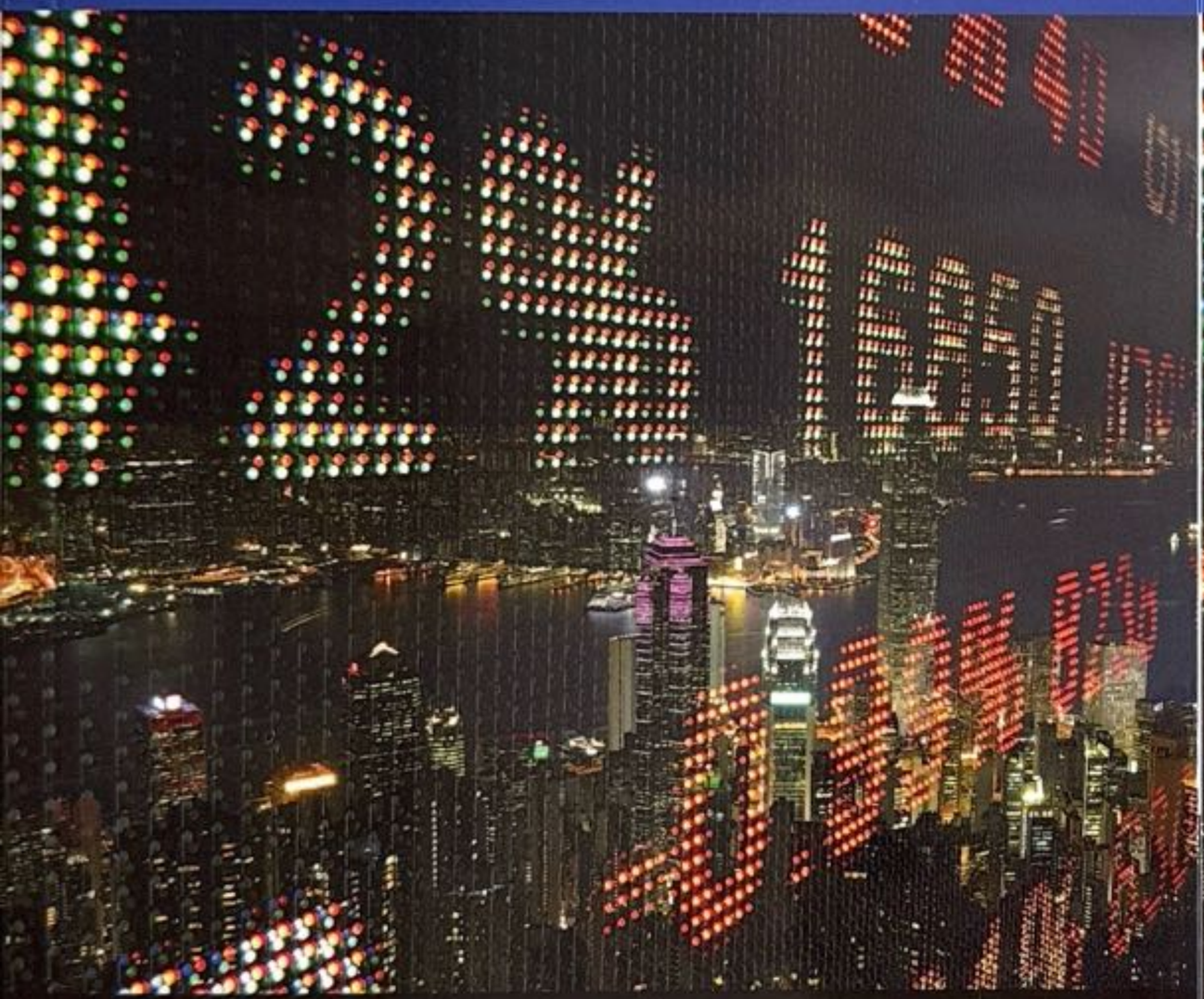
SFC Investigations and Enforcement Proceedings

Second Edition (Volume 2)

Nathan Dentice
Priscilla Au-Young



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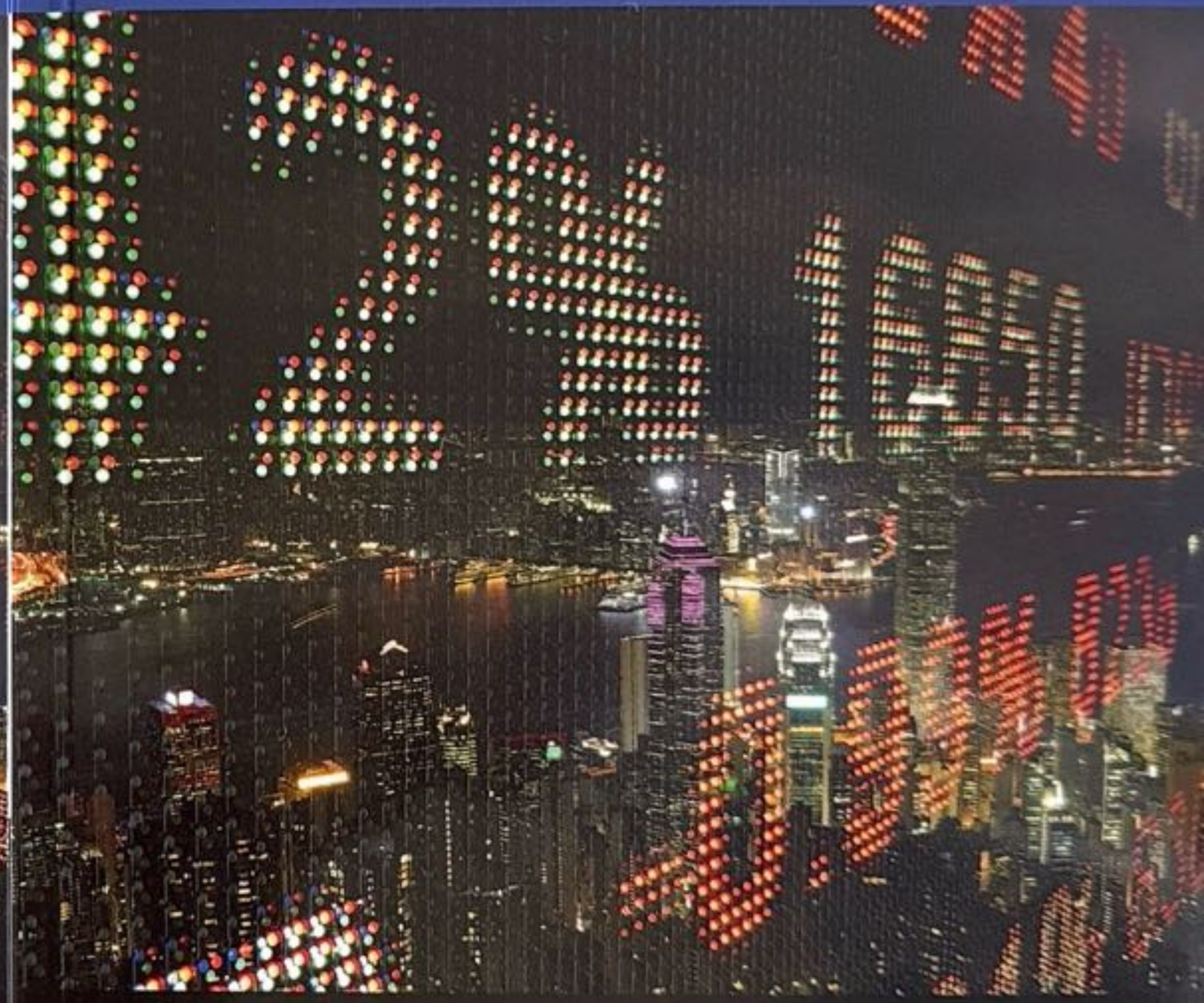

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is a question of fact, which will depend upon the circumstances of each case. This means that past cases are of little precedent value.[7]

[8-9] The onus of proving that a summary dismissal is justified is on the employer.[8] It is important to appreciate that summary dismissal under any of the limbs of section 9 is a strong measure which will only be justified in exceptional circumstances. To this effect, in *Law Ying Chung v Lo Chun Kie t/a Koon Hing Plastic Factory*,[9] the Court of Appeal emphasised that 'immediate dismissal of an employee by reason of one single act of misconduct … can only be justified in very exceptional circumstances' and endorsed the following passage from *The Law and Practice of the Labour Tribunal* by RA Ribeiro (now Ribeiro PJ) dealing with misconduct under section 9:

> It is therefore important to remember that, whatever the precise complaint, the modern approach is to regard all forms of summary dismissal as a 'strong measure to be justified only in exceptional circumstances'. Indeed, the case must involve misconduct which 'goes to the root of the contract so as to indicate an unwillingness to continue to be bound upon the original terms'. A similar approach is found in the Employment Ordinance, which approves of summary dismissal for misconduct only where that misconduct is 'inconsistent with the due and faithful discharge of the employee's duties'.[10]

[8-10] Whilst past cases are of little precedent value, the authorities suggest that a single act of disobeying a lawful and reasonable order will justify summary dismissal only if the act connotes a deliberate flouting of the essential contractual conditions. In particular, in *Laws v The London Chronicle (Indicator Newspapers) Ltd*,[11] Lord Evershed MR stated:

> one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and for that reason, therefore … the disobedience must at least have the quality that it is 'wilful': it does (in other words) connote a deliberate flouting of the essential contractual conditions.[12]

7 *Jupiter General Insurance Co Ltd v Ardeshir Bomanji Shroff* [1937] 3 All ER 67 (PC) at 74.

8 郭恩民 *v* 劉祥光 *Kwok Yan Man v Lau Cheung Kwong (t/a Yuen Tai Transportation Co)* [1999] 3 HKC 386 (CA) at 390G; and *Wong Yick Fook v Urbis (HK) Ltd* [2002] 3 HKC 51 (CFI) at para 9.

9 *Law Ying Chung v Lo Chun Kie t/a Koon Hing Plastic Factory* [2004] HKCU 1528 (unreported, CACV 28/2004, 15 October 2004) (CA) at paras 33–34, per Cheung, Yeung and Yuen JJA.

10 Whilst this passage refers to conduct demonstrating an intention not to be bound by the contract, it is clear that an employer may be justified in summarily dismissing an employee for misconduct even if there is no evidence that the employee will not comply with his or her obligations in the future: see *Rankin v Marine Power International Pty Ltd* [2001] VSC 150 at paras 253–254.

11 *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285; [1959] 1 WLR 698 (CA, Eng).

12 *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285; [1959] 1 WLR 698 (CA, Eng) at 701. Applied in *So Ching t/a South Sea Co v Kwan Hang Ching & Anor* [1987] 2 HKC 297 (HC) at 300.

[8-11] For misconduct to be inconsistent with the due and faithful discharge of the employee's duties, such as to justify summary dismissal, the act must be seriously inconsistent or incompatible with the employee's duties. It is not, however, necessary that the act be dishonest. Thus, in *Sinclair v Neighbour*,[13] the actions of a manager of a betting shop in borrowing money from the till in order to place his own bet, leaving a signed IOU and later replacing the money, were held to be sufficiently inconsistent with his duty as an employee to justify instant dismissal. Lord Sellers explained that:

> I do not think that it matters whether the conduct is to be described as dishonest misconduct or not. Views might differ. It was sufficient for the employer if he could, in all the circumstances, regard what the employee did as being something which was seriously inconsistent—incompatible—with his duty as the manager in the business in which he was engaged.[14]

[8-12] A single act of gross negligence or incompetence may justify summary dismissal if it constitutes a fundamental breach of the implied warranty that the employee is reasonably competent to do their job, even if there are no serious consequences.[15] An employee may also be summarily dismissed if found guilty of an offence outside the course of employment which is of such a character as to make it unsafe for the employer to continue employing the employee. Thus, in *Pearce v Foster and Ors*,[16] Lord Esher MR stated:

> if a servant is guilty of such a crime outside his service as to make it unsafe for a master to keep him in his employ, the servant may be dismissed by his master; and if the servant's conduct is so grossly immoral that all reasonable men would say that he cannot be trusted, the master may dismiss him.[17]

[8-13] A single act of fraud or dishonesty will usually constitute grounds for summary dismissal, but not always. In *Tse Ko Wa v Hong Kong Quality Assurance Agency*,[18] an employee was scheduled to interview a client on a specific day. The interview could not take place as scheduled and was, therefore, conducted by the employee three days later. To save the trouble of explaining matters to his supervisor, the employee falsified the date of the interview in his report. In finding that the actions of the employee did not justify summary dismissal, DHCJ To held that it was an over-generalisation to categorise any dishonest act as automatically justifying summary dismissal, and that there are 'degrees of dishonesty'. The judge reiterated that the test for whether an act of fraud or dishonesty is sufficient to justify summary dismissal is whether the act constitutes a repudiation.

13 *Sinclair v Neighbour* [1967] 2 QB 279, [1966] 3 All ER 988 (CA, Eng).

14 *Sinclair v Neighbour* [1967] 2 QB 279, [1966] 3 All ER 988 at 989 (CA, Eng). See also *Gilligan v AHK Air Hong Kong Ltd* [1989] 2 HKC 189 (HC) at 209.

15 *Tong Cheng v Taylor Woodrow Paul* [1965] HKDCLR 174 (DC).

16 *Pearce v Foster and Ors* (1886) 17 QBD 536 (CA, Eng).

17 *Pearce v Foster and Ors* (1886) 17 QBD 536 (CA, Eng) at 539–540.

18 *Tse Ko Wa v Hong Kong Quality Assurance Agency* [2004] 1 HKLRD 899 (CFI) at para 10.

[8-14] Provided good cause exists at the time of the dismissal, the dismissal will be justified even if the grounds justifying the dismissal were unknown to the employer at the time. Thus, where an employer summarily dismisses an employee on grounds which are insufficient but subsequently discovers facts which would justify the summary dismissal, the employer may rely on those facts in defending any claim for wrongful dismissal brought by the employee.[19] However, where an employment contract provides for the termination of employment by making a payment in lieu of notice and the employer exercises that contractual right, a debt to the employee thereby accrues, and the employer cannot avoid making the payment even if facts subsequently come to light which would have justified summary dismissal, as pointed out by Tomlinson LJ in *Cavenagh v William Evans Ltd*:[20]

> When an employer elects to terminate a contract on notice and offers payment in lieu of that notice it elects for a clean break. It takes the risk that it may subsequently discover matters which would have justified summary termination for breach, just as it takes the risk that the employee might subsequently have died or found a more attractive job elsewhere. The employers here obtained precisely that for which they had bargained. There is no basis upon which they either can or in my view should be able to deny to their employee that which correspondingly he bargained.[21]

[8-15] The above suggests that, where an employee has committed a serious offence under the SFO, the employer will almost certainly be justified in summarily dismissing the employee. Likewise, misconduct on the part of a licensed or registered person, which is sufficiently serious as to result in the SFC suspending or revoking the person's licence or registration, is also likely to justify summary dismissal. This is particularly the case because holding a licence or registration is likely to be an express or implied condition of the employee's employment, and retention of an employee whose licence or registration has been suspended or revoked may lead the SFC to question the employer's own fitness and properness to be licensed or registered. Because misconduct may justify summary dismissal on grounds which only become known to the employer after the summary dismissal, employees who have been summarily

19 *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) 39 Ch D 339 (CA, England) and *Ng Ai Kheng Jasmine v The Open University of Hong Kong* [2006] 2 HKLRD 228, [2006] HKCU 489 (CA) at para 51.

20 *Cavenagh v William Evans Ltd* [2012] EWCA Civ 697, [2012] IRLR 678.

21 *Cavenagh v William Evans Ltd* [2012] EWCA Civ 697, [2012] IRLR 678 at para 55. It should be noted that the employer in this case only counterclaimed for the amount the employee misappropriated from the employer, and did not counterclaim for any other breach of contract or duty, or for any damages or other relief. There was also no allegation that the employer's agreement to make a payment in lieu of notice was void or voidable by reason of a vitiating mistake. The court, therefore, did not consider whether the employer had a proper basis to recover the amount paid to the employee (at paras 19, 47). See also the discussion below regarding an employer's entitlement to claw back bonuses already paid to an employee on grounds of misconduct.

dismissed may wish to wait until the outcome of any SFC investigation before deciding whether to pursue a claim for wrongful termination.

[8-16] It should be noted that it may become apparent during the course of an SFC investigation or an employer's own internal investigation that an employee has committed breaches of duty to their employer which do not constitute regulatory wrongdoing, for example, failing to comply with the employer's internal procedures or compliance policies. If such conduct is sufficiently serious, the employer may be justified in summarily dismissing the employee under section 9 even though the employee is or may be innocent of regulatory wrongdoing. Employers who wish to avoid asserting regulatory wrongdoing (which might effectively amount to an admission of regulatory wrongdoing by the employer too) may choose to rely upon such grounds rather than making assertions which would have regulatory implications.

1.3 Process and fairness

[8-17] Hong Kong law does not impose any general duty on employers to act fairly or follow any particular form of process when dismissing employees.[22] Unless otherwise provided in the employment contract, an employer is not required to:

(1) give reasons for dismissing an employee;[23] or
(2) conduct a disciplinary process before dismissing an employee on disciplinary grounds.

[8-18] If the employment contract (or the employer's own guidelines and procedures, if these have been impliedly incorporated) requires the employer to follow a formal disciplinary process before dismissing an employee on disciplinary grounds, failure to follow the disciplinary process properly is likely to amount to a breach of contract and wrongful termination. The existence of a mandatory disciplinary process will also generally prevent the employer from terminating the employee's employment immediately by giving notice or by a

22 *Lam Siu Wai v Equal Opportunities Commission* [2021] 5 HKLRD 30, [2021] HKCU 4949, [2021] HKCFI 3092 at para 29. Note, however, that the Court of Final Appeal suggested in *Thomas Vincent v South China Morning Post Publishers Ltd* [2005] 4 HKC 205, (2005) 8 HKCFAR 605, [2005] 4 HKLRD 258 (CFA) at para 31 that if the process by which an employee is dismissed is arbitrary, this may make it more difficult for the employer to show that the employer had a 'valid reason' for the purposes of s 32K of the Employment Ordinance (Cap 57).

23 *Sun Zhongguo v BOC Group Ltd* [2003] 2 HKC 239 (CFI) at para 14; and *Reda and Anor v Flag Ltd* [2002] UKPC 38, [2002] IRLR 747 at para 42. Note that an employer who faces a claim for wrongful termination must be in a position to justify their decision. However, the employer should ensure that they have a proper basis for terminating the employment. In Hong Kong, the protection against wrongful dismissal or termination is contained in the Employment Ordinance.

payment in lieu of notice if the true grounds for the termination are disciplinary in nature and the disciplinary process has not been followed.[24]

[8-19] Notwithstanding that an employer may not be obliged to conduct a disciplinary process, an employer who has conducted such a process is likely to be in a better position to defend any decision to summarily dismiss an employee in the event the employee brings a claim for wrongful termination. The employer may, therefore, wish to consider conducting such a process voluntarily. The process for conducting an internal investigation into events relating to an SFC investigation is discussed in further detail in **Appendix 3**. The Labour Department has also published a Guide to Good People Management Practices which provides recommendations as to best practices in disciplinary cases.[25]

1.4 Implied restrictions

[8-20] Although there is no statutory or common law duty upon employers to act fairly or follow any particular form of process when dismissing employees, the courts have recognised that there may be scope in particular cases to imply restrictions into the employment contract as to the circumstances or manner in which an employee may be dismissed.

[8-21] In particular, following the decision of the House of Lords in *Malik and Ors v Bank of Credit and Commerce International SA (in liq), Mahmud and Ors v Bank of Credit and Commerce International SA (in liq)*,[26] the Hong Kong courts have recognised that there is an implied duty of mutual trust and confidence between an employer and employee.[27] This duty imposes reciprocal obligations upon the employer and the employee not to conduct themselves in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee without reasonable and proper cause. The House of Lords in *Johnson v Unisys Ltd*[28] has held, however, that the implied duty of mutual trust and confidence does not impose obligations upon employers as regards the manner in which an employee is dismissed; as such, it cannot be used as a platform to allow an employee to recover damages for loss arising from the manner of his or her dismissal. The reasoning of the House of Lords was that the duty of mutual trust and confidence is concerned with preserving the continuing relationship between employer and employee, and, therefore, the duty is not appropriate for application to the way the relationship was

24 *Campbell Richard Blakeney–Williams & Ors v Cathay Pacific Airways Ltd & Ors* [2013] 3 HKC 185, (2012) 15 HKCFAR 261 (CFA) at paras 63–77.

25 Labour Department, Guide to Good People Management Practices (June 2018) at para 23.

26 *Malik and Ors v Bank of Credit and Commerce International SA (in liq), Mahmud and Ors v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20, [1997] 3 All ER 1 (HL).

27 *Tadjudin Sunny v Bank of America, National Association* [2016] HKCU 1193 (unreported, CACV 12/2015, 20 May 2016) (CA) at para 58, per Kwan and Barma JJA and Chow J.

28 *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518, [2001] 2 All ER 801

terminated,[29] and further that English legislation already provides for remedies for unfair dismissal, and it would be contrary to the legislative intention for the courts to provide for additional remedies under the common law.[30]

[8-22] In the past, it was assumed that the reasoning in *Johnson v Unisys Ltd* was equally applicable in Hong Kong, and accordingly:

(1) the implied duty of mutual trust and confidence does not impose obligations upon employers as regards the manner in which an employee is dismissed; and

(2) there is no scope for implying any other restrictions into an employment contract as to the circumstances or manner in which an employee may be dismissed, as the Employment Ordinance already provides for the protection of employees, and it would be contrary to the legislative intention for the courts to permit additional remedies.[31]

[8-23] However, this assumption must now be reassessed in light of the decisions in *Tadjudin Sunny v Bank of America National Association*[32] and *Union of Shop, Distributive and Allied Workers and Ors v Tesco Stores Ltd*.[33] In *Tadjudin*, the Court of Appeal was prepared to imply into the employment contract at issue a term that the employer would not dismiss the employee only in order to avoid the employee becoming eligible for a discretionary performance bonus. In reaching that decision, the court declined to follow the reasoning in *Johnson v Unisys Ltd* to the extent that it indicated there is no scope for implying restrictions into an employment contract due to the fact that legislation already provides for the protection of employees, stating:

29 *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518, [2001] 2 All ER 801 at paras 46, 78.

30 *Johnson v Unisys Ltd* [2001] UKHL 13, [2003] 1 AC 518, [2001] 2 All ER 801 at paras 55–58, 80.

31 For example, in *Ko Hon Yue (高翰儒) v Liu Ching Leung (廖正亮) & Ors* [2008] HKCU 1215 (unreported, HCA 3494/2003, 4 August 2008) (CFI) at para 171(3), per Chu J:

> In Hong Kong, the protection against wrongful dismissal or termination is contained in the Employment Ordinance. The extent of the statutory protection is limited, as it is concerned only with the giving of due and proper notice for termination. There is no provision for awarding damages for the period after dismissal, except for any notice period that is required. As such the legislative intent is not to confer remedies for loss flowing from the unfair manner in which an employee is dismissed. In my view, it will not be appropriate for the courts to develop the common law to provide a remedy for unfair circumstances attending dismissal.

32 *Tadjudin Sunny v Bank of America, National Association* [2016] HKCU 1193 (unreported, CACV 12/2015, 20 May 2016) (CA), per Kwan and Barma JJA and Chow J.

33 *Union of Shop, Distributive and Allied Workers and Ors v Tesco Stores Ltd* [2024] UKSC 28, [2025] 2 All ER 565.

> The decision of the House of Lords in *Johnson v Unisys* can, in our view, ... be distinguished on the following grounds: ... Part X of the Employment Rights Act 1996 cannot properly be compared to Part VIA of the [Employment Ordinance (Cap 57)] ... the 1996 Act provides a very comprehensive statutory regime of employment protection against unfair dismissal generally, whereas Part VIA of the [Employment Ordinance (Cap 57)], as we have seen, is much more limited in scope and application.[34]

[8-24] The court was quick to emphasise that it was not deciding that any terms should be implied into employment contracts generally; however, the decision confirms that employment contracts may contain implied terms which prevent an employer from dismissing an employee in certain circumstances or on certain grounds, and that the Employment Ordinance will not prevent the implication of such terms.

[8-25] Similarly, in *Union of Shop, Distributive and Allied Workers and Ors v Tesco Stores Ltd*,[35] the UK Supreme Court held that the employment contracts at issue contained an implied term to qualify the employer's right to dismiss by notice so that it could not be exercised for the purpose of depriving the employees of their right to permanent retained pay. The decision of *Johnson v Unisys Ltd* was distinguished by Ellenbogen J at first instance (in respect of which there was no challenge on appeal) on the basis that the employees were not arguing that the employer had an implied obligation not to act in a particular manner; rather, their case was that there was an implied restriction on the grounds on which the power of dismissal might lawfully be exercised which would make the dismissals themselves wrongful.[36]

[8-26] It appears likely that this area of law will be the subject of further development in the future.[37]

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34 *Union of Shop, Distributive and Allied Workers and Ors v Tesco Stores Ltd* [2025] UKSC 28, [2025] 2 All ER 565 at para 77.

35 *Union of Shop, Distributive and Allied Workers and Ors v Tesco Stores Ltd* [2025] UKSC 28, [2025] 2 All ER 565.

36 *Union of Shop, Distributive and Allied Workers and Ors v Tesco Stores Ltd* [2025] UKSC 28, [2025] 2 All ER 565 at paras 121, 149.

37 There have been a series of cases in which the Hong Kong courts have indicated that terms may, in an appropriate case, be implied into insurance agency agreements to the effect that an insurer's power to terminate the agreement must be exercised in good faith, and not for arbitrary, capricious, perverse or irrational reasons (which would include terminating the agreement for the purpose of triggering claw back provisions): see, eg, *Re Shine Pui Keung* [2017] HKCU 3276 (unreported, HCB 686/2017, 20 December 2017) (CFI), per G Lam J; *So Sheung Hin Ben v Chubb Life Insurance Co Ltd* [2018] 5 HKC 47, [2018] HKCA 209; and *FWD Life Insurance Co (Bermuda) Ltd v Poon Cindy* [2020] 1 HKC 487, [2019] 3 HKLRD 455, [2019] HKCA 697. These decisions in relation to termination provisions appear consistent with the more general proposition that, in the absence of clear language to the contrary, the courts may imply a term that contractual discretions must be exercised honestly and in good faith for the purposes for which they were conferred, and not arbitrarily, capriciously or unreasonably (in the sense of

2. The Employer's Right to Suspend

[8-27] An employer who is put on notice of possible misconduct by an employee in the context of an SFC investigation will often wish to suspend the employee while the employer conducts an internal investigation and decides what further steps may be appropriate. This is particularly so where the employee has significant authority or responsibility and the employer must take reasonable steps to prevent risk to its business or clients.

[8-28] The Employment Ordinance (Cap 57) permits an employer to suspend an employee without pay for a limited time.[38] In particular, under section 11, an employer may suspend an employee without notice or payment in lieu of notice:

(1) as a disciplinary measure for any reason for which the employer could have summarily dismissed the employee;

(2) pending a decision by the employer as to whether or not the employer will exercise the right to summarily dismiss the employee; or

(3) pending the outcome of any criminal proceedings against the employee arising out of or connected with his or her employment.

[8-29] However, the duration of any suspension without pay under section 11 must be no longer than 14 days. This period may only be extended where the employee is the subject of criminal proceedings arising out of or connected with his or her employment, in which case the suspension may continue until the conclusion of the proceedings.[39] Any contractual term which purports to give an employer a right to suspend without pay for a longer period is void by reason of section 70 of the Employment Ordinance, which provides that any term of a contract of employment which purports to extinguish or reduce any right, benefit or protection conferred upon the employee by the Ordinance shall be void. An employee who is suspended from employment under section 11 may also, at any time during the period of his or her suspension, choose to terminate his or her employment without notice or payment in lieu.[40]

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irrationally): see, eg, *Braganza v BP Shipping Ltd and Anor* [2015] UKSC 17, [2015] 4 All ER 639.

38 Note, although there is no express statement in s 11 that the suspension will be without pay, this is accepted as the correct interpretation of the section: see *Wu Man Kwong v Asia Culture Broadcast Co Ltd* [1999] HKCU 1820 (unreported, HCLA 1/1998, 29 January 1999) (CFI) at para 8, per Recorder Edward Chan SC. This is consistent with the fact that an employee who is suspended under s 11 has a right to terminate their employment without notice or payment in lieu. See also the discussion regarding the fact that the word 'suspend' generally means to suspend all obligations in *Yeung Chung Ming v Commissioner of Police* [2007] 2 HKC 284 (CA) at paras 51–56.

39 Employment Ordinance, s 11(1).

40 Employment Ordinance, s 11(2).

[8-30] Practitioners have generally taken the view that, in addition to the right to suspend an employee without pay under section 11, employers may also suspend an employee *with pay* for such amount of time as is reasonably required to complete an internal investigation and/or disciplinary process. To the extent that this right is not expressly provided for in the employment contract, the common law position is that, where a serious allegation has been made against an employee, there is generally an implied right on the part of an employer to suspend the employee with pay during the course of an investigation into the allegations.[41] Thus, in *Downe v Sydney West Area Health Service (No 2)*,[42] Rothman J of the Supreme Court of New South Wales stated:

> it is a concomitant of one or other of the aforesaid implied duties [of good faith and mutual trust and confidence] that an employer has the right to direct [an employee] not to perform work for a closed period during the course of an investigation into allegations of misconduct. Assuming that the duty is exercised in good faith, such a direction not to perform work is not a breach of a contract of employment.[43]

[8-31] Subsequently, in *Arnold James Avenia v Railway & Transport Health Fund Ltd*,[44] Lee J of the Federal Court of Australia endorsed *Downe*, and added that the implied right to suspend without pay during the course of an investigation also arises as an incident of the obligation to follow lawful and reasonable directions. However, ultimately:

> in an individual case, the question of whether the employer is entitled to direct someone not to perform available work turns on the circumstances of the direction, the work that is not to be performed and the terms of the contract of employment. Put another way, the relevant circumstances must be considered to ascertain whether a particular direction was reasonable.[45]

41 The authorities suggest that suspension *without pay* for matters which do not fall within any of the limbs of s 11 is likely to amount to a breach of contract, at least in circumstances where there is no express contractual provision permitting the step. In particular, in *Keung Ah Pan v Hong Kong Macau Water Prod Engineering Co Ltd* [1995] HKCU 472 (unreported, HCLA 77/1994, 1 May 1995) (HC), per Rogers J, an employee who was suspected of abusing his sick leave entitlement was suspended, apparently without pay, until the issue of his sick leave entitlement was clarified. Rogers J found that the suspension did not fall within s 11 and that, therefore, the suspension was an effective termination of the contract of employment by reason of the failure to give the employee work and the notification to the employee that no work would be given.

42 *Downe v Sydney West Area Health Service (No 2)* (2008) 71 NSWLR 633, 210 FLR 268, [2008] NSWSC 159.

43 *Downe v Sydney West Area Health Service (No 2)* (2008) 71 NSWLR 633, 210 FLR 268, [2008] NSWSC 159 at para 414.

44 *Arnold James Avenia v Railway & Transport Health Fund Ltd* (2017) 272 IR 15, [2017] FCA 859 at para 166.

45 *Arnold James Avenia v Railway & Transport Health Fund Ltd* (2017) 272 IR 15, [2017] FCA 859 at para 165.

[8-32] Importantly, however, an employee will often have an implied right to work under the employment contract. This will be the case where the consideration moving from the employer to the employee under the contract includes the obligation to provide work, which will usually be the case where the role of the employee is such that the employee must practice his or her profession or trade in order to maintain or develop his or her skills, or where the employee's remuneration depends in part upon performing his or her role.[46] In such cases, any period of suspension with pay which extends for longer than is reasonable is likely to amount to constructive dismissal. Employers who choose to suspend an employee with pay should, therefore, act expeditiously in completing their internal investigation and deciding what further steps may be appropriate.

[8-33] It should also be noted that there remains a residual argument that section 11 of the Employment Ordinance was intended by the legislature to be the only mechanism by which an employee may be suspended. Were this argument found to be correct, then irrespective of the common law position, any suspension in circumstances not permitted under section 11 would be unlawful by reason of section 70 of the Employment Ordinance.

3. The Employee's Obligation to Cooperate in Any Internal Investigation

[8-34] Where an employer commences an internal investigation into allegations of misconduct, employees will generally be obliged under the common law to cooperate by providing information as requested. In *Associated Dominion Assurance Society Pty Ltd v Andrew & Haraldson*,[47] Herron J of the Supreme Court of New South Wales summarised the position as follows:

> … a duty lies upon an employee in general terms to give information to his employer such as is within the scope of his employment and which relates to the mutual interest of employer and employee. If an employee is requested at a proper time and in a reasonable manner to state to his employer facts concerning the employee's own actions performed as an employee, provided that these relate to the Master's business, the employee is bound, generally speaking, to make such disclosure.[48]

[8-35] However, the fact that an employee refuses to provide an explanation or answer questions will not necessarily justify summary dismissal; whether

46 *William Hill Organisation Ltd v Tucker* [1999] ICR 291 (CA, Eng) at 300–301; and *J Langston v The Amalgamated Union of Engineering Workers (Engineering Section) and Chrysler United Kingdom Ltd* [1974] ICR 510 at 521–522.

47 *Associated Dominion Assurance Society Pty Ltd v Andrew & Haraldson* (1949) 49 SR (NSW) 351 (CA, NSW).

48 *Associated Dominion Assurance Society Pty Ltd v Andrew & Haraldson* (1949) 49 SR (NSW) 351 (CA, NSW) at 357, applied in *Murray Irrigation Ltd v Balson* (2006) 67 NSWLR 73, 159 IR 52, [2006] NSWCA 253 at para 20.

summary dismissal is justified will depend upon the circumstances. Thus, in that case, Herron J went on to state:

> Most of these questions involve matters of degree. It could not be said that every act described would, if it stood alone, of necessity justify instant dismissal.[49]

3.1 Claiming privilege against self-incrimination

[8-36] In the absence of express contractual provisions, it is unclear whether it is permissible for an employee to refuse to answer an employer's questions on grounds of privilege against self-incrimination, or whether the employee will be in breach of the employment contract for refusing to answer on such grounds. On the one hand, the Federal Court of Australia in *Grant v BHP Coal Pty Ltd*[50] held that the privilege against self-incrimination is capable of applying in respect of questions asked of an employee by an employer, but only if there are proper grounds for the claim (ie, a real and appreciable risk of criminal proceedings, or proceedings for a punishment or penalty, being commenced against the person and the answer being used in evidence in those proceedings). On the other hand, there are authorities which proceeded on the basis that an employee will, or may, be in breach of the employment contract for refusing to answer questions on grounds of privilege against self-incrimination, but that this alone will not justify summary dismissal.[51]

[8-37] Whatever the correct position, it appears relatively clear that an employee's refusal to answer an employer's questions on the grounds of privilege against self-incrimination will not prevent the employer from summarily dismissing the employee if the available evidence is sufficient to establish substantive misconduct in relation to the matter under investigation. For this purpose, an employer who must subsequently justify the summary dismissal in a claim for wrongful termination may be entitled to rely on adverse inferences drawn from the employee's refusal to provide an explanation or answer questions, in accordance with the principles applicable in civil proceedings as explained in **Chapter 6**.

[8-38] Thus, in the English case of *Harris and Shepherd v Courage (Eastern) Ltd*,[52] two employees were charged with theft by the police. The employer invoked its internal disciplinary procedure and requested meetings; however, the employees refused to give any explanation before the criminal proceedings

49 *Associated Dominion Assurance Society Pty Ltd v Andrew & Haraldson* (1949) 49 SR (NSW) 351 (CA, NSW).

50 *Grant v BHP Coal Pty Ltd* (2017) 247 FCR 295, 266 IR 81, [2017] FCAFC 42 at para 108.

51 See, eg, *Murray Irrigation Ltd v Balson* (2006) 67 NSWLR 73 (2006) 159 IR 52, [2006] NSWCA 253, where the New South Wales Court of Appeal concluded that an employee was in breach of his employment contract for failing to answer questions on grounds of privilege against self-incrimination but that it would be harsh, unjust or unreasonable to dismiss the employee on these grounds.

52 *Harris and Shepherd v Courage (Eastern) Ltd* [1981] ICR 496 (EAT, Eng).

had been completed. The employees were subsequently dismissed. The Employment Appeals Tribunal, in deciding whether the dismissal was unfair for the purposes of the Trade Union and Labour Relations Act 1974 (UK), dismissed the employees' complaint, stating:

> It does not seem to the majority of this appeal tribunal that there is a hard and fast rule that, once a man has been charged, an employer cannot dismiss him for an alleged theft if the employee is advised to say nothing until the trial in the criminal proceedings. … if the evidence produced is, in the absence of an explanation, sufficiently indicative of guilt, then the employer may be entitled to act.[53]

[8-39] In light of the above, it would appear unwise for a Hong Kong employer to seek to summarily dismiss an employee solely on the basis of the employee's refusal to answer the employer's questions on the grounds of privilege against self-incrimination; the summary dismissal may be subsequently determined to be a wrongful termination either because the employee was legally entitled to refuse to answer the employer's questions, or because the employee's actions were not sufficiently serious as to justify summary dismissal. If the circumstances permit, the safer course would appear to be for the employer to summarily dismiss the employee only on the grounds that the available evidence is sufficient to establish substantive misconduct in relation to the matter under investigation.

4. Termination by the Employee

[8-40] Under Hong Kong law, an employee may unilaterally terminate his or her employment contract by:

(1) giving notice;[54]
(2) making a payment in lieu of notice;[55] or
(3) without notice in accordance with section 10 or 11(2) of the Employment Ordinance (Cap 57).

4.1 Termination without notice

[8-41] Section 10 of the Employment Ordinance permits an employee to terminate his or her employment without notice or payment in lieu of notice in certain circumstances, including upon any ground on which the employee would be entitled to terminate their employment without notice under the common law. Under the common law, an employee may terminate without notice where

53 *Harris and Shepherd v Courage (Eastern) Ltd* [1981] ICR 496 (EAT, Eng) at 501. Approved on appeal in *Harris and Shepherd v Courage (Eastern) Ltd* [1982] ICR 530 (CA, Eng) at 532. See also on this issue *Harris (Ipswich) Ltd v Harrison* [1978] ICR 1256 (EAT, Eng) and *Ali v Sovereign Buses (London) Ltd* (unreported, UKEAT/0274/06/DM, 26 October 2006).

54 See above discussion on notice periods.

55 See above discussion on the right to make a payment in lieu of notice.

the employer's conduct constitutes a fundamental breach of the employment contract, such as to amount to a repudiation. This is generally referred to as a constructive dismissal, because the employer's breach of the employment contract acts in effect to terminate the employment of the employee.[56]

[8-42] Section 11(2) of the Employment Ordinance permits an employee who has been suspended from employment under section 11, at any time during the period of his or her suspension, to choose to terminate his or her employment without notice or a payment in lieu.

4.2 Resignation

[8-43] An employee may resign by giving notice or by making a payment in lieu of notice in accordance with section 7(1A) of the Employment Ordinance.

[8-44] To the extent that an employee resigns by giving notice, the giving of notice will not prevent the employer from bringing the employment contract to an end immediately by summarily dismissing the employee or (if there are insufficient grounds to justify summary dismissal) making a payment in lieu of notice.[57]

[8-45] An employee who is suspected of misconduct in the context of an SFC investigation and who is in jeopardy of being summarily dismissed may consider approaching the employer and seeking to agree to resign instead, or simply resigning unilaterally by making a payment in lieu. This may put the employee in better stead to find fresh employment and may assist them to retain bonuses and other awards under any 'good leaver/bad leaver' contractual provisions. It may also be attractive to the employer, because it may allow the employer to terminate the employee without the need for any internal investigation or disciplinary process, and without the employer having to assert any regulatory wrongdoing (which might effectively amount to an admission of regulatory wrongdoing by the employer too).

[8-46] If an employer demands that an employee either resign or be summarily dismissed, this is likely to be considered a constructive dismissal; but where the resignation is brought about not by the threat of dismissal but by other factors such as an offer of financial benefits or a reference letter, this may rebut the inference of dismissal and render the termination voluntary.[58]

56 See, eg, *Ying Cheong Shoe Mfy v Yam Yuk Bing* [1987] 2 HKC 310 (HC) at 316, per Rhind J.

57 Employment Ordinance, s 8(b).

58 *Chu Hei Man, Qualia v Dynasty World Holdings Ltd* (unreported, HCLA 58/1999, 11 January 2000) (CFI), per Li DJ.

5. Fraudulent and Dishonest Enterprises

[8-47] Where it becomes apparent that an employer is carrying on a fraudulent or dishonest enterprise, this will constitute a fundamental breach of the implied duty of mutual trust and confidence between an employer and employee, enabling an employee to terminate the contract without notice. The employee may also claim damages for any harm caused to his or her future employment prospects as a result of being tainted by the employer's wrongdoing.

[8-48] Thus, in *Malik v Bank of Credit and Commerce International SA (in liq), Mahmud v Bank of Credit and Commerce International SA (in liq)*,[59] the defendant bank engaged in widespread fraud and manipulation, with the result that it collapsed in a high-profile scandal. Two former employees of the bank sought to make claims in the liquidation for financial loss caused by the stigma that had attached to them by reason of their association with the bank, which they alleged placed them at a serious disadvantage in finding new jobs. The House of Lords confirmed that the bank's conduct amounted to a repudiatory breach which would have allowed the employees to terminate their contracts without notice and claim damages for the harm to their employment prospects:

> Employers may be under no common law obligation, through the medium of an implied contractual term of general application, to take steps to improve their employees' future job prospects. But failure to improve is one thing, positively to damage is another. Employment, and job prospects, are matters of vital concern to most people. Jobs of all descriptions are less secure than formerly, people change jobs more frequently, and the job market is not always buoyant. Everyone knows this. An employment contract creates a close personal relationship, where there is often a disparity of power between the parties. Frequently the employee is vulnerable. Although the underlying purpose of the trust and confidence term is to protect the employment relationship, there can be nothing unfairly onerous or unreasonable in requiring an employer who breaches the trust and confidence term to be liable if he thereby causes continuing financial loss of a nature that was reasonably foreseeable. Employers must take care not to damage their employees' future employment prospects, by harsh and oppressive behaviour or by any other form of conduct which is unacceptable today as falling below the standards set by the implied trust and confidence term.[60]

[8-49] It should be noted that the House of Lords raised the possibility that if the employees had chosen to remain in their employment after becoming

59 *Malik v Bank of Credit and Commerce International SA (in liq), Mahmud v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20, [1977] 3 All ER 1 (HL).

60 *Malik v Bank of Credit and Commerce International SA (in liq), Mahmud v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20 at 37–38, [1977] 3 All ER 1 (HL).

aware of the bank's conduct, this might have amounted to a waiver of the bank's breach, depending upon the circumstances.[61]

6. Remedies for Wrongful Termination

[8-50] An employee whose employment is terminated unlawfully may bring a claim in the Labour Tribunal for wrongful termination. The remedy available to the employee in a claim for wrongful termination is generally confined to damages.[62]

[8-51] At common law, to the extent that the employer was entitled to validly terminate the employee's employment, the employer's liability in damages will be limited to the amount the employer would have had to pay had the employer done so.[63] The employee is also under a duty to mitigate his or her loss by

61 *Malik v Bank of Credit and Commerce International SA (in liq), Mahmud v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20 at 35, [1977] 3 All ER 1 (HL), per Lord Nicholls:

> The employee may treat the bank's conduct as a repudiatory breach, entitling him to leave. He is not compelled to leave. He may choose to stay. The extent to which staying would be more than an election to remain, and would be a waiver of the breach for all purposes, depends on the circumstances.

62 Part VIA of the Employment Ordinance also provides for various remedies in the event that an employer dismisses an employee for certain prohibited reasons or if the employee has served under a continuous contract for not less than 24 months with the intention of extinguishing or reducing any right or benefit conferred by the Ordinance. Such remedies may include re-instatement or re-engagement, but only with the employee's consent. Otherwise, the courts will not generally grant an injunction requiring an employer to re-engage an employee who has been wrongfully or unreasonably terminated, as it would not be appropriate for the courts to force people into an employment relationship against their will. The sentiment of the courts was conveyed by Fry J in *De Francesco v Barnum and Ors* (1890) 45 Ch D 430 at 438 as follows:

> For my own part, I should be very unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining continuous personal relations with one another to continue those personal relations. I have a strong impression and a strong feeling that it is not in the interest of mankind that the rule of specific performance should be extended to such cases. I think the Courts are bound to be jealous, lest they should turn contracts of service into contracts of slavery; and therefore, speaking for myself, I should lean against the extension of the doctrine of specific performance and injunction in such a manner.

See also *China Wah Yan Healthcare Ltd and Ors v Dr Chan Leung Kwok, Clement* [2019] HKCU 3128, [2019] HKCFI 2047 at para 57.

63 Thus, eg, in *Gunton v Richmond-upon-Thames London Borough Council* [1981] Ch 448 at 469, [1980] 3 All ER 577 (CA, Eng), per Buckley LJ:

> Where a servant is wrongfully dismissed, he is entitled, subject to mitigation, to damages equivalent to the wages he would have earned under the contract

seeking alternative employment, which may reduce the amount of damages payable.[64] In *Addis v Gramophone Co Ltd*,[65] the House of Lords held that there is no entitlement on the part of an employee to claim damages for injured feelings, mental distress or for any loss sustained by reason of the fact that a wrongful termination has made it more difficult for the employee to obtain fresh employment.

[8-52] In Hong Kong, the common law position has been modified by section 8A of the Employment Ordinance (Cap 57), which provides that, where a contract of employment is terminated otherwise than by giving notice or making a payment in lieu of notice, the party terminating the contract must pay to the other party a sum equal to that which would have been payable had the contract been terminated by a payment in lieu of notice. There is no obligation on the part of the employee to mitigate his or her loss under section 8A. However, section 8A does not apply where the employee terminates the contract on grounds of constructive dismissal under section 10 or during a period of suspension under section 11(2). In such cases, the employee must prove their loss in accordance with common law principles.

[8-53] The Hong Kong courts have, to date, taken the view that where section 8A applies, it reflects the full amount of the damages available to employees for wrongful termination (unless additional remedies are available under Part VIA). Thus, in *Kao Lee & Yip (a firm) v Lau Wing & Anor*,[66] Yuen JA explained:

> Section 8A makes it clear that where an employer has terminated an employee's contract of employment without notice or agreement to pay wages in lieu, an employee gets as damages for wrongful termination the notice period's wages—no less but also *no more*. The employee would not be entitled to claim the value of collateral or fringe benefits but neither would he need to prove or mitigate his damages.[67]

[8-54] It should be noted, however, that on appeal in *Kao Lee & Yip (a firm) v Lau Wing & Anor*,[68] the Court of Final Appeal expressly left open the possibility

> from the date of dismissal to the end of the contract. The date when the contract would have come to an end, however, must be ascertained on the assumption that the employer would have exercised any power he may have had to bring the contract to an end in the way most beneficial to himself; that is to say, that he would have determined the contract at the earliest date at which he could properly do so.

64 See, eg, *Ko Hon Yue (高翰儒) v Chiu Pik Yuk, the wife and intended adminstratrix of Liu Chung Leung & Ors* (2012) 15 HKCFAR 72, [2012] HKCU 418 (CFA) at para 79.

65 *Addis v Gramophone Co Ltd* [1909] AC 488 (HL) at 491.

66 *Kao, Lee & Yip (a firm) v Lau Wing & Anor* [2007] 4 HKC 86, [2007] 3 HKLRD 1128 (CA).

67 *Kao, Lee & Yip (a firm) v Lau Wing & Anor* [2007] 4 HKC 86, [2007] 3 HKLRD 1128 (CA) at para 36.

68 *Kao, Lee & Yip (a firm) v Lau Wing & Anor* [2009] 2 HKC 1, (2008) 11 HKCFAR 576 (CFA).

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GLOSSARY OF TERMS

AMLO	Anti-Money Laundering and Counter-Terrorist Financing Ordinance (Cap 615)
DOJ	Department of Justice
Futures Exchange	Hong Kong Futures Exchange Limited
HKBORO	Hong Kong Bill of Rights Ordinance (Cap 383)
HKMA	Hong Kong Monetary Authority
IDT	Insider Dealing Tribunal
MMT	Market Misconduct Tribunal
SFAT	Securities and Futures Appeals Tribunal
SFC	Securities and Futures Commission
SFO	Securities and Futures Ordinance (Cap 571)
Stock Exchange	The Stock Exchange of Hong Kong Limited
Takeovers Code	The Codes on Takeovers and Mergers and Share Buy-backs
Takeovers Panel / Panel	Takeovers and Mergers Panel

proving the offences committed by the offender, and the period of the delay is reasonable in the circumstances.

(3) Thirdly, delay will not ordinarily be a mitigating factor if it is caused by the offender's obstruction or lack of co-operation with the State, prosecuting authorities or investigatory bodies, but the offender's reliance on his or her legal rights is not obstruction or lack of co-operation for this purpose.

(4) Fourthly, delay will not ordinarily be a mitigating factor if it results from the normal operation of the criminal justice system, including delay as a result of the offender or a co-offender exercising his or her rights; for example, interlocutory appeals and other interlocutory processes.

(5) Fifthly, delay may be conducive to the emergence of mitigating factors; for example, if, during the period of delay, the offender has made progress towards rehabilitation or other circumstances favourable to him or her have emerged.

(6) Sixthly, delay (not being delay of the kind described in the second, third and fourth guiding principles) will ordinarily be a mitigating factor if:

(a) the delay has resulted in significant stress for the offender or left him or her, to a significant degree, in 'uncertain suspense'; or

(b) during the period of delay the offender has adopted a reasonable expectation that he or she would not be charged or a pending prosecution would not proceed, and the offender has ordered his or her affairs on the faith of that expectation.

(7) Seventhly, delay caused by dilatory or neglectful conduct by the State, prosecuting authorities or investigatory bodies may result in a discount of the sentence that would otherwise be imposed on the offender, if the court thinks it an appropriate means of marking its disapproval of the conduct in question.

[24-70] With respect to civil proceedings, as discussed in **Chapter 11**, the Limitation Ordinance (Cap 347) provides for two potential limitation periods for the purposes of actions (defined as including any proceeding in a court of law) brought under statutory provisions. In particular, section 4(1)(d) provides for a six-year limitation period in respect of 'actions to recover any sum recoverable by virtue of any Ordinance or imperial enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture', and section 4(3) provides for a 12-year limitation period for any 'action upon a specialty', subject to the proviso that this shall not affect any action for which a shorter period of limitation is prescribed by any other provision of the Limitation Ordinance.

[24-71] In *Securities and Futures Commission v Lu Ruifeng & Ors*,[109] the Court of Appeal was asked to consider the limitation period which would apply to a claim by the SFC under section 213 for restoration orders to obtain redress for the counterparties to certain alleged insider dealing transactions. The court explained that the starting point is that an action brought by the SFC under the SFO, being an instrument under seal, is an action upon a specialty and is therefore prima facie subject to a limitation period of 12 years under section 4(3) of the Limitation Ordinance (Cap 347). However, the rule for specialties is subject to an exception where the action is for monetary relief under an enactment; in such cases, the shorter six-year limitation period under section 4(1)(d) of the Limitation Ordinance applies. To determine whether the exception applies, the court should look to see what the 'substance or essential nature' of the relief truly sought in the particular case is. The Court of Appeal concluded that it was at least reasonably arguable in that case that the 'substance or essential nature' of the action sought to be brought by the SFC was, to the extent that it sought compensation for the counterparties who no longer retained the shares purchased from the alleged insider dealer, an action to recover a sum of money recoverable by virtue of the SFO, and subject to a limitation period of six years.

[24-72] The analysis in *Securities and Futures Commission v Lu Ruifeng & Ors* suggests that, to the extent that the 'substance or essential nature' of the relief sought in a civil action under section 213, 214 or 214A of the SFO is damages, the action will be subject to the six-year limitation period. If, however, the 'substance or essential nature' of the relief is something other than damages, the action will be subject to the 12-year limitation period.

[24-73] It also appears likely that, to the extent any civil proceedings are of a regulatory nature and are brought by the SFC, the principles in relation to staying criminal proceedings on the grounds of delay should be equally applicable. In *Chong Wai Lee Charles & Anor v The Insider Dealing Tribunal & Anor*,[110] the Court of First Instance rejected an application to stay insider dealing proceedings before the IDT on the grounds of delay. The court concluded that the relevant consideration was solely whether the implicated parties could be given a fair hearing given the period of delay which had elapsed since the date of the events the subject of the inquiry. In the *QPL*[111] proceedings before the MMT, the specified persons also applied to stay the proceedings on the grounds of delay, arguing that, as the proceedings were civil proceedings, the principles to apply were those pertaining to striking out civil proceedings for want of prosecution, and in particular the MMT should stay the proceedings if there had been 'inordinate and inexcusable delay' by the SFC. The Chairman, after

109 *Securities and Futures Commission v Lu Ruifeng & Ors* [2022] 3 HKC 143 [2022] HKCA 326.

110 *Chong Wai Lee Charles & Anor v The Insider Dealing Tribunal & Anor* [2006] HKCU 85 (unreported, HCAL 116/2005, 13 January 2006) (CFI) at paras 231–232, per Lam and Reyes JJ.

111 Ruling in the Matter of Dealing in the Listed Securities of QPL International Holdings Ltd (dated 27 December 2007).

considering the authorities, applied the criminal principles in relation to stays on grounds of delay and stays for serious abuse of process, stating:

> The Chairman has directed the Tribunal, that it is for a Specified Person to establish on the balance of probabilities that a "fair hearing" is not possible but that even if the Tribunal is satisfied that the Specified Persons can be afforded a fair hearing in these proceedings, nevertheless it can and should grant a stay of proceedings if the circumstances involved an abuse of process which so offended the Tribunal's sense of justice and propriety that these proceedings were tainted as an abuse of process.[112]

[24-74] Delay on the part of the SFC in completing its investigation and commencing proceedings before the MMT may be regarded as a mitigating factor in respect of certain types of orders, as explained in **Chapter 27**. Delay may also operate as a mitigating factor in disciplinary proceedings against a regulated person.[113] Further, where an ongoing investigation or disciplinary proceedings have resulted in delay in the processing, or the rejection, of a regulated person's application for a licence, registration or approval, or for a transfer of accreditation, the period of delay in approving the application will operate as a de facto suspension which ought properly to be taken into account when considering the appropriate disciplinary sanctions, as explained in **Chapter 25**.

112 Ruling in the Matter of Dealing in the Listed Securities of QPL International Holdings Ltd (dated 27 December 2007) at para 71.

113 In *Lai Voon Wai v Securities and Futures Commission* (unreported, SFAT 2/2020, 29 September 2020), the SFAT noted that any prejudice which a regulated person might have suffered in being caused to wait for a lengthy period of time before disciplinary proceedings were initiated is quite different from waiting to learn whether or not criminal proceedings are to be commenced. Nevertheless, the SFAT did not rule out the possibility that delay could be a relevant mitigating factor, as it went on to find on the facts of the case that the period of unjustified delay in drafting and serving the Notice of Proposed Disciplinary Action was not of such a magnitude as to merit a reduction in the sanctions imposed (at paras 133, 135).

Chapter 25

Disciplinary Proceedings Against Regulated Persons Under the SFO

[25-1] Where a regulated person is guilty of misconduct or is not fit and proper to be a regulated person, the SFC may take disciplinary action against that person under Part IX of the SFO.[1]

1. Disciplinary Powers

1.1 Licensed corporations and their representatives and officers

[25-2] Sections 194 and 195 of the SFO empower the SFC to take disciplinary action against licensed corporations and their representatives and officers. Under section 194, the SFC may exercise disciplinary powers over a 'regulated person' where that person is, or was at any time, guilty of misconduct or the SFC is of the opinion that the person is not a fit and proper person to be or to

1 The SFC also has disciplinary powers under the AMLO in respect of:
(1) a licensed virtual asset service provider, a licensed representative of a licensed virtual asset service provider, a responsible officer of a licensed virtual asset service provider, and a person involved in the management of the business of a licensed virtual asset service provider under Subdiv 1, Div 9, Pt 5B of the AMLO, where that person is, or was at any time, guilty of misconduct or the SFC is of the opinion that the person is not a fit and proper person to be or to remain the same type of regulated person; and
(2) a licensed corporation under Pt 4 of the AMLO that contravenes specified customer due diligence and record-keeping requirements. Such contraventions also constitute 'misconduct' for the purposes of the disciplinary regime under the SFO, and may call into question the licensed corporation's fitness and properness to remain licensed under the SFO. In practice, the SFC generally exercises its disciplinary powers under the SFO alone in relation to such breaches. See, eg, SFC, 'SFC reprimands and fines CSC Futures (HK) Limited $4.95 million for regulatory breaches' (9 October 2024) and the related Statement of Disciplinary Action.

remain the same type of regulated person. For the purposes of section 194, the term 'regulated person' is defined to mean a person who is, or was at the 'relevant time':

(1) a licensed corporation;[2]
(2) a licensed representative[3] of a licensed corporation;
(3) a responsible officer[4] of a licensed corporation; or
(4) a person involved in the management of the business of a licensed corporation.[5]

Licensed corporations and licensed representatives are referred to as 'licensed persons' under the SFO.[6]

[25-3] 'Relevant time' is defined to mean the time when the person is or was guilty of misconduct, or the time of the occurrence of any matter which (whether or not with any other matter) leads the SFC to form the opinion that the person is not a fit and proper person.[7]

[25-4] Section 195 then specifies additional circumstances in which the SFC may suspend or revoke a licensed person's licence, whether in relation to all or any part of the regulated activities for which the person is licensed, being, in summary, where the licensed person is insolvent, or where the licensed person or any of its directors is mentally incapacitated, or is convicted of an offence in Hong Kong or elsewhere (other than an offence under any of the relevant provisions[8]) which in the opinion of the SFC impugns the licensed person's

2 The term 'licensed corporation' means a corporation licensed under s 116 or 117 of the SFO: see SFO, Sch 1, s 1.
3 The term 'licensed representative' means an individual licenced under s 120 or 121 of the SFO: see SFO, Sch 1, s 1.
4 The term 'responsible officer' means an individual who is approved by the SFC under s 126(1) of the SFO as a responsible officer of a licensed corporation: see SFO, Sch 1, s 1.
5 SFO, s 194(7).
6 SFO, Sch 1, s 1.
7 SFO, s 194(7).
8 The term 'relevant provisions' is defined in s 1, Sch 1 to the SFO to mean the provisions of: (1) the SFO; (2) Parts II and XII of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32), so far as those Parts relate, directly or indirectly, to the performance of functions relating to prospectuses; (3) Part 5 of the Companies Ordinance (Cap 622), so far as that Part relates, directly or indirectly, to the performance of functions relating to the buy-back by a corporation of its own shares or a corporation giving financial assistance for the acquisition of its own shares; (4) Parts II and XII of the Companies (Winding Up and Miscellaneous Provisions) Ordinance, for the purposes only of s 213 of the SFO, and so far as those Parts relate, directly or indirectly, to an advertisement mentioned in s 38B(1) of that Ordinance; and (5) Part 2 (except s 6) of the AMLO. Section 12, Sch 1 to the SFO further provides that a reference to an Ordinance shall, unless the context otherwise requires, be construed as including any subsidiary legislation made under that Ordinance.

fitness and properness to remain licensed.[9] Similarly, where a responsible officer of a licensed corporation is convicted of an offence in Hong Kong or elsewhere (other than an offence under any of the relevant provisions) which in the opinion of the SFC impugns the fitness and properness of the person to remain a responsible officer, the SFC may suspend or revoke the person's approval to be a responsible officer.[10]

1.2 Registered institutions and their representatives and officers

[25-5] Sections 196 and 197 of the SFO empower the SFC to take disciplinary action against registered institutions and their representatives and officers. Under section 196, where a 'regulated person' is, or was at any time, guilty of misconduct or the SFC is of the opinion that the person is not a fit and proper person to be or to remain the same type of regulated person, the SFC may exercise disciplinary powers in respect of the person. For the purposes of section 196, a 'regulated person' is defined to mean a person who is, or was at the 'relevant time':

(1) a registered institution;[11]
(2) an executive officer[12] of a registered institution;
(3) a person involved in the management of the business constituting any regulated activity for which a registered institution is or was (as the case may be) registered; or
(4) an individual whose name is or was (as the case may be) entered in the register maintained by the HKMA under section 20 of the Banking Ordinance (Cap 155) as that of a person engaged by a registered institution in respect of a regulated activity (referred to as a 'relevant individual' in the Banking Ordinance (Cap 155)).[13]

Licensed corporations and registered institutions are referred to as 'intermediaries' under the SFO.[14]

[25-6] 'Relevant time' has the same meaning as under section 194, being the time when the person is or was guilty of misconduct, or the time of the occurrence of any matter which (whether or not with any other matter) leads the SFC to form the opinion that the person is not a fit and proper person.[15]

9 SFO, s 195(1).
10 SFO, s 195(7).
11 The term 'registered institution' means an authorised financial institution, being an 'authorized institution' under s 2(1) of the Banking Ordinance (Cap 155), which is registered under s 119 of the SFO: see SFO, Sch 1, s 1.
12 This refers to an executive officer of a registered institution appointed under s 71D of the Banking Ordinance: see SFO, Sch 1, s 1 and Banking Ordinance, s 2(1).
13 Banking Ordinance, s 20(10); SFO, 196(8).
14 SFO, Sch 1, s 1.
15 SFO, s 196(8).

[25-7] Section 197 then specifies additional circumstances in which the SFC may suspend or revoke a registered institution's registration, whether in relation to all or any part of the regulated activities for which the registered institution is registered, being, in essence, where the registered institution is insolvent, or where the registered institution is convicted of an offence in Hong Kong or elsewhere (other than an offence under any of the relevant provisions) which in the opinion of the SFC impugns the fitness and properness of the registered institution to remain registered.[16]

[25-8] The HKMA also has disciplinary powers in respect of executive officers of registered institutions under section 71C of the Banking Ordinance (Cap 155), and in respect of relevant individuals under section 58A of the Banking Ordinance.

1.3 Persons involved in management and the 'manager-in-charge of core functions' regime

[25-9] As evident, the persons who may be disciplined under sections 194 and 196 of the SFO include not only licensed and registered persons, but also persons involved in the management of the business of a licensed corporation or the business constituting any regulated activity for which a registered institution is or was registered.

[25-10] The term 'person involved in the management of the business' is not defined under the SFO. However, in *Tse Shui Hoi v Securities and Futures Commission*,[17] the SFAT accepted the principles laid down by the English court in *Re Market Wizard Systems (UK) Ltd*,[18] in relation to the analogous expression 'to take part in or be concerned in the … management' of a company in the context of the statutory prohibition against an undischarged bankrupt taking part in or being concerned in the management of a company without the leave of the court. There, it was held that the term is not to be construed narrowly or equated with a managing or other director, or a general manager; rather, it encompasses all those persons who exercise supervisory control or decision-making responsibility in the sphere of management, irrespective of whether they have 'ultimate control' over the corporation. Carnwath J cited with approval the analysis of Ormiston J in *Commissioner for Corporate Affairs (Vic) v Bracht*[19] in the Supreme Court of Victoria, where Ormiston J said:

> There must be an element of decision making, which affects the corporate enterprise as a whole, but those responsible need not form part of the board, nor even need they be executives directly communicating with the board. Nevertheless, in the ordinary course of affairs, it is only in a large company

16 SFO, s 197(1).

17 *Tse Shui Hoi v Securities and Futures Commission* (unreported, SFAT 10/2007, 20 March 2009) at para 38.

18 *Re Market Wizard Systems (UK) Ltd* [1998] 2 BCLC 282 (Ch) at paras 57–64.

19 *Commissioner for Corporate Affairs (Vic) v Bracht* (1989) 7 ACLC 40 (SC, Vic)

> that persons outside this latter category, so far removed from the power of control exercised by the directors, may be engaged in the 'management' of a company. In a small company like the present the actions of those directly answerable to the directors may amount to 'management', for, even if those people are also engaged in routine activities of a kind not normally associated with management, it is sufficient if powers and functions are delegated to those persons which are likely in their performance to have a significant effect on the business and financial standing of the company. As it is a protective section, protective at least of the creditors and shareholders, then it must have been designed to prevent the participation in management of those who might put the solvency or the probity of the corporation's administration at risk. Persons not given any significant discretion or advisory role in decision making could not therefore be intended as an object of the prohibition. It may be difficult to draw the line in particular cases, but in my opinion the concept of 'management' for present purposes, comprehends activities which involve policy and decision making, related to the business affairs of a corporation, affecting the corporation as a whole or a substantial part of that corporation, to the extent that the consequences of the formation of those policies or the making of those decisions may have some significant bearing on the financial standing of the corporation or the conduct of its affairs.[20]

[25-11] Ormiston J understood the expression 'take part in' to connote 'active participation':

> Such participation would have to be real and direct, but not necessarily in a role in which ultimate control is exercised, although it would have to be more than the administrative carrying out of the orders of others responsible for a company's management.[21]

[25-12] As to the expression 'being concerned in' Ormiston J said:

> In the present section I would see the prohibition as covering a wide range of activities relating to the management of a corporation, each requiring an involvement of some kind in the decision-making processes of that corporation. That involvement must be more than passing, and certainly not of a kind where merely clerical or administrative acts are performed. It requires activities involving some responsibility, but not necessarily of an ultimate kind whereby control is exercised. Advice given to management, participation in its decision making processes, and execution of its decisions going beyond the mere carrying out of directions as an employee, would suffice.[22]

[25-13] As explained in **Chapter 7**, the SFC has introduced the 'Manager-In-Charge of Core Functions' regime, which requires licensed corporations to appoint at least one individual to be in charge of specified 'Core Functions', being:

(1) Overall Management Oversight;
(2) Key Business Line;

20 *Commissioner for Corporate Affairs (Vic) v Bracht* (1989) 7 ACLC 40 (SC, Vic) at 47–48.

21 *Commissioner for Corporate Affairs (Vic) v Bracht* (1989) 7 ACLC 40 (SC, Vic) at 48.

22 *Commissioner for Corporate Affairs (Vic) v Bracht* (1989) 7 ACLC 40 (SC, Vic) at 49.

(3) Operational Control and Review;
(4) Risk Management;
(5) Finance and Accounting;
(6) Information Technology;
(7) Compliance; and
(8) Anti-Money Laundering and Counter-Terrorist Financing.[23]

[25-14] The SFC takes the view that the disciplinary regime established under the SFO applies to all Managers-In-Charge (MIC) of a licensed corporation, on the basis that an MIC is a 'person involved in the management of the business of a licensed corporation' and therefore a 'regulated person' under the definition in section 194(7) of the SFO.[24] Thus, an MIC may be disciplined for any misconduct or a failure to be or remain fit and proper to be an MIC, in the same way as a licensed person.

[25-15] The 'Manager-In-Charge of Core Functions' regime does not apply to registered institutions. However, registered institutions are expected to identify at least one individual as principally responsible for the overall management of the whole business of the registered institution, and to identify those individuals responsible for managing each of the businesses or functions listed in paragraphs 2–8 of the Fourteenth Schedule of the Banking Ordinance (Cap 155),[25] to the extent that these individuals are involved in the management of the business constituting any regulated activity for which the registered institution is registered.[26] The disciplinary regime established under the SFO will then apply to all such individuals, on the basis that they are 'persons

23 SFC, 'The 'Manager-In-Charge of Core Functions' regime is provided for in the Circular to Licensed Corporations Regarding Measures for Augmenting the Accountability of Senior Management' (16 December 2016) at paras 7–8.

24 SFC, 'The 'Manager-In-Charge of Core Functions' regime is provided for in the Circular to Licensed Corporations Regarding Measures for Augmenting the Accountability of Senior Management' (16 December 2016) at paras 5, 16–17.

25 The functions identified in paras 2–8 of the Fourteenth Schedule are: (1) the carrying on of business of any of the following descriptions or of any of their equivalents within an authorised institution: retail banking; private banking; corporate banking; international banking; institutional banking; treasury; or any other business which is material to the institution; (2) the maintenance of the accounts or the accounting systems of an authorised institution; (3) the maintenance of systems of control of an authorised institution, including those systems intended to manage the risks of the institution; (4) the maintenance of systems of control of an authorised institution to protect it against involvement in money laundering; (5) the development, operation and maintenance of computer systems for an authorised institution; (6) the conduct of internal audits or inspections of the institution's affairs or business; and (7) the function of ensuring that an authorised institution complies with the laws, regulations or guidelines that apply to it.

26 See Banking Ordinance, s 72B; the Supervisory Policy Manual Module SB-1 titled HKMA, 'Supervision of regulated activities of SFC-registered authorized institutions' (12 September 2025), footnote 3 at 17; and HKMA, Management Accountability at Registered Institutions, FAQs (16 October 2017), Question 1.

'involved in the management of the business constituting any regulated activity for which a registered institution is or was (as the case may be) registered' and therefore 'regulated persons' under the definition in section 196(8) of the SFO. The HKMA also expects any chief executives, alternate chief executives and directors who are directly responsible for supervising the conduct of regulated activities to be appointed as executive officers of the registered institution.[27] Such persons will also fall under the definition of 'regulated person' in section 196(8) of the SFO.

2. Grounds for Disciplinary Action

[25-16] Disciplinary action may be taken against a regulated person where the person is guilty of misconduct or is not fit and proper to be a regulated person, and where the additional circumstances set out in section 195(1), 195(2), 195(7), 197(1) or 197(2) of the SFO exist.

2.1 Misconduct

[25-17] 'Misconduct' and being 'guilty of misconduct' are defined in section 193(1) of the SFO as follows:

> ***misconduct*** (失當行為) means—
>
> (a) a contravention of any of the relevant provisions;
> (b) a contravention of any of the terms and conditions of any licence or registration under this Ordinance;
> (c) a contravention of any other condition imposed under or pursuant to any provision of this Ordinance, or of any condition attached or amended under section 71C(2)(b) or (9) or 71E(3) of the Banking Ordinance (Cap. 155);
> (d) an act or omission relating to the carrying on of any regulated activity for which a person is licensed or registered which, in the opinion of the Commission, is or is likely to be prejudicial to the interest of the investing public or to the public interest; or
> (e) an act or omission that—
> (i) relates to the carrying on of any activity, other than a regulated activity, that an intermediary may carry on for an open-ended fund company under this Ordinance; and
> (ii) in the opinion of the Commission, is or is likely to be prejudicial to the interest of the investing public or to the public interest,
>
> and ***guilty of misconduct*** (犯失當行為) shall be construed accordingly.

[25-18] Section 193(2) of the SFO provides that, where an intermediary is, or was at any time, guilty of misconduct within the meaning of paragraphs (a)–(e) of the definition of 'misconduct' as a result of the commission of any conduct

27 HKMA, Supervisory Policy Manual Module SB-1 titled 'Supervision of regulated activities of SFC-registered authorized institutions' (12 September 2025) at para 4.3.13.

occurring with the consent or connivance of, or attributable to any neglect on the part of:

(1) in the case of a licensed corporation, another person as responsible officer of the licensed corporation or a person involved in the management of the business of the licensed corporation; or

(2) in the case of a registered institution, another person as an executive officer of the registered institution or a person involved in the management of the business constituting any regulated activity for which the registered institution is or was registered,

the conduct shall also be regarded as misconduct on the part of that other person, and 'guilty of misconduct' shall also be construed accordingly.

[25-19] Section 193(2), therefore, creates a form of secondary liability for responsible officers and persons involved in the management of a licensed corporation, and executive officers and persons involved in the management of a registered institution, whereby they may be liable for any misconduct on the part of the licensed corporation or registered institution which occurs with their consent or connivance, or which is attributable to their neglect. This is similar in concept to the imposition of secondary liability on directors for criminal offences committed by a corporation under section 390 of the SFO. As explained in **Chapter 10**, connivance in this context means a knowing failure to stop misconduct from happening.

[25-20] Section 193(3) of the SFO then further provides that, for the purposes of paragraphs (d) and (e) of the definition of misconduct, the SFC shall not form any opinion that any act or omission is or is likely to be prejudicial to the interest of the investing public or to the public interest unless it has had regard to such of the provisions set out in any code of conduct published under section 169 of the SFO, or any code or guideline published under section 112ZR or 399 of the SFO, as are in force at the time of occurrence of, and applicable in relation to, the act or omission. This means that 'misconduct' is further defined by the codes and guidelines which have been issued by the SFC.

2.1.1 Misconduct under paragraph (d) must relate to a regulated activity

[25-21] The SFAT in *Moody's Investor Service Hong Kong Ltd v Securities and Futures Commission*[28] confirmed that, for the purposes of paragraph (d) of the definition of 'misconduct', the act or omission must relate to a 'regulated activity' and not activity generally:

> As cited earlier in this judgment, 'misconduct' itself must apply to 'regulated activity' and not activity generally. In this regard, see s. 193, which provides that 'misconduct' includes –

28 *Moody's Investor Service Hong Kong Ltd v Securities and Futures Commission* (unreported, SFAT 4/2014, 31 March 2016).

> ... an act or omission relating to the carrying on of any *regulated activity* for which a person is licensed or registered which, in the opinion of the Commission, is or is likely to be prejudicial to the interest of the investing public or to the public interest. (emphasis added)[29]

[25-22] However, the term 'relating to' is capable of bearing a broad meaning:

> Returning for a moment to the provisions of the Ordinance, the Tribunal notes that the term 'misconduct', as defined in s 193, includes 'an act or omission relating to the carrying on of any regulated activity'. In ordinary parlance, the phrase 'relating to' describes a form of connection, that is, a description of the way one thing stands in connection with another. It is not a precise phrase, the Tribunal recognises that, and, as such, for purposes of statutory construction, it is capable of bearing a broad or narrow meaning in order to further the legislative purpose. ...[30]

[25-23] When the issue came before the Court of Final Appeal, Lord Neuberger confirmed that the legislative purpose of paragraph (d) points away from giving its provisions a narrow meaning:

> Further, when one considers the purpose of section 193(1)(d), it appears, if anything, to point away from giving its provisions a narrow meaning. The section is in a Part of the Ordinance which is concerned with regulating and sanctioning 'regulated activity' in financial markets, by licensed persons. It therefore should be interpreted bearing in mind that it was enacted as a part of a scheme introduced to protect members of the public and financial markets against inappropriate or substandard behaviour, and which is directed to sophisticated people, expert and experienced in financial markets, who will, as [Counsel for Moody's] acknowledged, be in a privileged position as a result of being licensed, and who will often have ready access to legal advice, and some of whom will be (in many cases perfectly properly) keen to find ways of avoiding or minimising any control over their activities.[31]

[25-24] In *Choi Chi Kin Calvin v Securities and Futures Commission*, the SFAT found that the applicant's conduct in respect of a pre-IPO investment opportunity, while not itself a regulated activity, was nevertheless 'related to' his advising on the subsequent IPO, which was a regulated activity. The applicant's conduct in respect of the pre-IPO investment could, therefore, form the basis of a finding of misconduct.[32]

29 *Moody's Investor Service Hong Kong Ltd v Securities and Futures Commission* (unreported, SFAT 4/2014, 31 March 2016) at para 78.

30 *Moody's Investor Service Hong Kong Ltd v Securities and Futures Commission* (unreported, SFAT 4/2014, 31 March 2016) at para 106.

31 *Moody's Investor Service Hong Kong Ltd v Securities and Futures Commission* (2018) 21 HKCFAR 456, [2018] HKCU 3506, [2018] HKCFA 42 at para 40.

32 *Choi Chi Kin Calvin v Securities and Futures Commission* (unreported, SFAT 4/2022, 29 September 2023) at para 460.

2.1.2 Codes and guidelines

[25-25] Section 169(1) of the SFO gives the SFC the power to publish codes of conduct:

> for the purpose of giving guidance relating to the practices and standards with which intermediaries and their representatives are ordinarily expected to comply in carrying on the regulated activities for which the intermediaries are licensed or registered.

[25-26] Sections 112ZR and 399 of the SFO further give the SFC the power to publish codes and guidelines to provide guidance in respect of any matter relating to the incorporation, registration, management and operation of open-ended fund companies, including their administration and procedure; the business of open-ended fund companies; the furtherance of any of the SFC's regulatory objectives; in relation to any matter relating to any of the functions of the SFC under any of the relevant provisions; or in relation to the operation of any provision of the SFO.

[25-27] At the time of writing, there have been some 12 codes[33] and 41 guidelines[34] issued by the SFC under the SFO.

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33 Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission (2 October 2024); Code of Conduct for Persons Providing Credit Rating Services (June 2011); Code of Conduct for Share Registrars (2024); Code on Immigration-Linked Investment Schemes (April 2003); Code on Open-ended Fund Companies (11 September 2020); Code on Pooled Retirement Funds (2 October 2024); Code on Real Estate Investment Trusts (2 October 2024); Corporate Finance Adviser Code of Conduct (1 October 2013); Fund Manager Code of Conduct (2 October 2024); SFC Code on MPF Products (1 January 2019); SFC Handbook for Unit Trusts and Mutual Funds, Investment-Linked Assurance Schemes and Unlisted Structured Investment Products, which incorporates the Code on Unit Trusts and Mutual Funds, the Code on Investment-Linked Assurance Schemes and the Code on Unlisted Structured Investment Products (2 October 2024); and the Codes on Takeovers and Mergers and Share Buy-backs (29 September 2023).

34 Advertising Guidelines Applicable to Collective Investment Schemes Authorized under the Product Code (April 2013); Client Identity Rule Policy (April 2003); Core Operational and Financial Risk Management Controls for Over-the-Counter Derivatives Activities of Persons Licensed by or Registered with the Securities and Futures Commission (April 2003); Debt Collection Guidelines for Licensed Corporations (April 2003); Fit and Proper Guidelines (1 January 2022); Guidance Note for Persons Advertising or Offering Collective Investment Schemes on the Internet (April 2013); Guidance Note on Cooperation with the SFC (1 June 2023); Guidance note on directors' duties in the context of valuations in corporate transactions (15 May 2017); Statement on the liability of valuers for disclosure of false or misleading information (15 May 2017); Guidance Note on Position Limits and Large Open Position Reporting Requirements (2 July 2025); Guidance Note on Short Position Reporting (18 June 2012); Guidance Note on Short Selling Reporting and Stock Lending Record Keeping Requirements (6 June 2023); Guideline on Anti-Money Laundering and Counter-Financing of Terrorism

(For Licensed Corporations and SFC-licensed Virtual Asset Service Providers) (1 June 2023); Guidelines for Electronic Public Offerings (April 2003); Guidelines for Market Soundings (effective 2 May 2025); Guidelines for Reducing and Mitigating Hacking Risks Associated with Internet Trading (27 October 2017); Guidelines for the Approval of Corporations as Approved Lending Agents (1 April 2003); Guidelines for the Exemption of Listed Corporations and Other Persons from Part XV of the Securities and Futures Ordinance (Disclosure of Interests) (5 September 2014); Guidelines for the Regulation of Automated Trading Services (1 September 2016); Guidelines for Securities Margin Financing Activities (4 April 2019); Guidelines for Virtual Asset Trading Platform Operators (1 June 2023); Guidelines on Competence (2 October 2024); Guidelines on Continuous Professional Training (1 January 2022); Guidelines on Disclosure of Fees and Charges Relating to Securities Services (1 January 2005); Guidelines on Disclosure of Inside Information (June 2012); Guidelines on Exempt Fund Manager ("EFM") Status Under the Code on Takeovers and Mergers (the "Code") (10 April 2001) (Revised 30 September 2010); Guidelines on Exempt Principal Trader (EPT) Status Under the Code on Takeovers and Mergers (the Code) (10 April 2001 (Revised 30 September 2010)); Guidelines on Marketing Materials for Listed Structured Products (September 2006); Guidelines on Online Distribution and Advisory Platforms (effective 6 July 2019); Guidelines on Waivers of Certain Licensing Fees (March 2003); Guidelines on applying for a relaxation from the procedural formalities to be fulfilled upon registration of a prospectus under the Companies Ordinance (Cap. 32) (21 February 2003); Guidelines on revised procedures for applications for Exempt Principal Trader (EPT) status under the Code on Takeovers and Mergers (Code) by principal traders that form part of complex international financial groups (5 July 2013); Guidelines on revised procedures for applications for Exempt Fund Manager (EFM) status under the Code on Takeovers and Mergers (Code) by fund managers that form part of complex international financial groups (5 July 2013); Guidelines on the application of the CPMI-IOSCO Principles for Financial Market Infrastructures (27 May 2016); Guidelines on use of offer awareness and summary disclosure materials in offerings of shares and debentures under the Companies Ordinance (March 2003); Guidelines on using a 'dual prospectus' structure to conduct programme offers of shares or debentures requiring a prospectus under the Companies Ordinance (Cap. 32) (21 February 2003); Guidelines to fund managers on dealing disclosure obligations under Rule 22 of the Code on Takeovers and Mergers (Takeovers Code) (12 January 2017); Guidelines to capital market intermediaries involved in placing activities for GEM stocks (5 August 2022); Licensing Handbook (15 July 2025); Licensing Handbook for Virtual Asset Trading Platform Operators (25 July 2025); Management, Supervision and Internal Control Guidelines for Persons Licensed by or Registered with the Securities and Futures Commission (1 April 2003); Outline of Part XV of the Securities and Futures Ordinance (Cap.571) – Disclosure of Interests (24 May 2024); Prevention of Money Laundering and Terrorist Financing Guideline issued by the Securities and Futures Commission for Associated Entities of Licensed Corporations and SFC-licensed Virtual Asset Service Providers (1 June 2023); Project on the Use of Plain Language – How to Create a Clear Prospectus (January 1998); Project on the Use of Plain Language – How to Create Clear Announcements (July 1997); Risk Management Guidelines for Licensed Persons Dealing in Futures Contracts (25 August 2023); SFC Disciplinary Fining Guidelines (for regulated persons under the Securities

[25-28] The decision of the SFAT in *Moody's Investor Service Hong Kong Ltd v Securities and Futures Commission*[35] supports the view that codes and guidelines issued by the SFC may only govern the conduct of activities regulated by the SFC, including regulated activities and activities (other than a regulated activity) that an intermediary may carry on for an open-ended fund company under the SFO. The SFC cannot impose obligations on regulated persons in relation to non-regulated activities:

> codes of conduct may only be used by the SFC to discipline licensed corporations to the extent that such codes govern the carrying on of the regulated activities[36] in respect of which such corporations are licensed. While codes of conduct are not to be interpreted as statutes, they are not capable of extending the SFC's jurisdiction to non-regulated activities even when such non-regulated activities are closely collateral to regulated activities. Licensed corporations are entitled to certainty as to the extent of their obligations. That being the case, the division between regulated and non-regulated activities is not some broad swathe of uncertainty, the full breadth of which must be subject to internal control procedures to ensure safety. A prudent licensed corporation may decide to follow that course but the law imposes no such obligation. What separates regulated activities from non-regulated activities is, therefore, a bright line. Put another way, either an activity is regulated (and subject to paragraph 4.3 [of the Code of Conduct which requires licensed corporations to have internal control procedures]) or it is not.[37]

[25-29] The above analysis is subject to the caveat that codes and guidelines issued by the SFC may also govern conduct 'relating to' the carrying on of activities regulated by the SFC in light of the broad interpretation given to the definition of 'misconduct'. As explained by the SFAT in *Choi Chi Kin Calvin v Securities and Futures Commission*:[38]

> There is considerable force in [Counsel for the SFC's] submission that given that section 193(3) of the Ordinance expressly requires the Commission to have regard to Codes of Conduct, published under section 169 of the Ordinance, before forming an opinion that an act is prejudicial to the interest of the investing public or the public interest, it would make little sense to

and Futures Ordinance) (10 August 2018); Suggested Control Techniques and procedures for Enhancing a Firm's Ability to Comply with the Securities and Futures (Client Securities) Rules and the Securities and Futures (Client Money) Rules (April 2003).

35 *Moody's Investor Service Hong Kong Ltd v Securities and Futures Commission* (unreported, SFAT 4/2014, 31 March 2016).

36 Note, the SFAT's analysis was phrased in terms of 'regulated activities' only as at the time of the decision, para (e) of the definition of 'misconduct' (which governs activities (other than a regulated activity) that an intermediary may carry on for an open-ended fund company under the SFO) had not yet come into effect.

37 *Moody's Investor Service Hong Kong Ltd v Securities and Futures Commission* (unreported, SFAT 4/2014, 31 March 2016) at para 206.

38 *Choi Chi Kin Calvin v Securities and Futures Commission* (unreported, SFAT 4/2022, 29 September 2023).

> construe the provision as being limited only to regulating conduct constituting the carrying on of the regulated activity, and not to conduct related to it.[39]

2.1.3 Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission

[25-30] The most important code is the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission (Code of Conduct) published by the SFC under section 169 of the SFO,[40] which governs regulated persons generally.[41] The Code of Conduct creates a principles-based regime, specifying nine general principles with which licensed and registered persons are expected to comply:

(1) **GP1 – Honesty and fairness**: In conducting its business activities, a licensed or registered person should act honestly, fairly, and in the best interests of its clients and the integrity of the market.

(2) **GP2 – Diligence**: In conducting its business activities, a licensed or registered person should act with due skill, care and diligence, in the best interests of its clients and the integrity of the market.

(3) **GP3 – Capabilities**: A licensed or registered person should have and employ effectively the resources and procedures which are needed for the proper performance of its business activities.

(4) **GP4 – Information about clients**: A licensed or registered person should seek from its client's information about their financial situation, investment experience and investment objectives relevant to the services to be provided.

(5) **GP5 – Information for clients**: A licensed or registered person should make adequate disclosure of relevant material information in its dealings with its clients.

(6) **GP6 – Conflicts of interest**: A licensed or registered person should try to avoid conflicts of interest, and when they cannot be avoided, should ensure that its clients are fairly treated.

(7) **GP7 – Compliance**: A licensed or registered person should comply with all regulatory requirements applicable to the conduct of its business activities so as to promote the best interests of clients and the integrity of the market.

(8) **GP8 – Client assets**: A licensed or registered person should ensure that client assets are promptly and properly accounted for and adequately safeguarded.

39 *Choi Chi Kin Calvin v Securities and Futures Commission* (unreported, SFAT 4/2022, 29 September 2023) at para 464.

40 SFC, Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission (2 October 2024).

41 For the purposes of the Code of Conduct, the term 'registered person' includes a 'relevant individual' as defined in s 20(10) of the Banking Ordinance: Code of Conduct at vii.

(9) **GP9 – Responsibility of senior management**: The senior management of a licensed or registered person should bear primary responsibility for ensuring the maintenance of appropriate standards of conduct and adherence to proper procedures by the firm. In determining where responsibility lies, and the degree of responsibility of a particular individual, regard shall be had to that individual's apparent or actual authority in relation to the particular business operations, and the factors referred to in paragraph 1.3 of the Code of Conduct. Those factors include: the individual's level of responsibility within the firm, any supervisory duties he or she may perform, and the level of control or knowledge he or she may have concerning any failure by his or her firm or persons under his or her supervision to follow the Code of Conduct.

[25-31] The Code of Conduct goes on to impose various specific obligations on licensed and registered persons. However, the explanatory notes confirm that, in applying the Code of Conduct, the SFC will have regard to the general principles as well as its letter:

> The Commission will be guided by this Code of Conduct ('the Code') in considering whether a licensed or registered person satisfies the requirement that it is fit and proper to remain licensed or registered, and in that context will have regard to the general principles, as well as the letter, of the Code.[42]

[25-32] As noted above, the SFC is required to have regard to, among other things, the codes of conduct published under section 169 of the SFO when considering whether any act or omission is or is likely to be prejudicial to the interest of the investing public or to the public interest for the purposes of paragraphs (d) and (e) of the definition of 'misconduct'. In this context, the usual practice of the SFC is to define allegations of misconduct against a regulated person by reference to the general principles and paragraphs of the Code of Conduct which the SFC considers to have been contravened. The SFC may also take into account any failure on the part of an intermediary, or a representative of an intermediary, to comply with the provisions of the Code of Conduct when determining whether the person is fit and proper to be or to remain licensed or registered, as explained further below.

[25-33] In *HSBC Private Bank (Suisse) SA v Securities and Futures Commission*,[43] the SFAT rejected an argument by HSBC to the effect that the Code of Conduct was subject to the terms of the contractual agreement between a regulated person and its client, thereby allowing a regulated person to 'contract out' of its obligations:

> The Code does not constitute subsidiary legislation. However, it does constitute a clear guide, one that is admissible into evidence before this Tribunal, as to the principles that the SFC have the statutory authority to

42 Code of Conduct at vii.

43 *HSBC Private Bank (Suisse) SA v Securities and Futures Commission* (unreported, SFAT 3/2015, 21 November 2017).

take into account, and to act in accordance with, in furthering its regulatory responsibilities. By way of illustration, paragraph 5.3 of the Code lays down (in part) a guiding principle that, when a registered institution provides services to a client in derivative products, it must assure itself that the client understands the nature and risks of those products. Risks change according to changing circumstances. The guiding principle, therefore, is that the registered institution must take on the direct obligation, as part of its regulatory responsibilities, to assure itself that a client purchasing a derivative product at any time is aware of the risks that come with that product at *that* time. Is that obligation – one that comes into operation each time a client seeks to purchase a derivative product that has features that are new to him – capable of being diminished pursuant to a private contract between the registered institution and the client at the time of account opening, perhaps many months earlier? The Tribunal does not accept that this is permissible in law.

The principles set out in the Code act as a clear guide to the boundaries of a regulatory scheme. It may be a scheme which the SFC has fashioned in order to maintain appropriate safeguards for investors without stifling innovation and competition but the Tribunal is unable to see how, by that fact – in order to accord, in large measure at least, with its own commercial interests – a registered institution is able itself to alter the principles in terms of which it is obliged to conduct its business affairs.[44]

2.1.4 Relevance of employer's internal procedures and controls

[25-34] In *Chan Pik Ha Jenny v Securities and Futures Commission*,[45] the SFAT confirmed that a breach of an employer's internal procedures and controls might amount to misconduct under the SFO in certain circumstances. In particular, the SFAT identified three essential principles:

(1) First, if reliance is placed purely on internal controls, then the nature and extent of the controls must be determined. If the internal controls relate to such matters as hours of work, mode of dress and the like, then they will be relevant only to the relationship between employer and employee and have no broader reach. However, if purely internal controls seek reasonably to regulate procedures ensuring competence and integrity in the manner in which employees carry out their dealing responsibilities so that a failure to honour those controls will threaten the best interests of clients and the integrity of the market, then such controls may be taken into account by the SFC in its role as a regulator. This is because a failure to honour such controls may indicate, for example, that there has been a breach of General Principle 2 of the Code of Conduct, namely that in conducting his or her business activities, a licensed or

44 *HSBC Private Bank (Suisse) SA v Securities and Futures Commission* (unreported, SFAT 3/2015, 21 November 2017) at paras 92–93.

45 *Chan Pik Ha Jenny v Securities and Futures Commission* (unreported, SFAT 8/2013, 9 June 2014) at paras 21–27.

registered person shall act with due skill, care and diligence in the best interests of his or her clients and the integrity of the market.

(2) Secondly, internal controls, in so far as they seek to ensure competency and integrity in dealings, are not purely private but constitute an integral part of the regulatory system. In this regard, for example, paragraph 4.3 of the Code of Conduct requires a licensed or registered person to have internal control procedures and financial and operational capabilities which can be reasonably expected to protect its operations, its clients and other licensed or registered persons from financial loss arising from theft, fraud, and other dishonest acts, professional misconduct or omissions. Similarly, the Management, Supervision and Internal Control Guidelines for Persons Licensed by or Registered with the Securities and Futures Commission[46] recognise that, while internal control guidelines are fundamental, it is not possible to create a single set of universal applicability. That being the case, the internal control needs of a licensed or registered employer will vary from firm to firm depending on each firm's particular structure, business operations and needs.

(3) Thirdly, as in all major jurisdictions, Hong Kong's regulatory framework seeks to provide principles-based guidance as to expected practices and standards rather than copious detailed procedural standards which, in fast changing market circumstances, can rapidly become redundant.

[25-35] In the context of these principles, the SFAT explained the circumstances in which a breach of internal controls prescribed by an employer may be the subject of disciplinary action by the SFC:

> In this Tribunal's opinion, the three principles set out above, correctly summarise the approach that must be adopted when considering a breach of internal controls prescribed by an employer. Such a breach may be the subject of disciplinary action of a public nature, that is, action instituted by the SFC, because internal controls, in so far as they seek reasonably to regulate procedures ensuring competency and integrity in the manner in which employees carry out their dealing responsibilities, are not shut off from but are instead integrated into the regulatory framework that governs the securities industry. It is however not the breach of internal controls per se that renders an employee liable to SFC disciplinary action. It is rather the fact that that breach constitutes a failure to comply with the public principles-based regulations governing intermediaries imposed by the SFC. An example of such a principles based regulation, which is directly applicable in the present case, is General Principle 2 of the 2011 Code of Conduct which requires that a licensed dealer, in conducting his or her business activities, must do so with

46 SFC, Management, Supervision and Internal Control Guidelines for Persons Licensed by or Registered with the Securities and Futures Commission (1 April 2003).

due skill, care and diligence in the best interests of clients and the integrity of the markets.[47]

2.1.5 Supervisory responsibilities of responsible officers, executive officers and senior management

[25-36] As noted above, section 193(2) of the SFO creates a form of secondary liability for responsible officers of licensed corporations, executive officers of registered institutions, and persons involved in the management of licensed corporations and registered institutions, whereby they are made liable for any misconduct on the part of the licensed corporation or registered institution which occurs with their consent or connivance, or which is attributable to their neglect. However, in many cases, the SFC will not need to resort to the concept of secondary liability, because the SFC's codes and guidelines will impose direct obligations of supervision upon such persons which they will have contravened.

[25-37] For example:

(1) General Principle 9 of the Code of Conduct provides that the senior management of a licensed or registered person should bear primary responsibility for ensuring the maintenance of appropriate standards of conduct and adherence to proper procedures by the firm.

(2) Paragraph 14.1 of the Code of Conduct provides that the senior management of a licensed or registered person should properly manage the risks associated with the business of the licensed or registered person, including performing periodic evaluation of its risk management processes, and should understand the nature of the business of the licensed or registered person, its internal control procedures and its policies on the assumption of risk. Senior management should also clearly understand the extent of their own authority and responsibilities.

(3) The Management, Supervision and Internal Control Guidelines for Persons Licensed by or Registered with the Securities and Futures Commission[48] state that members of a licensed or registered person's senior management are ultimately responsible for the adequacy and effectiveness of the internal control system implemented. The Guidelines also contain specific control guidelines for important areas, including information management, compliance, audit or related review, operational controls, and risk management.

(4) The Guideline on Anti-Money Laundering and Counter-Financing of Terrorism (For Licensed Corporations and SFC-

47 *Chan Pik Ha Jenny v Securities and Futures Commission* (unreported, SFAT 8/2013, 9 June 2014) at para 27.

48 SFC, Management, Supervision and Internal Control Guidelines for Persons Licensed by or Registered with the Securities and Futures Commission (1 April 2003).