IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

Application No. 7 of 2007

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

NG CHIU MUI — Applicant

and

SECURITIES AND FUTURES COMMISSION — Respondent

Application No. 8 of 2007

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

LAW KAI YEE — Applicant

and

SECURITIES AND FUTURES COMMISSION — Respondent

Application No. 9 of 2007

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

TANG YUEN TING — Applicant

and

SECURITIES AND FUTURES COMMISSION — Respondent

Tribunal: Hon Mr Justice Stone, Chairman

Dates of Hearing: 15 and 16 April 2008

Date of Determination: 15 May 2009

DETERMINATION

The applications

1. This is the Determination consequent upon the hearing of three Applications for review by respectively **Ms Connie Ng Chiu Mui**, **Mr Law**

Kai Yee and **Ms Elke Tang Yuen Ting**, each of whom, at the material time, were officers of and were employed by a company known as Hantec International Limited ('HIL') a foreign exchange broker.

2. HIL was a Hong Kong company licensed by the SFC to carry out Type 3 (leveraged foreign exchange trading) regulated activity.

3. The applications share a common factual matrix, and concern allegations, and findings subsequently made by the SFC, in relation to the activities of these applicants in connection with the commercial activities of a company known as Cosmos Hantec International ('CHI'), a New Zealand company which carries on the business of offshore leveraged foreign exchange trading. CHI was and is *not* registered with the SFC.

4. HIL is part of the Hantec group which, I am told, is listed on the main board of the Hong Kong Stock Exchange through its holding company, Hantec Holdings Ltd.

5. HIL is wholly owned by Hantec Holdings limited, which company holds a 30% interest in CHI through a 100% held subsidiary, Hantec Bullion Investments Ltd.

6. Until May 2005 the offshore New Zealand entity, CHI, had established a presence in Hong Kong with the establishment of a 'liaison office' at Room 4408A, Cosco Tower, 183 Queen's Road Central. The offices of HIL were located on the 43rd and 45th floors of Cosco Tower.

7. In May 2005, subsequent to a raid by the SFC upon the 'liaison office' of CHI – a raid which resulted in the seizure of documents therefrom – CHI removed its operations to an office in Macau, and HIL moved into the vacated premises at Room 4408 Cosco Tower.

8. The applicants Connie Ng and KY Law were at the material times Responsible Officers of HIL.

9. Ms Ng (also known as Mrs Tang) is the wife of Mr Tang Yu Lap, whom I am told is the Chairman of the Hantec Group, and in his own right a Responsible Officer of HIL.

10. Connie Ng also was a director of CHI until 2005, and of Hantec Holdings, the ultimate parent of the Hantec Group, and the company which through its Overseas Investment Management Department provided in Hong Kong 'back-office' services to CHI.

11. Mr KY Law, in addition to being a Responsible Officer of HIL, has been a director of CHI since 2006.

12. The third applicant, Ms Elke Tang, was a licensed representative and Account Executive accredited to HIL during the relevant period.

13. By consent, these Applications have been heard together and have been presided over by the Chairman sitting alone, pursuant to the jurisdiction established by section 31, Schedule 8 of the Securities and Futures Ordinance, Cap 571.

The factual background

14. There is, as I have indicated, a common factual backdrop to the disciplinary action as now taken by the SFC against these three persons.

15. The matter arose thus.

16. The SFC received complaints against a number of licensed representatives of HIL who allegedly had induced individuals to open accounts with CHI in order to trade leveraged foreign exchange contracts, and in turn this prompted the SFC to conduct an investigation under section 182 of the SFO.

17. On 2 March 2005 the SFC raided CHI's premises at Cosco Tower and seized a variety of documents, including copies of CHI's account opening documents relating to Hong Kong clients, which showed licensed representatives accredited to HIL as their responsible Account Executives, internal documents of CHI showing Hong Kong as one of its target markets, and correspondence and other documents purporting to show the involvement of Hantec Group's Overseas Investment Management Department in the affairs of CHI.

18. As a consequence of this raid and consequent document seizure, the SFC formed the view that CHI in fact had been carrying on business within Hong Kong, notwithstanding that it was *not* licensed so to do, and for this reason was not subject to the regulatory jurisdiction of the SFO; more particularly the SFC came to the opinion that the three applicants herein, Ms Connie Ng, Mr KY Law and Ms Elke Tang, each of whom was licensed to

act for HIL, in divers ways wrongly had exceeded the ambit of such regulated activities, and illegitimately had been assisting CHI in carrying out its unregulated Hong Kong business.

19. These applications for review together encompass certain issues and/or preliminary points, and it may assist to deal with these matters at the outset before adverting to the circumstances and merits of each individual case.

(1) The 'jurisdictional issue': sections 114 & 115 of the SFO

20. The first issue has been referred to as a 'jurisdictional issue'; plainly the secondary liability now visited upon the applicants by the regulator cannot validly be said to be established *if*, on a true construction of the relevant statutory provisions, it cannot be said that the requirement underpinning such secondary liability, namely that in fact CHI had been carrying on unlicensed activities in Hong Kong, cannot be made good.

21. Section 114 (1) of the SFO reads thus:

> "(1) Subject to subsections (2), (5) and (6) no person shall –
>
> a. carry on business in a regulated activity; or
>
> b. hold himself out as carrying on business in a regulated activity.
>
> ….
>
> (3) Without prejudice to subsection (1)…no person shall –
>
> (a) perform any regulated function in relation to a regulated activity carried on as a business; or
>
> (b) hold himself out as performing such function"

whilst the term 'regulated function' is defined within section 113 as follows:

> " 'regulated function' in relation to a regulated activity carried on as a business by any person, means any function performed for or on behalf of or by arrangement with the person relating to the regulated activity, other than work ordinarily performed by an accountant, clerk or cashier"

Schedule 5 of the SFO stipulates that "leveraged foreign exchange trading" is a type of regulated activity, whilst Part 2 of Schedule 5 defines 'leveraged foreign exchange trading' as meaning:

> "(a) the act of entering into or offering to enter into, or inducing or attempting to induce a person to enter into or to offer to enter into, a leveraged foreign exchange contract;
>
> (b) the act of providing any financial accommodation to facilitate foreign exchange trading or to facilitate an act referred to in paragraph (a); or
>
> (c) the act of entering into or offering to enter into, or attempting to induce a person to enter into, an arrangement with another person, on a discretionary basis or otherwise, to enter into a contract to facilitate an act referred to in paragraph (a) or (b), but does not include…"

Section 115 (1) of the SFO is intituled 'Application of section 114 in relation to conduct or activities outside Hong Kong', and in relevant part reads:

> "(1) If –
>
> (a) a person actively markets, whether by himself or another person on his behalf and whether in Hong Kong or from a place outside Hong Kong, to the public any services that he provides; and
>
> (b) such services, if provided in Hong Kong, would constitute a regulated activity,
>
> then –
>
> (i) the provision of such services so marketed shall be regarded for the purposes of section 114(a) as carrying on a business in that regulated activity;

> (ii) the person's marketing of such services as referred to in paragraph (a) shall be regarded for the purposes of section 114(b) as holding himself out as carrying on a business in that regulated activity;…"

22. For the purpose of this case there has been some debate about the construction to be given to the phrase 'actively markets' within the opening words of section 115(1)(a).

23. In this connection Mr Bernard Mak, who appeared on behalf of the 3rd applicant, Ms Elke Tang, helpfully has drawn the Tribunal's attention to an Annex to Paper No CSA04/01, which on 17 November 2001 was submitted by the Financial Services Bureau and the SFC to the LegCo Bills Committee then deliberating upon what at that time was Part V of the Securities and Futures Bill (later to become the SFO, Cap 571); this Annex dealt, *inter alia*, with that which became section 115 of the SFO (but which at the Bill stage was numbered section 114A). Footnote 6, as then appended to section 114A, reads thus:

> "We briefed Members at the Bills Committee meeting on 4 July 2001 that we shall propose a Committee Stage Amendment to reflect clearly our policy intention to cover in this part of the Bill also those regulated activities conducted overseas but targeting at investors in Hong Kong. We are mindful that the regulatory catch should not be overly wide that catches such overseas service merely by their being available to local investors. *We have accordingly proposed to confine the regulatory catch only to those regulated activities actively marketed to the public in Hong Kong.* This is in line with arrangements in overseas jurisdictions. Consequential amendments are proposed to clause 115(2) such that an overseas corporation falling within the regulatory catch as a result is eligible for applying for the requisite licence. We are grateful to the market participants who have provided constructive input to us in defining the scope and in drafting these amendments." (emphasize added)

24. In addition, Mr Keith Yeung, appearing in these applications on behalf of the 1st and 2nd applicants, Ms Connie Ng and Mr KY Law, has drawn the tribunal's attention to the relevant page of the SFC website, posted on 17 March 2003, dealing with 'FAQ's', and which, under 'Topic 9', asks rhetorically *'What does "actively markets" mean under section 115 of the SFO?'*. He seeks to emphasise that the SFC's own view of the situation is encapsulated in the commentary, at 9.1, which reads:

> "This may include, for example, those who frequently call on Hong Kong investors and market their services (including offering products); running a mass media programme targeting at the investing public in Hong Kong; and Internet activities that target Hong Kong investors.
>
> Generally speaking, no person may actively market, whether in Hong Kong or from a place outside Hong Kong, to the public here any services which would constitute a regulated activity if provided in Hong Kong, unless that person is registered or licensed by the SFC. In determining whether or not a person "actively market" its services to the public, the SFC will consider the nature of the business activities as a whole and have regard to a number of factors, including (without limitation) the following:
>
> - whether there is a detailed marketing plan to promote the services;
> - whether the services are extensively advertised…
> - whether the related marketing is conducted in a concerted manner and executed in accordance with a plan or schedule which indicates a continuing service rather than a one-off exercise;
> - whether the services are packaged to target the people of Hong Kong;
> - whether the services are sought out by the customers on their own initiative"

25. Whilst I allude to this facet of the argument within the context of each of these applications, suffice it to say that both counsel for the applicants argued strongly that the term *'actively markets'* within section 115(1)(a), when taken in conjunction with the SFC explanatory material, must be taken to mean no more than marketing in the primary sense of pro-actively *advertising* the service to the Hong Kong public, and did *not* encompass, for example, instances of the *actual sale* of products to individual customers.

26. To this I would venture but two observations within the context of applications which I have not found it easy fairly to determine.

27. *First*, I do not agree with the conceptual restriction now sought by counsel – for obvious forensic reasons – to be applied to this phrase, nor do I consider either that the footnoted commentary in the consultative paper presented to the Bills Committee nor the content of the SFC website to represent any more than straws in the interpretative wind.

28. For my own part, I fail to see why the term "actively markets" should not, on its face, also be taken to include the actual sale of a particular product to a member of the Hong Kong public, although clearly much will depend upon the evidence surrounding the circumstances of any such sale. However, it seems tolerably clear that an actual sale consequent upon the advertising of the service to the Hong Kong public must be regarded as falling within this rubric.

29. *Second*, and equally important in my view, I decline Mr Mak's invitation to enlighten, and in this Determination to promulgate (or at the

least to attempt to promulgate), an all-encompassing definition of this intriguing phrase, which now is enshrined in statutory form the better to exercise the minds of counsel, judges, and even Tribunal Chairmen.

30. It seems to me, with respect, that what does or does not comprise the situation denoted by the term "actively markets" is a bit like the proverbial elephant – there may be difficulty in describing it, but you know it when you see it – and thus one is thrown back, as always in our system of adversarial litigation, upon the particular facts and circumstances as they have been proved to exist in any given case.

(2) The burden and standard of proof

31. On behalf of the 1st and 2nd applicants, Mr Keith Yeung made specific reference to both these issues, although in truth I do not consider that either aspect is other than settled law.

32. His first point is that the function of this tribunal generally is regarded as appellate, although the procedure is by way of rehearing. Thus, whilst the appellate approach may well be regarded as preferable, the statutory framework under which this tribunal has been established is such that its function cannot be thus confined: thus, in *SFAT No 12 of 2004*, whilst this tribunal noted that "this procedure by way of rehearing, involving reception of evidence *de novo*, is not something that this tribunal, essentially an appellate/review body, is likely to be persuaded to do other than in appropriate and relatively rare cases…", this certainly does *not* mean that, when required, as in the present instance, this tribunal can or should refuse

to entertain relevant new evidence bearing upon an application duly brought before it.

33. As to the standard of proof to be applied, this must now be regarded as settled. The statutory requirement as laid down in the SFO is for proof to be according to the civil standard, and in disciplinary proceedings in Hong Kong it is now accepted that the civil standard of the balance of probabilities is infused with that which, for shorthand, can be termed the '*Re H* approach', which essentially imparts a sliding scale, so that the more serious the allegation/accusation, the more compelling must be the evidence required to establish proof upon a balance or preponderance of probability: see, for example, *A Solicitor v The Law* Society of Hong Kong, *FACV No 24 of 2007*, and the observations of this tribunal in *SFAT No 4 of 2007*, Determination dated 9 November 2007.

34. Lastly, I perceive no difficulty in terms of the burden of proof. These are applications for review by the three applicants listed in the title of these applications, and, as such, they each bear the burden of satisfying the Tribunal that the sanctions visited upon them as a consequence of the regulator's disciplinary action should be varied; if and in so far as this is what Mr Yeung meant when he was referring to the burden of proof, I am able to perceive no conceptual difficulty.

(3) Admissibility of new documents

35. On behalf of his clients, Mr Yeung objected to the introduction into the hearing of these applications for review certain documents which he maintained comprised 32 new items, the existence of which, he said, had

remained unknown to his clients, the 1st and 2nd applicants, until February 2008, at the time when the SFC and the applicants had been in the course of mutually agreeing the documentary bundles to be used in these applications.

36. Given the absence of binding procedure statutorily imposed upon the Tribunal, and wherein the rules of evidence, at least as understood in the courts, are not applicable, the sole benchmark for so-called 'admissibility' must be the intrinsic fairness of the procedure, which is an aspect of these reviews which is jealously guarded by the Tribunal.

37. That this clearly is the case is placed beyond doubt by *section 219(1)(a) of the SFO, Cap 571*, which reads:

> "…the Tribunal, for the purposes of a review, may, on its own motion or on the application of any of the parties to the review ---
>
> (a) receive and consider any material by way of oral evidence, written statements or documents, even if the material would not be admissible in evidence in civil or criminal proceedings in a court of law;…"

38. Within the context of the present applications, I therefore can discern no difficulty in considering – and thereby rendering 'admissible' – documents which have emerged subsequent to the initial SFC disciplinary process, or, to be more precise, at the least were not relied upon in the relevant Letters of Mindedness.

39. These are documents of which the applicants have had ample notice. I am told by Mr Beresford that they have been in the relevant bundles since February, and in fact, upon taxing Mr Yeung as to the reason the Tribunal should not have regard to these documents, it remained unclear

precisely what was the conceptual basis of objection, albeit Mr Yeung clearly would have preferred that they not be used in these proceedings.

40. In this regard I would observe that I do *not* perceive anything underhanded or wrong on the part of the regulator in now seeking to refer to these documents, and I do *not* consider that any case has begun to be made out – if indeed this is what Mr Yeung had meant when he commented that these documents had been 'consciously' held back by the SFC – to the effect that in this regard the conduct of the regulator could be considered in any sense underhand or unfair; there is no evidence of that whatever.

41. In light of his submission, however, the Tribunal asked Mr Yeung if he was taken by surprise by any of these documents, and if, for example, he wished to move for an adjournment in order, perhaps, to obtain instructions. This offer was made on the basis of fundamental fairness, but in the event it was declined, and in the circumstances, wherein the applicants demonstrably are *not* taken by surprise, I can divine no reason whatever why these so-called 'new' documents should be excluded from the Tribunal's consideration.

42. Finally, if and in so far as the so-called issue of 'admissibility' as now raised was linked with the contention that the procedure of this tribunal is 'appellate', and thus that new documentation ought not to be admitted save, by analogy with court procedure, in terms of what is commonly referred to as *Ladd v Marshall* principles, in my view any such argument is both misguided and incorrect.

43. Whilst this Tribunal purports (and indeed prefers) to perform essentially an 'appellate' function, clearly in circumstances in which the parties require it this Tribunal must also exercise the function whereby the review which is held is conducted, where necessary, as a form of re-hearing, with, again if necessary, the reception of evidence (as indeed occurred within the context of these reviews, with certain *viva voce* evidence being called on behalf of the applicants).

44. Accordingly, I hold that Mr Yeung's efforts to keep out the further material which now has been introduced into the documentary 'mix' cannot be sustained upon this, or indeed any other basis.

Available evidence

45. This case is notable in one sense.

46. Each of the applicants for review had made (a) no representations to the SFC upon receiving from the regulator the letter which hitherto was called a 'Letter of Mindedness', and which now is termed a 'Notice of Proposed Disciplinary Action'; and (b) having failed to make any such representation, each of these individual applicants has declined to give evidence to this Tribunal in support of their review application, thereby declining to expose themselves to cross-examination.

47. In considering, and subsequently in deciding upon the disciplinary action against these three applicants, the SFC variously has relied upon documents it had seized at the time of the raid as was conducted upon CHI's premises on 2 March 2005, together with the interviews

conducted with the three applicants, and further upon interviews variously conducted with certain clients of CHI.

48. This material is before the Tribunal, which also permitted the applicants to call *viva voce* evidence on their behalf at the hearing of these applications.

49. In this connection two witnesses only were called into the witness box: first, a *Mr Tsui Luen On*, currently Deputy General Manager of Hantec Investment Holdings Ltd; and second, a *Mr Law Ming Lap*, a Responsible Officer of HIL, and also the person in charge of Sales and Marketing of HIL.

50. In addition, a third witness statement was put into evidence by consent, namely that of a *Mr Lau Yuk Ping*, head of Compliance and Internal Audit at Hantec Investment Holdings Ltd.

51. Absent hearing from the applicants themselves, I did not find the evidence of Mr Tsui and Mr Law to be of any significant assistance, and in fact they were but briefly cross-examined by Mr Beresford for the SFC.

52. The point of calling each of these gentlemen seemed to be to establish the sequence of events as occurred at the opening ceremony of the Macau branch of CHI in May 2005, and in particular to establish that this ceremony was held in the conference room of this new Macau branch at which Madam Ng Chui Mui and Mr Law Kai Yee, the first and second applicants herein, had made brief speeches, and thus that there was no other place on the premises in which a meeting could have taken place.

53. In the circumstances of these applications, I accord this evidence little, if any, weight or probative significance. The forensic strategy of keeping the applicants themselves out of the witness box, but instead in opting to call entirely peripheral persons – whose motives and the influences bearing upon them cannot be divined – in order that they should give no more than circumstantial evidence, strikes me as no more than transparent window dressing.

54. The short point is that if the applicants decline to go into the witness box that, of course, is entirely a matter for them. By the same token, however, such refusal to give evidence cannot, and indeed does not, enure in the drawing of inferences favourable to the applicants arising from the existing and available evidence – which presumably was the point of the appeal strategy as now adopted.

55. To the contrary, it seems to me that if and in so far as and applicant specifically chooses *not* to explain what happened, it is entirely open to the Tribunal to draw influences adverse to that applicant on the face of the existing material: see here the observations in *SFAT No 10 of 2007*, Determination dated 20 March 2009 (at paras 82-85) where, inter alia, this Tribunal observed as follows :

> "For the avoidance of doubt, I have no intention of placing a blush favourable to [the applicants] on the assembled material when the ineluctable fact is that [neither of the applicants] 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.
>
> 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 the Court of Appeal in *CACV 69 of 2008* (unreported), Judgment dated 26 Februrary 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.
>
> This approach specifically was rejected, and the appeal dismissed …
>
> Accordingly, if this approach be correct, as naturally I consider that it is, it simply was not open to Mr McCoy [*in SFAT 10 of 2007*] to consider parts of the evidential material as had been assembled for the case against [the applicants], and thus to submit 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."

The case as mounted against the three applicants

56. I propose to outline hereafter the regulator's case against each individual applicant in turn, the argument mounted upon his or her behalf at the hearing, and the Tribunal's decision upon each of these three applications.

57. I take the applicants in the order of the case numbers assigned to their respective applications.

(i) Ms Ng Chui Mui: Application 7 of 2007

58. In its NPDA dated 5 July 2007, sent under section 194 of the SFO, the SFC alleged, at paragraph 3 thereof, that as the result of its investigations, the Commission was of the opinion that Ms Ng was guilty of misconduct, and was not fit and proper to be licensed, "in that you aided and abetted the unlicensed activities of Cosmos Hantec Investment (NZ) Limited" in breach of General Principle 7 and paragraph 12.1 of the Code of Conduct for Persons Licensed by or Registered with the SFC.

59. This letter, which speaks for itself, proceeds to indicate the 'Grounds for Concern', which had stemmed from complaints received by the SFC against licensed representatives of HIL whom, it was said, allegedly had induced individuals who were Hong Kong residents to open accounts at Cosmos Hantec, which was not registered with the SFC in *any* capacity, in order to trade leveraged foreign exchange contracts.

60. The names of the Hong Kong clients, together with the names of the account executives as provided by Cosmos Hantec, were set out in an attachment to this letter, which recorded, also, that Cosmos Hantec had admitted that it had paid commissions to 4 HIL executives, namely Ms Tang Yuen Ting and Messrs Shum Lik Keung, Tam Sak Man and Chau Sau Ming, in respect of trades conducted by their clients. In addition, a table of trading losses suffered by their clients from trading leveraged forex contracts through Cosmos Hantec was attached to this letter.

61. This letter further noted that Ms Ng was a director and Responsible Officer of HIL and a director of Cosmos Hantec, and went on to

recite in detail her involvement in the business of CHI, highlighting the fact that she had worked in the Overseas Investment Department of HIL in Hong Kong at the material time, and that as the person in charge she had instructed two employees, Messrs Ng Hon Ming and Lee Yat Hung, to provide CHI with various services itemized in that letter, including arranging bank transfers at the direction of CHI, receiving completed account opening documents on behalf of CHI and forwarding these documents to CHI in New Zealand, and instructing the Overseas Investment Department to keep blank account opening documents and introductory brochures on behalf of CHI for collection by customers.

62. It further was said that Ms Ng had told the regulator that he had needed Madam Ng's approval before executing any fund transfer on behalf of CHI, and that she would initial documents on payment instruction forms.

63. Another interview with one Lau Pui Fong, an employee of CHI who worked at the premises from January 2005, was said to have revealed that Ms Ng had arranged for her to be employed by CHI from 1 January 2005, that she had been responsible for carrying out fund transfer instructions from CHI, and that after completing her assignments she would pass the relevant documents to Ms Ng for review.

64. In addition the SFC referred to documentary evidence, in particular two emails, which suggested that Ms Ng indeed had played an active role in the operations of CHI, and referred also to the evidence of one Shum Like Keung, then head of a team of account executives known within HIL as 'HO3', which recounted events at a cocktail party in Macau to celebrate the opening in that enclave of an office of CHI; after this party it

was said that team heads had been told by Law Kai Yee, another responsible officer of HIL, that if they were interested in doing business with CHI, they could solicit business for that company under the disguise of a nominee, which was to be a trusted person not registered with the SFC, and that that nominee would collect commission payments from CHI and subsequently distribute those payments.

65. A further informant interviewed by the SFC was one Lo Cho Yan, head of a team known within Hantec International as 'HOJ', who told the regulator that many staff of HIL introduced business to CHI because senior officials, including Madam Ng, had told the staff of HIL that they could do so, that the margin requirement of CHI was smaller than that of HIL, and that CHI paid higher commission to account executives than was the case with HIL.

66. Lo told the SFC that after the Macau cocktail party, staff of HIL met in a conference room in the new CHI office, and that at this meeting Ms Ng had told the staff that CHI had been set up as an additional line of business for them, and that they could earn commissions by introducing business to CHI, and that following thereon other senior officials, including Law Kai Yee, had elaborated upon this message, and had said that, in view of their licensing status, it might not be desirable for HIL employees to refer clients directly to CHI, but that employees should find persons to act as nominees to receive commissions on their behalf from CHI.

67. In this Notice of Proposed Disciplinary Action ('NPDA') the regulator also set out the results of its interviews with Ms Ng (at paragraphs 23-25 thereof).

68. During these interviews Ms Ng had said that she had known that CHI was in the business of providing forex trading services, but that since she did not take part in its daily operations she knew no details. Her responsibility as director of CHI was to attend the board meetings of that company in the capacity of HIL's representative thereon "so as to understand the nature of its investments", that CHI was not set up to provide services to Hong Kong residents, she was aware that CHI had a "liaison office" in Hong Kong which was situated at the HIL premises at the material time for the purpose of provision of "clerical and fund clearing support" to CHI, that she had not known that the liaison office had kept copies of account opening documents until after these documents had been found at the premises consequent upon the SFC search thereof, that she did ask Lee to assist CHI with its fund clearing requests, but that these instructions had come from CHI, and that she had not known the details of these instructions nor the destination of these funds, and that the management of HIL would not and did not tell its employees to find business for CHI, and so far as she was aware this had not occurred.

69. As to the two emails, dated 6 August 2003 and 24 January 2005 respectively, which had been seized by the SFC in its raid upon the HIL premises, the content of which appeared to relate to the operations of CHI, the so-called 'first email' was said by Ms Ng to have been sent in response to a request from the management of CHI for her assistance in revising the minutes of its first meeting shortly after it had commenced business, whilst the author of the 'second email' was one Chan Kwok Sung, a director of CHI responsible for its daily operation, that Chan was based in New Zealand, but that at the time of sending the email he and his wife were on holiday in

Hong Kong, and thus that Madam Ng had been asked to send the second email on his behalf.

70. As to the allegations of Shum and Lo, Ms Ng had admitted that she had attended the Macau cocktail party, but denied having told HIL employees to solicit business for CHI.

71. The NPDA sent to Ms Ng thereafter outlined the preliminary conclusion of the regulator, which clearly did not believe her story for the reasons therein articulated; in particular the SFC concluded on the basis of the information at their disposal that Ms Ng had aided and abetted the apparently unlicensed activities of CHI, and stressed that as a Responsible Officer of HIL, that Madam Ng was under a duty to ensure that its licensed representatives comply with all applicable laws and regulations; paragraph 34 of the NPDA read:

> "Your act of aiding and abetting unlicensed activities constituted a breach of General Principle 7 and Principle 12.1 of the Code of Conduct. Accordingly our preliminary conclusion is that you are guilty of misconduct and that your fitness and properness has been called into question."

72. The SFC indicated that pursuant to sections 194(1)(i), (ii) and (iv) of the SFO that it was thus proposed (a) to revoke Ms Ng's licence and the approval of her status as a Responsible Officer, and to prohibit her for life from applying to be licensed or registered, (b) applying to be approved under section 126(1) of the SFO as a responsible officer of a licensed corporation, (c) applying to be given consent to continue to act as an executive officer of a registered institution under section 71C of the Banking Ordinance, and finally, (d) seeking through a registered institution to have

her 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.

73. The SFC further indicated (at paragraph 37) that it was believed that the proposed penalty was the most appropriate in the circumstances, given that the misconduct as found was serious and detrimental to the integrity of the market, the dangers necessarily implicit within leveraged forex trading, which was "tightly regulated in Hong Kong to maximize the protection to Hong Kong investors", and that by encouraging HIL's licensed representatives to arrange Hong Kong clients to open accounts at CHI, "an unregulated entity which seemingly permitted clients to trade on lower margin requirements and hence more risky terms", Ms Ng had deprived the clients of their statutory protection under Hong Kong law, the clients themselves had suffered large losses, that Ms Ng had condoned "deliberate attempts" to conceal these unlawful activities "as illustrated by Law's comments at the [Macau] Cocktail Party, that she had had over 3 year's experience in the industry at the time of this misconduct, and that Ms Ng had no previous disciplinary record.

74. As is normal in this type of letter, the SFC informed Ms Ng of her right to be heard, and further – and not unimportant within the context of the manner in which this case was conducted on her behalf – paragraph 43 of the NPDA stated:

> "We enclose a list of documents on which we have relied in this matter. If you wish to obtain copies of the documents on the list, please inform us as soon as possible."

75. Thereafter, upon the SFC having received no representation whatever on the part of Ms Ng, it issued a Notice of Final Decision dated 7 September 2007, which document was confirmatory of the NPDA.

76. What this Notice of Final Decision also does, however, (at paragraphs 10 – 21) is to recite the history of the interaction between the SFC and Ms Ng's lawyers, including the provision, on 13 July 2007, of copies of documents on the List of Documents enclosed with the NPDA, the declining by the SFC of a request for release of "all unused materials" within the conduct of these disciplinary proceedings, and the request by her lawyers, on 18 August 2007, for an extension of time to submit representations on her behalf, which request in turn resulted in an extension of the time deadline to 24 August 2007, albeit by a letter dated 27 August 2007 the SFC was minded to say that if representations were to be received before it issued its final decision in this matter, these representations would be taken into account.

77. In the event, however, the SFC received nothing, and duly issued its Notice of Final Decision on 7 September 2007, with the content of which Ms Ng is aggrieved – hence this application.

Determination

78. The Tribunal has chosen to set out in some detail the history of this matter, and of the content of the NPDA and the Notice of Final Decision, because, as matters transpired, there is little of substance to add to the picture painted by the regulator as the result of its detailed investigations into this case, including the seizure of documents at the premises of HIL, and his subsequent interviews as were conducted.

79. Not only were no representations made by this applicant upon the regulator apprising her of their provisional views, and of the basis therefor, but, as earlier observed, upon the hearing of this application this lady pointedly declined to go into the witness box and to tell the Tribunal that the regulator's concerns and conclusions fundamentally were erroneous and misplaced.

80. With respect, in light of the background to the case, and of the widespread nature of the evidence revealed by the SFC investigation, this strikes me as a forensic strategy which does little to inspire confidence in its prospects for success.

81. On behalf of Ms Ng 10 grounds for review initially were advanced – all focusing upon the alleged errors in the conclusions/inferences drawn by the regulator in evaluating such material as was before it, focusing in particular upon Ms Ng's involvement in, and knowledge of, the payment of CHI commissions to HIL's account executives; in this regard there is considerable overlap in this regard with the case as run by the 2nd applicant, Mr Law.

82. In both instances the grounds in the respective applications for review on behalf of Ms Ng and Mr Law were amended, with 9 grounds now being advanced for Ms Ng and Mr Law, which amendments were delivered under cover of a letter from their solicitors, Messrs Robertsons, dated 20 February 2008, with the attack once more concentrating on the allegedly unfair methodology and incorrect inferential conclusions drawn by the regulator.

83. After carefully considering all the arguments, however, and despite the obvious effort which has been put in by the legal advisers, I am unable to see anything of substance in these arguments, bearing in mind particularly my earlier observation to the effect that, in the absence of *viva voce* evidence by the applicant, who is in the best position to know what did or did not occur and to testify to the same on oath, I see no reason to construe such material as was available in a manner favourable to the applicant, and, perhaps more significant, I can see no basis whatever for the criticism lavished upon the regulator in coming to the view that it did.

84. It seems to me that in this situation, *unless* it can be shown – which in my view in these two instances it cannot – that the regulator is plainly wrong in coming to its conclusions in light of the available materials, bearing in mind that such conclusions are untrammelled by any positive contrary testimony on behalf of the applicant, or that the material which has been evaluated cannot reasonably support the inference/conclusion as drawn, then in my view there is and can be no proper basis for review intervention by this Tribunal; to the contrary, for what it be worth, the clear probability is that the SFC, *qua* reasonable regulator acting in good faith, in fact drew wholly appropriate conclusions/inferences from the data available to it, including the various records of interviews.

85. For example, on behalf of Ms Ng it is contended that the SFC had erred in concluding that she knew the details of cash flows handled in Hong Kong by placing too much weight on the evidence of Mathew Ng (Grounds 2 and 3). However, as Mr Beresford has pointed out, the unchallenged evidence is that Connie Ng, as director of CHI and head of the

Overseas Management Department of Hantec Holdings, was approving these transactions on a *daily* basis, and the hard fact remains that as a Director and Responsible Officer of HIL she clearly failed to stop the unlicensed activities.

86. Ms Ng appears to have been the only person in Hong Kong responsible for its activities (her husband, Y L Tang, the Chairman of the Hantec Group, having disclaimed all knowledge of CHI's operations subsequent to its establishment), and I think it fair to conclude, as Mr Beresford submitted, that taken as a whole the available evidence – including that of Mathew Ng and YH Lee, together with the documents as were seized on 2 March 2005 – tend clearly to demonstrate that her involvement in CHI's business affairs indeed was substantial, and that it certainly was open to the SFC to find that her claim that she did not know about and was uninvolved in CHI's unlicensed activities not to be credible.

87. Nor do I find anything of substance in the other grounds prayed in aid by Ms Ng in terms of liability, all of which I have carefully considered.

88. It may be because counsel discerned that the reaction of the Tribunal was less than favourable towards the substantive submissions as made that, at the end of the hearing, greater attention began to be paid to that which had become the 9th Ground, namely that the penalty as imposed upon Madam Ng was "excessive in the circumstances, and was disproportionate to the facts of the case." In other words, the argument as to primary liability neatly transposed into what is reality was an extended plea in mitigation.

89. As to this, the principles established by this Tribunal over the first six years of its existence make it crystal clear that unless the Tribunal is

of the view that the sentence as passed is 'plainly wrong' for whatever reason, the Tribunal generally will decline to vary such sentence.

90. For my part I do not accept the contention that, for example, Connie Ng and Mr KY Law were caught in a 'grey area' of law and did not deliberately set out to infringe. Nor as I consider that the point concerning the scope of activities that a foreign company can undertaken in Hong Kong absent regulatory compliance is unduly intricate, and, as Mr Beresford suggested, this is something which in any event could have been resolved with legal advice.

91. The argument that there was no deliberate infringement of regulatory norms is in my view ambitious – "fanciful" and "unrealistic" were two of the dismissive epithets jurisdiction accorded to this suggestion by Mr Beresford – and in my view amounts to nothing of substance when set against the body of available (and wholly uncontradicted) evidence that deliberate efforts were made by both Connie Ng and Mr Law to divert business to an unregistered offshore entity in order to circumvent the domestic Hong Kong regulatory regime.

92. Ms Ng in particular strikes me as being in a difficult position in terms of penalty, wherein in relative terms her case self-evidently is the most serious of the three now under consideration by the Tribunal.

93. She was both a director of HIL and of CHI and, as Mr Beresford has reminded me, she was the only CHI director in Hong Kong whose interest clearly was in promoting the business of that entity. Equally clearly, in practical terms that commercial interest was diametrically

at odds with the interests of regulation in Hong Kong, or indeed in terms of the commercial interests of HIL.

94. Ms Ng was person of influence who was causing the Hong Kong regulatory regime to be breached within an area of financial activity, leveraged forex trading, which by its very nature is high risk and, wholly appropriately in my view, is subject to strict regulation in Hong Kong with a view to the protection of the 'investing' public. She knew and approved of the payment of commissions by CHI to HIL's account executives, commissions which the evidence demonstrates were paid at a higher level than those paid by HIL, and she must have appreciated that such commissions were being paid by a principal to which those account executives were not accredited, and within an entirely unregulated framework.

95. Nor is there any evidence that Ms Ng cares, or cared, one jot for the concerns of the SFC; to the contrary, this application has been premised upon the assertion, reached via the jurisdictional argument, that there was nothing whatever wrong with her actions. Hence the fact that the regulator has taken an uncompromising view of the activities of Ms Ng and that the SFC considers that she is not a fit and proper person to be licensed is unlikely to stimulate any surprise in the breast of that mythical (and fair-minded) observer, the man on the Shaukiwan tram, who may feel that the penalty of licence revocation and life prohibition was not inappropriate.

96. To this I would add only this gloss. Whilst the point was *not* made to me by counsel, for my part I am philosophically disinclined to favour 'life' bans, which is what has been handed down by the SFC in this

instance. It seems to me that there are few, if any, cases in this area which can be said to justify 'life' in the true sense, and in lieu thereof I am minded to substitute prohibition for a period of 10 years, which strikes me as the more appropriate in the circumstances, and which does not significantly detract from the seriousness with which in my judgment the regulator was entitled to view the conduct of Ms Ng.

Order

97. It follows from the foregoing, therefore, that in this application for review the Order of the Tribunal is as follows:

(i) Save that there is to be substituted prohibition for a period of 10 years in lieu of the prohibition for life as contained within the Notice of Final Decision dated 7 September 2007, the application for review in SFAT No 7 of 2007 is dismissed;

(ii) There is to be an order *nisi*, such order to become absolute unless application to vary the same is made by either party within 21 days from the date of this Determination, that 85% of the costs of and occasioned by this application are to be paid by the applicant to the respondent, such costs to be taxed if not agreed.

(ii) Mr Law Kai Yee: Application No 8 of 2007

98. The disciplinary proceedings against Mr Law Kai Yee commenced with a Notice of Proposed Disciplinary Action ('NPDA') dated 5 July 2007 from the SFC to Mr Law, wherein the regulator noted that as the result of its investigations it had formed the opinion that Mr Law – who

since 3 March 1995 had been licensed under the SFO to carry on Type 1 (dealing in securities), Type 2 (dealing in futures contracts) and Type 3 (leveraged foreign exchange trading), and who then was a Responsible Officer of Hantec International Finance Group Ltd, HT Futures Ltd and HIL – had been guilty of misconduct and was not fit and proper to be licensed.

99. The gravamen of the charge was that Mr Law had "encouraged licensed representatives of Hantec International to participate in the unlicensed activities of Cosmos Hantec" in breach of General Principle 7 and paragraph 12.1 of the Code of Conduct.

100. Thereafter set out in this NPDA was the background, which stemmed from complaints which had been received by the SFC about licensed representatives of Hantec International who allegedly had induced individuals to open accounts at CHI to trade leveraged foreign exchange contracts, together with an account of an interview with one Shum Lik Keung, head of a team of account executives known within Hantec International as "HO3", and an interview with one Lo Cho Yan, head of a team within Hantec International known as "HOJ".

101. This letter speaks for itself. Suffice to say that these two interviews yielded the information from Shum that Mr Law had attended at a Macau cocktail party in May 2005 to celebrate the opening of Cosmos Hantec's Macau office, and that at a meeting after the cocktail party, Mr Law had told team heads that if they were interested in doing business with CHI, they could solicit business for that entity under the guise of a nominee who "ideally should not be registered with the Commission", and who would

collect commission payments from CHI on behalf of those who had solicited business for CHI, and subsequently distribute those monies to them.

102. In similar vein, the interview with Lo Cho Yan was said to have yielded the information that senior officials of HIL, including Mr Law, had told the staff of that company on various occasions that they could introduce business to CHI, whose minimum margin requirement was lower than that of HIL, and who paid higher commissions to account executives than was the case with HIL.

103. Mr Lo's interview also referred to the same Macau cocktail party, wherein not only did he refer to what was said by Ms Ng Chiu Mui to the effect that CHI was set up as an additional line of business for them, and that the staff of HIL could earn commissions by introducing business to CHI, but that other senior officials "including you [ie. Mr Law] also had suggested that employees should find persons to act as nominees to receive commissions from CHI on their behalf.

104. The NPDA recited (at paragraph 19 thereof) that when interviewed, Mr Ng had admitted that he had gone to the cocktail party, but denied having said what he had been said to have said, although he had offered no explanation of why his colleagues had made this allegation against him.

105. In the event, the regulator made it clear that they preferred the evidence of Messrs Ho and Shum, and at paragraphs 21 and 22 of the NPDA, the SFC observed thus:

> "Although there was no express reference in Shum's or Lo's evidence to the solicitation of business from Hong Kong clients, it appeared that Hong Kong clients were the intended targets. It would not otherwise have been necessary for Hantec International's licensed representatives to receive commissions from Cosmos Hantec through nominees.
>
> It appears that, by telling Hantec International's licensed representatives that they could solicit business for Cosmos Hantec from Hong Kong clients, and explaining how this could be done despite their licensing status, you encouraged them to participate in the apparently unlicensed activities of Cosmos Hantec."

106. Accordingly, at paragraph 25 of the NPDA, the regulator proposed to suspend Mr Law's licence for a period of 3 years. The SFC noted that in their view this penalty was the most appropriate after taking into account all relevant circumstances, as set out in subparagraphs i. – v. thereof, namely that the alleged misconduct is serious and detrimental to the integrity of the market, particularly in light of the fact that leveraged forex trading is risky and thus tightly regulated, and thus clients who were encouraged to trade on lower margin requirements with Cosmos Hantec, an unregulated entity, had been deprived of their statutory protection in Hong Kong; that clients had suffered large losses as a result of trading with Cosmos Hantec (as exemplified at Attachment B); that there had been a deliberate attempt to conceal the unlawful activities by Mr Law; that he had over 10 years experience in the industry; and that Mr Law had no disciplinary record.

107. The NPDA pointed out specifically that the decision was provisional only, and that Mr Law had a right to be heard, at which point the SFC would consider any submissions he might make. The NPDA also attached relevant statements/records of 5 interviews upon which their provisional view was based, together with correspondence with the

Securities Commission of New Zealand, and monthly trading statements of various clients of Cosmos Hantec.

108. As noted earlier in this cumulative Determination (at paragraph 47 above) the procedural history demonstrates that Mr Law, together with the other two applicants whose cases are now being considered by this Tribunal, made no representations to the SFC upon receipt of the NPDA, nor did he elect to go into the witness box and to give evidence to this Tribunal refuting the case as mounted against him by the regulator.

109. In the event, absent representations from this applicant pursuant to the NPDA, under cover of a letter dated 7 September 2007, the SFC remitted to Mr Law its Notice of Final Decision and the reasons therefor. This Notice of Final Decision confirmed the suspension of Mr Law's licence for 3 years, and under the heading 'Reasons for Decision' the regulator rehearsed in detail the procedural history of events, which *inter alia* had involved requests for extensions of time to submit representations made by the lawyers retained to act for Mr Law – although in the event no representations ever were received.

110. Nor, as observed, has this applicant elected to assist his cause on the hearing of this application and to explain his side of the story to the Tribunal. To the contrary, he has relied upon the purely legal submissions pursuant to the Amended Grounds of Appeal.

111. In these circumstances I therefore repeat the earlier observations of this Tribunal (at paragraph 55 above) as to the situation wherein an applicant declines to give evidence, and that as a consequence it

remains open to the Tribunal to draw and/or to uphold inferences adverse to that applicant which have been drawn on the face of the existing material – just as, in fact, the regulator chose to draw its own inferences/conclusions from the interview material before it pending the that anticipated representations from Mr Law. The fact remains, however, that sworn denial came there none.

112. The situation therefore is that there is little before this Tribunal save for the legal argument mounted by counsel for Mr Law, none of which seemed to me to hold out any chance of success.

113. In fact, the argument on behalf of Ms Ng and Mr Law essentially overlapped, as Mr Beresford for the SFC pointed out, hence the direction that these applications were argued together.

114. The Amended Grounds of the Application for Review (containing widespread deletions of the original Grounds) as ultimately filed on behalf of Mr Law contain 9 individual grounds, which in substance range from asserting that the SFC failed to have any or any sufficient regard to other evidence which was available (and further failed to make timely discovery of the same), to an invocation of the matters of law – and the alleged absence of jurisdiction – which have been canvassed, and rejected, *qua* preliminary points at the outset of this Determination, to assertion that the SFC had erred in placing reliance upon the evidence of Messrs Shum and Lo in its evaluation of this case, and further in favouring that evidence to the evidence of the applicant and the other interviewees, that the SFC had failed to have regard to the entirety of the evidence and materials before it; and that,

finally, the penalty imposed upon the applicant was “excessive” and “disproportionate” to the facts of the case.

115. I have carefully considered all of these matters, and, absent representation in response to the NPDA, and evidence from the applicant himself, I am wholly unable to conclude that the SFC has acted incorrectly in coming to the view that it has in terms of liability.

116. With respect, the forensic strategy as implemented in Mr Law’s application struck me as doomed to failure. In my judgment it was open to the regulator to take the view that it took, and it is not the function of this Tribunal to second guess the conclusions of the SFC on the issues of concern that were raised on the basis of the assembled evidence.

117. It seems to me, with respect, that the content of the Amended Grounds as filed to underpin Mr Law’s application for review may have contained possibilities for further inquiry, and possibly even potential for success given the nature of the evidence adduced against him, but in the absence of any response whatever from Mr Law, whether sworn or unsworn, at any time subsequent to the NPDA, I fail to see how the Tribunal now can act on these grounds without, in effect, second guessing the SFC, which over the past years is a course this Tribunal consistently has declined to adopt – save, of course, in instances in which it can be shown, and shown clearly, that the regulator is in error or is plainly wrong, which in my judgment is *not* the case in this instance; in fact, looking at this matter largely and liberally I should have been surprised if the SFC had not pursued this case after assembling the evidence that it did in the course of its inquiries into the activities of CHI.

118. Accordingly, in terms of primary liability at least I decline to vary the Final Decision of the SFC as determined in Mr Law's case.

119. It is fair to say that I have encountered more difficulty in terms of the disciplinary penalty of three years as imposed upon Mr Law.

120. It is, of course, the case that in principle and general practice this Tribunal declines to interfere and to 'second-guess' the regulator, and in this regard I repeat the remarks upon this issue made in the context of the application for review by Ms Ng.

121. However, the fact remains that in the course of preparing this Determination I have been beset by the feeling that, in purely penalty terms, there is arguably a lack of internal consistency in the penalties as meted out to Ms Ng, Mr Law and Ms Tang, whose applications have been heard together given the commonality of the factual matrix; and that in this regard, and in light of the available evidence, Mr Law may be entitled to feel that he has been *relatively* harshly treated in comparison with his two erstwhile HIL colleagues.

122. Once again I apprehend that this was *not* a point made by counsel, no doubt because his focus was primarily upon securing a complete setting aside of the regulator's actions taken with regard to his clients.

123. Be that as it may. This Tribunal is on record as saying that it is disinclined to 'tinker', and that anything short of a significant reduction in penalty arguably falls within that characterization. In this particular instance,

however, it strikes me that the appropriate period of licence revocation for Mr Law is one of two years 3 months, and after some reflection I am minded to vary his penalty downwards by 25% accordingly.

Order

124. It follows from the foregoing, therefore, that the Order of this Tribunal upon this application for review is as follows:

(i) Save that the period of licence suspension as imposed in the Notice of Final Decision dated 7 September 2007 is to be reduced from 3 years to 2 years 3 months, the application for review in *SFAT No 8 of 2007* is dismissed;

(ii) There is to be an order *nisi*, such order to become absolute unless application be made to vary the same within 21 days from the date of this Determination, that 85% of the costs of and occasioned by this application are to be paid by the applicant to the respondent, such costs to be taxed if not agreed.

(iii) Ms Elke Tang Yuen Ting: Application 9 of 2007

125. Ms Tang's application is the third in this series of applications which were heard in sequence before this Tribunal. In Ms Tang's case she had separate representation, namely by Mr Bernard Mak of counsel.

126. Ms Tang, an account executive with HIL, at the outset appears to have been a relatively peripheral figure in terms of the initial SFC investigation into the activities of CHI, although it seems that the regulator became increasingly interested in the activities or its investigations progressed.

127. By its NPDA dated 5 July 2007, the SFC informed Ms Tang that in their opinion she was guilty of misconduct and was not fit and proper to be licensed in that she had engaged in the unlicensed activities of Cosmos Hantec Investment (NZ) Ltd in breach of HIL's internal policy as well as General Principle and paragraph 12.1 of the Code of Conduct for licensed persons; and further that she had failed to act honestly, fairly and in the interests of clients and the integrity of the market by providing false and misleading information to the Commission in breach of General Principle 1 of the Code of Conduct.

128. This NPDA, which is in detailed terms, speaks for itself.

129. The substance of the SFC's complaints were based upon interviews with two persons, Mr Woo U Dong and a Ms Chan, who were clients of Ms Tang, who acted as their account executive.

130. So far as the evidence emanating from Ms Chan is concerned, Ms Chan had confirmed that a new account had been opened for her at CHI via the agency of Ms Tang, and concluded, at paragraphs 14 and 15, that:

> "It is apparently beyond dispute that you invited Chan to open a new leveraged foreign exchange product at another company within the Hantec Group, advised her on the products that she should buy and sell in this new account, and received certain payments as a result of referring Chan to this company.
>
> According to information provided by Cosmos Hantec, it paid commissions totaling USD186,602 (approximately HK$1,455,496) to you from December 2003 to March 2004. It appears that these commissions related not only to the trades conducted by Chan but also trades conducted by Woo. Chan and Woo apparently suffered losses of USD110,483.95 (approximately $861,774.81) and USD276,925.19 (approximately $2,160,016.48) respectively from

> trading leveraged foreign exchange contracts through Cosmos Hantec between December 2003 and March 2004."

131. It also is alleged in the NPDA that Ms Tang had claimed that she did not know the company at which Chan had opened a new account was in fact CHI, although on the evidence in terms of the manner in which Chan had been advised by Ms Tang to place orders, and that payments had been received by Ms Tang in terms of Chan's referral to CHI, the regulator concluded (at paragraph 16) that "it would be inconceivable that you knew nothing about this company other than the fact that it was within the Hantec Group", and that in the SFC's view Ms Tang in fact knew that she had invited Chan to open an account at CHI "and apparently engaged in leveraged foreign exchange trading business of Cosmos Hantec."

132. As for Ms Tang's interview on 1 June 2005 about the Woo account, the SFC recite the objectively available evidence, in particular the first page of Woo's account opening document with CHI which was marked "Cosmos Hantec Investment (NZ) Limited – Agreement for Foreign Exchange Margin Trading Account" – and compared Ms Tang's account given to the SFC in terms of her knowledge about this account; to take one example, the SFC recite (at paragraph 21) that:

> "[You told us that] "you did not remember this document, but admitted you signed three times" thereon, that a Mr Lam had passed Woo's account opening document to her "and asked you to sign as the account executive", and that she did not know Lam's title or position within the Hantec Group, nor did she know why he had approached her in relation to the opening of Woo's account at Cosmos Hantec, but "nevertheless you still put your signatures on Woo's account opening document as you thought it would be helpful."

133. With regard to a subsequent interview the SFC recited that Ms Tang had told the SFC that she had not met Woo, nor persuaded him to place money in his CHI account or to trade in leveraged foreign exchange contracts. However, when the regulator had interviewed Woo, the latter said that he had opened an account with CHI in January 2004, and had stopped trading in his account in around March 2004 because he had lost approximately HK$2 million by that time, but that in or around May 2004 Ms Tang and her colleague, a Mr Yeung Kam Wing had met him and persuaded him to deposit further money in his CHI account and to continue trading – a request to which initially he agreed, but subsequently recanted.

134. The SFC state that they accepted Woo's evidence, as corroborated by that of Yeung, "to be far more convincing" than Ms Tang's account of events, and further state that it seemed to the regulator that Ms Tang had provided false and misleading evidence in her interview with the SFC on 6 June 2005 when she had said that she had never met Woo, nor had she persuaded Woo to place money in his account at CHI in order to trade leverage foreign exchange contracts.

135. The further complaint under this head is that false and misleading information was also given by Ms Tang in her interview on 7 February 2005, when she had disavowed knowledge of CHI, save that it was part of the Hantec Group, and that she had never seen the CHI account opening documents; the SFC continue (at paragraph 27): "It appears to us that you clearly knew the nature of business of Cosmos Hantec and that, when you signed on Woo's account opening document, you knew you did so in the capacity of his account executive at Cosmos Hantec. In addition, …it appears that you knew you invited Chan to open an account at Cosmos

Hantec, and apparently engaged in the leveraged foreign exchange trading business of Cosmos Hantec."

136. Accordingly, the SFC gave notice (at paragraph 30) that it proposed to suspend Ms Tang's licence for 9 months, and to fine her the sum of HK$1,455,496, and set out the reasons which it was believed justified this penalty, reasons which included the risk of leveraged forex trading, that CHI was an unregulated entity and that the clients, which had suffered substantial losses, had been deprived of their statutory protection under Hong Kong law and exposed to unnecessary risks, that Ms Tang had given false and misleading information to the SFC, and that, in terms of the amount specifically levied *qua* fine, this sum represented "the benefit you derived from your misconduct which we consider to be unjust enrichment", hence the order for disgorgement of this sum.

137. As was the situation in the other two instances the subject of this Determination, no written representations were received from Ms Tang in response to this NPDA, and thus on 7 September 2007 the SFC sent its Notice of Final Decision, which confirmed its provisional view, namely a suspension of licence for 9 months and a fine of HK$1,455,496.00.

138. By Notice of Application for Review dated 28 September 2007 Ms Tang sought redress from this Tribunal against this decision of the SFC.

139. In total there are 6 grounds set out therein in support of the application, which range from assertions that in coming to its conclusions in this matter the SFC had breached the principles of natural justice and/or procedural fairness and/or the applicant's right to a fair trial, that given the

gravity of the allegations made against Ms Tang the SFC ought to have directed itself, and to have applied, the standard of proof beyond a reasonable doubt, or alternatively that if and in so far as the requisite standard should be proof to a high degree of probability that this standard could not be attained on the evidence available to the regulator, that there was no credible evidence to demonstrate that the applicant had engaged in any unlicensed activities of CHI, alternatively that "by acting as no more than a mere conduit" in the dealings between CHI and their clients the applicant was not performing any regulatory activity contrary to s.114(3) of the SFO, and hence there was no sufficient basis of a finding of misconduct; additionally it is asserted that the SFC had failed in its conclusion that the applicant had failed to act honestly, fairly, and in the interests of clients, that she had provided false and misleading information; and finally, as to penalty, it is said that the financial penalty and the suspension imposed as excessive in all the circumstances, in particular because of the applicant's clear disciplinary record, and that the alleged acts did not cause prejudice to the investing public, that the interests of clients of CHI were not prejudiced, and that "the applicant had not been unjustly enriched".

140. In his helpful skeleton argument, Mr Mak on behalf of Ms Tang did not take up the cudgels in terms of the considerable diversity of points as pleaded in the notice of application for review, and instead made submissions which concentrated upon the argument that there was no sufficient basis for the conclusion of the regulator that CHI carried on regulated activities in Hong Kong, that in effect Ms Tang had acted as no more than a "mere conduit" in the dealings between CHI and its clients, and thus there had been no breach of Hantec International's internal policy or the Code of Conduct irrespective of the strength of the jurisdictional argument

also taken on her behalf, that Ms Tang's failure to recall her "brief encounter" with Mr Woo itself was not supportive of a finding that she had intended to mislead the SFC, and that the penalty as visited upon her was "excessive and disproportionate" considering all the circumstances of the case.

141. Notwithstanding the cogency of Mr Mak's submissions – in which, upon the issue of the carrying out of regulatory activities in Hong Kong he expressly had adopted the submissions made on behalf of Ms Ng and Mr Law – I am unable to perceive any basis for setting aside the conclusion of the regulator as to the decision to discipline Ms Tang.

142. In particular have reflected upon, but do *not* accept, his argument that Ms Tang should not be considered as having performed regulated functions of CHI, and that the Tribunal should accept as a matter of fact that "Ms Tang did no more than communicating with clients of Cosmos Hantec on an ad hoc basis", and thus that she did not engage in any activities in breach of HIL's policy or of the Code.

143. Upon the information available to the SFC as the result of its investigation, it is clear that Ms Tang was involved precisely as the regulator has concluded – and, if she was not, she could have made representations as to the erroneous nature of such conclusions and, perhaps more significantly, she could have chosen to enter the witness box and to tell this Tribunal the true position so far as she was concerned. Had she done this, she would at least have been in a position wherein there may have been (I decline to make any assumptions in this regard) hard evidence contradictory to that

assembled by the regulator, which thus may have provided her counsel with some cogent ammunition with which to argue her defence.

144. Instead, in common with the other applicants in this entirely regrettable affair, she has elected for the passive forensic strategy of sniping from the procedural sidelines, and if she has failed in this endeavour – as in my view she clearly has – in my view she can have no complaint that the Tribunal now is unwilling to interpret such evidence as exists in a manner favourable to her interests. In this regard I repeat my observations earlier in this Determination that where an applicant – who is in the best position to know what did or did not take place – specifically chooses *not* to provide the best evidence and to explain what has occurred it is open to the Tribunal to take the existing (and wholly uncontradicted) evidence at face value and, if considered appropriate, to draw inferences therefrom adverse to the applicant's interests.

145. As to penalty, Mr Mak argued that the losses suffered by Mr Woo and Ms Chan were not relevant, and that what Ms Tang may have done caused no prejudice to the interest of the investing public, nor was she in breach of any fiduciary duty to her clients. He also disputed that Ms Tang was unjustly enriched: "the fact was, whilst Ms Tang was paid commissions for trades done by Mr Woo and Ms Sandy Chan, she had no control over the frequency and size of trades done by them, hence Ms Tang could at most be regarded as saddled with a windfall and certainly not as unjustly enriched…"

146. Mr Mak suggested that the proposed penalty was "clearly inequitable", and that in the present case at any rate, the order requiring Ms Tang to pay a sum of over HK$1.4 million was "harsh and

disproportionate", a hardship aggravated by the imposition of the 9 month suspension. He also stress that a clear record since she was first registered as a commodity dealer's representative in 2000 entitled her to "the most generous discount".

147. As to penalty, I decline as firmly as I may to vary that which the regulator has imposed.

148. For my own part I fail to see – and unequivocally reject the contention – that reasonably it can be said that Ms Tang's activities did no harm to the investing public in the circumstances wherein her clients, who in fact suffered losses, were encouraged to trade with an unregulated entity; as Mr Beresford points out, Ms Tang now admits in her statement given to the SFC that she "well knew" that CHI was not registered in Hong Kong, and that CHI could not have Hong Kong people as its clients, and accordingly, she undoubtedly knew it was wrong for her to assist the unlicensed activities of an overseas unregulated company.

149. As to the fine of HK$1.4 million, on the SFC's case this is equivalent to the commission Ms Tang received from CHI in respect of the trades of her two clients, and whatever characterization has been employed to describe the nature of this fine – Mr Mak optimistically maintained that far from being "unjustly enriched" she merely had been "saddled with a windfall" - for my part (and however it be juristically analysed) I see no conceptual problem in the SFC stripping Ms Tang, via the medium of a fine, of the specific profits earned from such unlicensed and wrongful activities.

150. In my view Mr Beresford is correct in his submission that from the regulator's perspective it is particularly important to demonstrate to the market that persons such as Ms Tang will be deprived of their profits via levy of an appropriate fine when the amount in question can be ascribed to trades under the purview of offshore unregulated vehicles, and in my judgment there is no conceivable reason why Ms Tang should be entitled to retain the equivalent of her illegally earned commission payment.

151. Nor do I see any reason to interfere with the period of suspension imposed; indeed, in comparison with the position of Mr Law, it might be thought that Ms Tang had received rather more favourable treatment at the hands of the regulator, not least when there is factored into the equation is the additional element of misleading the regulator.

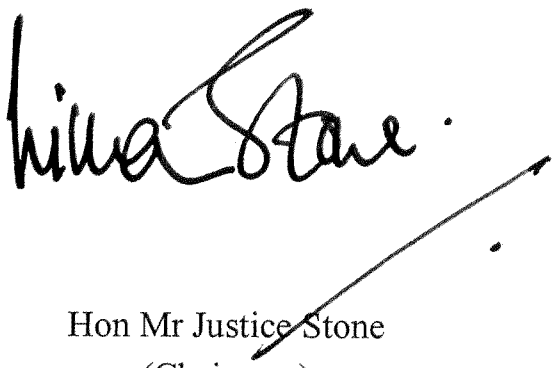
152. In fact, on the basis of the evidence as is available, I have no sympathy whatever for Ms Tang, and consider that there was room for the submission that in this circumstances, she had been dealt with relatively lightly. However, Mr Beresford mounted no argument in terms of an increase in penalty in this case, and whilst on occasion the Tribunal is prepared to reduce a penalty of its own volition, as indeed has occurred in the case of Mr Law – I am disinclined to order an increase absent an appropriate invitation so to do.

Order

153. It follows from the foregoing that the Order of the Tribunal on this application is as follows:

(i) The application for review in SFAT No 9 of 2007 is dismissed;

(ii) There is to be an order *nisi*, such order to become absolute unless application to vary the same is made by either party within 21 days from the date of this Determination, that the costs of and occasioned by this application are to be paid by the applicant to the respondent, such costs to be taxed if not agreed.



Hon Mr Justice Stone
(Chairman)

Mr Keith Yeung, instructed by Messrs Robertsons, for the applicants in SFAT No's 7 and 8 of 2007

Mr Bernard Mak, instructed by Messrs Andrew Law and Franki Ho, for the applicant in SFAT No 9 of 2007

Mr Roger Beresford, instructed by the SFC, for the respondent in each of the aforesaid applications