Application Nos. 13 and 14 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

CHUANG YUEHENG, HENRY	1st Applicant
CHUNG NAM SECURITIES LIMITED	2nd Applicant
and	
SECURITIES AND FUTURES COMMISSION	Respondent

Tribunal: Hon Mr Justice Stone, Chairman

Date of Hearing: 31 October 2008 (4 pm)

Date of Handing Down Decision: 11 November 2008

DECISION UPON APPLICATION
FOR STAY OF EXECUTION

The application

1. On 10 October 2008 this Tribunal handed down its Determination in the applications for review of Mr Henry Chuang Yue Heng and of Chung Nam Securities Limited, applications which were heard together.

2. This Determination speaks for itself.

3. For present purposes, suffice to say that the applications for review succeeded in part only, and that the fines respectively levied upon Mr Chuang and Chung Nam Securities Ltd were reduced; save as aforesaid, however, there was no change as to the decision of the regulator to issue a public reprimand against both applicants in terms of an appropriately amended Press Release.

4. As matters have transpired, it is solely this latter issue which forms the subject-matter of this application, made on behalf of both applicants for review, for a stay of execution of a decision of this Tribunal.

The procedural background

5. When the issue of stay was first mooted, by letter dated 13 October 2008 from the applicants' solicitors, Messrs Andrew Lam & Co, to the SFC, copied to the SFAT, this letter stated that it was the intention of both parties to appeal to the Court of Appeal against the Determination of this Tribunal on a point of law, pursuant to section 229 of the Securities and Futures Ordinance, Cap 571.

6. This letter requested the SFC "to kindly refrain from taking any steps to carry out the Tribunal's decisions" pending the outcome of that which then was anticipated to be an application for a stay to the Court of Appeal, and which ends with the observations that: "We are particularly mindful that were the SFC to publish the Public Reprimands provided for in the determinations, this would render the Appeals wholly nugatory".

7. A further letter of 20 October 2008 from Messrs Andrew Lam & Co to the SFAT advised that they had been instructed to lodge a Notice of Appeal with the Court of Appeal, and that in the meantime, pursuant to section 228 of the SFO, and on the instructions of both clients, that an Order of this Tribunal be sought "that the decisions in respect of both Applications be stayed, pending disposal of the appeal."

8. This letter added that in the absence of the consent of the SFC to this request, which thus far had not been forthcoming, it was assumed that the SFC would contest the stay application, and that "we would therefore invite the Tribunal to consider and, if thought fit, grant the requested stay by

way on (sic) the papers". The final paragraph of this letter also stated that "the essence" of the Tribunal's determination as to penalty already appears in its published determination at www.sfat.gov.hk (namely, the SFAT website upon which all Determinations are placed when issued), and thus invited the Tribunal "to remove the subject Determination from its website until the disposal of the appeal, such action being consistent with, and inherently necessary to the effectiveness of, the imposition of a stay."

9. To this letter the SFC responded by letter dated 21 October 2008 addressed to this Tribunal.

10. The regulator pointed out that in their letter of 20 October 2008 requesting a stay of execution of the Tribunal's decision handed down on 10 October 2008, Messrs Andrew Lam had provided no reasons why a stay of execution was appropriate in the circumstances, that no Grounds of Appeal against the Tribunal's Determinations in these applications for review had been forthcoming, "absent which the Commission cannot see any merits in the Applicants' appeal" stemming from the Determination, and thus that the stay application was opposed in principle; and further, if the Tribunal was minded to grant a stay of execution, that the Tribunal should make an order for the payment of money into the Tribunal pursuant to section 228.

11. In light of this correspondence the Tribunal declined to make any order for a stay on the papers alone – not least because on their face they contained no reference to any Grounds of Appeal, and this the Tribunal

could perceive no reason so to do – and by letter dated 24 October 2008, the SFAT ordered that the issue be argued at a hearing specially convened for Friday 31 October at 4.00 pm.

12. Given that the Determination(s), to which objection apparently now was to be taken by way of appeal on a point of law, had been decided by a full Tribunal, consisting of the Chairman and two lay members, it was agreed between the parties – such agreement being contained in a signed joint letter dated 23 October 2008 – that this application for a stay of execution be heard by the Chairman sitting alone, thereby conferring jurisdiction upon the Chairman sitting as the sole member of the Tribunal upon that which took the place of legal argument.

Argument upon the stay application

13. On behalf of the two applicants for a stay, Mr Henry Chuang and Chung Nam Securities Ltd, Mr John Brewer (who did not appear upon the substantive applications for review which had led to the Determinations in question, wherein the applicants had been represented by Mr Sarony SC and Ms Angel Lau) filed a Skeleton Argument on the day prior to the hearing.

14. In that very brief document, it was indicated that a Notice of Appeal was to be lodged with the court no later than 31 October 2008, and it made the point (at the second paragraph thereof) that since the penalties as varied by the Tribunal "embrace public reprimands as well as pecuniary penalties", that the execution of the public reprimand elements of the

decision "would cause damage to reputation which cannot thereafter be undone and so render nugatory the effect of any successful appeal."

15. It was further said that the applicants were willing, if so required by the Tribunal, to pay the pecuniary penalties as varied into the Tribunal, and that "consistent with the Applicants' application that execution of the public reprimand element of the decisions be stayed, the Applicants "respectfully request the Tribunal to remove from its website…the Determination of 10 October 2008."

16. During initial exchanges at the hearing of this application with the Tribunal, which was concerned as to the precise ambit of the proposed stay, Mr Brewer indicated immediately that notwithstanding the earlier written request that the Determination, as then issued and published on the SFAT website, be removed therefrom, that he was resiling from that submission as he considered it "a step too far".

17. As to the issue of paying the fines into the Tribunal (which in any event does not have the infrastructure to deal with such a course of action), whilst not abandoning the point it was no longer pressed, the Tribunal pointing out that, if and in so far as any appeal was successful, there could be no realistic doubt but that the SFC was 'good for the money', and thus clearly would return it to the applicants *if* the financial penalties as imposed by the SFC (and as subsequently varied by the Tribunal) were to be set aside.

18. Accordingly, this simply left the issue of the public reprimand – as represented by an appropriately amended Press Release to reflect the changes made to the initially-imposed SFC financial penalties – as the subject of this application for a stay, with which aspect of the SFC decision the Tribunal pointedly had refused to interfere.

19. Mr Brewer submitted that in the circumstances the Tribunal could, and indeed should, order that pending appeal the relevant Press Release should *not* be issued by the SFC.

20. Appearing for the regulator, as he had (together with Mr Westbrook SC) upon the substantive applications for review of the SFC decisions, Mr Laurence Li opposed the application in the restricted terms in which it now was made.

21. In this context the Tribunal has had the advantage of a detailed Skeleton Argument from Mr Li, which had been drawn prior to counsel having had sight of any Notice of Appeal, or of any particulars in terms of the grounds specified therein.

22. Counsel for the SFC submitted that whilst section 228 of the SFO did indeed provide for a party to apply to the Tribunal for a stay of execution of a decision of the Tribunal, his research had not revealed any previous case of an application to stay any such decision; in the three appeals he had located from Determinations of the SFAT to the Court of Appeal, none of those appeals had involved any stay application.

23. As to the primary argument that Mr Brewer was propounding in terms of reputational loss caused by a public reprimand, thus allegedly rendering nugatory any possibly successful appeal, Mr Li strongly suggested that this approach should not succeed, noting that that the adverse effect of a tribunal's decision upon a person's reputation or any social or business stigma was and is not a sufficient ground to order a stay, precisely because such stigma attaches consequent upon the decision itself, and that only success upon appeal therefrom is able to provide vindication.

24. In this connection Mr Li cited the judgment in *Fung Wai Kwong, William v Insider Dealing Tribunal* [2001] 1 HKC 22 (CA), in which Woo JA observed (*op cit*, at 47I-48B):

> "…The adverse effect of the Tribunal's finding of insider dealing against the appellant on his reputation and social or business status is not a matter which can be cured by a stay of execution; the stigma has attached since the determination of the Tribunal and only a success on the appeal would provide vindication. We consider that [this item] is not a sound basis for ordering a stay in the circumstances…"

and, further (*op cit*, at 48H-I), the learned judge said:

> "There is nothing that would render the fruits of this appeal, if it were successful, nugatory. The sums ordered, when paid, will be with the Government, and the appellant would have no risk to recover the same should he succeed in his appeal. Moreover, as he is financially capable of paying the sums, paying them pursuant to the order subject to his appeal does not seem to us to affect his prosecution of the appeal in any adverse manner. Nor, for that matter, will the payment affect his reputation and status in life, for it must be known, as is the fact, that he is appealing…"

25. Within the context of loss of reputation, Mr Li also submitted that, as a matter of logic, every adverse decision of the Tribunal potentially would be injurious to reputation, and thus would, on the applicants' case, command an automatic stay pending appeal; in fact, the *reductio ad absurdum* would be that the Tribunal would have to keep *every* decision made in *any* review confidential until any appeal period expired.

26. With regard to the Grounds of Appeal themselves, which had only been sighted by the SFC and by the Tribunal shortly prior to this hearing, and in response to a question from the Tribunal, Mr Brewer confirmed that the specific question at law which his clients wished to pose to the Court of Appeal was one of the Tribunal's jurisdiction to entertain the case against Mr Chuang, although counsel frankly accepted that this point had *not* been taken by counsel for the applicants at the hearing of the substantive applications for review.

27. As to these Grounds, for his part Mr Li opined that he could divine no merit therein, not only since the 'jurisdiction point' had not been taken at the substantive hearing, but that in any event there could be no question of this point having any bearing on the position of the second applicant, Chung Nam, and thus from this point of view any appeal on behalf of the 2nd applicant was wholly unfounded, given that on any basis there could be no point of law at issue.

Decision upon the stay application

28. This Tribunal has no hesitation in rejecting this application on the part of both applicants.

29. I say this for two main reasons.

30. First, and perhaps the more obvious, I can see no merit in the prospective appeal, although this of course ultimately must be a matter for the Court of Appeal.

31. The point of law which now is sought to be raised was not raised – as indeed Mr Brewer fairly accepted – at the hearing of the review which produced the Determination from which this appeal is sought to be maintained.

32. In fact, the substantive review application was conducted *solely* on the basis of fact, and the Determination itself – in which the Tribunal acceded to Mr Sarony's mitigation submission with regard to the size of the fines imposed, and made a reduction in each (for the 1st applicant, from HK$500,000 to HK$350,000, and for the 2nd applicant, from HK$1 million to HK$700,000) – was grounded on the view of the facts as taken by the Tribunal; no issue of law was raised, nor was necessary for this Determination; in short, the Tribunal simply considered that in the matter of monetary penalty imposed the SFC had 'over-egged' the pudding.

33. However, as is clear on the face of the Determination, no change was made to the regulator's decision to issue a Public Reprimand in the form of a Press Release, a proposed draft of which had been placed before the Tribunal at the hearing of the application, but the terms of which, upon the Tribunal's decision, clearly now required amendment.

34. It was in this context that Mr Brewer, who did his best with not an easy brief, was in some difficulty, because at the outset he expressly had resiled from the initial request that the Determination of the Tribunal be removed from the SFAT website, wherein it had been posted, in usual course, upon publication of the Determination itself. If I may say so, he clearly was correct to step back from that submission.

35. However, the ineluctable result was, and is, that the Determination remains within the public domain, and is accessible to be read on the internet to anyone who 'Googles' (if that term now has attained the status of a verb) the SFAT of Hong Kong, wherein I am told there is a 'link' to SFAT Determinations, all of which, at least since 1 April 2003 when this Tribunal formally was established, now repose on this website.

36. Thus, that which Mr Brewer was after in this application solely was suppression of an amended Press Release, which in normal course the SFAT sends out to the media upon publication of any Determination of this Tribunal.

37. In this connection, however, there was a slight wrinkle, in that Mr Li advised the Tribunal that in this instance, and consequent upon the Tribunal's substantive Determination, the SFAT had not yet promulgated such an amended Press Release, in substantial part, counsel said, because before it had been able to do so the regulator had received notice of this application for a stay, and thus out of courtesy to the Tribunal the regulator had forborne so to publish pending the outcome of this hearing.

38. So far as the content of a Press Release is concerned, it seems to me that two matters arise for consideration.

39. First, I entertain very considerable doubt that, having rendered its Determination consequent upon the substantive application for review, this Tribunal has any jurisdiction to dictate to the regulator the manner/form in which the Determination of this Tribunal is to be publicly announced.

40. The normal pattern which has developed, as I understand it, is that there appears to be a standard form of Press Release – which, to take but one example, generally receives a passing mention in one of the more obscure recesses of the 'SCMP Business Post' – wherein the actual result of the SFAT Determination is reported, and often is accompanied at the end of the factual reportage by that which presumably is regarded as a suitable homily on the part of the Director of Enforcement, or other senior official within the SFC, who is minded to state that the type of activity in question is not acceptable in terms of market integrity, will continue to be pursued by

the SFC in terms of disciplinary action, and now has received appropriate sanction, and so forth.

41. In this context, Mr Brewer complained that if and in so far as the outcome of any Tribunal Determination is perceived as adverse to the SFC, that such releases often are 'glossed', so that any impact critical to the SFC is deflected, and in this regard he cited one instance in particular – see *Korner v SFC*, SFAT No 5 of 2004 – in which he maintained that this phenomenon had occurred; in terms of this isolated instance he perhaps had a valid point.

42. It seems to me, however, that *if and in so far* as the regulator is minded to put out a Press Release which fails accurately to represent the objective reality – and I certainly do *not* imply that this is a frequent occurrence within a regulatory institution which consistently demonstrates its preoccupation with accuracy and fairness – or in which the reality is 'glossed' or is the subject of that which nowadays inelegantly is termed 'spin', such that a clearly incorrect impression is imparted, then this is, and in my view must remain, a matter solely between the applicants and the SFC and the publication in question – with such recourse/remedy as our legal system provides – and for my part I do not consider that the Tribunal, whose published Determination speaks for itself, need, or indeed should be, further involved.

43. This issue of the control by the Tribunal of the precise wording of a Press Release recently was raised in an earlier Determination – in *SFAT*

No 3 of 2008, Radland International Limited v SFC – in which it then was argued by leading counsel, Mr Harris SC, whose client had objected to the terms of a proposed Press Release, that a decision to issue a reprimand in particular terms fell within the rubric of a "specified decision" which was susceptible to review by the Tribunal pursuant to section 216(1) of the SFO, Cap 571; if this were not to be the case, argued Mr Harris, it would follow that the decision to issue a reprimand in particular terms could only be challenged by judicial review, which would be curious given that the SFAT statutorily had been established specifically to review disciplinary decisions of the market regulator.

44. In response to this submission, Mr Laurence Li, who also appeared in that case, as here, had submitted that when it came to the issue of a public reprimand the specifically 'reviewable' or 'specified decision' was the regulator's decision to reprimand, and did *not* encompass the particular mode or form which such reprimand was to take, which did not necessarily have to involve issuance of a Press Release: for example, it could assume the form of a circular to the securities industry, or a digital posting on the SFC's website, nor necessarily was there any 'standard form' of release, if in fact this was the manner chosen to place any such reprimand into the public domain.

45. In the event in the circumstances of that earlier review the Tribunal did not need to decide the point, although (at paragraph 48) it stated that it was "inclined" to the view that Mr Li's analysis was correct, and that the Tribunal has no power to order the regulator to issue a Press Release,

which essentially consists of reportage in terms of that which the SFAT has decided upon any application for review, in any particular form.

46. I adhere to this earlier view, and *if and in so far* as this point, as raised within the context of the current stay application in its restricted terms, requires decision, I adhere to this earlier expressed view.

47. However, it seems to me that once again I do not need finally to decide this on the basis of jurisdiction, because in the event in this case, in the unfettered exercise of its discretion, this Tribunal is *not* minded to accede to the stay application, in the revised terms in which it now has been advanced by counsel for the applicants, to order a stay of execution of the issue of a revised Press Release consequent upon the published Determination of the Tribunal.

48. Viewed from such discretionary perspective, the result of this Determination already is squarely within the public domain, and indeed has been for some weeks since the publication of the Determination upon the SFAT website, so that in a sense, with the concession made by Mr Brewer in terms of the withdrawal of the original request to remove this Determination from this website, it strikes me that the entire matter essentially is academic; the significant fact is that it remains accessible on the internet as opposed to other manifestations of the local media.

49. Nor do I perceive any merit in the intended appeal, given the absence of any 'jurisdictional point' having been taken at the time of the

substantive hearing of these applications for review, and in so far as it be relevant I accept the submissions of Mr Li, for the SFC, that in itself perceived damage to reputation is insufficient as a ground justifying a stay pending any appeal.

50. Nor, for that matter, do I accept the contention that any such damage would render any appeal nugatory.

51. For his part Mr Li has made it clear that i*f and in so far* as the Court of Appeal were to entertain this appeal in the circumstances, and to find in the applicants' favour – upon which this Tribunal expresses no view – then on behalf of the SFC he undertook to ensure that his client would issue a suitably 'remedial' Press Release announcing the result of the appeal, untrammelled by 'gloss', and thus removing any possibility of the potential unfairness to which Mr Brewer had referred.

52. Indeed, Mr Li also noted on behalf of the SFC that the Press Release which was due to be issued in amended terms consequent upon the Determination by the SFAT of these applications for review no doubt also would mention the fact that the applicants were launching an appeal to the Court of Appeal against the Determination against them, wherein their fines were reduced, and wherein also, it should be noted, no order for costs was made against them.

53. In these circumstances, therefore, it is difficult to appreciate why there should be any question of the discretion of this Tribunal being

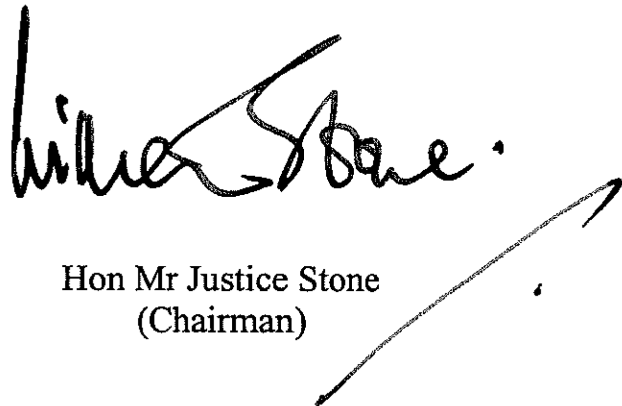
exercised in favour of the current (and now drastically revised) application for a stay of execution.

Order

54. Consequent upon the foregoing, therefore, this Tribunal makes the following order upon the applicants' application for a stay of execution:

(i) The application by the 1st and 2nd applicants for a stay of execution is dismissed;

(ii) There be an order *nisi* that the costs of and occasioned by such application be paid by the applicants to the respondent, such costs to be taxed if not agreed, such order *nisi* to become absolute unless within 14 days from the date hereof there be an application by either party to vary such order.



Hon Mr Justice Stone
(Chairman)

Mr John Brewer, instructed by Messrs Andrew Lam & Co,
for the applicants

Mr Laurence Li, instructed by the SFC, for the respondent