LIU PIK HAN v HONG KONG FEDERATION OF INSURERS APPEALS TRIBUNAL & ANOR

COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO 50 OF 2005
LAM J
20, 21 JUNE, 11 JULY 2005

Administrative Law – Judicial review – Power of Insurance Agents Registration Board – Decision to suspend applicant's registration as insurance agent – Whether Insurance Agents Registration Board acting ultra vires as investigator and adjudicator on the same matter – Insurance Companies Ordinance (Cap 41) ss 66, 67(1)

Human Rights – Right to a fair trial – Fair hearing – Lack of oral hearing before Insurance Agents Registration Board and Appeals Tribunal – Whether decision making procedurally unfair – Hong Kong Bill of Rights Ordinance (Cap 383) art 10 – Basic Law art 35

Insurance – Administration of insurance agents – Whether code of practice wide enough to cover disciplinary matters – Whether Insurance Agents Registration Board could act as investigator and adjudicator on the same matter – Insurance Companies Ordinance (Cap 41) ss 66, 67(1)

行政法 – 司法覆核 – 保險代理登記委員會的權力 – 吊銷申請人作為保險代理人的決定 – 保險代理登記委員會在一事件上同時擔任調查員及審裁員是否越權 – 《保險公司條例》(第 41 章)第 66, 67(1) 條

人權 – 公平審訊的權利 – 公平聆訊 – 在保險代理登記委員會及上訴審裁處前缺乏口頭聆訊 – 裁決是否在程序上出現不公平 – 《香港人權法案條例》(第 383 章)第 10 條 – 《基本法》第 35 條

保險 – 保險代理的行政事務 – 執業守則的範圍是否可足夠應付紀律問題 – 保險代理登記委員會是否可在一事件上同時擔任調查員及審裁員 – 《保險公司條例》(第 41 章)第 66, 67(1) 條

The applicant was an insurance agent whose registration was suspended by the Insurance Agents Registration Board, the second respondent, on the ground that she was deemed unfit and improper to continue acting as an insurance agent. Subsequently, the second respondent further decided to refuse her application for registration between 15 November 2004 and 14 April 2006 in the absence of an oral hearing. The second respondent's decisions were founded upon its own conclusion that the applicant had deliberately concealed the fact that she had been a director of two insolvent companies on five applications for confirmation of registration, a finding that the applicant took exception, contending that the

falsity came about by reason of an inadvertent mistake. There was, however, no finding on the part of the applicant's principal that the applicant had deliberately concealed her directorship in those companies.

The applicant, by filing further materials, appealed to the Hong Kong Federation of Insurers Appeals Tribunal, the first respondent, who considered that it was not necessary to hold an oral hearing and dismissed the applicant's appeal by letter dated 31 March 2005. The applicant then applied for judicial review of the decisions of the first and second respondents.

At the substantive hearing for judicial review, counsel for the applicant argued, inter alia, that the decisions reached by the first and second respondents were ultra vires the Insurance Companies Ordinance (Cap 41) (ICO) because under the ICO and the Code of Practice of the Hong Kong Federation of Insurers (the Code), the organ that should undertake investigations regarding disciplinary offences was the principal, viz the insurer who employed the applicant at the material time, and that the second respondent as the decision maker should not undertake its own investigation for otherwise it would act as the prosecutor as well as the judge in the matter. It was also argued on behalf of the applicant that having been deprived of an oral hearing at which she could have made factual and legal representations, art 10 of the Hong Kong Bill of Rights Ordinance (Cap 383) (the Bill of Rights) and the rules of natural justice and fairness had been breached.

In response, counsel for the first and second respondents submitted that cl 39(a) of the Code impliedly conferred a power of investigation on the second respondent, that there was no absolute requirement that an oral hearing must be held and that the procedures adopted by the first and second respondents were fair.

Held, quashing the decisions of the first and second respondents and remitting the matter to the second respondent for reconsideration:

(1) The legislative history and the scheme of the ICO provided for a two-tier structure regarding the regulation of insurance agents. The emphasis, as revealed by ss 4A(2)(e) and 70 of the ICO, was on self-regulation. Hence, the primary duty was vested upon the first respondent as a self-regulatory organization to maintain the professional standards of insurance agents (at 250D-F).

(2) Reading as a whole, cl 39(a) of the Code carried with it an implication that the second respondent could undertake investigations apart from referring the matter to a principal, since if the second respondent did not have the power to investigate and must depend on the investigations of the principal to exercise its duty to determine whether an agent was a fit and proper person, it would be severely handicapped and the self-regulatory regime would not be effective in many instances. Although the second respondent was operating in a quasi-judicial capacity in the exercise of disciplinary function, this did not mean that it was thereby barred from investigating. Whilst it would not be right if the adjudicators also acted as prosecutors, this was a separate question from whether the second respondent had an implied power under the Code to investigate. Given that the first respondent was equipped with the power to call for further information and evidence under ss 7 and 14 of the Appeals Tribunal Proceedings Rules (the Rules), it would be odd if the second respondent did not have a similar

power, for it would be bound by the investigation and findings of the Principal. Furthermore, s 66 of the ICO, which provided that the Insurance Authority had concurrent power to look into disciplinary matters, should not be read as excluding any power of investigation of the second respondent. The expression 'administration of insurance agents' in s 67(1) of the ICO was wide enough to cover disciplinary matters. *Albert and le Compte v Belgium* (1983) 5 EHRR 533, *Allidem Mae G v Kwong Si Lin* (HCLA 25/2002, Deputy Judge Cheung, 9 June 2003, unreported), *Le Thi Bich Thuy Kitty v Sheraton International* (HCLA 34/2004, Lam J, 4 June 2004, unreported), *Wong Chi Yung v Antech System Incorporated Ltd* [2003] 2 HKLRD 894 and *New World Development Co Ltd v Stock Exchange of Hong Kong* [2005] 2 HKC 506, considered (at 250H-254B).

(3) There was no absolute rule that a tribunal must give a party an oral hearing in order to satisfy the requirement under art 10 of the Bill of Rights. Where the submissions of the parties did not raise any issue of fact or law which were of such a nature as to require an oral hearing for their disposition, oral hearing could be dispensed with. However, when there were disputes of facts, especially when the resolution of such dispute might hinge on one's impression as to the credibility of a witness or a party, a fair hearing within the meaning of art 10 of the Bill of Rights would be required. *Allan Jacobsson v Sweden (No 2)* ECHR No 8/1997/792/993 and *Fredin v Sweden (No 2)* HCHR No 20/1993/415/494 considered (at 255E-H, 256G-I).

(4) Although the applicant did not request for oral hearing, the adjudicator should on its own volition arrange for the same where the issues could not be safely disposed of without an oral hearing. Given the serious nature of the charge, its consequences and the dispute raised by the applicant as to her state of mind at the time when she made the declarations, it was highly unsatisfactory, and unfair to the applicant, that the matter was disposed of without any oral hearing. *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531 and *R (West) v Parole Board* [2003] 1 WLR 705 considered (at 257A-258C, 259B-C).

Obiter

(5) In the exercise of its power by way of judicial review, the court did not sit as an appellate court even on matters relating to sentence. Unless it could be argued that the sentence was so out of proportion that no reasonable tribunal could have imposed the same, it was not for the court to set sentencing guidelines for the first and second respondents (at 260D).

(6) Neither the first nor second respondent had the power to grant a stay pending appeal. The Federation or the Insurance Authority may wish to consider whether such a power should be included in the Code. Be that as it may, the court should not simply quash the decisions without remitting the matter to the first respondent as that would usurp the function of the first and second respondents in exercising their disciplinary power, a task the court was not entrusted with (at 260F-H).

Cases referred to

Albert and le Compte v Belgium (1983) 5 EHRR 533, [1982] ECHR 6878/75, [1983] ECHR 7299/75 (ECtHR)

Allidem Mae G v Kwong Si Lin (HCLA 35/2002, Deputy Judge Cheung, 9 June 2003, unreported) (CFI)
Attorney General v Great Eastern Railway (1880) 5 App Cas 473, 44 JP 648, [1874-80] All ER Rep Ext 1459 (HL)
Chow Shun Yung v Wei Pih Stella [2003] 4 HKC 341, (2003) 6 HKCFAR 299 (CFA)
Chu Ping Tak v Commissioner of Police [2002] 3 HKC 663, [2002] 3 HKLRD 679 (CFI)
Fredin v Sweden (No 2) HCHR No 20/1993/415/494, [1994] ECHR 18928/91 (ECtHR)
Jacobsson (Allan) v Sweden (No 2) ECHR No 8/1997/792/993, [1998] ECHR 16970/90 (ECtHR)
Joplin v Chief Constable of the City of Vancouver (1982) 2 CCC (3d) 396
Le Thi Bich Thuy Kitty v Sheraton International (HK) Ltd (HCLA 34/2004, Lam J, 4 June 2004, unreported) (CFI)
Lloyd v McMahon [1987] 1 AC 625, [1987] 1 All ER 1118, [1987] 2 WLR 821 (HL)
New World Development Co Ltd v Stock Exchange of Hong Kong [2005] 2 HKC 506 (CA)
R v Chief Constable of the Thames Valley Police Force, ex p Cotton [1990] IRLR 344 (CA)
R v Local Government Board, ex p Arlidge [1914] 1 KB 160, 83 LJKB 86, 109 LT 651(CA)
R v Secretary of State for the Home Department, ex p Doody; sub nom Doody v Secretary of State for the Home Department [1994] 1 AC 531, [1993] 3 All ER 92, [1993] 3 WLR 154 (HL)
R (Vetterlein) v Hampshire County Council [2002] Env LR 198, [2002] JPL 289 (QBD)
R (West) v Parole Board [2003] 1 WLR 705, [2002] EWCA 1641 (CA)
Wong Chi Yung v Antech System Incorporated Ltd [2003] 2 HKLRD 894 (CFI)

Legislation referred to

Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (04/04/1990) art 35
Hong Kong Bill of Rights Ordinance (Cap 383) art 10 (issued under s 8)
Insurance Companies Ordinance (Cap 41) ss 4A(2)(e), 66, 67, 70
Labour Tribunal Ordinance (Cap 25) s 20(3)
Small Claims Tribunal Ordinance (Cap 338) s 16(3)

Other sources referred to

Appeals Tribunal Proceedings Rules (issued by the Appeals Tribunal of the Hong Kong Federation of Insurers) rr 7, 14
Bennion *Statutory Interpretation* (4th Ed, 2002) s 174
Fordham *Judicial Review Handbook* (4th Ed) paras 59.5.16, 59.5.17
Hong Kong Federation of Insurers 'Code of Practice' cl 39

[*Editorial note*: as to the administration of insurance agents generally, see *Halsbury's Laws of Hong Kong* Vol 15(1), Insurance [220.852]-[220.855].]

Application

This was the expedited hearing of an application for judicial review against the decisions of the Hong Kong Federation of Insurers Appeal Tribunal and the Insurance Agents Registration Board in refusing the applicant's registration as an insurance agent. The facts appear sufficiently in the following judgment.

Jin Pao (Fung, Wong, Ng & Lam) for the applicant.

Daniel Fung SC and Catrina Lam (Li, Wong & Lam) for the first and second respondents.

Alexander Stock (Law Officer (Civil Law)) for the Insurance Authority.

Lam J: 1. The applicant was an insurance agent. On 6 November 2004, the Insurance Agents Registration Board [the Board] decided that her registration were to be suspended on 15 November 2004 by reason of its conclusion that she was deemed not fit and proper to continue acting as an insurance agent. On 11 December 2004, the Board decided that it would not consider her application for registration between 15 November 2004 and 14 April 2006. The applicant appealed to the Appeals Tribunal of the Hong Kong Federation of Insurers [the Appeals Tribunal]. On 31 March 2005, the Appeals Tribunal dismissed the appeal without a hearing.

2. The applicant sought remedies from this court by way of judicial review in respect of these decisions. Leave application was filed on 24 May 2005 and leave was granted on 15 June 2005. Since there was no stay of execution, the applicant in effect lost her means of earning her livelihood by working as an agent since 15 November 2004. I therefore acceded to her request to have an expedited hearing. The substantive judicial review was therefore heard on 20 and 21 June 2005. I am grateful to counsel for their able assistance in their very thorough and comprehensive written and oral submissions which had to be prepared at short notice.

3. The Board's decisions were founded upon its conclusion in para 22 of its decision of 6 November 2004 that the applicant had deliberately concealed the fact that she had been a director of an insolvent company on five applications for confirmation of registration submitted by the applicant to the Board on 1 February 2002, 9 May 2002, 19 June 2003, 3 July 2003 and 20 October 2003 respectively in order to obtain five registrations. The applicant was therefore found to be guilty of '5 counts of false declaration'.

4. There is no dispute that the declarations contained in the five applications were false. It came about in the following manner. The applicant had been a non-executive director of two companies: Cheer Empire Investments Ltd and Kongo International Ltd. These two companies were wound up in 1994 and 1996 respectively and Certificates of Release of Liquidator were issued on 16 February 1995 and 13 November 1998 respectively. There was no suggestion that there had been

A any irregular dealings in the affairs of the companies. Hence, in para 12 of the decision of the Board dated 6 November 2004, the Board said the applicant's having been a director of an insolvent company does not render her not fit and proper to continue acting as an insurance agent.

5. In the five applications submitted by the applicant to the Board, the B applicant was required to declare whether she has ever been declared bankrupt or been a controller, a director, an officer or a senior manager of a corporation that has become insolvent in Hong Kong or elsewhere. She answered 'No' in respect of that in all five applications. Given the facts set out in para 4 above, the declarations were false.

C 6. However, the decision of the Board went beyond a finding that the declarations were factually false. The Board also concluded that the applicant deliberately concealed the correct situations from the Board in order to obtain her registrations. This is a finding that the applicant took exception.

D 7. The applicant's case is that the falsity came about by reason of inadvertent mistake. As she was not involved in the operation of these companies and was in substance only a nominal director, she relied on her husband's advice in answering the relevant questions in the negative in the five applications. Her husband, who was the major investor (and also the major creditor) in these companies, thought at the material time that E the insolvency of the companies had been fully taken care of as demonstrated by the Certificates of Release of Liquidator and advised the applicant to answer in the negative without reading the question carefully.

8. It is also the applicant's contention that she had no need to cheat the F Board regarding her directorship in the two companies. Given the satisfactory winding up of the affairs of the companies and her roles in their management, her registrations would be confirmed in any event.

9. The Board considered that it was not necessary to hold an oral hearing. Reasons for the Board's rejection of the applicant's case were set out in paras 19 to 21 of the decision dated 6 November 2004,

G

> 19. In signing and completing the Application Forms, the Respondent 'declare that all the information in this application is FULL, COMPLETE AND TRUE …' ('聲明本申請表內之所有資料乃事實之全部及真實無訛 …'). Therefore, an important duty is imposed on the Respondent to ensure H that the contents are full, complete and true which turned out to be not the case.
>
> 20. The Respondent admitted that she was aware of the winding up of CEIL and KIL. Therefore, she knew that:
>
> I i. CEIL and KIL were wound up; and
>
> ii. she had ever been a controller, a director, an officer or a senior manager of a corporation that has become insolvent in Hong Kong.

By declaring 'No' to Question 2 of Part VI of the 4 Application for Registration Forms concerned and Question 2 of Part III of Registration Renewal Form concerned is clearly making false declaration.

21.The Respondent alleged that she had made mistakes in completing the 5 forms is unacceptable because:

i. The question clearly states 'Have you ever been a controller, a director, an officer or a senior manager of a corporation that has become insolvent in Hong Kong or elsewhere?' (『本人是否在香港或其他地區曾宣布破產或曾在已經宣布破產的公司出任控權人、董事、高級行政人員或高級經理?』), there is no ambiguity at all;

ii. The language in the questions is simple and straight-forward. It is expressed in plain language. Any reasonable person having a plain reading of the questions concerned would understand to be 'whether an applicant has ever been a controller, a director, an officer or a senior manager of a corporation that has become insolvent in Hong Kong or elsewhere.' There was certainly no question of whether an applicant involved in the daily operation of the corporations concerned;

iii. 'Ever' means 'at any time'; and

iv. For a period of 1 year and 8 months, from February 2002 to October 2003, the Respondent had repeatedly declared 5 times to the Board that she had never been a controller, a director, an officer or a senior manager of a corporation that has become insolvent in Hong Kong, it is a deliberate act but not a 'mistake'.'

10. Regarding the Board's reasoning in para 20, the applicant averred in the material filed by her in support of her appeal to the Appeals Tribunal that she had not admitted that she was aware of the winding up of the two companies at the material times, viz when she made the declarations in the five applications. She only meant to say with the benefit of hindsight acquired by her in 2004, she realized that she made a mistake in giving those declarations regarding directorship over insolvent companies.

11. The Board through its secretary responded in a letter dated 31 January 2005 to the grounds raised by the applicant in the appeal. In that letter, the Board gave further reasons to support its decision.

12. As mentioned, the Appeals Tribunal dealt with the appeal on papers and in a letter dated 31 March 2005, the only reasons given for dismissing an appeal without a hearing were as follows,

This is to inform you that the Appeals Tribunal, having thoroughly studied your client's appeal, unanimously dismissed your client's appeal without a hearing because:

1. It was an irrefutable fact that your client did make the said false declarations.

2. There was no sufficient and valid evidence to support your client's appeal.

3. The conviction and the sentence awarded by the IARB were appropriate.

13. Despite request by the applicant for reasons for the dismissal of the appeal, the Appeals Tribunal replied in a letter dated 9 May 2005 indicating that all the reasons had been set out in the letter of 31 March 2005.

14. To be fair to the Board, some of the materials relied on by the applicant were only filed after its decision of 6 November 2004. Some additional documents or representations were filed before sentence was passed on 11 December 2004. Further materials were filed in support of the appeal. Under the Appeals Tribunal Proceedings Rules, the Appeals Tribunal may exercise all the powers and discretion that are conferred on the Board and it could consider further evidence.

15. Mr Pao advanced six grounds on behalf of the applicant to challenge the decisions of the Board and the Appeals Tribunal, which were succinctly summarized in para 15 of his written submissions,

(a) Both the IARB and the Appeals Tribunal reached their decision unfairly and in breach of art 10 of the HK Bill of Rights and the rules of natural justice and fairness in that the applicant was deprived of an oral hearing at which she could have made factual and legal representations, particularly where she was accused of deliberately concealing matters to obtain registration.

(b) The procedure adopted in the present case also amounted to a violation of the rights of the applicant under art 35 of the Basic Law to legal representation in that there was no oral hearing at which the applicant could have exercised her right to have her legal representatives to make factual and legal representations in her favour.

(c) Further, or alternatively, the Appeals Tribunal decision should be quashed because it failed to give any or any adequate reasons at all for dismissing the appeal in its letter dated 31 March 2005. There was simply no evidence to demonstrate it had specifically addressed its mind to the issues raised by the applicant. The reasons it gave were perfunctory and merely rubber-stamped the IARB decision.

(d) Both the IARB and the Appeals Tribunal decision were irrational and unreasonable in the public law sense, in that they failed to take into account relevant considerations, and misinterpreted the evidence of the applicant. There was never any appreciation of the degree of evidential satisfaction necessary to draw an inference of deliberate concealment, given that this was tantamount to a criminal accusation.

(e) Both the IARB and the Appeals Tribunal imposed a manifestly excessive and disproportionate sentence in deciding not to consider an application for registration for 17 months, a very serious penalty.

There was no basis for the applicant (or any one else) to determine what the likely period of sentence would be for any particular type of offence.

(f) Finally, the applicant submits that the decisions were reached *ultra vires* the ICO as neither the Appeals Tribunal nor the IARB were lawfully conferred power to make their decisions in the manner in which they did.

Ultra vires

16. I would start with a consideration of the *ultra vires* challenge. At the hearing, Mr Pao disavowed any contention that the Code of Practice of the Hong Kong Federation of Insurers is *ultra vires* the Insurance Companies Ordinance [ICO] (Cap 41). He also abandoned any argument on the lawfulness of the establishment of the Appeals Tribunal. Instead he confined his challenge to the contention that under the Code (as well as the scheme of the ICO), the organ that should undertake investigations regarding disciplinary offences is the insurer.

17. The legislative history and the scheme of the ICO clearly provide for a two-tiers structure regarding the regulation of insurance agents. The emphasis is on self-regulation, see ss 4A(2)(e) and 70 of the ICO. Hence, the primary duty is vested upon the Hong Kong Federation of Insurers as a self-regulatory organization to maintain the professional standards of insurance agents. Its Code of Practice is given statutory underpinning under s 67 of the ICO. By way of self-regulation, the professional body is required to have an appropriate system of disciplinary procedures in place to deal with breaches of proper conduct by its members, see s 70(3)(b) of the ICO.

18. At the same time, the Insurance Authority also has the power to regulate under s 66 of the ICO. Mr Stock, appearing for the Insurance Authority as a person that might be affected by the outcome of these proceedings, submitted that such power could be exercised in the event the self-regulatory regime become ineffective for some reasons. He said that was meant to be a residual power. I do not need to decide whether such power could be exercised even if the self-regulatory regime works efficiently. I am however satisfied that s 66 should not be construed in a manner that would cut down the disciplinary power of the Hong Kong Federation of Insurers by way of self-regulation.

19. The relevant provision in the Code is cl 39 of the Code,

> *Matters relevant to Fitness and Properness of Insurance Agents and Complaints against Insurance Agents*
>
> 39. 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 (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
B 14 days of the date of referral or such further period as may be specified by the IARB. In consequence 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
C 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 within 14 days or such further period as may be specified by the IARB and the IARB shall consider such representations;

D

(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
E proven, it may require a 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
F agents; or

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

an insurance agent whose appointment has been terminated in these
G 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
H 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.

I 20. Mr Pao submitted that under that clause, the investigation of a matter or complaint should be undertaken by the principal who shall report the progress and the findings of the investigation to the Board. The Board

may also request the principal to conduct further inquiries after the report. The Board, as the decision maker, should not undertake its own investigation for otherwise, it would act as the prosecutor as well as the judge in the matter.

21. In the present case, the principal, viz the insurer who employed the applicant at the material time, had investigated and reported in a letter dated 19 March 2004. The conclusion of the insurer was that there was no sufficient evidence to warrant any disciplinary action against the applicant. There was no finding on the part of the insurer that the applicant had deliberately concealed her directorships in the two companies. That was clearly a conclusion the Board arrived at on the basis of its own investigation and assessment of the materials before it.

22. It is also quite obvious that the Board did not rely on the investigation by the insurer. Even before the report of 19 March 2004, the Board carried out its own inquiries by requesting for information from the applicant by a letter dated 9 March 2004. In that letter, the Board also stated that the applicant was suspected of using false declarations to deliberately conceal her directorships in the two insolvent companies to procure her registrations. Hence, the Board was not proceeding under cl 39(b) of the Code in this instance.

23. Mr Fung SC submitted that although there is no express provision in the Code conferring a power of investigation on the Board, this must be implied from cl 39(a). Under that sub-clause, the Board has a discretion to refer the matter or complaint to a principal for investigation. By implication, Mr Fung contended, that the Board may decide to undertake the investigation itself instead of making of a reference. Further, by reason of the duty to consider the matter under cl 39, it carries with it by implication the power to investigate. He cited *AG v Great Eastern Railway* (1880) 5 App Cas 473 at 478 and 481 and various passages in *Bennion on Statutory Interpretation* (4th Ed, 2002). The most apposite passage in *Bennion* was at s 174 highlighted by Mr Stock in his submissions supporting the contention of Mr Fung. The test is whether it is proper, having regard to the legislative intention, to find the implication. Mr Stock also contended that cl 39(c) is an instance of the exercise of the power of investigation in receiving representations from the agent and the principal.

24. Whilst I have some doubts initially, I come to the conclusion that the contention of Mr Fung is correct for the following reasons.

(a) If the Board does not have the power to investigate and must depend on the investigations of the principal to exercise its duty to determine whether an agent is a fit and proper person, it would be severely handicapped and the self-regulatory regime would not be effective in many instances. Mr Fung referred to the obvious example where the principal was also implicated in a complain.

(b) The line between investigation and adjudication could be a fine one. In a sense, the power to receive representations could be part of an investigation. I am prepared to hold that in the exercise of its disciplinary function (albeit the sanction would be imposed indirectly through the principal in the form of a requirement on the latter under cl 39(d) and (e)), the Board is operating in a quasi-judicial capacity. Acting quite properly, Mr Fung did not dispute that a determination of the Board is a determination of the civil rights of a person in a suit of law under art 10 of the Hong Kong Bill of Rights and the applicant is entitled to a fair hearing by an independent and impartial tribunal (see *Albert and le Compte v Belgium* (1983) 5 EHRR 533 and *New World Development Co Ltd v Stock Exchange of Hong Kong* [2005] 2 HKC 506 (CA). However, it does not mean that it is thereby barred from investigating. Even in the context of judicial process, the Presiding Officers in the Labour Tribunal and the Adjudicators in the Small Claims Tribunal are required to investigate before they adjudicate, see s 20(3) of the Labour Tribunal Ordinance (Cap 25) and s 16(3) of the Small Claims Tribunal Ordinance (Cap 338). Hence, the mere fact that the Board has to adjudicate on the issue whether an agent is a fit and proper person does not undermine an implication that the Board has the power to investigate.

(c) What is important is that in the course of investigation, those who will adjudicate on the cause should retain their impartiality and should not investigate in a manner that give an impression of apparent bias, see *Allidem Mae G v Kwong Si Lin* (HCLA 35/2002, Deputy Judge Cheung, 9 June 2003, unreported); *Wong Chi Yung v Antech System Incorporated Ltd* [2003] 2 HKLRD 894; *Le Thi Bich Thuy Kitty v Sheraton International* (HCLA 34/2004, Lam J, 4 June 2004, unreported). Hence, it would not be right if the adjudicators also acted as prosecutors. Yet this is a separate question from whether the Board has the implied power under the Code to investigate and I should not let the concern in that respect cloud my judgment on the *ultra vires* challenge. Mr Fung suggested proper measures could be adopted to ensure that the role of prosecutor would be played by a person not involved in adjudication.

(d) The Appeals Tribunal is clearly equipped with the power to call for further information (see r 7 of the Appeals Tribunal Proceedings Rules [ATPR]). Those were investigatory power and it can also receive further evidence (see r 14 of the ATPR). It would be odd that the Board does not have similar power. That would be the case if the Board were bound by the investigation and findings of the principal.

(e) Whilst the Insurance Authority has concurrent power to look into disciplinary matters under s 66 of the ICO, given the legislative background and the clear intention on the part of the legislature to

adopt self-regulation by approved professional body like the Federation of Insurers, that section should not be read as excluding any power of investigation of the Board.

(f) The expression 'administration of insurance agents' in s 67(1) of the ICO is wide enough to cover disciplinary matters. Reading as a whole, cl 39 does carry with it an implication that the Board could undertake investigations apart from referring the matter to a principal.

25. I therefore hold that under the Code it is proper to imply a power of investigation being conferred on the Board although there is no express provision to such effect. The Board did not act in any manner *ultra vires* the Code.

26. As regards the procedural fairness of the hearing before the Board, the challenge by Mr Pao focused on the lack of oral hearing and failure to give reasons. There is no discrete challenge of apparent bias based on any allegation that the Board also acted as prosecutor. The respondents had filed no evidence in that regard. It is therefore inappropriate for me to express any view on that topic in addition to what I have already said.

Lack of oral hearing

27. I now move on to deal with the applicant's challenge based on the lack of oral hearing, whether before the Board or the Appeals Tribunal. Although Mr Pao relied on both art 10 of the Hong Kong Bill of Rights and art 35 of the Basic Law, I think what is in issue is the lack of oral hearing rather than the lack of legal representation. The Code does not bar legal representation in disciplinary proceedings.

28. Mr Pao relied on the dicta of Reyes J in *New World Development Co Ltd v Stock Exchange of Hong Kong* [2005] 2 HKC 506 (CA) at 534G-H regarding the significance of oral hearings.

> 142. There may be questions which arise when committee members read the submissions. Those will presumably have to be dealt with orally. There may be factual issues which will need to be clarified in oral examination and cross-examination. There may be intricate points of law or fact which, difficult to explain on paper, are more easily communicated through face-to-face interaction with committee members.
>
> 143. I do not think that one can downplay the benefits and importance of succinct, pinpoint and cogent oral submissions in any forum, the High Court included. Such type of oral submission is pre-eminently the stock-in-trade of the skilled barrister or solicitor. If the layman charged with serious matters feels inadequate to the task of oral submission and examination, he should be allowed to have his lawyer to speak on his behalf.

29. In *Chow Shun Yung v Wei Pih Stella* [2003] 4 HKC 341, (2003) 6 HKCFAR 299, Ribeiro PJ held that in relation to first instance hearings,

A the right to a fair and public hearing under art 10 of the Hong Kong Bill of Rights generally entailed an entitlement to an oral hearing held in public unless there were exceptional circumstances that justified dispensing with this, and generally required the court to give reasons for its decision and to pronounce its judgment in public. But that is not an immutable rule. B Ribeiro PJ put the following rider in para 37.4,

> Where no findings of fact are needed and oral submissions are considered unnecessary, the court may properly decide the case on the basis of written submissions.

C 30. Mr Pao also drew my attention to the decision of the English Court of Appeal in *R (West) v Parole Board* [2003] 1 WLR 705, in particular the obiter in paras 35 to 40 of the judgment of Simon Brown LJ. For present purposes, I would also highlight the judgment of Sedley LJ in paras 44 to 46, and I would quote from para 44,

D
> … This means, as Simon Brown LJ says, that attention needs to be given in each recall case to what is necessary for its just disposal. A prisoner who does not ask for an oral hearing cannot ordinarily expect one; but even here it may become apparent to the Parole Board that a hearing is needed if it is to reach a safe conclusion on a disputed issue. A prisoner who does ask for an oral hearing will not necessarily be entitled to one: again it will depend on what is E necessary for a fair disposal of the issues. Due process, moreover, raises more questions than orality. It may involve opportunities to respond, albeit in writing, to newly raised points; and so forth.

31. Mr Fung's submissions can broadly be summarized as follows. There is no absolute requirement that an oral hearing must be held. The ultimate F test is fairness, viz whether the procedures adopted were, despite the absence of oral hearing, sufficient to safeguard the attainment of fairness. He cited the dicta of Lord Bridge in *Lloyd v McMahon* [1987] 1 AC 625 at 702H-703A and *R v Local Government Board, ex p Arlidge* [1914] 1 KB 160 at 191-192 per Hamilton LJ. Mr Fung also took me through G paras 59.5.16 and 59.5.17 of *Fordham, Judicial Review Handbook* (4th Ed) for the purpose of illustrating that there is no material difference between the common law and art 6 of the European Convention for Protection of Human Rights and Fundamental Freedom. One of the cases cited is *R (Vetterlein) v Hampshire County Council* [2002] Env LR 198 at H [68] per Sullivan J,

> A 'fair' hearing does not necessarily require an oral hearing, much less does it require that there should be an opportunity to cross-examine. Whether a particular procedure is 'fair' will depend upon all the circumstances, including the nature of the claimant's interest, the seriousness of the matter for him and the nature of any matters in dispute.

I 32. In the present case, Mr Fung submitted that the procedures adopted by the Board and the Appeals Tribunal were fair. Both the Board and the

Appeals Tribunal had considered and decided that oral hearing was unnecessary. They did not give any substantive reason for so deciding. Mr Fung highlighted the following matters in paras 6, 7 and 12 of his written submissions and para 9 of his supplemental submissions,

(a) In the notice dated 9 March 2004, the Board duly notified the applicant as to the case against her together with a specific allegation that she had deliberately concealed matters by making false declaration for the purpose of obtaining a renewal or confirmation;
(b) The applicant was invited to submit written representation;
(c) The applicant did not make any request for oral hearing, even though she was at the appeal stage represented by lawyers;
(d) The applicant filed written representations with an admission;
(e) There is no evidence to suggest that an oral hearing would not have been granted had the applicant requested for one;
(f) There is no evidence to suggest that the applicant had desired or expected an oral hearing;
(g) The applicant had ample opportunity to explain her state of mind at the time of the alleged offences to the Board;
(h) The applicant had not positively asserted at any stage that she had no knowledge at the material times that the companies were insolvent;
(i) The applicant's case of lack of knowledge is contradicted by her own documents;
(j) The applicant would only repeat what she had said in the written representations if there were an oral hearing;
(k) There were no diametrically opposed allegations based on one man's words against another's;
(l) Issue as to the applicant's state of mind had to be determined objectively taking into account all the circumstances of the case;
(m) The appeal to the Appeals Tribunal only raised narrow issues that had been sufficiently disposed of without any oral hearing.

33. From the authorities, it is clear that there is no absolute rule that a tribunal must give a party an oral hearing in order to satisfy the requirement of art 10. Where the submissions of the parties do not raise any issue of fact or of law which were of such a nature as to require an oral hearing for their disposition, oral hearing could be dispensed with (see *Allan Jacobsson v Sweden (No 2)*, European Court of Human Rights, Case 8/1997/792/993). However, as observed by Ribeiro PJ, when there are dispute of facts, especially when the resolution of such dispute may hinge on one's impression as to the credibility of a witness or a party, a fair hearing within the meaning of art 10 involves an oral hearing being held (see *Fredin v Sweden (No 2)*, European Court of Human Rights, Case 20/1993/415/494).

34. The applicant was facing a serious charge of misconduct with implications on her integrity. The allegation of deliberate concealment for the purpose of obtaining her registration goes beyond allegation of neglect or inadvertent mistake on the part of the applicant in making the declarations in question. It carries with it an imputation of fraud. I fully agree with the dicta of McEachern CJSC in *Joplin v Chief Constable of the City of Vancouver* (1982) 2 CCC (3d) 396 at 409 (cited by Reyes J in the judgment of *New World Development* at para 139 of the judgment (at 534B-D (HKC)). A finding of guilt on such a charge would be a serious blemish on the record and will no doubt have adverse impact on the applicant's career development as a professional insurance agent.

35. Further, the potential consequence on a finding of guilt is also serious. Clause 39(e) of the Code sets out the sentencing options. It includes a suspension or termination of the appointment of an agent. Further, if the appointment of the agent is terminated, he or she would be barred from registration as an insurance agent for a specified period. As it turned out, the applicant is barred from registration until 14 April 2006. The applicant not only lost her job, she also could not work as an insurance agent for a substantial period of time. Since she could not service her existing clients during this period, this would cause great damage to her career even if she were able to resume her profession in the future.

36. I therefore do not agree with Mr Fung's submission that the disciplinary proceedings only brought about financial consequences to the applicant not dissimilar to those suffered by the councillors in *Lloyd v McMahon* [1987] 1 AC 625.

37. On the lack of request for oral hearing on the part of the applicant, I do not think it is of much significance in the present case. First, in the letter of 9 March 2004, the Board told the applicant that as a rule, the matter would be considered by correspondence. The applicant was not told that she could ask for an oral hearing. It cannot be suggested that the applicant had waived any right to an oral hearing. Second, as pointed out by Sedley LJ in *R (West) v Parole Board* [2003] 1 WLR 705, where the issues could not be safely disposed of without an oral hearing, the adjudicator should on its own volition arrange for the same.

38. The more important consideration is whether the issues could be fairly and properly disposed of without any oral hearing. Whilst the applicant had admitted to the falsity of the declarations, she also stated in the letter of 22 March 2004 that those were mistakes and she needed not cheat the Board in procuring her registrations. She also made clear in her letter of 9 February 2004 that she depended on her husband for information relating to the two companies.

39. It is quite plain that the applicant did not have the benefit of legal advice in putting forward her written representations to the Board before

the decision of 6 November 2004. Only an outline of her defence was provided therein. Notwithstanding that, it is still apparent that she was taking issue as to the allegation that she made the false declarations deliberately in order to procure her registrations. The question of intent was very much a live issue. The Board also appreciated that. It explicitly rejected such defence in para 21 of its reasons.

40. Given the serious nature of the charge, its consequences and the dispute raised by the applicant as to her state of mind at the time when she made the declarations, I am of the view that it is highly unsatisfactory that the matter was disposed of without any oral hearing. Given the sketchy nature of her written representations, there were many aspects that the applicant should have been given an opportunity to clarify at an oral hearing. The Board would be in a much better position to assess the credibility of the applicant in her assertion if an oral hearing is held where she was given the opportunity to give evidence if she so wished. As it were, the Board could only give the reasons as set out in para 21 for disbelieving the applicant. With respect, I do not find those reasons to be so persuasive that it would make no difference whether any oral hearing had been held. The Board did not appear to have addressed the plea of the applicant that she simply had no motive to conceal the truth at the material times because that was not necessary. Although the Board might take issue with that assertion (and Mr Fung had informed this court that the Board did not accept that to be the case), it is a matter that could not be fairly resolved by the summary procedure adopted by the Board.

41. Mr Fung argued that there were contradictions between the applicant's defence and some other representations and documents submitted on her behalf. Reference was made to such contradictions in the letter dated 31 January 2005 from the Board to the Appeals Tribunal. I have considered the documents carefully. I am however not persuaded that the so-called inconsistencies were so inexplicable that the only possible conclusion was that the applicant was lying when she said the mistakes were inadvertent. Since I am going to remit the matters to the Board, I would not go into the details. Suffice to say that I do not think one could fairly and safely proceed on the basis of documentary evidence that the applicant's case as to her mental state is wholly unbelievable. Before the Board rejected the applicant's defence on the ground of those inconsistencies, fairness demanded that she should be given an opportunity to explain the same at an oral hearing.

42. Another matter which requires clarification is whether the applicant actually admitted she knew that the two companies had been wound up at the material times. There was an ambiguity in that respect and in para 20 of its reasons the Board might have read more than it is warranted into the admission by the applicant that there were mistakes in the Registration

Forms in her letter of 22 March 2004. The proper course was to seek clarification from the applicant.

43. In my judgment, this is a case where the Board should have invited the applicant to attend an oral hearing on its own volition. In so saying, I have not lost sight of the nature of judicial review. As Lord Mustill put it in *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531 at 560H to 561A,

> … it is not enough for [an applicant] to persuade the court that some procedure other than the one adopted by the decision-maker would be better or more fair. Rather, they must show that the procedure is actually unfair. The Court must constantly bear in mind that it is to the decision maker, not the court, that Parliament has entrusted not only the making of the decision but also the choice as to how the decision is make.

44. I am of the view that the procedure adopted by the Board in disposing of the applicant's defence in the present case was unfair to the applicant.

45. The applicant had added further materials to support her case in the appeal. Such materials show that there are serious issues to be resolved on the question of deliberate concealment. If the Appeals Tribunal had afforded her an oral hearing, that might remedy the absence of oral hearing before the Board. However, the Appeals Tribunal did not consider a hearing to be necessary. Instead, the Appeals Tribunal dismissed the appeal on paper and the reasons given for dismissal were uninformative. As mentioned, this is a case where substantial additional materials were filed after the decision of the Board on conviction. The Appeals Tribunal Proceedings Rules provides for admissibility of further evidence on appeal. In those circumstances, the Appeals Tribunal should consider the defence of the applicant as to her state of mind in the light of such additional materials. From the reasons given by the Appeals Tribunal, one does not have any clue as to how the Appeals Tribunal assessed the new evidence. In my judgment, with the new materials, the matter cried out for an oral hearing. The applicant had clearly challenged the finding of deliberate concealment on appeal. Even though it is not a case where a dispute of fact had to be decided by preferring one witness' words to those of another, it is very much a case depending on assessment as to the credibility of the applicant.

46. I therefore conclude that the applicant had not had a fair hearing before the Appeals Tribunal.

47. Hence, the decisions of the Board and the Appeals Tribunal were reached without a fair hearing and infringed the applicant's right under art 10. Mr Fung argued that even if that were so, the court still retains a discretion to refuse to grant any relief where it would be futile to do so. I am far from satisfied that a rehearing would make no difference in the outcome and that it would be futile to remit the case back to the Board. In this connection, I respectfully adopt Bingham LJ's (as he then was) note

of caution in *R v Chief Constable of the Thames Valley Police Force, ex p Cotton* [1990] IRLR 344, cited in para 64 of the judgment of Deputy Judge Cheung (as he then was) in *Chu Ping Tak v Commissioner of Police* [2002] 3 HKC 663, [2002] 3 HKLRD 679.

48. I will grant a certiorari to quash those decisions.

Other grounds of challenge

49. Having reached such conclusion, I do not find it necessary to deal with the other grounds of challenge. I have already expressed some misgivings about the reasons given by the Board and those given by the Appeals Tribunal. I do not wish to express any conclusion in this judgment as to whether the lack of proper reasons could be a free-standing ground for judicial review.

50. As regards sentence, I would only confine myself to saying these. In the exercise of its power by way of judicial review, the court does not sit as an appellate court even on matters relating to sentence. Unless it can be argued that the sentence was so out of proportion that no reasonable tribunal could have imposed the same, it is not for this court to set sentencing guidelines for the Board or the Appeals Tribunal.

Relief

51. Mr Pao invited this court to consider simply quashing the decisions without remitting the matter to the Board. He urged this court to take into account that the applicant had been suspended since November 2004 and the suspension had caused her and her family some hardship. Apparently, neither the Board nor the Appeals Tribunal has the power to grant a stay pending appeal. The Federation or the Insurance Authority may wish to consider whether such a power should be included in the Code. Be that as it may, I am not persuaded that this court should adopt the course suggested by Mr Pao. To do so would, in my judgment, usurp the function of the Board and the Appeals Tribunal in exercising their disciplinary power and this court is not entrusted with such a task. I have every confidence that the Board will bear in mind the suspension already implemented in deciding whether to proceed with the disciplinary hearing and also in deciding the appropriate sentence if the applicant were convicted again at the rehearing.

52. As said, the decisions are quashed. I will also grant a mandamus directing that the matter be brought back to a differently constituted Board for consideration under cl 39 of the Code,

(1) For deciding whether to continue with the disciplinary proceedings in the light of the suspension already implemented and other relevant factors;

(2) if it decides to continue with the proceedings, for determination of the charge against the applicant afresh with an oral hearing of the matter.

53. I see no reason why costs should not follow the event as between the applicant and the respondents and I will make an order nisi that the respondents shall pay the applicant's costs, such costs to be taxed if not agreed. As between the applicant and the Insurance Authority, there shall be no order as to costs.

Reported by Matthew Ho