

The report of the Market Misconduct Tribunal into dealings
in the shares of China Gas Holdings Limited
on and between 15 November and 6 December 2011

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

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CHAPTER 1

NOTICE AND STATEMENT FOR THE INSTITUTION OF PROCEEDINGS GIVEN BY THE SECURITIES AND FUTURES COMMISSION

1.

IN THE MATTER OF THE LISTED SECURITIES OF CHINA GAS HOLDINGS LIMITED (STOCK CODE 384)

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

Whereas it appears to the Securities and Futures Commission that market misconduct within the meaning of section 270 of Part XIII of the Ordinance has or may have taken place arising out of certain dealings in the securities of China Gas Holdings Limited (Stock Code 384) (the “Company”), 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 or loss avoided as a result of the market misconduct found to have been perpetrated.

Person suspected to have engaged in market misconduct activities

Mr. CHENG Chak Ngok (“**Mr. Cheng**”)

Statement for institution of proceedings

1. The Company is and was at all material times listed on the Stock Exchange of Hong Kong Limited (“**SEHK**”) with stock code number 384.
2. ENN Energy Holdings Limited (“**ENN**”) is and was at all material times listed on the SEHK with stock code number 2688. Mr. Cheng was the Executive Director, Chief Financial Officer and Company Secretary of ENN at all material times.
3. In early 2011, ENN contemplated acquiring the Company and tried to find a partner to fund a takeover (“**Project 128**”). Initial talks were held with China National Offshore Oil Corporation but failed in May 2011, after which ENN approached China Petroleum & Chemical Corporation (“**Sinopec**”).
4. In around the end of October/early November 2011, Sinopec agreed to form a consortium with ENN for Project 128.
5. Mr. Cheng was involved in Project 128 and was responsible for negotiating a financing proposal for ENN in connection with the takeover of the Company.
6. On 7 December 2011, before the market opened, trading in the Company’s shares was suspended pending the release of a price sensitive information announcement.
7. On 12 December 2011, ENN and Sinopec issued a joint Pre-Conditional Voluntary General Offer announcement (the “**Announcement**”) regarding their offer to acquire all of the outstanding shares in the Company at HK\$3.50, representing a premium of 25% to the previous closing price of the Company’s shares.
8. On 13 December 2011, trading in the Company’s shares resumed and the share price jumped 20.4% from the previous closing price of HK\$2.80 to close at HK\$3.37.
9. As the alleged market misconduct took place from 15 November 2011 to 6 December 2011, the Ordinance in force at the material time would be the version before the

commencement on 1 January 2013 of the Securities and Futures (Amendment) Ordinance 2012¹.

Mr. Cheng was a connected person

10. Mr. Cheng was connected with the Company within the definition of section 247(1) of the Ordinance by virtue of his position in ENN and his involvement in Project 128 as set out in paragraphs 2 to 5 above.

Relevant information

11. On 11 November 2011, the following facts were made known to Mr. Cheng during a meeting:-
- (1) Sinopec would be ENN's partner for Project 128;
 - (2) The respective shareholding percentages to be acquired by ENN and Sinopec in the Company;
 - (3) Citigroup Global Markets Asia Limited (“**Citi**”) would be the financial advisor for Project 128; and
 - (4) There would be a kick off meeting for Project 128 on 17 November 2011.
12. On 14 November 2011, Mr. Cheng received a draft Powerpoint presentation by email from Citi containing an offer price range of HK\$3.00 to HK\$3.75 for a voluntary general offer for the shares of the Company.
13. On 17 November 2011, Mr. Cheng came to know the details of Project 128 during the kick off meeting, including the offer price of HK\$3.75 contemplated by ENN and Sinopec for the shares of the Company.

¹ For the purpose of this case there was no material difference between the insider dealing provisions in the version of the Ordinance in force at the material time and the current version of the Ordinance, save that the term “relevant information” has been replaced by “inside information” (while the substantive definition remains the same). References to the “Ordinance” in the rest of this Notice shall be construed as referring to the version in force at the material time of the alleged market misconduct.

14. On 5 December 2011, Mr. Cheng received emails suggesting that ENN and Sinopec were about to proceed with the proposed general offer and that the formal announcement of the general offer would be imminent.
15. On 6 December 2011, Mr. Cheng received an email confirming that Citi had received final approval from its credit committee on the bridging loan to ENN for the general offer.
16. The information set out in paragraphs 12 and 13 above is within the definition of ‘relevant information’ in section 245(2) of the Ordinance, in that it was specific information about the Company which was not generally known to the persons who are accustomed or would be likely to deal in the listed securities of the Company but would if generally known to them be likely to materially affect the price of the listed securities.
17. Mr. Cheng, by virtue of his position in ENN and his background and experience, must have known the above information to be relevant information. Mr. Cheng was therefore in possession of relevant information since 14 November 2011 through to the trading suspension in the Company’s shares on 7 December 2011 and the Announcement on 12 December 2011.

Dealing in shares of the Company by Mr. Cheng

18. Whilst in possession of the relevant information concerning the takeover of the Company by ENN and Sinopec, Mr. Cheng used the securities account of one Li Wei (“Ms. Li”) to purchase the Company’s shares, provided the funds for the purchase of the Company’s shares, and received the proceeds from the subsequent sale of the Company’s shares.
19. Various bid orders for the Company’s shares were placed via the securities account of Ms. Li, a resident of Mainland China and former consultant of the ENN Group, from 15 November 2011 to 6 December 2011. A total of 4,930,000 shares of the Company were purchased for HK\$13,763,605.60.
20. Trading in the Company’s shares was suspended on 7 December 2011, followed by the Announcement on 12 December 2011. Trading in the Company’s shares resumed on 13 December 2011.

21. From 13 to 16 December 2011, all of the Company's shares held in Ms. Li's securities account and purchased during 15 November to 6 December 2011 were sold for a total of HK\$16,752,442.26. A total profit of around HK\$3 million was made.
22. The Commission relies on the following to infer that Mr. Cheng used/controlled Ms. Li's securities account to purchase the Company's shares:-
 - (1) All the internet orders from Ms. Li's securities account for shares of the Company were placed via an IP address belonging to the office of ENN in Hong Kong. Ms. Li was not in Hong Kong at the time the shares were purchased and thus could not have made the purchases;
 - (2) Among the staff working in the office of ENN in Hong Kong, Mr. Cheng was the only person who knew Ms. Li personally and was in close association with Ms. Li at all material times, including the period in which there were fund transfers for the purchase and sale of the Company's shares;
 - (3) Mr. Cheng was in Hong Kong during the dates when the internet transactions took place;
 - (4) Phone calls from the ENN office to Ms. Li were made during the period in which orders for the shares of the Company were made from Ms. Li's account. It could be inferred that it was Mr. Cheng who made those calls as he was the only person among the staff of ENN in Hong Kong who knew Ms. Li personally and the calls were made at a time when Mr. Cheng's time card suggests that he was in the ENN office;
 - (5) A CPA firm in Hong Kong, M Square CPA Ltd, used by Mr. Cheng for receiving correspondence was also used to receive all of Ms. Li's bank correspondence and investment account statements. Such correspondence was passed on to Mr. Cheng. Mr. Cheng thus had possession and control of, and access to, Ms. Li's securities account statements during the period in which orders for the shares of the Company were made from such account; and
 - (6) The timing of the orders for the Company's shares coincides with Mr. Cheng's knowledge of the relevant information. The orders started on 15 November 2011, which was very close to the time when Mr. Cheng started to possess relevant information. Further, a relatively large number of shares were

purchased on 5 and 6 December 2011, just before the trading in the Company's shares was suspended and the general offer went public.

23. Of the HK\$13.7 million used to purchase the Company's shares via Ms. Li's securities account, Mr. Cheng had provided at least HK\$8 million for the purchase. The HK\$8 million was transferred by Xinao HK Holdings Limited ("**Xinao**"), a BVI company owned by Mr. Cheng, to Mr. Fong Man Chun Alen ("**Mr. Fong**", Mr Cheng's acquaintance), who then transferred the money to Ms. Li's bank savings account with Bank of China (Hong Kong) Limited for settlement of the purchases of the Company's shares.
24. In relation to the sale proceeds of the Company's shares, HK\$14.17 million of the HK\$16.7 million was transferred by Ms. Li to Mr. Fong, who then transferred at least HK\$615,233 to Mr. Cheng.
25. By reason of the above matters, Mr. Cheng engaged or may have engaged in market misconduct, namely insider dealing, contrary to section 270 of the Ordinance.

Dated this 14th day of July 2016.

Securities and Futures Commission

Course of the Proceedings

2. Shortly after the issue of the Notice and Statement for the Institution of proceedings the Securities and Futures Commission (“SFC”) served a synopsis dated the 14 July 2016, giving a summary of what was considered to be relevant factual information together with details of the trading in the shares of China Gas Holdings Limited (“China Gas”) said to constitute the market misconduct by way of insider trading.

3. The first directions hearing took place on the 22 September 2016 before the Honourable Mr Justice Hartmann NPJ, Chairman of the Market Misconduct Tribunal. The dates for the hearing were set as were the dates for the serving of documents.

4. The hearing commenced on 6 February 2017 and the evidence was completed on 14 February 2017. Final submissions were presented on 1 March 2017.

CHAPTER 2

THE BACKGROUND AND FACTUAL BASIS FOR THE INQUIRY

The Alleged Facts

5. These proceedings related to the specified person, Mr Cheng and his alleged dealings in the shares of China Gas, a company listed on the SEHK. The period involved was 15 November to 6 December 2011.

6. ENN was a company listed on the SEHK and Mr Cheng was at all material times the Executive Director, Chief Financial Officer and Company Secretary.

7. In early 2011, ENN considered acquiring China Gas and sought a partner. This was designated Project 128. An initial approach to another company failed and in May 2011 ENN approached Sinopec.

8. Around the end of October or early November 2011, Sinopec and ENN agreed to form a consortium for Project 128.

9. Mr Cheng was involved in Project 128 and was responsible for negotiating finance for the ENN takeover of China Gas.

10. Various bids for China Gas shares were placed via the Bank of China (HK) Ltd through the account of one Ms Li, a mainland resident and former consultant of the ENN Group from 15 November to 6 December 2011.

A total of 4,930,000 shares of China Gas were purchased for HK\$13,763,605.60. The SFC contends that it was Mr Cheng who used Ms Li's securities account to purchase these shares.

11. On the 7 December 2011, prior to the market opening China Gas shares were suspended pending the release of an announcement of price sensitive information.

12. On the 12 December 2011, ENN and Sinopec issued a joint Pre-Conditional Voluntary General Offer Announcement (the "Announcement") detailing their offer to acquire all the outstanding shares in China Gas at HK\$3.50 per share which was a premium of 25% on their closing price.

13. On 13 December 2011 trading in China Gas shares resumed. They traded at a closing price of HK\$3.37 per share on the day which was 20.4% higher than the previous closing price of HK\$2.80.

14. From 13 to 16 December 2011, all the Company's shares held in Ms Li's account which had been purchased between 15 November and 6 December 2011 were sold for HK\$16,752,442.26 giving a profit of about HK\$3 million.

The Legal Framework

15. As the market misconduct alleged occurred in November/December 2011 so it falls under the legislation then in force. S. 270(1) of the SFO (2003) then in force provided

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

(a) when a person connected with the corporation and having information which he knows is relevant information in relation to the corporation-

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

N.B. There is no material difference between the provisions then in force and the current provisions save that the term “relevant information” has been replaced by “inside information”.

16. Under s. 247(1) of the SFO (2003)-

“... a person shall be regarded as connected with a corporation if, being an individual-

- (a) ...;
- (b) ...;
- (c) he occupies a position which may reasonably be expected to give 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 office or substantial shareholder of either corporation; or
 - ...
- (d) he has access to relevant information in relation to the corporation and-
 - (i) he has such access by reason 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).”

17. “Relevant information” as defined in s. 245(2) the SFO (2003) means-

“... specific information about-

- (a) the corporation;
- (b) a shareholder or officer of the corporation;
or
- (c) the listed securities of the corporation or their derivatives,

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;”

18. S. 249 of the SFO (2003) also provides-

“... a person shall be regarded as dealing in listed securities or their derivatives if, whether as principal or agent, he sells, purchases ... any listed securities ...”

Mr Cheng was a Connected Person

19. Mr Cheng was connected with the Company (China Gas) within the definition of s. 247(1) of the SFO (2003) by virtue of his position in ENN and his involvement in Project 128 as described in the preceding paragraphs.

Relevant Information

20. In a meeting on 11 November 2011, the following facts were made known to Mr Cheng-

- (1) Sinopec would be the partner of ENN in Project 128;
- (2) ENN and Sinopec would acquire 55% and 45% interest in China Gas;

- (3) Citi would be the financial advisor for the Project; and
- (4) There would be a kick off meeting for Project 128 on 17 November 2011.

Mr Cheng was also instructed to assist and liaise with Citi for the bridging loan to finance Project 128.

21. On 14 November 2011, Mr Cheng received a draft Powerpoint presentation by email from Citi advising of an offer in the price range of HK\$3 to HK\$3.75 for a voluntary general offer for the shares of China Gas. The SFC submits that Mr Cheng read the email and the attached Powerpoint presentation.

The Expert Evidence

22. Mr Cheng Kai Sum (“the Expert”), an independent expert states that information about (i) the interest of Sinopec and ENN to form a consortium to acquire a majority stake in China Gas; (ii) the consortium’s intention to launch a voluntary general offer for the shares of China Gas; (iii) the price range of HK\$3 to HK\$3.75 per share; and (iv) the strategy to launch the offer at a lower price and subsequently improve the offer depending on the acceptance level, was specific information that was not generally known to persons accustomed or likely to deal in the shares of China Gas and was likely to materially affect the price of the shares if known to them.

23. On 17 November 2011, Mr Cheng came to know more details of Project 128. This was at the kick off meeting. Important details such as the assumed offer price of HK\$3.75 per shares in China Gas and also the pre-announcement timetable of the Project.

24. The Expert opined that this information was specific information, not generally known to those accustomed or likely to deal in China Gas shares and in particular the offer price was likely to materially affect the price of the shares if known to them.

25. The SFC suggests that Mr Cheng must have known this information to fall within relevant information. This is based on his position and seniority in ENN and his background and experience so that he knew he was in possession of relevant information since 14 November 2011 through to the suspension of China Gas shares on 7 December 2011.

26. On 5 December 2011, he received emails suggesting that ENN and Sinopec were about to proceed with the proposed general offer and that the formal announcement was imminent.

27. On 6 December 2011, Mr Cheng received an email confirming that Citi had received final approval from its credit committee for the bridging loan to ENN.

28. The SFC contends that given his involvement in the Project, including his role in arranging the bridging loan for ENN, he must have realised that the voluntary general offer and a formal announcement was imminent from the emails of 5 and 6 December 2011.

Dealing in the Shares of China Gas

29. Mr Cheng had been in possession of relevant information since 14 November 2011. This concerned the takeover of China Gas by the consortium of ENN and Sinopec. It is alleged that he used the securities account of Ms Li to purchase shares, provided the funds for such purchases and received the proceeds from the sale of the shares in China Gas.

30. The SFC relies on the following matters and invites the Tribunal to infer that Mr Cheng used / controlled Ms Li's securities account to purchase the shares in China Gas:

- (i) All the internet orders for shares were placed via an IP address belonging to the office of ENN in Hong Kong. Ms Li was not in Hong Kong at the time the shares were purchased, and so could not have made these purchases;
- (ii) Among the staff working in the office of ENN in Hong Kong at the time, Mr Cheng was the only one who knew Ms Li personally and was in close association and contact with her

at all material times including being involved in monetary transactions such as money exchanges and fund transfers with Ms Li. Also he enlisted the assistance of Mr Fong Man Chun Alen (“Mr Fong”) in relation to Ms Li’s fund transfers;

- (iii) Mr Cheng was in Hong Kong during the dates when the internet transactions took place and his time card suggests he was in the ENN office on those days;
- (iv) Phone calls were made from the ENN office to Ms Li during the period in which orders for shares in China Gas were made from Ms Li’s account. The SFC says it can be inferred that Mr Cheng made the calls as he was the only member of staff who knew Ms Li personally and they were made at a time when his time card suggests he was in the office;
- (v) A CPA firm in Hong Kong used by Mr Cheng for receiving correspondence was also used to receive Ms Li’s bank correspondence including bank and investment account statements. Such correspondence was passed onto Mr Cheng. Thus he had possession and control of and access to Ms Li’s securities account statements during the period in which orders for shares in China Gas were made from that account all; and

- (vi) The timing of the orders for the shares in China Gas coincides with Mr Cheng's knowledge of the relevant information. Further a relatively large number of shares were purchased on 5 and 6 December 2011, just before trading in the shares of China Gas was suspended and the general offer went public. In particular, soon after the email notifying ENN that the bridging loan was approved was circulated in the morning of the 6 December 2011 when Mr Cheng carried out an aggressive purchase of China Gas shares via Ms Li's securities account.

31. Of the HK\$13.7 million used to purchase China Gas shares via Ms Li's securities account, the SFC relies upon the following to invite the Tribunal to infer that Mr Cheng provided at least HK\$8 million for the purchase of China Gas shares:

- (i) The SFC contends that at least HK\$8 million of the HK\$13.7 million used to purchase shares via Ms Li's securities account was transferred by Xinao HK Holdings Limited ("Xinao"), a company owned by Mr Cheng, to Mr Fong who then transferred the money to Ms Li's bank account with the Bank of China (HK) Ltd;
- (ii) On 2 and 5 December 2011, Xinao transferred HK\$8 million in total to Mr Fong. Between 2 and 6 December 2011,

Mr Fong transferred at least HK\$8 million to Ms Li as instructed by Mr. Cheng;

- (iii) A relatively large number of shares in China Gas were purchased on 5 and 6 December 2011 allegedly with the HK\$8 million transferred by Mr Fong to Ms Li right before the suspension of trading on 7 December 2011;
- (iv) The proximity in time of (a) the transfer of HK\$8 million by Mr Cheng's company to Mr Fong; (b) the transfer of at least HK\$8 million by Mr Fong to Ms Li; and (c) the purchase of China Gas shares via Ms Li's securities account are too much of a coincidence; and
- (v) The convoluted manner in which the funds used for the purchase of shares were funnelled to Ms Li was done with a view to concealing the fact that the purchase money was sourced from and funded by Mr Cheng.

32. In relation to the sale proceeds of the China Gas shares, HK\$14.17 million of the HK\$16.7 million was transferred by Ms Li to Mr Fong, who then transferred at least HK\$615,233 to Mr Cheng:

- (1) The HK\$14.17 million was transferred to Mr Fong by Ms Li through 2 cheques issued on 28 December 2011, one cheque

issued on 6 January 2012 and one cheque on 16 January 2012;

- (2) On 4 January 2012, Mr Fong transferred HK\$615,233 to Shing Hing Plastic Part Co (“Shing Hing”) which was a money changer. The sum exchanged was RMB500,000;
- (3) Mr Fong then asked his mother to instruct Shing Hing to transfer the RMB500,000 to Mr Cheng’s bank account in Beijing on the same day; and
- (4) The convoluted manner in which the sales proceeds were transferred out of Ms Li’s account which the SFC contends was done with a view to concealing the fact that at least part of the sale proceeds were received by Mr Cheng.

Conclusion

33. On the basis of what is alleged above, it is the case of the SFC that Mr Cheng:

- (1) was connected with China Gas;
- (2) knew of the specific events detailed above;

- (3) knew that the information referred to above was relevant information within the meaning of s. 245(2) of the relevant SFO (2003);
- (4) dealt in the shares of China Gas while possessing such relevant information; and
- (5) made a profit of at least HK\$615,233.

CHAPTER 3

THE BASIC ALLEGATION AGAINST THE SPECIFIED PERSON AND OUTLINE OF LEGAL REQUIREMENTS

The Allegation of Insider Dealing

34. The basis for this inquiry is the allegation against Mr Cheng, the Specified Person, that he engaged in insider dealing using knowledge that had not been made public to make a profit from dealing in the shares of China Gas. This was done by purchasing a substantial number of shares in the knowledge and expectation of a Pre-conditional Voluntary General Offer announcement leading to a takeover bid by the consortium of ENN and Sinopec and then selling the shares after the offer was announced publicly. The allegation is he used the trading account of another person, Ms Li, to effect this dealing.

The Listed Corporation

35. To establish that the Specified Person has engaged in insider dealing, it has to be proved that he dealt in the securities of a listed company. In this inquiry this was not an issue. It is not challenged that at all material times China Gas was listed on the SEHK with stock code number 384.

That the Specified Person was a Connected Person in respect of China Gas

36. This is not an issue in this inquiry there being no challenge by Mr Cheng. Connected to the corporation is defined in s. 247 of the SFO (2003):

- (1) For the purpose of Division 4, 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) ...
 - (c) ...
 - (d) he has access to relevant information in relation to the corporation and-
 - (i) he has such access by reason of his being in such a position that he would be regarded as connected with another corporation by virtue of paragraphs (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...”

37. Mr Cheng was the Executive Director, Company Secretary and Chief Financial Officer of ENN, hence a connected person with ENN in accordance with s. 247(1)(a) of the SFO (2003).

38. The SFC case is that Mr Cheng was in possession of relevant information in relation to China Gas that is the consortium’s intention to make a general offer to all of its shareholders.

39. The relevant information he possessed was by reason of his role as the Executive Director, Company Secretary and Chief Financial Officer of ENN so s. 247(1)(d)(i) of the SFO (2003) applies.

40. The relevant information relates to a contemplated transaction, the intended general offer, involving ENN and listed securities of China Gas so s. 247(1)(d)(ii) of the SFO (2003) applies.

41. Thus Mr Cheng was clearly a connected person so far as China Gas is concerned by sections 247(1)(a) and (d)(ii) of SFO (2003).

The Relevant Information

42. “Relevant information” is defined in s. 245(2) of SFO (2003):

“ “relevant information”, in relation to a corporation, means specific information about –

- (a) the corporation;
- (b) a shareholder or officer of the corporation; or
- (c) the listed securities of the corporation or their derivatives,

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.”

43. Therefore the three essential elements defining “relevant information” are:

- (i) specific information;
- (ii) not generally known; and

- (iii) likely to materially affect the price of listed securities if generally known.

44. In the Report of the MMT relating to Asia TeleMedia Ltd dated 26 November 2015 at paragraph 165, specific information was defined as information which possesses sufficient particularity to be capable of being identified, defined and unequivocally expressed. This is to be contrasted with information which fails to achieve the required degree of specificity being too vague, inchoate or speculative.

45. Information must not be generally known to those accustomed or likely to deal in the listed securities of the corporation. This largely speaks for itself and appears not to be challenged by the Specified Person.

46. The test for whether the information is likely to affect the price is admirably defined in the Report of the Insider Dealing Tribunal in Public International Investments Limited at paragraph 19.4.2 and this Tribunal is very happy to apply that definition:

“... 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....”

In that same report at paragraph 19.4.5 “materially” was defined in the following terms:

“... we think that the word “materially” speaks for itself – it is to be contrasted with “slight”, “insignificant” and “immaterial”...”

47. In the Report of the Insider Dealing Tribunal in the International City Holdings Ltd dated 27 March 1986, the Tribunal observed at paragraph 2.6 speaking of the requirement of materiality:

“... 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.”

The Requirement for Knowledge

48. A person is not to be found guilty of market misconduct by insider dealing simply because he possesses information which determined objectively is found to constitute price sensitive information. The person can only be found to be culpable if the Tribunal is satisfied on a balance of probabilities he possessed the requisite knowledge that it was relevant information at the time he dealt with the shares. Whether a person possesses such necessary knowledge is an evidential point that has to be proved by the SFC for example by admissions made or by drawing inferences from relevant facts and / or the circumstances prevailing.

49. The Tribunal has further directed itself that knowledge includes the state of mind of a person who wilfully shuts his / her eyes to the obvious, such a person denies what in truth he / she knows to be the case by contriving a facade of ignorance.

The Person Must Deal

50. Dealing needs no further definition – it is simply the buying and / or selling of shares.

CHAPTER 4

MISCELLANEOUS MATTERS AND THE TASK OF THE TRIBUNAL

The Settling of Matters of Law and Fact

51. The Chairman gave the directions to the Members of the Tribunal as to the way matters of law and of fact were to be settled in accordance with s. 24(c) of Schedule 9 to the Ordinance.

The Task of the Tribunal

52. The SFC Notice has requested the Tribunal to determine the following matters for the period from 15 November to 6 December 2011:

- (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 or loss avoided as a result of the market misconduct found to have been perpetrated.

The Directions as to Good Character

53. The Chairman gave the members and, of course, himself directions as to the relevance of Mr Cheng's clear record. This was in the style of a "Vye Direction" (R v Vye; R v Wise; R v Stephenson [1993] 1 WLR 471, 97 Cr App R 134). In short the relevance of good record was that such a person's evidence should be viewed as more credible than a person of bad character and that such a person had less propensity to commit the acts alleged.

The Standard of Proof

54. The standard of proof for determining any question or issue before the Tribunal is "the standard of proof applicable to civil proceedings in a court of law". That is on a balance of probabilities. In *A solicitor v The Law Society* (2008) 11 HKCFAR 117, Bokhary P J held-

"... only two standards of proof are known to our law. One is proof beyond reasonable doubt and the other is proof on a preponderance of probability."

55. He also went on to say in the same case that where serious allegations are made and insider dealing must per force be included in that category, the court / tribunal must take extra care:

“The more serious the act or omission alleged, the more inherently improbable it is regarded, the more compelling will be the evidence needed to prove it on a preponderance of probability.”

56. In his judgement in *HKSAR v Lee Ming Tee* (2003) 6 HKCFAR 336, Sir Anthony Mason addressed the proper approach to the drawing of inferences in circumstances of gross misconduct. He 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 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.”

The Burden of Proof

57. The burden of proof, as is inevitably the case in our adversarial system, lies squarely with the SFC even though this is an inquiry. If market misconduct is to be found on the part of Mr Cheng, it is for the SFC to prove it on a balance of probabilities. Mr Cheng for his part bears no evidential burden.

Expert Evidence

58. The Tribunal has received a statement from one expert witness, Mr Cheng Kai Sum. He was an expert witness consulted by the SFC. No expert gave evidence on behalf of the Specified Person and the Specified Person did not challenge the oral testimony of the expert. The expert witness gave his opinions based on facts or perceived facts supplied to him by the SFC. The purpose of the expert evidence is to interpret those facts or perceived facts in such a way to assist the Tribunal with matters which may fall outside its experience and knowledge.

59. The Tribunal has been directed that it is not obliged to accept the evidence of the expert so far as it forms an expression of opinion. Although those opinions should be weighed carefully with due deference to the expert's experience and expertise. In this matter also the Tribunal notes and gives due weight to the lack of challenge to the expert's evidence. The Tribunal is entitled to accept or reject all or part of that evidence, coming to its own

conclusion on such matters based on a consideration of the totality of the evidence.

CHAPTER 5

CONSIDERATION OF THE ESSENTIAL ELEMENTS OF THE ALLEGATION OF MARKET MISCONDUCT BY MR CHENG

The Live Evidence

60. In this matter a full review of the live oral evidence is unnecessary. In general all witnesses gave evidence in line with the SFC's case against the Specified Person. They, as a body confirmed and underlined points made by counsel for the SFC. The expert, Mr Cheng Kai Sum was neither cross examined nor did the Specified Person provide any expert evidence to contradict his evidence. Therefore the Tribunal concluded and accepted that the expert evidence provided was generally agreed as unchallenged. The Tribunal also duly noticed that Mr Fong, the 10th witness for the SFC confirmed his position as an intermediary between Mr Cheng and Ms Li. He confirmed he transferred funds between his own account and that of Ms Li on the instructions of Mr Cheng. He also confirmed the use of his junket account for gambling by Mr Cheng and Ms Li. Also that Mr Cheng was a high roller. He also confirmed he transferred money thereto on behalf of Ms Li.

61. We say nothing more on the evidence. As will be explained later there is as much importance attached to what was not said than what was said.

The Essential Elements of Insider Dealing

Listed Company

62. There was no issue over China Gas being a listed company. It was listed on the SEHK as China Gas Holdings Ltd, Stock Code 384.

Connected Person

63. Mr Cheng did not challenge the fact that he was a connected person with China Gas Holdings Ltd. He was the Executive Director, Company Secretary and Chief Financial Officer of ENN. He was in possession of relevant information, inter alia that a consortium comprising ENN and Sinopec intended to make a general offer to the shareholders of China Gas to acquire their shares at a premium. S. 247(1)(d) of the SFO (2003) therefore applies.

64. He had this information by reason of his role in ENN (see paragraph 63 above). Therefore s. 247(1)(d)(i) of the SFO (2003) applies.

65. The relevant information related to the contemplated general offer involving both ENN and the listed securities of China Gas. Therefore s. 247(1)(d)(ii) of the SFO (2003) applies.

66. Therefore Mr Cheng was and the Tribunal so finds, a connected person with China Gas by virtue of sections 247(1)(a) and (d) of the SFO (2003).

Relevant Information

67. The Tribunal duly noted that for information to be deemed relevant information it has to be information specific to the corporation, its shareholders or officers or its listed securities,. It has to be not generally known to those accustomed to or likely to deal in its securities and likely to materially affect the price of the listed securities if generally known.

68. The Tribunal noted that whilst Mr Cheng did not formally admit he was in possession of relevant information at the time in question he did not seem to challenge that he was in possession of such information. This is clearly demonstrable by Mr. Mak's lack of cross examination of the expert witness and the fact that no contrary expert was produced on behalf of Specified Person.

69. The Tribunal found that the following information came to the attention of Mr Cheng during the relevant period under scrutiny. We bore in mind the dates set for the alleged misconduct which were from 15 November to 6 December 2011. First, there was a meeting involving Mr Cheng, Mr Wang Dong Zhi (the 2nd SFC Witness called) and Mr Yang Yu (who did not attend) on 11 November 2011. From this meeting, Mr Cheng was made

aware of the resurrection of Project 128 and that the partner of ENN would be Sinopec. The object was to acquire shares / takeover China Gas. ENN and Sinopec would acquire 55% and 45% respectively in China Gas. The financial adviser would be Citi. Also there would be a kick off meeting for Project 128 on 17 November 2011. Mr Cheng was to assist in the bridging loan arrangements for the Project.

70. On 14 November 2011, Mr Cheng received an email from Mr Jeff Na of Citigroup dealing with the financing of the Project, which he accepted in his oral evidence he had read. From that he knew the offer price would be in the range of HK\$3 to HK\$3.75 for the voluntary general offer for the shares of China Gas.

71. During or before the kick off meeting held at Sinopec's headquarters, Mr Cheng accepts that he received and read a Powerpoint presentation prepared by Citi. From that he learned further details of Project 128 including the assumed price of HK\$3.75 per share. Also that the project was proceeding with a pre-announcement timetable and there was an initial green light for the bridging loan.

72. On 5 December 2011, Mr Cheng received emails to the effect that the consortium was about to proceed with the proposed general offer and a formal announcement was imminent.

73. On 6 December 2011, Mr Cheng received an email confirming that Citi had received final approval for the bridging loan to ENN.

74. The Tribunal had no doubt that these important pieces of information put together and indeed, in some cases standing alone amounted to relevant information within the definition of s. 245(2) of the SFO (2003).

75. The information was specific, relating to the corporation and the listed securities, it was not generally known to persons accustomed or likely to deal in the Company's shares and was likely to materially affect the price of the Company's shares if known to them.

76. The Tribunal came to the findings shown above, taking into account the unchallenged evidence of the expert called by the SFC. That evidence is entirely clear on these points.

Knowledge of the Information being Relevant Information

77. The element of knowledge that the information is relevant information was explained by the MMT in Asia TeleMedia Ltd Report dated 26 November 2015:

“178. A person is not [to](sic) be found culpable of market misconduct by way of insider dealing because he possesses information which, determined objectively, is found to constitute

price sensitive information. That person may only be found culpable if the Tribunal is satisfied that he possesses the requisite knowledge, that is, that at the time he dealt in the shares he knew that the information in his possession was price sensitive.

179. Whether a person possesses the necessary knowledge is a matter of fact that may be proved directly, for example, by way of an admission against interest, or inferred from the relevant facts and / or circumstances.

180. The Tribunal has further directed itself that knowledge includes the state of mind of a person who wilfully shuts his eyes to the obvious; such a person denies what, in truth, he knows to be the case by contriving a façade of ignorance.”

78. At this point the Tribunal put to one side the question of dealing in the shares of China Gas and simply concentrated on whether Mr Cheng had been shown by the evidence to have the requisite knowledge that the facts amounted to relevant information, on a balance of probabilities.

79. The Tribunal took into account the nature of the information, it being an intended general offer for the shares in China Gas at a price substantially above the prevailing market rate with the intention of a takeover. Also we weighed Mr Cheng’s expertise and experience as the Executive Director, Company Secretary and Chief Financial Officer of ENN. In

addition we also considered the unchallenged opinions of the expert and the status and nature of those opinions. Our conclusion was that it was inconceivable that Mr Cheng could have viewed this as anything other than relevant information. His protestations regarding the problems of the bridging loan affecting the credit rating of ENN were complete “red herrings”. We were satisfied beyond a shadow of a doubt that he knew full well the facts he possessed amounted to relevant information. We find accordingly.

CHAPTER 6

THE QUESTION OF WHETHER THE SFC HAS SHOWN THE SPECIFIED PERSON TO HAVE DEALT WITH THE SHARES OF CHINA GAS

Preliminary Matters

80. The Tribunal found China Gas to be a listed company, and Mr Cheng to be a connected person thereto. Also he was in possession of relevant information which he knew to be such. The Tribunal had now to consider if the SFC had proved he had dealt in the shares to the requisite standard of proof.

81. The Tribunal notes that throughout Mr Cheng has consistently denied dealing in the shares of China Gas. He denied it in both his interviews with the SFC, in his statement for this hearing and maintained that position when giving evidence to the Tribunal. We noted that he was unshaken on that point and bore in mind the directions as to character referred to earlier.

82. Over and above the matters referred to above the Tribunal found certain matters to be proven to the level required by direct evidence. Inter alia, that various bids for China Gas shares were placed via the Bank of China (Hong Kong) Ltd securities from the account of Ms Li, a resident of Mainland China and former consultant of ENN Group between 15 November and 6 December 2011. A total of 4,930,000 shares were purchased at a cost of

HK\$13,763,605.60. Those shares held in Ms Li's account were then sold in the period of 13 to 16 December 2011 for a total of HK\$16,752,442.26. Thus making a profit of about HK\$3 million. This is based on the rise in the share price. Trading in the Company's shares resumed on 13 December 2011 having been suspended since 7 December 2011. On 12 December 2011 the consortium of ENN and Sinopec issued the Pre-Conditional Voluntary General Offer Announcement regarding their offer to acquire all of the outstanding shares of China Gas at HK\$3.50. On resumption of trading the shares jumped 20.4% from their closing price at the time of suspension of HK\$2.80 to close at HK\$3.37.

83. As stated previously the SFC's case is that, it was Mr Cheng, the Specified Person, who used Ms Li's securities account with the Bank of China (Hong Kong) Ltd to purchase and then sell those shares. The Tribunal noted that there was no direct evidence of this, Mr Cheng having denied this throughout and no evidence having been received from Ms Li. The Tribunal also noted that Ms Li's trading account during November and December 2011 was actively trading in other stock apart from China Gas so it was an active account. This raised questions in our mind, unaddressed by the SFC.

84. The SFC case is based on inferences to be drawn. The principles in relation to circumstantial evidence and the drawing of inferences has been set down by the Court of Final Appeal in *HKSAR v Lee Ming Tee* (2003) 6 HKCFAR, 336 at paragraph 72 and adopted by the MMT in the Report re Asia

TeleMedia Ltd dated 26 November 2015, previously quoted at paragraph 56 and quoted again for ease of reference.

“... 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 ... 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.”

The Tribunal noted the need for any adverse inference drawn to be based on proved facts and of a compelling nature. That we must not indulge in mere conjecture and that the burden of proof, as always, rested with the SFC.

85. The Tribunal noted that the SFC sought to persuade it of Mr Cheng’s market misconduct by drawing compelling inferences from:

- (a) the sources from which the bids for shares were made;

- (b) the timing of the bids, given Mr Cheng's possession of relevant information including the anticipated General Offer;
- (c) the flow of funds between the 3 principal parties – that is Mr Cheng, Mr Fong and Ms Li; and
- (d) Mr Cheng's relationship with Ms Li and control of her bank account, securities account and correspondence which came to him at all material times.

Mr Cheng's Control of Ms Li's Accounts

86. The Tribunal considered all these elements jointly and severally in detail. We began with point (d) which was Mr Cheng's involvement in the affairs of Ms Li. As the SFC had not called or obtained any record of interview from Ms Li the only history of their relationship and dealings was provided by Mr Cheng himself. Thus the Tribunal accepted the chronology of events laid before it by Mr Cheng. From this we accept that as far as Mr Cheng knew she was a consultant of the Parent Company, providing consultancy services on external relations with the government and the public. She was based at the head office in Langfang, Hebei. Mr Cheng had known her from the early 2000s, meeting at a social function or training event. He had been told she was a person of some importance to the Company and highly valued by the top management. He was instructed always to ensure she was

taken care of and helped. They met from time to time when Mr Cheng went to China. He entertained her requests on a few occasions – these were made directly by her or indirectly. In 2005 he assisted her when she was in Hong Kong to open an account with the Bank of China (Hong Kong) Ltd. He also, at her request, assisted her to make remittances to Macau for gambling. To facilitate this he introduced Mr Fong who was willing to make fund transfers to his “Remark Account” in Macau so others could gamble including Mr Cheng.

87. Also from time to time, he bought luxury items for her which were sent to the Mainland. These items included handbags. He would keep the receipt and she would reimburse him. In return Ms Li assisted him with money exchanges as she had good contacts.

88. Mr Cheng said, with reference to transactions under investigation, that in early December 2011 he received a phone call from Mr Zhao Xiaowen, Vice President of ENN Solar Co. Ltd to make a payment of the HK Dollar equivalent of US\$1 million to Ms Li. Mr Cheng said because of Ms Li’s status he decided that the approximate US\$1 million balance he had with Mr Fong which he had previously remitted for gambling in Macau should be used for this purpose. Therefore he asked Mr Fong to effect this transfer. The Tribunal noted two matters, the first being that we did not have the benefit of evidence from Mr Zhao and Mr Fong largely supported his evidence.

89. The Tribunal noted also the SFC’s contention that Mr Cheng had control of Ms Li’s bank accounts because all correspondence relating to them

were sent to a CPA Firm in Wanchai. It was then passed to Mr Cheng and ENN. Further that he also gave directions to Mr Fong to transfer money into her bank account and to dispose of funds transferred from her bank account. The Tribunal, however, could find no hard evidence that Mr Cheng had any authority, ability or in fact did so deal in her securities account. This seems to be an assumption on the part of SFC denied by Mr Cheng. The SFC rely upon inferences to be drawn.

90. Central to the allegations made by the SFC is the role played as a sort of “middleman” by Mr Fong in moving funds between Mr Cheng and allegedly Ms Li. From the evidence, and this is not contradicted, Mr Fong had met Mr Cheng in 2010. The former was a stockbroker who also was, it seems, a large scale gambler. Mr Cheng’s evidence supported by Mr Fong is that both trading in shares and gambling were facilitated by Mr Fong. That is to the extent that Mr Fong had the “Remark Account” in various casinos in Macau which was used by Mr Cheng and allegedly by Ms Li to ease and facilitate their gambling activities by holding funds for their use. Mr Fong gave no evidence of dealing with any funds relating to share purchases or sales involving the shares of China Gas.

Source of the Bidding Orders

91. From records provided by Bank of China (Hong Kong) Limited, Ms Li’s securities account reveal that most of the bidding orders for China Gas shares between 15 November and 6 December 2011 were made through the

internal platform and originating from the IP address subscribed to by ENN for its offices at Units 3101 – 3, Tower One, Lippo Centre, 89 Queensway, Central. That is from the computers in the offices of ENN. According to Immigration records Ms Li was not in Hong Kong between 5 October 2011 and 14 April 2012. Therefore she could not personally have placed those orders herself.

92. The days when the bidding orders emanated from computers in the offices of ENN were 15, 23, 24, 28 November and 5 and 6 December 2011. The evidence showed that in ENN's office there was a system whereby less senior members of staff clocked in and clocked out. Thus the SFC could show present in the offices at the time were Ms Ko Chau Ping (Witness No. 7), Ms Cheung Wai Yee (Witness No. 5) and Ms Lin Wei (Witness No. 6). All three claimed to have no knowledge of Ms Li. Other members of staff present returned questionnaires to the SFC indicating the same. These others were not and could not be cross-examined. Mr Cheng was not required to clock in and out but his evidence was that he did show the time of leaving the office voluntarily for record purposes. His records showed he left the office on each of the relevant days but there was no record of the time of his arrival. The Tribunal took note of two matters, the first being that at the very best, even if totally accepted, this showed he was in the office at some stage but not necessarily at the time of the making of the bids. Secondly whilst Mr Cheng accepted this information as being "basically" correct he did say on occasions when he was in Hong Kong, but working out of the office he would sometimes phone in to have a member of staff mark his out card to show he was working

and “not sick or anything”. The Tribunal noted that there was nothing to contradict this.

93. It was also apparent to the Tribunal that from time to time other persons, especially those from Hebei Head Office would attend the office of ENN during this period as the evidence given by Mr Wang Dong Zhi establishes. These people would not clock in and out. There were also others, such as the wife of Mr Cheung Yip Sang, Ms Agnes Lam who had an office in the suite of rooms as evidence given by Ms Cheung Wai Yee establishes. We also noted the floor plan of the office produced dated January 2010 showed a Mr Joseph Bailey but we took no account of this as there was no information to establish him as present in November / December 2011. The evidence established that within the offices there were more than one, if not several computers and there was nothing to connect the orders to a terminal under the exclusive control of Mr Cheng.

94. In short the Tribunal found that the evidence placing Mr Cheng at the offices of ENN at the date and time of each internet bid was tenuous given the lack of actual times he was present, the explanation of occasionally phoning in to instruct others to clock in him out and simple possible human error. We were therefore not satisfied that this aspect of the evidence had much probative value at all.

95. We accepted that it was not possible to trace the bids to any particular terminal within the offices as stated above. Also that despite the

best efforts of the SFC, the evidence did not exclude the possibility of other persons being in the offices who were not required to clock in and out and that these were persons with possible connections to Ms Li. We note too in Mr Yu's written reply to the Specified Person's final submission, despite his assertions to the contrary it is not incumbent on Mr Cheng to provide evidence, it is for the SFC to show there was no one connected to Ms Li.

96. Between 16 and 22 November 2011, it is fully accepted all orders were placed through the smartphone platform with none emanating from the internal platform of ENN computers within the Hong Kong offices. This was a time when Mr Cheng was absent from Hong Kong as the Immigration Records showed and is not contradicted. However, the records showed that China Gas shares were purchased through Ms Li's account by smartphone not just in periods when Mr Cheng was out of Hong Kong but also on 15 and 25 November and 5 December 2011 thus detracting somewhat from the probative value of the use of the phone while absent. There is no evidence as to who used the phone nor indeed whose phone was used. We could not rule out the possibility of it being Ms Li herself.

97. The Tribunal could see no significance at all in the two phone calls made on 22 November 2011 from ENN's offices to a phone number registered to Ms Li.

The Flow of Funds

98. The Tribunal noted this was a crucial plank of the case put forward by the SFC. However the Tribunal found a lack of cogent evidence to connect Mr Cheng, Mr Fong who was the alleged middleman or conduit and Ms Li. The total value of shares purchased in the relevant period of 15 November to 6 December 2011 via the trading account of Ms Li was HK\$13,763,605.60 which came from her saving's account with the Bank of China (Hong Kong) Ltd. HK\$10,800,000 of this was transferred from Mr Fong to that account:

- (a) HK\$500,000 on 21 November 2011;
- (b) HK\$1 million on 22 November 2011;
- (c) HK\$300,000 on 22 November 2011;
- (d) HK\$3.5 million on 2 December 2011;
- (e) HK\$4.1 million on 5 December 2011; and
- (f) HK\$1.4 million on 6 December 2011.

99. Out of the sum of HK\$10,800,000, HK\$8 million came from the bank account of Xinao, Mr Cheng's wholly owned company via two cheques each in the sum of HK\$4 million dated 2 December 2011.

100. After all the shares in China Gas in Ms Li's account were sold between 13 and 16 December 2011 for HK\$16,752,442.26, a total sum of HK\$14,170,000 was transferred from Ms Li's savings account with Bank of China (Hong Kong) Ltd to Mr Fong's account by three cheques of HK\$4 million, two dated 28 December 2011, and one dated, 6 January 2012 and a fourth cheque of HK\$2,170,000 dated 16 January 2012.

101. Mr Fong then transferred HK\$615,233 to a money exchange agent to remit RMB500,000 to the personal account of Mr Cheng, in Beijing.

102. From the interviews of Mr Cheng and Mr Fong with the SFC, the following details emerged:

- (a) Ms Li was introduced to Mr Fong by Mr Cheng;
- (b) Mr Fong would transfer funds to and receive funds from Ms Li's bank account;
- (c) Mr Fong had never met Ms Li nor had a phone conversation with her;

- (d) All requests in relation to the fund transfers to and from Ms Li's bank account were made by Mr Cheng to Mr Fong; and
- (e) In respect of the HK\$8 million from Xinao, Mr Fong was specifically requested, by Mr Cheng to use the money to make a transfer of US\$1 million to Ms Li.

103. Mr Cheng explained how this came about in his witness statement and in his evidence to the Tribunal. He received a phone call around beginning of December 2011 from the Vice President of ENN Solar Energy Co. Ltd, Mr Zhao Xiaowen for the payment of US\$1 million to Ms Li. He was aware of Ms Li's standing in the Company, that Mr Fong had had dealings with her before so knew her bank details and he held roughly US\$1 million with Mr Fong's account previously transferred to him for gambling in Macau. Therefore he asked Mr Fong to transfer the US\$1 million to Ms Li. It is unfortunate that the Tribunal did not have the benefit of evidence from Mr Zhao or even a statement from him.

104. The source of the US\$1 million from the statement of Mr Cheng and his evidence while somewhat confusing, appears clearly to have been from the two cheques dated 2 December 2011 each in HK\$4 million. One was deposited on 2 December 2011 and one was apparently dishonoured but was re-presented and deposited on 5 December 2011. Mr Cheng's evidence was to the effect that these cheques were intended for gambling in Macau but he

used the funds to assist Ms Li. It appears that Xinao received US\$1 million on 17 December 2011.

105. The Tribunal noted that whilst the SFC challenged Mr Cheng on the basic details of this transaction, he maintained his version and kept to his main theme despite this. There was, we found much to give pause for thought but little real substance in the SFC challenges.

106. The SFC case was that from the proceeds of the sale of the shares the only sum going directly to Mr Cheng from Mr Fong, not we note Ms Li, is the HK\$615, 233 concerned to RMB500,000 on 4 January 2012 and deposited to Mr Cheng's bank account in Beijing. However, Mr Cheng's case was that this was not from the proceeds of the sale of any shares but simply funds held by Mr Fong and he needed money on the mainland. The Tribunal noted that this could not be contradicted.

Chapter 7

THE FINDINGS OF THE TRIBUNAL AS TO MARKET MISCONDUCT

107. The Tribunal carefully considered all the evidence and submissions made and now gives its decision as follows.

108. The Tribunal is satisfied on a balance of probabilities that the Specified Person, Mr Cheng is a connected person so far as China Gas is concerned, it being a listed company on the SEHK with the Stock Code 384. Further that the information that Mr Cheng acquired in relation to Project 128 by a consortium comprising ENN and Sinopec, to issue a Pre-conditional Voluntary General Offer Announcement to acquire all outstanding shares in China Gas at HK\$3.50 per share clearly amounted to relevant information. Further that the Specified Person was fully aware that this amounted to relevant information.

109. We then turned to the question crucial to the Inquiry, as to whether on a balance of probabilities the SFC has shown that the Specified Person dealt in the shares of China Gas. To do so the SFC relied entirely on inferences to be drawn from the facts.

110. As we know the allegation was that he, based on his inside information between 15 November and 6 December 2011 on various days purchased 4,930,000 shares in China Gas for a total expenditure of

HK\$13,763,605.60 using the securities account of Ms Li, a lady who was not in Hong Kong at the time. The shares in China Gas were suspended before the market opened on 7 December 2011 pending the release of price sensitive information.

111. On 13 December 2011 trading resumed after the announcement and the price of shares had risen from their closing price on 6 December 2011 of HK\$2.80 to close on the day of resumption at HK\$3.37, an increase of 20.4%.

112. From 13 to 16 December 2011, all China Gas shares held in the account of Ms Li were sold for a total of HK\$16,752,442.26, yielding a profit of about HK\$3 million.

113. The Tribunal noted from the outset that there was no direct evidence that he had dealt in those shares. The SFC invited the Tribunal to draw compelling inferences from the circumstances that prevailed to be satisfied on a balance of probabilities that he dealt as alleged.

114. In Chapter 6 of this report we have dealt in some detail with the main planks of the case put forward by the SFC.

115. The bidding for shares via the securities account of Ms Li emanated from two sources, the computers in ENN offices and by smartphone. The Tribunal noted that it was not possible to identify which terminal was used in the offices of ENN. It was clearly established that these were more than one

but the exact number is not known. The Tribunal noted that there was some evidence of Mr Cheng being in the office on the days but not specifically at the time at which the orders were placed by reason of his clocking out record. The Tribunal found this not to be an entirely reliable basis, certainly not to the extent to be satisfied to the requisite level that he was in the office at the time and date on which each bid was made. We accept that on occasions he would arrange for the record when not physically present. We note he did agree the dates to be basically correct, but this falls short of full acceptance.

116. In relation to the use of the smartphone to make bids, the SFC case is that he was doing this when absent from Hong Kong as he had no access to ENN computers. We accept bids were made in this way when he was in China between 16 and 21 November 2011. But note also such bids by smartphone were placed on 15 and 25 November and 5 December 2011, so somewhat disrupting the pattern and chipping away at the probative value. As we have said, the Tribunal could not rule out the possibility, in the absence of more evidence, that it was Ms Li herself or someone else using the smartphone.

117. In our final analysis we could not find on a balance of probabilities that the evidence was strong enough to draw compelling inferences that Mr Cheng used the computers of ENN or a smartphone to place orders. We note during the time span in question other trading was taking place in that securities account of Ms Li. There are other possibilities from the facts other than it was Mr Cheng trading.

118. In respect to the time frame for the making of the bids from 16 November to 6 December 2011 we were satisfied Mr Cheng did have the necessary relevant information and that raised suspicions against him but that in itself was not sufficient to find him guilty of market misconduct.

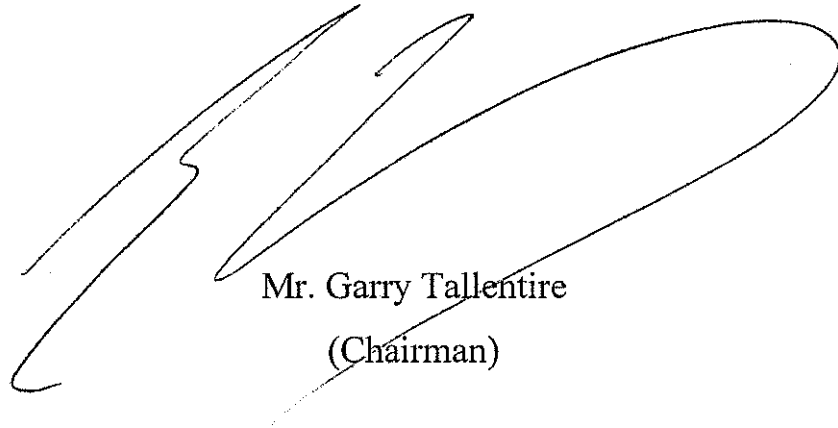
119. As to the flow of funds to which reference has been made in the previous chapters. Without reciting the facts again, we did find it suspicious, given the connection between Mr Cheng, Ms Li and Mr Fong. However, the flow from Mr Cheng to Ms Li via Mr Fong and then back again was short of providing compelling evidence of Mr Cheng's trading. To put it simply the only flow was HK\$8 million dollars to Ms Li, for which an explanation was given which was not totally convincing nor yet was it totally discredited. That is far short of the purchase price of over HK\$13 million. The alleged flow back to Mr Cheng was even less probative being merely just over HK\$600,000. We were not able to draw any inferences of balances being held, perhaps in Macau for later collection as seems to be implied. We also viewed this against the background of the three parties being heavily engaged in Macau gambling which the SFC apparently accepts from the way the case was presented.

120. Perhaps the ultimate hurdle that the SFC could not overcome was the vagueness about the actual relationship between Mr Cheng and Ms Li. We know the mechanics of the arrangements but whilst this raised suspicions we did not know the extent to which Mr Cheng had authority and control over

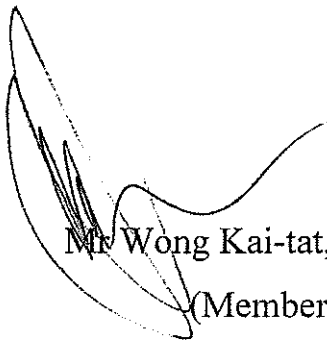
her accounts. Nor indeed, if Mr Cheng was the only person with any control. Without Ms Li the picture was a blur – the puzzle incomplete and vague.

Conclusion

121. The Tribunal in the final analysis acknowledges the efforts of the SFC to investigate a very suspicious scenario but we were driven to conclude for all the reasons in the report that in all the circumstances we could not be satisfied on a balance of probabilities that the Specified Person, Mr Cheng had committed market misconduct by way of insider dealing. Therefore we so rule.



Mr. Garry Tallentire
(Chairman)



Mr Wong Kai-tat, Dickson
(Member)



Mr Kam Chi-chiu, Anthony
(Member)

Dated 23 March 2017