

The report of the Market Misconduct Tribunal into dealings  
in the shares of China Huiyuan Juice Group Limited  
on and between 30 July 2008 to 4 September 2008

**Part I : A report pursuant to section 252(3)(a) and (b) of the Securities and  
Futures Ordinance, Cap. 571**

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Attestation to Part I of the Report

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## CHAPTER 1

### THE FINANCIAL SECRETARY'S NOTICE

1. The Tribunal was constituted in consequence of the Financial Secretary's Notice of 13 March 2012. The Notice is in the following terms.

**“IN THE MATTER OF THE LISTED SECURITIES OF  
CHINA HUIYUAN JUICE GROUP LIMITED  
(STOCK CODE 1886)**

**NOTICE TO THE MARKET MISCONDUCT TRIBUNAL  
PURSUANT TO SECTION 252(2) AND SCHEDULE 9 OF THE  
SECURITIES AND FUTURES ORDINANCE CAP. 571  
 (“THE ORDINANCE”)**

Whereas it appears to me that market misconduct within the meaning of section 270 (“Insider Dealing”) of Part XIII of the Ordinance has or may have taken place arising out the dealings in the securities of China Huiyuan Juice Group Limited (Stock Code 1886) (“Huiyuan”), the Market Misconduct Tribunal is hereby required to conduct proceedings and determine :

- (a) whether any market misconduct in the nature of insider dealing or otherwise has taken place;
- (b) the identity of any person who has engaged in the market misconduct found to have been perpetrated; and
- (c) the amount of any profit gained as a result of the market misconduct found to have been perpetrated.

**Person Suspected to have engaged in market misconduct activities**

Ms SUN Min (“Min”)

### **Particulars of the Suspected Market Misconduct**

1. At all material times, Min and her husband, MOK Fung Peter (“Peter”) were both directors and shareholders of Transfield Resources Limited, a company involved in the business of shipping and trading.

### **Proposed Voluntary Conditional Cash Offer by ABN AMRO**

2. Trading in the shares of Huiyuan on the Stock Exchange of Hong Kong Limited (“SEHK”) was suspended from 9:30 a.m. on 1 September 2008 at the request of Huiyuan. Trading closed on 29 August 2008 with the shares at a price of \$4.14.
3. Dealings in Huiyuan shares resumed at 9:30 a.m. on 3 September 2008 after ABN AMRO Asia Corporate Finance Limited (“ABN AMRO”) made an announcement on behalf of Atlantic Industries, a wholly owned subsidiary of The Coca-cola Company (“Coca-cola”) on three proposed voluntary conditional cash offers to acquire all of the issued shares in the share capital of Huiyuan (the “Announcement”) :
  - a. The Share Offer – HK\$12.20 for each Huiyuan share listed on the SEHK;
  - b. The Convertible Bond Offer – HK\$18,577.73 for each US\$1,000 nominal amount of each outstanding convertible bond; and
  - c. The Option Offers – HK\$6.20 and HK\$5.81 respectively for the outstanding Pre-Initial Public Offering (“IPO”) Huiyuan Option and Post-IPO Huiyuan Option.

The convertible bond and option offers were not listed on the SEHK.

4. The Share Offer was conditional upon :
  - a. The non-waivable pre-condition that consent or approval (including antitrust approval) of any governmental or regulatory body within any applicable waiting periods pursuant to the provisions of any laws or regulations in the People’s Republic of

China (“PRC”) where necessary for completion of the Share Offer;

- b. The waivable condition that valid acceptances of the Share Offer have been received at or before 4:00 p.m. on the First Closing Date from the Undertaking Shareholders (namely HY Holdings and Danone, substantial shareholders of Huiyuan which in aggregate held 64.51% of the then issued share capital); and
  - c. The waivable condition that no legal proceedings, investigations or enquiry that would make the acquisition of any Huiyuan shares by Atlantic Industries void, unenforceable or illegal.
5. On the day trading resumed, the market price of Huiyuan shares rose to close at \$10.94 which is a price rise of 164% from its closing price prior to the suspension.
6. In July 2008, Mr SUN Qiang Chang, a director of Huiyuan and a non-executive director of Gourmet Grace International Limited (a major shareholder of Huiyuan) and a friend of Min and Peter, approached Goldman Sachs inviting them to run an auction for the shares held by major shareholders of Huiyuan. On 24 July 2008 non-binding indicative bids were submitted to Goldman Sachs. This was the date of the emergence of relevant information about Huiyuan that was likely to materially affect its share price.
7. Prior to the Announcement on the 3 September 2008, there was no publicly available information regarding these bids or voluntary conditional cash offers.

**Dealings in Huiyuan shares by Min**

8. From 30 July 2008 to 29 August 2008, Min bought 8,613,500 Huiyuan shares through four companies belonging to herself and Peter :
- a. Perth Asset Management Limited using DBS Vickers (Hong Kong Limited);
  - b. Bombetta Development Limited using BOCI Securities Limited;

- c. Bartlock Investment Limited using Citi Private Bank; and
- d. Transfield Asset Management Limited using Goldman Sachs (Asia) Securities Limited.

These shares were bought at prices ranging between HK\$3.78 and HK\$4.66.

- 9. From 3 September 2008 to 4 September 2008, Min sold all their Huiyuan shares at prices ranging between HK\$10.24 and HK\$11.12, making a net profit over HK\$55.1 million (net of expenses).

### **The Diary Entries**

- 10. For the relevant trading in Huiyuan shares transactions, Min apparently engaged her secretary Ms Tera Cheung (“Tera”) to buy and sell the shares through her capacity as an authorized person.
- 11. A diary kept by Tera contained handwritten phrases, partly in Chinese and partly in English, pertaining to Huiyuan on pages for the dates 30 July and 1 August 2008.
- 12. For the page on 30 July 2008, the following phrases were written (words in italics are English in the original) :

- (4) *Huiyuan down/upside. Due Diligence.*  
Find someone to talk, *risk side? How much capital will be blocked.*
  - (1) Price of raw materials, *can't control*
  - (2) *Competitor Big*
  - (3) *PE rose from 7 times to 8*  
*09/[illegible] 13 loss Big*  
Restructuring or acquisition → bigger  
*MS, BNP, coverage, report is needed*  
*JPM, Jeff*

- 13. For the page on 1 August 2008, the following phrases were written :

- (4) *Huiyuan, 5 m shs PE 13 – 14 stop buying, (1) someone is*



discussing about general offer, largest shareholder has agreed but the *terms* haven't [illegible], price too high; (2) Anti-trust Law in *PRC* the *State* might not agree to *sell*. There are *risk(s)*. *PE* may not be able to reflect the post-acquisition *PE*.

14. These notes were made from the discussions that took place at a meeting with Peter, Min, Ms Catherine Cheung (Chief Operating Officers of Transfield Resources Limited) and Tera.
15. The diary entries show that Min (and possibly Peter) had knowledge of a potential takeover of Huiyuan. In particular, the most telling point is the phrase concerning the antitrust law of the PRC whereby the state might not agree to sell. This is in direct reference to the anti-trust provision, which an ordinary investor would not have in their contemplation unless they had knowledge of a potential takeover bid.
16. Clearly, Min had either directly or indirectly been tipped off by a connected person with this relevant information about the pending takeover bid that was likely to materially affect the share price of Huiyuan. With this relevant information and the knowledge that the information came from a connected person, she dealt with the shares through a number of her and her husband's companies with a view to profit from such knowledge in contravention of s270(1)(e) of the Ordinance.
17. Accordingly, Min engaged or may have engaged in market misconduct contrary to section 270 of the Ordinance.

Dated this 13<sup>th</sup> day of March 2012

[Signed]  
(John C Tsang)  
Financial Secretary".

2. At a directions hearing held on 18 June 2012 before the Chairman of this Tribunal only, objection was taken on behalf of Sun Qiang Chang to the wording of paragraph 6 of the Financial Secretary's Notice on the basis that, although Sun Qiang Chang was not cited in the Notice as an implicated person, the paragraph was drafted in such a way that, as a friend of Ms. Sun Min ("Sun Min"), the single person identified as an implicated party in the Notice, it was to be implied that Sun Qiang Chang, being a connected person, had passed relevant information to Sun Min and was therefore in fact an implicated person too. Having heard submissions, it was agreed, and the Chairman so directed, that, upon the formal constitution of this Tribunal, the Notice was to be amended by the deletion of the name of Sun Qiang Chang in paragraph 6.

3. Accordingly, on 14 September 2012, after the appointment of the members of this Tribunal and their ratification of the proposed amendment, paragraph 6 of the Notice was deleted by removing any mention of the name of Sun Qiang Chang so that the paragraph now read :

"6. In July 2008, a director of Huiyuan and a non-executive director of Gourmet Grace International Limited (a major shareholder of Huiyuan) and a friend of Min and Peter, approached Goldman Sachs inviting them to run an auction for the share held by major shareholders of Huiyuan. On 24 July 2008 non-binding indicative bids were submitted to Goldman Sachs. This was the date of the emergence of relevant information about Huiyuan that was likely to materially affect its share price."

4. The amended Notice was duly signed on 14 September 2012 by the Chairman and members of the Tribunal.

## CHAPTER 2

### AN OVERVIEW OF THE FACTUAL BACKGROUND AND THE BASIS FOR THE ENQUIRY

(i) *Huiyuan and the 2008 share offer by the Coca-Cola Company*

5. The China Huiyuan Juice Group Limited (“Huiyuan”) is a holding company which, together with its subsidiaries, is principally engaged in the production and sale of fruit juices. It also produces and sells vegetable drinks, flavoured teas and mineral water. Its head office is in Beijing. Its main area of operations is within the People’s Republic of China. At all times material to this report, it held a dominant position as a producer of fruit drinks in the Mainland.

6. In the early part of 2007, Huiyuan was listed on the Hong Kong Stock Exchange (stock code 1886). Although initially the share price was strong - at one stage reaching a high of \$12.20 - it then fell into decline. Financial commentators expressed concern that in a highly competitive market the company was struggling with high working capital requirements resulting in cash flow problems. By July 2008, the shares were trading below \$5.00.

7. It appears that in early 2008, Mr. Zhu Xinli (“Zhu”), the founder of Huiyuan and Chairman of the Board, entered into talks with the Coca-Cola Company regarding some form of strategic alliance. Nothing emerged from those talks. That, however, was only a prelude.

8. In or about June 2008, the three major shareholders in Huiyuan – Gourmet Grace International Limited, Danone Asia Private Limited and Zhu (through his company, China Huiyuan Juice Holdings Company Limited) – agreed to seek a joint sale of their respective shareholdings in the company.

9. At that time, Sun Qiang Chang (“Sun Chang”), a managing director of Warburg Pincus Private Equity IX LP (“Warburg Pincus”) was a director of Huiyuan. It appears that his directorship came about because Warburg Pincus held a substantial shareholding in Huiyuan through Gourmet Grace International Limited.

10. On or about 25 June 2008, acting on behalf of the major shareholders, Sun Chang made an approach to Goldman Sachs (Asia) L.L.C. (“Goldman Sachs”) to request that it present a strategic plan for how best to bring about the joint sale. That plan took the form of a limited auction.

11. Pursuant to that plan, on 8 and 9 July 2008 initial invitations were sent to potential bidders. These included the Coca-Cola Company, PepsiCo and Kirin Holdings. On the two days when the invitations were sent out, the price of Huiyuan shares closed at \$4.62 and \$4.69 respectively.

12. Later that month, on 24 July 2008, the Coca-Cola Company and PepsiCo submitted their indicative bids, that is, their preliminary, non-binding bids. As to the purchase price of the shares, the Coca-Cola Company offered \$11.00 per share, PepsiCo offered between \$9.00 and \$10.00 per share. These

bids were at least 80% higher than the highest price achieved by Huiyuan so far that month on the Stock Exchange.

13. The day following, on 25 July 2008, there were communications between Goldman Sachs and ABN AMRO (financial advisers to the Coca-Cola Company) in order to clarify the terms of Coca-Cola's indicative bid. Goldman Sachs also consulted with Zhu concerning the bids.

14. On 31 July 2008, the Board of Directors of Huiyuan was formally informed of the proposed sale by the major shareholders of their joint stake in the company. The Board authorised Huiyuan to provide such assistance as was necessary.

15. The following day, 1 August 2008, Goldman Sachs invited the Coca-Cola Company and PepsiCo to participate in the second round of the auction process, giving them access to all necessary information about the affairs of Huiyuan to enable them to conduct due diligence.

16. Some two weeks later, on 18 August 2008, PepsiCo's financial advisors, Morgan Stanley, advised that PepsiCo was withdrawing from the second round process.

17. What followed were negotiations between the major shareholders of Huiyuan (represented by Goldman Sachs) and the Coca-Cola Company (represented by ABN AMRO) as to an agreed price per share. By way of an

overview, it may be said that initially the Coca-Cola Company had little stated inclination to pay as much as \$12.00 per share while the major shareholders of Huiyuan were seeking something higher than that figure.

18. It appears that any potential deadlock over price was broken towards the end of August when Sun Chang suggested a price equal to the historic high of Huiyuan's share price on the Stock Exchange. That historic high was \$12.20. On Friday, 29 August 2008, agreement was reached between the parties at that price. The price of Huiyuan shares on the Stock Exchange closed that day at \$4.14.

19. At the request of Huiyuan, pending the release of an announcement pursuant to the Code on Takeover and Mergers, trading in the company's shares on the Stock Exchange was suspended on the following Monday and Tuesday, 1 and 2 September 2008.

20. On the morning of 3 September 2008, a joint announcement was published by Huiyuan and the Coca-Cola Company setting out the terms of an offer to acquire *all* of the issued shares in Huiyuan. The announcement is annexed to this report as Annexure 1.

21. The detailed terms of the offer have been set out in the Financial Secretary's Notice cited in Chapter One. For the purposes of this overview, they may be summarized as follows :

- The offer to purchase was made by Atlantic Industries, a wholly-owned subsidiary of the Coca-Cola Company and was subject to certain pre-conditions.
- The offer was to acquire all of the issued shares of Huiyuan for a sum of \$12.20 per share in cash. In addition, offers were made to acquire all outstanding convertible bonds of Huiyuan and to procure the cancellation of all outstanding Huiyuan options. These latter instruments, that is, the bonds and the options, were not quoted on the Stock Exchange.
- As to the pre-conditions, these included the pre-condition that all relevant government and regulatory approvals (including any anti-trust approval) must be obtained within a specified period of time.

22. As to the price offered per share, namely \$12.20, it should be noted that in the joint announcement (page 9), the highest and lowest prices of Huiyuan shares over the previous six months were stated :

“During the six-month period preceding the Last Trading Date, the highest closing price of Huiyuan Shares as quoted on the Stock Exchange was HK\$6.52 per Huiyuan Share on 5 May 2008, and the lowest closing price of Huiyuan Shares as quoted on the Stock Exchange was \$3.64 per Huiyuan Share on 13 August 2008.”.

23. On 3 September 2008, after the publication of the announcement, the market price of Huiyuan shares closed at \$10.94. Compared with the closing price on 29 August 2008, the day immediately preceding the suspension in trading, this represented an increase in the price of some 164%.

24. To put matters into broader context, the relevant trading data in respect of Huiyuan shares for the eight-day period from 27 August to 8 September is as follows :

Date	Volume	Turnover	Closing Price
27/8/2008	1,361,000	5,475,205	4.020
28/8/2008	2,212,000	8,724,575	3.930
29/8/2008	9,737,500	40,098,625	4.140
3/9/2008	224,717,856	2,480,375,424	10.940
4/9/2008	54,328,970	565,240,668	10.100
5/9/2008	31,229,500	300,691,061	9.600
8/9/2008	19,622,500	195,112,805	9.940

25. There being no external events of any particular moment to move the Hang Seng Index at that time, these indices make clear that the market reacted very favourably to the announcement of the share offer, that is, to the takeover offer by the Coca-Cola Company.

(ii) *The trading in Huiyuan shares by Sun Min*

26. In 1988, Sun Min married Mok Fung Peter (“Peter Mok”) in the United States. Shortly thereafter they came to Hong Kong where they set up a shipping business, Transfield Resources Limited (“Transfield Resources”). In the years that followed, the couple expanded their business interests by setting up an investment division, Transfield Asset Management Limited (“Transfield Asset Management”). In a statement dated 12 October 2012, Sun Min said that



the investment division of their business made substantive investments in shares, hedge funds and derivative instruments.

27. It would appear that the couple's endeavours in business and investments flourished. In her statement of 12 October 2012, Sun Min estimated that by mid-2008 their joint assets in their shipping business, Mainland real estate, equities and financial instruments were valued at around HK\$10 billion.

28. Although they ran their own private investment accounts, Sun Min said that between herself and her husband, she was the one principally responsible for operating the investment side of their business operations. As a rule of thumb, she said, she did not feel it necessary to inform her husband of any investment acquired by her to a value of US\$10 million or less but would consult him (and often the Chief Operating Officer of Transfield Resources) in respect of investments of greater value.

29. In the operation of the investment side of the business Sun Min was assisted by a team of three persons, including an accountant. There were, however, two persons in particular with whom she worked when purchasing equities. First, Ms. Catherine Cheung Fung Yi, a chartered financial analyst and Transfield's Chief Operating Officer ("Catherine Cheung") and, second, Ms. Tera Cheung Mei Shan ("Tera Cheung") whose responsibility was to execute buy and sell orders under Sun Min's directions and to gather information on investments. On the evidence, Catherine Cheung's role was essentially that of

an advisor while Tera Cheung's role was less elevated and was to carry out Sun Min's instructions.

30. In her statement of 12 October 2012, Sun Min said that in or around 2000, on the advice of their bankers, she and her husband formed a number of companies to hold specific types of investments. These companies included the three companies identified in paragraph 8 of the Financial Secretary's Notice, namely, Perth Asset Management Limited, Bombetta Development Limited and Bartlock Investment Limited. It was through these three companies, and Transfield Asset Management, that the 8,613,500 shares – the subject of this report – were purchased.

31. For the avoidance of ambiguity, it should be said that it has never been disputed that the four companies just identified were (at all material times) controlled by and beneficially owned by Sun Min and her husband, Peter Mok.

32. Turning to the purchase of the Huiyuan shares in July and August 2008, it was Sun Min's evidence that she had always had an interest in Huiyuan, a company described by her as a "dragon head" enterprise; namely, one that was a pioneer and leader in its field. She said that she also had considerable admiration for Zhu, its founder. Her purchase of shares in Huiyuan in July and August 2008 was not her first purchase of shares in the company. She had attempted unsuccessfully to secure a large allotment of shares at the time of Huiyuan's initial public offering in 2007, being given only a modest allocation, and at about the same time had purchased two option contracts based on the

value of Huiyuan shares, these being described by her as “knock out options”, that is, options that are knocked out or nullified if the underlying instrument (in this case Huiyuan shares) reaches a certain price.

33. The shares in Huiyuan secured at the time of the initial public offering were sold by Sun Min at a profit while, according to her, the options were knocked out (to her credit) within a matter of weeks.

34. In the result, in the first half of 2008, although Sun Min and her husband managed a reasonably diverse share portfolio and one of very considerable value, Huiyuan shares formed no part of it.

35. However, within less than a week of the Coca-Cola Company and PepsiCo submitting their indicative bids to acquire Huiyuan’s shares – those bids of course being of utmost confidentiality – Sun Min had instructed Tera Cheung to commence purchasing Huiyuan shares. The purchase of those shares was to continue intermittently from 30 July until 29 August 2008, the final purchase being made on the day before trading in the shares was suspended pending the announcement of the share offer by Atlantic Industries, the wholly owned subsidiary of the Coca-Cola Company.

36. As to the nature and extent of that trading, between 30 July and 29 August 2008 (inclusive) a total of 8,613,500 shares in Huiyuan were purchased under Sun Min’s direction at a cost of HK\$37,595,882.00, the shares being

purchased through the four companies beneficially owned by Sun Min and her husband.

37. In executing the purchases of the shares, Tera Cheung engaged the services of three broking houses that were regularly employed to buy and sell investments. They were : Goldman Sachs (Asia) Securities, DBS Vickers (Hong Kong) and BOCI Securities. The purchases were as follows :

30/7/2008 : 2,786,000 shares purchased (through two of the broking houses);

31/7/2008 : 2,696,000 shares purchased (through three of the broking houses);

7/8/2008 : 467,000 shares purchased (through three of the broking houses);

8/8/2008 : 377,000 shares purchased (through two of the broking houses);

12/8/2008 : 195,000 shares purchased (through one of the broking house), and

29/8/2008 : 2,092,000 shares purchased (through three of the broking houses).

38. On 3 and 4 September 2008, after the published announcement of Coca-Cola's takeover bid, all the Huiyuan shares purchased over the previous 31 days were sold at prices ranging between \$10.2375 and \$11.1180. The disposal of the 8,613,500 shares over that period of 48 hours secured a profit of \$55,106,157.00.

39. It appears that several matters aroused the concern of the Securities and Futures Commission ("the SFC") as to whether, in trading in Huiyuan shares between 30 July and 29 August 2008, Sun Min (and/or her husband, Peter Mok) had been guilty of market misconduct by way of insider dealing :

- The timing of the purchases, commencing as they did within a matter of days after the Coca-Cola Company and PepsiCo had made their indicative bids and continuing through until the day before trading was suspended pending an announcement of a general share offer.
- The size of the purchases, close to \$38 million being spent on a share which had been in decline for a relatively extended period of time.
- The fact that there had been no history of substantive and/or regular trading in the shares by Sun Min (or her husband) prior to the commencement of purchases on 30 July 2008.
- The fact that the shares had been purchased by several different companies using several different broking houses, suggesting perhaps some attempt to disguise the trading.

40. At the early stage of its investigations, while the SFC could perhaps point to disquieting circumstances, it had no primary evidence capable of proving that, when the trading took place, Sun Min and/or her husband and/or those with whom she worked had any knowledge of the confidential negotiations taking place to make a general offer for the shares in Huiyuan. It is, however, the SFC's assertion that in September 2009 it discovered such primary evidence.

*(iii) Discovery of the desk diary*

41. On 17 September 2009, SFC officers conducted a search of the Transfield Resources offices. During that search a desk diary was discovered. It was a standard A4 sized diary, one page being used for each day of the year.

The diary was discovered in that area of the office where Tera Cheung worked and bore her name in embossed lettering. That the diary had been used during 2008 by Tera Cheung alone and contained her handwriting, both in Chinese characters and English, was never disputed.

42. On two pages of the diary - on the pages bearing the dates of Wednesday, 30 July 2008 and Friday, 1 August 2008 - Tera Cheung had written notes concerning Huiyuan.

43. The assertion made in the Financial Secretary's Notice - it being a matter for determination by this Tribunal - is that the entries made on those two pages of the diary show that Sun Min (and possibly her husband) must have had advance knowledge of the potential takeover of Huiyuan, that the information contained in the entries constituted relevant information and that it could only have been given to them at that time by a connected person.

44. The first page on which an entry was made bore the date of Wednesday, 30 July 2008, that being the same date on which, under Sun Min's instructions, Tera Cheung, the author of the entry, had executed the first purchase of Huiyuan shares, a total of 2,786,000 shares at an average price of \$4.337, representing some 42% of the Huiyuan shares traded on the market that day. The second page on which an entry was made bore the date of Friday, 1 August 2008, two days later. Copies of the two pages are annexed to this report as Annexures 2 and 3.

45. What is actually written on both the first and second pages consists of jottings, partially in Chinese characters and partially in English, seemingly more for the assistance of the author than any third party. As is invariably the case with jottings of this kind, they are not full and complete, akin to some kind of report. They appear to highlight points only. Some of the jottings are not now capable of clear interpretation either by the ordinary reader or by Tera Cheung herself.

46. Looking to the first page (bearing the date of Wednesday, 30 July 2008), four matters are delineated, the one beneath the other, there being a sequence of numbers linking each. The impression gained is that Tera Chung has jotted down a list of matters discussed or to be discussed. This impression is fortified by further jottings on the upper right hand corner of the page separated from, or perhaps linked to, the four matters by a short vertical line. These jottings on the upper right hand corner of the page are also partially in Chinese characters and partially in English. However, reduced entirely to English for ease of understanding, they read as follows :

“Tue

Next meeting

(1) Officers

(2) PM [Peter Mok] has to know the amount of TAM’s loan

(3) To have a meeting on Tuesday.”.

47. During the course of the enquiry it was accepted that the letters ‘TAM’ stand for Transfield Asset Management and were used internally as an abbreviation for the investment arm of the business operations.

48. Returning to the four matters written from the left of the page towards the centre and linked by a sequence of numbers in circles, it is the fourth of these matters that speaks of Huiyuan. Again, these notes are partially in Chinese characters and partially in English. Reduced entirely to English, they read :

“Huiyuan down/upside. Due diligence.  
Find someone to talk, risk side! How much capital will be blocked.  
(1) Price of raw materials can't control  
(2) Competitor big  
(3) P.E. rose from 7 times to 8  
2009 13 loss big  
D Restructuring or acquisition → bigger  
MS [Morgan Stanley], BNP, coverage report is needed JPM, Jeff”.

49. Although, on an ordinary reading, individual statements in this section may not be capable of clear and specific interpretation, what emerges clearly when the section as a whole is considered is that it is focused - just as one of the entries actually says - on carrying out “due diligence” in respect of Huiyuan: looking to its “upside” and “downside”.

50. We do not take the phrase “due diligence” to have been used in its technical sense. Certainly there is no evidence to that effect. Rather it appears to have been used by way of a general instruction to conduct investigations. That investigations were in fact made by Tera Cheung that day and/or the next emerges from the evidence. In this regard she sent e-mails dated 31 July 2008 to Morgan Stanley, BNP Paribas and J.P. Morgan asking : “Do you cover this stock? Any reports?” It is interesting to note that Tera Cheung's e-mails were entirely neutral. Although she had recorded that



Huiyuan was the subject of a “restructuring or acquisition”, that having to be a principal reason for her search for information, she made no mention of it to the financial advisers from whom she sought information; for example, nothing along the lines of : “do you know of any possible restructuring or acquisition bid?”

51. Tera Cheung received at least one response to her search for information, this from a man named Chao at J.P. Morgan, his e-mail dated 31 July 2008 and being headed : “#1886 Huiyuan Juice”. It reads :

“Hi Tera,

Pls find attached our latest report on the company. It is slightly outdated.

I managed to talk to the analyst and she addressed the following points :

1. The company has highly been impacted by the inflation
2. The sales growth is slowing down, resulting in poor cash return condition
3. Company is announcing results in Sep and it is not expected to see much positive surprise
4. Our analyst will look into the company’s sales growth and volume in Sep to see how the company is doing
5. There are still some institutional holding but they are “under the water”
6. She has not decided to change her rating which is currently UNDERWEIGHT
7. There should not be any excitement until 2009.”.

52. Manifestly, this e-mail of 31 July 2008 expresses present caution concerning the acquisition of Huiyuan shares. No mention is made of any “excitement” by way of a known or rumoured restructuring or acquisition bid.

53. Tera Cheung sent an e-mail in the mid-afternoon of 31 July 2008 to Sun Min, Peter Mok and Catherine Cheung concerning matters to be discussed at the next “TAM Weekly Meeting”. In the e-mail she said that the meeting was scheduled for Tuesday, 5 August 2008 at 11:00 a.m. She went on to list the topics to be discussed, the third topic being “Huiyuan”. In short, Huiyuan was of on-going interest; in our judgment, hardly therefore a matter in respect of which Tera Cheung would be expected to neglect to report on-going developments of any potential importance.

54. The second page on which relevant entries were made by Tera Cheung is the page dated Friday, 1 August 2008.

55. Aside from what appear to be unconnected notes written by Tera Cheung at the foot of the page in pen, all other notes on the page are in pencil.

56. As to the notes in pencil, it appears that in one way or the other they relate to the investment activities of Sun Min and her husband. The notes are divided into three principal sections numbered (in circles) 1, 2 and 3. The first principal section is itself sub-divided into four sections numbered (again, in circles) 1, 2, 3 and 4.

57. The first “principal section” has next to it the letters “TAM” – as earlier indicated this being an internal abbreviation for matters concerning investments.

58. Of the three principal sections listed on the page, the third, principal section states that it concerns Huiyuan. The wording of the section is of central importance to this enquiry. As elsewhere, this section is written partially in Chinese characters and partially in English. Reduced to English only, the passage was originally translated as follows :

“Huiyuan, 5m shs [5 million shares], PE 13-14 stop buying. (1) Someone’s discussing about general offer. Largest shareholder has agreed, but the terms haven’t (illegible), price too high. (2) Anti-trust law in PRC, the state may not agree to sell. There are risk(s). PE may not be able to reflect the post-acquisition PE.”.

59. Towards the end of the hearing, it was submitted by the presenting officer that a more accurate English translation should include the word “yet” in the sentence commencing : “Largest shareholder has agreed ...” so that the sentence should read : “Largest shareholder has agreed, but the terms haven’t yet (illegible), price too high”.

60. The two members of this Tribunal, both of whom are fluent in English and in reading and writing Chinese characters, were of the view that the insertion of the word “yet” appeared to be the more accurate.

61. The issue of translation was one at least of *potential* importance. Assuming that the illegible character, as logically it must, bears a meaning equivalent to “been agreed”, “been confirmed”, “been okay’d” or similar then that portion of the entry reads : “Largest shareholder has agreed but the terms haven’t yet (been agreed/okay’d), price too high.”. The word “yet” in that

context clearly indicates that any disagreement as to price is not final, to the contrary that negotiations are still on-going.

62. In an attempt to secure a strictly correct translation, the presenting officer was requested to seek the advice of the Chief Chinese Language Officer of Department of Justice. In a letter dated 3 December 2012, a copy of which is attached to this report as Annexure 4, it was said that, whether or not the word “yet” should appear in a true translation had to be determined by context or, if that was not possible, by the intention of the author. The officer said that it was difficult to deduce the true meaning of the relevant Chinese character in context because of the fact that it appeared in a “broken and incomplete” phrase. As such, the meaning had to be left to the intention of the author.

63. Both in her written interviews (given in September 2009) and in the course of her testimony, Tera Cheung professed a complete lack of memory as to the circumstances prevailing when she wrote her notes. In the result, she said, she was unable to say what meaning she intended to convey other than what was obvious from the face of the notes. Put simply, it was the thrust of her evidence that she was in no better position than any third party in ascertaining the true meaning and intent of the notes.

64. In the light of that evidence, no purpose was to be served in recalling Tera Cheung to give further evidence as to what she had intended : had she intended a meaning conveyed by the word “yet” or had she not.

65. Accordingly, there being doubt in the matter, we accepted that a strict translation should *not* include the word “yet”.

66. We shall make observations as to the meaning and extent of Tera Cheung’s notes inscribed on the page dated 1 August 2008 later in this report. At this juncture we make the general comment only that, whether the word “yet” appears or does not appear, it is patent that the note refers to on-going negotiations. That being the case, on the face of the note, the prospect of agreement being reached cannot be discounted.

67. Finally, in considering Tera Cheung’s notes on the page bearing the date of 1 August 2008, it is to be noted that she has (at the very top of the page) noted that there is to be a meeting on 5 August 2008, although now the timing of the meeting has been brought forward from 11:00 a.m. to 7:00 a.m.

## CHAPTER 3

### THE LAW

68. Before setting out our more detailed analysis of the evidence, it is necessary to consider the legal framework within which that analysis took place.

69. In this regard, the following directions as to law were given by the Chairman to the members pursuant to section 24(c) of Schedule 9 of the Securities and Futures Ordinance, Cap. 571 (“the Ordinance”).

#### *Insider Dealing*

70. The Financial Secretary’s Notice has requested the Tribunal to determine whether market misconduct in the nature of insider dealing (or otherwise) has taken place. In the factual circumstances of the present case there was no evidence that Sun Min fell to be regarded as “connected” with Huiyuan pursuant to section 247 of the Ordinance. Accordingly, in so far as it was relevant to the present enquiry, section 270(1)(e) of the Ordinance provides that :

“Insider dealing in relation to a listed corporation takes place -

...

(e) when a person who has information which he knows is relevant information in relation to the corporation and which he received, directly or indirectly, from a person whom he knows is connected with the corporation and whom he knows or has reasonable cause to believe held the information as a result of being connected with the corporation -

(i) deals in the listed securities of the corporation ... ”.

(a) *“Listed corporation”*

71. There is no dispute that at all relevant times Huiyuan was a listed corporation.

(b) *“Relevant information”*

72. Section 245(2) of the Ordinance provides that :

“ ‘relevant information’ in relation to a corporation, mean specific information about -

(a) the corporation;

...

(c) the listed securities of the corporation ... ,

which is not generally known to the persons who are accustomed or would be likely to deal in the listed securities of the corporation but which would if it were generally known to them be likely to materially affect the price of the listed securities;”.

(c) *“Specific information”*

73. “Relevant information” must therefore be information that is “specific”. What constitutes “specific information” is not defined in the legislation. However, the term has been the subject of consideration by academics, the Insider Dealing Tribunal and judicially.

74. A number of jurisdictions have adopted the definition that specific information is information which possesses sufficient particularity to be capable of being identified, defined and unequivocally expressed.

75. This definition appears first to have been stated in Hong Kong by the Insider Dealing Tribunal in its report in the *Chinese Estates Holdings Limited* inquiry<sup>1</sup>. There, following a decision of the Singapore High Court in *Public Prosecutor v GCK Choudrie* (1981) 2 Co. Law 141, the Tribunal said (at page 39) :

“Specific information is information which possesses sufficient particularity to be capable of being identified, defined and unequivocally expressed. In this primary sense it is to be contrasted with mere rumor, with vague hopes and worries or with unsubstantiated conjecture”.

76. In *Firststone International Holdings Limited* inquiry<sup>2</sup>, the Chairman of the Insider Dealing Tribunal, Mr. Justice McMahon a distinguished criminal judge, made the following observations which this Tribunal has adopted :

“ Perhaps the primary legal authority as to what amounts to ‘specific’ information in an area of law remarkable for the absence of authorities is the Singapore High Court’s judgment in *Public Prosecutor - v - GCK Choudrie*.

That judgment held that information was specific if it possessed sufficient particularity to be capable of being ‘identified, defined and unequivocally expressed’.

It may be that if those comments are taken as being a definition of what is ‘specific’ information that, perhaps inevitably when a plain English word is sought to be defined, raises as many questions as it provides answers.

Be that as it may, that phraseology has been adopted by a number of Tribunals inquiring into suspected insider dealing in Hong Kong.

The definition advanced by the Singapore High Court in *Choudrie’s case* was itself based, in part at least, on similar phraseology in an earlier New South Wales Supreme Court decision of Lee J to the effect that

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<sup>1</sup> The report of the inquiry was published in June 1999.

<sup>2</sup> The report of the inquiry was published in July 2004.



‘specific information must be capable of being pointed to and identified and must be capable of being expressed unequivocally’ (see *Ryan - v - Triguboff* [1976]1 NSWLR 588 at 596).

The concern of both courts was really to attempt a workable distinction between information which was specific for the purposes of their jurisdictions legislation, and information which failed to achieve the required degree of specificity because it was too vague, inchoate or speculative.

In somewhat similar vein, in the case of *Green - v - the Charterhouse Group of Canada* 12 OR(2D)280, the Ontario Court of Appeal determined the question of whether information that a takeover offer may have been forthcoming for a particular company was properly regarded as specific. In the judgment of Arup J.A. it was said ‘the information may not have been worthy of credence or of sufficient weight to justify any positive action ... Nevertheless in my view the information was specific; the word is used by the section in contradistinction to ‘general’ as ‘not specific’. (at page 306)

The question of the meaning to attach to the word ‘specific’ in insider dealing legislation in England has been the concern of text writers over the past two decades.

In Rider & Ashe ‘Insider Crime - the New Law’ (1993 Jordan Publishing Ltd.), the authors said as to what purpose the word ‘specific’ served in the English Criminal Justice Act 1993 section 56(1) definition of inside information which requires the information to be ‘specific or precise’ :-

‘The word specific is intended to ensure that information about (e.g.) a huge dividend cut can be inside information, whilst mere rumour and untargeted information cannot’.

They go on to say :-

‘Information may still be specific even though as information it has a vague quality’.

A question of course arises as to how vague information may be before it is finally no longer sufficiently specific for the purpose of our legislation. It is that question which the definition in *Choudrie’s case* seeks to answer and in our view the approach of the court in that case has much to recommend it.”.

77. In *Chinney Alliance Group Limited*, a report of the Insider Dealing Tribunal dated 24 December 2004, it was asserted of “specific information” (page 36) :

“It is not necessary that all particulars or details of the transaction, event or matter be precisely known.”.

78. Of central relevance to the present inquiry is the question of whether a contemplated transaction, one that is under negotiation but has not been concluded, is capable of constituting specific information.

79. In the *Firstone International Holdings Limited* inquiry, Mr. Justice McMahan said (at page 59 of the report) :

“...the fact that a transaction is only contemplated or under negotiation and has not yet been subjected to any formal or informal final agreement does not necessarily cause the information concerning that contemplated course of action or negotiation to be non-specific.

Indeed section 4(1)(d) of the Ordinance<sup>3</sup> although dealing with the meaning to be attached to the phrase ‘connected person’ expressly accepts that relevant information might relate to either an actual transaction or a transaction which is merely contemplated.

In this regard Brenda Hannigan, the author of the oft-cited text ‘Insider Dealing’ (Kluwer Law 1988), says at page 54 :

‘Will knowledge of preliminary steps be sufficiently specific? What if ... an individual is found to know of a chain of events the most probable consequence of which is takeover bid? Will that suffice? Both instances would seem to be within the legislation, for while unfounded rumours and vaguest hopes would not be sufficient to amount to unpublished price sensitive information, contemplated acts as well as actual events are certainly within the legislation.’  
(emphasis added)

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<sup>3</sup> In respect of the current legislation, see section 247(1)(d)(ii) which also states that relevant information may relate to an “actual or contemplated” transaction.

In this Tribunal's view, the fact that a transaction is merely contemplated or at a preliminary stage of negotiation does not mean information concerning those negotiations cannot be specific.

Again as Brenda Hannigan commented

'... the whole point of insider dealing frequently is to deal while the transaction is only contemplated, for once it has actually occurred the market is likely to be aware of it and will move to reflect that fact in the price, thereby preventing any profiting by insiders'.

80. Mr. Justice McMahon continued by saying :

"... whether described as under contemplation or at a preliminary stage of negotiation must, in our view, have more substance than merely being at the stage of a vague exchange of ideas or a 'fishing expedition'. Where negotiations or contacts have occurred ... there must be a substantial commercial reality to such negotiations which goes beyond a merely exploratory testing of the waters and which is a more concrete stage where the parties have an intent to negotiate with a realistic view to achieving an identifiable goal."

81. Mr. Justice McMahon declined to impose any additional requirement that there be any foresight that the transaction will "probably" or "likely" come to fruition.

82. In this regard, in an earlier inquiry, that of *Stime Watch International Holdings Limited* dated February 2003, he had said (at page 85) :

"... there can be no additional requirement that information, otherwise specific, which relates to a proposed transaction can only be specific if, by some objective or even subjective measure, that proposed transaction is more probable than not to proceed or come to fruition.

In our respectful view such a requirement would tend to defeat the intended operation of the legislation. That is because in large part instances of insider dealing relate to transactions which are inchoate within the corporation's purview. That is, they are under negotiation and subject to final approval or agreement. In many cases, the chances as to whether

or not the transaction will be finalized or agreed cannot be given anything but the broadest assessment. The probabilities of the transaction being finalized or agreed may in many cases be simply unknown or unable to be quantified or assessed in any meaningful commercial way, yet the information concerning the commercial negotiation or the commercial approach which has taken place or been made may well in some circumstances so far as the proposed transaction is concerned be quite detailed.”.

83. Mr. Justice McMahon concluded (at page 88) :

“ It is the nature of the information which determines whether it is specific for the purposes of ... the Ordinance, not the commercial probabilities or perceived probabilities of the subject matter reaching fruition.”.

84. The present Tribunal was directed in accordance with Mr. Justice McMahon’s reasoning.

(d) *Information which would be “likely to materially affect the price” of the shares*

85. In the report of the Insider Dealing Tribunal in *Public International Investments Limited*, dated 5 August 1995, in addressing the issue of whether or not information was “likely to affect the price” of the shares of a company (if known to those accustomed or likely to deal in those shares) the nature of the test was described as being (paragraph 19.4.2) :

“The test is hypothetical in that on the date that the insider acts on inside information, he acts when the investing public, not in possession of the inside information, either does not act, or acts in response to other information or advice. The exercise in determining how the general investor would have behaved on that day, had he been in possession of that information, has necessarily to be an assessment. It is true that an examination of how those investors react once the information is stripped of

its confidentiality and becomes public knowledge, will often provide the answer, although care must be taken to ascertain whether the investors' response is indeed attributable to the information released, or whether it is wholly or in part attributable to other events, or considerations.”.

Of the term “materially” the report concluded (paragraph 19.4.5) :

“We think that the word ‘materially’ speaks for itself - it is to be contrasted with ‘slight’, ‘insignificant’ and ‘immaterial’.”.

86. In the report of the Insider Dealing Tribunal in *The International City Holdings Limited*, dated 27 March 1986, the Tribunal observed of the requirement of materiality that the information (paragraph 2.6) :

“ ... be likely to bring about a material change in the price of those securities. Thus information that would be likely to cause a mere fluctuation or a slight change in price would not be sufficient; there must be the likelihood of change of sufficient degree in any given circumstances to amount to a material change.”.

*To constitute market misconduct, “relevant information” must be received from a person “connected with the corporation”*

87. A “connected” person is defined in the Ordinance. It is a broad definition which seeks to include all those persons who may receive confidential, price-sensitive information” by reason of their relationship with a company.

The definition is contained within sections 247 and 248 of the Ordinance :

“247. ...

(1) ... a person shall be regarded as connected with a corporation if, being an individual –

- (a) he is a director or employee of the corporation or a related corporation of the corporation;
- (b) he is a substantial shareholder of the corporation or a related corporation of the corporation;
- (c) he occupies a position which may reasonably be expected to give him access to relevant information in relation to the corporation

by reason of –

- (i) a professional or business relationship existing between –
    - (A) himself, or his employer, or a corporation of which he is a director, or a firm of which he is a partner; and
    - (B) the corporation, a related corporation of the corporation, or an officer or substantial shareholder of either corporation; or
  - (ii) his being a director, employee or partner of a substantial shareholder of the corporation or a related corporation of the corporation;
- (d) he has access to relevant information in relation to the corporation and -
- (i) he has such access by reasons of his being in such a position that he would be regarded as connected with another corporation by virtue of paragraph (a), (b) or (c); and
  - (ii) the relevant information relates to a transaction (actual or contemplated) involving both those corporations or involving one of them and the listed securities of the other or their derivatives, or to the fact that the transaction is no longer contemplated; or
- (e) he was, at any time within the 6 months preceding any insider dealing in relation to the corporation, a person who would be regarded as connected with the corporation by virtue of paragraph (a), (b), (c) or (d).

(2) For the purposes of Division 4, a corporation shall be regarded as a person connected with another corporation so long as any of its directors or employees is a person who would be regarded as connected with that other corporation by virtue of subsection (1).

(3) In subsection (1), notwithstanding any other provisions of this Ordinance, “substantial shareholder”, in relation to a corporation, means a person who has an interest in the relevant share capital of the corporation, the nominal value of which is equal to or more than 5% of the nominal value of the relevant share capital of the corporation.

**248. ...**

- (1) For the purposes of Division 4, where a public officer or a

specified person in that capacity receives relevant information in relation to a corporation, he shall be regarded as a person connected with the corporation.

(2) In subsection (1), a reference to a specified person means a person who is –

- (a) a member of the Executive Council;
- (b) a member of the Legislative Council;
- (c) a member of a board, commission, committee or other body appointed by or on behalf of the Chief Executive or the Chief Executive in Council under an Ordinance;
- (d) an officer or employee of a recognized exchange company, a recognized clearing house or a recognized exchange controller;
- (e) an exchange participant;
- (f) an officer or employee of a body corporate incorporated by an Ordinance; or
- (h) an officer or employee of a body corporate specified by the Financial Secretary under subsection (3),

whether, in the case of paragraph (a), (b), (c), (d), (f), (g) or (h), the person is such a member, officer or employee (as the case may be) on a temporary or permanent basis, and whether he is paid or unpaid.

(3) The Financial Secretary may, by notice published in the Gazette, specify any body corporate for the purposes of subsection (2)(h).”.

### *The Standard of Proof*

88. Section 252(7) of Ordinance provides that :

“ ... the standard of proof required to determine any question or issue before the Tribunal shall be the standard of proof applicable to civil proceedings in a court of law.”.

89. That standard is the “balance of probabilities”.

90. In *Solicitor (24/7) v The Law Society of Hong Kong* [2008] 2 HKLRD 576 the Court of Final Appeal accepted the correctness of the approach to the

civil standard of proof expressed by Lord Nicholls of Birkenhead in *Re H & Others (Minors) (Sexual Abuse : Standard of Proof)* [1996] AC 563 at p 586

D-G :

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.”.

91. In his judgment in *Nina Kung alias Nina TH Wang and Wang Din Shin* (2005) 8 HKCFAR 387, Lord Scott of Foscote NPJ observed, in the context of allegations that Mrs Wang had procured the forgery and, in a conspiracy with another, was attempting to obtain probate in respect of a will she knew to have been forged, at paragraph 626 :

“The probability of these allegations being true must be judged on the evidence adduced in the case. But it must also take account of propensity. If such an allegation is made against a person with a record of involvement in forgery or fraud, the strength of the other evidence necessary to satisfy the balance of probability test is obviously less than would otherwise be required. Evidence of propensity must go into the balance ... Evidence to a very high standard of cogency indeed is necessary before the court can be justified in finding either to be dishonestly involved in a conspiracy to promote a forged will.”.

92. Under Hong Kong law, insider dealing may constitute a criminal offence. It is internationally recognized today to be a reprehensible form of market misconduct. The assertion that Sun Min (or her husband, Peter Mok) may have been guilty of insider dealing is therefore a most serious allegation.



That being the case, the Tribunal accepts that evidence to a high standard of cogency is necessary to justify a finding that Sun Min (or her husband, Peter Mok) traded on inside information.

### *Good character*

93. At the time of the hearing neither Sun Min nor her husband, Peter Mok, had any criminal convictions nor had they been found liable for any breach of regulations related to their professional and business affairs. They were both persons of good character. The Chairman has directed the Tribunal that a person of good character is less likely than otherwise might be the case to have committed the alleged misconduct and that good character supports his/her credibility in respect of both his/her statements made outwith the Tribunal, including in records of interview conducted by officers of the SFC and his/her evidence before the Tribunal.

### *Circumstantial evidence and inferences*

94. In his judgment in the Court of Final Appeal, with which all the other judges agreed, in *HKSAR v Lee Ming Tee* (2003) 6 HKCFAR 336 Sir Anthony Mason NPJ, having cited with approval the passage from the speech of Lord Nicholls quoted above, went on to address the proper approach to the drawing of inferences in circumstances of allegations of gross misconduct by senior officers of the SFC. Sir Anthony said :

“ ... that conclusion was not to be reached by conjecture nor, as the respondent submitted, on a mere balance of probabilities. It was to be plainly established as a matter of inference from proved facts. It is not possible to state in definitive terms the nature of the evidence which the court will require in order to be satisfied, in a civil proceeding, that a serious

allegation of this kind, is made out. It would not be right to say that the requisite standard prescribes that the inference of wrongdoing is the only inference that can be drawn (cf *Sweeney v Coote* [1907] AC 221 at 222, per Lord Loreburn) for that is the standard which applies according to the criminal standard of proof. In the particular circumstances, it was for the respondent to establish as a compelling inference that very senior officers of the SFC had deliberately and improperly terminated the investigation into Meocre Li's conduct for the ulterior purpose alleged, sufficient to overcome the inherent improbability that they would have done so (see *Aktieselskabet Dansk Skibsfinansiering v Brothers & Others* (2000) 3 HKCFAR 70 at pp. 91H, 96 G-I, per Lord Hoffmann).”.

### *Lies*

95. Of the approach to the evidence of the persons before the Tribunal and their statements outwith the Tribunal, the Tribunal has been directed that a lie in itself does not prove that the maker of the lie is culpable of the misconduct alleged against that person. People innocent of wrongdoing sometimes tell lies : perhaps, as a misguided reaction to a problem, or to postpone facing up to it or to attempt to deflect ill-founded suspicion, or to fortify their defence. Nevertheless, it may be a matter relevant to the credibility of that person.

### *Expert evidence*

96. The Tribunal has received evidence from Mr. Cheng Kai Sum and Mr. Richard Arthur Witts. Both were accepted as expert witnesses. The Tribunal received their evidence, containing both factual information and expression of opinions, because it was likely to be outside the knowledge and experience of the Tribunal. That being said, the Tribunal has been directed that it is not bound to accept the evidence of an expert witness in so far as it forms an expression of opinion. The Tribunal is entitled to accept or reject all or part of

that evidence, coming to its own conclusions on such matters based on a consideration of all the evidence.

97. At this juncture it is to be recorded that, having given due weight to the evidence of both expert witnesses, the Tribunal did not find their evidence to be of particular assistance.

98. It is to be noted that early in the course of the hearing before the Tribunal, Sun Min's leading counsel Mr. Peter Duncan SC, took objection to certain of the assertions of opinion contained in Mr. Cheng Kai Sum's witness statement. He did so on the principal ground that Mr. Cheng had given his opinion as to the true meaning of the notes contained in Tera Cheung's diary concerning Huiyuan. The meaning of the diary entries, however, was not properly a subject for expert opinion, their true meaning and extent being a matter for the Tribunal only.

99. In this regard, the Chairman ruled in favour of Mr. Duncan, holding that, although the diary entries, presented difficulties of understanding, this was not because of their arcane or technical content but because of the manner in which they had been inscribed. With the exception of terms of art appearing in the odd phrase, a reasonable tribunal in possession of the relevant background information was capable of determining the meaning of the entries without the assistance of expert evidence.

100. In the result, it was directed that Mr. Cheng's witness statement be suitably edited. This was done.

101. A copy of the Chairman's ruling (given on the second day of the hearing) is attached to this report as Annexure 5.

## CHAPTER 4

### SUN MIN'S RESPONSE TO ALLEGATIONS OF INSIDER DEALING

(i) *The denial of possessing relevant information*

102. It was never disputed by Sun Min that the decision to purchase Huiyuan shares in July and August 2008 was her decision and that the execution of that decision was carried out under her instructions.

103. Sun Min's husband, Peter Mok, agreed that the acquisition of the shares was carried out by his wife. It was his evidence that, although, in the ordinary course of events, he would have been informed later of the acquisition, and did come to learn of it, he played no part in the decision-making process itself.

104. While accepting that the decision to purchase Huiyuan shares was her decision alone, Sun Min denied knowing at that time of any negotiations to effect a take-over of Huiyuan. More specifically, she denied imparting any such information to Tera Cheung and denied receiving any such information from her.

105. Peter Mok also denied any knowledge of any take-over negotiations.

106. What then of the notes in Tera Cheung's diary, more specifically those speaking of take-over discussions?

107. Sun Min accepted that, if the matters in the diary had been entered on the dates indicated, she would have expected Tera Cheung to tell her of those matters. Tera Cheung's principal responsibility after all was "to place orders, follow up with brokers, and *gather information on investments*" [our emphasis] : paragraph 10(a) of Sun Min's statement of 8 October 2012. But it was Sun Min's assertion that, whatever should have been done, Tera Cheung did not in fact tell her of anything reflecting the matters written in the diary. In this regard, during the course of her testimony, the following exchange took place :

“Presenting Officer : Would you not expect her to pass on to you, or to your husband, the kind of information that we see on 1 August?

Sun Min : I would have wanted her to tell me that information but it turned out she told me nothing.”.

108. Peter Mok's evidence was to the exact same effect, namely, that he would have expected Tera Cheung to pass on such information to him, it being part of her duties, but that she had not done so.

109. As we understood it, it was the evidence of both Sun Min and Peter Mok that Tera Cheung must have come into possession of information about a possible take-over of Huiyuan from a third party, possibly one of her contacts in the investment world. This had to be the case because neither of them had given her any such information. While Tera Cheung must have intended to pass on the information – this being evident from her e-mail dated 31 July 2008 setting out the agenda for the meeting scheduled to be held on Tuesday, 5

August 2008 – she had not in fact done so. At all relevant times therefore they remained ignorant of any take-over negotiations.

(ii) *“TAM” meetings*

110. Sun Min, Peter Mok and both of their employees, Catherine Cheung and Tera Cheung, accepted that meetings did take place in order to discuss investments. These meetings were known as “TAM meetings”. It was further their evidence that it was planned that such meetings would take place on a regular basis. However, with individual work responsibilities taking precedence, that aspiration was not fulfilled. As Catherine Cheung expressed it when she gave evidence : “we never had a chance to sit down and have a meeting on a regular basis”.

111. Did a meeting take place to discuss Huiyuan? The notes in Tera Cheung’s diary indicate that such a meeting was scheduled for Tuesday morning, 5 August 2008, an indication confirmed by her e-mail giving the time and the agenda for such meeting.

112. It was, however, the unequivocal evidence of both Sun Min and Peter Mok that no such meeting took place on 5 August 2008. Their evidence in this regard is supported by an e-mail sent by Tera Cheung in the late afternoon of 4 August 2008 to them which reads :

“Cathy [Catherine Cheung] advised that she has an appointment with BNP Paribas risk manger/credit officer tomorrow morning, she would like to postpone TAM meeting to Wednesday.”.

113. What then of the request to adjourn the meeting by one day? In her statement of 8 October 2012, Sun Min said : “I do not remember that we eventually held any meeting after the original one was postponed ... The further buying of Huiyuan shares was entirely of my own initiative”.

114. Catherine Cheung, in her testimony, said that she honestly could not remember whether the adjourned meeting had taken place or not.

115. It was accepted that no formal records of TAM meetings were kept. There was therefore no independent evidence to demonstrate whether the adjourned meeting had or had not taken place.

116. That being said, it is to be remembered that the number of persons involved in the investment operations was limited : just four persons, all of them working in the same offices. There would therefore have been little or no difficulty in communicating information and/or discussing matters on an informal basis without any need for an agenda or a formalized meeting. In this regard, it must also be noted that, in respect of investment matters, Tera Cheung worked under Sun Min’s direct instructions and was directly answerable to her. As such, it was Tera Cheung’s duty to inform Sun Min of matters material to her investment. By way of illustration, in respect of the sale of Huiyuan shares on 3 and 4 September 2008, Sun Min said the following in her statement of 8 October 2012 :

“On 3 September 2008, I was in Prague when I received a phone call from Tera. Tera informed me about the announcement by Huiyuan about the takeover offer by Coca-Cola and that the offer price was HK\$12.00 and that trading in Huiyuan shares resumed that day. I was surprised that the



share price had gone up to HK\$11.00, and because of this big increase and the fact that the global market was shaky at the time, I instructed Tera to sell ...”.

117. Bearing in mind the seemingly efficient manner in which Tera Cheung passed on material information in other respects, the question must be asked : if she had been informed of take-over negotiations by a third party, why had she not, in the ordinary course of her duties, ensured that Sun Min and/or Peter Mok were made aware of that information? It is a matter to which we shall look in the next chapter.

(iii) *Sun Min’s stated reasons for purchasing Huiyuan shares*

118. It was the effect of Sun Min’s evidence that she decided to purchase Huiyuan shares in July and August 2008 for two reasons. First, she had always been impressed by the company, believing it to be a fundamentally sound enterprise, a leading company in its field. Second, she believed that the timing was right to begin acquiring the shares; after a long period of decline in value she was of the view that the price of Huiyuan shares had now bottomed out and offered positive value for the longer term.

119. Sun Min testified that she was confident in making decisions of this kind even though, on one view, they may be contrary to general market sentiment.

120. As to her general expertise, Sun Min pointed out that she was a graduate of a Beijing university who had attended an MBA programme in the United States.

121. She spoke of honing her investment skills by cultivating relationships with people in the banking and investment fields. In her statement of 8 October 2012, she observed (paragraph 14) :

“ ... it is quite common for me to receive investment ideas from investment professionals, or discuss my investment ideas with investment professionals. As I have invested significant amounts of money with certain banks, funds and brokers, it was part of the service which I expected from them.”.

122. Sun Min also spoke of attending investment seminars and of both herself and her husband subscribing to a large number of newspapers specializing in financial matters : the *Financial Times*, the *Asian Wall Street Journal* and the like. In addition she said, they had a “Bloomberg” terminal installed at the office.

123. Sun Min said that, when she thought it prudent, she would take the advice of Catherine Cheung, the Chief Operating Officer of Transfield Resources. She said that she respected the opinion of Catherine Cheung who was a qualified financial analyst. It had been Catherine Cheung, she said, who had originally recommended Huiyuan prior to its 2007 initial public offering (“IPO”) and who, in or about May or June 2008, had expressed the view that, after such a substantial decline in its share price, she believed that it now

constituted a good buy in order to keep for the long term. Catherine Cheung, when she testified, confirmed that she had in fact, given this advice to Sun Min.

124. It was implicit in Sun Min's evidence that proof of the fact that she was a confident investor was to be found in the nature and extent of her investment activities. By mid-2008, she said, a typical investment by her in a single stock would be between HK\$50 million and HK\$100 million.

125. Sun Min said that, by comparison, her investment in Huiyuan – costing some HK\$37.595 million – was relatively modest, the implication being that, although she favoured the share, she employed a measure of caution in respect of it.

126. In her statement of 8 October 2012, Sun Min listed the equity positions maintained by herself and her husband in their personal accounts and in their investment companies which, as at 31 July 2008, exceeded in value the total amount that was spent, and was to be spent, on the purchase of Huiyuan shares :

<b>Stock</b>	<b>No of Shares</b>	<b>Value (HK\$)</b>
China COSCO	38,012,000	717,666,560
Dryships Inc	627,337	377,414,722
China Shipping Container Lines	147,075,000	375,041,250
Synutra	1,043,888	296,624,951
Tianjin Port	71,704,000	261,002,560
Dalian Port	41,644,000	195,310,360
Zijin Mining	29,574,000	183,358,800
PetroChina	13,127,000	136,783,340
Zhong Xing – Shenyang Comm Buildings	10,507,508	89,974,110
ICBC	10,610,000	62,599,000
China Life	1,510,000	44,922,500
AirMedia Group Inc.	370,370	40,444,404

127. As to why she purchased Huiyuan shares in July and August 2008, Sun Min testified that, having dealt in Huiyuan shares at the time of the company's IPO, she had tracked the slow decline in the value of the shares, all the time maintaining faith in their inherent worth. She said that she had initially planned to begin purchasing Huiyuan shares in about May or June 2008 when she had discussed the matter with Catherine Cheung, her intended strategy being to invest about US\$10 million on a "buy and hold" basis. However, as the share price was continuing to decline, she decided to wait a little until she was able with more confidence to purchase by way of "bottom fishing".

128. Sun Min emphasised that she was not alone in her view that Huiyuan presented a reasonable 'buy' opportunity. At about that time, she said, there were articles in the local media to the same effect. Among the several articles put into evidence by her was one dated 2 July 2008 which appeared in the Hong Kong Daily News under the headline of "Buy in Huiyuan at under HK\$5". In part the article said (in English translation) :

"The China juice market has become more and more popular. It is believed that juice sales will be boosted during the Olympics this year, so a positive outlook can be expected. Anyway, Huiyuan's stock price at the level of HK\$5 below is really attractive. In addition, as trading is not frequent, there is virtually no trading at the lower price region. This signifies that there is certain support for Huiyuan's share price at this level. It is recommended to selectively buy in Huiyuan's shares. The initial target price is within the HK\$6.3 range."

129. In her statement of 8 October 2012, Sun Min summed up her reasoning for purchasing Huiyuan shares in July and August 2008 as follows :

- “(a) Compared with the price of HK\$5.10 paid by Warburg Pincus at the time of Huiyuan IPO, the shares were cheap at a price about HK\$4.00. It was a “bottom fishing” strategy.
- (b) Huiyuan was a “dragon head” enterprise. Besides Wahaha Group, a beverage producer in China, no other enterprise was as successful as Huiyuan. Further, Groupe Danone, a French food and beverage firm, was the second largest shareholder of Huiyuan. With the support and cooperation of a large international business like Groupe Danone, Huiyuan was a very good buy.
- (c) In late 2007, the P.E. ratios of red chips and domestic enterprises was too high. I therefore changed my focus to consumer companies in 2008. At the time of the Huiyuan IPO, the P.E. of Huiyuan was around 30 to 40. In July 2008, the share price was around HK\$4.00 to HK\$5.00 and the P.E. was in the mid-tens. (I relied on ET Net, a stock quote service, for P.E. ratios. I myself do not know how to calculate P.E. ratios.)
- (d) I believed that consumers would drink more juice during the summer and during the Beijing 2008 Olympic Games, and hence sales of Huiyuan products would increase.”.

(iv) *The pattern of buying*

130. As we have said, it was Sun Min’s stated strategy to invest up to US\$10 million in Huiyuan shares, a sum close to HK\$80 million.

131. It was however her evidence that because she was preoccupied with other matters in August 2008, the purchases during the month were intermittent and did not amount to anything like US\$10 million. These “other matters” included a family holiday to Paris in early July, six days spent at the Olympics in Beijing (from 18-24 August), time out of the office tending to the children’s study programmes and then, on 1 September, a flight to the United States via Europe in order to be with one of her children when he sat examinations.

132. Details of the purchase of Huiyuan shares are set out in paragraph 37 of this report. These details show that, having purchased a total of 5,482,000 shares on 30 and 31 July 2008, there were then just three days between 1 and 28 August 2008 when further shares were purchased : 467,000 shares on 7 August, 377,000 on 8 August and 195,000 on 12 August. The final purchase was made on 29 August, more than two weeks after the 12 August acquisition, the shares purchased on that day being 2,092,000.

133. On 29 August 2008, as set out in paragraph 24 of this report the volume of Huiyuan shares traded on the Stock Exchange rose from just 1,361,000 and 2,212,000 on the two previous days to 9,737,000. On 29 August, the share price closed at HK\$4.140; that is, above the \$4.00 mark. History showed that it was the final day of trading before the suspension in trading pending a formal announcement of the conditional cash offer to purchase all Huiyuan shares at a price of HK\$12.20.

134. As to why, after not ordering any purchase of Huiyuan shares for a period in excess of two weeks, Sun Min gave instructions for the purchase of over two million shares on 29 August, in her statement of 8 October 2012 she said :

“We returned from Beijing on 24 August 2008 to Hong Kong. I was busy planning my two boys’ back to school activities and my older son’s university entrance examinations during the week of 25 August 2008, and hence spent little time in the office or thinking about share investments before leaving with Kevin for the US via Europe on 1 September 2008. After I had sorted out my family affairs, I checked the performance of Huiyuan and noticed that, during the period when I had not been paying

attention to the stock market and not bought any further Huiyuan shares, the share price had dropped below HK\$4. I felt that I had missed an opportunity and hence I wanted to buy more shares. I instructed Tera to purchase some more Huiyuan shares on 29 August 2008, which was the Friday before I left for Europe (I left on 1 September 2008, which was the following Monday).”.

135. In her statement of 8 October 2012, Sun Min accepted that she was aware of the markedly elevated volume of trading in Huiyuan shares on 29 August. However, she said she had no idea why that should be. As to why she traded despite the share price rising above \$4.00, Sun Min said :

“I placed VWAP orders so as not to drive up the price and to ensure that the trader executing the order does so in line with volume on the market. In my experience, VWAP order could lower my purchase cost as it was less likely to cause a price spike which would happen if I set a fixed price or limit. I also believed that there was still a chance that share price could go down further, so I placed some VWAP orders and limited my total orders to around 2 million shares. I was prepared to buy more but I wanted to wait and see if the share price would fall again.”.

136. If Sun Min knew of on-going take-over negotiations then the sudden and marked elevation of the volume of trading in Huiyuan shares on 29 August may have been taken by her as evidence of the fact that such negotiations had been successful and that the news was leaking to the market. But, as we have said, it was Sun Min’s evidence that she was ignorant of any take-over negotiations and accordingly could only guess as to why on 29 August the volume of trading in Huiyuan suddenly spiked.

(v) *The use of different corporate vehicles to purchase the shares and different broking houses to execute the purchase*

137. Sun Min denied that anything sinister could be read into the fact that she had used four different corporate vehicles to purchase Huiyuan shares and that three separate broking houses had been employed to execute those purchases. This manner of trading in equities, she said, was normal practice for her and one she considered to be prudent.

138. It was Sun Min's evidence that originally Perth Asset Management was set up to deal with IPO subscriptions, Bombetta Development to deal with options and derivatives and Bartlock Investment to handle US stocks. However, as time went on, the distinctions became blurred so that by mid-2008 all investment companies controlled by herself and her husband were used for all investment purposes.

139. As to why she used separate corporate vehicles to purchase the same share, Sun Min said that she had been educated to understand that, when buying a large block of any single share, it was best not to advertise that fact too openly in order, as far as possible, to avoid a reactionary rise in the price of that share. For that reason she would attempt to diffuse the picture by using several corporate vehicles to purchase the share and would trust her financial advisers to use well-recognised trading practices that enabled them to acquire the share on her behalf at the lowest price. While this may, therefore, be described as a disguised form of trading, it was, as she understood it, entirely legitimate and was widely practiced by major players.



140. As to why she used several different brokers, Sun Min said that she liked to maintain a close relationship with a number of different banks and brokers. This gave her greater access to a broad range of research reports and, when an IPO took place, often gave her a preferred status in the acquisition of the shares being issued.

141. Sun Min testified that Tera Cheung was given a measure of discretion as to which corporate vehicles she used to purchase shares and which broking houses she employed. Tera Cheung understood the need for diversification and put the principle into practice.

*Is any adverse inference to be drawn from the use of different corporate to purchase the shares and the employment of different brokers to execute the orders?*

142. In our judgment, in light of the evidence, it is not possible to draw any adverse inference on the basis that Sun Min used different corporate vehicles and different brokers.

143. It is evident that Sun Min (and her husband) were major investors. It was not disputed that she was accustomed to investing between HK\$50 million and HK\$100 million on any single stock.

144. There is no evidence that – for Sun Min and those in the company – the practice of using different corporate purchasers and different brokers was an unusual one.

145. The reasons given by Sun Min to explain why she traded in the way she did are rational and, in our view, persuasive, especially having regard to her volumes of trading. No adverse inference is to be drawn from the fact that she used several different companies to trade in the same share and employed the services of different brokers.

## CHAPTER 5

### DID SUN MIN KNOW OF THE INFORMATION CONCERNING HUIYUAN CONTAINED IN TERA CHEUNG'S DIARY?

146. The allegation of insider dealing on the part of Sun Min is founded on the single allegation that, at the time when she purchased shares in Huiyuan on the last two days of July 2008 and during the course of August 2008 she must have known of the existence of takeover negotiations for the acquisition of all of the issued shares in the company. It is accepted that there is no evidential basis pointing to how exactly she came into possession of this knowledge but the allegation that she must have been in possession of it at the relevant time is based on the assertion that, having regard to all the circumstances, she must have known of the information contained in Tera Cheung's diary, more particularly the information set out on the page dated 1 August 2008. That entry by Tera Cheung spoke in direct terms of on-going negotiations by way of a "general offer" to acquire the shares of Huiyuan, the issue under negotiation being the exact price per share. Importantly, it spoke of the fact that the largest shareholder had agreed to sell, that person being Zhu, a man apparently much admired by Sun Min.

147. If this allegation of knowledge on the part of Sun Min is not proved to the required standard there is no basis for furthering the enquiry into whether, in purchasing the shares, she was guilty of market misconduct by way of insider dealing. The matter ends there.

148. There is no direct evidence that Sun Min knew of the information in Tera Cheung's diary. Sun Min has made no admission of knowledge while Tera Cheung has no memory either of receiving the information from Sun Min or her husband, Peter Mok, or of receiving information from some third party and passing it on to her or her husband. The only evidence that Sun Min had such knowledge is circumstantial in nature. Accordingly, if we are to find that Sun Min was in possession of such knowledge at a time when she purchased either all or some of the shares in Huiyuan, that finding must be plainly established as a matter of inference from the proved facts.

149. In determining whether that inference has been plainly established or, to put it another way, whether, having regard to all the circumstances, the fact of her knowledge is a compelling inference, it is necessary first to look to the evidence of Tera Cheung, the author of the diary entries.

*Tera Cheung's evidence*

150. Tera Cheung joined Transfield Resources in 1995, working first for Peter Mok as a secretary. She said that in or about 1997, when the company started actively to trade in equities and financial instruments, a small investment department was established and she was given the responsibility of working in that department. By July 2008, when the events which are the subject of this enquiry took place, she had been working in the investment department for over 10 years.

151. It is to be noted in passing that, in addition to working full-time in the investment department, Tera Cheung did a certain amount of equity trading for her own benefit.

152. Tera Cheung said that her duties were to execute the purchase and sale of securities on the instructions of Peter Mok and/or Sun Min and, when instructed, to seek out market information to assist in the profitable operation of the department.

153. In this latter respect, Tera Cheung said that over the years she had cultivated a relationship with a number of representatives of banks and finance houses. Her levels of trading were such that she could be assured of receiving assistance from these representatives and would often receive unsolicited information from them.

154. What emerges from this uncontested evidence is that Tera Cheung was no novice in matters concerning the buying and selling of equities. More specifically, having regard to her evidence, it is clear that she would have understood the importance of information concerning the takeover of a public company, certainly when she was, or had been just a day or so before, purchasing relatively large blocks of shares in that company.

155. It was Tera Cheung's evidence that Sun Min was principally responsible for the operation of the investment department. It was further Tera Cheung's evidence that each and every instruction to purchase or sell Huiyuan

shares in July, August and September 2008 was executed by her under the direct instructions of Sun Min. She received no such instructions from Peter Mok. Her evidence in this regard was undisputed. Nor did other evidence arise to the contrary.

156. As we have earlier indicated, the investment department was made up of a small team. Sun Min bore principal responsibility for the running of the department, assisted by her husband and, when advice was required, assisted also by Catherine Cheung. Tera Cheung would therefore have worked under the immediate supervision of Sun Min and would have reported directly to her. It is important to recognise that this was essentially an intimate team. Indeed, unless a “major” investment was being made, Sun Min herself testified that she would make investment decisions without consulting either her husband or Catherine Cheung and it would therefore be a matter of passing the trading instructions direct to Tera Cheung who would of course be responsible for reporting directly back to her.

157. Formal avenues of communication were not the norm as would perhaps be expected in a much larger organisation. The evidence was uncontested that, while all persons involved aspired to have regular formal investment meetings, it was an aspiration that was fulfilled at best on an intermittent basis. When Tera Cheung testified, she said that there was little need to make a record of the date on which she would come into possession of information because, if she considered it to be material, she would pass it on immediately. Bearing in mind the need to act relatively quickly in respect of

such information, whatever else may be said of Tera Cheung's assertion that she disregarded all time chronologies in her diary, it is entirely understandable that she would have been trained to pass on relevant information without delay. Invariably, that meant passing on the information to Sun Min and, in respect of trading in Huiyuan shares, would certainly have meant exactly that.

158. The essentially uncontested evidence therefore demonstrated that it would have been Tera Cheung's responsibility to keep Sun Min informed of all matters material to her investment in Huiyuan shares and to do so without delay. Two matters of evidence illustrate this.

159. First, it was accepted that on 3 September 2008, when the takeover offer was publicly announced, Tera Cheung telephoned Sun Min that same day in Prague, the capital of the Czech Republic, to inform her of the news and to take instructions from her: in this regard, see paragraph 79 of this report.

160. Second, Sun Min herself testified that, if the matters entered by Tera Cheung in her diary on the page dated 1 August 2008 had been entered on that date, she would have expected Tera Cheung to tell her of those matters; put another way, she would have seen it as part of Tera Cheung's duty to report to her: in this regard, see paragraph 70 of this report.

161. No reason was advanced by Tera Cheung as to why she may have neglected to pass on the information.

162. Although our analysis of all the relevant evidence does not end here, we are able to say that, on a consideration of that evidence, it beggars belief to think that, if Tera Cheung had been the one who had first come into possession of the information concerning the restructuring, acquisition or takeover of Huiyuan she would not without delay have passed that information to Sun Min. It is to be remembered that the ‘Huiyuan operation’, if it may be so described, was, for all practical purposes, a two-women operation : Sun Min giving the instructions, Terra Cheung executing them. Tera Cheung was no novice. She had been involved in the operation of the investment department for many years. She could not have failed to appreciate the potential importance of the information, especially at a time when she had commenced executing buy orders given to her by Sun Min.

163. As to the actual entries in the desk diary, it was never disputed by Tera Cheung that the diary belonged to her and that all entries were in her handwriting. These included the entries on the pages dated Wednesday, 30 July and Friday, 1 August 2008. The entries made by Tera Cheung on these two pages are of particular significance not simply because they make reference to Huiyuan but because of the apparent dates on which the entries were made. The significance of the entries being made on these particular dates lies in the following uncontested matters of evidence :

- On 24 July 2008, just six days prior to the date of the first entry and eight days prior to the date of the second, the Coca-Cola Company and PepsiCo formally submitted their indicative bids to purchase all of the issued



shares of Huiyuan, each stating a price at which they would be prepared to purchase those shares.

- On 25 July 2008, the day following, Goldman Sachs consulted with Zhu, the founder of Huiyuan, as to those bids, the critical issue, of course, being price.
- On Wednesday, 30 July 2008, the apparent date of the first entry in Tera Cheung's diary - an entry which speaks of what had to be a major event in the affairs of Huiyuan, namely, its "reconstruction or acquisition" and the urgent need to gain more information about the company, Tera Cheung made the first purchase of Huiyuan shares under the direct instructions of Sun Min : a total of 2,786,000 shares.
- On Thursday, 31 July 2008, although by then Tera Cheung had received a cautiously worded e-mail from an employee at J.P. Morgan in response to her enquiries and would no doubt have passed on the contents of that e-mail to Sun Min, she made the second purchase of Huiyuan shares under Sun Min's direct instructions: a total of 2,696,000 shares.
- On the same day, that is on Thursday, 31 July 2008, the Board of Huiyuan was formally informed of the proposed sale by the major shareholders of their joint stake in the company.
- It was on Friday, 1 August 2008, that Tera Cheung wrote in her diary of the fact of takeover negotiations. In this context, bearing in mind that her purchases over the previous two days had been made under the direct instructions of Sun Min, we repeat what we have said earlier; namely, that it beggars belief to think that, if Tera Cheung had received this sensitive

information from some third party, she would have neglected to pass it on to Sun Min.

- It was in fact on Friday, 1 August 2008 that Goldman Sachs invited the Coca-Cola Company and PepsiCo to participate in the second round of the auction process.
- Six days later, on 7 August 2008, Tera Cheung received instructions from Sun Min to purchase more shares in Huiyuan and, if Sun Min and she are to be believed, executed that instruction, plus further instructions to purchase given over the next two days, without informing Sun Min of the existence of takeover negotiations.

164. It was, of course, Tera Cheung's evidence that the fact that the information concerning Huiyuan appeared on pages in the diary dated 30 July and 1 August 2008 was coincidental; in short, that there was no intended nexus between the dates on which the information was received by her and the dates appearing in the diary.

165. Intuitively perhaps, it would be expected that Tera Cheung, a woman with considerable secretarial experience who entered information into her desk diary on a regular, almost daily, basis, would do so with direct reference to the date chronology set out in the diary. By way of illustration, if she was given market information which she decided to record, it would be expected that she would enter the record on the page bearing the date on which the information was received. Tera Cheung, however, denied that there was any such rational relationship between the dates contained in the diary and the information she put

down on the pages bearing those notes. It was her unambiguous evidence that she did not use the 2008 desk diary in any way as a diary but solely as a notebook. It was her evidence that, if she needed to make a note of any kind, she would open the diary at random and make her note on the first blank page, or blank part of a page, that fell open. That being the case, the date on which any particular note was written and the date of the page on which it was written had no intended relevance to each other. If there was any link anywhere within the pages of the diary it was purely coincidental. The effect of this startling assertion was that, if she was to be believed, none of her entries had any link to any time-line or date chronology : unless presumably a date was contained in the hand-written entry itself.

166. We accept of course that in the run of a busy day Tera Cheung may not have been punctilious in ensuring that the notes she recorded were all recorded on *that* day's page of the diary or another relevant page. However, we have no hesitation in rejecting the absolutist assertion that the diary was used solely as a notebook with no reference whatsoever at any time to the timeframe contained within the diary itself. In our view, considering her assertion in the context of her evidence as a whole, it was plainly tactical, her intention being twofold; first, to sever any connection between the dates when the entries were made with the almost contemporaneous events that were taking place in respect of the takeover of Huiyuan and, second, to cast the entries adrift from the dates when the purchase of shares in Huiyuan commenced. We have come to this determination – frankly, without any difficulty – for the following reasons.

167. First, a study of the diary as a whole makes it clear that there were entries generally which had to be recorded within the context of a timeframe, for example, some external event influencing matters. In this regard, for example, there is a note on the page of the diary dated Friday, 12 September 2008 which reads : “Lehman. Note, freeze trading.” The meaning of the note is not the important issue. The important issue is the fact that Lehman declared bankruptcy on the first working day after the weekend, that is, on Monday, 15 September 2008. Yet Tera Cheung insisted that the page on which she entered her note and its relationship to the final death throes of Lehman was purely coincidental; in short, that the note might just as well have been entered on a page for the month of February or July and it was no more than serendipity that linked it so closely with Lehman’s actual bankruptcy.

168. Second, whatever practice Tera Cheung may have adopted in respect of the balance of her entries in the diary, it is plain on the evidence that the entries made on the pages dated 30 July and 1 August 2008 were made on those dates. We say so for the following reasons :

- In respect of Huiyuan, the entry on the page dated 30 July 2008 states : “down/upside. Due diligence. Find someone to talk, risk side!” In light of that entry, one would expect to see enquiries being made by Tera Cheung (it being one of her central responsibilities to seek out market information) and that is exactly what the evidence has revealed. On the following day, 31 July 2008, she sent out emails asking for reports on Huiyuan, that date being verified by the date appearing on the emails themselves. There was certainly one reply – from J.P. Morgan – the date

on that email also being 31 July 2008 : in this regard see paragraph 50 of this report.

- The entry on the page dated 30 July 2008 contains a reference to an investment meeting scheduled to take place “next Tuesday”. That would be Tuesday, 5 August 2008. On the following day, 31 July 2008, Tera Cheung sent an email to the other members of the investment department stating in specific terms that a meeting was scheduled for Tuesday, 5 August 2008. In that email she listed the topics to be discussed at the meeting, one of the topics being “Huiyuan”. The entry on the page dated 1 August 2008 contains a reference to that same meeting, that reference appearing at the top of the page with the note : “05/Aug/08. 7 AM meeting”. In this regard, see paragraph 51 of this report. There is therefore a chronological nexus, set by the date of the forthcoming meeting, which bind the entries made on 30 July and 1 August 2008.
- On a more general basis, we are able to conclude that the specific reference on the page dated 1 August 2008 to takeover negotiations must have been recorded at about the time that the diary entry suggests because it was only shortly before that time that confidential negotiations did in fact commence. On the evidence, there had been no earlier negotiations by way of a general offer nor were there any later such negotiations. Put simply, at any earlier or later time of the year, there would have been no basis in fact (or rumour) upon which Tera Cheung could have spoken of takeover negotiations and the principal shareholder’s agreement to the takeover.

169. We are therefore satisfied that the information concerning Huiyuan written into the diary by Tera Cheung was entered on the dates stated in the diary itself, that is, on 30 July and 1 August 2008, at a time therefore when, if she had received the information concerning takeover negotiations from a third party, Tera Cheung would have had compelling reason to pass on that information to Sun Min without delay, there being no known impediment (on the evidence) to prevent her from doing so or to explain why she may have failed in her duty in this regard.

170. As to receipt of the information from a third party, Tera Cheung spoke of the possibility of receiving the information of the takeover negotiations from one of her contacts. She could not put it any higher than that because she protested that she had no memory of events at that time. In our view, this purported lack of memory is not believable. No matter what the size of trading carried out by the investment department, it is to be remembered that the short term trading in Huiyuan shares brought in a profit of over \$50 million and did so within the span of just over one calendar month. Tera Cheung, who had been working in the investment department for over 10 years, executed the purchase orders and the sale orders. She could not have been ignorant of the profit made and the fact that it had been made in such a short span of time. Even if there had been other such advantageous trades in the history of the investment department, this one could not have been so mundane as to be entirely forgotten. The source of the good fortune – whoever the tipster was – would have been fixed in her memory; if not the actual name then certainly the company he or she represented.

171. For the reasons given, we reject the possibility that Tera Cheung received the information contained on the page dated 1 August 2008 from some forgotten contact and for some forgotten reason, or simply by way of pure oversight, neglected to pass on the information to Sun Min. We are satisfied that, if she had received information of such potential importance in respect of Huiyuan at the very time when she was executing substantial purchase orders in respect of shares of that same company, she would without doubt – absent some compelling reason, and no such reason was asserted – have passed that information to Sun Min. On a consideration of all the evidence, we are satisfied that she did not do so because she was not the source of the information contained on the two pages of the diary.

172. In our judgment, an examination of the structure and wording of the entries made by Tera Cheung in regard to Huiyuan give rise rather to the compelling inference that the information contained in those entries was obtained internally. By that we mean that Tera Cheung was either instructed to write down the information in setting out agendas or compiling lists of matters that had to be dealt with internally or that these were matters that arose during the course of internal discussions and which, because of the position she held in the investment department, she decided should be recorded. Further, on a consideration of all the evidence, we are satisfied that the information must have come from Sun Min or, if not, that Sun Min must have known of the information.

173. Turning to the structure of Tera Cheung's notes written into the diary on the page dated 30 July 2008, it will be seen that each item listed in the centre of the page is numbered from 1 to 4. The overall impression given is of a cohesive structure to the notes; not only are they numbered in sequence, the one item appearing beneath the other but, in one manner or another, the notes all appear to relate to matters of investment. The notes were clearly not written independently of each other at different times or on different dates, their cohesion being a matter of pure coincidence. The very clear impression given, one which we are satisfied reflects the truth, is that these notes were written at about the same time either as matters discussed during the course of a meeting or as matters directed to be written down by her by way of an agenda or similar. When we talk of a meeting, we do not mean necessarily a formal investment meeting. We accept that within the investment department matters were dealt with on a more immediate and casual basis. In respect of the notes on this page –

- In so far as Huiyuan (item 4 in the list) was concerned, the recorded instruction (or exhortation) was to obtain information, a direction that, on any sensible reading, must have had an internal source : “find someone to talk, risk side!”. The independent evidence shows that Tera Cheung duly took action in respect of that direction, sending out emails the next day to various finance houses seeking information on Huiyuan.
- By this time, that is, by 30 July 2008, there was some talk (whether by way of debate or instructions given) of events of real importance taking place in respect of Huiyuan. The notes read in part: “Restructuring or acquisition → bigger.”



- The note to the upper right-hand side of the page which refers to a meeting on the following Tuesday clearly suggests a “follow up” meeting, one at which various matters, including information on Huiyuan, would be raised.

174. What must also be borne in mind, giving some context to the apparent urgency concerning Huiyuan, is that it was on this day, 30 July 2008, that Tera Cheung made the first purchase of Huiyuan shares under Sun Min’s direct instruction, that itself being evidence that Sun Min herself was involved in matters concerning the Huiyuan investment at about that time.

175. Turning to the notes appearing on the page of the diary dated 1 August 2008, in our judgment they give the same very clear appearance of cohesiveness. Three principal subjects are listed in numerical order, the one beneath the other. Under the principal subjects there are further subdivisions. We are satisfied that these notes must have been written at the same time : they are structured and, by way of an overview, are unitary in nature.

176. When looking to matters of structure, it is to be observed, for example, that the first principal subject matter is subdivided into four sub-matters. Each of the matters is related to the broader management of TAM investments. The one sub-matter, for example, speaks of Peter Mok being given an updated copy of “the “PL” [the profit and loss account] every Friday. A second sub-matter refers to the requirement for an evaluation or review of the performance of “all funds”.

177. The second principal subject speaks of other investment matters, for example, that Catherine Cheung had arranged, or was to arrange, to meet a person by the name of Danny in respect of a shipping hedge fund of some kind.

178. The third principal subject is “Huiyuan”; very clearly (by that time) an investment matter of immediate relevance.

179. We have already observed that the notes set down on the page dated 30 July 2008 give the very clear impression of having been written at the same time either as matters set down by way of an agenda for a forthcoming meeting or as matters discussed at a meeting and requiring action. The same clear impression is given by the notes appearing on the page dated 1 August 2008.

180. Our impression accords with what Tera Cheung herself, just a year or so after the events in question, accepted was the probability. In the course of an interview in September 2009, Tera Cheung was asked who had given her the information contained in the notes. At that time she said that the matters should probably have been raised at a meeting of Transfield Asset Management but she could not remember exactly who spoke of them. In an interview given a few days later she did not resile from this probability; to the contrary she confirmed that this was probably how the information had come to be recorded by her :

“Q. you said you were told the messages about Huiyuan in [the notes on the page dated 1 August 2008] by someone who was present in a meeting, but you didn’t remember who told you. And at that time,

those who were present in the meeting included Peter Mok, Sun Min, Catherine Cheung and you, right?

A. Probably right.”

181. While therefore, when being interviewed, Tera Cheung would not commit herself, she accepted that, to the best of her memory, it was probable at least that the information recorded by her had arisen during the course of one or more internal meetings, that is, meetings of TAM : Transfield Asset Management. Mere probabilities of memory can have little evidential weight. That is accepted. Nevertheless, they do add some limited extra weight to what we are satisfied is the overwhelming weight of the other evidence. In this regard, it is to be noted that she did not during the course of her interviews speak of any recollection of the representative of a finance house or bank supplying the information concerning Huiyuan directly to her.

182. A study of the manner of the composition of the Huiyuan notes appearing on the page dated 1 August 2008 underscores the correctness of Tera Cheung’s recollection and of our impression. Why else would Tera Cheung commence this note with a record of instructions going to the manner in which she had, or was to, execute the purchase of shares in Huiyuan? This beginning portion reads : “5m shs [shares], PE 13-14 stop buying”. As to this note, it is to be recalled that on the two previous days (30 and 31 July 2008) Tera Cheung had purchased just over 5 million Huiyuan shares on Sun Min’s direct instructions, the exact total being 5,482,000. So that the sentence can be considered in context, we cite the full note again, the sentence constituting the record of instruction being placed in italics :

*“Huiyuan, 5m shs [5 million shares], PE 13-14 stop buying. (1) Someone’s discussing about general offer. Largest shareholder has agreed, but the terms haven’t (illegible), price too high. (2) Anti-trust law in PRC, the state may not agree to sell. There are risk(s). PE may not be able to reflect the post-acquisition PE.”.*

183. As the expert evidence made clear, there are a number of different ways of calculating P.E. It is not necessarily a simple and straightforward calculation. We did not feel confident in determining in the first sentence in the citation about, the one in italics, the exact meaning of the phrase “PE 13-14 stop buying”. But if the sentence that we have placed into emphasis does, in part at least, constitute the record of some form of instruction, as we are satisfied that it must, and if, as Sun Min herself has always accepted, she was the one who gave *all* relevant instructions to Tera Cheung in respect of the purchase of Huiyuan shares, then it must, in some part at least, constitute a record of an instruction given by her, either a record that is wholly historical or a record that is in part historical and in part a direction to the limits of present and/or future action. Why else the phrase : “stop buying”? It was never suggested that Tera Cheung had any discretion as to how many shares she bought in Huiyuan and when. A note to “stop buying” must therefore in some manner have originated with Sun Min.

184. What follows that instruction are the cryptic notes of the on-going takeover negotiations, all of it (that is the instruction regarding purchase and the cryptic notes) constituting the same short body of information, all of it manifestly, in our view, having been written at the same time.

185. In our judgment, looking to the matters which we have set out in this chapter, the single compelling inference to be drawn is that, whether the information concerning Huiyuan on the page dated 1 August 2008 came to be recorded by Tera Cheung as a result of an internal discussion or instructions given, whether the information came from Sun Min herself, which we believe is most likely, or any other party present, the information must have been known to Sun Min by that date.

### *Summary*

186. In our judgment, on a consideration of all the evidence, we are satisfied that the information concerning the “restructuring or acquisition” of Huiyuan and the on-going negotiations for its takeover by way of general offer came to be recorded in Tera Cheung’s diary because that information was given to her internally, that is, as part of instructions given to her or as relevant information that arose during the course of an internal meeting. Whether that information was imparted to Tera Cheung by Sun Min or any other party present, we are satisfied that Sun Min must have known of that information. We are satisfied of this on the basis that it is, on a review of all the evidence, the compelling inference to be drawn.

187. If however, as to who first came to know of the information, it should be held that it is reasonably possible that Tera Cheung herself first came to know of it, we reject any suggestion that she may have failed for some unstated reason to pass it on to Sun Min and to do so without delay.

188. In the result, therefore, we have concluded that the information concerning Huiyuan found in Tera Cheung's diary on the pages dated 30 July and 1 August 2008 was known to Sun Min on the dates on which it was recorded or within a day or two.

## CHAPTER 6

### DID THE INFORMATION IN THE DIARY CONSTITUTE “RELEVANT INFORMATION”

189. Having found as a fact that Sun Min did know of the information contained in the diary and came to have knowledge of it on the dates on which the information is recorded or, failing that, shortly before or shortly thereafter, the question that arises is whether the information constituted “relevant information” as that term is defined in the Ordinance.

190. Pursuant to section 245(2) of the Ordinance “relevant information” means specific information about a corporation which is not generally known to those persons who are accustomed or would be likely to deal in the listed securities of that corporation but which would, if it were generally known to them, be likely materially to affect the price of those securities.

191. Accordingly, “relevant information” must be “specific information”.

192. In considering this issue, we acknowledge that, on the evidence placed before the Tribunal, the extent of the information received by Sun Min can be no greater than the extent of the information set out in Tera Cheung’s jottings. There is no evidence of receipt of any other information concerning the potential takeover. That is not to say however that the jottings define the limits of Sun Min’s knowledge of the affairs of Huiyuan at that time. While we have rejected Sun Min’s assertion that she was at all material times utterly ignorant of any takeover negotiations, it does not follow that we have rejected her evidence

that she had an interest in the fortunes of the company. On her own admission, Sun Min was a sophisticated trader, a person who stayed in contact with the market. The fact that she had at one time purchased shares in Huiyuan supports her own contention that she maintained a continuing interest in the company. We do not dispute the fact that Catherine Cheung, who worked with her and was a chartered financial analyst, had recommended a few weeks earlier that she should consider purchasing shares in the company to hold for the longer term. Such a recommendation would not have been made without some knowledge of the inherent worth of the company.

#### *Understanding the diary entries*

193. Reduced entirely to English, Tera Cheung's note appearing on the diary page dated 31 July 2008 is as follows :

“Huiyuan down/upside. Due diligence.  
Find someone to talk, risk side! How much capital will be blocked.  
(1) Price of raw materials can't control  
(2) Competitor big  
(3) P.E. rose from 7 times to 8  
2009 13 loss big  
D Restructuring or acquisition → bigger  
MS [Morgan Stanley], BNP, coverage report is needed JPM, Jeff”.

194. As we have said earlier, looked at as a whole, the note clearly records the need to carry out “due diligence” in respect of Huiyuan and to do so with some urgency. This latter observation is drawn from the general tone of the note and the fact that the first shares in Huiyuan were purchased that same day.



195. Why the need for investigation, why the need for assessing the “downside” and the “upside” of the company? The only indication in the note is to be found in the phrase “restructuring, or acquisition → bigger”. Both terms – “restructuring” and “acquisition” – cover a broad range of possibilities. A “restructuring” may be a form of “acquisition” and vice-versa. There is nothing in the note which enables the terms to be understood within any more specific ambit.

196. The arrow pointing to the word “bigger” is ambiguous, capable of meaning any number of things.

197. All that can be drawn from the note is that Huiyuan is the subject of some major event in its history, perhaps an acquisition or perhaps a restructuring which may itself be a form of acquisition.

198. Clearly this major event, contemplated or actual and whatever its true nature, offers opportunities. But equally, so the note makes clear, it may present risks, hence the phrase : “find someone to talk, risk side!”.

199. The factual information recorded in the note – other than the implication that Huiyuan is the subject of a “restructuring or acquisition” – does not appear to be confidential, that is, information not known to those who are accustomed or would be likely to deal in Huiyuan shares. For example, the fact that Huiyuan has “big” competitors in the Mainland soft drinks market

would be common knowledge, equally the fact that the “PE” ratio of the shares had been subject to fluctuation.

200. Concerning the information contained in this first note, we are satisfied that, taken on its own, it does not contain sufficient particularity to allow the transaction or event to which it relates to be identified or its nature coherently described and therefore understood. In our view, it is too vague to constitute “specific information”.

201. The first note, however, puts the second note – the one written on the page dated 1 August 2008 – into context. It shows that when the second note came to be written Tera Cheung had known for 48 hours (or thereabouts) that Huiyuan was the subject of some major event in its history, either by way of restructuring or acquisition or a mix of the two.

202. The second note is as follows :

“Huiyuan, 5m shs [5 million shares], PE 13-14 stop buying. (1) Someone’s discussing about general offer. Largest shareholder has agreed, but the terms haven’t (illegible), price too high. (2) Anti-trust law in PRC, the state may not agree to sell. There are risk(s). PE may not be able to reflect the post-acquisition PE.”.

*Does the second note constitute “specific information”?*

203. As elsewhere in the diary, what is written in this note is written in a cryptic form, clearly jottings for Tera Cheung’s own information and recall. The notes patently present a form of shorthand, the essence only of what Tera Cheung has been told. During the course of the hearing it was asserted that the

note was “very vague”. Mr. Witts, the expert called on behalf of Sun Min, was of the opinion that the note would “give the impression that things were at a premature stage”. Such a note, he said, would not influence the share price as even the identity of the “possible bidder” is not revealed. We do not agree. When the note is examined for what it truly says we are of the view that it does possess sufficient particularity to be capable of being identified, defined and unequivocally expressed. There is more there – much more – than mere conjecture. We are satisfied that the following substantive information may be drawn from the note.

204. First, negotiations *are* taking place for the takeover of Huiyuan. The negotiations are not simply an incident of history, already determined. Leaving aside issues of tense construction in written Chinese, the fact that negotiations are on-going is supported by the fact that the consequences of a possible successful outcome are considered : will the State intervene on an anti-trust basis, what may happen to the P.E.? In summary, the note must speak of continuing negotiations, ones that may in the context of commercial reality, have a successful outcome.

205. Second, the structure of the on-going negotiations is known. The negotiations are by way of “general offer”, namely, a bid to buy sufficient of the shares to trigger the requirement to offer to purchase all issued shares. This means that ordinary ‘retail’ shareholders, persons in the position of Sun Min, stand to profit directly if a final agreed offer per share is higher than the depressed price at which the shares are presently quoted on the market. In this

latter regard, if the negotiations are continuing in order to try and reach agreement on the “high” price being requested by Huiyuan, it strongly suggests that a price materially higher than the depressed market price is being demanded and, subject to compromise, will remain materially higher.

206. Third, although the identity of the bidding party is not known, the plain inference to be drawn from the risk of anti-trust interference is that the bidder is a substantial Mainland entity or an international company. Why else would there be a risk of State interference to prevent the effective creation of a monopoly on some form of unfair competition? In summary, the indications are that the party seeking the takeover must be a major player.

207. Fourth, the negotiations consist of more than a mere “fishing expedition”. The largest shareholder, Zhu (also the founder of Huiyuan) has agreed to sell. The negotiations are therefore between a willing buyer and a willing seller.

208. Fifth, the principal issue upon which agreement has not (yet) been reached – unsurprisingly, in the context of a general offer – is the price per share.

209. Sixth, even if negotiations are successful, there is the risk, however, of State interference on the basis of recently promulgated anti-trust (i.e. anti-monopoly) legislation.

210. In our judgment, these six factors point to the fact that there is “a substantial commercial reality” to the on-going negotiations. They have clearly gone beyond a mere testing of the waters and have reached the stage where the parties have an intent to negotiate “with a realistic view to achieving an identifiable goal”<sup>4</sup>.

211. “Specific information” may be general in nature. The fact that, in order to put the information into fuller context, it may be necessary to know something of the company itself does not strip the information of its potency. It was never disputed by Sun Min that at the material time she had some knowledge as a sophisticated investor of the worth of Huiyuan : that it was a dominant company in the field, a company which, even though faced with difficulties in a competitive market, including cash flow difficulties, nevertheless had an inherent worth and potential. As the information in the diary makes clear, the central issue that remained in contention concerning the takeover of the company by way of general offer related to the price of the shares, that itself indicating that a price materially above the current depressed price was being sought. All information, no matter how plain and obvious, must be considered in the context of what else is known. Viewed in that context, we are satisfied that the sum of the information, even though not of itself exhaustive, was clearly specific information.

212. It is true that there is no indication as to the probability of the negotiations being successful but, as this Tribunal has been directed, information

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<sup>4</sup> The phrases in italics are drawn from the judgment of Mr. Justice McMahon in *Firststone International Holdings Limited* cited in paragraph 80 of this report.

may still be specific even if it does not contain any indication that the transaction under contemplation is more likely to be agreed than not. To cite Mr. Justice McMahon again, “it is the nature of the information which determines whether it is specific ... not the commercial probabilities of the subject matter reaching fruition”<sup>5</sup>.

213. We have had no difficulty in coming to the conclusion therefore that the information contained in the second note, (written on the page dated 1 August 2008) was “specific information” in terms of the Ordinance.

*Knowledge on the part of Sun Min*

214. It is necessary to look to the question of whether Sun Min knew that the information which came into her possession was “relevant information”.

215. In our judgment, Sun Min must have known that the information which came into her possession was “relevant information”.

216. Sun Min herself spoke of her experience and skill as an investor, indeed as a successful investor. She spoke of the importance of being kept abreast of information, hence her desire to foster relations with bankers and financial advisors.

217. In the context of Huiyuan’s depressed share price and its perceived cash flow problems in an expanding but nevertheless competitive market, Sun

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<sup>5</sup> Taken from his judgment in *Stime Watch International Holdings Limited* and cited in paragraph 83 of this report.

Min would have been very much alive to the fact that a takeover bid by a major player would be bound to have a material impact on the company's share price, more especially a bid by way of general offer, a bid that on any rational assessment, was being actively negotiated by a willing buyer and – importantly – a willing seller.

218. The question may then be asked, if Sun Min knew that the information which came into her possession at about that time was “relevant information”, why did she not immediately make more purchases? Why wait for several days and then only purchase intermittently in relatively modest amounts, at least until the very end of the month when she made a single large purchase? She was after all used to making investments worth millions of dollars, indeed tens of millions. In this case, however, her purchases were relatively modest. This is a matter to which we have given consideration. On the evidence, there is no indication of why she chose to trade in the way she did in August. That being said, it is not inevitable that a person who receives inside information will risk their all on it. The fact that the information, although specific, is not yet certain in all respects may well motivate a degree of caution. The evidence revealed that Sun Min was a sophisticated investor not necessarily a reckless one.

*What then of the purchase of shares made on 30 and 31 July 2008?*

219. On 30 July 2008, pursuant to Sun Min's instructions, Tera Cheung purchased 2,786,000 Huiyuan shares. On the following day, 31 July 2008, again subject to Sun Min's instructions, Tera Cheung purchased a further

2,696,000 shares in the company. In this two-day period, a total of 5,482,000 were purchased.

220. It was only on the day following, on 1 August 2008, that Tera Cheung wrote the note that we have found contained “specific information”.

221. In our judgment, the note written by Tera Cheung on the page of her diary dated 30 July 2008 – that being the date on which the first purchase of shares was made – was too vague, too uncertain, too ambiguous, to be capable itself of constituting “specific information”.

222. It is not uncommon that what starts as rumour, as a hint that holds out some sort of uncertain promise, takes on more substance as more information is received, being transformed into information that is “specific” in its nature.

223. There is no evidence before us that on the first two days of trading (30 and 31 July 2008) either Tera Cheung or Sun Min knew of the information contained in the second note (the note appearing on the page dated 1 August 2008). If anything, the evidence points the other way.

224. On the basis of the evidence, therefore, it is to be accepted that Sun Min’s purchases on the first two days of trading were as likely as not made on the back of rumour : enticing rumour, yes, but not substantive enough to constitute “specific information”.



225. Accordingly, Sun Min cannot be found liable for insider dealing in respect of those purchases.

*Not generally known ...*

226. By its nature, inside information is information which is known only to a few and is not generally known to the market, the market being defined as those persons who are accustomed or would be likely to deal in the listed securities of the company which is the subject of the information.

227. The question to be determined therefore is whether, at the time when Sun Min purchased the balance of shares in Huiyuan, the “specific information” contained in the second note was generally known to those persons who were accustomed or would be likely to deal in that company’s shares.

228. It is a fact that rumours may emerge from even the most confidential negotiations. Sun Chang described the Huiyuan takeover negotiations as “extremely” price-sensitive and confidential but he accepted that in or about mid-July rumours of the negotiations were circulating.

229. In this regard, he spoke of an exchange of e-mails on 17 July 2008, the first e-mail speaking of a rumour that negotiations were taking place and of his reply of the same dated :

“Let’s monitor stock price movement and if there’s unusual spike we may have to answer questions from the HKSE. Plse talk to Freshfields and get a statement ready and prepare a board meeting to inform directors.”.

230. On the following day Sun Chang received a further e-mail related to a rumour that Goldman Sachs had been appointed financial advisor to Zhu, Huiyuan's principal shareholder.

231. In the course of his testimony (by video link) Sun Chang did not speak of any further rumours reaching his ear.

232. As to his concern that the extent of the rumours circulating on or about 17 July 2008 may be evidenced by a spike in the price of Huiyuan shares, there was no such spike. To the contrary there was a decline in the share price. On 9 July 2008, the closing price had been \$4.690; by 17 July it had fallen to \$4.250 and by the 25 of the month it had fallen further to \$4.080 within a shorter span of time, the closing prices on 16, 17, 18 and 21 July were \$4.290, \$4.250, \$4.120 and \$4.060.

233. Looking to the broader picture, between 16 July and 21 August 2008 the share price declined from \$4.290 to \$3.970.

234. In so far as rumours were circulating in the second half of July 2008 therefore it is evident that there was no general buying on the basis of such rumours. That in itself is an indication that the rumours would have been limited and would seem to have died away in late July and August : the share price continuing its decline.

235. It should also be said that, concerning the existence of rumours, Sun Min did not testify that she bought on the back of any rumours. Indeed it was the thrust of her evidence that she knew of no rumours.

236. On 29 August 2008, the final day of trading before the suspension came into effect, although there was a limited rise in the closing price of Huiyuan shares (up to \$4.140 from \$3.930 the day before) there was a very marked increase in turnover : up from \$8,724,575 the day before to \$40,098,625. On this last day Sun Min purchased 2,092,000 shares. It was her evidence, however, that she had no idea why there had been such a substantial increase in turnover and that she only made her purchases that day because, having been away from Hong Kong, she saw that the share price had continued its decline and felt that she should rectify the earlier missed opportunity.

237. We pause here to say that, in our view, having known of the on-going takeover negotiations since about the beginning of August 2008, Sun Min (an experienced trader) could not have failed to appreciate the very real possibility that the turnover was exploding because certain players in the market had come to learn of a successful outcome to the negotiations.

238. While clearly rumours must have begun to spread on 29 August 2008, nothing has been put before us to indicate that by that date they were so widespread as to be generally known to the market. The fact that a few seek to exploit information does not mean necessarily that the information itself is

generally known to the market. If it was, a greater rise in the price of the shares may have been expected.

239. Accordingly, we are satisfied that between 1 and 29 August 2008 (inclusive) knowledge of the information contained in the second note was not generally known to the market, that is, to those persons who were accustomed or would be likely to deal in the listed securities of Huiyuan.

*Would knowledge of the negotiations, if it was generally known, be likely to have materially affected the price of Huiyuan shares?*

240. “Relevant information”, by definition, is price-sensitive information. It is information which, if generally known, would be likely to have a material impact on the price of a share. Information of no such consequence, information which would be unlikely to move the market or at best only do so to a slight or insignificant degree is not inside information.

241. As set out earlier in this report, the test is hypothetical : what must be determined is how the general investor would have behaved if he had been in possession of the information contained in Tera Cheung’s second note.

242. When he testified, Sun Chang (who had been at the heart of the negotiations) said that the negotiations were “extremely” price-sensitive. To emphasise the point, when dealing with a request by another investment banker which would have required confirming the existence of negotiations, Sun Chang said :

“I did not talk to him [another investment banker] because at that time the transaction was highly secretive and price-sensitive. It was kept on a need to know basis, so I would not talk to anybody outside the small circle of people who were essential to the transaction.”.

243. Clearly, in the opinion of Sun Chang, an experienced investment banker, it was necessary to maintain the confidentiality of the fact of the negotiations themselves not merely the result of their outcome. It was necessary to do so because he considered the fact of these particular negotiations to be price-sensitive information, that is, information that could have a material affect on the share price.

244. Of course, as an investment banker, Sun Chang was trained that all takeover negotiations are confidential and potentially price-sensitive. In our judgment, however, there was good reason to seek to guard the confidentiality of the negotiations in this particular case, more especially information of the kind to be drawn from Tera Cheung’s second note. We say so for the following reasons :

- Huiyuan shares were deeply depressed, having fallen well over 60% since the peak of the share price at \$12.20.
- Huiyuan was perceived to be struggling with cash flow problems in a very competitive market.
- News of a takeover bid by a major Mainland or international company, a company capable of dealing with Huiyuan’s perceived cash flow problems presented a real opportunity for growth.
- A takeover bid by way of a general offer would be good news for retail investors.

245. In this regard, it is relevant, we think, to look to the e-mail received by Tera Cheung on 31 July 2008 from a financial adviser at J.P. Morgan : this is the e-mail referred to in paragraph 51 of this report. In the e-mail the views of the analyst at J.P. Morgan are passed on. Huiyuan's sales growth has slowed resulting in a "poor cash return"; the company has been adversely affected by inflation; the company results in September are not expected to reveal any surprises of a positive nature. The share is rated "underweight", no "excitement" being expected until 2009. On the evidence, this assessment – although in the eyes of some commentators it offered an opportunity to buy at the bottom – was not contrary to market sentiment at the time. In our view, in light of that sort of dull assessment, news of active negotiations by way of a takeover bid would have been seen as just the "excitement" that J.P. Morgan feared might not be coming until 2009.

246. During the course of the hearing it was suggested that the investing public would be dissuaded by the mention of the possible interference of the State authorities in the Mainland, a striking down of the deal on the basis that it offended anti-trust legislation. The legislation had only just come into effect and was at the time the subject of much media comment.

247. As it was, however, when news of the successful negotiations were made public, Huiyuan's share price rose some 164% - despite the continuing risk of the deal being undermined by the anti-trust legislation, indeed the more

so perhaps considering that it was now known that Coca-Cola was the buyer : an American brand and a global one.

248. In our view, having regard to all the evidence, we do not think that the risk of State interference on the basis of the new anti-trust legislation would have deterred the average investor if they had come to know of the on-going negotiations any more than it deterred investors once it was known that successful negotiations had been concluded.

249. The Tribunal has been directed that an examination of how the market reacted once information was in the public domain may well provide the answer as to whether, before it was generally known, it was information likely to have a material impact. In the present case, however, the information made public knowledge was of a different kind to the information to be drawn from Tera Cheung's jottings. The information made public was of negotiations successfully concluded, the company that offered to buy all issued shares at \$12.20 per share being a global brand. The information in Tera Cheung's note by contrast was of on-going negotiations only, the bidding company not being identified, the share price still subject to negotiation.

250. That being said, looking to the factors that we have outlined above, particularly in paragraph 244, we are satisfied that the information contained in Tera Cheung's second note was price sensitive information. We do not suggest that, if it had been made public, it would have had anything like the dramatic impact of the announcement that successful negotiations had been concluded.

On that occasion, all relevant details were revealed, the offer per share being \$12.20 in contrast to the closing price on the previous trading day of \$4.140. Nevertheless, we are satisfied that the information contained in Tera Cheung's second note, if made public, would have stirred the market and, in a considered assessment of the prospect of a successful outcome of negotiations by market participants, would in all likelihood would have had a positive, material impact on the long-term depressed share price.

*Was the information from a "connected" person?*

251. At the outset, it must be said that no evidence came before us during the course of the inquiry to suggest that Sun Chang abused his position of trust by passing any information concerning the negotiations to Sun Min, her husband or any of their employees.

252. Sun Chang gave evidence by video link from Beijing, that being at the time his home and workplace. He accepted that he had known Sun Min and her husband for a number of years; he accepted that he had attended social events put on by them and from time to time had played golf with Peter Mok, Sun Min's husband. He described himself as being friendly with the couple although not a close friend.

253. In the giving of his evidence, Sun Chang impressed as an experienced banker well aware of his ethical obligations. Nothing arose during the course of his testimony to suggest that he would have had reason – any particular reason, that is, other than the bonds of an ordinary and not intimate friendship –



to put his career at risk by passing confidential, price-sensitive information to either Sun Min or her husband.

254. It should also be said that nothing arose during the course of the inquiry to suggest that any other *identified* “connected” person may have passed confidential price-sensitive information to Sun Min and/or her husband related to the Huiyuan negotiations.

255. We are satisfied, however, for the reasons given in this report, that confidential, price-sensitive information concerning the Huiyuan negotiations *was* passed to Sun Min or Tera Cheung on or about 1 August 2008.

256. If the identify of the person (or persons) who passed the information cannot be ascertained, the issue, to be determined is whether, on a consideration of all the evidence, the compelling inference to be drawn is that the source of the information must have been an unidentified “connected” person and that Sun Min must have known of that fact.

257. If the information received by Sun Min (which did not identify the bidding company in the negotiations) had come from any of the following class (or classes) of persons it would have come from a “connected” person :

- an officer of Huiyuan, that is, a director or employee;
- an officer of any subsidiary or an otherwise related company;
- a substantial shareholder of Huiyuan or a related company;

- a person occupying a position which may reasonably be expected to give him access to confidential price-sensitive information by virtue of a professional or business relationship with Huiyuan or any of its related companies. In respect of the takeover negotiations, this last category would include a member of the professional bodies advising Huiyuan : the investment bankers, bankers, business advisers, solicitors and accountants.

258. One possible source of the “relevant information” was rumour. We have accepted that, on the evidence, it was as likely as not that the information contained in Tera Cheung’s first note (dated 30 July 2008) may have been the result of rumour, perhaps the tail of the limited rumours that circulated, at least among a confined number of investment bankers, on or about 17 and 18 July 2008.

259. However, there is nothing to suggest that some two weeks later, on or about 1 August 2008, rumours – now more heavily burdened with detail – were still circulating.

260. In this regard it is to be remembered that the second note conveyed the following information which was of greater substance than the information contained in the earlier rumours :

- that the negotiations were not merely at a preliminary, “testing the water stage”. They were, as we have indicated earlier, sufficiently advanced to

have taken on a particular structure, namely, a bid by way of a general offer and to have focused in on the core issue : the price per share;

- that “the seller” – clearly Zhu the founder and principal shareholder, and no doubt, if the bid was by way of general offer other major shareholders – had agreed to sell;
- that the issue of a potential risk was now being factored into the information, that risk being of a possible State veto exercised on the basis of new anti-monopoly legislation;
- that this last piece of information (of itself) suggested that the bidding company was a major player.

261. What of the proposition that the information – information which accurately reflected the on-going state of play in the confidential negotiations – may have come from a financial adviser? It is to be remembered that on 30 July 2008 Tera Cheung was tasked to carry out due diligence on Huiyuan. In our judgment, however, there is no evidence to support the proposition. If such information had trickled down to the level of a completely unconnected financial adviser it would inevitably have become reasonably widespread and have been reflected in the share price of Huiyuan or at least the turnover in the trading of the shares. In addition, why should a trader reserve the information for Tera Cheung (or Sun Min) only? There was however no noticeable movement. In the share price, it remained flat, indeed it continued to decline, while turnover remained essentially static.

262. In any event, as we have said earlier, if advice had been received in good faith from an adviser by either Sun Min or Tera Cheung they would surely have had some memory of it. After all, a very substantial profit was made within a matter of a month. But Sun Min did not speak of any such advice while Tera Cheung, who appeared to touch on the possibility, only did so in the vaguest of terms and professed no memory.

263. As it is, on 31 July 2008, the Board of Huiyuan had been formally advised of the proposed sale by the major shareholders of their joint stake in the company and had agreed to render as much assistance as was necessary. Put simply, subject to terms being agreed, there was now an agreement to sell. That information was reflected in Tera Cheung's second note of the following day.

264. On 31 July 2008 what would have been known to those closely involved in the negotiations was that the Coca-Cola company had put in an indicative bid of \$11.00 per share while PepsiCo had placed its bid at between \$9.00 and \$10.00 per share. What those closely connected with the negotiations would also have known was that Zhu and the major shareholders were looking for a higher price. Reduced to Tera Cheung's cryptic note, that information would accurately fit into the statement that agreement had not yet been reached – indeed it had not – and that clearly what would be the principal bone of contention was the price per share.

265. In our judgment, information, albeit not exhaustive, of this substance and broad accuracy could not have been obtained at the beginning of August on the tail of a rumour or from some unconnected financial adviser. It must have come from somebody close to the negotiations, somebody therefore, either as a company officer, a substantial shareholder or a professional adviser who was a connected person. In our judgment, that is the single, compelling inference that must be drawn.

266. Must Sun Min have known of the source? We are sure she did know of the source. As we have said earlier in this report, all the evidence points to her personally receiving the information.

267. In this regard, it is important to take into account that both Sun Min and her husband had Mainland connections as well as Hong Kong connections. Sun Min had undergone tertiary education in Beijing. Both their shipping business and their investment business had thrived. By mid-2008, Sun Min estimated that the joint worth of herself and her husband was in the region of HK\$10 billion. Sun Min spoke of cultivating contacts. In general terms, therefore, it is accurate to say that at the time when Sun Min received the inside information concerning Huiyuan she and her husband were a highly affluent, well connected couple. Accordingly, suggestion that Sun Min may have had connections with persons close to the negotiations does not in any way sit uneasily with what, on the evidence, is known of her.

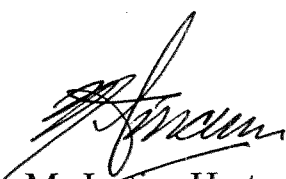
## CHAPTER 7

### CONCLUSION

268. For the reasons set out in this report we have concluded that Sun Min is culpable of insider dealing, contrary to section 270(1)(e) of the Ordinance.

269. This culpability relates to her purchase of Huiyuan shares on 7, 8, 12 and 29 August 2008, the total number of shares being 3,131,000.

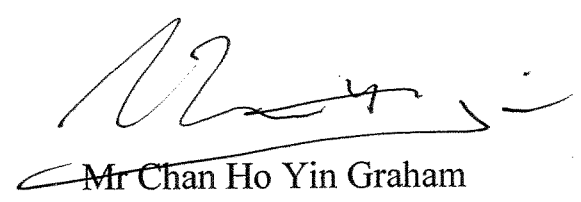
270. The Tribunal has identified no other implicated persons.



The Hon Mr Justice Hartmann JA  
(Chairman)



Mr Chan Chi Hung  
(Member)



Mr Chan Ho Yin Graham  
(Member)

Dated 1 March 2013