

The report of the Market Misconduct Tribunal into dealings
in the shares of Sino Katalytics Investment Corporation
on and between 2 January 2009 to 9 January 2009

**Part II : The determination of the profit gained, pursuant to section
252(3)(c), and the orders of the Tribunal pursuant to section 257(1)
and 262(2)(b)(v) of the Securities and Futures Ordinance, Cap 571**

INDEX

	Paragraphs
Chapter 5 A determination of the profit gained as a result of the Market Misconduct	115-121
Chapter 6 Orders	122-144

Attestation to Part II of the Report

INDEX – APPENDICES

	PAGE
Appendix V Sales by Mr Peter Yau to buyers other than Mr Duncan Chui	A13
Appendix VI Profit gained by Mr Peter Yau by selling 4 tranches of Sino Katalytics shares other than to Mr Duncan Chui on 9 January 2009 after 15:51	A14
Appendix VII Statement of Executive Director of the Corporate Finance Division of the SFC dated 22 May 2012	A15-A19
Appendix VIII Costs and Expenses – Department of Justice and SFC	A20-A21
Appendix IX Costs and Expenses – Tribunal	A22

CHAPTER 5

A DETERMINATION OF THE PROFIT GAINED AS A RESULT OF THE MARKET MISCONDUCT

115. As required by the Financial Secretary's Notice dated 12 April 2011 and pursuant to section 252(3)(c) of the Ordinance, having found Mr Duncan Chui and Mr Peter Yau culpable of market misconduct, namely false trading, price rigging and stock market manipulation, the Tribunal went on to determine the amount of profit gained or loss avoided by them as a result of the market misconduct.

116. The Tribunal is satisfied that the misconduct to which regard is to be had in addressing the issue is the trading in the shares of Sino Katalytics by both of them in the last 20 minutes or so of 9 January 2009. In that trading, Mr Duncan Chui was a buyer of those shares and Mr Peter Yau a seller. The Tribunal has found, *inter alia*, that each of them took part in that trading with the intention of creating an artificial price for dealings in those shares, in particular intending that the trading have the effect of increasing the price of the shares traded on the Stock Exchange of Hong Kong. Further, that it was their intention to trade with each other. Clearly, that conduct was a joint enterprise. Accordingly, the fact that Mr Duncan Chui bought Sino Katalytics shares from Mr Peter Yau at a price greater than the market price, namely that set by the forces of genuine buyers and sellers, and that Mr Peter Yau sold those shares to Mr Duncan Chui at a price greater than the market price does not fall to be considered as profit gained by Mr Peter Yau. In the context of the joint enterprise, there was no profit gained in the trading between each other.

117. By contrast, the four sales by Mr Peter Yau to buyers other than Mr Duncan Chui after the trading between the two of them had the effect of artificially increasing the price at which Sino Katalytics shares were traded, is relevant to a consideration of the profit gained by Mr Peter Yau. Prior to the trading between Mr Peter Yau and Mr Duncan Chui, which began at 15:39:14, there were only two other trades in Sino Katalytics shares that day, namely a trade of 50,000 shares at 4.2 cents per share at 11:43 and one of 500,000 shares at 4.4 cents per share at 14:54. Trading between Mr Peter Yau and Mr Duncan Chui began at 15:39 with a trade of 1 million Sino Katalytics shares at 4.9 cents per share. There followed two further trades of one million shares each for 5.0 cents per share at 15:41 and 15:50. In the period from 15:51 to the close of trading Mr Peter Yau sold four tranches of Sino Katalytics shares to buyers other than Mr Duncan Chui, the details of which are set out in Appendix V. The first of those sales was at 5.0 cents per share and the last at 5.5 cents per share. Interspersed between those trades, were further trades between Mr Peter Yau and Mr Duncan Chui culminating with their final trade between each other that day at 15:59:52 of 800,000 shares at 5.5 cents per share. The Tribunal is satisfied that the four sales by Mr Peter Yau to buyers other than Mr Duncan Chui are sales in which a profit was gained by Mr Peter Yau.

118. In the course of the hearing on 20 July 2012, in face of suggestions made in written submissions that the Tribunal receive expert evidence on the issue of whether or not a profit was gained, the Tribunal indicated that it felt able to address the issue without the need for or expense of expert testimony. In the result, none of the parties pressed their earlier suggestion that expert evidence be adduced.

Market price

119. In respect of the issue of the determination of the market price to be taken in calculating the profit made by Mr Peter Yau in the four sales to buyers other than Mr Duncan Chui, Mr Bernard Mak submitted that the market price was greater than the last traded price of 4.4 cents per share, prior to trading between Mr Duncan Chui and Mr Peter Yau. He pointed to the wide spreads between 'Asks' and 'Bids' in the period after trading had begun between Mr Duncan Chui and Mr Peter Yau, in particular that at 15:55 there was an 'Ask' by a broker other than one acting for the two men for 6.0 cents per share. He said that evidenced a sellers market that was becoming aggressive. He submitted that Mr Peter Yau could have achieved sales for his other 'Ask' orders at 4.8 cents or even 5.0 cents per share.

120. For its part, taking a necessarily broad approach to the matter, the Tribunal is satisfied that the appropriate market price to be stipulated for this purpose was the last traded price of Sino Katalytics shares prior to the trading between Mr Peter Yau and Mr Duncan Chui, namely 4.4 cents per share.

121. Accordingly, the profit gained by Mr Peter Yau is to be calculated by the difference between the price per share at which he sold those four tranches of Sino Katalytics shares and 4.4 cents per share. (See Appendix VI) The gross profit gained by Mr Peter Yau was \$16,800.00. The transaction costs of the sales are to be deducted from the gross profit. Having regard to the transaction costs⁴, discernible on the statements of account of Mr Peter Yau, we are satisfied that the profit gained by Mr Peter Yau was \$16,200.00.

⁴ Broker commission, stamp duty and transaction levy.

CHAPTER 6

ORDERS

122. As requested, the Tribunal was provided with written submissions by all the parties prior to the hearing of 20 July 2012, *inter alia*, as to the orders that it ought to make pursuant to section 257 of the Ordinance. Further oral submissions were advanced at the hearing by Mr Chiu, of Chiu & Partners, who appeared for Mr Duncan Chui, and by Mr Bernard Mak on behalf of Mr Peter Yau.

123. In those submissions the Tribunal was referred to the orders made against persons found to be culpable of various forms of market misconduct by differently constituted Tribunals. Indeed, submissions were made on behalf of Mr Duncan Chui and Mr Peter Yau by reference to such orders that, were the Tribunal minded to make a particular order in the instant case, the duration of the order ought to be less than that to which reference was made. However, each case has its own distinctive features. In determining the appropriate orders to be imposed on those found culpable of market misconduct the Tribunal must have particular regard to the specific facts and circumstances of the case.

124. At the time of the commission of the conduct in respect of which Mr Duncan Chui and Mr Peter Yau have been found culpable of market misconduct, namely 9 January 2009, each of them was an executive director of Sino Katalytics and Mr Duncan Chui its Chairman. Each had a substantial shareholding in Sino Katalytics. As noted earlier, the Tribunal has found that they intended by the impugned trading in shares of Sino Katalytics to artificially increase the price at which the shares were traded, so that they could induce others to subscribe for a placement of Sino Katalytics shares, which would be

offered at a discount to its last traded price. Each of them participated in the decision of the Board of Directors of Sino Katalytics to enter into the agreement with Guoyuan to place Sino Katalytics shares. Clearly, in the pursuit of their joint enterprise their trading in their own holdings of Sino Katalytics shares was intimately linked to their position as directors of Sino Katalytics, in consequence of which they were able to achieve the ultimate objective of making a placement of Sino Katalytics shares.

Section 257(1)(a): an order that a person shall not act as a director or take part in the management of a listed corporation

125. Having regard to all the circumstances which led this Tribunal to determine that Mr Duncan Chui and Mr Peter Yau were culpable of market misconduct, we are satisfied that it is appropriate that the Tribunal make orders in respect of each of them that they shall not act as a director or take part in the management of a listed company for a period of two years.

Section 257(1)(b): cold shoulder order

126. The Tribunal is satisfied, given all the circumstances of the commission of the market misconduct, that it is appropriate to make a ‘cold shoulder’ order against both Mr Duncan Chui and Mr Peter Yau for a period of two years, namely that they shall not, without the leave of the Court of First Instance, in Hong Kong directly or indirectly in any way acquire, dispose of or otherwise deal in any securities.

127. Mr Mak informed the Tribunal that Mr Peter Yau is currently the subject of a ‘cold shoulder’ order imposed by the SFC for breach of the Code on Takeovers and Mergers (“Takeovers Code”). That order is for a duration of 18 months and came into effect on 23 May 2012. Accordingly, it expires on 22 November 2013. These circumstances in which the Executive Director of the

Corporate Finance Division of the SFC (“the Executive”) came to impose that order are set out in his statement of 22 May 2012 (see Appendix VII). On 10 June 2011, the collective shareholding of Mr Peter Yau and Capital VC Limited in Longlife Group Holdings Limited (“Longlife”) exceeded 30%, being 30.19%, thereby triggering a mandatory general offer obligation under the Takeovers Code. At the material time, Mr Peter Yau was an executive director and substantial shareholder of Capital VC Limited. He managed two investment accounts, one for Capital VC Limited and the other for his personal investments. Notwithstanding the fact that they had been reminded by the SFC of the mandatory general offer requirement of the Takeovers Code, Capital VC Limited and Mr Peter Yau failed to comply with the obligation, announcing on 17 August 2011 that they would not make a general offer for Longlife. Having determined that the failure “ ... constituted a serious breach of one of the most fundamental provisions of the Takeovers Code which merits strong disciplinary action”, the Executive imposed the ‘cold shoulder’ order on Mr Peter Yau pursuant to section 12.2(c) of the Introduction to the Takeovers Code and publicly censured both Capital VC Limited and Mr Peter Yau pursuant to section 12.2(b) of the Introduction to the Takeovers Code.

128. Of Mr Peter Yau’s explanation, that the collective shareholding of Capital VC Limited and himself had reached 30.19% because he had acquired the shares of Longlife having wrongly calculated the collective shareholding, the Executive determined of Mr Peter Yau that he had not “ ... made any serious efforts to put in place compliance procedures which could have helped to avoid such a serious breach of the Takeovers Code”.

129. The Tribunal is conscious that the conduct, which resulted in the Executive imposing a ‘cold shoulder’ order on Mr Peter Yau, occurred about 2 1/2 years after the market misconduct of which the Tribunal has determined Mr

Peter Yau to be culpable. Nevertheless, the Tribunal is satisfied that it is appropriate that the sanction imposed under section 257(1)(b) of the Ordinance be effective in its own right in reflecting disapproval of Mr Peter Yau's market misconduct. Accordingly, pursuant to section 257(8) of the Ordinance, the Tribunal orders that the 'cold shoulder' order imposed upon Mr Peter Yau take effect on 23 May 2013.

Section 257(1)(d): disgorgement of profit gained

130. Given our earlier finding that Mr Peter Yau gained a profit as a result of his market misconduct on 9 January 2009 of \$16,200.00 we are satisfied that it is appropriate that the Tribunal make an order that he pay that amount of money to the Government.

Section 257(1)(e) and (f): an order in respect of the costs and expenses of the Government and the SFC

131. Section 257(1)(e) and (f) of the Ordinance provide that the Tribunal may make an order in respect of the costs and expenses reasonably incurred by the Government and the SFC respectively in relation or incidental to the investigation of the conduct of a person determined to be culpable of market misconduct and in respect of the proceedings before the Tribunal.

132. The Tribunal has received a claim from the SFC in respect of the costs and expenses of the SFC in respect of the investigation of Mr Duncan Chui and Mr Peter Yau and from the SFC and the Department of Justice in respect of the costs and expenses of the SFC and the Government in relation to or incidental to the proceedings before the Tribunal (see a summary at Appendix VIII). The Tribunal's own costs and expenses of the proceedings are to be included in the total costs and expenses of the Government (see a summary at Appendix IX).

133. It was submitted on behalf of both Mr Duncan Chui and Mr Peter Yau that in determining the appropriate orders to make in respect of the costs and expenses of the SFC and the Government the Tribunal ought to afford them a discount from the amounts claimed on behalf of the SFC and the Government to reflect the former's conduct in the investigation which impacted on the length of time taken up in the proceedings themselves, in particular, that no inquiries were made in the investigation period of the placees in the placement. Those inquiries were made during the proceedings themselves at the direction of the Tribunal. Further, that the primary evidence relating to the placing of orders to trade in Sino Katalytics shares by Mr Peter Yau was obtained only during the proceedings and at the direction of the Tribunal. Also, complaint was made that the SFC had failed to make full disclosure prior to proceedings of all relevant unused material.

134. Contrary submissions were made on behalf of Mr Duncan Chui and Mr Peter Yau as to the proportion of such costs and expenses of the SFC and the government in relation to the proceedings, as were reasonably incurred, that the respective parties ought to be ordered to bear respectively. It was submitted on behalf of Mr Duncan Chui, that only a small proportion of the time spent in the proceedings was concerned directly with his conduct, whereas considerably more time in the proceedings was spent addressing issues relevant, directly and indirectly, to the conduct of Mr Peter Yau. The Tribunal was invited to apportion any orders as to costs and expenses reasonably incurred by the Government and the SFC in the proportion of 90% against Mr Peter Yau and 10% against Mr Duncan Chui.

135. It was submitted on behalf of Mr Peter Yau that there was no basis to distinguish between the two men in apportioning orders as to costs and expenses reasonably incurred by the Government and the SFC.

136. There is no dispute that there was incomplete disclosure of unused material by the SFC to the Presenting Officer and thereby to the Specified Persons at the time of the Directions hearing on 3 October 2011. As a result, on 19 October 2011, the first day of the substantive hearing, counsel for the Specified Persons were served with a new list of unused material, copies of which were made available to counsel to inspect there and then. Some of the material related to telephone conversations that had been recorded between Mr Duncan Chui and Mr Peter Yau and their respective brokers. In consequence, the proceedings were interrupted whilst counsel made a preliminary assessment of the size of the task of considering that material. Eventually, the proceedings were adjourned to enable counsel to read, listen to and consider the new material. In light of the material now disclosed the Tribunal made orders pursuant to section 254 of the Ordinance directed at the SFC, requiring them to obtain further relevant related material.

137. Clearly, the impact of the tardy disclosure of unused material was on the proceedings themselves. In the result, approaching the matter broadly in our judgment in consequence the amounts claimed by the SFC and the Government in respect of the proceedings are to be discounted by 5%.

138. It was the Tribunal which determined to exercise its powers under sections 253 and 254 to obtain material in respect of the placees and to require them to give oral testimony. There is no doubt that in large part those inquiries concerned the role of Mr Ben Cheung and his relationship with Mr Peter Yau. They were not concerned directly with Mr Duncan Chui.

139. An element of the costs and expenses of the SFC claimed in relation or incidental to the proceedings of is in respect of Mr Eric Cheng. That claim is for

a total of \$171,374.00. As we noted in Part I of our report (paragraph 89) his evidence, and for that matter the evidence of Mr Richard Witts called on behalf of Mr Duncan Chui, was of limited assistance to the Tribunal since in its view the material matters for determination lay squarely within the Tribunals remit, so that in large part the Tribunal was not assisted by expert evidence. However, the Tribunal went on to observe (paragraph 90) that in his report Mr Cheng had encroached on many areas outwith the province of an expert, so that his report had been received in edited form only. However, the Tribunal went on to note that the statistical information he provided was of assistance to the Tribunal.

140. Taking a broad view of the matter, in the judgment of the Tribunal only 50% of the costs and expenses of the SFC claimed in respect of Mr Eric Cheng were reasonably incurred.

The respective proportion of the costs and expenses to be borne by Mr Duncan Chui and Mr Peter Yau

141. Although the market misconduct of which Mr Duncan Chui and Mr Peter Yau have been found culpable occurred on 9 January 2009 only, it was necessary for the Tribunal to receive material relevant to events that occurred both before and after that date to put that conduct in context. Notwithstanding our finding that their conduct evidenced a joint enterprise, not only as to trading in Sino Katalytics shares on 9 January 2009 but also as to the ultimate objective of a placement of Sino Katalytics shares, it is clear that material that the Tribunal sought and received in respect of events subsequent to 9 January 2009 concerned Mr Peter Yau more than it did Mr Duncan Chui. As we noted at paragraph 93 of our report, Mr Ben Cheung played a crucial role in the genesis of the placement and bringing it to fruition. It was his relationship and contact with Mr Peter Yau that concerned much of the inquiries of events subsequent to 9 January 2009.

142. In the result, in our judgment those matters are to be reflected in the proportion of costs and expenses of the SFC and the Government each of them is to bear in respect of the proceedings. Accordingly, again taking a broader approach to the matter, we order that, of the costs and expenses reasonably incurred, Mr Duncan Chui bear one third and Mr Peter Yau two thirds.

Section 257(1)(g) of the Ordinance: a recommendation that disciplinary action be taken

143. Having been informed, at the Tribunal's direction, by those representing Mr Peter Yau that he is a member of the Association of Chartered Certified Accountants, but no other professional bodies, we recommend to them that they take disciplinary action against him. Pursuant to section 262(2)(b)(v) of the Ordinance, we order that the Association of Chartered Certified Accountants be provided with a copy of our report, Parts I and II.

Orders

144. Accordingly, the Tribunal makes the following orders under the Ordinance :

As to Mr Duncan Chui

- (i) pursuant to section 257(1)(a) that, without the leave of the Court of First Instance, he shall not act as a director or in any way, whether directly or indirectly, be concerned or take part in the management of a listed company for the period of 2 years from 20 August 2012;
- (ii) pursuant to section 257(1)(b) that, without the leave of the Court of First Instance, in Hong Kong he shall not, directly or indirectly, in any way acquire, dispose of or otherwise deal in any securities for the period of 2 years from 20 August 2012;

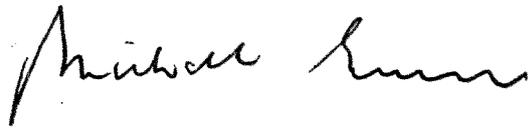
- (iii) pursuant to section 257(1)(e) that he shall pay the Government the sum of \$1,261,679.00; and
- (iv) pursuant to section 257(1)(f) that he shall pay the Securities and Futures Commission the sum of \$65,761.00.

As to Mr Peter Yau

- (i) pursuant to section 257(1)(a) that, without the leave of the Court of First Instance, he shall not act as a director or in any way, whether directly or indirectly, be concerned or take part in the management of a listed company for the period of 2 years from 20 August 2012;
- (ii) pursuant to section 257(1)(b) that, without the leave of the Court of First Instance, in Hong Kong he shall not, directly or indirectly, in any way acquire, dispose of or otherwise deal in any securities for the period of 2 years from 23 May 2013;
- (iii) pursuant to section 257(1)(d) that he shall pay to the Government the sum of \$16,200.00, being the profit he gained as a result of his market misconduct;
- (iv) pursuant to section 257(1)(e) that he shall pay the Government the sum of \$2,523,359.00;
- (v) pursuant to section 257(1)(f) that he shall pay the Securities and Futures Commission the sum of \$131,522.00

- (vi) pursuant to section 257(1)(g) that the Association of the Chartered Certified Accountant, be recommended to take disciplinary action against Mr Peter Yau; and

- (vii) pursuant to section 262(2)(b)(v) that a copy of the whole report of the Tribunal be provided to the Association of Chartered Certified Accountants.



The Hon Mr Justice Lunn
(Chairman)



Mr Ian Grant Robinson
(Member)



Mr LI Chiu-wah, Joseph
(Member)

Dated 16 August 2012