

# Securities and Futures Appeal Tribunal – landmark Court of Appeal decision

## Case summary

In a landmark decision, the Court of Appeal unanimously overturned the practice that the Securities and Futures Appeal Tribunal (the **SFAT**) has adopted since 2003 in only proceeding on the basis that it has a limited role in reviewing Securities and Futures Commission (the **SFC**) decisions which are appealed to the SFAT. To date, the SFAT's approach has been that until a disciplinary action proposed to be taken by the SFC is demonstrated to be clearly wrong, either in principle or on the basis of mistaken/ overlooked facts, the SFAT will not interfere.

The Court of Appeal has held that this is the incorrect approach. In rejecting the SFC's arguments before it, the Court of Appeal held that the correct approach is that a review by the SFAT should be a "*full merits review*", that is, the SFAT in making the review, should be exercising the powers of the original decision-maker and in fact, should be acting as if it were the original decision-maker.

## Background

On 8 July 2009, the Market Misconduct Tribunal (the **MMT**) found the applicant (respondent in this appeal) guilty of insider dealing contrary to section 270(1)(c) of the Securities and Futures Ordinance, Cap. 571 (the **SFO**). The MMT suspended his trading licence for nine months. On 27 January 2010, the SFC determined that the applicant was no longer a fit and proper person to be licensed. As a result of that finding, the SFC sought to impose a life ban on the applicant pursuant to section 194(1)(iv) of the SFO prohibiting the applicant from carrying out regulated activities.

The applicant appealed successfully to the SFAT against the penalty imposed by the SFC. The SFAT held that a life ban was "*manifestly excessive*" and it was set aside in place of a ten-year prohibition from carrying on regulated activities.

The SFC then launched an appeal to the Court of Appeal against the SFAT's decision and raised as a point for decision the proper role and function of the SFAT on a review under section 217 of the SFO.

## SFAT's standard of review should be a "full merits review"

The Court of Appeal firmly rejected the SFC's submissions that the SFAT should review SFC decisions on a limited basis. The set-up of the SFAT, being an independent tribunal comprised of a judge and two lay members (appointed on account of their expertise in the relevant field), as well as the powers of review granted to the SFAT by the SFO, underlined the SFAT's independence from the SFC and meant that the SFAT is obliged to exercise its own independent judgment on a review which should be a "*full merits review*".

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The Court of Appeal held that the SFC is acting as a regulator in making any disciplinary actions against licensed or registered individuals. SFC plays both the roles of "prosecutor and judge". Therefore, the SFAT is the first occasion where there is an independent hearing should a case proceed to the SFAT level. Mr Justice Tang Ag CJHC stated in the judgment that "[t]he contention that a person's reputation or livelihood could be so seriously affected by a regulator, acting as prosecutor and judge, without a genuine full merits review by an independent tribunal, is so abhorrent to our system, that I reject it unhesitatingly."

The Court of Appeal further rejected the SFC's submissions that the SFAT should accord "special respect" to SFC decisions following the principles laid down in *Bolton v Law Society* [1994] 1 WLR 512. *Bolton* was an English case concerned with a practising solicitor who was suspended from practice for two years by the Solicitors Disciplinary Tribunal (the **SDT**) and who then appealed to the Divisional Court successfully against the SDT's orders.

The Court of Appeal stated further that it is false to draw an analogy between the SFC and a professional disciplinary tribunal such as the SDT given that the SFC is both "prosecutor and judge". Although the SFC is charged with the statutory function of protecting investors and maintaining the integrity of the financial services in Hong Kong, the SFAT, being comprised of a judge and two lay members appointed on the basis of their expertise in the financial services field, is "eminently suited to decide fairly, independently and impartially what punishment is necessary to safeguard the integrity and reputation of the financial markets in Hong Kong". It is the SFAT's decision that should command the Court's "special respect" (if on appeal under section 229 of the SFO) and not the SFC's decision that should be accorded with "special respect" by the SFAT.

The SFAT is entitled to make an independent assessment of all the circumstances of a case and arrive at its own decision. The Court cannot interfere unless the SFAT has erred in law as provided under section 229 of the SFO.

In this instance, the Court of Appeal held that the SFAT has not made any error of law. Mr Justice Tang Ag CJHC went so far as to point out that a ten-year prohibition from carrying on regulated activities is eminently reasonable and a life ban would have been "manifestly excessive". The Court of Appeal has ordered the SFC to pay the applicant's costs of the Court of Appeal proceedings.

## Conclusion

This is a very significant decision. It will tend to encourage more appeals to the SFAT by licensed and registered persons against what they perceive as incorrect or excessive SFC decisions and penalties (disciplinary decisions in particular). It may also see the SFC adopt a more balanced approach to the assessment of penalties, especially if there is a risk that the SFC will face adverse costs orders as in this case.

Even if it does not alter the SFC's approach to the assessment of penalties, it should certainly encourage the SFC to set out in more detail in its Notices of Decisions the reasons why it, as the regulator, considers that the findings, including penalties, are warranted.

Clifford Chance and Laurence Li of Temple Chambers acted for the applicant (respondent in this appeal) in this case.

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