Application No. 4 of 2007

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

IN THE MATTER OF a Decision made by the Securities and Futures Commission under section 194(1)(iv) of the Securities and Futures Ordinance, Cap. 571

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

BETWEEN

LEE ON MING, PAUL — Applicant

and

SECURITIES AND FUTURES COMMISSION — Respondent

Tribunal: Hon Mr Justice Stone, Chairman

Date of Hearing: 29 October 2007

Date of Determination: 9 November 2007

DETERMINATION

The application

1. This is the determination upon an application for review by the applicant herein, Mr Paul Lee On Ming, who is aggrieved by a Decision of

the SFC dated 11 July 2007 wherein, by Notice of that date, at paragraph 10 thereof, the SFC prohibited the applicant for life from:

(i) applying to be licensed as a representative;

(ii) applying to be approved under section 126(1) of the Securities and Futures Ordinance, Cap. 571, as a responsible officer of a licensed corporation;

(iii) applying to be given consent to act as an executive officer of a registered institution under section 71C of the Banking Ordinance; and

(iv) seeking through a registered institution to have his 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.

2. By Notice of Application for Review dated 31 July 2007, through his solicitors, M/s Anthony Siu & Co., Mr Lee formally sought review of this Decision by this Tribunal, and he has throughout these proceedings been represented by Mr Bernard Mak of counsel, with Mr Roger Beresford of counsel representing the regulator.

3. With the consent of the parties, this review has been conducted by the Chairman sitting alone, pursuant to the provisions of section 31, Schedule 8, of the Securities and Futures Ordinance, Cap. 571.

The background

4. At this stage I should say a little about the factual and procedural background to a case which was not always so narrowly framed, initially being of wider ambit in terms of the allegations levelled against the applicant, Mr Lee.

5. In around 1998 Mr Lee, became a broker with Fulbright Securities.

6. In 2000 the applicant caused accounts to be opened with Fulbright in the name of his aged father, Lee Keng, and in the name of his sister-in-law, Wong Pui Lai. Both were cash accounts, and the applicant was authorized to operate these accounts.

7. The matters the subject of this case, and in particular the regulator's inquiry into the conduct of the applicant, stemmed from an investigation by the SFC into suspected market manipulation and short selling in the accounts of Lee Keng and Wong Pui Lai during July and August 1994.

8. By a Notice of Proposed Disciplinary Action dated 17 January 2007 a prohibition for life under section 194(1)(iv) of the SFO was proposed by the regulator on the fourfold basis that:

(i) Mr Lee had deceived Fulbright in account opening and had concealed personal trades;

(ii) Mr Lee had forged the signature of his sister-in-law, Wong Pui Lai, on the account opening documents and on 12 cheques purportedly drawn by Wong;

(iii) Mr Lee had committed market manipulation through the operation of the two accounts in question; and

(iv) Mr Lee had conducted short selling through these two accounts.

9. Thereafter, by a second Notice of Proposed Disciplinary Action dated 2 February 2007, the SFC made reference to additional documentation, and proposed in addition the imposition of a financial penalty under section 194(2) of the SFO in a sum between HK$100,000 and HK$500,000.

10. In the event, representations against the imposition of such penalties were made on behalf of Mr Lee, through his solicitors, by letters dated 7 May 2007 and 11 May 2007.

11. The broad thrust of the detailed representations thus made on each of the counts was that the serious allegations, “tantamount to allegations of serious criminal charges”, of deception of Fulbright, forgery, market manipulation and short selling had not been made out on the evidence and could not be established to the requisite standard of proof, the submission being made that in the events which had occurred the Commission should have concluded that in the particular circumstances that no element of deception had been involved and that all that Mr Lee had done “was consistent with an honest belief that he was simply taking short cuts for convenience’s sake and that at no time harboured any intention to deceive anyone”.

12. The allegation of the forgery of Ms Wong's signature was disputed, the opinion of handwriting expert Mr Robert Radley being prayed in aid (concluding in his report that the evidence on the point was "far from conclusive"), whilst the second letter of representation culminated in the submission that if, notwithstanding the representations thus made, the SFC were to decide not to alter the preliminary conclusions, in any event the proposed penalties of life prohibition and a substantial fine were "disproportionately severe" in the circumstances, and did not reflect the gravity of Mr Lee's misconduct; in this connection it was said that his conduct was "necessarily of a less serious nature" and that such misconduct as had occurred had arisen "out of a misunderstanding between family members, inadvertence and negligence of Mr Lee", and that the pattern of the trades under investigation "resulted from the peculiar investment philosophy and belief harboured by Mr Lee."

13. These representations also made the point that, Mr Lee apart, there was no victim in this case, and that after the investigation into his conduct Mr Lee had withdrawn from the industry and was currently unemployed. It was further said that to prohibit Mr Lee for life from rejoining an industry in which he had earned his living for the past 12 years would be to stifle the financial circumstances of someone who was the sole breadwinner for his family.

14. Accordingly, it was submitted that a shorter prohibition period would be appropriate and justified "to reflect the gravity of the misconduct in question".

15. In response to the representations thus made the SFC made further inquiries into the trading data which it had been given by Mr Lee's former employer, Fulbright, into the relevant trading in Brilliance China shares, and, as a result, the regulator decided to give Mr Lee the benefit of the doubt in terms of the allegations of manipulating the market in Brilliance China shares and as to short selling.

16. Accordingly, by its Notice of Final Decision dated 11 July 2007, the SFC found that basis (1) and (2) as set out in the Notice of Proposed Disciplinary Action dated 17 January 2007 were made out – that is, the allegations of deception of Fulbright and that of the forgery of Ms Wong's signature – and duly concluded that in light of these conclusions that Mr Lee had been guilty of misconduct for the purpose of section 194 of the SFO, and thus was not fit and proper.

17. The third and fourth allegations initially mounted against Mr Lee in the initial Notice of Proposed Disciplinary Action were, however, no longer maintained, albeit that notwithstanding the abandonment of these grounds, there was no alteration in the penalty initially proposed by the regulator, that is, prohibition for life of Mr Lee.

18. Nor was the additional financial penalty which had been proposed in the further Notice of Proposed Disciplinary Action dated 2 February 2007 maintained.

19. The representations which had been thus made to the regulator on behalf of Mr Lee were to be mirrored in the submissions made by counsel

for Mr Lee in the hearing of this application, albeit by the time of the review itself there had been a significant difference in terms of the penalty the SFC wished to visit upon the applicant.

20. It was this. Although the representations made on behalf of Mr Lee to the SFC had resulted in the dropping of two of the more serious charges, nevertheless by the stage of Notice of Final Decision they had yielded no change in the regulator's decision as to the life prohibition for life – which was the situation at the time when the application for review had been filed.

21. However, approximately one week before the commencement of the present review hearing, in the skeleton argument filed on behalf of the regulator, Mr Beresford had made it clear (at paragraph 4 thereof) that as to penalty, the SFC now conceded that a life prohibition was *not* appropriate on the facts of the case and in light of the reduced charges, and it was now submitted that a period of 18 months was the appropriate period to be substituted by this tribunal.

22. Hence, in terms of penalty the goal posts had moved considerably, and, if I may say so, entirely sensibly; in fact, at the initial directions hearing this tribunal had commented to counsel that, on its face at least, this case did not appear to warrant the very stringent punishment of the life prohibition thus imposed, and it was suggested that the issue be reconsidered, a sentiment which, to its credit, the regulator now appeared to have taken on board – hence the concession, which not only appeared in the skeleton argument, but which, I am told, had been the subject of an open

offer which Mr Beresford had made to Mr Mak a week prior to the hearing in an attempt to settle this case.

23. However, Mr Mak has been bound by his instructions, and thus he has proceeded to argue the application on the basis both of the primary liability of his client and in terms of the quantum of penalty as *now* sought to be imposed.

The primary facts

24. The primary facts of this case are set out in the Notice of Proposed Disciplinary Action dated 17 January 2007, and I do not intend to rehearse them in full.

25. In outline, the relevant factual matrix centres upon 12 cheques apparently drawn by the applicant's sister-in-law, Ms Wong, between 12 July 2004 and 30 August 2004 on HSBC account number 118-761857-001 and payable to Fulbright Securities, where Mr Lee was an account executive.

26. As Mr Beresford pointed out in the course of argument, it appears from the HSBC bank statement of the account of Ms Wong upon which the 12 cheques were drawn that each of these cheques was funded by a credit to the account in the same amount on the same day as the corresponding cheque was drawn; the credit to the account in turn came from the applicant's account number 062-888300-888 maintained with HSBC.

27. Thereafter the applicant used these funds to trade in an account in Ms Wong's name with Fulbright Securities, and when settlement was due, Fulbright Securities drew cheques payable to Ms Wong, and delivered these cheques to the applicant, who then deposited the cheques into a joint account, number 118-0-037633, held in the names of Ms Wong and himself, and thereafter the applicant transferred these monies to his own account.

28. It appears that the applicant also used his father's account with Fulbright for his own trading. I am told that his father, Lee Keng, was 88 when interviewed by the SFC in January 2005, and that at that time he was almost blind, illiterate, and had net assets of about HK$1000, and that he never had engaged in securities trading, although he recalled that the applicant once had asked him to sign some documents.

29. During the course of the investigation by the SFC into suspected market manipulation, the regulator discovered the use by the applicant of the two accounts with Fulbright Securities, and in his first interview with the SFC, *prior to* the obtaining of any banker's records and before the SFC had discovered the source of the funds in Ms Wong's account, the applicant had made various admissions, including his signing the relevant Client Agreement and Account Opening forms in the name of Ms Wong, and signing the authorization for a third party to operate her account; he further admitted that he had ensured that Fulbright Securities would send the relevant statements to his own address, that he had taken all trading decisions for the dealings in the account of Ms Wong during the relevant period in his own interest and not that of Ms Wong, subsequently depositing the Fulbright Securities settlement cheques into a joint account

held by him and Ms Wong, and likewise that he had taken all trading decisions for all dealings in the account of Lee Keng with Fulbright in the relevant period in his own interest and not that of his father.

30. In this connection the applicant also said that he had used Ms Wong's account with Fulbright rather than his own because it was money under the name of his mother, who was aged and had cancer, albeit he could not recall whether his mother had died before or during the relevant period, and also had claimed that the monies probably were owned by him.

31. The second interview of the applicant with the SFC took place *after* the SFC had exercised its powers under section 182 of the SFO and had obtained the relevant bank records from HSBC.

32. When these records were put to the applicant, he admitted that the account opening form in the name of Ms Wong contained his own telephone numbers and address, although he did not admit that the signatures on the 12 cheques had been done by him, notwithstanding that Ms Wong had denied that such signatures were her's; nor was he able to explain why, in light of the records showing that the Fulbright settlement cheques had been paid into the joint account of himself and Ms Wong, that all withdrawals from that account then had been paid into his own account, although in this context he did suggest that the monies may have been "borrowed" and had had to be transferred to another person.

33. When it had been put to Mr Lee that the explanation given in his first interview to the effect that he had been managing his mother's

money was inconsistent with the monetary transfers which in fact had occurred, he had declined to offer an explanation, although when asked if he had intended or attempted to use another person's account with Fulbright to cover up his own securities dealing, he had answered 'no'.

34. It was against this background, wherein the initial interview with the applicant had been followed by the acquisition of bank records and a subsequent interview, that the SFC had come to the conclusions that it did, as communicated to the applicant in the Notice of Final Decision of 11 July 2007.

Evidence on this application

35. Mr Lee, the applicant, did not give evidence before the tribunal at this hearing, and no *viva voce* evidence of any kind was called.

36. Accordingly, argument was conducted solely on the face of the assembled papers.

The applicant's case

37. In presenting the applicant's case, his counsel, Mr Bernard Mak, mirrored the arguments made in terms of representations to the regulator, and mounted his submission on three fronts: *first*, that in light of the allegations made against his client, and in order to give effect to the applicant's right to a fair trial under the Hong Kong Bill of Rights, the standard of proof upon which the SFC in principle should act should be that of proof beyond a reasonable doubt; *second*, that in the circumstances of this

case the findings of the SFC underpinning the Decision and the penalty imposed were not justified on the evidence in this case; and *third*, that even if the tribunal was not minded to interfere with the findings of the SFC, in any event the SFC had failed to adopt a penalty commensurate with the gravity of the misconduct involved.

38. I consider each of these lines of argument in turn.

(i) The standard of proof

39. This tribunal previously has considered this issue, at least in so far as it affected the deliberations of the SFAT itself, in *SFAT No.6 of 2004, Lau Hing Hung, Joie v. SFC,* Determination dated 27 January 2005, at paragraphs 28-34, a review hearing at which I note that the applicant therein also had had the advantage of being represented by Mr Mak.

40. In *Joie Lau, op cit.*, the tribunal made it clear in its Determination that in terms of its evaluation of the evidence in that case, the SFAT took as its statutory starting point section 218(7) of the SFO, which provides that in instances other than contempt, "the standard of proof required to determine any question or issue before the Tribunal shall be the standard of proof applicable to civil proceedings in a court of law."

41. The tribunal also made it clear in that Determination that it accepted that there was a 'gloss' to that position, and that the more serious the allegation made, the more compelling must be evidence upon which to determine whether the civil 'balance of probability' standard had been met.

42. The Determination in this earlier case also had quoted and adopted the well-known dictum of Lord Nicholls in *In re H (Minors),* [1996] AC 563, at 586E which emphasized that "built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation", in other words, an effective 'sliding scale' to be applied, within the confines of the civil standard of proof, dependent always upon the nature of the allegation and the particular circumstances of the case.

43. In *Joie Lau*, the tribunal – which in that instance was constituted by a full panel of three, consisting of the Chairman and two lay members – also was constrained to observe (at paragraph 33) that although Mr Mak in that case had accepted this standard, nevertheless "such was the ambit of his argument that on occasion we wondered (no doubt unfairly) that he was attempting to guide the tribunal toward the higher (and from his viewpoint the infinitely safer) ground of proof to the criminal standard, namely, proof beyond a reasonable doubt …"

44. The current submission maintains a variation to this earlier standard of proof argument, which Mr Mak now posits thus: that the substance of the prohibition imposed on the applicant (and indeed that of the financial penalty as earlier imposed) within the context of disciplinary proceedings pursuant to section 194 of the SFO is punitive and deterrent to a degree which renders section 194 proceedings criminal for the purposes of the Hong Kong Bill of Rights, and in particular section 10 thereof, which enshrines the right to a fair trial.

45. Accordingly, Mr Mak says that in terms of its disciplinary proceedings the standard imposed *upon the SFC* to be satisfied that the applicant has committed misconduct and/or was not a fit and proper person before punitive orders under section 194 can be imposed should be that of the criminal standard of proof, namely, that the SFC should be satisfied beyond reasonable doubt of its allegations as made against the person the subject of the disciplinary proceedings.

46. Mr Mak's fall-back position to this bold submission is that should this contention *not* be sustained, nevertheless the standard of proof should be that of a high degree of probability which is warranted by the seriousness of the allegations as made against his client. As to this latter submission, I agree.

47. However, Mr Mak's primary submission as to the imposition of the criminal standard upon SFC within the context of its own disciplinary proceedings strikes me as ingenious but, equally, as incorrect.

48. Section 387 of the SFO deals with the point, and specifically enshrines the civil standard of proof; this provides that "where it is necessary for the Commission to establish or to be satisfied, for the purpose of any of the relevant provisions (other than provisions relating to criminal proceedings or to an offence)" of any of the matters therein specified (at paragraphs (a) to (f) of section 387), "it is sufficient for the Commission to establish, or to be satisfied as to, the matter referred to (in subparagraphs (a) to (f)) … on the standard of proof applicable to civil proceedings in a court of law."

49. Express statutory provision apart, I also agree with and accept the submission of Mr Beresford that the question of whether, as the result of misconduct, a regulated person remains a fit and proper person to be regulated under the SFO is a determination of his civil rights and obligations; Mr Beresford adds that where, as in the present case, the power exercised by the SFC is the power to prohibit him from applying to be a regulated person, there is no penalty that properly could be classified as criminal in any event.

50. Moreover, as Mr Beresford pointed out, if Mr Mak were to be correct in his principal submission, this would lead to the curious situation that a higher standard is to be applicable within SFC domestic disciplinary proceedings notwithstanding the application of a lower standard in the very tribunal, the SFAT, which has been statutorily established to oversee the disciplinary activities of the regulator and, if the case demands it, to act as a check and balance against that which may be considered to have been an infringement of an applicant's rights.

51. Mr Beresford characterizes such a potential situation as "absurd", and in this I agree; it is absurd not least because, in the exercise of its power to review the disciplinary decisions of the SFC, this tribunal is entitled to substitute its own opinion on the basis of the civil standard enshrined within section 218(7) of the SFO.

52. In this connection Mr Beresford also submits, again in my view correctly, that if and in so far as disciplinary proceedings properly were to be classified as criminal in nature for the purposes of the Hong Kong Bill of Rights, such classification must be so for *all* purposes (and not simply for

the particular purpose which happens to suit any particular applicant), and that if this were to be correct this would have the inevitable result of requiring the Ordinance to be rewritten.

53. In the context of the present discussion I should also make reference to the recent Hong Kong Court of Appeal case of *Koon Wing Yee v. Insider Dealing Tribunal*, CACV 358 and 360 of 2005, Judgment dated 30 May 2007 (a decision which may have stimulated the line of argument currently adumbrated by Mr Mak), which concerned, *inter alia*, the privilege against self-incrimination within Article 11(2)(g) of the HKBOR, and wherein the Court applied a European 'substance over form' approach to classification of proceedings in Hong Kong for the purpose of the HKBOR.

54. This 'substance over form' approach is exemplified in a case in the European Court of Human Rights in *Engel v. Netherlands (No 1)*, 1979 1 EHRR 647, at 678, wherein that Court held that there are three main criteria to be applied in assessing whether disciplinary proceedings involve the determination of a 'criminal charge' for the purpose of Article 6 of the European Convention on Human Rights:

> *first*, the classification of the offence under domestic law, that is, whether it is criminal, disciplinary or both;
>
> *second*, the nature of the offence: strong indicators of a 'criminal charge' being that the particular provision potentially applies to the whole population rather than the regulation of a specific and limited class of persons, and that such conduct generally is dealt with by criminal law in other contracting states; and

> *third*, the nature and severity of the potential sanction, in particular whether the purpose of the order is punitive as well as preventative, and whether the findings and penalty form part of a person's criminal record.

55. Which brings the discussion back to the judgment in *Koon Wing Yee, op cit.*, in which the Hong Kong Court of Appeal found that the 'three times profit' penalty within section 23(1)(c) of the Securities (Insider Dealing) Ordinance, Cap. 395 – now, of course, repealed – was criminal in character for HKBOR purposes, and specifically the right to claim privilege against self-incrimination, because it was punitive and deterrent in nature in addition to its severity.

56. Moreover, the Court in *Koon Wing Yee* found that an element of dishonesty (or at least an absence of *bona fides*) was involved in the then offence of 'insider dealing' – now recast as 'market misconduct' under the SFO, Cap. 571 – and further emphasized that it was *not* dealing with disciplinary proceedings, and that in that context it was dealing with a penalty of *general* application.

57. As Mr Beresford has pointed out in his excellent Appendix dealing with the classification of disciplinary proceedings under section 194, Cap. 571 – which compilation this tribunal has found of considerable assistance – *Koon Wing Yee* is *not* authority for the proposition that a punitive and deterrent or even a severe fine would be sufficient *without more* to make a disciplinary offence criminal in character, with commensurate standard of proof implications.

58. Thus, for example, in *Irving Brown v. United Kingdom,* Application No 38644 of 1997, it was held in the European Court that disciplinary proceedings before the domestic Solicitors' Complaints Tribunal did not amount to a criminal offence under Article 7 of the European Convention simply because the penalty was substantial.

59. For present purposes, however, perhaps the main point is that where – as in domestic disciplinary proceedings, of which proceedings by a market regulator provide a prime example – the offence is *not* one of general application but is limited to a restricted group (such as regulated persons, as defined in section 194(7), or persons wishing to be so registered to work in the particular market), it will *not* usually be regarded as criminal unless the penalty involves or may lead to a loss of liberty: see, for example, *Fleurose v. The Securities and Futures Authority Ltd,* [2001] EWCA Civ 2015, wherein Schieman LJ in the English Court of Appeal considered the issue of whether the hearing of Mr Fleurose before the Disciplinary Appeals Tribunal of the English Securities and Futures Authority constituted the determination of a criminal charge.

60. In the course of his judgment upon this element of the case, Schieman LJ made reference to two earlier decisions of the English Court of Appeal, namely, *Han & Yau v. Commissioners of Customs and Excise,* [2001] EWCA Civ 1048 and *Official Receiver v. Stern,* [2001] 1 WLR 2230, and quoted with approval from paragraphs 65 and 66 of the judgment in *Han, op cit.*:

> "65. It seems clear from the case law…that in considering the three criteria routinely applied by the Strasbourg Court for the

> purpose of determining whether the applicant is the subject of a 'criminal charge', the first criterion, namely the catergorisation of the application in domestic law, is no more than a starting point for the classification, and is not decisive of the nature of the allegation. If the offence the subject of the allegation is not criminalized by the national law, the Court determines whether it is nonetheless criminal in character for the purposes of Article 6 [of the European Convention on Human Rights: Right to a fair trial] by proceeding to the second and third criteria, namely the nature of the offence and the severity of the penalty which it invokes…
>
> 66. Under the second criterion, the Court considers whether or not, under the law concerned, the 'offence' is one which applies generally to the public at large or is restricted to a specific group. If the former, then despite its 'de-criminalisation' by the national law, it is apt to be regarded as criminal. Further, if a punitive or deterrent penalty is attached, it is likely to be regarded as criminal in character, even in cases where the penalty is in the nature of a fine rather than imprisonment. *On the other hand, where the offence is limited to a restricted group, as is generally the case in relation to disciplinary offences, the Court is unlikely to classify a charge under the applicable disciplinary or regulatory code as criminal, at least unless it involves or may lead to loss of liberty…"* (Emphasis added)

61. I further accept the submission now made on behalf of the SFC that section 194, Cap. 571 is both disciplinary and regulatory, and that the two grounds for action under section 194 are disjunctive. The question of whether a person is 'fit and proper' does not necessarily depend upon a finding of misconduct, (albeit in practice in the vast majority of cases the two irrevocably are linked), and that the object of the section is to provided the SFC with powers of prudential regulation, and is not specifically limited to a power to discipline for past misconduct; thus, section 194 is concerned both with past conduct (in the sense of misconduct) and possible future conduct (in the sense of whether a person is fit and proper to continue to be a regulated person).

62. It follows from the foregoing, therefore, that I reject Mr Mak's submission as to the applicability of the criminal standard of proof in the conduct of SFC disciplinary proceedings.

63. As earlier indicated, however, I have no quarrel with, and indeed accept, his 'fall-back position', which within the confines of the civil standard, recognizes the existence of that which earlier I have referred to as a 'sliding scale'; in its Notice of Final Decision in the present case (at page 8, paragraph 11) the regulator expressly recognizes that whilst the standard of proof in civil proceedings is that of the balance of probabilities, "the degree to which a party may prove its case in order that the party may be considered to have satisfied this standard of proof is commensurate with the gravity of the charge" and that "the more serious the allegation, the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it", citing in this context the adoption by this tribunal in *Joie Lau, op cit.*, of the dictum of Lord Nicholls in *In re H (Minors), op cit.*

64. I further recognize that this approach accords with the view of this territory's highest court in *HKSAR v. Lee Ming Tee & Securities and Futures Commission (Intervener),* [2004] 1 HKLRD 513, wherein it was held that in applying the civil test, dishonesty must be established as a compelling inference sufficient to overcome such inherent improbability of dishonesty as the circumstances of the case may disclose; in the words of Sir Anthony Mason NPJ, at 533D-G:

> "It is not possible to state in definitive terms the nature of the evidence which the court will be require in order to be satisfied, in a civil proceeding, that a serious allegation of this kind [alleged improper termination by SFC officers of an investigation in order

> to avoid disclosure which might compromise the standing of an expert witness] is made out. It would not be right to say that the requisite standard prescribes that the inference of wrongdoing is the only inference that can be drawn…for that is the standard which applies according to the criminal standard of proof. In the particular circumstances it was for the respondent to establish as a compelling inference that very senior officers of the SFC had deliberately and improperly terminated the investigation…for the ulterior purpose alleged, sufficient to overcome the inherent probability that they would have done so…"

65. Finally, absent future appellate interference or statutory amendment, I would make so bold as to express the hope that the Determination in *Joie Lau, op cit.*, taken together with the Determination in the present case, will have the effect within future SFAT proceedings of finally settling the point as to the applicable standard of proof both in the conduct of the disciplinary proceedings by the SFC *and* in terms of the manner in which the SFAT approaches this issue.

(ii) The merits: SFC findings justified?

66. In light of the foregoing discussion of applicable principle, I turn now to consider the second main head of Mr Mak's argument, which is that the findings of the SFC were not justified on the evidence in this case; to a significant extent, this aspect of the argument overlapped with Mr Mak's submissions as to the appropriate penalty to be imposed upon his client.

67. I can, I think, take this second point in relatively short compass.

68. It is the applicant's case that, even taking the standard of proof to be that of a high degree of probability, that such evidence as there was before the SFC could not have satisfied this standard.

69. Mr Mak reminded the tribunal that the SFC had found two charges to be established against his client:

(1) that in breach of General Principle 1 of the Code of Conduct for Persons Licensed by or Registered with the Securities and Futures Commission, that the applicant had deceived his employer, Fulbright; and

(2) that the applicant had forged the signature of his sister-in-law, Ms Wong.

70. I think it fair to say that it was the issue of forgery which provided the focus of Mr Mak's attack; as I understood the position, he did not go so far as to assert that his client was wholly innocent of every allegation.

71. Mr Mak submitted that the factual dispute between the applicant and the SFC was confined to whether the applicant indeed had signed Ms Wong's signature on the 12 cheques.

72. His thesis broadly was thus: his client admittedly had been 'foolish' and 'sloppy' in the manner in which he had conducted the affairs the subject-matter of this case, so that he had neglected or failed to follow the necessary formal requirements before opening accounts and carrying on trades for the benefits of the family, trades that, he said, were consented to

and allowed by both the applicant's father and by his sister-in-law. Accordingly, even if (which was not admitted) the cheques of Ms Wong in fact had been signed by the applicant, it is "plausible", said Mr Mak, that Ms Wong had "permitted or suffered her account to be utilized by the applicant to facilitate transactions to which she consented or allowed."

73. I did not find this argument persuasive.

74. Nor, for that matter, did Mr Beresford, who submitted that when the evidence was looked at as a whole, there was ample evidence upon which the SFC could find that the applicant indeed had signed Ms Wong's name on the cheques, evidence that was summarized within the Notice of Final Decision. Moreover, he said, in coming to its conclusion the SFC specifically had reminded itself of the guidance as to the standard of proof given by Lord Nicholls in *In re H (Minors), op cit.,* and the inferences the SFC had been able to draw from the evidence as a whole, and in particular the 'money trail', well afforded the conclusion that the applicant had signed the cheques in the name of PL Wong.

75. Mr Beresford noted that the tribunal had not had the opportunity of seeing the applicant in the witness box to deny the allegation of forgery, and further submitted that there should be no question of interfering with the SFC finding in this regard *unless* the tribunal were to be satisfied that the SFC, properly directed and in light of the evidence as a whole, could not properly have drawn such an inference of forgery.

76. I agree. In fact, in the course of this hearing I made it clear to Mr Mak that in so far as the allegation of forgery was concerned, in light of the totality of the evidence before me I had little doubt, even taking the matter at the higher end of the civil scale, but that his client indeed had forged Ms Wong's name on the cheques.

77. In this context the tribunal further observed that on this aspect of the matter Mr Mak faced a difficult forensic task, given that his client had not considered it worthwhile to go into the witness box in order to give the lie to the forgery allegation, presumably on the basis that it was inadvisable to add perjury to the existing list of alleged defalcations.

78. Accordingly, I have little difficulty in holding, and so do, that in terms of the remaining charges of deception and forgery as maintained by the regulator against the applicant, the findings plainly were borne out by the evidence, and could *not* reasonably be criticized, far less set aside by this tribunal.

(iii) Penalty imposed not commensurate with the gravity of the conduct involved

79. In terms of this submission on behalf of the applicant, two points require stressing at the outset: *first*, that at the time when this application was filed until approximately one week prior to the hearing, the penalty which the regulator had sought to impose on Mr Lee was a prohibition for life; and *second*, that the argument as to penalty which was rehearsed by Mr Mak on behalf of Mr Lee – wherein he suggested (at paragraph 28 of his skeleton argument, that "a prohibition in terms of

months should be more than apt in the circumstances" – itself was predicated upon the tribunal accepting Mr Mak's submission that this case was revelatory of little more than a silly/sloppy applicant who had taken stupid and wholly misguided shortcuts in the manner in which he had handled investment of his family's money, but which in the circumstances was not only not 'dishonest' in the ordinary sense of that term, but also had involved no personal gain, nor misappropriation of client's funds, nor for that matter any prejudice to the securities' market.

80. As to the first point, as indicated at the outset of this Determination in the narrative regarding the procedural development of this case, the prohibition for life as pronounced in the SFC Notice of Final Decision no longer was on the table, given that Mr Beresford on behalf of the regulator stated in terms that whilst in the circumstances the remedy of prohibition was undoubtedly the appropriate power for the SFC to exercise (the applicant no longer enjoying the status of a 'regulated person'), nevertheless it was now considered that the appropriate period of such prohibition was 18 months.

81. It followed from this, in my view far more reasonable conclusion in the known circumstances, that on behalf of his client Mr Mak now had commensurately the more difficult task, given that there was to be no attempt to hold to the very stringent penalty as originally imposed in the disciplinary proceedings.

82. In turn this begged the question as to whether, assuming Mr Mak's characterisation of the nature of his client's conduct was correct, the penalty *as now revised* was appropriate in all the circumstances?

83. But was Mr Mak correct in this purported characterisation? Did the facts of this case justify the picture he had painted of a rather silly and misguided individual who had played fast and loose with the formalities, but whose conduct, in the prevailing circumstances, was not to be considered as inherently venal?

84. Were this to be the conclusion of this tribunal, it seems to me, the existing substantial reduction in penalty notwithstanding, that Mr Mak had a tolerably good chance of obtaining a yet further reduction, not least in the context of previous cases he placed before the tribunal by which he sought to demonstrate that relatively light periods of suspension had been imposed – albeit he accepted, of course, the fundamental tenet that, at bottom, each case turns upon its own particular facts.

85. For his part Mr Beresford took a very different view of the nature of Mr Mak's activities, as revealed on the evidence.

86. Not only did he firmly reject Mr Mak's characterization of the nature of the offences, he made it clear on behalf of the SFC that even at this late stage the SFC was unsure exactly "what had been going on", and, in colloquial parlance, precisely "what Mr Lee had been up to".

87. In this context, Mr Beresford drew particular attention to the curious, and as yet wholly unexplained manner, by which significant amounts of money had circulated, namely from the applicant's account to that of PL Wong, on whose account the 12 cheques had been drawn, and thereafter the payment of the Fulbright settlement cheques into the joint account of the applicant and Ms Wong, and thence the transfer of such funds back into the applicant's account.

88. Mr Beresford also commented upon the applicant's lack of assistance in the SFC investigation during the second interview, at which time the regulator had obtained copies of the relevant HSBC bank records/statements, and in particular Mr Lee's lack of explanation of the source of the significant sums of money which had been in his account in the first place, and which were transferred to Ms Wong's account in order to fund the trades as were undertaken.

89. Even now, said Mr Beresford, the SFC had had no answers as to this element of the case, and on behalf of the regulator he certainly did *not* accept the 'stupid/misguided/shortcutting' description of the applicant's activities in dealing with family money; equally, whilst being unable to identify the precise activity in which Mr Mak had been indulging, he most certainly did *not* exclude from consideration the existence of venality within the applicant's machinations.

90. In this I am minded to agree with Mr Beresford. It seems to me highly probable, on the face of the undisputed evidence, that there has been considerably more to this whole affair than meets the eye, and I bear in mind,

also, that the applicant has made no attempt fully to enlighten, either in his interviews with the regulator or in terms of evidence to this tribunal; at best, I suspect that he has revealed only a part of the true picture.

91. In light of this conclusion I have decided, after some reflection, to accept the alternative period of prohibition as now put forward by the SFC, namely the substitution of the original life prohibition by the very substantially reduced period of 18 months, which strikes me as about right in the particular (and peculiar) circumstances of this case.

Order

92. In light of the foregoing, therefore, I make the following Order on this application for review:

> *(1) That the application for review herein be allowed to the extent that the period of prohibition imposed upon the applicant by the SFC be varied such that the life prohibition as initially imposed within the Notice of Final Decision dated 11 July 2007 be set aside, and that there be substituted therefor a period of prohibition of 18 months.*

93. In the circumstances of this case the issue of costs is more than usually problematic. The matter was canvassed in some detail with counsel, who not unnaturally made opposing submissions: Mr Mak, whilst feeling unable to ask for the totality of his costs of this application, nevertheless submitted that in the event his client should have a significant percentage of

such costs; to the contrary, Mr Beresford pitched his submission on the point at the level of no order as to costs.

94. This issue has caused the tribunal almost as much reflection as the substance of the review itself, and I cannot pretend that a fair (or, at the least, a not unfair) answer immediately has presented itself.

95. Mr Beresford fairly accepted that in order to achieve a reduction in penalty that the applicant had had to come to the tribunal, although he made the point that the offer of a substituted figure of 18 months had been made to Mr Mak on an 'open' basis a week before this hearing; to this Mr Mak riposted that by this stage he had been retained to act in any event, with consequent costs implications.

96. Mr Beresford also noted that in terms of argument before the Tribunal the standard of proof point had taken a considerable amount of time, and should he win on this aspect, then the situation would be that each side would effectively have 'won' an element of the argument, the applicant having obtained what in the event was a consensual reduction.

97. To this last submission I note, further, that in the event Mr Mak, who represented the applicant with great good sense, has not achieved any further reduction in the substitute period of 18 months as became formally on offer one week prior to the commencement of this review.

98. As this tribunal frequently has commented when wearing its Commercial Court hat, costs are an inexact science, and cannot be calculated

as if by slide rule; the court or tribunal simply attempts to achieve what is perceived as broadly fair in all the circumstances of the case.

99. At the end of the day, having taken all facts into account, I therefore make the following costs order:

> *(2) As to the costs of this application for review, the applicant is to have 50% of his costs, such costs to be taxed if not agreed.*

100. The tribunal is grateful to both counsel for their considerable assistance.

Hon Mr Justice Stone
(Chairman)

Mr Bernard Mak, instructed by Messrs Anthony Siu & Co., for the applicant

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