Code of Conduct.

174. After considering the provisions of the Code of Conduct, and having regard to all that has been placed before us, we are satisfied, on the balance of probabilities, that in not contacting its clients and making full disclosure to them

of what had occurred, the applicant omitted to do an act that related to the carrying on of a regulated activity for which the applicant was licensed and in respect of which we have formed the opinion that the applicant's omission "is or is likely to be prejudicial to the interests of the investing public or the public interest".

175. We, therefore, find the applicant guilty of misconduct.

176. We have not received submissions from either party on whether the applicant's conduct, if found to be blameworthy in some way, also renders him unfit and improper "to be or to remain the same type of regulated person". Nor have we received any assistance from them on the meaning of fit and proper or the standard of competence below which a regulated person must fall in order to render that person not fit and proper.

177. Nevertheless, we have considered whether the conduct of the applicant has fallen so far below the standard to be expected of regulated persons as to render it, in our opinion, not a fit and proper person to be or to remain the same type of regulated person. We have concluded that it has not.

Sanctions

178. The only issue in respect of the sanctions imposed by the SFC is whether the misconduct warranted the imposition of a financial penalty in addition to a public reprimand and if so the amount of that penalty.

179. The disciplinary provisions of the SFO in no way detract from the

importance and value of the non-punitive roles of the SFC in educating, informing, advising and guiding the industry. But when serious misconduct takes place it will be necessary for that misconduct to be properly punished. The punishment, however, is not imposed for punishment's sake, but rather to advance the functions and objectives of the SFC as regulator of the industry.

180. Thus, the role and purpose of sanctions within the disciplinary process is directly related to the effectiveness of the SFC in carrying out its functions. Of those functions Tang ACJHC said in the *David Tsien* case:

> "Nor do I doubt that the function of the SFC includes the protection of investors, the maintenance of the integrity of financial services in Hong Kong, as well as the reputation of persons who were involved in the financial industries. I also accept that such objectives are important."

181. It could be said that the core functions of the SFC are the protection of investors, the maintenance of the integrity of the securities and futures industry and the preservation and promotion of public confidence in the industry. The disciplinary process and the sanctions that are imposed as part of it are intended to advance these objectives. It advances them by publicly condemning specific acts or omissions of misconduct and reflecting that condemnation in the imposition of a sanction which will be recognised as being a meaningful punishment. In order to be meaningful as a punishment it may be necessary for the sanction to contain an element of deterrence. This will always depend on the nature and seriousness of the misconduct.

182. Against these general principles the type and level of sanction appropriate to the applicant's misconduct fall to be considered.

183. In respect of the first area of misconduct the applicant has revealed a very poor level of understanding of the OMD-C computer system. Furthermore, the applicant has demonstrated a very poor appreciation of its responsibilities to ensure that the way it configured and operated its own system did not cause the connection with the OMD-C computer system to expose its clients to any adverse consequences. We do not know what, if any, guidance or instruction, the HKEx provides to its licensees but we have no doubt that the SFC was correct to conclude that more could, and should, be done to alert licensees to forthcoming tests.

184. Throughout the SFC investigation the applicant has failed, indeed refused, to accept that it was in any way at fault and attributes total responsibility for the incident to the HKEx. To say that there is a lack of remorse is something of an understatement. Perhaps of greater concern, is the lack of insight that the applicant possesses in respect of its responsibility for the incident. The applicant has shown an unwillingness to consider even the possibility that it might be at fault. The applicant's conduct is not just a failure of competence; it also reflects a total indifference to what lessons it can learn from the incident in order to better serve its clients.

185. We are of the view that a public reprimand is not a sufficient penalty for the applicant's misconduct and that a financial penalty is additionally required to demonstrate the seriousness with which that misconduct should be viewed.

186. We recognise that this aspect of the applicant's misconduct was not

intentional and flowed from an inexplicably negligent misunderstanding of the OMD-C system. We also recognise that the HKEx could have done more to assist its clients to better understand the testing regime of its system. We also accept that the misconduct was not committed for the purpose of conferring a financial benefit on the applicant or for causing loss to anyone and that, ultimately, no client of the applicant did suffer a loss.

187. For all these reasons we would not have considered that, on its own, this aspect of the applicant's misconduct would have warranted a fine as great as HK$600,000. But it is not on its own and the size of the fine must take account of the applicant's other aspect of misconduct to which we shall now turn.

188. The second area of misconduct is, in our view, of a far more serious level. There is nothing which mitigates it and it deserves to be condemned in the strongest terms. It not only impacts upon the affected clients but also on the reputation of the Hong Kong securities industry.

189. Again the applicant has shown a total lack of remorse and a desire to blame everyone else but himself. His attitude can only be described as a wilful refusal to acknowledge any wrongdoing on his part. He must be made to understand that the privilege of being permitted to work within the securities industry brings with it great responsibilities – responsibilities towards Hong Kong and its local and global reputation as a leading financial centre; responsibilities towards the securities and futures industry and responsibilities towards clients. Those responsibilities are reflected in the Code of Conduct but, regrettably, they appear to be unfamiliar to the applicant.

190. The actions of the applicant were clearly intentional and clearly based on a full understanding of what had happened. We can only assume that the applicant adopted the policy it did to minimise reputational damage to itself. Protecting itself from reputational damage is protecting itself from financial harm. The interests of its clients became completely secondary to the self-interest of the applicant. This attitude and the way the applicant treated its clients causes reputational harm to the Hong Kong securities and futures industry. There is a need for the punishment to be severe in order to deter others from thinking that they can treat the interests of their clients with similar indifference and to adequately punish the applicant for his misconduct.

191. Misconduct as egregious as the applicant's second area of misconduct calls for condign punishment. A public reprimand is clearly inadequate. There must be a financial penalty and it must be substantial.

192. In our view a fine of HK$600,000 for both areas of misconduct is by no means excessive, disproportionate or unjust.

Conclusion

193. We find the applicant is guilty of misconduct in respect of both the areas identified by the SFC. We impose sanctions of a public reprimand and a fine of HK$600,000. The application for review is dismissed with costs to the respondent.

Mr Ian Charles McWalters
(Chairman)

Mr Gary Cheung Wai-kwok
(Member)

Ms Lorna Chen Xin
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