AIA INTERNATIONAL LTD v APPEALS TRIBUNAL OF THE HONG KONG FEDERATION OF INSURERS & ANOR

COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO 163 OF 2015
ZERVOS J
11 MAY, 20 JULY 2017

Administrative Law – Judicial review – Natural justice – Right to hearing – Insurance Agents Registration Board – Authority to make order – Payment order against insurance company in respect of conduct of insurance agent – Insurance company not a party to disciplinary proceedings – Appeal to Appeals Tribunal dismissed without hearing – Procedural propriety – Dispute on facts – Whether oral hearing should be held – Whether in breach of natural justice

Insurance – Regulation of insurance companies – Insurance Agents Registration Board – Payment order against Insurance company in respect of conduct of insurance agent following disciplinary proceedings – Insurance company not a party to disciplinary proceedings – Whether Board had power to make order

行政法 — 司法覆核 — 自然公義 — 聆訊的權利 — 保險代理登記委員會 — 作出命令的權力 — 針對保險公司的保險代理行為的付款命令 — 保險公司並非紀律聆訊的其中一方 — 向上訴審裁處作出上訴,在沒有聆訊下遭駁回 — 程序上的規範 — 就事實作出爭議 — 是否應進行口頭聆訊 — 是否違反自然公義

保險 — 保險公司的規例 — 保險代理登記委員會 — 針對紀律聆訊後保險公司的保險代理行為的付款命令 — 保險公司並非紀律聆訊的其中一方 — 委員會是否有權作出命令

On 22 February 2014, the second respondent, the Insurance Agents Registration Board (the IARB) made a payment order of $806,200 against the applicant, following disciplinary proceedings against one of its former agents (the Former Agent). Prior to the disciplinary proceedings, the Former Agent had been convicted in the District Court on his own plea of fraud related offences in relation to the misappropriation of monies from his clients (the Complainants), for which he was sentenced to three years' imprisonment.

The applicant was not a party to the disciplinary proceedings before the IARB. It was not given notice of the payment order, nor the opportunity to be heard on the matter. The applicant appealed against the IARB's decision to the first respondent, the Appeals Tribunal of the Hong Kong Federation of Insurers (the Appeals Tribunal), which on 15 May 2015 dismissed the appeal without hearing.

On 17 November 2015, leave was granted to the applicant to judicially review the respective decisions of the Appeals Tribunal and the IARB. The following questions were up for review: Did the IARB have the power to make a payment

order? Did the IARB, by making the payment order against the applicant, breach the principles of natural justice? Did the Appeals Tribunal err in law in not holding an oral hearing when there was a dispute over the facts? Did the Appeals Tribunal err in law in finding that the applicant was liable for the actions of its former agent?

Held, quashing the decision of the IARB and remitting the matter back to the Appeals Tribunal for rehearing:

Whether the IARB had the power to make a payment order against the applicant

(1) The Code of Practice for the Administration of Insurance Agents (the Code) set the requirements and standards that insurance agents must maintain, and pursuant to cll 44-48, any breach could result in disciplinary proceedings by the IARB. The IARB would investigate the matter or complaint, and if after considering all relevant representations, it considered that there had been a breach of the Code or the matter at issue rendered the respondent therein (an insurance agent) not fit and proper to be or continue to be registered as a registered insurance agent, it may take 'disciplinary action' (cl 39(d) and (e) of the 6th edition of the Code), or 'disciplinary or other action' (cl 44(d) and (e) of the 7th edition of the Code). The action that the IARB could take included requiring the principal 'to take··· such other action as the [Appeals Tribunal] thinks fit' (cl 39(e) of the 6th edition of Code). Over the years in relation to numerous cases of misconduct, the disciplinary action taken by the IARB included a requirement that the insurer repay any premiums procured by the misconduct, or reinstate the status of an insurance policy notwithstanding that the premiums in respect of that policy were misappropriated by the insurance agent concerned and were never received by the insurer. In any event for the avoidance of doubt, it had been made clear under cl 44 of the 7th edition of the Code that the action required by a principal included 'refunding premiums paid by persons affected by the conduct of the relevant respondent' (paras 113-114, 118-119).

(2) In all cases during the currency of the 6th and 7th editions of the Code in which the applicant had been requested by the respondents 'to repay a sum of money misappropriated or otherwise mishandled by its insurance agent,' the money was a payment for a premium actually due on an actual insurance policy. There was no suggestion that any other insurers had been subject to a request to repay a sum of money that did not come within this description. The Former Agent's disciplinary hearing was in relation to his fraudulent conduct involving a bogus product that was not of a type that the applicant provided. The $800,000 payment order was not characterised as payments of premium in the documents provided by the Complainants, and the $6,200 was not a payment of a premium actually due on an actual policy with the applicant. In other words, the payment order was different to orders made in the past as it did not relate to a policy either in existence or offered by the applicant. On this basis, the applicant had no reason to believe that it would be subject to a request by the IARB to repay the amount in question to the Complainants (paras 95, 104, 106, 115, 120).

(3) The court did not express its view whether the payment order fell within the terms of the practice accepted by insurers or required by law, for that would be a matter that should have been the subject of evidence, if necessary, and

A submissions before the IARB and Appeals Tribunals respectively, except it stated that cl 39 was wide enough to empower the IARB to make the order that it did (para 95).

Whether the respondents breached principles of natural justice, and whether the Appeals Tribunal erred in law

B (4) The right to a fair hearing required that individuals or entities should not be penalised by decisions affecting their rights unless they had been given prior notice of the case, a fair opportunity to answer it, and the opportunity to present their own case. Under cl 39(c) of the 6th edition of the Code, the IARB was obliged to notify a principal and to give it the opportunity to make representations, C if it would likely be adversely affected by disciplinary action taken against its insurance agent. More specifically, when dealing with a complaint concerning an insurance agent, if the IARB considered that it would likely take disciplinary action should the matter or complaint be proven, it must provide the insurance agent and 'any Principal who is likely to be adversely affected by such action with an opportunity to make representations' in such a manner and form as the IARB D considered appropriate, and that it must consider such representations. Here, the applicant was not a party to the disciplinary proceedings against the Former Agent or given notice of the payment order under contemplation; and the IARB did not comply with the requirements under cl 39(c). The IARB should have notified the applicant that it was contemplating to make a payment order against it in the same E way that it notified the Former Agent, advising him of the nature and likely consequences of the proceedings, informing him of his rights, and giving him the opportunity to be heard on the matter, even the opportunity to elect an oral hearing if he wished to have one (paras 117, 120, 125, 127).

Whether the respondents breached principles of natural justice and whether the F *Appeals Tribunal erred in law*

(5) In the appeal proceedings before the Appeals Tribunal, there was a dispute as to the reliance by the Complainants on the Former Agent's alleged apparent authority. The lack of opportunity to cross-examine the Complainants in an oral hearing on this matter and test their factual case could not be dealt with or remedied by written submissions. Therefore, the applicant in being denied an oral G hearing was unable to test the evidence, and was prejudiced in exercising its right of appeal (paras 105-106).

(6) In addition, the Appeals Tribunal did not properly address the issues that had been raised by the applicant whilst extensive written submissions had been presented to it. A number of critical issues were not properly addressed or H reasoned. The issues were dealt with by conclusive statements without any reasons or explanations. More particularly, the Appeals Tribunal did not explain the nature and scope of the underlying power of the IARB to require a principal to make a payment, other than it was wide enough to cover the payment requested. In this instance, it required in particular the Appeals Tribunal to address I the matters raised by the applicant in oral hearing and to properly address these matters in its decision. Its decision was unsatisfactory. The Appeals Tribunal should have addressed the issue of 'previous practice' as well as considering the factual dispute that had been raised by the applicant in relation to the Complainants' dealings with the Former Agent. These were matters that most likely would have warranted an oral hearing (paras 75, 99, 105-106, 122).

Cases referred to

A Solicitor v Law Society of Hong Kong [2013] 4 HKC 198 (CA)

Chime Corp Ltd, Re (2004) 7 HKCFAR 546, [2004] 3 HKLRD 922, [2004] HKCU 1453 (CFA)

Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480, [1964] 1 All ER 630, [1964] 2 WLR 618 (CA, Eng)

Liu Pik Han v Hong Kong Federation of Insurers Appeals Tribunal [2005] 3 HKC 242 (CFI)

MGM v Director of Immigration [2017] HKCU 295; (HCAL 63/2015, Au-Yeung J, 3 February 2017, unreported) (CFI)

Orrico Philippe v Municipal Services Appeals Board [2015] 4 HKC 557, [2015] 4 HKLRD 111, (2015) 20 HKPLR 631 (CA)

Ridehalgh v Horsefield [1994] Ch 205, [1994] 3 All ER 848, [1994] 3 WLR 462 (CA, Eng)

Styland Holdings Ltd (No 2), sub nom, Securities and Futures Commission v Kenneth Cheung Chi Shing & Ors, Re [2012] 2 HKLRD 325, [2012] HKCU 545 (CFI)

Wong Tak Wai v Commissioner of Police [2010] 6 HKC 58, [2010] 4 HKLRD 409, (2010) 15 HKPLR 828 (CA)

Legislation referred to

Companies Ordinance (Cap 32) (Repealed) s 168(c)(2)
Insurance Companies Ordinance (Cap 41) ss 4, 4A, 5, 6, 7, 8, 66, 67, 68, 77
Securities and Futures Ordinance (Cap 571) s 214(2)(e)

Other sources referred to

Bowstead & Reynolds on Agency (20th Ed) [8-198]
Hong Kong Federation of Insurers, Code of Practice for the Administration of Insurance Agents (6th Ed) [cll 1-47]
Hong Kong Federation of Insurers, Code of Practice for the Administration of Insurance Agents (7th Ed) [cll 49-56]
The Law Reform Commission of Hong Kong, Report on Laws of Insurance [6.10]

[*Editorial note*: for the right to a fair hearing, see *Halsbury's Laws of Hong Kong*, Title 10, Administrative Law, and for regulation of insurance companies, see Title 22, Insurance.]

Application

This was an application for judicial review against the respective decisions by the second and first respondents following disciplinary proceedings against one of the applicants' former insurance agents, whereby the applicant was subject to a payment order of $806,200 that was subsequently upheld on appeal. The facts appear sufficiently in the following judgment.

Robin McLeish (Winnie Mak, Chan & Yeung) for the applicant.
Jin Pao (Reed Smith Richards Butler) for the first and second respondents.

A **Zervos J:**

Introduction

1. On 22 February 2014, the Insurance Agents Registration Board (the IARB) made a payment order of $806,200 against the applicant, AIA International Ltd (AIA), following disciplinary proceedings against a former agent of the applicant. Prior to the disciplinary proceedings, the agent had been convicted in the District Court on his own plea of fraud related offences in relation to the misappropriation of monies from his clients, for which he was sentenced to 3 years' imprisonment.

2. The applicant was not a party to the disciplinary proceedings before the IARB. It was not given notice of the payment order, nor the opportunity to be heard on the matter. The applicant appealed against the IARB's decision to the Appeals Tribunal (the Appeals Tribunal) of the Hong Kong Federation of Insurers (the HKFI) which on 15 May 2015 dismissed the appeal without hearing.

3. On 17 November 2015, leave was granted to the applicant to judicially review the respective decisions of the IARB and the Appeals Tribunal.[1] The grounds for review can be crystallised into the following four questions.[2] Does the IARB have the power to make a payment order? Did the IARB, by making the payment order against the applicant, breach the principles of natural justice? Did the Appeals Tribunal err in law in not holding an oral hearing when there was a dispute over the facts? Did the Appeals Tribunal err in law in finding that the applicant was liable for the actions of its former agent?[3]

The legal and administrative framework

4. In order to address the issues raised by the present proceedings, it is necessary to briefly examine the legal and administrative framework of the insurance industry in Hong Kong.

5. The HKFI was established on 8 August 1988 as a self-regulatory body

1. Hearing bundle, 24-26.
2. Hearing bundle, 1-12 (Form 86).
   Ground 1: The making of the payment order was an ultra vires act and the Appeals Tribunal made an error of law in finding to the contrary.
   Ground 2: Breach of natural justice by the IARB in making the payment order and failure by the Appeals Tribunal to take account of relevant factors and/or the taking into account of irrelevant factors and/or error of law in rejecting AIA's challenge to the payment order on the ground of breach of natural justice.
   Ground 3: Failure to take account of relevant factors and/or the taking into account of irrelevant factors and/or error of law in not deciding not to hold an oral hearing of AIA's appeal against the payment order.
   Ground 4: Error of law in finding that the IARB was entitled to require AIA to pay Ms Tsui and Ms Suen the money ordered to be paid to them under the payment order.
   Ground 5: Irrationality as shown cumulatively in relation to Grounds 1, 2 and 4.
3. Hearing bundle, 3-11.

of insurers to advance and promote the development of the insurance business in Hong Kong. It became a limited company on 29 December 1994.

6. Articles 48 to 55 of the Articles of Association of the HKFI provide for the establishment of the IARB for the purposes of implementing and administering a Code of Practice (the Code) for the administration of insurance agents issued by the HKFI.

7. The Code provides for the establishment and operation of the Appeals Tribunal for the purpose of determining appeals against the decisions of the IARB made under the Code. The decisions of the Appeals Tribunal are final.[4]

8. The principal legislation governing the insurance industry in Hong Kong is the Insurance Companies Ordinance (Cap 41) (the ICO). It was enacted in its original form in 1983 with the primary purpose of protecting policy holders. At the time, it was acknowledged that there was a need for continuous prudential supervision aimed at protecting policy holders in all types of insurance.

9. For the purposes of the ICO, the Chief Executive is required to appoint a public officer to be the Insurance Authority.[5] The functions of the Insurance Authority are to regulate and supervise the insurance industry for the promotion of the general stability of the insurance industry and for the protection of existing and potential policy holders.[6] Part of the Insurance Authority's responsibilities is to maintain a register of authorised insurers.[7]

10. An amendment to the ICO was made in 1994 which added Part X dealing with 'insurance intermediaries'.[8]

11. The amendment had its origins in 1986, when the Law Reform Commission (the LRC) issued a report, highlighting the absence of professional standards for insurance agents and confusion over the roles and liabilities of agents and brokers. As policy holders' interests were at risk, the LRC recommended the introduction of legislation to, amongst other things, define the roles of agents and brokers and make insurers responsible for the actions of their agents. As explained in the LRC's report:

> 'By making insurance companies responsible for the actions of their agents, we believe that insurers will take greater care in the employment and training of their agents. An insurer will be unlikely to fail to regulate his agents' activities when he may be held liable for their deficiencies'.[9]

12. The insurance industry recommended the adoption of voluntary codes of practice with appropriate statutory backing. The first version of the

4. Clauses 42 to 46 of the 6th edition of the Code. Clauses 49 to 56 of the 7th edition of the Code.
5. Section 4.
6. Section 4A.
7. Section 5.
8. The Insurance Companies (Amendment) No 3 Bill 1993.
9. At [6.10].

Code was adopted by the HKFI in 1993. However, there were still concerns that self-regulation had not proved fully effective in the absence of statutory backing, as voluntary codes could not provide an effective sanction against non-compliance.

13. It would appear that the underlying policy objectives behind Part X of the ICO and the Code were to strengthen protection to policy holders, to maintain effective self-regulation in the industry and to have an appropriate system in place to deal with improper conduct by its members. It was viewed that this would lead to enhanced public confidence in the insurance industry. To this end, s 67 of the ICO provides that:

> '(1) The Hong Kong Federation of Insurers is required, with the approval of the Insurance Authority, to issue a code of practice for the administration of insurance agents.
>
> (2) The Hong Kong Federation of Insurers is required to amend the code of practice for the administration of insurance agents as the Insurance Authority directs.
>
> (3) The Hong Kong Federation of Insurers is not, without the prior written approval of the Insurance Authority, to amend or withdraw the code of practice.
>
> (4) An insurer is required to comply with a code of practice approved under this section in its administration of insurance agents.
>
> (5) The Insurance Authority has the power to require an insurer and an insurance agent to supply information that verifies the insurer's, or the insurance agent's, compliance with the code of practice.'
>
> (Emphasis added)

14. It is also worth noting s 68 which concerns the insurance agent's relationship with an insurer. Section 68 reads:

> '(1) An appointed insurance agent is the agent of the insurer in the agent's dealings with a person other than the insurer for the issue of a contract of insurance and insurance business relating to the contract.
>
> (2) An insurer is not able to exclude or limit its liability for the actions of its appointed insurance agent in the dealings for the issue of a contract of insurance and insurance business relating to the contract.
>
> (3) A provision in a contract of insurance or an agency contract that contravenes sub-s (1) or (2) is void.
>
> (4) Where, in an insurance transaction undertaken by an appointed insurance agent, a particular insurer is not able to be identified, the insurers which have appointed the insurance agent as an appointed insurance agent to conduct the class of business that relates to the claim by the proposed insured are jointly and severally liable for the damages arising as a result of the actions of the appointed insurance agent.
>
> (5) The liability of an insurer under this section arises whether the appointed insurance agent purports to act as a principal or as an agent for an undisclosed or disclosed principal.

(6) In assessing liability for a claim under sub-s (4), the court is required to be satisfied that the proposed insured has acted in the utmost good faith and without contributing to the failure on the part of the insurance agent to effect the proposed insurance contract.'

15. I mention s 68 because it deals with an insurer's legal obligations and liabilities in relation to an appointed insurance agent's dealings with a person in respect of the issue of a contract of insurance or related insurance business.

16. The centrepiece of the insurance industry's self-regulatory regime is the Code which is given statutory backing under s 67 of the ICO and is issued by the HKFI (with the approval of the Insurance Authority) and administered by the IARB.[10]

17. The Code is for the administration of insurance agents (s 67(1)), although both insurance agents and insurers are required to comply with the Code (s 67(4)).

18. In terms of enforcement, under s 67(5), the Insurance Authority has the power to require an insurer and an insurance agent to supply information that verifies compliance with the Code. Failure to supply verifying information is a criminal offence as provided by s 77(8)(e). Also, under s 77(9)(e)(iii), an insurer which fails to take disciplinary action as required by the IARB is subject to a criminal offence.

19. In the present case, the 6th edition of the Code was in force during the relevant times.[11] It has since been replaced by the 7th edition.[12]

20. Part A is the interpretation section and consists of Clauses 1 to 5. It confirms the status of the Code, noting that it has been approved by the Insurance Authority pursuant to s 67 of the ICO and referred to in Article 38 of the Articles of Association of the HKFI. It also sets out relevant definitions.[13] Finally, it provides under Clause 5 that:

'The intention is that this *Code* should be no more onerous on Principals and insurance agents than the [ICO]. This *Code* should be interpreted according to that intent. In the event of a conflict between this *Code* and the [ICO], the [ICO] shall prevail and this *Code* shall be invalid to the extent of any inconsistency.'[14]

21. Part B is the general principles section and consists of Clauses 6 to 11. Under Clause 7 it provides that the IARB may:

'(a) refer complaints received by it: -

(i) concerning insurance agents to any Principal or insurance agent; and

10. *Liu Pik Han v Hong Kong Federation of Insurers Appeals Tribunal* [2005] 3 HKC 242, [17] (Lam J (as he then was)).
11. From June 2004 to February 2010.
12. The 7th edition came into force in March 2010.
13. Hearing bundle, 77, Clause 1.
14. Hearing bundle, 79.

A (ii) concerning Responsible Officers or Technical Representatives to any Principal or the relevant insurance agent as appropriate

for investigation;

(b) receive investigation reports from any Principal or relevant insurance agent B relating to complaints mentioned in clause 7(a);

(c) require any Principal or relevant insurance agent to take disciplinary action in consequence of a complaint;

(d) confirm the appointment of insurance agents, Responsible Officers and C Technical Representatives or revoke such confirmation;

(e) keep and maintain:

(i) a register of insurance agents; and

D (ii) a sub-register of insurance agents' Responsible Officers and Technical Representatives

whose appointments have been confirmed by the IARB;

and

E (f) report to the Insurance Authority where it appears to the IARB that: -

(i) an insurance agent, a Responsible Officer, Technical Representative or Principal has breached Part X of the *Ordinance* or this *Code*;

F (ii) an insurance agent is not or has ceased to be a fit and proper person to act as such; or

(iii) a Responsible Officer or Technical Representative is not or has ceased to be a fit and proper person to act as such.'[15]

G 22. Under Clause 8, the IARB may issue Guidance Notes, although they do not form part of the Code.[16] Guidance Notes have not been issued in relation to the terms and scope of any liability of a principal as a result of an insurance agent's misconduct.

23. It is noted under Clause 11 that a principal or an insurance agent who H fails to comply with the Code or Part X of the ICO may be subject to criminal prosecution under s 77 of the ICO.[17]

24. Part C is the rules section and consists of Clauses 12 to 36. Clause 23 sets out the obligations of a principal in respect of insurance agents. It provides:

I 'A Principal shall ensure that each of its insurance agents: -

15. Hearing bundle, 80.
16. Hearing bundle, 81.
17. Hearing bundle, 81.

(a) does not, to the Principal's knowledge, act at any one time or more than the maximum number of Principals allowed;

(b) is eligible to be engaged in a Line of Insurance Business in respect of which the Principal is authorized to carry on and has appointed the insurance agent to engage in;

(c) meets the fit and proper criteria set out in Part E of this *Code*;

(d) is confirmed by and registered with the IARB in accordance with this *Code*;

(e) is appointed as an insurance agent of the Principal in writing by an agency agreement. The agency agreement shall require the insurance agent to comply with Part F of this *Code*;

(f) discloses his registration number if so requested;

(g) identifies his registration number on his business cards if they are distributed;

(h) complies with this *Code*; and

(i) has registered as an MPF intermediary with the MPFA where the insurance agent is engaged in selling or advising on Mandatory Provident Fund schemes or their constituent or underlying funds.'[18]

25. A principal is also required under Clauses 24 and 25, in the circumstances specified, to terminate the appointment of, or provide training to, insurance agents respectively.

26. Part D is the procedures section and consists of Clauses 37 to 47. Clause 39 deals with complaints against insurance agents and provides:

'The following shall apply if the IARB becomes aware of any matter which may render an insurance agent not fit and proper to act or continue acting as such or receives a complaint concerning an insurance agent: -

(a) the IARB may refer the matter or the complaint to any Principal or insurance agent for investigation;

(b) the Principal shall diligently and expeditiously investigate the matter or the circumstances of the complaint and, on request by the IARB, report the progress and the findings (if any) of the investigation within 14 days of the date of referral or such further period as may be specified by the IARB. In consequences of such report, the IARB may request the Principal to conduct further inquiries;

(c) If the IARB considers that it is likely to take disciplinary action if the matter or the complaint is proven, the IARB shall provide the insurance agent to whom the matter relates or the subject of the complaint and any Principal who is likely to be adversely affected by such action with an opportunity to make representations in such manner and form as the IARB considers appropriate and

18. Hearing bundle, 83 and 84.

within 14 days or such further period as may be specified by the IARB and the IARB shall consider such representations;

(d) when the IARB considers that all matters relevant to the matter or the complaint have been fully and satisfactorily investigated and reported and that all representations concerning the matter or the complaint have been considered and the matter renders the insurance agent not fit and proper to act or continue acting as such or the complaint is proven, it may require the Principal to take disciplinary action;

(e) disciplinary action may include requiring a Principal to:

(i) issue a reprimand to any of its insurance agents;

(ii) suspend or terminate the appointment of any of its insurance agents; or

(iii) take or refrain from taking such other action as the IARB thinks fit;

an insurance agent whose appointments has been terminated in these circumstances will be barred from Registration as an insurance agent, a Responsible Officer or Technical Representative for a specified period;

(f) when requiring disciplinary action affecting any Principal or insurance agent, the IARB shall also serve on that Principal and insurance agent a notification of that requirement together with a statement specifying the grounds thereof; and

(g) if a Principal fails to comply with a requirement to take disciplinary action, the IARB may impose a further requirement and report such failure to the Insurance Authority.'[19]

(Emphasis added)

27. Clauses 42 to 46 set out the appeal provisions in relation to decision of the IARB made under the Code. They read:

'42. There shall be an Appeals Tribunal who shall determine appeals against decisions of the IARB made under this *Code*, and its decisions shall be final.

43. The members of the Appeals Tribunal shall be persons (not being members of the IARB) nominated by the HKFI and confirmed by the Insurance Authority.

44. Any person adversely affected by a decision of the IARB made under this *Code* may appeal to the Appeals Tribunal but that decision shall take effect immediately notwithstanding that an appeal has or may be made.

45. The Appeals Tribunal may determine its own procedures but otherwise an appeal shall be conducted and determined in accordance with the *Appeals Tribunal Proceedings Rules*, as amended from time to time.

46. On determining an appeal the Appeals Tribunal may confirm, vary or reverse the decision being appealed or substitute thereof such other decision, consistent with the powers of the IARB, as it thinks fit.'

19. Hearing bundle, 87-88.

28. As I have already mentioned, the 6th edition of the Code was replaced by the 7th edition. The equivalent of Clause 39 of the 6th edition is Clause 44 of the 7th edition which so far as material provides:

> 'The following shall apply if the IARB becomes aware of any matter which may involve a breach of this *Code* or which may render a Registered Person [which term includes an insurance agent registered under the *Code*] not fit and proper to remain appointed and registered as a Registered Person: -
>
> …
>
> (d) when all representations concerning the matter or the complaint have been considered by the IARB and the IARB is of the view that either there has been a breach of this *Code* or the matter at issue renders the respondent not fit and proper to be or continue to be registered as a Registered Person, the IARB may take disciplinary action or other action in the manner set out in clause (e) below and/or require the Principal or any Registered Person to take disciplinary or other action in the manner set or other action in the manner set out in sub-clause (e) below;
>
> (e) disciplinary or other action may include:
>
> (i) issuing a reprimand to the relevant respondent;
>
> (ii) suspending or terminating the appointment of the relevant respondent; or
>
> (iii) taking or refraining from taking such other action (including, for the avoidance of doubt, refunding premiums paid by persons affected by the conduct of the relevant respondent) as the IARB thinks fit;'[20]

(Emphasis added)

29. The emphasised parts of Clause 44 of the 7th edition highlight relevant changes to the wording of Clause 39 of the 6th edition. For the sake of completeness, the 6th edition includes Part E which is the section on fit and proper criteria for insurance agents and Part F which is the section on minimum requirements of a model agency agreement.

30. In summary, the ICO establishes a self-regulatory regime[21] for the administration of insurance agents. All insurance agents[22] must be registered with the IARB, and insurers and insurance agents must comply with the Code.[23] Insurers assume obligations to comply with the Code when they obtain authorisation to carry on insurance business.[24] The insurer is required to apply for the registration of the insurance agent with the

20. Hearing bundle, 227-229.
21. The self-regulatory regime for insurance agents is to be phased out when a new regime for the regulation of insurance intermediaries introduced by the Insurance Companies (Amendment) Ordinance 2015 comes into effect.
22. Including their responsible officers and technical representatives.
23. Statutory backing for and compliance of the Code is provided by virtue of s 67 of the ICO.
24. See ss 6(1), 7 and 8 of the ICO.

IARB,[25] and to obtain confirmation of their appointment from the IARB.[26] The insurer is also required to keep a register of appointed insurance agents.[27] A failure by an insurer to comply with the Code may constitute a criminal offence.[28]

The background facts

31. The facts giving rise to the present application can be briefly stated as follows.

32. Mr Lau Chun Ming (Mr Lau) was a registered insurance agent of AIA with the IARB. He was first registered as an agent of AIA in 1994 and thereafter he renewed his registration every 3 years until it was cancelled in March 2012.

33. Ms Tsui Ming Lo (Ms Tsui), and her mother, Ms Suen Oi Wah (Ms Suen), were clients of Mr Lau, through whom they took out insurance policies with AIA in 2001 and 2002 respectively.

34. On 7 November 2007, Mr Lau represented to Ms Tsui that there was a 'fund investment product' of two years' duration with a guaranteed return of 8 per cent. Ms Tsui decided to invest in the product and she in turn persuaded her mother, Ms Suen, to invest with her. On the same day, Ms Tsui transferred $250,000 into Mr Lau's bank account, and a few days later on 10 November 2007, Ms Suen transferred $350,000 from a joint account she held with Ms Tsui to a bank account designated by Mr Lau which both Ms Tsui and Ms Suen knew belonged to Mr Lau's wife.

35. On 15 November 2007, Mr Lau gave to Ms Tsui and Ms Suen what was purported to be an AIA receipt with the number 'L2590921', recording that $600,000 had been received for an 'Investment-Linked Deposit' with the policy number 'AIG-1356-198'.[29]

36. In January 2008, Mr Lau informed Ms Tsui and Ms Suen that they could top up their original investment of $600,000. On 17 January 2008, Ms Tsui transferred $50,000 to Mr Lau's account. Ms Suen also transferred $312,200 to Mr Lau's account and instructed him to use $150,000 of that money together with Ms Tsui's $50,000 to increase the investment in the investment-linked product. The remaining balance of $162,200 was to be used for payment of the premium due on Ms Suen's AIA insurance policy number B723089793. As found by the IARB, AIA received the sum of $156,000 in payment for this policy which was a one-off payment, and the balance of $6,200 was not a sum due to AIA and the policy was unaffected by Mr Lau's misappropriation of it. Thus, the $6,200 was an overpayment to Mr Lau.

25. Clauses 15 and 16 of the Code. Clauses 29 to 31 of the Code provide similar obligations on insurance agents when appointing its responsible officer or technical representative.
26. Clause 14 of the Code.
27. Section 66 of the ICO.
28. Sections 77(9) and (10) of the ICO.
29. Hearing bundle, 367.

37. On 11 January 2009, Mr Lau gave to Ms Tsui and Ms Suen a confirmation certificate regarding their investment which proved to be false. It was described as a 'Time Deposits/Structured Investment Deposit Confirmation' numbered 'C7833/09'. It was recorded that the principal amount was $918,960, the interest/participation rate was 8%, the date of interest/deposit was 1 November 2009, the expiry date was 30 April 2011 and the deposit period was 18 months.[30]

38. As it turned out, Mr Lau had fraudulently misappropriated funds that he had received from Ms Tsui and Ms Suen by falsely representing that the funds were to be invested in an investment product of AIA. The total sum misappropriated by Mr Lau was $806,200 which represented the total sum of $962,200 he received from Ms Tsui and Ms Suen, less the $156,000 paid to AIA in April 2008. Of the $806,200, $800,000 was falsely obtained by Mr Lau on the pretence that it was for an investment-linked product and $6,200 was an overpayment of a premium for a policy with AIA.

39. AIA submit that neither the $800,000, nor the balance of $6,200, was a premium payment that was actually due in respect of an actual insurance policy with AIA.

40. A police investigation was conducted into the affairs of Mr Lau, and both Ms Tsui and Ms Suen made statements to the police on 15 October 2012.[31]

41. On 1 November 2012, Ms Tsui and Ms Suen lodged a complaint against Mr Lau with the HKFI and the matter was subsequently investigated by them.

42. The HKFI made inquiries with AIA about the case. In response to a letter dated 3 September 2013 from HKFI, AIA advised by a letter dated 11 September 2013 that on 14 April 2008 it received a lump sum of $156,000 for Ms Suen's AIA insurance policy number B723089793.[32] In response to another letter dated 18 September 2013 from HKFI, AIA advised by a letter dated 2 December 2013, that it never provided to customers any form of securities subscription or high interest rate deposit plan through financial planning consultants; that the AIA receipt numbered 'L2590921' had been falsified (the receipt number related to a receipt issued to another of Mr Lau's clients on 17 April 2007); and that it had not issued policy 'AIG-1356-198' or received the $600,000 as stated on the receipt.[33]

43. It should be noted that in the correspondence between the HKFI and AIA, the HKFI did not inform AIA that it would hold it liable for the

30. Hearing bundle, 368.
31. Hearing bundle, 347-352 (statement of Ms Tsui), and 353-359 (statement of Ms Suen).
32. Hearing bundle, 370 and 371.
33. Hearing bundle, 372-374.

A conduct of its former agent and seek a payment order against it.

Prosecution of Mr Lau

44. Mr Lau was eventually prosecuted in the District Court for various offences of theft, fraud and obtaining property by deception where it was alleged that he deceived clients in investing monies with him for non-existent AIA products which he misappropriated.

45. On 7 February 2014, Mr Lau pleaded guilty to the offences he faced and he was sentenced to 3 years' imprisonment.[34]

46. The judge in his reasons for sentence noted that Mr Lau in his capacity as an insurance agent of AIA cheated his clients from November 2005 until 2011. He noted that Mr Lau had defrauded his clients in the total sums of US$12,836 and HK$3,060,677. He also noted that Mr Lau through his fraudulent schemes falsely represented to clients about AIA products and to this end created false documentation to deceive the clients and to cover up his dishonest activities. He found that Mr Lau had 'brazenly abused' the trust of his clients.[35]

Disciplinary proceedings against Mr Lau

47. By registered post the HKFI served a notice dated 28 January 2014 on Mr Lau at his last known address.[36] The notice set out particulars of the complaint from Ms Tsui and Ms Suen together with annexures, and informed him of the impending disciplinary action against him in relation to the complaint. He was also invited to respond to the allegations that had been made.

48. The notice is an important document because it described the nature and purpose of the impending disciplinary action. It is necessary therefore that it be examined in some detail.

49. The notice was addressed to Mr Lau, and not to AIA. He was informed that pursuant to the Code the IARB had 'the power to hear the alleged breach of a registered person on whether a person is fit and proper to act and continue acting as a registered person. If any matter causing a person not fit and proper to act and continue acting as a registered person, or a complaint is proven, the Board can take disciplinary action or other action against such person.'

50. The notice set out the allegations of the complaint of Ms Tsui and Ms Suen which were particularised by reference to supporting material. It also set out AIA's response to inquiries from the HKFI that Mr Lau had falsified a receipt in relation to monies that it did not receive and that he falsely represented that it had issued a policy which it had never provided to

34. Hearing bundle, 425-428.
35. Hearing bundle, 426, [8].
36. Hearing bundle, 324-327, English translation, 384-0001-0011.

clients. It then set out the charges alleged against Mr Lau and the clauses of the Code that were alleged to have been breached. He was informed that:

> 'The Board may:
>
> 1. Pursuant to clause 39 of the Code (6th Ed) which was applicable at the time of the incident, determine that you are not fit and proper to act or continue acting as a registered person.
>
> 2. Take disciplinary or other action, including suspension or termination of your appointment.'[37]

51. By the notice, Mr Lau was invited by the Secretariat to respond to the allegations as set out in the notice in writing on or before 28 February 2014.

52. Also by the notice, Mr Lau was informed that as the IARB may take disciplinary action of terminating his appointment due to the present case, he was recommended to commission a legal representative, and that he had a right to request for an oral hearing. He was asked whether he admitted or denied the allegations and to provide certain information. He was finally informed that if he did not reply within the prescribed time, the Secretariat would submit his case to the IARB for determination based on the evidence that was presently available.

53. The significance of this document is twofold. First, it is solely directed to Mr Lau as the subject of the disciplinary action. It sets out full particulars of the allegations and charges against Mr Lau, as well as the consequences of any adverse finding made against him, namely the revocation of his registration. He is given an opportunity to respond in writing or in oral hearing to the allegations, and he is informed of the procedures and his rights. Secondly, AIA is not the subject of the disciplinary action, nor is any action referred to or contemplated against AIA.[38]

54. The HKFI were unable to serve the notice on Mr Lau, and most likely this was due to the fact that he had been sentenced to a term of imprisonment following his conviction on 7 February 2014.

The decision of the IARB

55. On 22 February 2014, the IARB considered the matter in Mr Lau's absence and determined that the charges of using documents containing inaccurate information, making inaccurate representation and mishandling client monies were established against Mr Lau. The overall disciplinary action against Mr Lau was revocation of registration as an insurance agent for a period of 7 years.

56. On 3 March 2014, the IARB handed down its written decision in

37. Hearing bundle, 384-0006.
38. Hearing bundle, 384-001-384-011.

A Disciplinary Action Notice (File No: C12/889/JC).[39] As already noted the respondent was Mr Lau and there was no other party to the proceedings. In its decision, the IARB set out the charges against the respondent which included two counts of uttering a document containing inaccurate information, one count of making an inaccurate representation, and one B count of mishandling of clients' monies.

57. The IARB stated that attempts had been made to contact the respondent in relation to the hearing but they were unsuccessful; provided a description of the statements from Ms Tsui and Ms Suen; referred to the submissions of AIA and to the remarks of the Secretariat; and listed the C documentary evidence. The reference to submissions from AIA consisted of the two letters from AIA to the HKFI dated 11 September and 2 December 2013. In the first letter, AIA responded to a letter from the HKFI providing information about relevant policies as requested. In the second letter, AIA similarly responded to a request from the HKFI for information about the D authenticity of the subject documents of the disciplinary action against Mr Lau.

58. The IARB then set out its ruling. It stated that it had been proved that the respondent's address was not a true one and therefore the only statements that it had were that of Ms Tsui and Ms Suen. It accepted their E statements which it found were consistent and supported by documentary evidence, and also uncontradicted in light of the absence of the respondent.

59. In accordance with Clause 44(d) of the Code, the IARB found that all the matters in relation to the charges had been fully investigated, that the Secretariat was unable to make contact with the respondent, and that the F complainants and the respondent could not be summoned for an oral hearing and therefore on the evidence it ruled that the charges against the respondent had been established. It should be noted that the IARB had incorrectly referred to Clause 44(d) of the 7th edition instead of Clause 39(d) of the 6th edition which was the applicable clause.[40]

G 60. The IARB went on to impose disciplinary action in relation to each of the charges that it had found proven. This consisted of revoking the respondent's registration as an insurance agent for a total period of 7 years. It was noted that the charge of mishandling of clients' monies involved a sum of $806,200. The IARB went on to deal with follow-up action in its H final paragraph and stated:

> '29. The Respondent, at all the material times, was an appointed intermediary of AIA. According to the previous practice, the board requires AIA to fully refund the money of HKD$806,200 mishandled by the Respondent to Madam Suen and Miss Tsui.'[41]

I 61. As a result of the IARB's decision, an enforcement notice dated 22

39. Hearing bundle, 385-401, English translation.
40. Hearing bundle, 397, IARB decision, [22].
41. Hearing bundle, 400-401. This extract is from the certified translation.

February 2014 was copied to AIA for payment of the monies stated in the final paragraph.[42]

The appeal to the Appeals Tribunal

62. On 12 May 2014, AIA lodged an appeal with the Appeals Tribunal seeking a reversal of the order by the IARB. This was done pursuant to Clauses 42 and 44, which permitted AIA to appeal the IARB's decision in relation to the payment order.

63. AIA argued that the practice as accepted was to refund a premium or reinstate a policy where a premium had been paid in relation to a policy that either existed with the insurer or was offered by the insurer. Whether this is the case was a matter for proper adjudication by the IARB and later by the Appeals Tribunal.

64. The IARB took the view, relying on Clause 44 of the 7th edition, that the AIA had been requested in the past to take up follow-up action without objection.[43] The IARB in its letter to the Appeals Tribunal dated 20 May 2014 explained its position as follows:

> '3. The Respondent in the present case was a registered insurance agent of AIA at the material times. He also used such capacity to sell the alleged 'High-interest Deposit' Scheme of AIG and issued a receipt of AIA to the complainant. The board considers that AIA, as the insurance company which appointed the Respondent, cannot exonerate itself from liability in respect of the Respondent's misconduct. The Registration Board therefore requested AIA to take appropriate follow-up action.'[44]

65. AIA responded through its solicitors by letter dated 18 July 2014 where it was stated that the sum of money that 'AIA is required to pay pursuant to the Decision is to compensate the clients concerned for their loss of money misappropriated by the Former agent from them by means of a ***sophisticated fraudulent scheme***. The scheme involving the opening of a bank account in the name of a company he set up called 'AIGA Asset Trade' that he persuaded his victims to pay money into for purported deposit and/or share investment schemes'.[45]

66. The solicitors for AIA objected to the IARB letter on two grounds. First, the relevant edition of the Code was the 6th edition and not the 7th edition. They highlighted the difference in wording between Clause 39 of the 6th edition and Clause 44 of the 7th edition. Secondly, even under the new provision as provided by the 7th edition of the Code, it was not accepted that it gave the IARB the power to require a principal to pay money to affected persons generally as compensation for loss suffered by

42. Hearing bundle, 410-423.
43. Hearing bundle, 430-433.
44. Hearing bundle, 432.
45. Hearing bundle, 434-435.

A them which would more probably be the subject of a civil claim in the event that the principal is liable for the loss concerned. They added that the past cases involving AIA only required it to make a payment to an affected person to refund premium and not otherwise. It was submitted that the IARB's payment order was not a refund of premium.[46]

B 67. The IARB through its solicitors filed reply submissions dated 25 August 2014.[47] They referred to the principal and agent relationship by making reference to common law agency principles and s 68 of the ICO. They also acknowledged that the 6th edition of the Code applied to the present case but submitted that the amendments to Clause 44 of the 7th C edition merely refined Clause 39. It was stated:

> '8. Clause 39(e)(iii) confers a wide discretion upon the IARB to decide what action it thinks fit to require a principal to take, including the example provided in clause 44, being refunding premiums paid by persons affected by the conduct of the relevant respondent.
>
> D
>
> 9. We submit that a refund of mishandled funds (be it premiums or otherwise) falls within the discretion exercisable by the IARB under the Code, which correlates with the purposes of disciplinary action of maintaining the reputation of the insurance agent's profession and sustaining public confidence in the integrity of the profession.'[48]
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> E

68. The solicitors submitted that there was no lack of precedent for the payment order, although they did acknowledge that the present case was unusual. They argued that the IARB had a wide discretion to decide what action it thinks fit to require a principal to take under Clause 39(e)(iii) of the F 6th edition of the Code, 'including a refund of premiums or other sums paid by persons affected by the conduct of insurance agents'. They also argued that as a matter of principle, an act of an agent within the scope of his apparent authority does not cease to bind his principal merely because the agent was acting fraudulently and in furtherance of his own interests. G Curiously, they referred to s 68 of the ICO but that provides when assessing liability for a claim under sub-s (4), the court is required to be satisfied that the proposed insured has acted in the utmost good faith and without contributing to the failure on the part of the insurance agent to effect the proposed insurance contract. By virtue of the agency relationship between H AIA and Mr Lau, the solicitors contended that 'if Mr Lau acted within the scope of this apparent authority, those acts would bind AIA, notwithstanding that it was a sophisticated fraudulent and/or dishonest scheme'.[49]

69. The solicitors further submitted that Mr Lau was acting within the

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46. Hearing bundle, 434-438. This was confirmed by way of affirmation from Ng Wai Ling of AIA dated 18 July 2014, Hearing bundle, 439-441.
47. Hearing bundle, 442-448.
48. Hearing bundle, 444.
49. Hearing bundle, 445.

scope of apparent authority in selling the two policies, even though he abused his authority and sold the policies for his own interests.[50] They also denied that there had been a contravention of the principles of fairness and natural justice. They pointed out that AIA would have been aware of the proceedings and that it would be required to repay the monies misappropriated by its agent but took no steps to make any submissions. They also noted that the Appeals Tribunal would correct any defect in this regard by providing a fresh hearing on the merits and considering AIA's representation and evidence in full.[51]

70. AIA filed its written response submissions dated 13 October 2014. It was represented by Mr Robin McLeish of counsel. The submissions in general addressed in detail the matters that had already been raised by AIA as its grounds of appeal.[52] The IARB filed further written reply submissions dated 11 November 2014 through its solicitors. It addressed the grounds of appeal as raised by AIA.[53] AIA through its counsel filed written further response submissions dated 12 December 2014.

71. In general terms, AIA complained that it had not been given prior notice that it might be made the subject of the decision or of any possible adverse findings by the IARB, nor was it given the opportunity to adduce evidence or make submissions in relation to these matters. Both AIA and IARB in their written submissions to the Appeals Tribunal addressed whether the IARB had power to make the payment order under the Code. AIA requested an oral hearing to argue its case and to test the evidence of the complainants.

The decision of the Appeals Tribunal

72. By letter dated 15 May 2015, the HKFI advised AIA that the members of the Appeals Tribunal had decided to dismiss its appeal without a hearing. The decision of the Appeals Tribunal was by way of majority of Mr Kelvin CK Lee and Mr Gary KL Soo, with Mr Roger KC Yung dissenting.

73. The Appeals Tribunal handed down its written decision on 22 July 2015.[54] Mr Lee wrote a separate decision with whom Mr Soo agreed. Mr Yung disagreed in a separate written decision.

74. On the question of the IARB's power to make the order, Mr Lee noted that the 6th edition of the Code applied and stated:

> 'Much has been said in the useful written submissions and affirmations on meaning/limitation of the applicable paragraphs in 6th Edition of the Code

50. Hearing bundle, 446.
51. Hearing bundle, 447.
52. Hearing bundle, 467-473. The written response submissions were supported by a 2nd affirmation of Ng Wai Ling of AIA, Hearing bundle, 481-483.
53. Hearing bundle, 484-488.
54. Hearing bundle, 533-537.

A when compared to the 7th Edition, in particular those raised by the Appellant after its appointment of barrister. With due respect to the Appellant and its able advocates, I am satisfied clause 39 of the 6th Edition is wide enough to empower IARB to make the order it did.

B I wish to make clear I arrived at my conclusion without regard to what is provided for under the 7th Edition. In my view, the 6th Edition should be interpreted as is, and no meaningful guidance one way or another can be gained from reading a subsequent edition.'[55] (Emphasis added)

C 75. As is apparent from the quoted passage above, he does not explain his reasons as to why Clause 39 is wide enough to empower the making of the order that the IARB did in the present case. He does not address the arguments of the parties, in particular the submissions of AIA. It is a conclusion without reasons.

D 76. On the question of the conduct of the disciplinary proceedings and whether there had been any breach of natural justice, Mr Lee found that AIA should have been aware of the possibility of adverse findings against it as it had been previously required by the IARB to 'refund premiums'. He concluded that AIA was 'alive to a risk of a possible IARB ruling asking it to pay something' but chose not to act further in relation to the disciplinary proceedings, and any disadvantage to AIA had been remedied by the appeal process.[56]

E 77. On the question of whether AIA should be held responsible as principal for the fraud perpetrated by Mr Lau, Mr Lee stated:

F 'The Appellant also asserted repeatedly the loss to the Complainants was caused by sophisticated fraudulent and/or dishonest scheme perpetrated by its ex-insurance agent and the Appellant itself cannot fairly or reasonably be blamed.

G I have a lot of sympathy to the Appellant but such sympathy stopped short of preventing me from finding as I do, on balance of all evidence and arguments before me, that the amount of HK$806,200 was indeed received directly or indirectly by Mr Lau in his capacity as insurance agent of the Appellant and, in case it is necessary, under his apparent authority bestowed upon him by his appointment as the Appellant's insurance agent which the Complainants obviously relied upon.'[57] (Emphasis added)

H 78. He went on to reject AIA's request for an oral hearing and also stated that there was little if any dispute over Mr Lau's misconduct and that the evidence and submissions put forth by the parties focused on issues of law and interpretation of the provisions rather than a dispute as to the facts.

I 79. As already noted, Mr Yung disagreed in a separate written decision and he pointed out that AIA had advanced three grounds of appeal which

55. Hearing bundle, 534-535
56. Hearing bundle, 535.
57. Hearing bundle, 535-536.

involved legal and factual aspects and issues which should be fairly and properly disposed of in a hearing.

Does the IARB have the power to make a payment order?

80. As provided under s 67(1), the Code is for the 'administration of insurance agents'. Its function, therefore, is to administer insurance agents and it has been held that this is wide enough to cover disciplinary matters.[58]

81. The Code empowers the IARB to take disciplinary action against insurance agents and impose various sanctions on them for failing to meet professional requirements and standards. It extends to requiring the principal to take certain disciplinary action against the insurance agent, in the form of a reprimand, or a suspension or termination of appointment, or such other action as the IARB thinks fit.

82. Mr Robin McLeish, for the applicant, argues that the purpose of the imposition of sanctions following disciplinary proceedings is not to compensate those who have suffered loss, but to compel prescribed standards of professional conduct.[59] He contends that the awarding of compensation against a party liable for a civil wrong is the function of the civil courts, not as a general rule of professional regulatory bodies.

83. The respondents argue to the contrary. Their position is reflected in the affirmation of Mr Tam Chung Ho Peter, the Chief Executive of the HKFI. He states that for the Code to achieve the purpose of effectively regulating insurance agents in Hong Kong, it is important that policy holders have an effective means of redress in cases of misconduct. He states that this is only possible if the IARB and the Appeals Tribunal have power to require insurers to repay premiums procured by misconduct. He further states that it has been the long standing practice of the IARB and the Appeals Tribunal in cases of misconduct to include a requirement that the insurer repay any premiums procured by the misconduct or reinstate the status of an insurance policy notwithstanding that the premiums in respect of that policy were misappropriated by the agent and never received by the insurer. He points out that this was well known to, and accepted by, the industry generally, and would also have been well known to the applicant at the time of Mr Lau's misconduct. This requirement was euphemistically referred to by the IARB in its decision as the 'previous practice', without any further explanation as to the nature and ambit of the practice.

84. I think it is correct to say that a practice has developed, with the acquiescence of the members of the insurance industry, that in cases involving disciplinary action against an insurance agent, the IARB can require the principal either to reinstate the policy where the premium has been misappropriated by the agent or to repay a premium of an unsuitable

58. *Liu Pik Han v Hong Kong Federation of Insurers Appeals Tribunal & Anor* [2005] 3 HKC 242, [24(f)] (Lam J (as Lam VP then was)).

59. See *Ridehalgh v Horsefield (CA)* [1994] Ch 205, 225E-F (Sir Thomas Bingham MR).

or inappropriate policy. It appears that the basis of the practice stems from the language of Clause 39(e) of the 6th edition of the Code, which empowers the IARB to require an insurer to take 'such other action' as the IARB 'thinks fit'.[60] It is argued that this is wide enough to empower the IARB (and hence the Appeals Tribunal) to require an insurer to repay premiums procured by misconduct. It must not be overlooked that the practice has been accepted by authorised insurers (the principals).

85. Mr Jin Pao, for the respondents, argues that for the Code to achieve the purpose of effectively regulating insurance agents in Hong Kong, it is important that policy holders have an effective means of redress in cases of misconduct. He submits that such a construction is supported by the legislative background and underlying policy objectives of the ICO and the Code.

86. Mr McLeish makes the point that the 'previous practice' has never been for the principal to compensate a victim of the loss that he or she has suffered by an agent's fraudulent conduct that has nothing to do with an actual policy. He argues that this would widen the scope of the 'previous practice' which it has never been in the past, nor can it be according to the relevant statutory provisions. He further argues that the statutory provisions have to be in very clear language for the IARB to have the power to order a payment of compensation by a principal. He points to two matters that he submits are significant. First, the power to make a compensatory payment is not provided for as part of the function of the IARB or the Appeals Tribunal as set out under s 67(1) of the ICO and the relevant clauses of the Code. Secondly, he points to the difference in the wording between the 6th and 7th editions of the Code where in the equivalent clause of the 7th edition it is added that such other action includes 'for the avoidance of doubt, refunding premiums paid by persons affected by the conduct of the relevant respondent.'

87. I accept the respondents' argument that the inclusion of the qualification in the 7th edition is merely a reiteration of the action that has been taken and accepted as an appropriate measure by the members of the insurance industry in disciplining or taking other action in relation to the conduct of insurance agents.

88. The critical issue in these proceedings is the power that the IARB (and the Appeals Tribunal) is given by the term 'such other action', and whether it includes payments of the nature that was made in this case. Whilst there has been some debate between the parties as to whether the 'previous practice' is or is not a compensatory payment, whatever description is given to the payment under this practice, the issue is what has been agreed to by the insurers, or required of them by law.

89. There seems to be no doubt, and this is accepted by the applicant, that the IARB or the Appeals Tribunal is empowered to require an insurer

60. Clause 44(e) of the 7th edition of the Code.

to repay premiums procured by an agent's misconduct. The question is whether the practice extends to empower the IARB to require an insurer to make a payment for loss suffered by a person as a result of the fraudulent conduct of the insurer's agent where no policy was in existence and no premium was required to be paid, and is this the practice (where the insurer must reimburse or compensate for the loss incurred) that has been agreed to by the insurers or required of them by law. It necessitated the Appeals Tribunal to address what was the nature and scope of the action that the IARB could require a principal to take under Clause 39.

90. Mr Pao relies on the important policy objectives of the legislative and regulatory framework which he submits are designed to strengthen protection to policy holders and maintain effective self-regulation. He argues that under Clause 39(e)(iii), the IARB is conferred with a wide discretion in determining what other action, apart from requiring a principal to issue a reprimand or suspend or terminate an agent, it may require the principal to take as it 'thinks fit' in the circumstances of the particular case. He disagrees with Mr McLeish's argument that there needs to be clear and express provision for the making of an order of the type made in this case where a payment order was issued against the insurer. He notes that in other contexts it has been held that wide language similar to Clause 39(e)(iii) have permitted the courts to make orders for compensation or damages, even though there was no express language to that effect.

91. Mr Pao directs the Court's attention to two cases. The first is *Re Chime Corp Ltd* (2004) 7 HKCFAR 546, [2004] HKCU 1453 where the Court of Final Appeal determined that the power to make 'such other as the Court considers appropriate' in an unfair prejudice petition under the old s 168(2)(c) of the old Companies Ordinance allowed the court to order payment of damages, compensation or restitution to the relevant company. In that case, the Court noted that the section was designed to provide a 'high degree of flexibility' in terms of the remedies which the court may require.[61] The second case is *Re Styland Holdings Ltd (No 2)* [2012] 2 HKLRD 325, [2012] HKCU 545 where Barma J (as he then was) applied *Re Chime Corp Ltd* and decided that the language of 'such other order as the Court considers appropriate' in s 214(2)(e) of the Securities and Futures Ordinance permitted the court to order damages or compensation to a listed company in an action by the Securities and Futures Commission in relation to alleged misconduct by management.

92. Mr Pao therefore contends that even though Clause 39(e) does not expressly refer to compensatory orders that is not determinative. What is important, he submits, is that the IARB was intended to be given a 'high degree of flexibility' in deciding the appropriate remedy to be ordered against an insurer upon a proven complaint of misconduct. Accordingly, an order may be disciplinary or compensatory in nature.

61. Lord Scott NPJ, [39]-[42].

A 93. The Court has been informed that between 2005 and 2010, under the 6th edition of the Code there have been a total of 58 cases in which the IARB or the Appeals Tribunal required insurers to repay premiums or reinstate policies. Mr Pao points out that 25 out of these 58 cases involved AIA and at no time did it raise any objection to these orders.

B 94. Mr Pao goes on to argue that AIA was fully aware of the requests or orders made under Clause 39(e) of the 6th edition and of the compensatory or restitutionary element of them. He decries the stance taken by AIA in these proceedings, and submits that it has never argued before the IARB that it did not have jurisdiction to make these orders.

C 95. I am not in agreement with this submission. It would have been obvious that the payment order in this instance is different from previous ones, namely a payment arising from the fraudulent misconduct of an agent where there was no actual policy in existence, and did not constitute a repayment of a premium or the reinstatement of a policy where a premium D had been misappropriated. I am not expressing a view whether this payment falls within the terms of the practice accepted by insurers or required by law, for that is a matter that should have been the subject of evidence, if necessary, and submissions before the IARB and later on before the Appeals Tribunal which it did not properly address, except to state that Clause 39 E was wide enough to empower the IARB to make the order that it did.

96. The fact is that AIA was not a party to the disciplinary proceedings and was not given notice of, or the opportunity to be heard on, the payment order under contemplation by the IARB. It was AIA's position on appeal that it wished to challenge the payment order both on a question of fact and F law. It was not given the opportunity to do so.

97. Mr Pao also relies on the fact that the disciplinary action taken by the IARB in cases of misconduct included a requirement that the insurer repay any premiums procured by the misconduct or reinstate the status of an insurance policy, notwithstanding that the premium in respect of that policy G was misappropriated by the agent and never received by the insurer. He submits that there is no principled distinction between this case, which involved a misappropriation of a principal sum intended for an investment-linked product, and the misappropriation of premiums for an actual insurance policy. This is where the parties differ. This highlights the H critical issue in this case, which was not, with respect, properly addressed either by the IARB or the Appeals Tribunal in their respective decisions.

98. Whilst the IARB's power to require insurers to refund premiums and cancel or reinstate policies is a very important part of the regulatory regime, which appears to be a position that the applicant does not dispute, the I question still remains what is the nature and scope of the power of the IARB to require a principal to make a payment for losses incurred by clients as a result of any fraudulent misconduct by the insurer's agents.

99. Mr Pao argues that it is common for complaints to be made against insurance agents for issues such as requesting customers to sign blank or

incomplete forms, failing to make reasonable efforts to ensure the policy meets the needs of the policy holder and the act of inducing or attempting to induce a policy holder to drop an existing life insurance policy and to take another policy that is substantially the same kind by using misrepresentations or incomplete comparisons of the advantages and disadvantages of the two policies. This is all very well but this and other relevant matters should have been properly presented to and addressed by the Appeals Tribunal. Whilst it is acknowledged that extensive written submissions were presented to the Appeals Tribunal, the critical issues were not properly addressed, if at all.

100. Mr Pao submits that to disallow IARB to make a payment order as made in this case would mean that the policy holder has to seek redress through the courts by the normal route. He submits that this would have serious ramifications for the self-regulatory regime, which is highly undesirable. He submits that if the matter is left to the civil courts, it would not provide a practical means of redress to an aggrieved policy holder, who would be denied a cost-effective and efficient means of redress. He further submits that it is established that members of a professional body may waive certain rights, even fundamental ones, by virtue of joining a profession. To illustrate his point, he refers to *A Solicitor v Law Society of Hong Kong* [2013] 4 HKC 198. He notes that AIA is contractually obligated to comply with the Code under Article 7 of the HKFI's Articles of Association. He further notes that under Clause 10 of the 6th edition of the Code the HKFI shall have the power to determine the meaning of the Code in both English and Chinese versions and to resolve any inconsistencies between them, and any determination made by the HKFI shall be 'conclusive and binding'. Whilst Mr Pao makes a valid point, it very much depends on the terms and conditions of the Code, and in any event, a determination under Clause 10 concerns resolving inconsistencies between the English and Chinese versions and no more than that.

101. It comes back to the critical issue that AIA was not given a fair opportunity to address the issue of the payment order and have it properly determined both before the IARB and the Appeals Tribunal.

Were the principles of natural justice breached by the IARB in making the payment order, and by the Appeals Tribunal in the manner in which it dismissed the appeal?

102. Mr McLeish submits that the IARB was in breach of the principles of natural justice in making the payment order for three reasons. First, no prior notice was given to AIA of the possibility that the payment order might be made against it. Secondly, AIA was not afforded the opportunity to adduce evidence, examine the complainants or make submissions in relation to the payment order. Thirdly, the IARB failed to give any adequate reasons for its decision to make the payment order. He also submits that the Appeals Tribunal failed to take into account relevant factors, took into

account irrelevant factors, or erred in law in rejecting the appeal on the ground of breach of natural justice and failing to hold an oral hearing of the appeal. This was compounded by the lack of any adequate reasons for its decision in upholding the payment order.

103. The respondents submit that it has been a long standing practice of the IARB and the Appeals Tribunal in cases of misconduct to require insurers to repay premiums procured by misconduct and that this should have been well known to AIA, and that there was no need for an oral hearing because the IARB and the Appeals Tribunal had carefully considered the underlying facts which were not in dispute in making and upholding the payment order. This begs the question. AIA took issue with the facts, or at least wished to have the evidence tested as it was not notified of the IARB's payment order and denied the right to be heard on the matter. Whilst I appreciate that AIA in the past had complied with payment orders, even though it was not a party to the disciplinary proceedings, the nature of this payment order was different.

104. Mr McLeish submits in response that in all cases during the currency of the 6th and 7th editions of the Code in which AIA had been requested by the respondents 'to repay a sum of money misappropriated or otherwise mishandled by its insurance agent,' the money was a payment for a premium actually due on an actual insurance policy. He notes that the respondents are not suggesting that any other insurers had been subject to a request to repay a sum of money that did not come within this description. He argues that the $800,000 payment order was not characterised as payments of premium in the documents provided by the complainants, nor was it described as such in the summary of the evidence by the IARB. He submits that the position of AIA was that Mr Lau's disciplinary hearing was in relation to his fraudulent conduct involving a bogus product that was not of a type that AIA provided. He also submits that the $6,200 was not a payment of a premium actually due on an actual policy with AIA. It was on this basis that AIA had no reason to believe that it would be subject to a request by the IARB to repay the amount in question to the complainants.

105. Mr McLeish challenges the respondents' contention that the underlying facts were not in dispute. He points out that AIA's submissions to the Appeals Tribunal, which were repeated in these proceedings, were that there is a dispute as to the reliance by the complainants on Mr Lau's alleged apparent authority. He argues that the lack of opportunity to cross-examine the complainants in an oral hearing on this matter and test the factual case of the complainants could not be dealt with or remedied by written submissions. He therefore argues that AIA in being denied an oral hearing was unable to test the evidence, and was prejudiced in exercising its right of appeal. He adds that there was also a failure on the part of the Appeals Tribunal to provide adequate reasons for its decision in upholding the payment order in this case, in particular the nature and scope of the

underlying power of the IARB to require a principal to make a payment order.

106. In the circumstances of the present case, I agree with Mr McLeish's submissions.

Did the Appeals Tribunal err in law in finding that the applicant was liable for the actions of its former agent?

107. AIA argues that the payment order should not have been made because it would not have been subject to civil liability.

108. The Appeals Tribunal in its decision found that 'the amount of HK$806,200 was indeed received directly or indirectly by Mr Lau in his capacity as insurance agent of the Appellant and, in case it is necessary, under his apparent authority bestowed upon him by his appointment as the Appellant's insurance agent which the Complainants obviously relied upon.'

109. AIA argues that the majority of the Appeals Tribunal erred in law in finding, in the absence of an oral hearing, that the IARB was entitled to require it to pay Ms Tsui and Ms Suen the sum under the payment order because Mr Lau received it 'in his capacity' as an insurance agent and without any finding that it was reasonable for Ms Tsui and Ms Suen to have relied upon Mr Lau's alleged apparent authority from AIA. It is pointed out by Mr McLeish in submissions that the contention that AIA effectively bore a civil liability to repay Ms Tsui and Ms Suen was not a matter relied upon in the IARB's reasons for the payment order.

110. As a matter of general principle, where money is received from a third party by an agent while acting within the scope of his actual or apparent authority and is misapplied by him the principal is liable to repay the third party: *Bowstead & Reynolds on Agency* (20th Ed), [8-198]. It is further explained in *Bowstead & Reynolds on Agency* that apparent authority arises:

> 'Where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority.'[62]

111. In deciding whether a principal is liable for the acts of an agent on the grounds of apparent authority, it is usual to establish that the principal has represented or held out the agent to possess that authority; and that the third party reasonably relied on that representation or holding out.

62. *Bowstead & Reynolds on Agency*, [8-010]. See *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, 503.

112. AIA argue that on the available evidence these two requirements were not established. The respondents on the question of the evidence argue to the contrary. I do not propose to address the issue as to whether or not the evidence established the two requirements concerned as that is a matter for the decision making body to apply the relevant legal principles to the facts as presented to it, and after hearing submissions.

Discussion

113. The Code sets the requirements and standards that insurance agents must maintain, and any breach of them may result in disciplinary proceedings by the IARB.[63] The IARB will investigate the matter or complaint, and if it considers that there has been a breach of the Code or the matter at issue renders the respondent (the insurance agent) not fit and proper, it may take 'disciplinary action',[64] or 'disciplinary or other action'.[65]

114. The action the IARB may take includes requiring the principal 'to take or refrain from taking such other action as the IARB thinks fit'.[66] Over the years in relation to numerous cases of misconduct,[67] the disciplinary action taken by the IARB has included 'a requirement that the insurer repay any premiums procured by the misconduct or reinstate the status of an insurance policy notwithstanding that the premiums in respect of that policy were misappropriated by the insurance agent concerned and were never received by the insurer'.[68] This is a position that is accepted by AIA. For the avoidance of any doubt, it has now been made clear under Clause 44 of the 7th edition that the action required by a principal includes 'refunding premiums paid by persons affected by the conduct of the relevant respondent'.

115. A senior officer of AIA, Mr Yung Sin Man, in his evidence, confirmed that the repayments AIA were requested to make during the currency of the 6th edition of the Code were repayments of insurance policy premiums that had been misappropriated or otherwise mishandled by agents of AIA.[69] AIA maintains that the repayments concerned actual insurance policies taken out with it, and the misappropriated premiums AIA was requested to repay were all payments that were due in respect of the policies concerned. AIA's position is that it has never been requested to repay any payment misappropriated or otherwise mishandled by an AIA agent that

63. Clauses 44 to 48 of the Code.
64. Clauses 39(d) and (e) of the 6th edition of the Code.
65. Clauses 44(d) and (e) of the 7th edition of the Code.
66. Clause 39(e) of the Code.
67. The HKFI's records from 2005 to 2010, the period during which the 6th edition applied, there were a total of 58 cases where the insurer was required to repay premiums (5 cases involving AIA) or reinstate the status of the policies concerned as if the insurer had received the premiums paid (20 cases involving AIA). See Affirmation of Tam Chung Ho Peter, [36].
68. Affirmation of Tam Chung Ho Peter, [35].
69. Affirmation of Mr Yung Sin Man, [19].

was made as a premium for a non-existent insurance policy or as a purported premium payment in respect of an actual insurance policy that was not actually due.[70]

116. I should add that AIA also take issue as to whether it has been 'requested' or 'required' to make the repayments by the IARB or the Appeals Tribunal.[71] The language of Clause 39(e) provides that the IARB's disciplinary action includes 'requiring' a principal, in addition to reprimanding an insurance agent, or suspending or terminating his appointment, to take such other action as the IARB thinks fit. Very little turns on this issue as to whether it is 'a request' or 'a requirement', as AIA acknowledges it has responded to 'requests' by making repayments of premiums.

Clause 39(c)

117. Under Clause 39(c) of the 6th edition the IARB is obliged to notify a principal, and to give it the opportunity to make representations, if it is likely to be adversely affected by disciplinary action taken against its insurance agent. This in my view is an important obligation on the IARB in the context of the present case. More specifically, it provides that the IARB when dealing with a complaint concerning an insurance agent, if it considers that it is likely to take disciplinary action if the matter or complaint is proven, it must provide the insurance agent and 'any Principal who is likely to be adversely affected by such action with an opportunity to make representations' in such a manner and form as the IARB considers appropriate, and that it must consider such representations.

118. Clause 39(d) provides that the IARB having considered the matter or the complaint has been fully and satisfactorily investigated and reported, and having determined that the insurance agent is not fit and proper after considering all representations concerning the matter or the complaint, 'it may require a Principal to take disciplinary action.'

119. As I have already noted, Clause 39(e) provides that disciplinary action may include requiring a principal to issue a reprimand to insurance agents, or suspend or terminate the appointment of an insurance agents, or to take or refrain from taking such other action as the IARB thinks fit, including requiring the insurer to refund premiums paid by persons affected by the conduct of the insurer's agent.

120. The respondents argue that AIA was aware of the disciplinary proceedings against Mr Lau, and well aware of the relevant practice. They contend that AIA could have made representations to the IARB before it made its decision. I disagree with this submission in various respects. First, AIA was not a party to the proceedings or given notice of the payment order under contemplation. Secondly, the payment order was different to orders

70. Ibid, [20] and [21].
71. Affirmation Mr Yung Sin Man, [15]-[18].

made in the past as it did not relate to a policy either in existence or offered by AIA. Thirdly, the IARB did not comply with the requirements under Clause 39(c).

121. The respondents also argue that there was no unfairness or prejudice caused to AIA in the decision-making as a whole as it was given ample opportunity to make representations to the Appeals Tribunal which it did. The respondents prey in aid the curative principle which means that decisions which do not comply fully with procedural fairness requirements can be cured if the person affected has recourse to a further hearing or appeal which itself provides fairness. They cite *Wong Tak Wai v Commissioner of Police* [2010] 4 HKLRD 409 at paras 67 and 69, per Kwan JA; and *MGM v Director of Immigration* [2017] HKCU 295, HCAL 63/2015, 3 February 2017, per Au-Yeung J. Kwan JA in *Wong Tak Wai* explained that the courts have declined to intervene on grounds of procedural unfairness where the impugned decision is subject to correction by a procedure which has proper procedural safeguards. She explained that this approach is based in large part on an assessment if, in all the circumstances of the original hearing and subsequent appeal, the procedure as a whole would satisfy the requirements of fairness. She goes on to note that of particular importance are (a) the gravity of the error committed at first instance, (b) the likelihood that the prejudicial effects of the error may also have permeated the rehearing, (c) the seriousness of the consequences for the individual, (d) the width of the powers of the appellate body and (e) whether the appellate decision is reached only on the basis of the material before the original tribunal or by way of fresh hearing, or rehearing de novo.

122. The respondents submit that any procedural flaw arising from the non-compliance with Clause 39(c) by the IARB had been cured on appeal. As pointed out by Kwan JA, whether the procedural unfairness has been cured or corrected by the subsequent appeal process will depend on various factors including the gravity of the error committed in the first place, the likelihood that its prejudicial effect has permeated the appeal hearing, and whether the appellate body has the powers to correct the procedural unfairness and has exercised those powers accordingly. In my view, the Appeals Tribunal has not properly addressed the issues that had been raised by the applicant. As I have already explained in the reasons given, a number of critical issues were not properly addressed or reasoned. The issues were dealt with by conclusive statements without any reasons or explanations. More particularly, the Appeals Tribunal did not explain the nature and scope of the power, other than it was wide enough to cover the payment requested by the IARB.

123. The respondents note, however, that the equivalent of Clause 39(c) is contained in Clause 44(c) of the 7th edition and that the following practice of the IARB has been introduced since this case.

> 'After considering allegations made against an insurance agent, if the IARB considers that there is prima facie case, the IARB will issue a letter to the

insurer, informing the insurer of the allegations made against its insurance agent and inviting submissions to be made. The IARB will mention in the letter that it may take disciplinary or other action, including requesting the insurer to refund premiums to those affected by the conduct of the agent if the allegations are substantiated. A

Upon deciding that the allegations are substantiated, the IARB will inform the insurer of its decision and state that the IARB may take disciplinary or other action under Clauses 44(d) and (e) of the Code, including requesting the insurer to refund premiums to those affected by the conduct of the agent. The IARB will then invite the insurer to make any further submissions it wishes to make.' B

124. The respondents point out that AIA is aware of the current practice since there have been 9 cases involving AIA concerning policy refund or reinstatement of policies after the practice was adopted. They also point out that the IARB has never received any representations from AIA upon receipt of such direct notice from the IARB. C

125. In my view, the critical issue in the present proceedings is whether the principles of natural justice have been offended to warrant the intervention of this Court in relation to the decision or decisions made by the relevant bodies. The fundamental principles of natural justice demand that a right or interest of a party should not be affected without getting notice of the matter and an opportunity to be heard in relation to it. The right to a fair hearing requires that individuals or entities should not be penalised by decisions affecting their rights or legitimate expectations unless they have been given prior notice of the case, a fair opportunity to answer it, and the opportunity to present their own case. In this instance, it required in particular the Appeals Tribunal to address the matters raised by the applicant in oral hearing and to properly address these matters in its decision. The decision was unsatisfactory in that it failed to address adequately if at all the issues raised by the applicant so as to know the reasoning of the Appeals Tribunal and how it arrived at its conclusions. D E F

126. A key feature of the courts' supervisory jurisdiction in judicial review is to ensure that administrative hearings are conducted fairly. G

127. In conclusion, the IARB should have notified AIA that it was contemplating making a payment order against it in the same way that it notified Mr Lau, advising him of the nature and likely consequences of the proceedings, informing him of his rights, and giving him the opportunity to be heard on the matter, even the opportunity to elect an oral hearing if he wished to have one. Similarly, the Appeals Tribunal should have addressed the issue of 'previous practice' as well as considering the factual dispute that had been raised by the applicant in relation to the complainants' dealings with the insurance agent. These are matters that most likely would have warranted an oral hearing. H I

Costs

128. For the foregoing reasons, I am of the view that a number of

A procedural irregularities took place before the IARB and the Appeals Tribunal that violated fundamental principles of natural justice, as well as the requirements of Clause 39, and that the Appeals Tribunal left unresolved various critical issues raised by the applicant. In line with my judgment, I therefore make an order certiorari quashing the decision of the 2nd B respondent, including the payment order. I remit the matter back to the Appeals Tribunal for rehearing and reach a decision according to law and to any relevant comment in this judgment.

129. It seems to me that on the question of costs the applicant should receive its costs, but I will require argument on the issue in light of the C Court of Appeal decision in *Orrico Philippe v Municipal Services Appeals Board* [2015] 4 HKC 557, [2015] 4 HKLRD 111, if applicable. The parties should file and serve written argument within 7 days from the date of this judgment.

D Reported by Ivy Ho

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