Application No. 10 of 2007

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

IN THE MATTER OF a Decision made by the Securities and Futures Commission under 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

TSE SHIU HOI — Applicant

and

SECURITIES AND FUTURES COMMISSION — Respondent

Tribunal: Hon Mr Justice Stone, Chairman

Date of Hearing: 17 July 2008

Date of Determination: 20 March 2009

DETERMINATION

The application

1. By a Notice of Review dated 28 October 2007 the applicant herein, SH Tse, applies for review of the decision of the SFC dated 11 September 2007 to prohibit the applicant for life under the provisions of section 194 of the Securities and Futures Ordinance, Cap 571 ('SFO') from performing certain 'regulated activities'.

2. This decision was made under section 194(1)(i) of the SFO and is a 'specified decision' within the meaning of section 217(1) of the SFO.

3. With the consent of the parties this application was heard by the Chairman sitting alone, pursuant to section 31 of Schedule 8, SFO.

4. This review, together with the reviews in *SFAT No's 6 and 15* (in relation to applications respectively made by Hong Kong Forex Investment Ltd ('HK Forex') and one Eddie Chung Ng Chit, (the Responsible Officer of HK Forex), were heard 'back to back' over the same hearing period, that is, 15-17 July 2008, given that each of these reviews arose out of the same factual matrix, namely the activities of HK Forex.

5. In this review the applicant, Mr SH Tse, was represented by Mr Gerard McCoy SC and Mr Bernard Mak, who both also represented HK Forex.

6. Mr Beresford, together with Mr Dennis Kwok of counsel, were instructed to appear for the SFC in each of these reviews.

The factual background

7. Mr Tse is a substantial shareholder in a company known as Sincere Finance Ltd, of which HK Forex, Sincere Bullion and Sincere Securities are wholly-owned subsidiaries.

8. Whilst neither licensed nor registered, as a person in the management of the business of HK Forex, Mr Tse is a 'regulated person' for the purpose of section 194 of the SFO, and thus, if the SFC is of the opinion that such person is, or was at any time guilty of misconduct or is not a fit and proper person to remain a 'regulated person', the SFC may exercise jurisdiction over him in terms of the potential sanctions set out in section 194: in the instant case the SFC concluded that the sanction within section 194(1) (a)/(b)(iv) was relevant in that it decided to prohibit the applicant for life from doing any of the activities so specified.

9. In terms of regulatory sanction the position of Mr Tse is irrevocably bound up with the conclusions of the SFC as to the activities of HK Forex, and thus there is substantial factual overlap between his case and

the regulator's case against that company, which is the subject-matter of *SFAT No 6 of 2007*, the Determination in which is published on the same date.

10. Suffice it to say that the SFC has come to the view that Mr Tse was guilty of misconduct and was regarded as not fit and proper to be a regulated person because he consented to, or connived in, unlicensed activities by the staff of HK Forex or persons associated with or acting through HK Forex and/or its staff.

11. By its Notice of Proposed Disciplinary Action ('NPDA') dated 20 July 2007 the SFC gave the applicant herein, Mr Tse, an opportunity to be heard in relation to its proposal to prohibit him for life under section 194 of the SFO.

12. This document, of some 50 paragraphs, noted that HK Forex was registered on 21 September 1995 as a 'leveraged foreign exchange trader', that it is wholly owned by Sincere Finance Holding Ltd, which also owns Sincere Bullion Limited, that Mr Tse is the major shareholder and Chairman of Sincere Finance, and that between June 1995 and March 2002 he also was a director of HK Forex.

13. Paragraph 2 of this NPDA recounted the existence of investigations conducted by the SFC under section 12 of the Leveraged Foreign Exchange Trading Ordinance ('LFETO') and section 182 of the

SFO “into your conduct in relation to the unlicensed activities that involved Hong Kong Forex, Sincere Bullion, and Tse’s Macau International Investment (Macau) Limited (‘Tse’s Macau’)”.

14. Paragraph 5 of the NPDA noted that “any misconduct of Hong Kong Forex should be regarded as misconduct on your part” because Mr Tse was involved in the management of HK Forex, and that the alleged failures of HK Forex apparently occurred with his “connivance or consent”; paragraph 6 of this document set out the reasons underpinning the conclusion as to “connivance and consent”, referring to the applicant’s control of HK Forex and Sincere Bullion and Tse’s Macau – whose business included clients referred to Tse’s Macau by staff of HK Forex and Sincere Bullion, that Mr Tse appeared to be the financial beneficiary of the activities of these corporate entities, that he should have known that Tse’s Macau was operating an illegal business “because you have been disciplined twice by us in relation to these business activities”, and that despite knowledge of the illegal activities, HK Forex had not appeared to put in place any sufficient measures to “prevent, identify and deter the unlicensed activities, apparently for the purpose of ensuring profits for you”.

15. Within the NPDA there follows a lengthy statement of ‘Grounds for Concern’ which refers to the 1999 and 2004 convictions of HK Forex in relation to unlicensed activities and disciplinary action (in 1999 and 2002) against HK Forex.

16. The invocation of the fact of prior disciplinary actions was a reference to the unlicensed activities by staff of HK Forex and the facilitating of the opening and operation of leveraged foreign exchange trading accounts with Tse's Macau, with the 2002 disciplinary action concluding that:

> "…HK Forex allowed its staff to introduce clients to trade in 'black market' leveraged foreign exchange contracts and Hang Seng Index Futures trading through related Macau entities and that the Macau 'black market' activities could not have occurred without the knowledge of HK Forex's responsible directors and senior management, which included you."

17. There follows a recital of perceived regulatory failings on the part of HK Forex, and the representations which were made by that company, and reference to Mr Tse's senior management role in HK Forex at the time of the earlier disciplinary actions in 1999 (when HK Forex was known as 'Tse's Forex') and in 2002, which resulted in public reprimands for unlicensed activities both against the company and himself.

18. Reference also is made to the content of a purported exculpatory interview with Mr Tse on 15 June 2006 "in relation to the various unlicensed activities that had occurred over the years at HK Forex", the gravamen of Mr Tse's responses at that interview being that Mr Tse personally was not involved in the management and that he had taken measures to ensure elimination of illegal activities, in particular involving Tse's Macau, before the regulator proceeded to analyse Mr Tse's alleged 'connivance' in the wrongful activities of HK Forex, Sincere Bullion and

Tse's Macau: see, for example, paragraphs 25 and 27 of the NPDA, which respectively read:

> "Your apparent control of HK Forex, Sincere Bullion and Tse's Macau gives rise to the only reasonable inference that staff of Sincere Bullion and HK Forex are all acting for your benefit. Corporate entities under your control appear to be also used interchangeably because the ultimate business goal of these entities is the same, ie. generating profits for you….
>
> Neither you nor HK Forex took any resolute action to prevent, identify or deter unlicensed activities, despite you and Hong Kong Forex's knowledge of involvement by people associated with or acting through HK Forex and/or its staff in introducing clients to Tse's Macau."

19. In terms of 'Proposed Disciplinary Action', the regulator noted that this is not the first time that Mr Tse had been involved in unlicensed activities in relation to Tse's Macau, that leveraged foreign exchange trading activities at that entity "flout both the laws of Hong Kong and Macau", given that Tse's Macau is not regulated under either Hong Kong or Macau law, and that repeated failings in this area, allegedly encouraged and facilitated by Mr Tse, in collaboration with staff of HK Forex, "should not be tolerated" because they adversely affected investors' interests.

20. Specific particulars of client infractions are given, and the SFC concluded (at paragraph 38 of the NPDA) that the staff of HK Forex had no fear of interference from senior management, that "the corporate identities of HK Forex, Tse's Macau and Sincere Bullion appear to have been used interchangeably", and that "the licensed status of HK Forex appears to have

been used as a disguise to cover up the operations of Sincere Bullion's unlicensed staff".

21. Accordingly, the SFC noted (at paragraph 39) that it proposed:

> "to prohibit Mr Tse for life under section 194 of the SFO from doing all or any of the following in relation to any regulated activities:
>
> 39.1 applying to be licensed or registered;
>
> 39.2 applying to be approved as a responsible officer or a licensed corporation;
>
> 39.3 applying to be given consent to act or continue to act as an executive officer of a registered institution under section 71C of the Banking Ordinance; and
>
> 39.4 seeking through a registered institution to have your name entered in the register maintained by the Monetary Authority under section 20 of the Banking Ordinance as that of a person engaged by the registered institution in respect of a regulated activity."

22. The regulator stated that the penalty of a life prohibition was appropriate in light of past breaches of HK Forex, "under [Mr Tse's] management and control", which had no adequate internal controls but "had no regard for the regulatory regime at all", noting the convictions of HK Forex and the past disciplining of individuals (for example, Leung Ting Wai, Randy Li Chi On, Mimi Lee Mei Mei) within the Sincere Finance Group for unlicensed activities in Hong Kong and in Macau's 'black market'. The NPDA substantively concluded:

> "We do not believe any person who is in the ultimate management and has ultimate control of a licensed corporation with such a continuous record of unlicensed activities and a seemingly total

> failure to effectively improve its internal controls should be allowed in the industry as a regulated person."

23. I have spent a little time on the content of this NPDA, which also contained 7 Annexures, because its very detail not only illumines the subject-matter of the present case, but in itself would seem to merit a cogent and detailed response from Mr Tse *if* indeed there was to be serious contention in answer to the equally serious assertions therein.

24. However, although the NPDA, in usual form, specifically invited representations from him in answer to these matters, none whatever was forthcoming. Nor, for that matter, has the Tribunal had the opportunity to see Mr Tse in the witness box either to refute or to mitigate these allegations.

25. But this is to get ahead of the story.

26. Since no response was forthcoming to the NPDA, on 11 September 2007 the SFC sent a Notice of Final Decision made under sections 194 and 198 of the SFO to Mr Tse.

27. Since no representations had been received from Mr Tse this document is in shorter form than usually is the case; in normal course it would recount the substance of the representations as received and the response(s) of the regulator to them. However, in this instance the SFC observed (at paragraph 23):

> "Since you have not provided reasonable explanations for not submitting your written representations in response to the NPDA within the specified time, we have decided this matter based on the evidence set out in the NPDA to you, the two NPDAs to Hong Kong Forex and the two defence submissions from Hong Kong Forex."

28. For present purposes suffice it to say that the regulator's Final Decision on its proposed disciplinary action was prohibition for life under section 194 from doing the specified activities as set out in the NPDA.

29. It is from this Final Decision that Mr SH Tse has seen fit to launch this application for review.

30. However, no witness statement was filed by Mr Tse, nor, as earlier observed, has he seen fit to go into the witness box pursuant to this application, contenting himself simply with reliance upon reference to the evidentiary material within the accumulated case papers, together with the persuasive contentions of his leading counsel, Mr McCoy SC.

Mr Tse's principal arguments

31. In outlining the arguments on behalf of his client, Mr McCoy produced an interesting skeleton argument which has served to simplify the task of the Tribunal in sorting out the wood from the trees in a case which, as usual, is overly-dependent upon box-files of paper.

32. For present purposes I allude only to the basic thrust of Mr McCoy's submissions, in terms both of his initial written and subsequent oral presentation, which irrevocably were bound up with the position adopted by his other client, HK Forex; at this stage it is worth pointing out that at the initial hearing of its review in January 2008 – at that time ordered to stand adjourned by the Tribunal to be heard at the same time as the related cases of Mr Tse and Mr Eddie Ng – HK Forex had indicated through its counsel, Mr Patterson, that its application for review of liability for the misconduct alleged was abandoned, and that when actually it was heard the review would be conducted (as indeed ultimately it was) essentially on the basis of a plea in mitigation of the sentence of licence revocation as visited by the regulator upon HK Forex.

33. However, the current position of Mr Tse, said Mr McCoy, is that disciplinary action should not be taken against him personally by reason of such misconduct as now had been admitted by HK Forex because at the material times he had had no interest or control in Tse's Macau, nor did he "consent or connive" at the misconducts as now admitted by HK Forex – indeed, leading counsel argued, as against Mr Tse the SFC could not have justified such findings on the basis of the evidence which they had amassed, inimitably characterized by Mr McCoy as "a veritable collection of half truths, theories and occasional surmises surrounded by the odd inference".

34. In this connection leading counsel reviewed (at pages 3-15 of his skeleton argument) the basis upon which the SFC had taken its

disciplinary action against Mr Tse, in the particular context, for example, of the control of 'Tse's Macau', and suggested in this regard that the regulator had ignored a slew of relevant evidence which would have suggested that "a much more reasonable inference is that Tse was not even marginally connected to the operation of Tse's Macau", whilst "the theories of the SFC in this regard had not even been put to Tse in interviews, so that Tse's denials could and should not have been blithely ignored by the regulator"; warming to this idea, he concluded:

> "Tse was only interviewed once. The theories of the SFC identified above (and indeed the other theories relied on by the SFC) were not even put to Tse by way of subsequent interview. The SFC sought to propose the most draconian order against Tse based on its rejection of his clear denials in the absence of a hearing, or an opportunity to deal with the accusations before an impartial and independent tribunal. Whether Tse filed any representation to the SFC after the NPDA was issued was hence neither here nor there…"

35. Thus, Mr McCoy's first theme, if I may shortly term it, was insufficiency of "hard-core evidence".

36. His second broad theme was that the SFC, consistent with their view of the evidence, also had arrived at the erroneous conclusion that HK Forex was "rotten to the core", and that, to the contrary, this was "an overestimation of the problem", and that of the 70 Account Executives as divided into 12 groups operating within HK Forex, the "diseased group was Group 1", headed by Ms Mimi Lee "of ill fame", the operative in charge of that specific group, and that all convictions of HK Forex had emanated from

the activities of that one group; or, as Mr McCoy graphically expressed the position, “the cancer was isolated in Group 1, which meant the great and severable bulk of the activities were completely legitimate and of no regulatory concern.”

37. It was accepted by Mr Tse, leading counsel said, that he *was* involved in the governance of HK Forex and Sincere Bullion to the extent that he had received periodic reports from senior management of those entities, and he indeed that he had been consulted on important decisions and measures to remedy regulatory breaches by those companies.

38. In this context Mr McCoy accepted that the decision in *Re Market Wizard Systems (UK) Ltd* [1998] 2 BCLC 282, construing the term ‘involved in the management’ also should inform the construction of the like term ‘involved in the management’ as was used in section 193(2)(a)(ii) of the SFO: thus, in light of the significant discretion and advisory role played by Mr Tse in these companies, Mr Tse indeed was “concerned or [had] taken part in the management” of HK Forex for the purpose of that subsection.

39. Mr Tse further agreed, said Mr McCoy, that unfortunately HK Forex had failed to take sufficient internal control measures, and hence, to a certain extent, misconducts admitted by HK Forex *were* attributable to neglect on his [Mr Tse’s] part.

40. However, whilst his client had understood that a period of prohibition perhaps was called for, his position was that a prohibition for life was "blatantly excessive and disproportionate in the circumstances", not least when it was considered that Mr Eddie Ng, the Responsible Officer of HK Forex, and a man with far more 'hands on' responsibility on a daily basis, and a person on whom Mr Tse had relied to give him appropriate information, had been given "only" a 3 year suspension of his licence.

41. Accordingly, on a comparative basis it was submitted that the length of prohibition invoked upon Mr Tse "should in any event be shorter than the suspension [3 years] to be imposed on Eddie Ng", not least since, as he put it, his other client, HK Forex, had now had had the "cancer cut out" from its corporate body, and that presently it was undergoing a period of interim suspension – dating from the initial hearing on 28 January 2008 – so that if and in so far as its own application for review were to enure in a favourable outcome resulting in the lifting of the order for licence revocation, as in the circumstances should be the situation so that the company now could return to being a functioning company, so should the period of Mr Tse's prohibition appropriately be tailored. That, at any rate, appeared to be the principal thrust of his submission in Mr Tse's individual case.

42. In addition to the twin themes of his address, as summarised above, Mr McCoy had a third, and more ambitious submission which appeared to be of relatively recent origin, and which had not been articulated in his skeleton argument.

43. It was this. He said that whilst he accepted that Mr Tse was a 'regulated person', for the purpose of the SFO he was neither 'registered' nor 'licensed', and that as a consequence the SFC had applied incorrect criteria in purporting to invoke a lifetime prohibition upon him. This was, said Mr McCoy, a 'jurisdictional point'; if correct, the Code of Conduct could and did have no application to his client, who thus was governed solely by the normal strictures of the common law, which involved only the general obligation upon citizens not knowingly to break the law, and that in this proceeding, which fundamentally involved 'fitness and properness to be licensed', his client could not be at risk, because the SFC decision-making process was flawed in that "it imposed inapt criteria". Although he accepted that this argument provided a basis for judicial review, Mr McCoy nevertheless maintained that this was a nettle with which this Tribunal now should grapple: "having got here, we ought to be able to finish here, that is the point".

Decision

44. In his submissions Mr McCoy SC clearly had to walk a difficult line.

45. Since his client pointedly had ignored *both* the invitation from the SFC to respond to the very detailed NPDA, and thereafter had spurned the opportunity to enter the witness box at the hearing of this application, and thus to inform the Tribunal of just how erroneous was the SFC's case underpinning the life prohibition visited upon him, it strikes me that in order

to succeed in this endeavour the points as now made by leading counsel must be regarded as so fundamentally cogent (and determinative) in face of the wealth of evidential material presently available against Mr Tse that it simply would not open to the Tribunal entertaining this application to decline to accede to the application.

46. The fact remains, however, that viewed from the applicant's perspective the persuasive burden upon him in the circumstances was set high, and light of all that I have read in this case, and indeed in the application for review of HK Forex – with which application, as I have earlier observed, Mr Tse's own case irrevocably is entwined – this strikes me as a daunting task indeed. Given the provisions of the legislation governing the operation of this Tribunal, the niceties and rules of civil evidence do not apply, and in substance perhaps the outstanding benchmark for the operation of the Tribunal in hearing these applications remains only the rigorous application of fairness to both parties – which no doubt explains the stipulation in the SFO that a Hong Kong judge is to be appointed to referee these applications by persons such as Mr Tse who are disgruntled by the disciplinary sanctions handed out by the SFC *qua* market regulator.

47. I say this at the outset because, notwithstanding the skill with which Mr McCoy SC invested his task, in light of all the circumstances of this case, particularly when taken together with the regrettable history of the activities of HK Forex, it seems to me likely to be difficult indeed to persuade any fair-minded Tribunal that the SFC had got Mr Tse's case

"plainly wrong", and that in terms of the sentence as handed down that it had hopelessly 'over-egged the pudding' such that, in accordance with established principles – as so frequently laid down in past Determinations of this body – this Tribunal thus would be constrained to interfere.

48. Whilst it does not greatly matter (and also probably is not the concern of the SFAT), I am minded to venture the further comment – as was made to counsel during the hearing of this application – that I remain mildly surprised that the SFC has gone to the trouble of disciplining Mr Tse in the manner that it has, namely in terms of a life prohibition from making application to be licensed or registered in relation to the stipulated regulated activities.

49. It is abundantly clear that Mr Tse never has sought either to be licensed or registered, and throughout his career in forex and forex-related activities that always he has been content to remain in background control; moreover, were he to deviate from his established *modus operandi*, and actually apply to the regulator to become licensed and/or registered, the historical facets of his career thus far almost inevitably would preclude favourable reception of any such application. So that when looked at from a *macro* perspective there seems to be little practical point – on either side – arising from imposition of the current sanction.

50. Be that as it may. This Tribunal is seized with this application for review of an existing SFC decision, and therefore must decide the case

on the basis of all the material which has been assembled (doubtless at considerable expense) for its consideration.

51. For this purpose I take Mr McCoy's basic 'submission themes' in turn.

52. First, I am unable to accept the contention that there was insufficient evidence available to the SFC to arrive at its conclusions, in particular in this context that the SFC finding as to Mr Tse's control of Tse's Macau was wrong because it had failed to consider relevant evidence in his favour, and also in its further conclusion that Mr Tse had 'connived' or 'consented' to the misconduct that undoubtedly had occurred at HK Forex.

53. In this regard Mr Beresford, who conducted the case for the SFC with typical thoroughness and attention to detail, has reminded me of the historical backdrop when, in 1999 and 2002, both HK Forex and the applicant were publicly reprimanded in relation to unlicensed activities at HK Forex and 'black market' leverage forex trading and Hang Seng Index futures trading through Tse's Macau; in this context he made the point that notwithstanding Mr Tse's resignation following the disciplinary action in 2002, the method of soliciting business for HK Forex and Tse's Macau clearly did not change, and that unlicensed persons, principally staff of Sincere Bullion, were being both encouraged and facilitated by staff of HK Forex to 'lure' clients to open leveraged forex trading accounts either with HK Forex or with Tse's Macau.

54. Mr Beresford said that in all the circumstances of the case there was no conceivable reason why – as the applicant now asserts – the SFC should have taken Mr Tse's bare interview denial at face value, and whilst he accepted that Mr Tse is not on record as a shareholder of Tse's Macau, Mr Beresford pointed to facts which, he maintained, did not lead to any conclusion other than that the applicant was in *de facto* control of the operation of Tse's Macau, and that the three registered shareholders of that entity clearly were mere nominees.

55. He pointed to the fact that the two operational bank accounts held by Tse's Macau with the Wing Hang Bank HK and Macau had as authorized signatories thereto the applicant himself and the applicant's son, Bryan Tse, and that these two persons were the only two authorized signatories (out of five) capable of operating the bank accounts of Tse's Macau because the company chop needed in order to operate these accounts was in Bryan Tse's possession.

56. The same Bryan Tse also had stated in his interview with the SFC that, in terms of Tse's Macau, "it's [his] father's business", and that he had been made to be one of the authorized signatories for Tse's Macau and that the applicant would prepare cheques for him to sign; he also had admitted that he himself knew nothing about the business of Tse's Macau, nor had any idea who provided funds for the business and the operation of the bank accounts: Bryan Tse simply had signed cheques which were presented to him by his father.

57. During his detailed submission Mr Beresford referred to the various matters relating to the running of Tse's Macau as were set out in his skeleton argument – for example, that the other two shareholders, a Mr Zhang and a Ms Crystal Yang – both resided outside Hong Kong or Macau, and were not authorized signatories of bank accounts of Tse's Macau, and he stated that, notwithstanding that the applicant had said that he did not know who was in charge of the management and daily operation of Tse's Macau, it was "incredible" that it could seriously be maintained that the person with control of the bank accounts, namely, the applicant and his son, to whom Mr Tse personally gave instructions, were not immersed in its management and daily operation.

58. Mr Beresford pointed out that the name 'Tse's Macau' was printed on the applicant's name card under the name 'Sincere Finance', and that unlicensed staff in the Sincere Group and several clients had confirmed to the SFC that they had been told by staff of Sincere Bullion/HK Forex that Tse's Macau was related to companies within the Sincere Group.

59. He further noted that certain individual clients – namely, Wong Ngai Lai, Au Lai Ping, and Wong Chi Yin – all had been asked to deposit monies into the Hong Kong Wing Hang Bank account, and that there could be no doubt that this same account was the operational bank account of Tse's Macau, which the applicant controlled: the bank transfer records showed that the applicant was "asked" to sign an authorization of transfer of funds from

the HK Wing Hang account to the Macau Wing Hang account amounting to over HK$7 million over a span of 7 days.

60. Mr Beresford thus invited the conclusion in light of the accumulated evidence that staff of HK Forex and persons acting through HK Forex had been able to engage and assist in unlicensed activities without fear of interference from senior management of HK Forex, and that in fact the identities of HK Forex, Tse's Macau and Sincere Bullion were *de facto* interchangeable, and thus that in all the circumstances, as uncovered by the SFC investigations, the SFC reasonably had concluded not only that Mr SH Tse controlled the operation of Tse's Macau, but that he must have been the beneficiary of this operation.

61. All that had emanated from Mr Tse in this context, said Mr Beresford, was a bare denial at interview of control of Tse's Macau, and that such a denial did not suffice to overcome that which Mr Beresford described as "the overwhelming inference" that the applicant had been in control of Tse's Macau. Nor had there been any necessity to conduct another interview before issuing the NPDA, in which the SFC contentions had been outlined in detail; the hard fact remained that Mr Tse neither had responded to the NPDA nor exercised his right, within his application for review to this Tribunal, to give evidence repudiating such conclusions.

62. True it is that in the course of his skeleton argument (at page 3 of this skeleton argument *et seq*) Mr McCoy had taken the opportunity to

attack the inferential conclusions and “theories” on the part of the SFC about his client’s control and beneficial ownership of Tse’s Macau, HK Forex and Sincere Bullion, and the further “assumption upon assumption” that Tse had gone out of his way to get HK Forex to condone unlicensed activities by its employees in favour of Tse’s Macau; he further maintained that these “theories” flew in the face of Mr Tse’s evidence to the SFC that he had handed over management and daily operation of Sincere Bullion to one Leung Ting Wai, of HK Forex to Mr Ng Chit Chung (‘Eddie Ng’, whose application for review is *SFAT No 15 of 2007*), and that he had asked one Mr Anthony Yu On Lee to “keep an eye on the administration of HK Forex, Sincere Bullion, Sincere Securities and Sincere Finance, leaving his approval to be required only for “special and non-recurrent expenses”. Mr Tse also had told the regulator, said Mr McCoy, that he had told Eddie Ng, Leung and Anthony Yu that if they found staff members referring clients to Tse’s Macau, that this must immediately be reported to the SFC: “I also told them anybody who would not follow my instruction will be fired immediately.”

63. Mr McCoy warmed to this theme in his written argument by submitting that the assertion of Tse’s interest in Tse’s Macau was the erroneous “building block” upon which the SFC had maintained that Mr Tse therefore had exercised his control over HK Forex in order to condone unlicensed activities, and that the SFC had failed to consider relevant evidence, namely that there were other signatories to the Wing Hang Bank account in Macau, and that there was a ‘Mr Chan’ at Tse’s Macau

responsible for handling matters relating to the opening of accounts: “this is a piece of independent evidence showing that the operation of Tse’s Macau did not necessarily involve Tse” was how leading counsel expressed the position.

64. Mr McCoy also sought to draw favourable inferences from various detailed references to account information of the Macau Wing Hang Bank account in 2001 and 2004 – he noted that the Hong Kong Wing Hang account of Tse’s Macau was opened only on 29 January 2003 – and that a resolution of Tse’s Macau dated 19 July 2004 indicated that the Macau Wing Hang account of Tse’s Macau could be operated by any 2 signatures out of Mr Tse, Bryan Tse, Wong Tung Shan, Fong Chung and So Kin Keung.

65. In turn this led to the conclusion pressed on the Tribunal by leading counsel that “a much more reasonable inference” is that Tse was “not even marginally connected to the operation of Tse’s Macau”, which lent credence to Tse’s answer to the SFC that he and his son only were involved as authorized signatories in the sense that Mr Zhang and Crystal Yang had asked them to operate the accounts for their (Zhang and Yang’s) convenience.

66. Mr McCoy asserted – at least in his extensive written submission, although many of these points pointedly were not individually articulated at the actual hearing, and were dealt with by an encompassing reference to the skeleton argument – that the “SFC could not reject the denials of Tse”, that the SFC plainly was wrong in taking its action against

Tse on the premise that he had an interest or control in Tse's Macau, that Tse's admitted involvement in the management of HK Forex did not lead to the conclusion that he had a like involvement in Tse's Macau, that the admissions of misconducts by HK Forex was "irrelevant" to the issue of whether the directors or controllers of HK Forex had "consented to or connived" at such failings, and that the SFC "theories" ignored the primary fact that his client had handed over his managerial functions in the Sincere Group pursuant to undertakings given by him in 2002, and that there were no facts to demonstrate that he had retained control of substantial managerial functions in any of the Sincere Group companies: "the SFC proceeded on the basis that all the individuals concerned were willing to risk their career or reputation and acted as Tse's protégé or dummies. In this regard, the SFC was oblivious to the background, personal characteristics and evidence of the individuals concerned…" was how this point was expressed.

67. It also strongly was suggested that in dealing with Mr Tse the SFC wholly had ignored the position taken by Mr Eddie Ng, who basically personally had accepted responsibility for the failings of HK Forex, and further had denied the involvement of Tse in such failings.

68. In context of this latter submission I note that I did not have the opportunity to see Mr Ng in the witness box, either in his own application for review nor in this one, albeit now having heard the 3 applications together – namely that of Mr Ng, together with Mr Tse and of HK Forex – it

is clear to me that strategically Mr Ng occupied a pivotal dual role as a convenient object of blame and as an apologist for Mr Tse.

69. In order to avoid the obvious conflict Mr Ng was represented by separate counsel, Mr Oderberg, notwithstanding a clear factual commonality of interest with HK Forex and Mr Tse, who both were represented by Mr McCoy SC. This enabled Mr McCoy, on behalf of Mr Tse, not only to single out Mr Ng for the greater part of the blame for the regulatory infractions which had occurred within HK Forex, but at the same time to treat Mr Ng's 3 month licence suspension as a higher range comparator for the purpose of sentence to be levied on his client.

70. I not only reject the sentence comparison argument, given that for my part I regard Mr Ng as having been fortunate indeed in terms of the lenience with which he was treated by the regulator, but further, and as is clear from the Determination in Mr Ng's application – *SFAT No 15 of 2007* – neither do I accept the contention that it was Mr Ng's actions (or lack of them) that were the primary problem, and that Mr SH Tse was merely the peripheral player that Mr McCoy wished to paint him; as I expressed the position in Mr Ng's Determination (at paragraph 65 thereof), "in my judgment it would have been difficult to do anything in that organization [HK Forex] absent Mr Tse's clear imprimatur".

71. A good deal more was said in Mr McCoy's written skeleton, such as the suggestion that it was illogical for Mr Tse to have preferred the

interest of Tse's Macau over that of Sincere Bullion and HK Forex, and that "reputational damage to the Sincere Group, his flagship, was necessarily of much greater concern to Tse", and that the matters referred to in the NPDA's sent to HK Forex also did not support the SFC's theories.

72. There is no necessity, however, to descend further into detail; the essential flavour of the detailed written submission is apparent from the foregoing.

73. As to the allegation regarding the 'connivance and consent' of Mr Tse, whilst there was no dispute that the applicant was involved in the governance of HK Forex and Sincere Bullion, and that he had had the authority to give (and indeed did give) instructions to senior management of HK Forex and Sincere Bullion from time to time, nevertheless the contention of Mr Tse appears to be that he was always "one step removed" from daily operation and colleagues, and thus that he could not have "connived" in the misconduct committed by the staff of HK Forex.

74. Mr Beresford's robust response to this was that given the repeated pattern of misconduct and unlicensed activities that had taken place since 2002, and given the prior disciplinary history of HK Forex going back to 1999, it should have been eminently clear to the applicant that what was occurring represented a stark repetition of matters for which the applicant himself specifically had been reprimanded in the past. Thus, said Mr Beresford, the regulator had not been looking at isolated incidents, but a

"systemic pattern of similar compliance failures/offences arising from the operation of HK Forex from its inception in 1995", and further that the applicant's apparent control of HK Forex, Sincere Bullion and Tse's Macau gave rise to "the only reasonable inference" that staff of these companies ultimately were acting for the applicant's benefit, and that corporate entities under the applicant's control appeared to be used interchangeably by staff, depending on circumstances and convenience, and all towards the end of generating profit for the applicant.

75. Nor, said Mr Beresford, in light of the continuation of the like pattern of misconduct and unlicensed activities, was there any evidence that the applicant had made any serious attempt to prevent or deter such unlicensed activities, despite his undoubted knowledge of the involvement in these matters of persons associated with or acting through HK Forex, or of its staff in introducing clients to Tse's Macau. Moreover, the fact that the 5 convictions as outlined in the 1st NPDA to HK Forex did not involve a 'Tse's Macau element' did not mean that the applicant should not be held responsible for compliance failures, which all stemmed from the same root cause, namely grossly inadequate internal control measures at HK Forex, which the applicant and senior management of HK Forex could have implemented but manifestly failed to do so: as counsel observed, "the applicant's unwillingness to comply with the regulations and his continued willingness to accept business from unlicensed sources demonstrate that he is unfit to be a regulated person".

76. In terms of the 'connivance and consent' element of the charge, Mr McCoy's skeleton argument maintained that "looking at the evidence in the round" it could not have been the case that Tse had consented or connived to certain incidents, which he thereafter itemized, stressing in this context the interview given by Eddie Ng to the SFC, which suggested the existence of routine meetings to advise staff as to what could or could not be done, and that efforts had been made to put the companies back "on the right track" notwithstanding the problems of recent years. Moreover, said leading counsel, Mr Tse himself had told the SFC on 15 June 2006 that in speaking to Zhang Dacheng and Crystal Yang he had informed them that he had wanted them "to cease doing business for people in Hong Kong", and that he also had told the regulator that "I have also told Ng Chit Chung, Eddie, Leung Tin Wai and Yu On Lee that if they found any staff members referring clients to Tse's Macau to open accounts there, they must immediately report to the SFC and act as witnesses…"

77. Thus, the argument went, it was clear that Mr Tse had only known of these incidents in their aftermath when they had been reported to him by Eddie Ng, and that there was no evidence that he had controlled HK Forex nor had consented to or connived in its misconduct, although it is accepted (at paragraph 37 of the written submission) that "a certain degree of neglect on the part of Tse was involved" in terms of instituting appropriate supervision – "Tse could have asked Eddie Ng to think of additional measures to monitor the activities of account executives in Hong Kong" – and that he could earlier have taken up with Zhang and Yang of

Tse's Macau that there should be no acceptance of clients referred to them by HK Forex: "Had Tse acted more proactively at that time, the misconducts by Cherie Yu, Mimi Lee and her subordinates might well have been avoided" was how Mr McCoy put this point.

78. In terms of the thematic submission that there simply was insufficient evidence available to the SFC to conclude that a life prohibition was appropriate – "blatantly excessive and disproportionate in the circumstances" was the advocate's denunciation – I find myself wholly unable to agree with Mr McCoy's dismissive summation. In my view the arguments put forward by Mr Beresford, which I accept, are overwhelming.

79. As to Mr McCoy's second basic theme, focusing upon the position of HK Forex, I deal with that more fully in the Determination in that company's own application (*SFAT No 6 of 2007*), but in so far as Mr Tse is concerned I am constrained to say that consider it extraordinary, in face of abundant evidence gathered by the regulator, and in light of the history of events, that this gentleman should have considered it appropriate to launch this review, and to brief leading counsel seriously to suggest that in terms of the punishment handed down that the SFC had been "plainly wrong" and "excessive" in the circumstances.

80. To the credit of Mr McCoy SC, however, sensibly he chose not to refer in any detail to the written submissions as were placed before the Tribunal (it may well be that he was afforded no opportunity to have any

input prior to being retained), and – as the transcript makes clear – in the event he chose to couch his oral argument in far more general terms; hence my characterization earlier in this judgment of his broad 'themes'.

81. From a purely forensic viewpoint this clearly was correct strategy, but at the end of the day I reject his fact-based characterizations, and his attempt to draw favourable or, as he put it, "more reasonable inferences" from the veritable mass of documentary material assembled by the SFC in the course of the disciplinary action, and thereafter for the conduct both of this, and of the two related reviews of HK Forex and Eddie Ng.

82. For the avoidance of doubt, I have no intention whatever of placing a blush favourable to Mr Tse (or, for that matter, to HK Forex or Eddie Ng) on the assembled material when the ineluctable fact is that neither Mr Tse nor Mr Ng chose to avail themselves of the opportunity to give evidence and to reject, on oath, adverse conclusions and inferences drawn by the regulator in the face of abundant – it may be thought overwhelming – circumstantial evidence.

83. In my view the situation is to the contrary. When a person pointedly refuses to go into this witness box to explain his position, he is in no position to complain if a tribunal declines to afford him the advantage of regarding his case in the most favourable light. This point was recently made in Court of Appeal in *CACV 69 of 2008*, (unreported) Judgment dated

26 February 2009, in which an alleged adverse possessor of land, seeking to maintain title thereto, sought to request the court to draw from the available evidence inferences favourable to her interest, notwithstanding that she had declined to enter the witness box at the trial of the action and to tell the first instance judge precisely what had, or had not, factually occurred to underpin the element of *animus possidendi* which was said to have existed in order to underpin the adverse possession she claimed. At the trial the judge had held against the claimant on the adverse possession claim, in the course of which he drew inferences adverse to the claimant from the available evidence in terms of an implied licence granted by the landowner to the claimant's deceased husband; on appeal leading counsel for the claimant sought – as indeed Mr McCoy valiantly has sought to do in this case – to overthrow the findings of the judge below on the basis of certain favourable inferences which she maintained should have been drawn in favour of her client.

84. This approach specifically was rejected, and the appeal dismissed, and on the point of the drawing of appropriate inferences, one of the members of the Court of Appeal observed as follows (*op cit.* at paragraphs 21-24):

> "…in the particular circumstances of this case the die effectively was cast when the defendant chose not to give evidence in the court below.
>
> Whilst …it is not for this court to speculate upon her reason for not so doing, the hard fact remains that in the context of *animus possidendi*, the one person who could have shed the greatest light upon the situation was available, yet pointedly was not called; accordingly the learned judge below…was left in the unenviable position of having relatively little hard evidence to work with, and

> of having to draw an inference from such evidence as was available as to the implication of a licence…
>
> Notwithstanding the considerable skill with which [leading counsel] invested her argument, against the background wherein one person who could be relied upon to know and to give the 'best evidence' as to the contemporaneous situation deliberately chooses not to testify, it seems to me that counsel is in difficulty in asking this court now to interpret such evidence as was before the judge in a manner advantageous to her client's case.
>
> In fact, it seems to me that the position is to the contrary – if, as here was the case, the defendant widow specifically elected to deprive the court below of the best available evidence as to the relevant intention to possess, then any doubt in the evidence …falls to be resolved *against* and not in favour of the defendant, who – by analogy with the position of a party responsible for material non-disclosure upon any issue – thereafter cannot be heard to complain if, as a consequence, an unfavourable inference then is drawn by the trial court against the defendant's interest…"

85. Accordingly, if this approach be correct, as naturally I consider that it is, it simply was not open to Mr McCoy to consider parts of the evidential material as has been assembled for the case against Mr Tse and/or HK Forex, and thus to submit (at paragraph 17 of the written submission) that the inference which *should* thus be drawn is not such as was drawn by the SFC, but that "a much more reasonable inference" in favour of his client was to be gleaned from the material there under scrutiny.

86. Nor, for that matter, do I understand why it should, or indeed could have been said (at paragraph 19 of the written submission) that the SFC improperly had rejected Mr Tse's denials as to relevant issues "in the absence of…an opportunity to deal with the accusations before an impartial

and independent tribunal". I am not entirely sure what was meant by that description – for my part I entertain the modest hope that this Tribunal accords with that characterization – but in any event in this review there was a golden opportunity for Mr Tse to enter the witness box and to give evidence to establish his case and clear his name, and at a stroke to remove any question of such adverse inference as is said wrongly to have been drawn against him.

87. Regrettably, however, this did not occur, and in my judgment the matter ends there – unless, as earlier commented, the material upon which the regulator chose to act is so plainly deficient and non-probative that it would be dangerous to permit any adverse findings made on such basis to stand.

88. Patently, however, this is not the case. To the contrary, it has been difficult to sit in this Tribunal absorbing the accretion of evidence in this, and the two other associated reviews involving HK Forex and Mr Ng, without it becoming crystal clear not only that there was a cogency and internal logic to the regulator's case, and the conclusions espoused therein, but that such evidence as was assembled reveals that which in my judgment Mr Beresford was correct to characterize as "a rampant culture" among the staff of HK Forex to engage in unlicensed activities, and that such activities involved Tse's Macau – in which context I note, as a postscript, the presence of an 'incentive scheme' for staff arising from the referral of business to Tse's Macau.

89. I thus agree with Mr Beresford's submission not only that there plainly was sufficient evidence against Mr Tse, whose consent and/or connivance at the prevailing situation I have no reason whatever to doubt, but that having regard to the totality of the evidence and the circumstances of repeated offences committed by HK Forex and its staff, the SFC was entirely justified to take the view that it has, and to invoke the most serious disciplinary action against Mr Tse.

90. Indeed, I would go so far as to say that in my view it takes a certain gall, twinned with an obvious lack of remorse (and perhaps even a lack of embarrassment) on Mr Tse's part, to suggest, *via* the mellifluous words of senior counsel, that this was not, and could not, be the case on the totality of the material and accumulated evidence now before the regulator, and thereafter placed before this Tribunal.

91. This clearly is sufficient to dismiss this application for review *in limine*. However, there remains for consideration Mr McCoy's third 'thematic submission', which is that of jurisdiction. If he is correct, that is the end of the matter. Jurisdiction is jurisdiction; either it exists or it does not, and merit has no part to play.

92. To repeat the nub of the argument: it is submitted that since Mr Tse is of a particular class of person – described by Mr McCoy as "an unusual animal…who is regulated, but not registered or licensed" – the necessary consequence is that the Code of Conduct, which applied to

'licensed' and 'registered' persons only, had no application to him and to his activities: "the approach of the SFC was to borrow erroneously the series of duties that apply to registered and licensed persons and to wrongly transpose them to regulated persons" was how Mr McCoy put it; thus that the SFC, as regulator, had imposed "inapt criteria" in deciding, as they now have, to impose a lifetime prohibition upon Mr Tse – whom, it is said, is governed in his activities *solely* by the negative strictures of the common law, as is every other citizen of Hong Kong, so that his only obligation was "not to knowingly contravene the law".

93. I suspect that this concept, enthusiastically promulgated by leading counsel, was the product of late-night reflection, possibly aided and infused by injudicious amounts of caffeine, and that, whilst at the time it may have seemed cogent, it is one of those ideas which palls when ventured in the cold light of the courtroom.

94. Certainly Mr Beresford thought so.

95. His immediate response was that the answer to this proposition was to be found within section 193 of the SFO, and in particular within the provisions of subsections (2) and (3), subsection (1) having dealt with the definition of four specific types of 'misconduct'.

96. Accordingly, subsection 193(2)(b)(ii) provided that where an "intermediary" (for which, for present purposes, one could interpose HK

Forex) is or was at any time guilty of misconduct of four stipulated categories as the result of the commission of misconduct occurring with the consent or connivance of, or attributable to any neglect on the part of a person involved in the management of a business of a registered institution, such conduct shall be regarded as misconduct on the part of that person, and 'guilty of misconduct' shall be construed accordingly.

97. Thus, said Mr Beresford, that which the SFC had found was that HK Forex's misconduct was as a result of the commission of conduct occurring with the consent or connivance of a person involved – namely Mr Tse – in the management of the business, then the result is that Mr Tse is deemed guilty of misconduct under subsection 2(b)(ii).

98. In this connection Mr Beresford stressed that, in the case of Mr Tse, the SFC did *not* find against him on the alternative basis of 'neglect' (as, to the contrary, had been the case with the disciplinary action against Mr Ng and HK Forex), and that the Notice of Decision as issued against Mr Tse read, at paragraph 3 thereof:

> "As a result of our investigations, we preliminarily found that you are a person involved in the management of Hong Kong Forex and that you are guilty of misconduct and you are not fit and proper to be a regulated person because you consented to or connived in the unlicensed activities by HK Forex's staff or people associated with or acting through HK Forex and/or its staff who induced clients to trade in leveraged foreign exchange contracts either in Hong Kong Forex or Tse's Macau. Accordingly, any misconduct of Hong Kong Forex should be regarded as misconduct on your part because you are a person involved in Hong Kong Forex's management and Hong Kong Forex's alleged failure has apparently occurred with your consent and connivance…"

99. Having proceeded thus, counsel said, the application of the Code of Conduct to Mr Tse – Mr McCoy's allegedly "inapt criteria" – was statutorily imported through section 193(3), which made specific reference to "any code of conduct published under section 169 or any code or guideline published under section 399 as are in force at the time of the occurrence of, and applicable in relation to, the act or omission"; in fact, Mr Beresford noted, the main Code of Conduct was published under section 399, and as to the statutory definition of 'regulated person', this occurred at section 194(7), which provided that such was any one of a licensed person, a responsible officer of a licensed corporation, or (and this was applicable to Mr Tse) "a person involved in the management of the business of a licensed corporation."

100. Accordingly, counsel for the SFC concluded, there was no basis for the sweeping assertion that the SFC had had no jurisdiction over Mr Tse.

101. I agree with and accept Mr Beresford's submissions. It strikes me as an extraordinary suggestion that the obligations of a 'regulated person' in the position of Mr Tse were neither more onerous nor extensive than the simple common law obligation of the normal citizen in the street not to contravene the law. I decline to accept Mr McCoy's suggestion that in this proceeding Mr Tse was, in effect, 'bomb-proof' ("you can't touch us"), and I have little hesitation in dismissing this ambitious submission as to lack of jurisdiction.

102. It follows from the foregoing, therefore, that none of the submissions as pressed on the Tribunal in this review by Mr McCoy have found favour, and this conclusion necessarily must result in the dismissal of this application.

103. As a postscript, on 3 November 2008, a short supplementary written submission "identifying or emphasizing certain points of mitigation" was received by the Tribunal. Whilst the heading of this document specifically referred to *SFAT 6 and 10 of 2007*, I took the view that it was more relevant to the application for review of HK Forex in *SFAT No 6 of 2007*, and accordingly I specifically sound to the matters therein in the Determination of that application, which is to be published at the same time as the Determination in this application by Mr Tse, and which views apply equally to this case. Suffice it to say that nothing in this supplementary submission affects my view of the merits, or the result of, the present application.

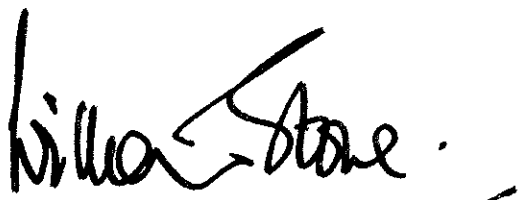
Order

104. Consequent upon the foregoing, the order of the Tribunal is as follows:

(i) The application for review by Mr Tse Shiu Hoi in SFAT No 10 of 2007 is dismissed;

(ii) There is to be a costs' order *nisi* that the costs of and arising from this application are to be paid by the applicant to the respondent, such costs to be taxed if not agreed;

(iii) Absent written submissions seeking a variation of such costs' order, the order *nisi* will become absolute at the expiry of 21 days from the date of this Determination.



Hon Mr Justice Stone
(Chairman)

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

Mr Roger Beresford and Mr Dennis W H Kwok, instructed for the Securities and Futures Commission