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HCAL 49/2008

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO 49 OF 2008

BETWEEN

LUK KA CHEUNG Applicant

and

THE MARKET MISCONDUCT TRIBUNAL 1st Respondent

THE FINANCIAL SECRETARY 2nd Respondent

Before: Hon Hartmann JA (sitting as an additional judge of the Court of First Instance) and A Cheung J in Court

Dates of hearing: 3 and 4 November 2008

Date of judgment: 18 November 2008

JUDGMENT

Hon Hartmann JA:

1. I am in full agreement with the judgment of my brother and have nothing to add.

Hon A Cheung J:

Background

2. In this application for judicial review, the applicant challenges the decision of the Chairman of the Market Misconduct Tribunal (MMT) dated 28 February 2008 that the Tribunal is validly constituted and has jurisdiction to determine the matters referred to it by the Financial Secretary's notice dated 12 September 2007.

3. The facts leading to this judicial review application are uncontroversial. The Tribunal was set up by s 257 of the Securities and Futures Ordinance (Cap 571), which came into force in April 2003. On 12 September 2007, the Financial Secretary instituted the second ever proceedings of the Tribunal by issuing a notice pursuant to s 252(2) of the Ordinance. The notice directed the Tribunal to institute and conduct proceedings to determine whether any market misconduct within the meaning of Part XIII of the Ordinance had taken place in relation to the dealings in the securities of China Overseas Land and Investment Ltd. The notice specified three persons suspected of having engaged in market misconduct – the applicant was one of them.

4. At a preliminary hearing on 9 November 2007, the Tribunal directed that the specified persons identify, supported by full written submissions, any and all issues to be taken, other than the substantive matters, by 7 December 2007. In accordance with that direction, the applicant filed a detailed written submission dated 7 December 2007 to challenge, amongst other things, the constitutionality of the proceedings.

5. Despite doubts over the Tribunal's jurisdiction to determine its own constitutionality, the Tribunal, chaired by a judge of the Court of First Instance who sat with two members, nonetheless conducted a hearing on 25 February 2008. In a written ruling dated 28 February 2008, the Chairman determined that the Tribunal had jurisdiction to determine the issue of its own constitutionality and then dismissed the applicant's challenge.

6. Leave to apply for judicial review against the Tribunal's determination on its own constitutionality was granted on 29 May 2008 and a direction for holding an expedited hearing was also given.

Separation of powers and the Basic Law

7. In this application for judicial review, Mr Jonathan Harris SC, appearing for the applicant, contends, in essence, that what the Ordinance requires the Tribunal to do is to exercise the judicial power of the State, which is reserved exclusively under the Basic Law for the courts of judicature of the Hong Kong Special Administrative Region to exercise. This offends against the doctrine of separation of powers, which underlies the political and legal structures set up under the Basic Law.

8. Counsel points out, quite correctly, that s 291 in Part XIV of the Ordinance provides, *inter alia*, that conduct commonly described as insider dealing constitutes a criminal offence. S 303 specifies the penalties that a court may impose on a person that is convicted of such an offence. Yet Part XIII of the same Ordinance provides an alternative

regime by which the Tribunal, a statutory body established by the Ordinance and consisting of three people, two of whom are not judges and are appointed by the Financial Secretary, may at the Financial Secretary's instigation determine whether conduct identified in s 270 under Part XIII has taken place. Counsel correctly points out that such conduct is identical in all material respects to the criminal conduct that is set out in s 291 under Part XIV.

9. Mr Harris therefore argues that what the Tribunal purports to do in an inquiry is, in substance, to decide whether or not insider dealing has taken place, and thus whether a criminal offence has been committed, by acting as a court or a 'shadow court' in the sense of exercising what on a proper analysis is the judicial power of the State, reserved for the Judiciary of the HKSAR.

10. This is, counsel contends, constitutionally objectionable. First, arts 19 and 80 of the Basic Law provide that the courts of judicature of the HKSAR only shall exercise the judicial power of the Special Administrative Region. The Tribunal is not such a court and therefore cannot exercise the judicial power in question. Secondly and alternatively, if the Tribunal is in law and in substance such a court, its constitution and procedures do not comply with arts 80 to 96 of the Basic Law.

11. It is common ground that, in relation to the second point made by counsel, indeed the Tribunal's constitution and procedures do not comply with arts 80 to 96 of the Basic Law. The only and all important issue in the present application is whether the Tribunal does

purport to exercise the judicial power of the HKSAR, which is vested exclusively in the Judiciary of the HKSAR, pursuant to the provisions in the Basic Law. In other words, the issue is: is the Tribunal purporting to function as a 'court' or a 'court of the classic kind', when it is not such a court?

12. This is not a novel contention in Hong Kong. In the leading case of *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd* (2006) 9 HKCFAR 234, Ribeiro PJ described the relevant issues as follows (at pp 263-264):

> "77. Another context in which the concept of 'a court' may be in issue concerns cases where a challenge is made to a tribunal's jurisdiction on the ground that it is performing a function which involves exercise of the judicial power whereas it is not a properly constituted 'court' and therefore cannot lawfully exercise such power.
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> 78. Thus, in *Shell Company of Australia Ltd v Federal Commissioner of Taxation* [1931] AC 275, the question was whether the Board of Review set up under Australian tax legislation to review decisions of the Commissioner of Taxation was exercising the judicial power of the Commonwealth within the meaning of s 71 of the Constitution. If so, the taxpayer contended that it was not a properly constituted 'court' since the terms of appointment of its members lacked the entrenched security of tenure enjoyed by judges. The challenge was unsuccessful since the Board of Review was held not to be exercising the judicial power but merely acting administratively.
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> 79. In our own jurisdiction, a challenge based on similar grounds succeeded in *Lai Hung Wai v Secretary for Security* (Unreported, HCAL 1596/2001, Hartmann J; 9 September 2002; see also *Yau Kwong Man & Lai Hung Wai v Secretary for Security* CACV 377/2002, 2 July 2003). Young persons who had been convicted of murder had been made subject to an indefinite sentence of imprisonment. Legislation (s 67C of the Criminal Procedure Ordinance, Cap 221) was passed to modify that sentence so that there would be a fixed minimum term. It was provided that this task would be performed by the Chief

> Executive on the recommendation of the Chief Justice. The constitutionality of that legislation was successfully challenged on the basis that the fixing of the term of imprisonment involved an exercise of the judicial power which had to be exercised by a court of law as provided for by Art 80 of the Basic Law and not by the Chief Executive. Section 67C was consequently further amended to vest the function in the court instead.
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> 80. ... In this category of cases, there is no doubt that if the function in question involves exercising the judicial power, only a court of law is qualified to exercise it. The argument is about the nature of the function and whether the body performing it is in fact a court of law."

Legislative materials

13. Mr Harris has, without objection from the Financial Secretary, referred the Court to various legislative materials, to explain the genesis and policy intention behind the relevant provisions in the Ordinance. A Bills Committee paper (Paper No 12/01) is particularly informative. This is what it says:

> **"INTRODUCTION**
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> This paper outlines the provisions in Parts XIII and XIV of and Schedule 8 to the Securities and Futures Bill ('SF Bill') and the policy intention behind them. The provisions are principally concerned with defining and dealing with 'market misconduct', and seek to –
>
> (a) establish the Market Misconduct Tribunal ('MMT'), and detail its composition and procedures and its powers to inquire into and punish market misconduct on a civil basis;
>
> (b) create dual civil and criminal regimes for dealing with market misconduct;
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> (c) create a comprehensive right of civil action for those who suffer pecuniary loss owing to market misconduct; and

(d) create a number of criminal offence targeted at various acts of fraud, deception or misrepresentation involving securities, futures contracts or leveraged foreign exchange trading.

...

DUAL CIVIL AND CRIMINAL REGIMES TO DEAL WITH MARKET MISCONDUCT

3. The existing regulatory regime is inconsistent and inadequate in dealing with market misconduct and needs to be improved.

4. At present, insider dealing is a civil wrong defined in the Securities (Insider Dealing) Ordinance (Cap 395) ('S(ID)O'). Under the S(ID)O, the Insider Dealing Tribunal ('IDT') inquiries into cases of suspected insider dealing referred to it by Financial Secretary. Civil procedures are adopted, and a high civil standard of proof is applied. The IDT is not bound by the civil or criminal laws of evidence. At the end of an inquiry, the IDT makes a report of its findings and may punish anyone it finds to have engaged in insider dealing with a variety of orders, as follows-

(a) to prohibit a person from being involved in the management of any named corporations for up to 5 years;

(b) to pay to the Government an amount up to that of the profit made or loss avoided as a result of the insider dealing; and

(c) to pay a penalty of an amount up to three times the profit made or loss avoided as a result of the insider dealing.

5. All other forms of market misconduct are, on the other hand, criminal offences under the Securities Ordinance (Cap 333) ('SO') and the Commodities Trading Ordinance (Cap 250) ('CTO'). The offences cover-

(a) false markets and trading;

(b) restrictions on fixing prices for securities; and

(c) false or misleading statements.

6. In addition, the SO and the CTO criminalize fraud and the employment of fraudulent or deceptive devices, offences

which are more in the nature of a one-on-one fraud or deception, rather than conduct which affects the market for securities or futures contracts as a whole.

7. These offences are limited and have proven inadequate in effectively dealing with all forms of misconduct that are prejudicial to the interests of the investing public and the public interests, and in particular, different forms of market manipulation.

8. The criminal standard of proof (i.e. beyond reasonable doubt) and the restrictive rules of criminal evidence have inhibited successful criminal prosecutions in some instances of market manipulation. To date, there have been 10 successful prosecutions for market manipulation out of 12 cases brought. The maximum penalties under the SO and the CTO for similar offences are inconsistent and inadequate. For the 10 successful cases, the court has imposed suspended sentences in two instances, and the average fine of the other eight cases imposed has been only $40,000.

9. The civil regime for dealing with insider dealing under the IDT has been relatively successful, for the following reasons-

(a) obligation to answer questions put by the investigator which may later be used as evidence against the person before the IDT;

(b) absence of the right to silence before the Tribunal;

(c) use of a standard of proof below the criminal standard;

(d) the fact that the IDT is not bound by the formal rules of evidence and may consider any evidence it considers relevant and probative;

(e) the fact that a judge of the Court of First Instance sits with 2 lay persons who are experts; and

(f) the IDT's ability to impose a range of heavy financial penalties.

10. We therefore propose the establishment of a tribunal modelled on the IDT to be called the MMT that would have jurisdiction to inquire into and punish all forms of market misconduct, including insider dealing, and to make similar orders to those available to the IDT.

> ...
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> 13. However, the success of the IDT has been primarily due to the absence of the right to silence and its ability to consider compelled self-incriminating statements gathered during SFC investigations. The incorporation of procedural criminal safeguards into the market misconduct proceedings, despite the retention of heavy financial penalties as a sanction, would therefore render the MMT little or no more effective than criminal prosecution in deterring and punishing market misconduct, and would not better protect investors.
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> 14. To bolster the punishment and therefore deterrent effect of the proposed civil regime, the Bill will add two additional elements to the market misconduct regime.
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> ...
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> 16. Secondly, the Bill will make it procedurally easier for those who suffer pecuniary loss as a result of market misconduct to bring a civil action. The Bill will make the findings of the MMT in relation to market misconduct admissible evidence in civil proceedings (see paragraph 59 below). This will in turn enhance the deterrent effect of the proposed regime."

14. Mr Harris also points out to the Court, by reference to the evidence filed, that a key criterion as to whether or not a case of suspected market misconduct will be pursued in the Tribunal is whether, in the view of the Securities and Futures Commission, it is likely a prosecution in the criminal courts will be successful. Where it appears a conviction by the courts will be difficult to secure, the Commission will recommend the Financial Secretary initiate proceedings in the Tribunal instead: LegCo Panel on Financial Affairs Paper dated 27 March 2006 (LC paper no CB(1)1179/05-06(07)) at para 7.

Australian cases

15. Mr Harris relies on a number of Australian cases to support his contention that where the doctrine of separation of powers is constitutionally enshrined, the judicial power of the State can only be exercised by the courts of judicature, or courts of the classic kind, established under the constitution. Australia is such a case where s 71 of the Constitution vests the judicial power of the Commonwealth in a Federal Supreme Court (the High Court of Australia) and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. These Australian authorities include, amongst others, *Huddart, Parker & Co Pty Ltd v Moorehead* (1908) 8 CLR 330; *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 and *Brandy v Human Rights and Equal Opportunity Commission* (1994-1995) 183 CLR 245. Moreover, in the passage from the judgment of Ribeiro PJ in *New World* that has been extracted above, *Shell Company of Australia Ltd v Federal Commissioner of Taxation* is also such a case. In a great many of these cases, the courts had to determine whether a power given to a body to determine a particular matter was in truth and in substance a judicial power that could only be exercised by the federal courts pursuant to s 71 of the Australian Constitution.

16. In *Albarran*, what was in issue was whether the power conferred by s 1292(2) of the Corporations Act 2001 (Cth) on the Companies Auditors and Liquidators Disciplinary Board to cancel or suspend the registration of a person as a liquidator for a specified period if satisfied that certain conditions were fulfilled was judicial or not. In

the highly illuminating judgment of Kirby J, a number of matters were examined in order to decide the question. Amongst other things, the judge looked at the history and the origin of the current federal legislative regime for the registration of auditors and liquidators. This was because the history of the determination of early legal controversies, factually similar and apparently analogous to a later controversy, could sometimes be useful as indicating a function which, by the Constitution, was reserved, in the case of federal law, to the necessary exercise of the judicial power (para 94). The judge also took into account the history of Australian companies legislation, particularly the need for a more systematic and detailed regulation of company liquidators by procedures involving registration due to the growth of the economy. In the judge's view, the establishment of professional disciplinary boards to supervise such a registration became a logical and natural development (para 95). Furthermore, the judge took the view that legally and functionally, the purpose of the provision in question was to uphold the standards of registered liquidators, to ensure the compliance with an adequate and proper performance of the duties imposed on company liquidators, to protect company shareholders, creditors, officers and employees, and the public, and to uphold professional and business expectations in that regard (para 96). Regard having had to the function which the Board performed and the interpretation of the section in question, as well as the intramural or domestic disciplinary arrangements, Kirby J concluded that the Board was not engaged in the adjudication or determination of guilt, still less of criminal guilt, or in the imposition of punishment as such. He therefore came to the view that the Board did not exercise a judicial power (para 97).

17. Lastly, the judge carried out a function check of his conclusion against the basic objective, reflected in the Constitution, of reserving the exercise of federal judicial power to the federal courts, which has been described in another Australian case, *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 11 (*per* Jacobs J) in the following terms:

> "The historical approach to the question whether a power is exclusively a judicial power is based upon the recognition that we have inherited and were intended by our *Constitution* to live under a system of law and government which has traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of the parliament and the executive. But the rights referred to in such an enunciation are the basic rights which traditionally, and therefore historically, are judged by that independent judiciary which is the bulwark of freedom. The governance of a trial for the determination of criminal guilt is the classic example."

18. Kirby J took the view that orders made by the Board did not require the intervention of courts as 'the bulwark of freedom' for the protection of what had been traditionally regarded as 'basic legal rights' (para 99). Rather, the judge considered the case under determination differently (para 100):

> "On the contrary, what is involved in the appellant's cases is no more than the operation of a disciplinary scheme designed ultimately to uphold standards of integrity and competence in the liquidation of companies. Such a disciplinary scheme involves functions apt to an administrative body. The Board is thus an unremarkable disciplinary institution which, for functional reasons, includes relevant professional and business expertise. The Board cannot enforce its own decisions and its decisions are subject to facilities of administrative review of which the appellants have availed themselves."

19. In *Brandy, supra*, the High Court of Australia dealt with the question of whether the Human Rights and Equal Opportunity Commission charged with the obligation to hold inquiries into conduct allegedly amounting to racial discrimination was actually exercising a judicial power reserved for the federal courts. The Court answered the question in the affirmative. A major factor that the Court took into account was that although a determination by the Commission was not binding or conclusive between any of the parties to it, yet the Commission was obliged by the statutory provisions to lodge a determination in a registry of the Federal Court as soon as practicable and the Registrar was required to register it – upon registration the determination was to have effect as if it were an order made by that court.

20. In the joint judgment of Mason CJ, Brennan and Toohey JJ, the judges explained the general principles as follows (258-259):

> "Although many decision-making functions may take their character as an exercise of judicial, executive or legislative power from their legislative setting, the character of the decision-maker and the nature of the decision-making process, some decision-making functions are exclusive and inalienable exercises of judicial power. As Dixon CJ and McTiernan J observed in *R v Davison*:
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> > 'The truth is that the ascertainment of existing rights by the judicial determination of issues of fact or law falls exclusively within judicial power so that the Parliament cannot confide the function to any person or body but a court constituted under ss 71 and 72 of the Constitution.'
>
> In that statement, the expression 'judicial determination' means an authoritative determination by means of the judicial method, that is, an enforceable decision reached by applying the relevant principles of law to the facts as found.
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> Thus, it has always been accepted that the punishment of criminal offences and the trial of actions for breach of contract

> and for wrongs are inalienable exercises of judicial power. The validity of that proposition rests not only on history and precedent but also on the principle that the process of the trial results in a binding and authoritative judicial determination which ascertains the rights of the parties. ... The determination involves an exercise of such power not simply because it is made by a court but because the determination is made by reference to the application of principles and standards 'supposed already to exist'. And the determination is binding and authoritative in the sense that there is what has been described as an immediately enforceable liability ... Consequently, even if the determination in such a case were to be made by an administrative tribunal and not by a court, the determination would constitute an exercise of judicial power, although not one in conformity with Ch III of the Constitution."

21. What eventually tipped the scales was the automatic registration of the Commission's determination (pages 259-260):

> "But s 25ZAB goes beyond providing the machinery for the enforcement of a determination. It purports to give a registered determination effect 'as if it were an order made by the Federal Court'. A judicial order made by the Federal Court takes effect as an exercise of Commonwealth judicial power, but a determination by the Commission is neither made nor registered in the exercise of judicial power. An exercise of executive power by the Commission and the performance of an administrative function by the Registrar of the Federal Court simply cannot create an order which takes effect as an exercise of judicial power; conversely, an order which takes effect as an exercise of judicial power cannot be made except after the making of a judicial determination. Thus, s 25ZAB purports to prescribe what the Constitution does not permit."

22. The joint judgment of Deane, Dawson, Gaudron and McHugh JJ was also to the same effect so far as these general principles were concerned. Having pointed out the difficulty, if not impossibility, of framing a definition of judicial power that is at once exclusive and exhaustive, the judges stated the general principles, including the one

concerning the enforceability of decisions, in the following terms (pages 267-268):

> "It is traditional to start with the definition advanced by Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead* in which he spoke of the concept of judicial power in terms of the binding and authoritative decision of controversies between subjects or between subjects and the Crown made by a tribunal which is called upon to take action. However, it is not every binding and authoritative decision made in the determination of a dispute which constitutes the exercise of judicial power. A legislative or administrative decision may answer that description. Another important element which distinguishes a judicial decision is that it determines existing rights and duties and does so according to law. That is to say, it does so by the application of a pre-existing standard rather than by the formulation of policy or the exercise of an administrative decision. ... But again, as was pointed out in *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd*, the exercise of non-judicial functions, for example, arbitral powers, may also involve the determination of existing rights and obligations if only as the basis for prescribing future rights and obligations.
>
> However, there is one aspect of judicial power which may serve to characterise a function as judicial when it is otherwise equivocal. That is the enforceability of decisions given in the exercise of judicial power. In *Waterside Workers' Federation of Australia v J W Alexander Ltd*, Barton J said:
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> > 'It is important to observe that the judicial power includes with the decision and the pronouncement of judgment the power to carry that judgment into effect between the contending parties. Whether the power of enforcement is essential to be conferred or not, when it is conferred as part of the whole the judicial power is undeniably complete.'"

Applicant's arguments

23. As described, Mr Harris relies heavily on these Australian authorities. First, he submits that the Tribunal purports to perform a function which is judicial in nature and which has only previously been performed by the criminal courts. He argues that the forms of market

misconduct that the Tribunal is empowered to inquire into under Part XIII of the Ordinance are exactly the same as the offences that the criminal courts are required to try under Part XIV. The effect of the institution of proceedings in the Tribunal, it is contended, is to oust the jurisdiction of the criminal courts and usurp that function from the courts. He argues that s 307, enacted to prevent 'dual punishment', in the sense that persons who are the subjects of proceedings before the Tribunal cannot be charged in a criminal court for the same conduct, necessarily 'equates' the function performed by the Tribunal with that performed by the criminal courts.

24. Secondly, Mr Harris argues that the Tribunal wields powers which are intrinsically judicial powers, such as compelling people to attend and give evidence on oath, authorising the Securities and Futures Commission to conduct searches of premises and compel people to attend interviews and give statements, and punishing people for contempt in the same manner as the Court of First Instance by means of fines and imprisonment. The Tribunal may also impose various orders by way of sanctions, such as disgorgement orders, Government costs orders, Commission costs orders and Financial Reporting Council costs orders. Further, the Tribunal may, through the imposition of disqualification orders, cold shoulder orders and disciplinary orders, prevent a specified person from practising his trade or profession and participating in the economic life of the community.

25. Mr Harris further makes the side point that by determining whether the specified person has been guilty of market misconduct, the

Tribunal is in substance exercising an authority to label him as a criminal in the eyes of the public.

26. Thirdly, Mr Harris points out, rather correctly, that under s 264 of the Ordinance, the Court of First Instance may, on notice in writing given by the Tribunal, register an order of the Tribunal in the Court of First Instance and the order shall, on registration, become for all purposes an order of the Court of First Instance made within the jurisdiction of that Court. Mr Harris relies on *Brandy* and contends that such a feature points strongly to the conclusion that the Tribunal is in fact exercising the judicial power reserved for the courts of judicature.

27. Fourthly, Mr Harris also points out, again correctly, that a determination by the Tribunal that a person has engaged in market misconduct is admissible in evidence for the purposes of related civil proceedings and must be deemed correct by the civil court unless the contrary is proven: s 281(8). The Tribunal, counsel argues, therefore purports to perform the fact-finding role of the civil courts and to determine the legal liability of specified persons to third parties.

28. In summary, counsel submits that the Tribunal's power falls squarely within the judicial definition of 'judicial power', in that the Tribunal is purporting to determine a controversy between the State and a specified person, by reference to pre-existing rights and in accordance with law, and to issue a binding and authoritative decision. The Tribunal, in the words of Mr Harris, constitutes a 'shadow judiciary system'.

Interpreting the Basic Law – importance of context

29. It is true that the principle of separation of powers is enshrined in the Basic Law, and the judicial power of the Special Administrative Region is exclusively vested in the Judiciary: see *Lau Cheong v HKSAR* (2002) 5 HKCFAR 415, 447-448 (para 101). The task in the present case is to determine whether the Market Misconduct Tribunal is required by the Ordinance to exercise such a power. That necessarily involves the interpretation of the relevant provisions in the Basic Law in order to understand what the judicial power of the State (or the HKSAR) is.

30. As Hartmann J (as he then was) has observed in *Lau Kwok Fai Bernard v Secretary for Justice*, HCAL 177/2002 and 180/2002 (10 June 2003), para 23:

> "While therefore I accept that the Basic Law incorporates the principle of the separation of powers (subject of course to the meaning and purpose of specific articles which may act to modify that principle), it is apparent that whether the Ordinance, in respect of any individual article or in respect of the Basic Law generally, offends that Law is a matter which may only be determined by looking at the Ordinance 'in context'. As the Privy Council said in *Liyanage* : each case must be decided in the light of its own facts and circumstances, including the *true purpose of the legislation* and *the situation to which it is directed*."

31. And as was also observed during the course of counsel's submission, 'each constitution is the child of its environment'. It is, therefore, unsafe to simply borrow and apply the Australian jurisprudence on separation of powers in general and on judicial power in particular without first recognising the rationale behind the Australian approach,

which is a 'strict' one: *per* Kirby J in *Albarran*, para 61. And there are reasons for that strict approach to separation of powers, as Kirby J explained in para 62:

> "The governing principle can be traced to concepts expounded in Alexander Hamilton's views concerning the special need in a federation to have a branch of government, the judiciary, which was insulated from the other branches of government so as to be able to perform the functions essential to its purposes. Hamilton considered the independence of the judiciary from the other arms of government essential to ensure impartial decision-making in those matters where, otherwise, there was a risk of encroachment and partiality in the administration of federal laws affecting such matters as the 'life, liberty or property' of those who are subject to such laws."

32. In Hong Kong, we certainly do not have a federal system. Rather, under the principle of 'one country, two systems' the HKSAR is vested with independent judicial power, including that of final adjudication (art 19). A main theme of the Joint Declaration and the Basic Law, as Mr Duncan SC (Mr Conney with him) for the Financial Secretary has reminded the Court, is that of continuity, including continuity between the pre-existing and the present court and judicial systems: *New World* at para 43. And art 8 of the Basic Law specifically provides that subject to exceptions, the laws previously in force in Hong Kong shall be maintained.

33. In this regard, the warning sounded by Sir Anthony Mason in his article, *The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong* (2007) 37 HKLJ 299, 305-306 is apposite:

> "Quite apart from political differentiations, there are doctrinal differences, such as those mentioned above. These doctrinal differences, which are not always based on political differentiations, present obstacles to the importation of principles based on different doctrinal foundations. Take, for example, the separation of powers. The United States and Australian Constitutions incorporate a separation of powers, as does the Constitution of Canada (at least impliedly), while United Kingdom public law also asserts a separation of powers. But the content of that separation varies across the four jurisdictions. Although the United States and the Australian separation of powers is similar in some respects, the difference between the presidential system and the Westminster system, with its doctrine of responsible government, means that there is a substantial cleavage between the two systems. Neither in Canada nor in the United Kingdom has the doctrine been taken as far as it has in Australia, let alone the United States.
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> The consequence is that judicial decisions on the separation of powers need to be treated with great care before they can be imported from one jurisdiction to another. This proposition has significance for Hong Kong. The Basic Law incorporates a separation of powers. So far, however, the courts of the HKSAR have not had occasion to consider what the doctrine may entail in Hong Kong. It would not follow that the Basic Law, when construed in the light of its context and the preservation of the English common law by Article 8 of the Basic Law, necessarily mandates a separation of powers that conforms either to the United States or Australian model."

See also Anthony Mason, *The Role of The Common Law in Hong Kong* in *The Common Law Lecture Series 2005* (HKU) 1, 22-24.

34. Unlike the Australian Constitution which came into being at the beginning of the last century – well before the development of administrative bodies and tribunals, the Basic Law became Hong Kong's Constitution under very different circumstances. By then, following developments in the United Kingdom and elsewhere, particularly after the Second World War, administrative bodies and tribunals had become prevalent and they performed or discharged numerous functions that had

superficial resemblance to the judicial process. Amongst other things, by reason of the requirement under public law, these tribunals and bodies had to act judicially in their decision-making process. And they even exercised some sort of 'judicial power'. As Robert Walker LJ (as he then was) pointed out in *General Medical Council v British Broadcasting Corporation* [1998] 1 WLR 1573, 1580C-F:

> "[Counsel] submitted, correctly, that the P.C.C. of the G.M.C. has to adjudicate in a formal and judicial manner on very serious issues which are of public importance and may also have the gravest effect on the reputation and career of an accused medical practitioner. Mr Henderson was correct in submitting that the PCC is exercising a sort of judicial power but in our judgment it is not the judicial power of the state which is being exercised. ..... In this case, by contrast, the P.C.C. is a statutory committee of a professional body specially incorporated by statute. It exercises a function which is recognisably a judicial function, and does so in the public interest. It acts in accordance with detailed procedural rules which have close similarities to those followed in courts of law. Nevertheless it is not part of the judicial system of the state. Instead it is exercising (albeit with statutory sanction) the self-regulatory power and duty of the medical profession to monitor and maintain standards of professional conduct."

This passage was cited with approval by Ribeiro PJ in *New World* (para 85); the case was also relied on in *Tse Wai Chun v Solicitors Disciplinary Tribunal* [2002] 3 HKLRD 712, 722 (para 16).

35. Wade & Forsyth, *Administrative Law* (9th edn), Chap 23 contains a highly informative discussion on statutory tribunals in the United Kingdom, which is helpful to a significant extent in understanding the tribunal system in Hong Kong which, before 1997, was naturally based on the UK model. The authors point out the advantages of tribunals on pages 907-908 – they can offer speedier, cheaper and more accessible justice. Another advantage is that of expertise. Specialised

tribunals can deal both more expertly and more rapidly with special classes of cases, whereas in the High Court counsel may take a day or more to explain to the judge how some statutory scheme is designed to operate. Even without technical expertise, a specialised tribunal quickly builds up expertise in its own field. At pages 908-910, the chapter goes on to discuss other characteristics of statutory tribunals, including the so-called 'administrative tribunals':

> "The system of tribunals has now long been an essential part of the machinery of government. The supplementary network of adjudicatory bodies has grown up side by side with the traditional courts of law. There is a close relationship between the two systems, both because under the ordinary law the tribunals are subject to control by the courts and also because Parliament has in the majority of cases provided a right of appeal from the tribunals to the courts on any question of law. A case which starts, say, in a social security or employment tribunal may therefore end in the House of Lords, having passed through four or five stages of litigation. This is a rare event, since otherwise the tribunal system would be self-defeating. But the tribunals must in some way be integrated with the machinery of justice generally. As will be seen, it has proved necessary to increase the supervisory powers of the courts, as well as to extend rights of appeal.
>
> Tribunals are subject to a law of evolution which fosters diversity of species. Each one is devised for the purposes of some particular statute and is therefore, so to speak, tailor-made. When any new scheme of social welfare or regulation is introduced the line of least resistance is usually to set up new ad hoc tribunals rather than reorganise those already existing. Uncontrolled growth has produced over fifty different types of tribunal falling within the Tribunals and Inquiries Act 1992. When all their local subdivisions are aggregated the total (including Scotland) exceeds 2,000. They range from extremely busy tribunals such as those dealing with social security, employment, valuation appeals and rent assessment to tribunals which have no business at all and have therefore never been appointed, such as the mines and quarries tribunals. ...
>
> The responsibilities of tribunals are in general no less important than those of courts of law. Large awards of money may be made by tribunals, for example, in cases of industrial injuries.

> Mental health review tribunals determine whether a patient ought to be compulsorily detained, and so lose his personal liberty, whereas the administration of his property is a matter for the courts of law.
>
> ...
>
> ... the decisions of most tribunals are in truth judicial rather than administrative, in the sense that the tribunal has to find facts and then apply legal rules to them impartially, without regard to executive policy. Such tribunals have in substance the same functions as courts of law. When, for example, jobseeker's allowance is awarded by a social security tribunal, its decision is as objective as that of any court of law. Only two elements enter into it: the facts as they are proved, and the statutory rules which have to be applied. The rules may sometimes give the tribunal a measure of discretion. But discretion is given to be used objectively, and no more alters the nature of the decision than does the 'judicial discretion' which is familiar in courts of law. These tribunals therefore have the character of courts, even though they are enmeshed in the administrative machinery of the state. They are 'administrative' only because they are part of an administrative system for which a minister is responsible to Parliament, and because the reasons for preferring them to the ordinary courts are administrative reasons.
>
> ...
>
> Fourthly, and most important of all, tribunals are independent. They are in no way subject to administrative interference as to how they decide any particular case. No minister can be held responsible for any tribunal's decision. Nor are tribunals composed of officials or of people who owe obedience to the administration. It would be as improper for a minister to try to influence a tribunal's decision as it would be in the case of a court of law."

For academic discussion on the Hong Kong position, see also P Wesley-Smith, *Judges and Judicial Power under the Hong Kong Basic Law* (2004) 34 HKLJ 83, 94-102; B Hsu, *Judicial Independence Under the Basic Law* (2004) 34 HKLJ 279, 280-286.

36. It is plain that in a modern society like Hong Kong, administrative tribunals and bodies have an important role to play. This is not a new phenomenon. It was already the case before the Basic Law was promulgated. Given the theme of continuity, it would be very surprising if the effect of the Basic Law, upon its proper interpretation, were to outlaw these administrative tribunals and bodies for ousting the jurisdiction or usurping the judicial functions of the courts of judicature of the HKSAR. Or put another way, the Basic Law should be interpreted in such a way as to enable, so far as violence is not done to the principle of separation of powers as understood in the tradition of English common law, the continued existence and development of administrative tribunals and bodies. This calls for a flexible and realistic, as opposed to an idealistic, approach to the doctrine of separation of powers, and a purposive and contextualised interpretation of the scope and meaning of 'judicial power' in the Basic Law, rather than following indiscriminately the strict interpretation adopted by the Australian courts towards their own Constitution, which was written under very different circumstances in order to serve its own unique purposes.

Combating insider dealing in Hong Kong

37. This theme of continuity brings me to the fact that the Insider Dealing Tribunal, the predecessor of the Market Misconduct Tribunal, was already in existence for some years before 1997, pursuant to the provisions in the Securities (Insider Dealing) Ordinance (Cap 395) (now repealed). Some of the background facts can be gleaned from the judgment of Sir Anthony Mason NPJ in *Koon Wing Yee v Insider*

Dealing Tribunal [2008] 3 HKLRD 372, 389 to 391. As his Lordship explained (at paras 45 and 46):

> "45. Insider dealing is an 'insidious mischief' which threatens the integrity of financial markets and public and investor confidence in the markets. The object of SIDO [Securities (Insider Dealing) Ordinance] was to eliminate insider dealing and to reinforce the transparency of the markets, thereby enhancing and preserving Hong Kong's position as an international financial centre. The importance of attaining this object led to the decision to arm the Tribunal with the additional powers of imposing a penalty and ordering disqualification.
>
> 46. That insider dealing amounts to very serious misconduct admits of no doubt. It is a species of dishonest misconduct. It consists of using price-sensitive information (which is not in the public realm) about a public company for private gain in circumstances where the wrongdoer's misconduct is based on knowledge of, or his having reason to believe, critical prescribed elements of the misconduct described by s 9 of SIDO. That public censure was thought earlier to be an adequate sanction is indicative that insider dealing is considered to be very serious misconduct and that severe injury to reputation may flow from such a finding."

38. I have already quoted from the relevant legislative materials which throw light on the purposes and policy intention behind the replacement of the old Ordinance with the present Securities and Futures Ordinance and the setting up of the Market Misconduct Tribunal to combat insider dealing. The new scheme has been described by Sir Anthony Mason NPJ as providing for dual civil and criminal regimes to deal with insider dealing (at p 391):

> "47. Moreover, insider dealing is a form of conduct which can be readily characterized as criminal conduct. Indeed, the SFO [Securities and Futures Ordinance], which enacted the present legislation governing insider dealing, provides for dual civil and criminal regimes to deal with six types of market misconduct. The purpose of the SFO was to enhance the

> deterrent and punitive effect of the available sanctions for insider dealing on the basis that the regime under SIDO was insufficient to combat effectively acts of market misconduct. Similar dual regimes had by then been adopted in the United Kingdom, the United States and Australia.
>
> 48. As an element in the new civil regime, the SFO set up the Market Misconduct Tribunal ('the MMT') to hear cases of suspected market misconduct. The MMT was given power to impose civil sanctions, including surrender of any profit made or increased by market misconduct, but without power to impose a fine or penalty. The decision to leave the MMT without power to impose a fine was influenced by legal advice received by the Government to the effect that the existence of such a power might lead to a breach of the BOR."

39. It is interesting to note that neither the Court of Final Appeal, nor apparently the eminent counsel appearing in *Koon Wing Yee*, which was concerned with whether the proceedings before the Insider Dealing Tribunal were compatible with human right requirements, raised the question of whether the Insider Dealing Tribunal was exercising the judicial power of the HKSAR that is exclusively vested in the courts of judicature, if they ever thought that it was a potential problem. This is particularly so when the Court of Final Appeal actually concluded that the nature of the charges before the Insider Dealing Tribunal was criminal.

40. That, if nothing else, tends to support my earlier observation that the (pertinent) philosophy behind the Basic Law is one of continuity, and it would be a very surprising suggestion indeed if anybody were to suggest that the Insider Dealing Tribunal, which had been established before 1997 to deal with a particular type of evils affecting the financial markets that had been identified by the executive/legislature, had

suddenly become a usurper of judicial authority after the coming into force of the Basic Law.

41. This is a highly relevant background fact, in the sense that how, historically, the subject matter under discussion has been dealt with and how the present regime came into being are material to determining whether the judicial power of the State is involved: see *Albarran, supra*, paras 91 and 95.

A novel subject matter

42. Another important fact, in my view, is this: As the Australian authorities have pointed out, if the subject matter is one that has, traditionally or historically, been the subject of adjudication by the courts of judicature, that is an indication that what is involved is the judicial power of the State. Thus, subjects such as crimes, or claims in contract or tort, are subjects traditionally dealt with by the courts in exercise of their judicial power of the State. Hiving off any such subject matters from the court's jurisdiction to a tribunal could therefore be problematic.

43. The same consideration does not apply where the subject matter is novel to the common law. Insider dealing is such a subject. It is not a common law offence. Nor does it sit comfortably well with traditional causes of action based on contract, tort, trust, agency or companies law – although I am not saying that given the right facts, some causes of action could not be framed under the common law.

44. Likewise, the sanctions that the Tribunal can impose, namely, orders of disqualification, cold shoulders orders, cease and desist orders, disgorgement orders and extensive costs orders, are, by and large, sanctions not known to the common law. They are creatures of statute. There is therefore, again, no question of hiving off remedies that are traditionally dispensed by courts of law to an administrative tribunal.

45. In short, it is not a case of removing from the jurisdiction of the court a subject matter and giving it to a statutory tribunal to deal with. What actually happens is that by legislative intervention, a new subject matter is identified as one that requires regulation or policing, and, for policy or administrative reasons, the task is given, not to the traditional courts, but to a statutory tribunal specially established for such purposes. In those circumstances, the case for saying that the judicial power of the State, exercisable only by the courts of judicature, is removed from the courts and given to a statutory tribunal, is not particularly convincing.

46. Having said that, of course, if the statutory intervention results in the creation of criminal offences, and the determination of those offences is left in the hands of a statutory tribunal instead of the criminal courts, that would be a quite different story. For, regardless of whether the offences are statutory in origin, the trying of crimes is, from all perspectives, an exercise of the judicial power of the State that should, under the doctrine of separation of powers, be reserved exclusively for the criminal courts.

MMT does not decide criminal guilt

47. This brings me to Mr Harris' point that the Market Misconduct Tribunal is, in truth and in substance, required to try criminal offences. I do not accept this argument. As has been observed by Sir Anthony Mason NPJ in *Koon Wing Yee*, the new Ordinance provides for dual civil and criminal regimes to deal with six types of market misconduct. At the choice of the Financial Secretary, the same conduct may be referred to the criminal courts for trial or the Market Misconduct Tribunal for investigation (but not both). If the Part XIV route is taken, it is a criminal court, applying criminal rules and procedures, including the criminal standard of proof, which will decide whether a criminal offence has been committed and the appropriate criminal punishment. The Market Misconduct Tribunal will have nothing to do with it. On the other hand, if the Part XIII route is chosen, the Market Misconduct Tribunal will, applying its own rules and procedures which are civil (and inquisitorial) in nature, carry out investigations into the matter and determine whether market misconduct has taken place. That determination will not be the determination of the commission of a crime. No such determination will be made. Nor is it relevant to any criminal proceedings for – by definition – there will not be any parallel criminal proceedings. Nobody will be labelled a criminal – to do so would be defamatory, for the Tribunal's determination, based on the civil standard and according to rules and procedures that are civil and inquisitorial in nature, is not a determination of *criminal* guilt. That there is a distinction between guilt and criminal guilt, as Mr Duncan SC has argued, is clearly borne out by Kirby J's judgment in *Albarran, supra*, at para 97, where the learned judge concluded that the Companies Board was not

engaged 'in the adjudication or determination of guilt, still less of criminal guilt'.

MMT does not decide civil liability

48. Nor is the Market Misconduct Tribunal required to determine civil liability. It is noteworthy that the Ordinance creates a civil cause of action based on market misconduct (s 281) but does not give the jurisdiction to determine such liability to the Tribunal. Rather such civil liability is to be determined by the civil courts. What the legislature has done is to render the determination by the Tribunal admissible evidence in the civil proceedings and to create a rebuttable presumption based on the determination of market misconduct against the defendant.

49. That does not make the Market Misconduct Tribunal the adjudicator of civil liability or of the primary facts necessary to found such liability. What has been done is nothing more than the creation of an evidential aid in the civil proceedings before the courts. If the legislation had provided that the determination by the Tribunal is conclusive evidence of the commission of the market misconduct in the civil proceedings, that would have been a different matter. But that is not the case here.

Nature of the function of MMT

50. What then is the nature of the function of the Tribunal? What function, in the statutory scheme, does the Tribunal perform, for the

purposes of which it is given the power of determination – hence the nature of such power?

51. Speaking of the repealed Securities (Insider Dealing) Ordinance and the now defunct Insider Dealing Tribunal, Sir Anthony Mason NPJ observed in *Koon Wing Yee* that the object of the Ordinance was to eliminate insider dealing and to reinforce the transparency of the markets, thereby enhancing and preserving Hong Kong's position as an international financial centre (para 45). As a successor to the former statutory regime, in my view, the present Ordinance and the Market Misconduct Tribunal it has established are there to serve, hopefully in a more effective manner, the same purposes. This is fully borne out by the legislative materials that have been referred to. The same conclusion has been reached by Hartmann J (as he then was) and Lam J in *Chau Chin Hung v Market Misconduct Tribunal*, HCAL 123/2007, 124/2007 and 22/2008 (22 September 2008), although the focus of that decision was on the nature and severity of the sanctions that the Tribunal could impose. The Court had no difficulty in concluding, in respect of those sanctions, namely disqualification, cold shoulder orders, cease and desist orders, disgorgement orders, reference of an identified person to his own professional body for possible disciplinary proceedings, as well as extensive costs orders, that they are all designed to protect financial institutions and the investing public, or, in the case of costs orders, to serve a compensatory purpose.

52. In my view, quite plainly, looking at the dual regimes under the Ordinance, and particularly the Part XIII scheme, the purpose is to protect and maintain the integrity of the financial markets in Hong Kong,

thereby enhancing and preserving Hong Kong's reputation as an international financial centre. It is regulatory in nature. The investing public, and therefore public interest at large, is protected in the sense that the regime ensures the integrity of the financial markets in which the investing public carry on their investment or trading activities. It is very different from the case, for instance, dealt with by the Australian court in *Brandy*, concerning racial discrimination, which, of course, is a problem cutting across all strata of the society.

53. It is true that the sanctions are potentially severe, and therefore carry with it a deterrent effect, but that does not render the sanctions any less protective in nature. This has been decided by *Chau Chin Hung*, against which Mr Harris has mounted no challenge. In particular, the power to disqualify is protective rather than punitive in character, namely, that the primary purpose of the power is to protect investors and the public. In so far as the making of such an order has a deterrent effect, that effect is incidental and subservient to the purpose of protecting shareholders, investors and the public from people who are unfit to hold office: *Koon Wing Yee* at paras 72 and 73; *Chau Chin Hung* at paras 29-32. In other words, nothing penal is involved here and, as I have already concluded, the Tribunal is not required to determine any criminal liability or to impose any penal sanction or punishment. That is not the purpose of the scheme laid down in Part XIII. Rather, that is the business of the criminal courts pursuant to Part XIV of the Ordinance.

54. In my view, to a substantial extent the Tribunal is performing a function comparable to that performed by a regulating body or disciplinary tribunal established to self-regulate a particular type of

activities amongst a specific class of people in the society. Of course, like solicitors disciplinary proceedings, the public at large has a stake in the matter in the sense that solicitors are here to provide legal services to the public and it is in the interest of the public that professional misconduct of solicitors be investigated into and dealt with accordingly. Likewise, the Market Misconduct Tribunal is there to regulate the conduct of those involved in the financial markets in Hong Kong. The investing public and the reputation of Hong Kong as a serious financial centre all have a stake in it. But it is very different in nature from, say, the determination of a criminal offence by a criminal court, or the adjudication of civil disputes before a civil court. The functions performed by the courts in those cases are qualitatively different from that performed by the Tribunal. Maybe this is just another way of putting the distinction between exercising the judicial power and exercising a judicial power of the State.

Registration of MMT's orders

55. It is true that an order of the Tribunal may be registered in the Court of First Instance, and once registered, it shall take effect as if it were an order of that court (s 264(1)). In this regard, the Australian decision in *Brandy* is of course highly relevant.

56. But first, unlike *Brandy*, registration is not automatic. The court plainly retains a discretion whether to register an order under s 264(1) ('the Court of First Instance *may* ... register an order of the Tribunal ...'). It cannot be assumed that the discretion is anything other than a real one.

57. Secondly, I do not see *Brandy* as laying down the rule that if an order by a tribunal is automatically registrable as an order or judgment of a court of the classic kind, the tribunal must be exercising the judicial power of the State. In my view, taken at the highest, that is only a pointer, albeit an important one, that what is being exercised is the judicial power of the State.

58. Moreover, the actual decision in *Brandy* was heavily influenced by its context, namely racial discrimination, a subject matter which, one would have thought, ought to be dealt with by the courts of the classic kind.

59. In any event, as I said at the outset, in interpreting our Basic Law, the historical context – the use of administrative tribunals in general and the use of a specialised tribunal to combat insider dealing in particular in Hong Kong – cannot be ignored. A flexible and sensitive approach must be adopted.

60. Furthermore, under the former legislation, registration of the orders of the Insider Dealing Tribunal was automatic: s 29 of the Securities (Insider Dealing) Ordinance. Viewed historically, such provision was already in existence prior to 1997, and assuming that the Basic Law did not intend to create a sea change in terms of regulating insider dealing in Hong Kong, it is difficult to see how a *discretionary* power to register could turn the successor to the Insider Dealing Tribunal into a tribunal seeking to exercise the judicial power of the State.

61. In my view, all things considered, what is being sought to achieve in s 264(1) is nothing more than to provide a convenient aid to execution. Imagine, for the purposes of argument, that s 264(1) were not included in the legislation: there would have to be put in place instead elaborate provisions to set up a machinery of execution of the Tribunal's orders. But not only that: efforts and expenses would have to be incurred in order to implement the machinery of execution designed on paper in the legislation. The registration provisions in s 264(1) simply provide a convenient shortcut to the problem. In my view, it is never intended to affect the substance of the matter, that is to say, that the Tribunal is established to police and regulate market behaviour.

MMT's powers

62. That the Tribunal is given powers regarding gathering evidence and punishing people for contempt cannot be conclusive of the matter. Understandably, those powers are required to enable the Tribunal to do an effective job, particularly bearing in mind that proceedings before the Tribunal are essentially inquisitorial in nature: *Chau Chin Hung, supra,* at para 56. (Likewise, proceedings in the Insider Dealing Tribunal were also inquisitorial. There was no *lis* as such. *Riady v Insider Dealing Tribunal* [2003] 2 HKC 10, 18, para 23(2).)

63. The Tribunal's power to commit people for contempt is not unique to it. The Solicitors Disciplinary Tribunal certainly possesses such a power. In *Tse Wai Chun, supra*, at paras 18 to 21, the Court of Appeal held that at least in the local context, possession of a statutory

power to commit people for contempt in the face of a tribunal is nothing unusual.

64. Taking a step back, the whole question of whether a tribunal is in fact exercising the judicial power of the State cannot possibly be determined by the single question of whether it has a power to commit for contempt in the face of the tribunal.

65. Just as that fact does not turn the Solicitors Disciplinary Tribunal in *Tse Wai Chun* into a court of the classic kind, exercising the judicial power of the State, it alone cannot be dispositive of the question under discussion.

Policy intention

66. It is true that the legislative materials sometimes used words which would tend to suggest that the Tribunal is there to 'punish' activities of insider dealing and to impose 'sanctions'. But there is a limit to what one can derive from these legislative materials, which were policy papers or explanatory notes, rather than the legislation itself. Ultimately, the legislation, as enacted, must be looked at with care to determine whether the Tribunal is in substance seeking to determine criminal guilt, and whether the sanctions that the Tribunal can impose are penal, with deterrent and punishment being its primary objectives. The fact that it is thought that securing a Part XIV conviction is difficult and thus there is a need to set up a Part XIII alternative does not turn the Part XIII scheme into one whereby the judicial power of the State is exercised.

One must not confuse the reasons for needing an alternative regime with the true nature of that alternative regime.

Double jeopardy

67. The question of 'double jeopardy' does not take Mr Harris' case very far. The same or similar policy considerations can lead to the enactment of provisions against double jeopardy irrespective of whether the two set of proceedings in question are both legal proceedings belonging properly to the province of courts of the classic kind, or whether one set of proceedings is legal in nature (in the above sense) and the other administrative in nature. That, in the absence of provisions safeguarding against double jeopardy, a person may be vexed in two sets of proceedings does not necessarily or logically mean that the nature of those two sets of proceedings is the same or similar.

Conclusion

68. Having considered all the relevant circumstances, I have no hesitation in concluding that the Market Misconduct Tribunal is not required by the Ordinance to exercise the judicial power of the HKSAR. It does not oust the jurisdiction of the criminal courts in Hong Kong, nor does it usurp their function. It is established to perform a regulatory and protective role in Hong Kong's financial markets. It is there to ensure that those engaged in market misconduct do not profit from their wrongs. In a fairly general sense, it performs a function that protects and benefits the interests of the society as a whole. But it does not determine criminal guilt nor impose penal sanction. Certainly it wields extensive powers and indeed it must act judicially. But one thing it does not do is

to exercise the judicial power of the HKSAR. Hong Kong has a long history of using administrative bodies and tribunals for similar functions. They are, to a certain extent, integrated into and form part of the 'machinery of justice', a phrase used in *Wade & Forsyth, op cit*, at page 906. In my view, their place in Hong Kong is not affected by the provisions in the Basic Law.

69. I would therefore dismiss the application for judicial review. I would also make a costs order *nisi* that the Financial Secretary have the costs of these proceedings (including any costs previously reserved), with a certificate for two counsel.

(M.J. Hartmann)
Justice of Appeal

(Andrew Cheung)
Judge of the Court of First Instance
High Court

Mr Jonathan Harris SC, instructed by Richards Butler, for the applicant

The 1st respondent, in person, absent

Mr Peter Duncan SC and Mr Nicholas Cooney, instructed by the Department of Justice, for the 2nd respondent

附錄 II

股份歷來的資料

股份: 00688 – 中國海外

日期	交投量	成交額（元）	高位	低位	收市價	變動 (%)	恒生指數收報	變動 (%)
26/11/2003	81,540,000	98,042,740	1.230	1.170	1.220	5.17	12,086.67	0.65
27/11/2003	24,792,000	30,687,080	1.260	1.210	1.240	1.64	12,075.99	-0.09
28/11/2003	8,498,000	10,361,280	1.240	1.210	1.220	-1.61	12,317.47	2.00
01/12/2003	5,781,258	7,140,497	1.250	1.220	1.240	1.64	12,456.99	1.13
02/12/2003	8,508,000	10,539,520	1.250	1.230	1.240	0.00	12,412.23	-0.36
03/12/2003	74,736,400	94,247,664	1.290	1.230	1.270	2.42	12,361.18	-0.41
04/12/2003	48,375,228	64,222,976	1.350	1.260	1.340	5.51	12,342.65	-0.15
05/12/2003	12,612,725	16,622,784	1.340	1.300	1.320	-1.49	12,314.73	-0.23
08/12/2003	4,237,575	5,537,984	1.310	1.300	1.310	-0.76	12,177.44	-1.11
09/12/2003	17,610,000	23,507,660	1.360	1.310	1.350	3.05	12,393.64	1.78
10/12/2003	31,446,320	43,907,712	1.420	1.360	1.400	3.70	12,398.38	0.04
11/12/2003	40,423,574	59,178,147	1.490	1.420	1.480	5.71	12,554.58	1.26
12/12/2003	17,344,400	25,186,948	1.480	1.430	1.450	-2.03	12,594.42	0.32
15/12/2003	22,400,000	32,671,960	1.490	1.420	1.430	-1.38	12,520.17	-0.59
16/12/2003	13,470,000	19,224,240	1.460	1.400	1.420	-0.70	12,260.33	-2.08
17/12/2003	9,728,522	13,315,389	1.430	1.320	1.370	-3.52	12,193.12	-0.55
18/12/2003	10,264,000	13,973,180	1.390	1.310	1.390	1.46	12,240.25	0.39
19/12/2003	13,938,000	19,868,520	1.460	1.400	1.420	2.16	12,371.75	1.07
22/12/2003	17,115,000	24,761,743	1.460	1.420	1.460	2.82	12,487.99	0.94
23/12/2003	10,902,600	15,634,048	1.470	1.410	1.420	-2.74	12,420.51	-0.54
24/12/2003	2,308,000	3,259,320	1.420	1.400	1.420	0.00	12,456.70	0.29
29/12/2003	4,638,000	6,596,640	1.450	1.390	1.440	1.41	12,464.29	0.06
30/12/2003	4,754,000	6,777,580	1.450	1.410	1.410	-2.08	12,526.74	0.50
31/12/2003	9,148,000	13,255,180	1.470	1.410	1.420	0.71	12,575.94	0.39
02/01/2004	10,254,000	15,011,160	1.480	1.430	1.470	3.52	12,801.48	1.79
05/01/2004	75,167,123	125,306,349	1.780	1.450	1.750	19.05	13,005.33	1.59
06/01/2004	34,197,978	57,426,618	1.730	1.640	1.680	-4.00	13,036.32	0.24
07/01/2004	45,066,911	79,170,796	1.830	1.690	1.740	3.57	13,157.68	0.93
08/01/2004	21,362,000	36,207,540	1.740	1.660	1.680	-3.45	13,203.59	0.35
09/01/2004	21,232,000	35,842,660	1.720	1.650	1.710	1.79	13,385.80	1.38
12/01/2004	12,390,000	21,126,340	1.730	1.670	1.720	0.58	13,352.22	-0.25
13/01/2004	21,106,798	34,613,869	1.720	1.570	1.660	-3.49	13,396.65	0.33
14/01/2004	24,897,984	42,163,213	1.730	1.650	1.700	2.41	13,320.88	-0.57
15/01/2004	23,772,000	40,381,160	1.730	1.650	1.660	-2.35	13,249.81	-0.53
16/01/2004	24,826,400	42,208,600	1.720	1.660	1.700	2.41	13,167.76	-0.62
19/01/2004	58,943,000	105,283,348	1.860	1.700	1.810	6.47	13,253.31	0.65
20/01/2004	103,509,200	203,206,652	2.025	1.850	1.970	8.84	13,570.43	2.39
21/01/2004	62,191,518	123,242,820	2.050	1.910	1.920	-2.54	13,750.58	1.33
26/01/2004	92,903,357	189,671,999	2.125	1.950	2.000	4.17	13,727.27	-0.17
27/01/2004	994,762,000	1,798,302,580	1.910	1.810	1.890	-5.50	13,761.88	0.25
28/01/2004	61,324,000	113,649,410	1.880	1.830	1.840	-2.65	13,431.78	-2.40
29/01/2004	53,948,000	97,705,960	1.830	1.770	1.820	-1.09	13,334.01	-0.73
30/01/2004	46,541,099	81,816,711	1.820	1.720	1.750	-3.85	13,289.37	-0.33

附錄 III

簡易程序訟費評估
市場失當行為審裁處研訊程序–
中國海外發展有限公司
［截至二零零九年六月三日］

A. 一般資料
A1 作出命令日期 –
A2 研訊程序類別：市場失當行為審裁處
A3 接受方：財經事務及庫務局局長
A4 賺取費用人士
何伍永怡女士在一九九七年獲認許為大律師，收費每小時 4,000 元
William Liu 先生在二零零七年獲認許為大律師，收費每小時 2,500 元
律政書記，收費每小時 1,000 元

		元
B. 簡單工作		
B1 製作文件		4,853.00
B2 影印副本		85,539.00
B3 律政書記洽談：40 小時		40,000.00
B4 專人派遞：41 程 x 50 元		2,050.00
	小計：	132,442.00
C. 政府律師所用時數		
C1 伍何永怡女士：554 小時		2,216,000.00
C2 William Liu 先生：59 小時 15 分		148,125.00
	小計：	2,364,125.00
D. 大律師費用		
D1 關有禮先生		686,400.00
D2 葉德強先生		83,000.00
D3 翟紹唐先生		5,500.00
	小計：	774,900.00
E. 其他支出		
E1 郵費		15.00
	小計：	15.00
F. 本評估的費用：32 小時，每小時 1,600 元		51,200.00
	小計：	51,200.00
	合計：	**3,322,682.00**

檔號：MMTI 3/07C

附錄 IV

簡易程序訟費評估
市場失當行為審裁處研訊程序–
中國海外發展有限公司
[截至二零零九年六月三日]

A. 一般資料
A1 作出命令日期 –
A2 研訊程序類別：市場失當行為審裁處
A3 接受方：財經事務及庫務局局長
A4 賺取費用人士
何伍永怡女士在一九九七年獲認許為大律師，收費每小時 4,000 元
William Liu 先生在二零零七年獲認許為大律師，收費每小時 2,500 元
律政書記，收費每小時 1,000 元

B. 簡單工作		元
B1	製作文件	4,853.00
B2	影印副本	85,539.00
B3	律政書記洽談：40 小時	40,000.00
B4	專人派遞：41 程 x 50 元	2,050.00
	小計:	132,442.00

C. 政府律師所用時數
C1 何伍永怡女士：554 小時 2,216,000.00
- 通訊
電郵份數：602
函件份數：285
- 會議：
2007 年 12 月 12 日：1 小時 15 分(與葉德強先生開會)
2008 年 12 月 30 日：1 小時 30 分(在西盟斯律師行開會)
2008 年 12 月 31 日：1 小時(在齊伯禮律師行開會)
2009 年 1 月 22 日：2 小時 30 分(與 Clive Rigby 先生開會)
2009 年 3 月 17 日：1 小時 25 分(與 Clive Rigby 先生開會)
- 出席審裁處的聆訊：

2008 年
5 月 23 日 (1 小時)
6 月 5 日 (30 分)
7 月 14 日 (5 小時)
8 月 15 日 (5 小時)
11 月 21 日 (30 分)
11 月 28 日 (5 小時)
12 月 18 日 (5 小時)
所用時間：22 小時

2009 年
1 月 5 至 9 日 (25 小時)
1 月 12 至 16 日 (25 小時)
1 月 19 至 20 日 (10 小時)
2 月 9 至 10 日 (10 小時)
2 月 23 至 26 日 (20 小時)
3 月 9 至 13 日 (25 小時)
3 月 16 至 19 日 (20 小時)
3 月 31 日 (5 小時)
4 月 1 日 (5 小時)
4 月 3 日 (5 小時)
4 月 6 至 7 日 (10 小時)
5 月 26 日 (5 小時)

5 月 29 日 (5 小時)
所用時間：145 小時
- 草擬文件、資料搜集、審閱文件、與大律師、證監會、證人、審裁處秘書、專家及其他人士洽談，以及一般行政事宜。

C2 William Liu 先生：59 小時 15 分 148,125.00
- 通訊
  電郵份數：60
- 會議
  2009 年 2 月 11 日：2 小時 40 分
- 出席審裁處的聆訊
  2009 年 2 月 16 至 20 日：25 小時
- 審閱文件／核證電話錄音謄本：13 小時

小計: 2,364,125.00

D. 大律師費用

D1	關有禮先生	686,400.00
D2	葉德強先生	83,000.00
D3	翟紹唐先生	5,500.00
	小計:	774,900.00

E. 其他支出

E1	郵費：	15.00
	小計:	15.00

F. 本評估的費用：32 小時，每小時 1,600 元 51,200.00

小計: 51,200.00

合計 **：3,322,682.00**

檔號：MMTI 3/07C

附錄 V

簡易程序訟費評估
市場失當行為審裁處研訊程序–
中國海外發展有限公司
[截至二零零九年六月三日]

A. 一般資料

A1 作出命令日期 –

A2 研訊程序類別：市場失當行為審裁處

A3 接受方：財經事務及庫務局局長

A4 賺取費用人士

何伍永怡女士在一九九七年獲認許為大律師，收費每小時 4,000 元
William Liu 先生在二零零七年獲認許為大律師，收費每小時 2,000 元
律政書記，收費每小時 1,000 元

B. 簡單工作		元
B1	製作文件	4,853.00
B2	影印副本	85,539.00
B3	律政書記洽談：40 小時	40,000.00
B4	專人派遞：41 程 x 50 元	2,050.00
	小計：	132,442.00

C. 政府律師所用時數

C1 何伍永怡女士：525 小時 2,100,000.00

- 通訊
  電郵份數：602
  函件份數：285
- 會議：
  2007 年 12 月 12 日：1 小時 15 分(與葉德強先生開會)
  2008 年 12 月 30 日：1 小時 30 分(與西盟斯律師行開會)
  2008 年 12 月 31 日：1 小時(與齊伯禮律師行開會)
  2009 年 1 月 22 日：2 小時 30 分(與 Clive Rigby 先生開會)
  2009 年 3 月 17 日：1 小時 25 分(與 Clive Rigby 先生開會)
- 出席審裁處的聆訊：

2007 年

10 月 30 日 (30 分)
11 月 9 日 (33 分)

2008 年

2 月 25 日 (2 小時 10 分)
2 月 28 日 (各方缺席聆訊)
3 月 13 日 (1 小時 5 分)
5 月 23 日 (56 分)
6 月 5 日 (10 分)
11 月 21 日 (38 分)
12 月 18 日 (3 小時 57 分)
1 月 5 日 (4 小時 6 分)

2009 年

1 月 6 日 (3 小時 58 分)
1 月 7 日 (4 小時)
1 月 8 日 (4 小時 5 分)
1 月 9 日 (4 小時 23 分)
1 月 12 日 (4 小時 20 分)
1 月 13 日 (4 小時 5 分)
1 月 14 日 (3 小時 53 分)
1 月 15 日 (3 小時 59 分)
1 月 16 日 (3 小時 57 分)
1 月 19 日 (4 小時 2 分)

1 月 20 日 (4 小時 7 分)
2 月 9 日 (4 小時 10 分)
2 月 10 日 (3 小時 48 分)
2 月 23 日 (4 小時 2 分)
2 月 24 日 (4 小時 3 分)
2 月 25 日 (4 小時 7 分)
2 月 26 日 (4 小時 16 分)
3 月 9 日 (4 小時 6 分)
3 月 10 日 (3 小時 59 分)
3 月 11 日 (4 小時 3 分)
3 月 12 日 (4 小時 6 分)
3 月 13 日 (3 小時 48 分)
3 月 16 日 (3 小時 59 分)
3 月 17 日 (4 小時 3 分)
3 月 18 日 (4 小時 2 分)
3 月 19 日 (4 小時 4 分)
3 月 31 日 (4 小時 8 分)
4 月 1 日 (1 小時 36 分)
4 月 3 日 (20 分)
4 月 6 日 (3 小時 37 分)
4 月 7 日 (4 小時 9 分)
4 月 28 日 (1 小時 10 分)
4 月 26 日 (35 分)
5 月 29 日 (2 小時 55 分)
7 月 9 日 (各方缺席聆訊)
所用時間：138 小時

- 草擬文件、資料搜集、審閱文件、與大律師、證監會、證人、審裁處秘書、專家及其他人士洽談，以及一般行政事宜。

C2	William Liu 先生：53 小時 32 分 - 通訊 - 電郵份數：60 - 會議 2009 年 2 月 11 日：2 小時 40 分 - 出庭 2009 年 2 月 16 至 20 日：19 小時 17 分 - 審閱文件：13 小時		107,067.00
		小計：	2,207,067.00
D.	大律師費用		
D1	關有禮先生		686,400.00
D2	葉德強先生		83,000.00
D3	翟紹唐先生		5,500.00
		小計：	774,900.00
E.	其他支出		
E1	郵費：		15.00
		小計：	15.00
F.	本評估的費用：32 小時，每小時 1,600 元		51,200.00
		小計：	51,200.00
		合計	**：3,165,624.00**

檔號 ： MMTI 3/07C

附錄 VI

簡易程序政府訟費評估
市場失當行為審裁處研訊程序 –
中國海外發展有限公司
（二零零九年六月四日至二零零九年八月四日）

A. 賺取費用人士
何伍永怡女士於一九九七年獲認許為大律師，收費每小時 4,000 元
律政書記，收費每小時 1,000 元

B. 簡單工作

影印副本	2,445 元
律政書記洽談：2 小時	2,000 元
專人派遞：23 次 x 50 元	1,150 元

C. 大律師費用

關有禮先生	69,800 元

D. 伍何永怡女士所用時數：78 小時 312,000 元
二零零九年七月十七日(下午二時三十分至三時十五分)與專家舉行會議
二零零九年八月三日(上午九時三十七分至下午一時十分)審裁處聆訊
二零零九年八月四日(上午九時三十七分至下午一時五十分)審裁處聆訊

通訊：31 份函件及 176 份電郵

草擬文件、資料搜集、審閱文件、
與大律師、證監會、證人、審裁處秘書、專家及其他人士洽談，
以及一般行政事宜

合計： **387,395 元**

* * * *

預期在審裁處發出命令後招致的訟費

審閱報告、草擬命令、通訊、 與審裁處秘書及其他人士洽談(伍何永怡女士 2 小時)	8,000 元
律政書記在原訟法庭影印及登記命令(0.5 小時)	500 元
付予原訟法庭的登記費	1,045 元
把經蓋印的命令送達各方、證監會、財經事務及庫務局以及審裁處 (6 程 x 50 元)	300 元

合計： **9,845 元**

附錄 VII

檔號：508/EN/1013

人員姓名	職級	二零零六至零七年度	二零零七至零八年度	二零零八至零九年度	二零零九至一零年度	合計	間接費用
Geoff Harris	高級總監		1.17			1.17	181.42
Keith Choy	總監			1		1	186.09
Karen Smyth	總監		4.84			4.84	750.49
Joe Kenny	總監		1	3.99	6.92	11.91	2,185.30
Kenneth Luk	總監		0.75			0.75	116.30
Tong, Hon Fai Jimmy	副總監／高級經理	66	99.25	120.75	25.5	311.5	39,346.43
Ng, Chun Ling Agnes	經理			327.92		327.92	34,146.31
Stephen Wong	經理		17.16	35.5	6.67	59.33	5,851.13
Kenny Ko	經理		42.25			42.25	3,594.63
Benny Fung	經理			1		1	104.13
Polly Tse	經理			11.5	6	17.5	1,822.28
Angela Wong	經理				9	9	937.17
Fion Li	高級秘書	2.5	11.16	3.84	1.5	19	1,546.77
Josephine Wong	高級秘書	0.58	0.17			0.75	56.27
Emily Mok	高級秘書			24.66	1.25	25.91	2,445.13
Zoe Lam	文員		2	5.5		7.5	672.54
Greenie Wong	文員			8.75		8.75	825.74
Irene Tse	秘書			3.5		3.5	330.30
Sophia Shiu	行政秘書／高級秘書			96.5	11.5	108	10,191.96
Jones Tsang	文員			10.25		10.25	967.29
Christine Choy	文員				2.5	2.5	235.93
Candy Wu	文員		1	1.25		2.25	194.71
Teresa Ho	高級秘書		-	4.75		4.75	448.26
合計		**69.08**	**172.99**	**655.67**	**63.92**	**981.33**	**107,136.55**

上述間接費用總額：　107,137 元

填報人員：　Heidi Lo
經理－財務及行政

二零零九年七月三日

費用報表

508/EN/1013

人員	年度	時數
Choy, Chung Fai Keith		**1.00**
	二零零八至零九年度	1.00
Choy, Kwun Yuk Christine		**2.50**
	二零零九至一零年度	2.50
Fung, Ho Yin Benny		**1.00**
	二零零八至零九年度	1.00
Harris, Geoffrey Frank		**1.17**
	二零零七至零八年度	1.17
Ho, Wai Man Teresa		**4.75**
	二零零八至零九年度	4.75
Kenny, Michael Joseph		**11.92**
	二零零七至零八年度	1.00
	二零零八至零九年度	4.00
	二零零九至一零年度	6.92
Ko, Lai Kee Kenny		**42.25**
	二零零七至零八年度	42.25
Lam, Wai Ling Zoe		**7.50**
	二零零七至零八年度	2.00
	二零零八至零九年度	5.50
Li, Cho Fun Fion		**19.00**
	二零零六至零七年度	2.50
	二零零七至零八年度	11.17
	二零零八至零九年度	3.83
	二零零九至一零年度	1.50
Luk, King Yip Kenneth		**0.75**
	二零零七至零八年度	0.75
Mok, Yuen Ting Emily		**25.92**
	二零零八至零九年度	24.67
	二零零九至一零年度	1.25
Ng, Chun Ling Agnes		**327.92**
	二零零八至零九年度	327.92
Shiu, Ka Pui Sophia		**108.00**
	二零零八至零九年度	96.50
	二零零九至一零年度	11.50
Smyth, Karen		**4.83**
	二零零七至零八年度	4.83
Tong, Hon Fai Jimmy		**311.50**
	二零零六至零七年度	66.00
	二零零七至零八年度	75.25
	二零零八至零九年度	144.75
	二零零九至一零年度	25.50
Tsang, Tsz Chung Jones		**10.25**
	二零零八至零九年度	10.25
Tse, Oi Lin Irene		**3.50**
	二零零七至零八年度	3.50
Tse, Po Shan Polly		**17.50**
	二零零八至零九年度	11.50
	二零零九至一零年度	6.00
Wong, Kai Ho Stephen		**59.33**
	二零零七至零八年度	20.67
	二零零八至零九年度	32.00
	二零零九至一零年度	6.67
Wong, Mei Mei Angela		**9.00**
	二零零九至一零年度	9.00
Wong Mei Yee Josephine		**0.75**
	二零零六至零七年度	0.58
	二零零七至零八年度	0.17
Wong, Shuk Kiu Greenie		**8.75**
	二零零八至零九年度	8.75
Wu, Kam Ting Candy		**2.25**
	二零零七至零八年度	1.00
	二零零八至零九年度	1.25
總計		**981.33**

總費用	**385,507.78 元**

填報人員：Ross Hui　　核實人員：Mavis Ip

註：上述員工費用按(*)所載二零零六至零七年度、二零零七至零八年度、二零零八至零九年度、二零零九至一零年度的薪酬結構及福利計算。

香港干諾道中 8 號
遮打大廈 8 樓
證券及期貨事務監察委員會
夏禮信先生

香港中環
金鐘道 89 號
力寶中心一座 2302 室
力寶證券有限公司轉交
Clive Rigby 先生

夏禮信先生：

中國海外

我就上述案件至今所提供服務的收費單如下：

舉行會議

二零零七年 一月三十一日	力寶中心 Stephen Suen & Jimmy	下午四時正至 下午五時零五分	1 小時 05 分
二零零七年 二月十二日	力寶中心 Stephen Suen & Jimmy	上午十一時正至 上午十一時十二分	12 分

審閱、記事、草擬及電話聯絡

二零零七年 二月六日	補充報告	2 小時 20 分
二零零七年 二月九日	審閱、草擬及與 Stephen Suen 電話聯絡	1 小時 45 分
二零零七年 三月五日	補充報告(下午三時正至下午四時三十五分； 下午五時十五分至下午六時三十分)	2 小時 50 分
	合計：	8 小時 12 分

8 小時 12 分，每小時 3,800 元　　**31,160** 港元

Clive Rigby

二零零八年六月十七日

附錄 VIII

附件 B

就有關公眾利益豁免權及法律專業保密權的爭議點在審裁處席前進行法律程序而合理地招致的證監會訟費及開支分項細目

處理案件的證監會律師

證監會的內部律師（執業律師）	獲認許的年份
程蘋	1995 年(香港)

證監會職員費用分項細目

(i) 聯絡工作(包括會議、電話交談及信件／電郵)

與委託人洽談	程蘋	5.2 小時
與 Simmons & Simmons 洽談	程蘋	6.9 小時
與審裁處洽談	程蘋	0.8 小時
與律政司洽談	程蘋	2.2 小時
與大律師洽談	程蘋	4.1 小時
	小計：	19.2 小時

(ii) 專業工作

審閱和檢視文件，以及預備公眾利益豁免權證明書	程蘋	7.3 小時
與大律師舉行會議的準備工作	程蘋	0.3 小時
與大律師會面	程蘋	0.7 小時
為審裁處聆訊的準備工作	程蘋	2.3 小時
出席審裁處的聆訊	程蘋	3.2 小時
	小計：	13.8 小時

合計	：	33 小時
證監會職員費用	：	**26,178** 元

大律師費用

Roger Beresford 先生的費用	**140,000** 元
：	**166,178 元**

附錄 IX

附件C

就二零零九年八月三日及四日在審裁處席前進行的聆訊而合理地招致或合理地附帶招致的證監會訟費及開支分項細目

處理案件的證監會律師

證監會的內部律師（執業律師）	每小時費用	獲認許的年份
Evelyn Tsang	850元	1996年(香港)(獲認許為大律師)
Lawrence Tse	750元	1995年(香港)(執業律師)

證監會職員費用分項細目

(i) 聯絡工作(包括會議、電話交談及信件/電郵)

	Evelyn Tsang	Lawrence Tse
與委託人洽談	0.5小時	1小時
與提控官洽談		0.3小時
第(i)項小計：	0.5小時	1.3小時

(ii) 專業工作

審閱和檢視來往書信檔案、聆訊文件、雙方陳詞、聆訊謄本	3小時	5小時
擬備書面陳詞	2.5小時	5小時
二零零九年八月三及四日聆訊準備工作		2小時
出席審裁處二零零九年八月三及四日的聆訊		8小時
第(ii)項小計：	5.5小時	20小時
第(i)+(ii)項總計：	**6小時**	**21.3小時**

證監會職員費用： **21,075元**

附錄 X

香港金鐘道 66 號
金鐘道政府合署高座 3 樓
律政司
何伍永怡女士

香港中環
金鐘道 89 號
力寶中心一座 2302 室
力寶證券有限公司轉交
Clive Rigby 先生

何女士：

中國海外

我就上述案件至今所提供服務的收費單如下：

舉行會議

二零零九年一月二十二日	與何伍永怡女士及大律師關有禮先生舉行會議(上午十時至下午十二時四十五分)，地點為事務所	兩小時四十五分鐘
二零零九年二月十一日	與關有禮先生及 William 舉行會議(下午二時三十分至五時十五分)，地點為事務所	兩小時四十五分鐘
二零零九年三月十六日	與何伍永怡女士舉行電話會議	二十分鐘
二零零九年三月十七日	與關有禮先生舉行會議(下午二時三十分至三時五十五分)，地點為事務所	一小時二十五分鐘

審閱、記事、草擬及電話聯絡

二零零八年十二月二十二日		四十五分鐘
二零零八年十二月二十九日	回應 Witts 先生	一小時三十五分鐘
二零零九年一月二十二日	覆核和編製目錄、圖表及配股圖表	兩小時
二零零九年二月四日	閱讀關有禮先生的開審陳詞	四十分鐘
二零零九年二月四日	閱讀 Witts 先生新的陳述書(晚上七時至八時十五分)	一小時十五分鐘
二零零九年二月五日	閱讀 Witts 先生的陳述書–其中包括資料搜集 與何伍永怡女士洽談和向證監會索取數據及陳述書	兩小時五十五分鐘
二零零九年二月五日	回應 Witts 先生和覆核數據(下午四時三十分至五時)	三十分鐘
二零零九年二月五日	覆核數據和回應 Witts 先生(下午六時至晚上七時五分)	一小時五分鐘
二零零九年二月六日	草擬(上午十時二十分至下午十二時四十五分；下午二時四十五分至六時十五分)	五小時五十五分鐘
二零零九年二月七日	草擬(下午一時十五分至三時零二分；下午三時三十分至四時十五分)	兩小時三十二分鐘
二零零九年二月八日	草擬(上午十時二十五分至下午十二時五分；晚上九時四十五分至十時五十五分)	兩小時五十分鐘

二零零九年二月九日	草擬、閱讀和資料搜集(下午十二時零五分至四十五分；下午二時三十分至六時四十分)	四小時五十分鐘
二零零九年二月九日	閱讀所草擬的文件、閱讀和資料搜集(下午六時四十分至晚上十時五十三分)	四小時十三分鐘
二零零九年二月十日	編製圖表和分析(上午九時三十分至十一時)	一小時三十分鐘
二零零九年二月十日	閱讀資料及記事(上午十一時至下午十二時四十分；下午三時五分至五時)	三小時三十五分鐘
二零零九年二月十一日	草擬	四十分鐘
二零零九年二月十六日	閱讀電話談話謄本	兩小時四十分鐘
二零零九年二月十八日	覆核數據和回應大律師	十二小時二十分鐘
二零零九年二月十九日	覆核數據(上午八時三十分至九時三十分)	一小時
二零零九年二月十九日	覆核數據和回應大律師	六小時十三分鐘
二零零九年二月二十日	覆核數據和回應大律師(上午八時十五分至九時十五分)	一小時
二零零九年三月九日	重新整理股票數據	兩小時六分鐘
二零零九年四月二日	閱讀和記事	兩小時
二零零九年四月三日	閱讀和記事(上午十時二十分至下午十二時三十分；下午二時二十八分至四時十五分)	三小時四十七分鐘
二零零九年四月三日	在家中閱讀和記事	二十分鐘
	小計：	七十五小時三十一分鐘
	七十五小時三十一分鐘 × 每小時港幣 4,200 元：港幣 317,170 元	

出庭

二零零九年二月十六日	出席市場失當行為審裁處聆訊(10:00-13.30)	港幣 20,000 元
二零零九年二月十七日	出席市場失當行為審裁處聆訊(9:30-13:30)	港幣 20,000 元
二零零九年二月十八日	出席市場失當行為審裁處聆訊(9:30-13:30)	港幣 20,000 元
二零零九年二月十九日	出席市場失當行為審裁處聆訊(9:30-13:30)	港幣 20,000 元
二零零九年二月二十日	出席市場失當行為審裁處聆訊(9:30-11:00)	港幣 20,000 元
二零零九年三月十九日	出席市場失當行為審裁處聆訊(10:00-13:30)	港幣 20,000 元
二零零九年三月三十一日	出席市場失當行為審裁處聆訊(9:30-13:30)	港幣 20,000 元
二零零九年四月一日	出席市場失當行為審裁處聆訊(14:00-16:00)	港幣 20,000 元
二零零九年四月六日	出席市場失當行為審裁處聆訊(9:30-13:30)	港幣 20,000 元
二零零九年四月七日	出席市場失當行為審裁處聆訊(9:30-13:30)	港幣 20,000 元
二零零九年四月二十八日	出席市場失當行為審裁處聆訊(9:30-10:30)	港幣 20,000 元
	小計：	港幣 220,000 元

總計： 港幣 **537,170** 元

Clive Rigby

二零零九年五月二十九日

香港中環
干德道 50 號
駿豪閣 26G
彭張興

收費單

香港金鐘道 66 號
金鐘道政府合署高座 3 樓轉交
市場失當行為審裁處
何伍永怡女士

中國海外發展有限公司
專家證人費用

	港幣(元)
擬備相關的專家陳述書的費用總額	80,000
二零零九年八月三日的聆訊費用 1.5 個小時，每小時的收費為 4,000 元	6,000
總金額	86,000

(港幣八萬六千元正)

彭張興

(可把款項滙入我的滙豐銀行帳戶(號碼：608-161303-888)，以支付上述款項。)

二零零九年八月四日

附件 1

訟費的分項數字

發票日期	**發票號碼**	**發票金額**
二零零四年十一月十日	1087824	港幣 41,513.00 元
二零零五年三月三日	1100101	港幣 146,585.70 元
二零零五年九月二十八日	1121734	港幣 115,000.00 元
二零零九年二月六日	1272127	港幣 56,038.18 元

總計： 港幣 359,136.88 元

附件 **2**

時間成本的分項數字

	日數			詳情
	孔先生	吳先生	聶先生	
	1	1.5	3.5	出席審裁處聆訊
	1	1	1	與律師會面
	0	1	1	與證監會會面
	2	2	2.5	為案件作準備
總計	4 日	6 日	8 日	
金額：	港幣 67,600 元	港幣 62,700 元	港幣 56,000 元	總金額：港幣 186,300 元

每日收費(根據每月 22 個工作日計算)：-

(1) 孔先生：港幣 16,900 元

(2) 吳先生：港幣 10,450 元

(3) 聶先生：港幣 7,000 元

附錄 XI

（律政司二零零九年七月三十一日函件的附件）

時序表 — 中國海外發展有限公司

二零零六年七月二十七日	證監會致函財政司司長向他轉介一宗懷疑市場失當行為個案。
二零零六年七月二十八日	財經事務及庫務局把個案轉交律政司提供意見。
二零零六年十一月十三日	律政司代表財政司司長致函要求證監會提供資料／作出澄清。
二零零六年十一月十四日	證監會要求開會，隨後於二零零六年十一月二十一日補發信件。
二零零六年十一月二十二日	律政司就證監會提出的問題致函該會。
二零零六年十一月二十四日	財經事務及庫務局與證監會開會（律政司以財經事務及庫務局顧問的身分列席）。
二零零七年三月二十二日	律政司致函證監會查詢進展情況。
二零零七年三月三十日	證監會回覆律政司二零零六年十一月十三日的信。
二零零七年四月十三日	律政司就二零零七年三月三十日的函件，以電郵再次要求證監會提供文件。
二零零七年四月十八日至二十三日	律政司與證監會有書信往來，律政司要求證監會進一步提供文件／作出澄清。

二零零七年四月二十七日	律政司的意見擬稿備妥。
二零零七年六月八日	律政司發出指示，請領訟大律師提供意見。
二零零七年六月二十五日	領訟大律師提供意見。
二零零七年七月二十日	律政司向財經事務及庫務局提供意見。
二零零七年七月三十一日	財經事務及庫務局要求律政司草擬根據第 252 條發出的通知，以便把個案轉交市場失當行為審裁處審理。
二零零七年九月三日	律政司向財經事務及庫務局提供根據第 252 條草擬的通知。
二零零七年九月十日	財經事務及庫務局尋求財政司司長批准根據第 252 條發出通知。
二零零七年九月十二日	財政司司長批准根據第 252 條發出通知。

附錄 XII

(節錄自證券及期貨事務監察委員會(證監會)
二零零九年七月三十一日補充文件第 6 段
有關根據《證券及期貨條例》第 257(1)(f)條
就調查費用提出申請的部分)

證監會初步調查時序表

日期	事件
二零零四年九月二十二日	證監會就此事展開調查
二零零五年四月二十二日	證監會調查員就所得證據向證監會內部律師徵詢初步法律意見
二零零五年十一月五日	證監會請 Clive Rigby 先生在案中提出專家證供
二零零五年十二月八日	證監會收到最後一批應其要求而給予的紀錄及文件
二零零六年二月十日	Clive Rigby 先生提交首份專家陳述書
二零零六年二月十六日	此事轉介證監會內部律師，以諮詢其法律意見
二零零六年七月二十七日	證監會向財政司司長匯報此事
二零零七年三月二十一日	Clive Rigby 先生提交首份補充專家陳述書
二零零七年九月十二日	根據《證券及期貨條例》第 252(2)條向審裁處發出財政司司長的通知

附錄 XIII

調查二零零四年一月中國海外股份交易期間
重要步驟及審裁處研訊的
"綜合時序表"

二零零四年一月	
七日至二十六日	財政司司長向審裁處發出的通知指明的有關期間；
二十一日及二十六日	梁志強先生所管理的基金沽售中國海外股份； 一月二十六日－陸家祥先生所管理的基金沽售股份；
二零零四年七月	
二十日	證監會發信給摩根大通、荷銀、摩根資產管理及中國海外，索取關於二零零四年一月二十六日中國海外股份配股公告的資料；
二零零四年九月	
二十二日	證監會根據第 182 條展開"調查"；
二十三日	證監會根據第 183 條向中國海外、ING(代表荷銀)、摩根資產管理及摩根大通發出通知，索取指明人士的電話談話錄音及謄本，以及其他文件；
二零零四年十月	
二十七日	證監會根據第 183 條向梁志強先生發出通知指他是"受調查人"，並要求與他會面； 證監會根據第 183 條向摩根資產管理發出通知索取資料；
二零零四年十一月	
十八日	證監會與梁志強先生會面；
二零零四年十二月	
一日	證監會根據第 183 條向中國海外發出通知索取文件；
二零零五年二月	
四日	證監會根據第 183 條向錢柏昌先生發出通知指他是"受調查人"，並要求與他會面；
十七日	證監會與錢柏昌先生會面；
二零零五年三月	
八日	證監會根據第 183 條向陸家祥先生發出通知指他是"受調查人"，並要求與他會面；
二十二日	證監會與陸家祥先生會面；
二零零五年五月	
六日	證監會第二次與梁志強先生會面；
五月九日至 七月十五日	證監會與證人(聶先生、孔先生、龍田淵先生、范龍飛先生及 Weiner 先生)會面；
二零零五年六月	
七日	證監會根據第 183 條向摩根大通發出通知索取資料；

二零零五年十一月	
三十日	證監會根據第 183 條向荷銀及摩根資產管理發出通知索取文件；
二零零五年十二月	
八日	證監會收到最後一批根據第 183 條索取的文件；
二零零六年二月	
十日	Clive Rigby 先生的首份專家報告；
二零零六年七月	
二十七日	證監會通知所有三名指明人士，證監會已完成他們為"受調查人"的調查，以及已"把有關事件，連同召開市場失當行為審裁處的建議，呈交財政司司長"； 證監會把個案轉交財政司司長；
二十八日	財政司司長把個案轉交律政司；
二零零六年十一月	
十三至二十四日	律政司代財政司司長致函要求證監會進一步提供資料/作出澄清；財經事務及庫務局(律政司)與證監會開會；
二零零六年十二月/二零零七年一月	龍田淵先生再與證監會人員會面，並在二零零七年一月十九日再提供一份陳述書；
二零零七年三月	
十三日	律政司向證監會查詢進展情況；
三十日	證監會回覆律政司二零零六年十一月十三日有關進一步提供資料/作出澄清的要求；
二零零七年四月	
十三至二十三日	律政司要求證監會進一步提供資料/作出澄清；
二十七日	律政司備妥意見初稿；
二零零七年六月	
八至二十五日	律政司徵求並收到領訟大律師的意見；
二零零七年七月	
二十日	律政司向財經事務及庫務局提供意見；
三十一日	財經事務及庫務局要求律政司擬備根據第 252 條發出的通知；
二零零七年九月	
三日	律政司把根據第 252 條草擬的通知送交財經事務及庫務局；
十二日	根據第 252 條發出財政司司長的通知；
二零零七年十月	
二十三日	律政司司長委任提控官；
二十五日	財政司司長代表行政長官委任審裁處的成員；
二十六日	提控官致函通知各指明人士審裁處召開首次聆訊的日期；
三十一日	審裁處召開首次聆訊，並在席上建議暫定由二零零八年二月十八日開始進行實際聆訊；此外，關於就品質國際一案成立的審裁處所進行的研訊程序中的指明人士提出的司法覆核申請，申請涉及的事項

包括審裁處的司法管轄權，各方獲悉夏正民法官已在十月二十九日給予許可；

二零零七年十一月

九日　錢柏昌先生的律師申請暫緩審裁處的研訊程序，"以待一宗司法覆核的最後結果"，該司法覆核程序關乎品質國際一案。梁志強先生及陸家祥先生的律師就有關申請表示他們是中立的，而提控官則表示支持申請。審裁處取消暫定在二零零八年二月十八日開始進行實際聆訊的安排，並定出提交有關一切初步爭議點的書面陳詞的時間表，並預留二零零八年二月的其中三天以進行該等聆訊；

二零零七年十二月

五日　梁志強先生的律師向審裁處提交書面陳詞，就證監會聲稱享有法律專業保密權和公眾利益豁免權尋求指示；

七日　錢柏昌先生的律師向審裁處提交書面陳詞；

陸家祥先生的律師向審裁處提交書面陳詞，質疑審裁處的司法管轄權；

二零零八年二月

二十五日　審裁處進行聆訊。聆訊期間，陸家祥先生經由代表質疑審裁處的司法管轄權；梁志強先生經由代表提出申請，要求審裁處向證監會就其聲稱享有法律專業保密權及公眾利益豁免權作出指示；以及作出了提控官提供財政司司長的通知第 2.1 段所述行為詳情的命令。

二十八日　審裁處裁定本身有司法管轄權；

二零零八年三月

十三日　審裁處聆訊代表梁志強先生的大律師提出有關法律專業保密權及公眾利益豁免權的爭議點。已進行部分聆訊，聆訊押後；

十八日　終審法院發出 *Koon Wing Yee and Insider Dealing Tribunal* 一案的判詞；

二十日　審裁處通知各方，研訊程序中的實際聆訊定於二零零八年七月十四日至八月十五日進行；

二零零八年五月

二十日　代表陸家祥先生的律師行致函告知審裁處，已就審裁處是否有司法管轄權進行研訊程序向高等法院申請司法覆核。

二十三日　審裁處舉行了指示聆訊，就送達有關法律專業保密權和公眾利益豁免權這些爭議點的書面陳詞等事，向各方發出時間表；相關聆訊定於二零零八年六月五日舉行；

二十九日　陸家祥先生的代表律師行致函審裁處，表示夏正民法官已接納就審裁處的裁定申請許可進行司法覆核的申請(高院憲法及行政訴訟 2008 年第 49 號)，並命令盡快舉行有關聆訊；

三十日　陸家祥先生的代表律師行致函審裁處，要求審裁處"無限期押後這些研訊程序，直至陸家祥先生的司法覆核申請有最終裁定為止"；

二零零八年六月

五日　錢柏昌先生的代表律師行致函審裁處，表示同意建議，即審裁處席前的研訊程序，按陸先生的代表律師行二零零八年五月三十日的函件所述的理由押後；

	提控官支持該項申請，梁志強先生的代表律師行則表示對申請保持中立；
	審裁處舉行聆訊，席上把研究程序押後直至有進一步命令為止；
二零零八年十一月	
十八日	上訴庭法官夏正民及張舉能法官就高院憲法及行政訴訟 2008 年第 49 號一案頒下駁回有關司法覆核申請的判詞；
十九日	審裁處通知各方，會在二零零八年十一月二十一日進行“指示”聆訊；
二十一日	在審裁處席前進行的聆訊席上，陸家祥先生的代表律師就高院憲法及行政訴訟 2008 年第 49 號一案的判詞告知審裁處，雖然其律師行並未接獲指示，但“極有可能提出上訴”，預期屆時會申請押後這些研訊程序，“直至司法覆核程序有最終裁定為止”；
	審裁處定於二零零八年十二月十八日進行有關法律專業保密權和公眾利益豁免權這些爭議點的聆訊，以及定於二零零九年一月五日展開實際聆訊。
二零零八年十二月	
十八日	舉行聆訊，處理梁志強先生經由代表提出就證監會的法律專業保密權和公眾利益豁免權聲請作出指示的申請。

審裁處俟後進行的聆訊，載於審裁處報告書卷一第一部第 8 頁(英文版)內。

附錄 XIV

市場失當行為審裁處研訊程序
中國海外發展有限公司

因有關代表梁志強先生的律師就法律專業保密權和
公眾利益豁免權的聲稱提出申請所進行聆訊及附帶事宜
而令審裁處招致的訟費及開支

項目	招致的訟費 （元）
1. 審裁處主席*	66,007.47
2. 審裁處秘書處*	9,294.84
3. 審裁處成員、法庭記錄員及法庭傳譯員費用	33,335.42
合計：	**108,637.73**

* 按照工作時數及二零零七至零八年度及二零零八至零九年度"職工成本計算便覽"所載時薪額計算。

附錄 XV

市場失當行為審裁處研訊程序

中國海外發展有限公司

因有關代表陸家祥先生的律師

質疑審裁處的司法管轄權及附帶事宜

而令審裁處招致的訟費及開支

項目	招致的訟費 （元）
1. 審裁處主席*	57,251.14
2. 審裁處秘書處*	6,107.14
3. 審裁處成員、法庭記錄員及法庭傳譯員費用	14,126.88
合計：	**77,485.16**

* 工作時數及二零零七至零八年度"職工成本計算便覽"所載時薪額計算。

附錄 XVI

市場失當行為審裁處研訊程序
中國海外發展有限公司

與審裁處研訊程序有關及所附帶的訟費及開支
（不包括有關法律專業保密權和公眾利益豁免權及
有關審裁處的司法管轄權受質疑的訟費及開支）

項目	訟費 （元）
1. 審裁處主席*	1,896,580.56
2. 審裁處成員	418,895.68
3. 審裁處秘書處*	476,293.02
4. 法庭傳譯員費用	58,800.00
5. 法庭記錄員費用	226,475.00
6. 專家證人費用 (a) Clive Rigby 先生 (按第 1274 段所述扣減 30%) (b) 彭張興先生	462,019.00
7. 郵費	78.40
合計：	**3,539,141.66**

* 按照工作時數及二零零七至零八年度及二零零八至零九年度“職工成本計算便覽”所載時薪額計算。

附錄 XVII

根據第 257(1)(e)條及第 257(1)(f)條
作出的繳付款項命令的計算依據

(I) 第 257(1)(e)條

	下列人士須向政府繳付的款額		
	錢柏昌先生	**梁志強先生**	**陸家祥先生**
律政司			
第 1245 段	726,204.80 元	726,204.80 元	726,204.80 元
第 1247 段	55,026.00 元	55,026.00 元	55,026.00 元
審裁處 （第 1273-4 段）	1,179,713.89 元	1,179,713.89 元	1,179,713.89 元
審裁處－公眾利益豁免權／法律專業保密權 （第 1269 段）	—	108,637.73 元	—
審裁處－司法管轄權 （第 1270 段）	—	—	77,485.16 元
合計：	**1,960,944.69** 元	**2,069,582.42** 元	**2,038,429.85** 元

(II) 第257(1)(f)條

	下列人士須向證監會繳付的款額		
	錢柏昌先生	梁志強先生	陸家祥先生
第 1249 段	174,601.00 元	174,601.00 元	174,601.00 元
證監會－公眾利益豁免權／法律專業保密權 （第 1268 段）	—	166,178.00 元	—
第 1268 段	—	21,075.00 元	—
合計：	**174,601.00** 元	**361,854.00** 元	**174,601.00** 元