Application No. 15 of 2007

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

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

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

BETWEEN

NG CHIT CHUNG, EDDIE — Applicant

and

SECURITIES AND FUTURES COMMISSION — Respondent

Tribunal: Hon Mr Justice Stone, Chairman

Date of Hearing: 16 July 2008

Date of Determination: 20 March 2009

DETERMINATION

The application

1. This is an application for review by the applicant herein, Mr Eddie Ng Chit Chung, of an SFC decision dated 7 December 2007 whereby it was determined that the applicant's licence should be suspended for a period of 3 years.

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

3. The parties to this review have consented to the application being heard by the Chairman of the SFAT sitting alone, pursuant to section 31 of Schedule 8 to the SFO.

4. This application has been heard during the same hearing dates of two other applications: *SFAT No 10 of 2007*, the application for review of Mr Tse Shiu Hoi, and *SFAT No 6 of 2007*, the application for review of Hong Kong Forex Ltd, the Determinations in which are published on the same date as this application.

5. The background to the order for the 'consolidated' hearing of these 3 applications has been outlined in the Determination in *SFAT No 6 of*

2007, and essentially arises because of the common factual background giving rise to the SFC decisions, from which an application for review was launched in each instance.

The factual background

6. The applicant, Mr Ng, commenced working for HK Forex in September 1999; since 4 December 2000 he had been the Responsible Officer of that company, and since 1 April 2003 he was Executive Director of HK Forex.

7. Mr Ng was registered as a leveraged foreign exchange trader's representative under the Leveraged Foreign Exchange Trading Ordinance ('LEFTO') prior to 1 April 2003, and held a licence under the provisions of the SFO after that date.

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

9. HK Forex is part of the Sincere Group of companies: together with Sincere Bullion and Sincere Securities, it is an wholly owned subsidiary of Sincere Finance, of which Mr SH Tse is a substantial shareholder.

10. In *SFAT No 10 of 2007* Mr Tse applied for review of an SFC decision whereby Mr Tse was prohibited for life under section 194 from performing certain categories of 'regulated activities', principal among which was applying to be licensed or registered, or applying to be a Responsible Officer of a licensed corporation; in *SFAT No 6 of 2007*, HK Forex also applied for review of an SFC decision whereby its licence was revoked.

11. As these published Determinations indicate, for the reasons adumbrated therein neither of these applications for review was successful.

12. The hearing of Mr Ng's application for review, in which he was represented by Mr Keith Oderberg of counsel, was 'sandwiched' between the application of HK Forex on 15 July, and the application of Mr SH Tse on 17 July 2008, Mr Ng's application being entertained on 16 July 2008.

13. The decision of the SFC to pursue the current applicant, Mr Ng, arose as a consequence of the extremely poor disciplinary and regulatory record of HK Forex, in which Mr Ng was both Responsible Officer and Executive Director. The nature and extent of these matters have been itemized in the skeleton argument of Mr Beresford, counsel for the SFC in this review.

The 1st NPDA

14. In the Notice of Proposed Disciplinary Action ('the 1st NPDA') dated 23 June 2006, the SFC announced to Mr Ng that it was mounting an inquiry under section 12 of LFETO and section 194 of the SFO, as to whether Mr Ng had been guilty of misconduct, and whether he was a fit and proper person to remain licensed these two Ordinances.

15. In the factual background set out in the 1st NPDA, the SFC noted a total of 5 convictions of HK Forex, of its staff and of persons associated with or acting through it, for offences arising out of unlicensed activities and 'cold calling' in leveraged foreign exchange that had taken place in the period between March 2001 and July 2004, and suggested that during the period of these offences both Mr Eddie Ng and one Mr Randy Li had had senior supervisory responsibilities within HK Forex: as earlier noted, in Mr Ng's case he was both a Responsible Officer since 4 December 2000 and an Executive Director from 1 April 2003.

16. The 1st NPDA set out in detail the SFC's Grounds for Concern, including an analysis of the evidence underpinning the 5 convictions as had occurred, and the internal control failings within the company as thereby were indicated, and expressed the view that Mr Ng was in breach of the "Conduct of Business Guidelines for Licence Holders under the LFETO" – in particular General Principle 4.7 and GP4.3 – and the Code of Conduct – in particular General Principle 7 and GP3.

17. The view thus formed was buttressed by reference to earlier 1999 convictions and disciplinary sanctions as had been visited on the company – then known as 'Tse's Forex' – the regulator observing that notwithstanding such breaches and related disciplinary sanctions, HK Forex apparently had continued to introduce clients to trade in 'black market' leveraged forex contracts and Hang Seng futures through related Macau entities: Appendices B and C to this 1st NPDA summarized the history of relevant disciplinary events.

18. In light of the repeated breaches of a similar nature, the primary cause of which was alleged to have been the failure of senior management of HK Forex adequately to supervise and to implement the law, the SFC took the view that such failures were "deliberate" on the part of Mr Ng; paragraph 80 of the 1st NPDA reads as follows:

> "We propose to conclude that the repeated breaches of a similar nature were deliberate failures of you. It appears that you did not take heed of the advice in the two independent review reports [dated 18 August 2000 and 23 September 2002 by independent accountants Li, Tang, Chen & Co] for independent checks to be conducted to ensure compliance. In the alternative we consider that you were grossly incompetent in the steps taken by you, if any to rectify internal control problems"

whilst paragraphs 82 and 83, under the heading 'Proposed Disciplinary Action', read thus:

> "We currently propose to suspend your licence for 18 months under section 12 of the LFETO and section 194 of the SFO.
>
> We believe the penalty is appropriate because all of the above breaches suggest that you did not implement adequate internal

> controls and had no regard for the regulatory regime. Despite two previous public reprimands and a conviction for similar matters against Hong Kong Forex, you appear to have failed to implement effective internal control procedures which directly facilitated the misconduct and illegal acts of its employees and others to the detriment of its clients' interests and damaged market integrity. We took into account that you had a clean disciplinary record."

19. Representations were invited from Mr Ng, and on 30 August 2006 the applicant made his initial written representations. This was a 7 page document, the opening paragraph of which reads:

> "I am writing to admit that as a responsible director, I am accountable for the unpleasant events as mentioned by you and to ask for your indulgence to take into account the following factors prior to considering types of disciplinary action against me…"

20. Thereafter there follows some background history, explanations and mitigation of the 5 convictions under complaint, the point further being made that all the cases cited "are not involved with my honesty, integrity, conduct and/or ethics", and further that the clients in the three cases cited did not suffer actual loss. The "poor quality of agents" is cited in mitigation, and Mr Ng also comments (at paragraph 10 of his submission):

> "The effectiveness of the systems and operation of Hong Kong Forex has been hindered by the deviant norms, value and culture of the front-line staff which has been deeply rooted in Hong Kong Forex. As an individual, I am limited in terms of power, influence and ability to enable all the agents to wholeheartedly comply with the procedures as laid down. It is unreasonable and unfair to put all the blames on my shoulder. The value and norms of people with working culture of Hong Kong Forex must be dramatically reformed and replaced with new perceptions and values."

21. Mr Ng thus submitted that in all the circumstances of the case, the suggested penalty of 18 months' suspension was "harsh, excessive and not proportionate to the actual extent of role and responsibility that I played…", and he requested that "severe reprimand with a fine of HK$50,000.00" was an appropriate penalty "in order to reflect [my] degree of responsibility".

22. Somewhat unusually, however, this was not to be the end of the story. Because new allegations against and involving HK Forex by then had surfaced, and the SFC became increasingly concerned.

The 2nd NPDA

23. Accordingly, by a 2nd NPDA dated 30 March 2007, the regulator rehearsed the content of the 1st NPDA, and, at paragraphs 5 and 6 of the 2nd NPDA, opined as follows:

> "In response to the First Letter, Leung, Chan & Pang, your solicitors, submitted a written representation dated 30 August 2006 on your behalf. You admitted that you were accountable in certain respects and asked us to consider several factors before making our final decision. You submitted that a severed reprimand and a fine of $50,000 is the appropriate sanction for you.
>
> There is further evidence, however, that suggests that, between March 2004 and September 2005, a total of a further eleven persons, who were staff of or associated with or acting through Hong Kong Forex and/or its staff, were implicated in unlicensed activities for inducing clients to trade in leveraged foreign exchange contracts either at Hong Kong Forex or a related Macau entity, Tse's International Investment (Macau) Limited ('Tse's Macau'). As a responsible officer supervising Hong Kong Forex's operations, you are seemingly responsible for the occurrence of these additional unlicensed activities…"

24. This 2nd NPDA once again is detailed in terms of the allegations mounted, and as to the regulator's cause for concern. The SFC therein expressed the view that the applicant must have been well aware of the unlicensed activities, in particular the referral of clients to Tse's Macau by staff of Sincere Bullion in collaboration with HK Forex staff, all of whom at that time physically were under the same roof, and that the purpose of the unlicensed activities was to benefit SH Tse, the ultimate owner of the Sincere Group and of Tse's Macau.

25. The SFC took the view (at section F of the 2nd NPDA) that the only reasonable inference in the circumstances was that Mr Ng had encouraged and facilitated HK Forex staff to engage in unlicensed activities, alternatively that he was grossly incompetent in implementing effective internal control measures within HK Forex, a view buttressed by the previous convictions of HK Forex in 1999 and 2002 in relation to similar Macau regulatory offences.

26. The proposed disciplinary action is set out in paragraphs 131-140 of the 2nd NPDA, the SFC noting in particular that Tse's Macau is not regulated under either Hong Kong or Macau law, thus stripping clients of their statutory protection, that "the corporate identities of Hong Kong Forex, Tse's Macau and Sincere Bullion were interchangeable", and also that "the licensed status of Hong Kong Forex appears to have been used as a disguise to cover up the operations of Sincere Bullion's unlicensed staff".

27. Accordingly, the SFC proposed a suspension of Mr Ng's licence for a period of 3 years under section 194 of the SFO on the basis of the allegations in the 1st and 2nd NPDA's. The SFC thus stated:

> "Considering the more serious gravity of your failings, suggested by the further incidents described in this letter, we consider that the proposed sanction of 18 months suspension for the matters alleged in the First Letter is inadequate and we now replace it with the proposed sanction in this letter.
>
> We believe the penalty is appropriate because all of the breaches suggest that you did not implement any adequate internal controls and had no regard for the regulatory regime at all. There were two previous public reprimands and two convictions for similar matters against Hong Kong Forex. In relation to the matters mentioned in the First Letter and in this letter, a total of six individuals were convicted while another one is pending appeal against acquittal. So far, a total of 16 persons from companies within the Sincere Group were disciplined for unlicensed activities in Hong Kong and in Macau's 'black market'.
>
> We believe that any licensed person, who seemingly failed to effectively improve a licensed corporation's internal controls in light of a continuous record of unlicensed activities and blatantly disregarded the regulatory requirements should be suspended for a lengthy period to protect the interests of investors and the integrity of the market."

28. This 2nd NPDA contained at Appendix A a list of documents (mainly interview records) relied on by the regulator in respect of Mr Ng, together with a copy of the Disciplinary Provisions within Part IX of the SFO.

29. Accordingly, further submissions were invited from Mr Ng in response to this 2nd NPDA.

30. On 8 June 2007, the applicant's solicitors filed their client's second written representations to the SFC.

31. Once again, this is a document of some 7 pages, which is responsive to certain paragraphs of the 2nd NPDA.

32. This document speaks for itself, and for present purposes suffice to say that its thrust was that the applicant had done all that he could to ensure compliance with the law, that he had had no control over the staff of Sincere Bullion, and that, whilst (as was the position in his first representations) he took "moral responsibility" for the misconduct that undoubtedly had occurred, nevertheless he should not be held personally responsible for the actions of miscreant staff within Hong Kong Forex.

33. In this regard his response to paragraph 10 of the 2nd NPDA sets the prevailing tone:

> "I certainly was on guard at all times against similar failings which you mentioned. I was certainly aware that I had to make staunch efforts to improve Hong Kong Forex's internal control measures. I set about doing this to the very best of my ability. I put in place stringent guidelines, gave regular briefings and organized seminars of the Continuing Professional Development type in which ethical matters were stressed. Furthermore I made it known to all members of staff that any breach of the regulations would be met with the most severe consequences.
>
> However, it is in the nature of things, which I am sure you understand, that a person who is determined to flout security measures, will always find a way. There is no perfect system and dishonest practices will not always be readily detectable…"

34. Mr Ng further denied that Mr SH Tse had day-to-day control over Sincere Finance "and particularly not of Hong Kong Forex", and he "doubted" if Mr Tse was in day-to-day control of Tse's Macau. Whilst conceding Mr Tse's major shareholding in the relevant companies he maintained that it was a "quantum leap of logic" to suggest that the staff of Sincere Bullion and Hong Kong Forex all were acting for the benefit of Mr Tse, whilst he maintained that the idea that "corporate entities under the control of Mr Tse are also used interchangeably is ridiculous and is strongly denied."

35. I pause to observe that this stout defence of Mr Tse's position within Mr Ng's representations starkly contrasted with the attitude toward Mr Ng evinced by leading counsel for Mr Tse at the hearing of Mr Tse's own application for review, and indeed that of HK Forex, wherein one of the submissions made was that it was Mr Ng who was the man who had been primarily responsible for the failures, both disciplinary and criminal, of HK Forex.

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

37. Two further brief representations were filed on behalf of Mr Ng: the first dated 5 November 2007, which responded to a letter from the SFC of 26 October 2007 relating to the content of, and questions arising from, the statement of one Maggie Tin Fu Man, and the second (and fourth in

sequence) dated 20 November 2007, which responded to a letter from the SFC dated 14 November 2007 in terms of the like subject-matter.

38. Upon receipt of Mr Ng's four written representations, on 7 December 2007 the SFC gave to the applicant its Notice of Final Decision, which was to uphold the conclusion that he was guilty of misconduct and was not fit and proper to remain a licensed person, and that "accordingly we have decided to suspend your licence for three years."

39. This Notice of Final Decision is a detailed document, and under 'Reasons for Decision' the SFC take in and give their conclusions under four major headings: (I) Knowingly permitting unlicensed activities; (II) Findings on 7 individual incidents; (III) Flawed internal control measures; and (IV) Other internal control failings.

40. In explanation of the 3 year suspension of licence sanction now visited upon Mr Ng, the SFC noted (at paragraph 73) the statistics to date, namely that since March 2002 there had been 9 convictions, including a conviction of HK Forex, relating to unlicensed activities, and that to-date a total of 16 persons from companies within the Sincere Group had been disciplined for unlicensed activities in Hong Kong and in Macau's leveraged foreign exchange "black market".

41. The regulator further observed (at paragraph 74) that the SFC had settled with Hong Kong Forex twice and had given them opportunities to rectify breaches occurring in previous periods:

> "In fact, when we settled with Hong Kong Forex on the second occasion in March 2002 for matters related to unlicensed activities between September 1999 and September 2000, we were giving Hong Kong Forex a third time to put its house in order. It was incumbent upon you, in light of Hong Kong Forex's recidivism, to implement stringent measures to address Hong Kong Forex's failings, but you did not. Alternatively, you were grossly negligent…"

42. The SFC disputed that it had received "any co-operation and assistance" from the applicant (as he had suggested in his initial set of written submissions), and maintained that:

> "…a suspension, therefore, adequately reflects the severity of the current case, considering that you were the person having overall responsibility for the operation of Hong Kong Forex, the seven incidents were repetitive in nature, and your failures were deliberate or, alternatively, due to your gross negligence."

43. Mr Ng remains aggrieved by this action, and thus, in company with HK Forex and Mr Tse, he has launched this application for review.

The evidence upon this application

44. Prior to the hearing it had been telegraphed that Mr Ng was to give evidence at this application. However, at the outset of his submission his counsel, Mr Oderberg, indicated that he had "revised" that decision, and that he would *not* be calling his client; at the same time Mr Oderberg made it

clear from the bar table that his client accepted that, after leaving HK Forex, Mr Ng had become a director of the Sincere Group as at the end of February 2008.

45. However, notwithstanding the lack of sight of Mr Ng in the witness box, some minimal evidence nevertheless was tendered.

46. First, a witness statement went in by consent of both parties: this was the statement of one Desmond Chan, a compliance officer within HK Forex.

47. Second, a lady by the name of Yung Tak Li was called to give *viva voce* evidence. This evidence was in very short compass, and she was but briefly cross-examined.

48. In my view neither the tendered witness statement nor the short evidence of Ms Li materially added to the sum of knowledge in this case, and most certainly has made no difference whatever to the outcome of this application for review.

49. In fact, the decision not to call the applicant, Mr Ng, who to-date had been vocal in his representations in response to the 1st and 2nd NPDA's, meant that this hearing effectively took the form of Hamlet without the Prince.

The applicant's argument

50. The argument of Mr Oderberg on behalf of Mr Ng was no more than a sophisticated submission in mitigation.

51. Counsel had caused to be filed a written skeleton argument in advance of the hearing, which contained an historical review and thereafter commentary and submission upon certain incidents, seven in number, which had underpinned either disciplinary sanction or criminal conviction, and for which, said Mr Oderberg, the SFC simply had taken a impressionistic view absent real evidence of the alleged oversights specifically laid at the door of his client.

52. Correctly in my view, Mr Oderberg left the Tribunal to consider his written skeleton in detail, and during the hearing took the opportunity to sketch a 'broad brush' picture.

53. In this connection Mr Oderberg's thesis was that he wished to concentrate on quantum rather than liability, and within this parameter he essentially followed two roads: *first*, that in substance there had not been change sufficient to cause the alteration of view on the part of the regulator, and thus to raise the sanction from the original period of 18 months suspension to one of 3 years, and accordingly it was not possible to understand the increase in penalty; and *second*, that when looked at as a whole, it was "quite impossible" to discern with any certainty whether the final determination of the SFC was founded upon gross

negligence/recklessness, or whether it went further, and involved an assertion that there had been connivance and actual knowledge on the part of his client of the regulatory breaches as had occurred, so that Mr Ng effectively was accused of assisting such breaches by "knowing non-intervention".

54. In this connection Mr Oderberg expressed his position thus [Transcript, July 16, at page 23, line 23]:

> "…it is unclear, totally unclear, whether he was being sentenced on the basis of mere carelessness, carelessness at a higher level, perhaps recklessness, or whether in fact there was an element, as in my submission appears to be, of actual knowledge and connivance"

and he thereafter argued strongly [Transcript, *op cit.*, page 24, line 15] that:

> "In my submission, [three years is manifestly too much] in the case of a man who has not been disciplined before, who has not been charged with any criminal activity in respect of any of these breaches, who, on my instructions, as I understand it, gave evidence in one of the proceedings…"

Mr Oderberg consequently suggested that, in an instance in which the juridical basis of sentence was as unclear as he maintained, that the fairest way of arriving at a sentence was to assume "carelessness rather than venality"; this latter phrase emanated from the Tribunal, but represented a sentiment with which Mr Oderberg agreed and indeed adopted.

55. Warming to his theme, Mr Oderberg also suggested that what had happened was that Mr Ng, as an individual within HK Forex, as a matter

of practical politics been treated by the SFC as individually responsible not only for infractions within HK Forex, of which he was the Responsible Officer, but that in addition he had been unfairly pilloried for being on notice of a systemic regulatory problem within the Sincere Group as a whole [Transcript, *op cit.,* at page 28, line 9]:

> "The difficulty of course is that there's been this assumption, which I think emerged yesterday in the proceedings before you, that [regarding] anything that happened within the Sincere Group it was proper to sheet home to any individual responsible officer within any of the companies under the umbrella of the Sincere Group…"

56. In effectively suggesting that a licence suspension period of 18 months represented the upper reaches of an appropriate sanction for his client, Mr Oderberg also sensibly accepted that the earlier "apparent rejection" by Mr Ng of an 18 month period probably reflected "undue optimism" on his client's part [Transcript, *op cit.*, at page 26, line 15], and he also accepted ("a perfectly appropriate way to deal with it" – Transcript, page 23, line 12) the proposition put to him during argument by the Tribunal that, in matters of sentence such as this, he would have to convince the Tribunal that 3 years indeed was "manifestly excessive", and thus that the period of suspension should have been no more than 2 years, that is, some 30% less, this being the minimum benchmark required for the Tribunal to come to the view that something "plainly" had gone wrong in the sentencing process.

57. In summation, Mr Oderberg pressed on the Tribunal that, as a matter of principle, the sentence passed on his client was “incorrect, unfair and manifestly excessive”, and that in fact the SFC could not in good conscience have sentenced Mr Ng to more than, at most, a licence suspension period of 2 years.

58. Mr Oderberg had arrived at this point after initially submitting, in direct response to a query by the Tribunal, that a licence suspension of 1 year was appropriate and would be at the least comprehensible and something with which his client could have lived, absent the need for an application for review; during the course of stating his best case Mr Oderberg also had trailed his coat and openly had suggested, in the alternative, that he may be able to come to terms with the original period of 18 months’ suspension if and in so far as the regulator was willing to put this back on the table – an invitation to treat to which Mr Beresford, for the regulator, pointedly did not bite.

Decision

59. I shall not repeat the established principles upon which this Tribunal acts in an application for review; they have been referred to in the Determination in SFAT No 6 of 2007 (at paragraph 91 *et seq*).

60. In order for Mr Oderberg to get home in his submission in mitigation the Tribunal has to be convinced that something is plainly wrong with the disciplinary sanction passed by the regulator upon Mr Ng; as a rule

of thumb, the Tribunal generally has to be satisfied that such sentence is approximately some 30% out of line in order to stimulate interest in taking remedial action upon review.

61. In other words, had the Tribunal itself been seized with this matter at the outset, and had it considered 30 months as a more appropriate sanction against Mr Ng, this is nothing to the immediate point. In order to get the Tribunal to 'bite' at the blandishments placed in front of it by counsel, Mr Oderberg had to satisfy the Tribunal that 2 years should have been the maximum sanction for the offences with which the regulator was confronted; anything lesser would amount to mere 'tinkering', which in principle this Tribunal strives (perhaps not always successfully) to avoid.

62. The question in this review thus is: has Mr Oderberg succeeded in this task?

63. In my view the answer to this is 'No', and very clearly 'No', notwithstanding the skill which Mr Oderberg demonstrated in his argument.

64. In this connection I also am reminded of the approach adopted by Mr McCoy SC on behalf of Mr Tse in *SFAT 15 of 2007*; he had maintained that, on a comparative basis, it was wrong in principle for the "prime mover" in and of the mistakes made by HK Forex, that is, Mr Eddie Ng, to have been given "only" a 3 year licence suspension, when his

corporate client, HK Forex itself received a licence revocation, and when his individual client, Mr Tse, had received a lifetime prohibition.

65. At first blush this is an attractive argument, *provided* that one accepts, which I do *not*, that Mr Ng indeed was the "prime mover" of HK Forex's defalcations – in my judgment it would have been difficult to do anything in that organization absent Mr Tse's clear imprimatur – and provided that one accepts, which again I do *not*, that in according 3 years to Mr Ng that the SFC had erred on the side of leniency.

66. To the contrary. This argument wholly breaks down when looked at from the other end of the telescope, namely, that arguably Mr Ng has escaped relatively lightly in light of the disastrous regulatory and disciplinary record of HK Forex during the years in which he was Responsible Officer, and latterly Executive Director of that company.

67. Having said this, I must record that Mr Beresford for the SFC, whose conduct of these cases is tough but fair and who eschews opportunistic bandwagons, made it clear that he neither had instructions nor wish to push for an increase in the sanction as now visited upon Mr Ng. For his part his only concern was to combat the mitigation as so plausibly developed by Mr Oderberg, and thus to preclude any reduction in the period of licence suspension currently passed upon Mr Ng.

68. In this regard Mr Beresford filed a written skeleton argument which concisely set out the regulator's response to the main contentions advanced on behalf of Mr Ng.

69. This document speaks for itself, and I do not intend to go into great detail.

70. For present purposes, however, Mr Beresford responded to the contention that there was no real evidence of intention or conscious misconduct on the part of Mr Ng by pointing out that during the period 1999-2005 there had been a systematic and fundamental regulatory failure in the operations of HK Forex, and that the majority, if not all, of such failures had "occurred on the applicant's watch" in the form of a clearly repetitive and identifiable pattern of like offences during the years of the applicant's supervision, which had resulted either in conviction or in disciplinary sanction. Given that the applicant had been the Responsible Officer since 2000, he said that the SFC clearly was entitled to look to the applicant to ensure proper compliance, and that at a very early stage the applicant should have been aware of the risks of unlicensed activities related to Tse's Macau and the activities of the staff of its associated company, Sincere Bullion.

71. Mr Beresford developed this theme with reference to a chronology and tabulated appendix, which I found most useful as an historical summary of the relevant infractions, and in light of such material it is difficult to do other than agree – which I do – with this basic contention:

this clearly is far from a ‘marginal case’ heavily dependent upon adverse inference, but, to the contrary, is based upon hard primary fact.

72. Nor do I accept the contention that the applicant was inexperienced, and that the defalcations of the company of which he was the Responsible Officer had resulted primarily from the oversight of others: the ineluctable fact is that the majority of the misconduct and offences took place during the 5 years of his tutelage, and that having accepted the appointment of Responsible Officer and of Executive Director, it ill-behoves Mr Ng now to attempt to shift the blame to others.

73. The case advanced that Mr Ng had delegated compliance issues to Desmond Chan and firms of auditors, and thus that he had done his best to ensure basic compliance within the operation of HK Forex, also does not strike a sympathetic chord with the Tribunal, since it ignores the repeated nature of the unlicensed activities that had occurred within HK Forex over the years, and also that, as Mr Beresford further pointed out, it must have been obvious to the applicant that any such delegation to professional staff to handle compliance issues, and the control measures as allegedly then were put in place, patently had proved inadequate and ineffective, and that repeated like offences had continued; alternatively, it is reasonable to suppose that the delegation itself must have been manifestly defective and grossly inadequate.

74. Nor, for that matter, do I accept the notion that such unlicensed activities were effected clandestinely, and thus were hard to detect.

75. It seems to me that this submission, if seriously advanced, contains within it seeds of its own downfall, in that it is the duty of the Responsible Officer to be on top of internal supervision, and to ensure that internal systems do not lend themselves to such clandestine activities; accordingly if indeed such activities were not detected by Mr Ng – and in the circumstances I confess that I find this very hard to accept – the short point is that they clearly *should* have been. In fact, the period over which such unlicensed activities occurred, taken together with the fact that at that time HK Forex and Sincere Bullion physically shared the same premises, and that in practice there clearly was little to separate the activities of the respective staff members, tends to give the lie to the protested ignorance on the part of Mr Ng that it was difficult to keep a handle on all that was going on: is it, for example, seriously contended that Mr Ng was in ignorance of the existence of an ‘incentive scheme’ which was put in place for unlicensed staff to persuade clients to open leveraged forex accounts at HK Forex or Tse’s Macau??

76. The foregoing aspects tend to point to the applicant having turned ‘a Nelsonian eye’ to the frequent infractions such as were occurring in his bailiwick, and regarded thus, amount to knowledge of what was taking place.

77. It is not difficult to come to this view on the papers. Moreover, that which plainly does nothing to improve the position from the applicant's viewpoint is the fact that, whilst counsel clearly was under instructions to run the mitigation along these lines, Mr Ng did not keep to his earlier advertised intention, and himself to go into the witness box in order to attempt to make good the matters now prayed in aid on his behalf.

78. In the parallel Determination mounted by Mr Tse in *SFAT No 10 of 2007* (at paragraph 80 *et seq*) I have made it very clear that in this Tribunal if an applicant seeks to hide behind submissions from the bar table, and chooses not to go into the witness box, then I see no reason to reject the adverse conclusions of the regulator, which conclusions are based not on surmise but in this case possess an evidential foundation in unassailable fact given the frequency of the regulatory/disciplinary infractions. In this regard I have quoted (*op cit*., at paragraph 82) the view of one of the members of the Court of Appeal in *Civil Appeal No.69 of 2008*, Judgment dated 26 February 2009, which sentiments I also adopt for the purpose of this review. If indeed Mr Ng had been serious in the protestations he had employed counsel to make on his behalf, it was open to him to have backed this with sworn testimony – indeed, until the outset of the hearing of this application it specifically had been indicated by his legal representatives that he intended so do – and the fact that he changed his mind and did not avail himself of this opportunity speaks for itself.

79. At the end of the day it is clear that this application for review must be dismissed.

80. It seems to me that taking the case at its lowest, the 3 year period of licence suspension imposed upon Mr Ng is wholly justified on the basis of gross negligence, as opposed to wilful oversight/knowledge of that which was going on, and for present purposes I am prepared to approach this review on this basis, although my view also is that the overwhelming probability is that Mr Ng indeed well knew of the regulatory infractions occurring on a frequent basis right under his nose. For what it be worth I repeat my view that in the particular circumstances Mr Ng has been treated with considerable leniency by the regulator, albeit I have not considered raising the sentence in light of the position adopted by Mr Beresford in this regard.

81. In my judgment, however, there can be no question of reducing the period of suspension to the levels as were sought by Mr Oderberg.

82. I agree with the submission on the part of the SFC that the 'supervisory aspect' of the case, that is, the absence of proper or adequate supervision by a company officer specifically seized with this task, is an exacerbating feature of this case, and is a matter which merits a clear deterrent sanction: within the regulatory framework recognized supervisors must be expected to adhere to a higher standard of conduct than the

subordinates who are (or should be) subject to appropriate internal supervision.

83. Moreover, the fact is that HK Forex, and by extension the applicant as Responsible Officer, already had been accorded two earlier opportunities by the regulator to put its 'compliance house' in order, and given the highly adverse regulatory history, justifiably a great deal more reasonably could have been expected on the part of Mr Ng; regrettably, however, regulatory non-compliance and blatant infraction continued unabated over the period of years during Mr Ng's tenure as Responsible Officer, and it strikes me as odd that he should consider, as he now apparently does, that he has been hard done by at the hands of the regulator. For my part, I should have thought that entirely the opposite is true.

Order

84. As I understand the position – and I believe that this is common ground – Mr Ng, the applicant herein, no longer is a 'regulated person' given that he has left HK Forex and now is employed by Sincere Bullion, which I am told, to my surprise, does not fall under the purview of the SFC since gold bullion trading is unregulated in Hong Kong, a matter of which the legislature presumably is unaware.

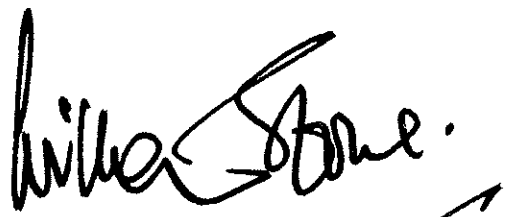
85. Accordingly, the fact that Mr Ng no longer is 'regulated' or 'registered' presumably means that the original SFC sanction of a 3 year

licence suspension is transmuted to a 3 year prohibition against any new licence application on the part of the applicant.

86. Be that as it may. For immediate purposes the Order of the Tribunal upon this application is as follows:

a. The application for review in SFAT No 15 of 2007 is dismissed;

b. There is to be an order *nisi* that the costs of and occasioned by the application are to be to the respondent, to be taxed if not agreed, such order *nisi* to become absolute unless within 21 days from the date hereof written representation is made from either party to vary this order *nisi*.



Hon Mr Justice Stone
(Chairman)

Mr Keith Oderberg, instructed by M/s Leung, Chan & Pang, for the applicant

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