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Application No. 2 of 2009

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IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

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IN THE MATTER of a Decision
made by the Securities and Futures
Commission pursuant to s 194(1) of
the Securities and Futures
Ordinance, Cap 571,

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IN THE MATTER of s 217 of the
Ordinance

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BETWEEN

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LI KWOK KEUNG, ASSER

Applicant

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SECURITIES AND FUTURES COMMISSION

Respondent

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Before: Hon Saunders J, Chairman, Mr Kwan Pak Chung, Edward,

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and Mr Chan Kam Wing, Clement

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Dates of Hearing: 25 & 26 November 2009

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Date of Decision: 19 March 2010

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DECISION

Introduction:

1. On 30 January 2009, the Securities and Futures Commission, (the SFC), made a decision, pursuant to s 194 of the Securities and Futures Ordinance, Cap 571, (SFO), to revoke Mr Li's licence and to prohibit him, for 10 years, from:

- (i) applying to be licensed or registered with the Securities and Futures Commission;
- (ii) applying to be approved under s 126(1) SFO as a responsible officer of a licensed corporation;
- (iii) applying to be given consent to act or continue to act as an executive officer of a registered institution under s 71C Banking Ordinance; and
- (iv) seeking through a registered institution to have his name entered in the register maintained by the Monetary Authority under s 20 Banking Ordinance as that of a person engaged by the registered institution in respect of the regulated activity.

2. Mr Li has made application for review against that decision to this Tribunal, constituting the Chairman, Saunders J, Mr Chan Kam Wing, Clement, and Mr Kwan Pak Chung, Edward.

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The facts:

3. Mr Li joined Goodwill Investment Services Ltd and Goodwill Commodities Ltd, (subsequently SBI E2-Capital Ltd and SBI E2-Capital Securities Ltd, collectively, SBI) in August 1999. He was first registered as a securities dealer's representative and a commodity dealer's representative under the Securities Ordinance in 1987. He is currently licensed to carry on Type 1 (dealing in securities) regulated activities under the SFO.

4. In the course of an investigation into other activities, the SFC learned that a cheque in the sum of \$64,900 had been issued to Mr Li on 15 October 2003. Mr Li was required to attend an interview, which he did on 27 May 2005. He gave an explanation in respect of that cheque at that interview.

5. He was required to attend a second interview. He did so, with his solicitor, on 8 July 2005. At that interview, he produced a written statement admitting that the explanation that he had given on 27 May 2005 in respect of the cheque, was false. In the course of the interview, he then explained that the cheque was in fact a profit from a share placement made through one of the client accounts of another SBI dealer. During that interview he admitted calling that other dealer after he had received the enquiry letter from the SFC. He said that the other dealer asked him not to disclose the truth of the placement, and suggested the false story that had been given.

6. On 4 April 2006, the SFC issued a summons in the

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Magistrates Court in Hong Kong by which Mr Li was charged in the following terms:

“YOU, LI Kwok Keung, Asser, on 27 May 2005, in Hong Kong, did when answering questions raised by an investigator under section 183(1)(c) of the Securities and Futures Ordinance, give answers which were false or misleading in a material particular, and you knew or were reckless as to whether the answers were false or misleading in a material particular.”

7. On 3 November 2006, Mr Li entered a plea of guilty to that charge.

8. It is necessary, in order that the full background may be properly understood to set out a number of passages¹ from the hearing on that day. Mr Li was represented by counsel, Mr Finny Chan, and the SFC by counsel, Mr Giles Surman.

“Mr Chan: Now, remorse does not only come from my mouth. The remorsefulness will be followed, I understand, by the defendant himself, that he will give full co-operation to the SFC concerning the activities of {X} and also Selina Siu of which he played no part, save for the private placement itself. So that is the basis of the mitigation.

The second matter which my learned friend may wish to elaborate on is this, that because of the conviction and the fine which will be imposed on him, he may be suspended by the SFC. We hope not, of course. But, as I say, the defendant has agreed to give full co-operation to the SFC in which case there is a possibility that he may just be reprimanded. I hope.

.....

¹ The passages set out are extracts and are not a comprehensive reproduction of the transcript.

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Mr Surman: Sir, I hesitate to add after the defence have had the last word, so can I - - I did warn my learned friend about this, that if he mitigated on the basis that there was going to be co-operation with the SFC, then I would seek to reply to that.

To date, we have had an oral suggestion from the defence they will cooperate, we've got nothing in writing at all. Sir, I am aware that in the past, if somebody certainly comes to the magistrate and says, 'We are going to co-operate with the SFC', that it has been the practice, certainly of other magistrates, then to adjourn the matter for a number of weeks to see if that co-operation crystallises. I leave the matter in your hands and just alert you to the practice of other magistrates. But I'm in your hands, Sir.

.....

Mr Chan: Our position is this, we would like the matter to be dealt with today, for obvious reasons because the defendant will have to pay extra costs, legal costs.

Court: Yes.

Mr Chan: The second matter is this, that we will - we undertake to write a letter to the SFC today, telling them that we've already pleaded guilty today and we will assist the SFC in the future.

Court: I think if the promise is materialised, that will certainly affect the way that the SFC - how the SFC would deal with the defendant in the future.

Mr Chan: Yes. It serves two purposes, yes.

Court: Whether his licence will be suspended or just reprimanded.

Mr Chan: That's right. It serves two purposes, yes. Our

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solicitor will undertake to write a letter today to the SFC offering full co-operation to the SFC.

Court: As rightly pointed out by Mr Surman, a promise is only a promise. I shouldn't take it into consideration.

Mr Chan: I think (the solicitor's) promise as a solicitor is good enough. And I will make the same undertaking because; really, for the saving of costs, because he is now without a job and we are hoping that....

Court: Ultimately, how helpful the statements that the defendant is about to make is something that I do not know.

Mr Chan: Of course. We understand that. But well those are my instructions and it is really a matter for you.

Court: Yes. And you are in a dilemma. You are in a dilemma. The defender wants to have the matter dealt with today, to save costs - and, on the other hand, you have no more than a promise by the defendant.

Mr Chan: That's right, that's the position. All he agrees is a promise and will be done to date, but other than that, I don't think I can assist the sake of saving costs."

Following that mitigation, the court proceeded to fine Mr Li \$4,000 and to order him to pay costs to the SFC in the sum of \$12,261. Following the sentencing Mr Chan again confirmed that an appropriate letter would be written to the SFC.

9. On that same day Mr Li's solicitor wrote to the SFC in the following terms:

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“Pursuant to the undertaking given to the Court, we hereby write to you to confirm our client’s intention to offer co-operation with you in your investigation of the matter.”

10. On 20 December 2006, a Mr Monty Yuen of the SFC sent, by fax to Mr Li’s solicitors, a draft witness statement for consideration. The solicitor discussed the witness statement with Mr Li. Mr Li was not willing to sign it, apparently because of uncertainty as to how he would be dealt with in any disciplinary procedure that might be taken by the SFC. On 11 January 2007 there was a conversation between Mr Li’s solicitor and Mr Yuen in relation to Mr Li’s reluctance to sign the statement.

11. On 12 January 2007, Mr Yuen wrote directly to Mr Li informing him that he was to be interviewed by the SFC at 9:30 a.m. on 22 January 2007. Attached to the letter was an appropriate notice under s 13(1) SFO.

12. On 16 January 2007, a letter was written by the solicitors to the SFC, for the attention of Mr Yuen. The letter contained the following paragraph:

“On 20th December 2006, Mr Monty Yuen sent us a draft “statement” prepared by him and proposed our client to sign on it. After going through the draft statement our client had hesitation as to the appropriateness for him to sign the said “statement”.

.....

That message was conveyed to your Mr Yuen over the telephone around 11 January 2007. Thereupon your Mr Yuen said that if our client did not sign that statement, he would issue a letter to him. It sounded like that Mr Yuen would exert pressure on our client by issuing a letter to him. And hence, our client received your abovesaid letter. It is quite odd to find the content of the

said letter is to request our client to attend an interview for investigation.

We have reasons to believe that there is an abuse of power and process on your part. We should be grateful to receive an explanation from you before your proposed “interview.” (sic)

13. Mr Yuen responded in the following terms on 18 January 2007:

“For the record, it has always been our intention to interview Mr Li since he, while mitigating in open court on 3rd November 2006, undertook to fully cooperate with the SFC. Mr Li was contacted on the same day and initially agreed to be interviewed on 7th November 2006. However, in the afternoon of 3rd November 2006, Mr Simon Siu represented that Li had nothing to add to his previous interviews and would like to save on legal costs. A “draft” narrative statement based on information given earlier by Li was faxed to Mr Simon Siu’s office on 20th December 2006 in order to facilitate to Li’s request to save cost. Li was invited to view and make alterations to the “draft” statement before a final statement would be signed in an interview. Mr Li was never requested to sign the “draft” statement.

Neither Mr Simon Siu nor Mr Li had indicated whether any alterations required to the draft statement until 11th January 2007 when your Mr Simon Siu stated that Mr Li was not prepared to sign the statement without giving any reason. In such circumstances, we need to interview Mr Li as to why he had hesitation as to his appropriateness to sign the statement, which comprised only information that was provided earlier by Mr Li.”

The interview was postponed to 26 January 2007.

14. Again, Mr Li attended the interview with his solicitor. Mr Li, following the appropriate preamble, immediately asserted that he had previously been told:

“...that if I told the truth, the possibility that I would be prosecuted in the future might not be high, only if I insisted on telling lies that I would be punished. However, ultimately the conclusion reached that I was totally uncooperative and was then prosecuted.”

We do not propose to reproduce the full extent of the interview. It is sufficient if we say that the interview then went on to constitute a conversation between Mr Li and Mr Yuen in which Mr Li repeatedly reiterated what he understood to have been an assurance given prior to his previous interview, that if he cooperated with the SFC he would not be disciplined in respect of the matter of which he had been convicted and fined.

15. The essence of Mr Li’s position was made clear in his final substantive answer in the following terms:

“I want to know the SFC’s criteria for instituting the prosecution against me in the previous case. For instance, I told your colleague Nancy Tong that I just wanted to help people and had corrected what I had said previously as soon as possible. I cooperated and told you the truth instead of the case that I was requested to tell the truth after you had found the evidence. Moreover, I believe that the SFC could have treated my case by way of a public reprimand instead of instituting a prosecution against me in the court, thus leaving me with a criminal record.”

16. The SFC then took its time to consider the matter. On 5 May 2008, a letter was written to Mr Li setting out proposed disciplinary action to be taken under s 194 SFO. The misconduct which Mr Li was accused was described in the following terms:

“(a) misled the SFC during an interview, in breach of section 184 SFO and General Principle 1 of the Code of Conduct for Persons Licensed by or Registered with the SFC (“Code of

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Conduct”)

(b) failed to honour an undertaking given by you to a court of law and the SFC by refusing to cooperate with the SFC in its prosecution of {X}, another licensed representative of SBI and Siu Pui Sze Elina (“Elina Siu”) in breach of General Principle 1 of the Code of Conduct; and

(c) failed to disclose to SBI your interest in your brother’s account and concealed your personal trading in your brother’s account from SBI, in breach of your SBI’s staff dealing policy and General Principle 1 of the Code of Conduct.”

17. The notice of proposed disciplinary action recorded, in paragraph 49, that in deciding penalty the SFC had not taken into account Mr Li’s breach of s 184 of the SFO, instead, apparently basing the decision principally on Mr Li’s failure to honour his undertaking, and less so, on his failure to disclose his interest in his brother's account and concealing his personal trading. For those failures, the SFC proposed to revoke Mr Li’s licence and prohibit him from being licensed or registered for life.

18. On 18 July 2008, through his solicitors Mr Li, as he was entitled, made submissions to the SFC.

19. Remarkably, it took over six months, until 30 January 2009, for the SFC to make a decision on this relatively straightforward matter. On that day Mr Li was informed that, having carefully considered the submissions that had been made the SFC, had determined to revoke Mr Li’s licence, and prohibit him as set out in paragraph 1 above, for a period of 10 years.

20. Now, Mr Li comes to us seeking a review of that decision.

The grounds for review:

21. Initially, Ms Lam sought to challenge the propriety of the decision made on the grounds that Mr Li had a legitimate expectation, following a conversation that had taken place with Nancy Tong, prior to Mr Li's second interview, in which he revealed to the SFC. The submission was that Nancy Tong had said that Mr Li had not told the truth, and that in the event that he did tell the truth, and was prosecuted in respect of his earlier falsehood, he would not be subject to disciplinary action.

22. A secondary issue that had arisen in the application was the question of the disclosure of unused material. We will have more to say on the subject at the conclusion of this decision.

23. In respect of this application, on the first day of the hearing, additional documentation was provided to Ms Lam, counsel for Mr Li. This included a note of a telephone conversations that had taken place between Mr Li's solicitor, and the SFC officer who first interviewed Mr Li. Those telephone conversations occurred shortly before the second interview, and related to the issue as to whether or not Mr Li would be subject to disciplinary proceedings himself if he were to give SFC information before they learned that information themselves.

24. In the light of notes of the telephone conversations Ms Lam took the view that she could no longer press the suggestion that Mr Li had a legitimate expectation that if he cooperated with the SFC, he would not be subject to disciplinary action. We are satisfied that that was an entirely proper course to take.

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It is necessary to remember that disciplinary action is an independent procedure which the SFC may undertake, and that it is quite distinct from criminal sanctions prosecution. That is not to say however that there is no relationship between the two. In the event, the real point made by Ms Lam was that the penalty imposed on Mr Li was, in all of the circumstances manifestly excessive.

Discussion:

25. It is first necessary to consider the situation of a person facing investigation of a criminal offence who wishes to give evidence and who seeks immunity in exchange for that evidence. In the normal course of events the procedure that is invariably followed in such cases will be one of two scenarios. First, the person's solicitor will suggest to the police, (or possibly the Director of Public Prosecutions), that his client is willing to give evidence under immunity, and that he is prepared to give a statement on a without prejudice basis in order that the police may ascertain whether or not an immunity will be granted.

26. Second, alternatively, an appropriately authorised police officer may indicate to the person or his solicitor that the prosecuting authorities are willing to consider an immunity, and again a without prejudice statement is sought.

27. If after having considered that without prejudice statement, the prosecuting authorities authorise the police to proceed by using that person as an accomplice witness, the immunity is given. In the event that truthful evidence is given, no prosecution of that person will follow.

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28. We accept entirely that in circumstances where a disciplinary power arises there is an additional factor to be considered. The existence of the disciplinary power is, as is exemplified by the disciplinary provisions in the SFO, required to protect the public. As Mr Westbrook correctly put it, the SFC have a statutory duty to regulate the industry and the profession.

29. Thus, even if a person who is willing to give evidence under immunity in order to implicate others, usually more serious offenders, that person will not necessarily escape disciplinary procedures. That is because that person's conduct may still have been such that the public require protection from such persons. But the fact that evidence has been given under immunity may well be a powerful factor in mitigation of any penalty that could be imposed in the disciplinary action. But it does not necessarily follow that there must be disciplinary procedures. The matter will be entirely in the discretion of the disciplinary authority.

30. Contained in the bundle of papers put to us by Ms Lam is a document issued by the SFC in March 2006 entitled "Cooperation with the SFC²". The document opens with the following paragraph:

"This Guidance Note is issued with a view to clarifying the Commission's long-standing practice of giving credit to regulated persons for their cooperation with the SFC by imposing lighter disciplinary sanctions than would be imposed in the absence of cooperation."

The document contains the following paragraphs which we consider are relevance in the present case:

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“4. In the absence of extraordinary circumstances, the maximum reduction of a disciplinary sanction that would be considered is either a reduction of the type of sanction by one order of magnitude (for example, from a revocation of licence to a suspension) or 33%.

5. Further reductions in penalty may be possible since the SFC may re-assess its initial view of the seriousness of a breach based on any new facts revealed during proceedings or without prejudice settlement discussions. This means that the final penalty is sometimes reduced by more than one-third.

6. The SFC may also be prepared to further reduce the penalty to take into account any extraordinary mitigating factors that come to light of which it previously was not aware.

9. Even outstanding cooperation, however, will not lead the SFC to refrain from taking disciplinary action where it is considered appropriate to take it. Neither will cooperation resulting the imposition of a disciplinary sanction which is disproportionately light.”

31. We are of the view that these matters are entirely properly set out and that the SFC have acted properly and sensibly in establishing and publishing a policy in this respect. What is of significance in the context of this case is the terms of paragraph 9. It is clear from that paragraph that the SFC itself, correctly in our view, envisages that there may be circumstances in which, where notwithstanding there being an act otherwise liable to discipline on the part of a person, circumstances may arise where disciplinary action might not be taken. It would be wrong of the SFC to fetter their discretion to prosecute by establishing a rule that every act liable to discipline must be the subject of disciplinary action.

32. But it appears that in this case, that the sequence of events

² It is not entirely clear to us whether the SFC are still using these guidelines. For the reasons set out in this Decision we are of the view that it is entirely appropriate that such guidelines should exist.

outlined by the policy was not followed. Unfortunately, what happened in this case led to confusion, and, on the part of Mr Li and those advising him, that confusion was quite understandable.

33. There is no doubt at all that, prior to the interview on 8 July 2005, Mr Li, his solicitors, and Ms Nancy Tong discussed the question as to whether or not, if Mr Li gave information to the SFC that they did not already have, Mr Li would be subject to disciplinary action. In our view, the moment that issue was raised, Mr Li and his advisers should have been supplied with the policy document prepared and published by the SFC. They would have then immediately understood that, for quite proper policy reasons, even if Mr Li cooperated and gave evidence, he would still potentially be subject to disciplinary action.

34. Had this course being followed we have no doubt at all that Mr Li would have been advised by his solicitors to make the statement. The fact that he intended to cooperate was a matter that could be put to a magistrate in mitigation in sentencing. Mr Li would have been aware that he might still be disciplined, but he would also know that he could reasonably expect significant mitigation in the penalty to be imposed for any disciplinary offence.

35. But that was not the case. Instead each party proceeded on a different understanding. The SFC understood that they had reserved the right still to take disciplinary proceedings against Mr Li. Mr Li and those advising him mistakenly understood that if truth was revealed he would not be disciplined.

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36. But it is plain that no assurance was given to Mr Li that he would not be subject to disciplinary action. He must recognise that he had given a promise to the court that he would assist the SFC. He demonstrably failed to do so. Notwithstanding his misunderstanding of the position, he was obliged to honour that undertaking. The SFC were entirely justified in being concerned that he failed to do so.

37. However, we believe that it is necessary to recognise that a misunderstanding had arisen. In those circumstances we are satisfied that it is open to us to review the penalty imposed by the SFC.

Similar offences:

38. The “Notice of Proposed Disciplinary Action” dated 5 May 2008, did not set out any comparative cases, which might indicate to Mr Li the basis upon which the SFC had determined that a life ban was appropriate. In their submissions, Mr Li’s solicitors, drawing from SFC press releases, listed three cases in which persons had been disciplined for providing false information to the SFC’s interview.

39. The SFC, in its “Notice of Final Decision” has set out six cases in which the penalties ranged from a public reprimand to prohibition for life. Three of those cases were the three cases referred to by Mr Li’s solicitors in their submissions on his behalf.

40. Three of the six cases involve the use of secret accounts, in which there was no suggestion of the provision of false or misleading information, nor a breach of an undertaking to the court. Those cases do

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not assist in the determination of this matter.

41. Of the three further cases, quite plainly the case involving prohibition for life was distinguishable. In that case defendant had stolen clients securities and conspired to pervert the course of justice. It is simply not a suitably comparable case.

42. The next most serious resulted in a prohibition for two years. That too is barely a suitable comparable case. In that case the licensed person was charged firstly, with the provision of false information; secondly, allowing clandestine and unauthorised third party orders; and, thirdly, operating discretionary accounts without written authorisation.

43. The remaining two cases were cases of giving false or misleading information, and resulted in suspension for 8 1/2 months in one, and a public reprimand in the other. These were explained by the SFC as “being more than three years old, and not reflecting the current penalty level”.

44. The SFC throughout were particularly concerned with the fact that Mr Li had given an undertaking to the court, and that he had breached that undertaking. They are right to be concerned about the situation, but it is necessary to view that situation in the light of the misunderstanding between the SFC and those advising Mr Li, and Mr Li, as we have set out above. Those circumstances go a very long way to ameliorate what might otherwise be a very serious breach.

45. Had the appropriate procedure been followed, the policy

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explained properly to Mr Li and his solicitors, and Mr Li properly understood that notwithstanding his admission and likely prosecution, disciplinary action was also likely, we believe that he would have cooperated and have given the necessary evidence if required. Consequently, in our view, in these very unusual circumstances, we believe the penalty ought to be imposed upon that basis.

46. We have taken into account all of the matters in mitigation raised by Ms Lam and the matters of seriousness pressed upon us by Mr Westbrook.

Conclusion:

47. We allow the application for review, set aside the decision of the SFC, and substitute an order in the following terms:

“Pursuant to s 194, all licences held by Li Kwok Keung, Asser, be suspended for a period of 18 months”.

48. In reaching our conclusion we have weighed into the balance the present view of the SFC, correctly held in our view, that the provision of false information is a serious matter, and that it would be unlikely that it would ever result in a person giving false information not being disciplined, even if that person were to give helpful information to the SFC. We deliberately say unlikely, as we recognise there may be circumstances in which the SFC may find it appropriate, notwithstanding that someone has given false information, if very substantial and significant assistance were given, that disciplinary action might not follow. Each case would need to

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be determined on its merits.

49. We think that the whole issue of “accomplice witnesses” and the way in which they should be dealt with in a disciplinary context, is a subject to which the Process Review Panel might well give attention, with the assistance of appropriate legal advice.

Costs:

50. We may be perceived as having been critical of the SFC in the procedures they adopted in this case. If there is to be any criticism it falls also on Mr Li’s solicitors. It was equally open to those advising Mr Li to explore the matter in more detail and to settle the precise basis upon which any action might be taken by Mr Li before any steps were taken. The SFC are not the only ones responsible for the unfortunate circumstances that arose.

51. In the whole of the circumstances, we are satisfied that justice will be done to all parties if there be no order as to costs. The order will be an order nisi to be made absolute in 14 days.

Unused material:


52. We feel it appropriate to say something about the question of unused material. The documents provided to Ms Lam, referred to in paragraph 24 above, were described by her as being provided “for the first time in these proceedings”. That is strictly correct. But that was not the first occasion upon which the solicitors advising Mr Li had received those

documents. It is clear that those documents had been supplied as part of the disclosure in the criminal proceedings against Mr Li. However, they had not been contained within the disclosure for these Review proceedings.


53. The preliminary view held by the Chairman was that the obligation on the SFC as to the disclosure of unused material ought to be equivalent to that of a prosecutor in criminal proceedings. That view was expressed during the hearing. The matter was not the subject of full argument from counsel before us, as the matter of disclosure was not pressed further by Ms Lam. Because the issue did not ultimately proceed to full argument this is not an appropriate occasion in which to lay down principles.

54. The Chairman has now had an opportunity to consider the decision of the Court of Final Appeal in *Lam Siu Po v Commissioner of Police* [2009] 4 HKLRD 575. It appears to the Chairman that there is a strong argument that disciplinary proceedings under the SFO are proceedings which involve a determination of a persons “rights and obligations of in a suit at law”, the expression contained in Article 10 of the Bill of Rights, (s 8 Cap 383). In those circumstances, just as in *Lam Siu Po*, where the engagement of Article 10 led to the entitlement to legal representation, so it seems that the requirement of fairness demanded by Article 10 should lead also to a requirement for the disclosure of unused material in disciplinary proceedings, equivalent to that in criminal proceedings.

55. It appears to us from the limited argument on the issue that did take place that the SFC take the view that in disciplinary proceedings the obligation of disclosure upon them is not as extensive as that in criminal proceedings. There not having been full argument, it is not appropriate for us to say anything further, other than having set out the preliminary views held by the chairman at the present time. At an appropriate occasion it will be necessary to consider the matter in detail, but only after full argument from both the SFC and a person subject to disciplinary proceedings, seeking unused material.



John Saunders
 Judge of the Court of First Instance
 High Court
 Chairman



Mr Chan Kam Wing, Clement
 Member



Mr Kwan Pak Chung, Edward
 Member

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