Application No. 6 of 2007

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

IN THE MATTER OF a Decision made by the Securities and Futures Commission under section 12 of the Leveraged Foreign Exchange Trading Ordinance, Cap. 451, and sections 194 and 198 of the Securities and Futures Ordinance, Cap. 571

AND IN THE MATTER OF section 217 of the Securities and Futures Ordinance, Cap. 571

BETWEEN

HONG KONG FOREX INVESTMENT LIMITED — Applicant

and

SECURITIES AND FUTURES COMMISSION — Respondent

Tribunal: Hon Mr Justice Stone, Chairman

Dates of Hearing: 28 January, 15 and 17 July 2008

Date of Determination: 20 March 2009

DETERMINATION

The application

1. By a Notice of Application dated 17 September 2007, the applicant herein, HK Forex, applies for a review of the decision of the SFC dated 27 August 2007 to revoke the licence of the applicant.

2. This decision was made under section 194(1)(i) of the Securities and Futures Ordinance, Cap 571 ('SFO'), and is a "specified decision" within the meaning of section 217(1) of that Ordinance.

3. With the consent of the parties, acknowledged in usual written form, this application has been heard by the Tribunal Chairman sitting alone, pursuant to the provisions of section 31 of Schedule 8 of the SFO.

The procedural history

4. This application has not followed the usual course.

5. This review initially was opened before the Tribunal on 28 January 2008; at that hearing the applicant, HK Forex, was represented by Mr Kevin Patterson of counsel, and the respondent regulator by Mr Roger Beresford.

6. During that first hearing, it became clear to the Tribunal, given the factual matrix from which the SFC action against HK Forex had arisen, that it was illogical and inappropriate for the present application to be heard and determined consequent upon this January 2008 hearing when two other applications, *No 10 of 2007* (against the ultimate major shareholder in HK Forex, Mr SH Tse) and *No 15 of 2007* (against Mr Eddie Ng Chit Chung, the Responsible Officer of HK Forex) were scheduled to be heard by this Tribunal in July 2008.

7. This situation caused the Tribunal concern, not least since the common factual matrix upon which the SFC disciplinary sanctions against HK Forex, Mr Tse and Eddie Ng had been based in all probability would result in substantial commonality of submission, and that therefore unless these 3 separate applications for review were heard at the same time, there remained at least the possibility of disparate (and thus potentially unfair) Determinations in these three cases.

8. Accordingly, during the January 2008 hearing of this application the Tribunal decided to adjourn part-heard this application by HK Forex, and ordered that it be completed at the same time as the two outstanding applications involving essentially the like subject-matter.

9. Consequent upon this decision to adjourn the instant application, the Tribunal was faced with the problem of what was to be done about the then current status of HK Forex, given that the penalty handed down for the alleged disciplinary infractions by that company was one of revocation of licence, and that in the view of the SFC a simple adjournment of the

application would result in an unjustified *de facto* extension of that licence until the completion of the July 2008 hearings of the other two associated cases; I apprehend that one of the reasons why this case had been pursued independently of the other factually-common cases against Mr Tse and Mr Ng was precisely because the regulator had wished to obtain an early resolution of the licence position of HK Forex.

10. In the event, the practical solution adopted by the Tribunal was to order the adjournment to July 2008 of the application for review by HK Forex, but with the following qualification: that pending the determination of that review, and of the two associated reviews by Mr Tse and Mr Ng, that there should be an interim suspension of the licence of HK Forex pending such determination of its application for review. It is fair to say that the Tribunal felt able to adopt this course because, on the face of the available papers, it reasonably could not envisage a situation wherein, even if the SFC decision as to revocation of licence were to be varied, any sanction ultimately to be handed down to HK Forex would be less than the period of interim suspension thereby necessitated by this interim adjournment.

11. This decision necessarily imported that the activities of HK Forex would come to an immediate halt, and in this context the Tribunal rejected the urgings of Mr Patterson, then acting on behalf of the company, to the effect that justice amply would be served in this instance by setting aside the extant SFC order for revocation of the licence of his client, and substituting therefor an order for a one month licence suspension, together with payment of a substantial fine – then suggested by Mr Patterson to be in the order of, say, HK$10 million.

12. Accordingly, in January 2008 an Order was made by the Tribunal staying the revocation order as imposed by the SFC on terms that there be an interim suspension of the licence of HK Forex, which interim suspension was to take effect from 4 am on Wednesday 30 January 2008, Hong Kong time – this time and date having been chosen to permit HK Forex to wind up its outstanding commercial arrangements – and that such interim suspension was to remain in place until determination of this application, together with the other two factually-associated applications.

13. At the end of that hearing an extemporary judgment was given by the Tribunal explaining the course that it had chosen to adopt: [see Transcript of the hearing of 28 January 2008, at page 49 *et seq*].

14. It is appropriate further to record that, an immediate application for a stay of execution of this interim suspension having been refused by this Tribunal, HK Forex immediately mounted an urgent appeal against the Tribunal's order of an interim suspension, which appeal thereafter was heard, but in the event the Court of Appeal refused to interfere: see the judgment of the Court of Appeal in *CACV 26 of 2008*, Rogers VP delivering his decision on 29 January 2009 immediately after hearing the appeal of HK Forex.

15. Thereafter, a directions hearing regarding the application for review by Mr Ng was held in normal course on 4 February 2008, at which representatives of HK Forex and of Mr Tse also attended (Mr Tse's directions hearing already having taken place at an earlier date), with the result that the hearing of Mr Ng's application, together with the adjourned

hearing of the HK Forex application and the hearing of Mr Tse's application, all were confirmed to be held during the period 15-17 July 2008.

16. In light of this somewhat unusual procedural history it remains to be added that at the resumed hearing of the adjourned HK Forex application that Mr Patterson did not attend, and that HK Forex then was represented by Mr McCoy SC, leading Mr Bernard Mak (which team also represented Mr Tse), and that the 'order of play' upon the hearing of these 3 applications was that Mr McCoy SC made his submissions on behalf of HK Forex on the opening day, 15 July, thereafter Mr Ng's application was heard on the following day, with Mr Oderberg of counsel representing Mr Ng, and on 17 July 2008 Mr McCoy SC returned to the Bar table and moved Mr Tse's application for review, and also made his reply in the application for review of HK Forex.

17. As was the case at the initial hearing in January, Mr Beresford appeared for the regulator at the July hearings of all three applications; for the July hearings he was assisted by Mr Kwok of counsel.

18. At the end of the day, therefore, and with some manoeuvring, the situation was achieved wherein the three applications were, if not 'consolidated' in the formal sense, at least were heard the one after the other.

19. I return now to relevant matters immediately surrounding Hong Kong Forex's application for review.

The regulatory background

20. Until 1 April 2003 leveraged foreign exchange trading was regulated under the old Leveraged Foreign Exchange Trading Ordinance, Cap 451 ('LFETO') which was enacted in 1994, and the powers of the SFC under section 12 thereof remained exercisable after 1 April 2003 pursuant to the Securities and Futures Ordinance, Cap 571 (the 'SFO'), Schedule 10, section 64.

21. 'Misconduct' was defined within section 12(7) of the LFETO, and section 9 contained matters to which the SFC may have regard in considering the 'fitness and properness' of any person; in addition, the Conduct of Business Guidelines for Licence Holders under LFETO was issued under section 76 thereof.

22. Leveraged forex trading now is defined as a 'regulated activity' in Part 1 of Schedule 5 to the SFO; section 193 defines 'misconduct', and section 129 contains the matters to which the SFC is directed, or to which the regulator may have regard, in considering whether a person (or entity) is 'fit and proper'.

23. Section 194 of the SFO is both disciplinary and regulatory, and the grounds for action under section 194 are disjunctive: in *SFAT No 4 of 2007, Lee On Ming, Paul and the SFC*, this Tribunal noted as follows (at paragraph 61):

> "I further accept the submission now made on behalf of the SFC that section 194, Cap 571 is both disciplinary and regulatory, and that the two grounds for action under section 194 are disjunctive.

> The question of whether a person is 'fit and proper' does not necessarily depend upon a finding of misconduct (albeit in practice in the vast majority of cases the two irrevocably are linked), and that the object of the section is to provide the SFC with powers of prudential regulation, and is not specifically limited to a power to discipline for past misconduct; thus, section 194 is concerned both with past conduct (in the sense of misconduct) and possible future conduct (in the sense of whether a person is fit and proper to continue to be a regulated person."

24. The Code of Conduct for Persons Licensed or Registered with the SFC, usually referred to simply as 'the Code', has been applicable since 1 April 2003, and Schedule 6 thereof contains additional requirements for licensed persons engaged in leveraged forex trading; these include safeguards relating, *inter alia*, to audit trails of client orders, minimum margin requirements, management controls and so on.

25. Mr Beresford has submitted that the SFC regards leveraged foreign exchange trading as a high risk activity, and he cited three reasons for this view: first, it is geared, often very heavily, second, many 'investors' do not understand currency fluctuations, and third, that the leveraged forex trader often may take an opposite position in the foreign exchange market – which, of course, is a world-wide phenomenon trading on a 24/7 basis.

26. Accordingly, he emphasized that leveraged forex trading was tightly regulated and for very good reason, and he further noted that only an unlicensed company can avoid the statutory regulatory safeguards, thereby considerably increasing the risk to clients.

27. Mr Beresford observed that in section 4 of the SFO, Cap 571, the SFC is charged with specific regulatory objectives, including the provision of protection for members of the public investing in or holding financial products, and also to minimize crime and misconduct in the financial industry. Among the functions set out in section 5 of the SFO, the regulator is required "to take such steps as it considers appropriate" to ensure that the relevant provisions are complied with, and to secure an appropriate degree of protection for members of the public investing in or holding financial products, having regard to their degree of understanding and expertise.

The factual background in this case

28. The applicant, HK Forex, first was registered as a leveraged foreign exchange trader on 21 September 1995, and since 1 April 2003 it had been operating under a deemed licence for Type 3 (leveraged forex trading) activities.

29. HK Forex, together with two other companies known as Sincere Bullion Ltd and Sincere Securities Ltd, is a wholly owned subsidiary of Sincere Finance Ltd, of which Mr SH Tse (the applicant for review in *SFAT No 10 of 2007*) is a substantial shareholder. I would add at this juncture that, as a result of its investigations, the SFC had concluded that Mr Tse also controlled a company known as 'Tse's Macau', which trades foreign exchange, but which entity neither is licensed in Macau nor in Hong Kong.

30. It is undisputed that HK Forex has had a very poor record of prior convictions and disciplinary actions, and in his useful and detailed skeleton argument Mr Beresford has set out the relevant sequence of infractions and sanctions which have occurred during the period from September 1999 to 2002.

The 1st NPDA

31. The origin of the present application for review began on 23 June 2006, when by a Notice of Proposed Disciplinary Action of that date ('the 1st NPDA'), the SFC gave HK Forex an opportunity to be heard regarding its then proposal to suspend the licence of HK Forex for a period of 12 months.

32. In this 1st NPDA, which consists of some 21 pages and 94 paragraphs, plus 4 Appendices, the SFC set out in detail its 'Grounds for Concern' (at page 5 *et seq*); this document, which speaks for itself, covered the circumstances underpinning the 5 convictions, during the period March 2004 and February 2006, of HK Forex itself and of unlicensed persons associated with HK Forex who actively had engaged in leveraged forex trading, and noted that at the time of commission of these offences, which was between March 2001 and July 2004, senior management of HK Forex with supervisory responsibilities included Mr Eddie Ng [now the applicant in *SFAT No 15 of 2007*] and a Responsible Director of HK Forex since 4 December 2000, and also one Mr Randy Li, a Responsible Director of HK Forex from August 1999 to October 2003, and also a representative of Sincere Securities between January 2000 and February 2004.

33. The ‘Internal Control Failings’ of HK Forex as revealed by the evidence underpinning these 5 convictions was highlighted in detail, including reference to claims by Eddie Ng that he would not allow unlicensed staff to handle client accounts nor to ‘cold call’ potential clients, and like claims by Randy Li, and after analysis of each conviction the SFC stated its views on the issues thus raised by the relevant circumstances.

34. In this 1st NPDA the SFC set out in some detail the perceived breaches of the Code of Conduct and the ‘Conduct of Business Guidelines for Licence Holders under the LFETO’ which it concluded had occurred, and thereafter referred to the previous compliance record of HK Forex, with focus upon the 1999 conviction of HK Forex – then known as “Tse’s Forex Investment Company Limited” – and disciplinary sanctions arising out of the company permitting four of its employees to engage in leveraged forex trading without being duly licensed as representatives.

35. Thereafter the emphasis within the 1st NPDA changed to the disciplinary sanctions of 2002, based upon the continuation of similar breaches by the company – which by that stage had changed its name to “Hong Kong Forex” – and which also related to the fact that from September 1999 to September 2000, HK Forex was found to have allowed its account executives to introduce clients to trade in “black market” leveraged foreign exchange contracts and Hang Seng Index Futures through related Macau entities, and its conclusion that such Macau “black market” activities could not have occurred without the knowledge of the responsible directors and senior management at HK Forex – which included SH Tse, the major shareholder and director of HK Forex, and TW Leung, the general manager

of Sincere Finance, both of whom were concerned in the management of HK Forex at the time.

36. As a result of these findings, HK Forex, SH Tse and TW Leung were publicly reprimanded on 11 March 2002 for allowing Macau "black market" activities, and it was made clear to SH Tse and to TW Leung that, had they been 'registered' with the SFC, their licences would have been revoked.

37. Apart from HK Forex, a total of 12 persons were disciplined, and the 1st NPDA makes it clear (at paragraph 72) that "this should have been a serious lesson for Hong Kong Forex", albeit it goes on to observe that "… HK Forex did not appear to have learnt anything from it, in light of the five subsequent convictions for breaches involving Hong Kong Forex from March 2001 to July 2004."

38. This 1st NPDA also makes mention of "two independent internal control reviews" within HK Forex consequent upon the 1999 conviction and disciplinary sanctions and the 2002 disciplinary sanctions, whereby, as required by the regulator, HK Forex had appointed an independent accountant to conduct a review of its internal control procedures; this had resulted in two reports respectively dated 18 August 2000 and 23 September 2002, prepared by Li, Tang, Chen & Co, which reports specifically had identified HK Forex's need for independent checks and balances in order to ensure proper compliance with regulatory requirements.

39. The SFC further observed within the 1st NPDA (at paragraph 75) that had the recommendations within these reports been implemented, unlicensed and 'cold calling' activities within HK Forex could have been prevented or detected, and that it appeared that HK Forex did not conduct independent checks to ensure compliance, or, if it did, such checks were inadequate to achieve such compliance.

40. The point also is made in this document that notwithstanding the convictions and disciplinary infractions of September 1999 and of March 2002, nevertheless in March 2004 HK Forex had been convicted for the like offence under section 5 of the LFETO as had been the case in September 1999, and that 4 other convictions, including one each in March 2004, December 2004, September 2005 and February 2006, also had involved HK Forex's business activities, which still involved unlicensed activities and 'cold calling'.

41. The conclusion of the SFC, therefore, (at paragraph 82 of the 1st NPDA) was that these repeated breaches of matters of a similar nature "were deliberate failures of Hong Kong Forex's senior management", alternatively "gross incompetence" on their part, and this despite the advice tendered within the 2 independent review reports.

42. Accordingly, the 1st NPDA proposed (at paragraph 84) to suspend the licence of HK Forex for 12 months under section 12 of the LFETO and section 194 of the SFO.

43. As is usual in these cases, representations were invited to be made, in this instance both written and, if thought necessary, oral, and in this regard there was an offer of a meeting with the regulator to discuss these matters.

44. On 31 August 2006, the then solicitors for HK Forex, Troutman Sanders, made written representations on its behalf in response to the 1st NPDA.

45. This detailed document, of some 20 pages, speaks for itself.

46. The gravamen of the response is set out at paragraph 2.7 thereof, which sets out reasons why the proposed findings of the regulator and the proposed sanction were not appropriate in light of the factors therein listed, which factors, *inter alia*, involved assertions that the evidence did not support the findings of "blatant disregard" of the Code and Guidelines, that the conduct was "not so serious" as to warrant the proposed sanction of 12 months suspension, that "undue emphasis" had been placed upon the previous adverse disciplinary record of HK Forex, that any suspension of HK Forex would lead to "irreversible and irreparable financial hardship and other damage to the Sincere Group as a whole", and potentially place Sincere Securities into financial jeopardy, that such suspension was not in the public interest, nor was it "fair and proportionate" given the seriousness and nature of the alleged conduct, and that in any event the penalty of suspension of a licensed corporation was "inconsistent" with prior decisions of the SFC.

47. This response also averred that HK Forex was "prepared to take further actions to enhance the strength of its management and internal controls in discussion and cooperation with the SFC", and thereafter descended into a detailed analysis of the issues and facts as alleged, which were not conceded, together with comment upon the relevant standard of proof, the proposed sanction and the ramifications of the proposed sanction, and a comparison of penalties for like breaches. Reference in this letter also was made to the possible purchase of "a substantial minority stake" in the Sincere Group (including HK Forex) by a 'Potential Investor', which would, it was averred, improve management and internal control, and further listed the "mitigating factors" advanced by the company.

48. Paragraph 12.3 of this letter of representation reads:

> "It is respectfully submitted that any suspension of HK Forex license for the Forex business is equivalent to imposing a "death penalty" with severe consequences not only for HK Forex but also for its clients, accounts executives, employees and related corporations in the Sincere Group"

and thereafter the writer averred, at paragraph 12.4:

> "For all of the above reasons, it is respectfully submitted that an amicable settlement of the present case will be in the best interest of the clients of Hong Kong Forex and the Sincere Group and the general investing public as a whole as well as the many account executives and employees of Hong Kong Forex and the Sincere Group, who otherwise will be left unemployed."

The 2nd NPDA

49. Again somewhat unusually, this letter of response did not result in a Notice of Final Decision on the part of the SFC.

50. To the contrary. The next procedural event was the issuance by the regulator of a '2nd Notice of Proposed Disciplinary Action' ('the 2nd NPDA') dated 22 March 2007, which once more is a substantial and detailed document of 38 pages and 179 paragraphs, plus an Appendix enclosing a List of Documents, a copy of section 194 of the SFO, and a pamphlet entitled "Disciplinary Proceedings at a Glance".

51. This document took the opportunity to review the history of the infractions to-date of HK Forex, and under the heading "Further Grounds for Concern" listed in significant detail no les than 13 further grounds for concern on the part of the SFC in relation to the ongoing activities of HK Forex.

52. *Part I* of these Grounds relates to *'Unlicensed activities'*, under the following heads: (A) a conviction for unlicensed activities regarding two HK Forex client accounts opened by an unlicensed person through HK Forex and its licensed staff; (B) an alleged 'incentive scheme' for unlicensed staff to lure clients to open accounts at HK Forex and/or Tse's Macau through associating with HK Forex's licensed staff; (C) a conviction for unlicensed activities regarding a Tse's Macau client account opened through associating with HK Forex's licensed staff; (D) alleged unlicensed activities regarding three Tse's Macau client accounts opened through associating with HK Forex; (E) the apparent control of Tse's Macau, which "reasonably suggested" that Tse was in control of Tse's Macau operations, and the that 3 registered shareholders of Tse's Macau were merely his nominees; (F) Tse's knowledge of 'Tse's Macau' business; (G) Tse's antecedents; (H) Tse's role in the unlicensed activities; (I) Preliminary

conclusions relating to the unlicensed activities, in particular in failing to implement effective internal controls; and (J) Preliminary findings relating to unlicensed activities.

53. *Part II* of these Grounds then take in allegations that HK Forex failed to act honestly, failed to issue monthly statements to clients, failed to ensure that proper records of orders were kept, and failed to ensure appropriate checks on order limits and order forms.

54. The proposed disciplinary action placed at the factual forefront the unlicensed activities which were alleged to have taken place in relation to Tse's Macau, paragraph 160 of the 2nd NPDA stating:

> "This is not the first time that Hong Kong Forex has been involved in unlicensed activities in relation to Tse's Macau. Leveraged foreign exchange trading activities at Tse's Macau flout both the laws of Hong Kong and Macau. Clients are stripped of their statutory protection when they are induced to trade in Tse's Macau, which is not regulated under Hong Kong or Macau law. Such repeated failings should not be tolerated because they adversely affect investors' interests and market integrity. It appears that it is most unbefitting for Hong Kong Forex, as a licensed corporation, to be encouraging and facilitating these unlicensed activities, in collaboration with persons associated with or acting through it and/or its staff…"

whilst paragraph 165 continued:

> "It appears that Hong Kong Forex's staff and persons associated with or acting through Hong Kong Forex and/or its staff were able to engage or assist in unlicensed activities without fear of interference from the senior management. The corporate identities of Hong Kong Forex, Tse's Macau and Sincere Bullion were interchangeable. The licensed status of Hong Kong Forex appears to have been used as a disguise to cover up the operations of Sincere Bullion's unlicensed staff. It appears that this is conduct unbecoming and unprofessional and the unlicensed activities,

> apparently perpetrated with Tse's consent or connivance, defied the purpose for which a licence was originally granted to Hong Kong Forex."

Paragraph 167 and paragraph 168 announce the significant variation in sanction from that proposed in the 1st NPDA, and why such variation was thought appropriate; these paragraphs read:

> "Accordingly, we currently propose to revoke Hong Kong Forex's licence under section 194 of the SFO for all the allegations in the First Letter [the 1st NPDA] and in this letter. Considering the more serious gravity of Hong Kong Forex's failings, suggested by the further incidents described in this letter, we consider that the proposed sanction of 12 months suspension for the matters alleged in the First Letter is inadequate and we now replace it with the proposed sanction in this letter.
>
> We believe the penalty of revocation is appropriate because all of the breaches suggest that Hong Kong Forex did not have any adequate internal controls and had no regard for the regulatory regime at all. There were two previous public reprimands and two convictions for similar matters against Hong Kong Forex. In relation to the matters in the First Letter and in this letter, a total of six individuals were convicted while another one is pending appeal against acquittal. So far, a total of 16 persons from companies within the Sincere Group were disciplined for unlicensed activities in Hong Kong and in Macau's 'black market'."

Paragraph 170 finally concluded:

> "We do not believe that any licensed corporation with such a continuous record of unlicensed activities and a seemingly total failure to effectively improve its internal controls should continue to be licensed."

55. On 9 June 2007, in response to this 2nd NPDA, further submissions were made on behalf of the applicant by M/s PC Woo & Co; this letter appended thereto a separate written submission from Hong Kong Forex which is signed by a director of HK Forex, Mr Yu On Lee.

56. This submission document clearly has been carefully drafted, and purportedly is responsive to the issues as raised by the SFC in the 2nd NPDA; I shall not here descend into the detail thereof, because in substance this seems to be reflective of the arguments variously placed before this Tribunal on behalf of HK Forex during the present application for review.

57. For present purposes, suffice to say that, at paragraph 89 of this written submission, the writer (whom I presume is counsel) strikes the following placatory note:

> "The Company frankly and whole-heartedly accepts that there were weaknesses in its then internal supervision and controls procedures and measures, and is determined and has plans to further improve the same. The Company remains willing to be disciplined by an appropriate sanction, and to resolve this case with the SFC. The Company wishes to meet with the SFC to discuss and work out an appropriate solution to the matter. The Company is prepared to submit a settlement proposal to the SFC at any time…"

58. On 27 August 2007, the SFC gave its Notice of Final Decision under section 12 of LFETO and sections 194 and 198 of the SFO.

59. Once again, this is a document of substance of some 22 pages, together with an Appendix with a coloured 'Time Chart of Events' which chronicles, in tabular form, the significant events/infractions which had led to the regulator to come to its final decision on penalty, which is stated (at paragraph 3) to be the decision to revoke Hong Kong Forex's licence.

60. Much of the material therein has reappeared within the submissions made on this review application by Mr Beresford on behalf of the SFC. For present purposes, therefore, suffice to say that the Reasons for the SFC Decision are set out in some detail (at paragraph 4 *et seq*) and appear under the headings of 'Deliberate failures to stop unlicensed activities', 'Flawed internal control measures', 'Control of Tse's Macau', 'Failing to act honestly', 'Other internal control failings', 'The sanction', and, finally, 'Consent to decision proposal', this being a response to the settlement urgings of HK Forex.

61. In this latter regard, paragraphs 120-122 of this 2nd NPDA serve to encapsulate the regulator's view:

> "Hong Kong Forex submitted that it would like to settle with a public reprimand and a substantial fine because any revocation would have severe consequences to Hong Kong Forex, its clients, account executives, staff members and related corporations of the Sincere Group and that it is prepared to take further actions to enhance the strength of its management and internal controls in discussion and cooperation with the SFC.
>
> Hong Kong Forex had flouted two previous settlements that were too lenient, viewed from today's standards. It has disregarded its duty to uphold the law in three different periods. Therefore it should not be given a fourth chance but should face a final determinative sanction to send a serious message to it and to the industry about serial recidivism.
>
> A public reprimand and a substantial fine would not send a sufficient deterrent message and have the appropriate industry impact. Given Hong Kong Forex's bad compliance record and that it could not be trusted to carry into effect what it had agreed to do in two settlements, it deserves a revocation, which is the only appropriate outcome."

62. It is against this final, documented and carefully reasoned view that this application for review now has been launched by HK Forex, which company during the course of this bifurcated application has had the benefit of representation by no less than three learned counsel.

63. I turn now, therefore, to the representations made on behalf of the applicant to this Tribunal during the extended hearing of this review.

Arguments mounted on behalf of HK Forex

64. At the initial hearing of this application commencing on 28 January 2008, Mr Patterson, counsel then representing the applicant, had advanced argument upon the basis of written skeleton submissions he had prepared for this purpose.

65. Mr Patterson made it clear at the outset that HK Forex no longer applied for a review of the findings of the regulator as to its 'misconduct', and noted that different 'Contingency Plans' had been agreed with the regulator in the event (a) that revocation was upheld, or (b) that this sanction was varied to deal with a possible 'suspension scenario'.

66. In effect, Mr Patterson's argument developed into an elaborate plea in mitigation, wherein 'liability' properly so-called was *not* disputed, but the extreme sanction of revocation, as proposed in the 2nd NPDA, specifically was attacked.

67. Mr Patterson's thesis that whilst HK Forex had been guilty of 'misconduct', by reason of the wrongful actions of senior management, nevertheless HK Forex remained "fit and proper" to be licensed; further that even if one were to accept all the adverse findings as had been made by the regulator in terms of the misconduct of HK Forex, the penalty of revocation was "unreasonable and excessive" in all the circumstances, and that other "more reasonable" sanctions were available to the SFC, which accordingly would have been the more appropriate.

68. In this regard Mr Patterson criticized as unlawful that which he divined to be a 'confidential third strike policy' he alleged was being adopted by the SFC, which policy, he maintained, had no valid application in section 194 disciplinary proceedings, and which, he said, "denigrated and debased" the statutory right of an applicant to be heard properly and fully without a pre-determined sanction arising from any so-called 'third strike'.

69. In the course of his submission Mr Patterson reviewed the content of the 1st and 2nd NPDA's, and made the point that the uplift in penalty (that is, from 12 months' suspension to the revocation of licence) was unjustified on the facts, and "appears to reflect the application of the hitherto undisclosed 'third strike' policy".

70. He noted that the sanction of revocation represented the harshest possible penalty which may be imposed upon an existing business licensed with the SFC, and effectively terminated the life of the company concerned; moreover, this was an unusual and oppressive penalty given that there undoubtedly were members of senior management who remained

licensed and in post, and who had *not* been the subject of severe criticism from the regulator.

71. At this point, he said, the company knew of no equivalent case wherein revocation of licence had been imposed in a similar situation, and thereafter (at paragraph 28, subparagraphs (1) to (6)), he analysed some of the individual cases within the activities of HK Forex of which complaint now had been made.

72. Mr Patterson also suggested that, at bottom, the SFC had found HK Forex guilty of misconduct and as unfit to remain licensed primarily on the basis that its senior management – and Mr Eddie Ng Chit Chung in particular, the applicant in *SFAT No 15 of 2007*, and the person characterized by the SFC as "the directing mind and will of HK Forex" – had been responsible for the repeated failure to address the risk of 'cold calling', unlicensed trading and "black market" trading as had been disclosed within HK Forex by the various SFC investigations.

73. Thus, this submission went, whilst some criticism validly was to be levelled against fellow executives of Mr Eddie Ng, including Mr Yu On Lee and Mr Law Chi Kan (who also was a Responsible Officer), it was clear that it was Mr Ng who bore the "primary responsibility" for what had occurred, as it was he who was responsible for the leveraged forex business and the staff thus involved.

74. Moreover, said Mr Patterson, findings of 'misconduct' did not in themselves constitute HK Forex being 'unfit for purpose' and thus unfit to

remain licensed, and in concluding, as it now had, that HK Forex in fact lacked the requisite 'fitness and properness' to remain as a licensed corporation, the SFC had failed to have regard to the efforts thus far made by HK Forex to improve its internal controls, and, in particular, to the appointment of Mr Alex Pang, formerly a senior director of the Enforcement Division of the SFC, as a non-executive member of the Board, together with the formation of a 'Compliance Committee' tasked with addressing the problems identified by the regulator in the operations of HK Forex.

75. It also was the case, he said, that in resolving to revoke the license of HK Forex, the SFC had erred in not specifically putting to HK Forex certain matters, and thus there was a lack of transparency in the sentencing process, not least in light of the 'third strike' policy which now appeared to be in place.

76. Nor, said counsel, had the SFC had any or any sufficient regard to the impact of the closure of HK Forex upon its business and staff, and thus the sanction would not represent "a fair and proportionate response to the matter in hand", the further fact that the management of HK Forex now had changed, given that with effect from 30 November 2007 Mr Eddie Ng had resigned from his position with the company, and that there now was actual physical separation of the businesses of HK Forex and that of Sincere Bullion Ltd – so that the alleged 'pairing' of unlicensed Sincere Bullion staff with those of HK Forex, so criticized by the SFC, no longer would occur. He also noted the fact that the account which 'Tse's Macau' had had with HK Forex was closed in March 2006, that there had been co-operation by HK Forex with the SFC investigation, and last but not least, that there was at

that time the "serious possibility" of a commercial buyer in place which was interested in acquiring a controlling stake in the gold bullion, securities and leveraged forex businesses of the Sincere Group, and that any such purchase would have to be approved by the SFC and thus, it confidently was anticipated, would involve both a change of staff and culture within these companies.

77. Mr Patterson acknowledged that HK Forex was in position to pay a significant financial penalty, and that it was realistically contemplated that a period of suspension indeed would be imposed, but insisted that licence revocation would be a step too far and an "inappropriate and excessive" sanction.

78. It is fair to say that whilst Mr Patterson mounted his submission with some skill, the Tribunal remained wholly unimpressed by the suggestion that upon review matters now could be put right simply by payment of a large fine and a relatively short period of suspension; as the transcript reveals, this sentiment was conveyed to counsel, and in fairly trenchant terms.

79. It struck me then, as now, that if the regulator itself wishes to enter a financial accommodation with a sanctioned party, that is essentially a matter for the SFC *qua* disciplinary body, but in so far as this Tribunal is concerned, upon the hearing of an application for review of SFC disciplinary action, a sanctioned party should not expect to achieve its aim of a variation of severe disciplinary sanction simply by waving its chequebook in the Tribunal's face. I wish to make it clear that in principle this Tribunal is

fundamentally averse to any idea that an applicant simply can buy its way out of trouble; if it wishes to interest the regulator in such a course in order at the outset to compromise or to ameliorate potential disciplinary action, so be it, but once application is made for review of such regulatory action before this Appeals Tribunal different norms are in place; in this regard there should be no room for misapprehension.

80. Accordingly, an order for interim suspension duly was made, as recounted earlier in this Determination, and the application was stood over to July 2008, the Court of Appeal, as earlier noted, having declined to interfere with this interim course.

81. At the resumed hearing, Mr McCoy SC – who by then, together with Mr Bernard Mak, had assumed the HK Forex brief in place of Mr Patterson – made it clear that he adopted Mr Patterson's submissions in mitigation, but he went further in what, by this time, obviously were changed circumstances.

82. In the situation in which HK Forex then found itself, some six months *after* the initial hearing, Mr McCoy sought to use that fact to justify the stance he now adopted, which was that "six months suspension is appropriate", and that what he now was looking for on behalf of his client was "immediate rehabilitation" [*vide* Transcript, 15 July, page 15, lines 8-10].

83. Mr McCoy submitted that notwithstanding that which he graciously characterised as the "prescience" of the original decision to suspend the licence of HK Forex for the 6 month period between the two

hearings, nevertheless the period as thus calculated from the original decision "ought now to represent a proper punitive deterrent element that is sufficient to protect the public".

84. He supplemented this argument by citing that which he maintained was the signally proportionate disparity between the sentences as handed out to his own clients Mr Tse (life suspension) and HK Forex (licence revocation) when compared with that handed down by the regulator to Mr Eddie Ng (three year's suspension), and thus he asked rhetorically "how can they get sanctions … significantly higher than Mr Ng's?" [Transcript, 15 July 2008, page 15, lines 25-26]. His position, as counsel for Mr Tse and for HK Forex, was that "Mr Ng's three years is an appropriate benchmark from which you would work down for Mr Tse and the company" [*op cit.*, lines 27-28], observing that it was plain that the SFC had taken an overall approach to the issue of sentencing [*op cit.*, pages 16, lines 3-10]:

> "They have obviously seen how the company, Mr Tse and Mr Ng all fitted together, and we say that the company on no basis, on no basis at all, could ever be worse off than Mr Ng, who had the decision-making human authority and capacity. It is not just odd but it is actually bizarre that the company is given revocation and Mr Ng is permitted in three years at the moment to rejoin the industry as before…"

85. Mr McCoy thereafter drew the attention of the Tribunal to the original skeleton argument of Mr Patterson, before concluding [*op cit.*, at page 18, lines 8-15]:

> "Even if one accepts all the adverse findings, and we don't, made by the SFC, we say that the penalty is unreasonable and excessive. This is really I think in criminal law terms a Newton hearing, where you admit liability but deny the scope and effect of it. We

> do admit that we have a potential liability and an actual liability for what went on, but we say that the overall finding is simply unsupportable…"

86. I turn now to consider Mr McCoy's submission as to the asserted "unsupportability" of the licence revocation of HK Forex.

Decision

87. If I may say so, the decision to hear all three applications for review arising out of the activities of HK Forex has contributed significantly to the ability of the Tribunal fully to comprehend the overall scope of the regulator's case; absent this form of 'consolidation' (I use the word loosely), there was at least a danger of inability to appreciate the bigger picture, with the additional spectre of inconsistent decisions within these three applications.

88. I make this comment not for the purpose of validation of the action as was taken by the Tribunal – it struck me, as it would any other judge, as an obvious course to adopt in the circumstances – but simply formally to emphasise that in future 'composite' cases of this nature it does not assist in the efficient and fair disposition of such applications for the regulator to 'hive off' and to seek to have heard and determined but one of such cases in advance of the 'connected others', as initially had occurred in this case.

89. The full import of what was happening on this occasion did not become clear to the Tribunal until the commencement of the hearing of the

review application by HK Forex in January 2008, and certainly it had not been evident at the 'directions hearing' some months earlier – hence the necessity in my view for preliminary thought to be given by the regulator and its counsel to the manner in which 'connected' applications are to be dealt with at the application for review level.

90. In this regard I intend no gratuitous criticism – at the July hearing of the three applications, Mr Beresford for the SFC fully recognized the utility of the underlying principle – but it seems to me that this is a point worth stressing for future instances wherein there is a common factual matrix and diverse sanctions are passed by the regulator upon various participants within parameters of a factually common background. Indeed, I suspect that it may assist the quintessential objective observer to read all three decisions in the respective applications of HK Forex, Mr Tse and Mr Ng, in order fully to understand the decision of the Tribunal in each of these three reviews.

91. In light of the principles expressly laid down over the past 6 years since the establishment of this Tribunal – which statutorily succeeded its forerunner in this area, the Securities and Futures Appeals Panel – I see no necessity to repeat in detail the content of accumulated Determinations dealing with the operation of these principles: suffice it to say, once again, that this Tribunal is *not* a regulator, that it neither has the skill nor the knowledge to be a regulator, and that it exists only as a statutory 'check and balance' to the exercise of executive disciplinary power in order to ensure that nothing has gone seriously wrong – "out of whack" is the rather blunt colloquial term that has crept into the lexicon of this

jurisdiction – or to ascertain whether, for any other reason, unfairness clearly can be demonstrated to have been visited upon an applicant for review.

92. In short, this Tribunal certainly does *not* exist to 'rubber stamp' the disciplinary actions of the SFC, but neither does it seek to substitute its own views for that of the market professionals 'on the ground': the fact that the Tribunal may, in its wisdom, have passed or have considered passing a different sentence at the SFC disciplinary level, is nothing to the point: unless and until a disciplinary action is demonstrated to be clearly wrong, either in principle or on the basis of mistaken/overlooked fact, this Tribunal will *not* interfere. Indeed, I venture the view that this conceptual approach is fortified by the occurrence of the present financial contagion, which by common consensus has arisen in no small part by reason of a lack of adequate financial regulation/oversight in many apparently sophisticated financial jurisdictions.

93. This said, I now concentrate on the particular case of HK Forex, albeit in practical terms it is difficult to separate its application with that of its owner, Mr Tse, a fact which of course is emphasized by their common representation by leading and junior counsel, Mr McCoy SC and Mr Mak.

94. In a nutshell, was the sanction of revocation of licence, as Mr McCoy so firmly suggested, a disproportionate aberration on the part of the regulator?

95. The short answer to this, it seems to me, plainly is 'No'.

96. If I may say so, whilst acknowledging the undoubted skill with which Mr McCoy warmed to his task, even an advocate of his considerable persuasive powers is unable to function as a modern alchemist, and thus effectively to turn black into white, or, at least, into a mild shade of grey.

97. It has been difficult to immerse myself in the details of the activities of this company, and indeed of that of Mr Tse and of Mr Ng, without forming the view that not only was the regulator fully entitled to take the view that it did, both in the case of HK Forex and also in the two related individual cases, but that, had it *not* acted as it did, and had it not reacted thus to an wholly untenable situation – replete as it was with ample historical precedent in terms of blatant misconduct and regulatory infraction – any omission so to do would have meant that the regulator manifestly would have failed in its public regulatory duty.

98. For my part, I am wholly resistant to the placatory submissions so soothingly advanced by leading counsel for HK Forex in this review. It is as plain as a pikestaff that HK Forex not only had a disgraceful cumulative history of continuing disciplinary contravention, but that it continued to embody a culture which is (or was) rotten to the core, and with regard to which the SFC cannot possibly be shown to have been incorrect, let alone 'plainly wrong', in taking the view that HK Forex deserved to be removed from the financial landscape by means of revocation of its licence.

99. I mean no disrespect if I do not refer in detail to the representations made on behalf of the regulator by its counsel, Mr Beresford, whom, in his detailed and useful skeleton argument, patiently led the

Tribunal through the catalogue of misconduct and deception perpetrated by this company: his 'Summary of misconduct' and attached Chronology provides an illuminating picture of this company's history of operations and of regulatory infraction.

100. Mr Beresford has also made useful submissions as to the meaning of "fit and proper" – 'fitness' tests competence and 'propriety' assesses integrity and suitability – and he has pointed out that under section 129 of the SFO, in considering whether a person is 'fit and proper', the SFC is required, in addition to any other matter it may consider relevant, to have regard to the ability of HK Forex and any of its officers to carry on the regulated activity competently, honestly and fairly. His argument was that each of these factors clearly is relevant in the present case: the failure of HK Forex, Eddie Ng and Randy Li to implement internal controls goes to competence, whilst 'consenting to and conniving' in unlicensed activities, including the clear referral of business from Hong Kong to Tse's Macau – supported, it should not be forgotten, by an institutionalized 'incentive scheme' – goes to honesty and fairness.

101. He further suggested that in terms of reputation, character, reliability and financial integrity, both HK Forex and its officers patently are found wanting; particularly venal in this context was the aforesaid fact that HK Forex account executives had been 'incentivised' to refer business that ought to have been brought into HK Forex to Tse's Macau. He also noted that there were 8 convictions of employees of HK Forex on the basis of infringements of regulated activity and unlicensed activities since March 2002.

102. The SFC, said Mr Beresford, was able to take into account information in its possession relating to other companies in the same group, and in the present case it clearly was able to take into account information relating to the operation of Sincere Bullion and Tse's Macau: a regular pattern had emerged of Sincere Bullion staff 'pairing up' with HK Forex staff to conduct unlicensed activities, including referring business to Tse's Macau, which itself was unlicensed and unregulated, and was the subject of complaints of loss from dissatisfied clients, who had been induced by HK Forex staff to trade forex in the Macau 'black market'.

103. Mr Beresford further argued that a "root cause" of HK Forex's ability to carry on business competently, honestly and fairly was the control by SH Tse of the Sincere Group, and he noted that the "cause of the impairment not having ceased", it was wholly likely that its effect would continue whilst this state of affairs prevailed.

104. Nor, he said, was there within the SFC any so-called 'third strike policy', nor any foundation for suggesting that such existed. Whilst the figurative expression 'third strike' was used in the Notice of Final Decision (at paras 101 and 111), its only purpose was succinctly to state the regulator's view of the "recidivist disregard" by HK Forex of 2 previous similar regulatory actions, and to express the view that this company should not be afforded opportunity to offend yet again. But there was, and is, he submitted, no indication of a Californian-type policy of "three strikes and you are out": in fact, the two NPDA's and the Notice of Final Decision spoke for themselves in demonstrating the great care and attention to detail

demonstrated by the regulator during its careful evaluation of the appropriate sanction.

105. I accept this submission.

106. I also accept the argument that the SFC has an obligation to consider the wider public interest, namely the deterrence of conduct of the adverse type repeatedly manifested by HK Forex, which, as earlier observed, appears to have had an overt culture of non-compliance and repeatedly had flouted the law and regulatory requirements. The fact that TW Leung and (as it appears) Mr Eddie Ng now have moved to Sincere Bullion – which is not required to be licensed and is not subject to the disciplinary jurisdiction of the SFC – does not strike me as conduct likely to ameliorate the situation as has arisen in terms of the activities of HK Forex, which, as Mr Beresford insisted, must be regarded as a "wholly delinquent organization" with little probability of improvement.

107. Nor for that matter did the issue of the possible sale of HK Forex seem to me to be anything to the immediate point. Whilst Mr Patterson initially had made a good deal of this "imminent deal" with a foreign third party, it struck me as plain that this was not a case of a whole-scale restructuring, wherein SH Tse was wholly to relinquish his interest in favour of an independent purchaser; to the contrary, this was no more than a case of a putative buyer sitting in the wings awaiting the outcome of the disciplinary action, and to all intents and purposes any such interest was most unlikely to withstand the interim suspension as was ordered by this Tribunal in January 2008.

108. Turning finally to the suggestion that the relevant matters had not been put to HK Forex by the SFC, I fail to see that this allegation has any analytical basis. Mr Beresford has stressed that the so-called "8th incident" – wherein the SFC then was in the process of prosecuting an unlicensed person, who had paired up with a licensed staff member of HK Forex for unlicensed activities in July to August 2006 – expressly was *not* taken into account in making the decision, as the Notice of Final Decision makes clear, at paragraph 65 thereof:

> "In considering the final sanction against Hong Kong Forex we have not taken the eighth incident into account. Our sanction decision has not been affected by the eighth incident and the evidence from the seven incidents was sufficiently cogent for us to decide that Hong Kong Forex's licence should be revoked."

109. As for the suggestion that the Democratic Party 'Stock Investor and Survey Report' was not raised, I find it difficult to take this point seriously; in any event, as Mr Beresford observed, this was only cited to answer the submission from HK Forex that a closure of HK Forex would cause collateral damage to other members of the Sincere Group, and in fact this was not an operative part of the revocation decision because, as was made clear by the regulator, whatever the impact might be of the licence revocation, there was perceived to be an overwhelming necessity to sanction HK Forex by reason of the very serious circumstances as existed.

110. It is clear that the field of leveraged foreign exchange contains within it great potential for client abuse and consequent loss, not least because of the complexity of the subject matter to the small (and doubtless unsophisticated and ignorant 'investor'), seduced by 'cold calling' and the

promise of easy riches, to dip his toe into what can only be described as a financial morass from which there is little chance of escape, let alone profit, a situation exacerbated in this case with the additional ingredient of the referrals of new clients to HK Forex to the wholly unregulated clutches of Tse's Macau – involving the so-called 'black market foreign exchange contracts' – wherein their money in all probability will have disappeared into a black hole, leaving no possibility of accountability or redress either in Hong Kong or Macau.

111. At the end of the day, it is clear to me that the SFC took the view, upon entirely justified grounds, that it had lost all confidence in HK Forex and in its ultimate controlling shareholder, Mr SH Tse, and that the sanction of revocation was both appropriate and necessary in the public interest. The regulator carefully considered the whole case, including its extensive history, and in the exercise of its discretion came to a decision with which this Tribunal emphatically declines to interfere upon this application.

112. By way of postscript, it seems to me that the brief further written submission filed on behalf both of the company and of Mr Tse, which was dated 3 November 2008, was anything but a persuasive addition to the debate.

113. The thrust of this subsequent document was that leveraged forex transactions speak for themselves as being high risk, and that the members of the public who partook were "street wise and alert to the intrinsic risks", in comparison to the unsuspecting and vulnerable members

of the public who in the current financial contagion have been "mulcted by the licensed banks". Thus, the argument continued, the overall loss to the public at the end of the day in the instant case was "thought to be less than HK$10 million", which is a figure which, it is said, withstands favourable comparison with the recent massive losses in the unregulated sale of derivative products by licensed banks. Moreover, the few remaining staff members of HK Forex, some 20 out of 600, remain on the books of Sincere Bullion, and the uncertainty of the present litigation outcome compounded with the instability of the global economic downturn paints a bleak picture for these remaining staff.

114. Hence, this written submission concluded, in an overall evaluation of appropriate sanctions "consonant with contemporary commercial realities", the terminal penalties of life disqualification [upon SH Tse] and life revocation [on HK Forex] would be "disproportionately severe and indeed swingeing".

115. I confess that this late plea did nothing to persuade me. To the contrary, it probably served to make things worse. I quite fail to see why or how the wholly disgraceful greed and obvious failure to have regard to risk management on the part of commercial banks now being rescued by governments around the world can have any bearing or persuasive effect in terms of the present case. The fact that greedy bankers also had their feet in the trough strikes me as nothing to the point, whilst the suggestion that the sum of HK$10 million in losses to the public as the result of the activity of HK Forex is somehow a mitigating factor strikes me as ludicrous. I know neither the provenance nor accuracy of this figure, and I presume that this

loss remains uncompensated, but I respectfully suggest to the framers of this argument that it makes little difference to small participants induced to participate in the unleveraged forex casino that others worldwide also have lost greatly as the result of untrammelled venality. Nor, for that matter, do I accept the evidentially unsubstantiated contention that the clients of HK Forex were 'streetwise' and alert to the inherent risks; it seems to me that the probabilities are quite the opposite, and that the vast majority of clients of a company which, together with Tse's Macau, appear to have been predatory organisations, were likely to have been 'cold called' by the account executives of HK Forex, who no doubt cared more for their own commissions, and who almost certainly gave no thought whatever to the interests of the small clients who were talked into participating, and to the losses which inevitably were to be incurred.

116. It seems to me that if there is one thing which emerges from the present worldwide financial contagion it is that financial centres require greater regulation, not less, and that a loosening of present regulatory standards, which would be the position if the sanction now visited on HK Forex was to be varied to a penalty of a lesser nature, most certainly is *not* the answer; to the contrary, it strikes me as essential, and for my part I have no intention whatever of interfering with the sanction of licence revocation as now visited upon HK Forex. If ever there was an appropriate case, in my judgment this is it.

117. However, the dark nature of the situation as thus revealed in this case has been without its occasional lighter moment. I refer here to the revelation, which I am assured is *not* apocryphal, wherein one of the

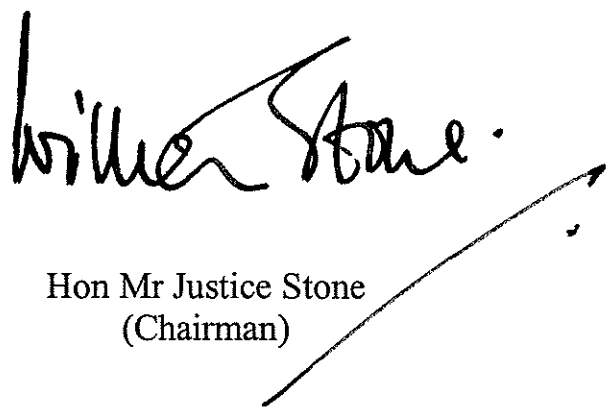
Assistant Directors of the SFC was selected and 'cold called' in his office by an unnamed HK Forex account executive with an invitation to 'invest' in unleveraged foreign exchange, thereby demonstrating that even rapacious conduct occasionally contains within it seeds of black humour.

Order

118. On the basis of the foregoing reasons, therefore, I make the following Order upon this application for review:

(i) The application by HK Forex in SFAT No 6 of 2007 is dismissed;

(ii) There will be an order *nisi*, such order to be made absolute within 21 days from the date hereof absent written representation to vary the same, that the costs of and occasioned by this application are to be to the respondent, such costs to be taxed if not agreed.



Hon Mr Justice Stone
(Chairman)

Representation:

On 28 January 2008:

Mr Kevin Patterson, instructed by Messrs P C Woo & Co., for the applicant

Mr Roger Beresford, instructed by the SFC, for the respondent

On 15 and 17 July 2008:

Mr Gerard McCoy SC and Mr Bernard Mak, instructed by Messrs Sit Fung Kwong & Shum, for the applicant

Mr Roger Beresford and Mr Dennis WH Kwok, instructed by the SFC, for the respondent