

## CHAPTER 13

### THE LAW : A DETERMINATION OF ANY PROFITS GAINED OR LOSSES AVOIDED IN THE SALE OF SUNNY GLOBAL SHARES.

293. As required by the Financial Secretary's notice dated 27 August 2007, and having found that Mr Wilfred Hung, Mr Joe Chan and Ms Tsoi Yung Yung were culpable of insider dealing in the disposal of their holdings of Sunny Global shares in June 2003 and that Ms Katherine Yu, Mr Lee Man Fa and Info Fortune were culpable of knowingly or recklessly disclosing or authorising the disclosure of false or misleading information, the Tribunal went on to consider :

“.. the amount of any profit gained or loss avoided as a result of the market misconduct.”

(section 252(3)(c) of the Ordinance).

#### The Law.

294. Although Section 252(3)(c) of the Ordinance requires that the Tribunal determine the amount of any profit gained or loss avoided as a result of the market misconduct the Ordinance gives no specific guidance of how the calculation is to be made. However, the proper construction and ambit of the terms “.. profit gained or loss avoided” in the context of their use in section 23(1)(b) of the Securities (Insider Dealing) Ordinance, Cap. 395, namely “.. as a result of the insider dealing”, was considered by the Court of Final Appeal in the *Insider Dealing Tribunal v Shek Mei Ling* [1999] 2 HKCFAR 205. In his judgment, with which all the other judges agreed, Lord Nicholls of Birkenhead noted : (page 209 I-J)

“The purpose of an order under s 23(1)(b) is to strip from the insider dealer the amount of the profit gained by him as a result of the insider dealing. He is not to be allowed to retain his ill gotten gains.”

295. Of the phrase “profit gained” Lord Nicholls went on to observe : (page 210 B-D)

“To be within the scope of a financial order there must be a ‘profit’ that is ‘gained’ by the person in question, whether the insider dealer or someone else, and it must have been gained ‘as a result of the insider dealing’. A comparable limitation applies to ‘loss avoided’. As a matter of statutory interpretation, two points seem clear. The first point can best be explained by taking the simple case of a person connected with the company who acquires confidential price sensitive information and buy shares in anticipation of a rise in the market price. In due course, when the information becomes public knowledge, the price rises and the insider dealer sells the shares. *Prima facie* the difference between the purchase and sale prices, neither more nor less, is the amount of the profit gained by the insider dealer as a result of the insider dealing.”.

296. Having noted that markets do not operate in a sterile vacuum and that the difference between purchase and sale prices is likely to be affected by many factors apart from the disclosure of the specific confidential information Lord Nicholls went on to determine : (page 210 I)

“References to profit gained are to be read, naturally and consistently with the purpose of financial orders, as references to profit arising from buying and selling on the market, without any allowance for the ordinary incidents affecting market prices”.

Subsequently, Lord Nicholls elaborated on the second of the two points to which he had alluded : (page 211 A-D)

“The second point which is clear concerns the position where an insider dealer, having bought shares in anticipation of a price rise, chooses to retain them rather than realise his profit when information becomes public knowledge. Take a case where the insider dealer retains the shares and thereafter, over the period of months or even years that elapses before the Tribunal makes a financial order under s. 23, he sells the shares either in one parcel or gradually. Or he may still own the shares, or some of them when the Tribunal makes its order. The approach adopted by the Tribunal in this type of situation, in my view correctly, is to treat the relevant profit as that gained by the insider dealer when the information was made public and the market had a reasonable opportunity to digest the information. The gain is to be measured by reference to the market value of the shares at that date.”.

297. Of the construction of the phrase “loss avoided” Lord Nicholls noted : (page 212 I-213 C)

“This could arise if the confidential information were unexpectedly bad news about a company’s business. Of necessity, calculation of the amount of a loss avoided is different from calculation of the amount of profit gained. The amount of profit gained by an insider dealer is an actual amount and can be calculated accordingly. By way of contrast, the amount of a loss avoided by an insider dealer is a notional exercise, because *ex hypothesi* the loss was not actually sustained by the insider dealer : the loss was avoided. Thus, in the case of the dealing in shares, calculation of the amount of loss avoided will typically involve comparison of two elements, one actual (the shares were sold) and the other notional (what would have happened if the shares had been retained). The actual element in the calculation will comprise the amount realised by the insider dealer from the shares sold before the market learned the bad news. The notional element will comprise the market value of the shares at a date which has to be identified as the appropriate date. Failing cogent evidence that, in any event, the shares would have been sold before the market announcement, the date will usually be the date by which the market learned and absorbed the information. This will usually be the appropriate date because it can normally be expected that, save for the misuse of the confidential information, the insider dealer would still have held his shares at that date and, hence, would have suffered loss accordingly.”.

298. Section 257(1)(d) of the Ordinance empowers the Tribunal to make an order in respect of a person identified as having engaged in market misconduct pursuant to section 252(3)(b), namely :

“...that the person pay to the Government an amount not exceeding the amount of any profit gained or loss avoided by the person as a result of the market misconduct in question.”.

## CHAPTER 14

### THE PROFIT GAINED BY MR WILFRED HUNG, MR JOE CHAN AND MS TSOI YUNG YUNG.

The sale of Sunny Global shares by Mr Wilfred Hung, Mr Joe Chan and Ms Tsoi Yung Yung in June 2003.

The factual basis of the findings of culpability of insider dealing.

299. The nub of the market misconduct of Mr Wilfred Hung, Mr Joe Chan and Mr Tsoi that grounds the finding of their culpability of insider dealing arises from their use of specific relevant information, namely the significant downturn in the profits of Sunny Global to be announced in the Interim Results, to determine firstly, to exercise their respective option rights to acquire Sunny Global shares at an exercise price of \$0.435 per share and secondly, to proceed to sell the shares thereby acquired, save for 440,000 shares owned by Ms Tsoi, at an overall profit prior to the announcement of the Interim Results after the market had closed on 23 June 2003. In so doing, they were each able to make a net profit resulting from the difference between the acquisition costs of the shares each of them acquired from Sunny Global and monies each one received from the sale of those shares before the market reacted negatively to the information of the substantial decline in the profits of Sunny Global announced in the Interim Results.

Expert evidence.

300. In her report, dated 25 July 2008 (“second report”), Ms Stella Fung stated that the methodology she used for calculating the “profit gained” was in accordance with the approach of the Insider Dealing Tribunal in *China Apollo Holdings*

*Limited*, dated 6 June 2002 (at pages 139-141). She summarised that approach thus : (paragraph 6)

“(a) When the insider dealing consists of an improper purchase, the profit gained comprises the difference between the cost of purchase and the net sale price. However, if the shares are retained after the information has become generally known to the market the profit is calculated by reference to the unrealised market value at a date that has to be identified as the appropriate date (the appropriate date). That date will usually be the date on which the market learned of and absorbed the information.

(b) When the insider dealing consists of an improper sale, the loss avoided comprises the difference between the amount realised by the insider dealer from the shares sold before the market learned of the bad news, and the notional market value of the shares at the appropriate date when the market learned of and absorbed the bad news.

(c) When the insiders exercised their share options and bought and sold the shares after they became aware of the relevant information (which was bad news about a company’s business), their dealing was not to avoid a loss but to gain a profit. The IDT took the view that the insiders, while in possession of the relevant information, took advantage of a rising market in the shares in order to enrich themselves.”.

301. In her oral testimony Ms Stella Fung said that it was her opinion that the conduct of Mr Wilfred Hung, Mr Joe Chan and Ms Tsoi fell into category (c) of her summary of the approach of the Insider Dealing Tribunal in *China Apollo Holdings*, namely to be regarded as “profit gained” rather than “loss avoided”.

302. Of the market reaction to the Interim Results announced by Sunny Global Ms Stella Fung observed, at paragraph 19 of her report dated 10 October 2007 (“first report”) :

“Immediately after the publication of the Interim Results, Sunny Global’s share price dropped 33% to close at \$0.305 with heavy turnover of 34 million shares on 24 June 2003. Share price stayed at the similar level on the following two trading days and closed at \$0.31 and \$0.29 on 25 and 26 June 2003 respectively. During the three trading days from 24 to 26 June 2003, the average traded price of Sunny Global shares was \$0.311, which represent a decline of 31.7% over

the closing price of \$0.455 on 23 June 2003. Therefore, the market reacted very negatively to the announcement of the Interim Results.”.

Calculation of profit gained.

303. Ms Stella Fung set out her calculations of the “profit gained” by the three Specified Persons in June 2008 at paragraph 9 and Exhibit SF-13 of her second report.

(a) Mr Wilfred Hung.

Total purchase cost	\$1,740,000.00
<u>Total sale proceeds</u>	<u>\$1,823,847.00</u>
Profit gained	\$83,847.00

Included in the “Total sales proceeds” are 400,000 shares that were sold at a loss in relation to the share option exercise price.

(b) Mr Joe Chan Cheung.

Total purchase cost	\$1,740,000.00
<u>Total sale proceeds</u>	<u>\$2,027,301.00</u>
Profit gained	\$287,301.00

(c) Ms Tsoi.

Total purchase cost	\$1,548,600.00
<u>Total sale proceeds</u>	<u>\$1,770,348.00</u>
Profit gained	\$221,748.00

In Ms Tsoi’s case Ms Stella Fung excluded from her calculation the purchase cost and sale proceeds of 440,000 Sunny Global shares which Ms Tsoi sold on 24 June 2003, after the announcement of the Interim Results. She did so on the basis that in those circumstances, the average selling price on that day being \$0.321 per share, “no profit gained or loss avoided was associated with the sale of shares”.

Submissions on behalf of Mr Wilfred Hung, Mr Joe Chan and Ms Tsoi.

304. Mr Mak stated that he took no issue with the approach, calculation and results in respect of the issue of “profit gained” as set out in Ms Stella Fung’s report.

CONCLUSION

305. We agree that the approach adopted by Ms Stella Fung is appropriate and accept her calculations and results in respect of the profit gained by the Mr Wilfred Hung, Mr Joe Chan and Ms Tsoi.

## CHAPTER 15

### PROFIT GAINED BY INFO FORTUNE, MR LEE MAN FA AND MS KATHERINE YU.

The sale of Sunny Global shares by Info Fortune in August 2003.

306. There is no dispute that Info Fortune sold a total of 179 million Sunny Global shares in its account with Kim Eng in the period beginning 1 August and concluding 28 August 2003, the proceeds of which sales were credited to that account.

<u>Date</u>	<u>Volume of shares sold</u>	<u>Price/range per share</u>	<u>Credit</u>
1 August	52 million	\$0.30	\$15,563,028.00
11 August	40 million	\$0.35	\$13,966,820.00
22 August	41.2 million	\$0.42-\$0.47	\$18,100,736.76
25 August	23 million	\$0.355-\$0.405	\$8,649,574.78
28 August	22.8 million	\$0.305-\$0.335	\$7,107,217.44
TOTAL	179 million		\$63,387,376.98

The withdrawal of the proceeds of sale.

307. The “Monthly Statement” for August 2003 of Info Fortune with Kim Eng states that as at 31 August 2003 three transactions described as “Transfer Withdrawal” had been made from the account. The first and second withdrawals were amounts of \$15,562,978.00 and \$13,966,770.00 and matched amounts credited to the account for sales of Sunny Global shares on 1 and 11 August 2003 respectively, following the deduction of transfer charges of \$50 on each occasion.



The third withdrawal was of the aggregate of the amounts credited to the account following the sale of Sunny Global shares on 22 and 25 August 2003, namely \$26,750,261.54, less a transfer charge of \$50. The amount credited to the account following the sales of 28 August 2003, \$7,107,217.44 remained in the account as at 31 August 2003.

308. Mr Eric Siu, the manager of the Compliance Department of Kim Eng, stated in a letter dated 1 August 2008 in reply to a requisition of the Tribunal, pursuant to section 254 of the Ordinance, that those three sums of money had been transferred to an account in that company's name with Hang Seng Bank. The first transfer had been made on the written instructions of Info Fortune. From the opening mandate it is clear that the signature appended to those instructions was that of Mr Lee Man Fa. Mr Siu provided the monthly statement for that account for September 2003 and explained that the "Transfer Withdrawal" of \$7,107,180.92 was monies transferred to the same bank account in the name of Info Fortune with Hang Seng Bank. All of the transfers that followed the first transfer were carried out on the instructions of Mr Charles Wong, an Account Executive of Kim Eng.

Mr Lee Man Fa's explanation to the SFC.

309. By a letter dated 25 November 2004 to the SFC Jennifer Cheung & Co responded on behalf of Mr Lee to various enquiries made of him by the SFC in their letter of 4 November 2004. In particular, it was asserted:

"(b) Mr Lee used the proceeds from the disposal of the shares of Sunny Global Holdings Limited in around August 2004 to finance his investment in 40% interests in a hotel in Fujian, PRC for RMB 65,000,000 ("the Investment").

(c) & (d) The said sum of around HK\$36.6 million received by Mr Tsai was remitted to Mr Xu on instructions of Mr Lee for the Investment. Almost the entire amount of HK\$26,750,000 withdrawn from the bank account of Info

Fortune Holdings Limited on 29 August, 2003 was also paid to Mr Xu for the Investment.”.

310. Of the description of Mr Lee’s relationship with Mr Tsai Hung Ching (“Mr Tsai”) given by Mr Lee, in an interview by the SFC on 24 June 2004, it was asserted:

“(a) Mr Lee would like to clarify that he did not partner with Mr Tsai in any trading business or project investment. What he meant was that Mr Tsai introduced an investment in a hotel to him as described in paragraph (b) below. He also assisted Mr Lee to remit funds to Mr Xu Beifang, the investment partner of Mr Lee (“Mr Xu”), for the purpose of financing the said investment. Mr Lee paid a commission to Mr Tsai for such services.”.

311. By a letter dated 18 August 2008 an officer of the Hang Seng Bank responded to a requisition of the Tribunal, pursuant to section 254 of the Ordinance, and provided account opening and other documents relating to an account opened with that bank on 17 June 2003 in the name of Info Fortune, of which Mr Lee was the sole signatory. The statement of account describes the deposit from Kim Eng of the following four sums of money :

- (i) 7 August 2003 -- \$15,562,978.00
- (ii) 13 August 2003 -- \$13,966,770.00
- (iii) 27 August 2003 -- \$26,750,261.54
- (iv) 5 September 2003 -- \$7,107,180.92

312. The statement of account of Info Fortune with Hang Seng bank describes that account on 29 August 2003 as having been debited in respect of two cheques, payable to cash, in the sum of \$10,300,000.00 and \$16,450,000.00 respectively. The cheques themselves are dated 29 August 2003 and made out to cash. The obverse side of the bank cheques bears Mr Lee’s signature and records his identity card number, asserting that the identity card had been seen.

313. By an agreement on the letterhead of Homey Hotel, dated 5 June 2003, Mr Lee agreed with Mr Xu Beifang to invest 65 million renminbi in a joint-venture project in the Homey Hotel in Shishi City. In a record of interview, conducted of him by the SFC on 14 April 2005, Mr Lee asserted that it had been orally agreed between the parties that that sum of money would be paid in about six months. A receipt on the letterhead of Honey Hotel, dated 16 October 2003, attached to the agreement asserts receipt by Mr Xu Beifang of 65 million renminbi in cash from Mr Lee.

314. The total proceeds of the sale of 179 million Sunny Global shares by Info Fortune in August 2003 amounted to \$63,387,377.00. At the prevailing exchange rate between the Hong Kong dollar and the renminbi in August and September 2003, 65 million renminbi could have been purchased for just over HK\$61 million.

Mr Tsai Hung Ching's explanation to the SFC.

315. By a letter dated 18 November 2004 Michael Li & Co informed the SFC on behalf of Mr Tsai that, following his introduction of Mr Lee to a Mr Wu in respect of a hotel project in Fujian,

“3. Mr Tsai was requested by Mr Li to assist in transmitting funds under China for investment in the aforesaid project. According to client records, a total of Hong Kong \$36,636,748 was received by Mr Tsai from Li on 7 August, 15 August and 5 September 2003.

4. Upon receipt of the said sums from Li, which were paid in trenches (sic), Mr Tsai deliver the said sums on various occasions to one of his acquaintances, a Mr Tsai who is currently in Macau, for the purpose of exchanging the same into Reminbi (sic) and injecting them into the said project.”.

316. The letter enclosed photocopies of two bankbooks in the name of Mr Tsai, which evidenced deposits by cheque on 7 August 2003 of two sums of money, namely \$6,562,978.00 and \$9 million. The aggregate of those two sums of money is \$15,562,978.00. The statement of account of Info Fortune with Hang Seng Bank describes a cheque in that amount as having been debited to that account on 15 August 2003. The cheque itself states that the payee was Mr Tsai and on the obverse side of the cheque describes the monies as having been deposited into two accounts with account numbers matching those of Mr Tsai having been split into sums of \$9 million and the balance.

317. On 15 August 2003, two sums of money, namely \$4,966,770.00 and \$9 million were deposited into the two bank accounts of Mr Tsai. The statement of account of Info Fortune describes those two cheques as having been debited to that account on 15 August 2003. The cheques themselves stipulate the payee as Mr Tsai Hung Ching and on the obverse side of the cheque describe their deposit into the two respective accounts of Mr Tsai.

318. On 5 September 2003, \$7,107,000.00 was deposited into one of the two bank accounts of Mr Tsai. The statement of account of Info Fortune describes a cheque in that amount as having been debited to that account on 5 September 2003. The cheque itself stipulates the payee as Mr Tsai Hung Ching and on the obverse side of the cheque describe its deposit into one of the two accounts of Mr Tsai.

319. The aggregate of the five sums of money deposited into Mr Tsai's account is \$36,636,748.00, as claimed in the letter to the SFC on Mr Tsai's behalf dated 18 November 2004.

320. In his record of interview, dated 26 November 2004, Mr Tsai denied that he had any business dealings with Mr Lee but added that he had introduced him to Mr Wu, the manager of the Homey Hotel, in the presence of Mr Xu Beifang, its owner. He confirmed the accuracy of the account of events in respect of his role in remitting funds for Mr Lee, described in his solicitor's letter of 18 November 2004, naming the person who had assisted him in the remittance as Cai Hai Shao, resident in Macau, whom he said was able to make available the equivalent money in renminbi through family members in Shishi City, Fujian, PRC. He said that he had withdrawn money in cash from his bank account on several occasions after which he had given those monies to Cai Hai Shao either in Hong Kong or Macau.

321. Mr Tsai's bank passbooks records the withdrawal in cash six separate occasions of a total of \$29 million on and between 13 and 20 August 2003, closely matching the deposit by cheques of a total of \$29,529,748.00 on 7 and 15 August 2003. Similarly, the deposit by cheque of \$7,107,000.00 on 5 September 2003 is matched by three withdrawals in cash of a total of \$7,126,000.00 on 10 and 11 September 2003.

By whom was the profit gained?

322. Before embarking upon the consideration of the calculation of "profit gained" it is relevant to consider the question : by whom was the profit gained? There is no evidence at all that Ms Katherine Yu benefited from the profit gained the relevant question is : was the "profit gained" attributable to Info Fortune, Mr Lee or both?

Submissions of the Presenting Officer.

323. Ms Juliana Chow submitted that both Info Fortune and Mr Lee had gained a profit from the sale of the Sunny Global shares by Info Fortune and that in consequence each was joint and severally liable to disgorge that profit and the Tribunal could make disgorgement orders against each of them.

Submissions on behalf of Info Fortune.

324. Mr Hylas Chung reminded the Tribunal that on 20 October 2007, before the proceedings commenced before the Tribunal, ownership of the shares of Info Fortune had passed from Mr Lee to Mr Vincent Eng who was now its sole director. He submitted on behalf of Info Fortune that there was no profit gained attributable to the company arising from its sale of Sunny Global shares in August 2003. He submitted that any such profit that was gained was a gain made by Mr Lee. He relied upon Mr Lee's explanation to the SFC, supported as to \$36.6 million by Mr Tsai, that he had used the proceeds of sale to remit monies for his own investment in a hotel in Fujian. Also, he pointed to additional support for Mr Lee's account contained in the statement of account of Info Fortune with both Kim Eng and Hang Seng Bank.

A consideration of the evidence and submissions.

325. From the above review of the material before the Tribunal it is apparent that the proceeds of sale of Sunny Global shares in August 2003 in the account of Info Fortune with Kim Eng, namely \$63,387,377.98 were deposited into that account and then transferred, less transfer charges, to a bank account in the name of Info Fortune with Hang Seng Bank. On each occasion very shortly after the receipt of the monies into that account the monies were withdrawn, either as cheques payable to Mr Tsai or cash.

As to \$36.6 million.

326. Mr Lee's explanation to the SFC that he had used around \$36.6 million of those proceeds to make payment through Mr Tsai is supported by Mr Tsai's explanations to the SFC and is consistent with the movement of monies in and out of Mr Tsai's bank passbooks, not only as to several cheques drawn on the account of Info Fortune in matching amounts made out to Mr Tsai but also as to matching amounts in two cheques in the same account made payable to cash. In addition, there were large withdrawals of cash from Mr Tsai's account in the period of about one month which, broadly speaking, match in aggregate the monies deposited in that account from the account of Info Fortune. Significantly, thereafter there was no activity in either account of Mr Tsai, other than end of the year interest payments, for fully six months.

As to \$26.75 million.

327. Of Mr Lee's assertion to the SFC that he had used :

“..almost the entire amount of \$26,750,000 withdrawn from the bank account of Info Fortune Holdings Ltd on 29 August 2003..”

to pay Mr Xu for his investment in Homey Hotel in Fujian there is no specific supporting evidence.

328. In the report of the Insider Dealing Tribunal in *Firstone International Holdings Limited*, dated 8 July 2004, the Tribunal considered the ambit of the phrase “profit gained” in a similarly worded provision in section 23(1)(b) Securities (Insider Dealing) Ordinance Cap. 395. The Tribunal concluded that :

“.. a person should not be ordered to ‘disgorge’ a profit pursuant to the provisions of section 23(b) of the Ordinance unless the person has gained a profit for himself. The purpose of section 23(b) is not penalising the insider

dealer, that is the function of section 23(c), but to take away from the person who is found to be an insider dealing any gain he made as a result of his insider dealing.”.

329. The factual events that led to consideration of the issue by the Tribunal was its determination that insider dealing in the shares of Firststone had been conducted in accounts held in the names of four BVI companies. The Tribunal determined that in those dealings each of the four companies was under the guiding mind of Mr James Huang and that as a result they were (page 178) :

“...fixed with the knowledge and intent of James HUANG in their trading activities in Firststone shares.”.

However, having determined that those companies had not been given notification of the enquiry, nor had service been effected of material related to the enquiry and having found that, as a result, none of the companies had been given an opportunity to be heard by the Tribunal the Tribunal made no finding of insider dealing against any of the companies (See Chapter 11). Nevertheless, in considering the liability of Mr James Huang to orders of the Tribunal, the Tribunal posed itself the rhetorical question of whether or not the “profit gained” resulting from the insider dealing was effectively at the disposal or discretion of James Huang, rather than the four companies. Having found that Mr James Huang controlled both the trading of those companies and their bank accounts the Tribunal answered that question in the affirmative. Accordingly, the Tribunal imposed an order of disgorgement of the profit gained against Mr James Huang.

## CONCLUSION

330. At paragraph 291 (page 119) of Part I of this Report we determined that Mr Lee was the “controlling brain” of Info Fortune. We find that he used his power to control Info Fortune not only to cause it to sell Sunny Global shares in August 2003



but also to effect the disposal of the profit gained for his benefit. We accept his account to the SFC that he had used the equivalent of 65 million renminbi (namely, about HK\$61 million) from the total proceeds of sale of Sunny Global shares in that month of \$63,387,376.98 to make payment to Mr Xu Beifang pursuant to their agreement of 5 June 2003, that being his investment in the hotel project. He, not Info Fortune, benefited from proceeds of sale of Sunny Global shares and, in particular, such part of those proceeds that was “profit gained” in consequence of the market misconduct in question.

## CHAPTER 16

### CALCULATION OF PROFIT GAINED BY MR LEE MAN FA.

331. In her first report Ms Stella Fung addressed the issue of trying to calculate the profit gained from the sale of Sunny Global shares by Info Fortune following the publication of false or misleading information in assertions in various announcements made by the company in the period 1 to 25 August 2003, of which period she noted:

“Info Fortune sold a total of 156.2 million shares at an average price of \$0.3614 per share.”.

332. She identified, on the one hand, the positive effects to the market price that flowed from announcements of possible share placements/injection of assets/change of controlling shareholder of Sunny Global (which she called “the Negotiations”). On the other hand, she pointed to the negative impact of announcements of the disposal of large parcels of shares by the controlling shareholder of Sunny Global together with the fact of a “...larger supply of free float shares in the market” :

“36. Out of the total issued share capital of 412 million shares, Info Fortune held 300 million shares (72.8% of the issued share capital) whilst the remaining 112 million shares (or 27.2% of the issued capital) was circulated in the market as at 31 July 2003. The selling of shares by Info Fortune increased the free float of Sunny Global shares by 139% to 268.2 million shares (65.1% of issued share capital) as at 25 August 2003. In theory, the sudden dramatic increase in the supply of shares in the market will exert downward pressure on the share price. However, Info Fortune was still able to sell the shares at higher and higher prices before 25 August 2003. This indicated that the market demand for the Sunny Global was so strong that it was able to absorb the large quantities of shares sold by Info Fortune without dampening the share price. During this period, other than the announcements about the disposals of shares by Info Fortune, the other announcements published by the company were all related to the possible share placing which might lead to a change in controlling shareholders. The share price movements confirmed my view that the

investing public had been induced by the announcements regarding the possible change in controlling shareholders to buy into the shares. Their purchases of the shares offset the downward pressure on the share price due to Info Fortune's disposals, and supported the share price. If Info Fortune had not sold shares onto the market, the share price of Sunny Global might have increased even further before the proposal was terminated."

333. Of the overall effect, she said :

"38. ...It is therefore difficult to separate the price effects due to each of these two factors, in particular the disposals of shares by Info Fortune were conducted on various days when the Negotiations were at different stages.

39. It is therefore difficult to estimate precisely the "true" sales proceeds received by Info Fortune should the Negotiations have never been existed. One method that I could think of is to assume that it could only sell shares at the re-rated price of \$0.3141 (i.e. the average traded price of the shares on 28 August 2003.) The re-rated price had been taken into account the news that the Negotiations had been terminated (i.e. there was no Negotiations) and that the supply of free float shares in the market had been increased by 156.2 million shares. Based on the re-rated price of \$0.3141, I estimated that Info Fortune would have received \$7,388,260. [The "excess" sales proceeds is:  $(\$0.3614 - \$0.3141) * 156,200,000 = \$7,388,260$ .]".

334. Ms Stella Fung went on to enter the general caveat that the calculation was "a very rough estimate" and enumerated its shortcomings. Firstly, she noted that Info Fortune had sold its shares on various days at intervals during the month of August 2003, as a result of which the share price should have gradually eased responding to the gradual increase in free float shares in the market instead of a sudden decline on a specific day. As a result, the application of a single re-rated price at the end of the period to calculate the "true" sale proceeds of Info Fortune in the absence of any Negotiations might have overestimated the benefit gained by Info Fortune. Noting that in the period 1 to 28 August 2003 the closing price of Sunny Global shares had dropped 8.83% she calculated that the average closing price in that period would be \$0.325, that is 3.47% higher than the re-rated price.

335. Secondly, and conversely, she said that if Info Fortune had sold the shares in one block it might have had to do so at some discount to the prevailing market price. That price might have been below \$0.3141 in the absence of any Negotiations. In that event, she indicated that the calculation might underestimate the benefit gained by Info Fortune. Noting that a seller of a large block of shares could usually only sell at 5 to 10% discount from the prevailing market price she estimated that the underestimation attributable to this factor was of that same magnitude.

336. It was Ms Stella Fung's opinion that if the overestimate attributable to the first factor was netted off against the underestimate attributable to the second factor the underestimate outweighed the overestimate, with the result that her calculation of the profit gained was conservative.

337. Thirdly, she noted that the assumed re-rated price taken on 28 August 2003 was a day on which Info Fortune had sold 22.8 million Sunny Global shares, that being 47.7% of turnover of those shares that day. She accepted that Info Fortune's sales that day might have exerted downward pressure on the share price causing the re-rated price to be lower than it otherwise would have been.

An alternative method of calculation.

338. Ms Stella Fung suggested that an alternative method of calculation was to take the price at which Info Fortune had sold Sunny Global shares first of all on 1 August 2003, namely \$0.30. She noted that price was at a discount of 11.8% to the previous closing price of the shares. It was her opinion that the discount was justified in the absence of positive news from the company and in light of the fact that the average daily turnover of those shares on the market in the previous two

months was only 7.26 million shares. Next, she noted that the subsequent sales of shares by Info Fortune were at higher and higher prices as information of the Negotiations was disclosed in the announcements made by Sunny Global. It was her opinion that, in the absence of such information, buyers of Sunny Global shares might have demanded lower and lower prices to reflect the increasing free float supply of shares in the market. Accordingly, she concluded that it was logical to deduce that if no information of Negotiations had been disclosed to the market Info Fortune might have had to sell its Sunny Global shares at \$0.30 per share or below. In order to be conservative in her calculations, Ms Stella Fung said that she took the initial disposal price of 1 August 2003, namely \$0.30, to make the calculation that the “excess” sales proceeds gained by Info Fortune attributable to the price effect of information of the Negotiations was \$9,590,680.00.

339. In cross-examination, by Mr Hylas Chung, on behalf of Info Fortune, Ms Stella Fung calculated the rise in price of the shares of other shoe manufacturers in the period 24 June to 28 August 2003. In particular, Yue Yuen and Symphony had risen 11.96% and 138.10% respectively. Kingmaker had lost 0.99%, whereas Sunny Global shares had gained 1.64%. However, she said that she was unable to say whether that represented a market trend. Yue Yuen had just taken over Symphony, so that there would be other factors impacting on price, such as corporate development. Furthermore, Sunny Global had just announced results which were quite disappointing compared with other companies, so its share price might not move in line with those of other shoe manufacturers.

340. Ms Stella Fung accepted that after the announcement by Sunny Global of 21 July 2003, made after the close of trading, the price of Sunny Global shares had declined in the following two days. However, she noted that was in line with a

decline in the Hang Seng index, that the price changes were within the normal range of trading of a stock and that the volume of shares sold was low. She agreed that on the days of the sale of Sunny Global shares, by Info Fortune by the Non-Automatic Matching System, on 1 and 11 August 2003, the closing price of the shares had risen 13.24% and 5.26% respectively but that, following the announcement on the evening of those days of the sales by the controlling shareholder, the closing price the following day had dropped by 3.9% and 1.3% respectively. She said that the market would have become aware during trading hours on those of the fact of the sale by placement of large blocks of Sunny Global shares at a significant discount to the market price. Also, she said that the market would have had regard to the earlier announcements of the company, including that of the 5 August 2003 in particular the potential stated there of placing of shares, change in control of the company and/or injection of assets into the Group.

341. She acknowledged that, following the announcement of 19 August 2003 by Sunny Global that negotiations were at an “advanced stage”, on the resumption of trading on the following day, 20 August 2003, the closing price of those shares had dropped 14.63%. However, she noted that on 21 August 2003 the closing price had re-bounded by 28.57%. Of that she said :

“The market tried to digest the information so that the share price had not yet stabilized. The immediate reaction is a drop in share price because of the low takeover price, as stated in the announcement, and then afterwards other expectations or speculation in the market emerged, so the share price rebounded again.”

342. When it was suggested to Ms Stella Fung that Info Fortune had not benefited from the announcements made by Sunny Global, she repeated the opinion that she had expressed in her first report namely, that in light of the Interim Results of Sunny Global, together with the substantial increase in the free float of shares,

because of sales by the controlling shareholder, if there had been no announcements in respect of Negotiations the share price of Sunny Global likely would have decreased in the period instead of stabilizing. She noted that the announcements made by Sunny Global, except for the announcement of 19 August 2003, gave no new information, rather they repeated the position already announced, so that it was not a question of looking for an immediate effect in response to any single announcement.

The re-rated price.

343. Of Ms Stella Fung's choice of the average sale price of Sunny Global shares on 28 August 2003 as the "re-rated" price to be taken in calculating the profit gained in the sale of Sunny Global shares by Info Fortune, Mr Hylas Chung suggested that a more accurate price to take was the average sale price in the five days prior to the announcement of 21 July 2003, namely 14 to 18 July 2003. However, Ms Stella Fung did not agree :

"You have to take into account two factors. One is the Negotiation announcement that has an effect on the share price. On the other hand, the increase in shares in the market because of the selling from Info Fortune, that would also impact on the share price."

Of the latter factor, she said that selling from the controlling shareholder would affect the share price quite significantly, counteracting the price effect of the announcements of Negotiations. The sale of 156 million Sunny Global shares by the controlling shareholder was of a very substantial quantity that would have a very negative effect on the share price. Without that factor, she said that she was prepared to accept that, in the absence of any announcements of Negotiations, one could look at the price of shares sold before the announcement, namely around \$0.35 per share. However, that was simply not the case.

Submissions on behalf of Info Fortune.

344. Mr Hylas Chung submitted that, given that following the announcements made after trading had ceased on 21 July, 1 and 11 August 2003, the market had reacted on the following day by posting closing prices which represented a decline from the previous trading day it was to be concluded that there was no “profit gained” from the authorisation of the disclosure of false or misleading information contained therein. However, it is to be noted that the announcement of 5 August 2003 had been made during trading hours and that the closing price of Sunny Global shares that day represented a gain of 8.11% over the previous day. In any event, Mr Hylas Chung submitted that even if there was a profit it was one that was not capable of calculation.

Re-rated price.

345. Mr Hylas Chung invited the Tribunal to reject the re-rated price of \$0.3141 per share adopted by Ms Stella Fung, namely the average sale price on 28 August 2003, as being unreliable. He noted that Stella Fung accepted that all the shares had not been sold on the same day, rather they had been sold on a number of occasions in August 2003, and that on 28 August 2003 Info Fortune had been responsible for the sale of 47.7% of Sunny Global shares. He suggested that the appropriate price to take was the average price at which shares were sold in the period 14 to 18 July 2003, namely \$0.351 per share.

CONCLUSION

346. We accept the opinion of Ms Stella Fung that, in the absence of the announcements made by Sunny Global in the period 21 July to 22 August 2003 of Negotiations (namely, the approach by investors to the majority shareholder said to



be variously interested in taking a placement of shares in the company, advancing proposals which might result in a change of control of the company/injecting assets into the company, acquiring the majority of the shares of the company and finally less than the majority of the shares of the company), following upon the Interim Results the fact of the ever-increasing free float of shares in the market brought about by the sale of shares by the controlling shareholder likely would have caused a decrease in the share price. Rather, it is to be noted that in that period of time the shares rose and stabilized, notwithstanding the ongoing sale of shares by the majority shareholder. Accordingly, we find that a profit was gained in the sale of Sunny Global shares by Info Fortune.

347. We agree with Ms Stella Fung that the series of announcements is to be viewed collectively, rather than focusing on a particular announcement. An overall picture of false or misleading information was being amassed, layer upon layer. Although the announcement made after the close of trading on 22 August 2003 stated that :

“The Proposal cannot proceed further as and Major Shareholder no longer has 50.49% interest in the Company.”

in the body of the text that sentence was followed immediately by the statement that :

“The Major Shareholder does not know whether the investor will consider to acquire less than 50.49% as of the Company from the Major Shareholder.”.

It was not until the announcement made after trading had closed on 27 August 2003 that it was asserted that :

“All negotiations between the Major Shareholder and the Investor has ceased.”.

In the result, we are satisfied that the sale of shares by Info Fortune on 28 August 2003 is not relevant to these considerations.

348. We agree with Ms Stella Fung's rejection of the suggestion that the appropriate price to take in calculating the quantum of any profit gained is the average price of the shares sold in the period 14 to 18 July 2003. We accept her reasoning that the ever-increasing size of the free float of shares available in the market as a result of the sale of shares by the controlling shareholder was a factor relevant to determining the appropriate price. The first of those sales occurred on 1 August 2003.

349. As noted earlier Lord Nicholls observed in his judgment in *Shek Mei Ling* that the calculation of profit gained or loss avoided is usually to be made by reference to the price of the shares at a date when the information was made public and the market had a reasonable opportunity to digest the information. We accept Ms Stella Fung's opinion that the appropriate date by which the market had learned of and adsorbed the information that the Negotiations had ceased completely was on 28 August 2003 following the announcement of the previous day to that effect. On 28 August 2003 the closing price of Sunny Global shares was \$0.31 per share. However, we accept Ms Stella Fung's opinion that the appropriate price to take as the re-rated price of the shares was the average price at which shares were sold on 28 August 2003, namely \$0.315. We are mindful of the caveats that Ms Stella Fung has entered in respect of her choice of that methodology at arriving at the appropriate price to take as the re-rated price. However, we accept the reasoning she advanced for being satisfied that, nevertheless, it was the appropriate price to take, in particular her opinion that any element of overestimate of benefit to Info Fortune (3.47%) arising from taking a re-rated price at a single date, given that the

350. The final caveat that Ms Stella Fung entered in respect of the re-rated price arose from the fact that on 28 August 2003 Info Fortune sales of Sunny Global shares comprised 47.7% of the shares of that company sold that day. It was her concern that those sales might have :

“.. exerted downward pressure on the share price and undermined the re-rated price.”.

However, other than identifying that possibility Ms Stella Fung made no attempt at quantifying the effect. It is to be noted that on 29 August 2003, in the absence of any sales by Info Fortune of Sunny Global shares, the closing price was \$0.315 per share, exactly the re-rated price identified by Ms Stella Fung. In the result, we are satisfied that the appropriate re-rated price to take is that identified by Ms Stella Fung, namely \$0.315 per share.

## CHAPTER 17

### ORDERS

351. Section 257(1) of the Ordinance provides that, in respect of a person identified as having engaged in market misconduct pursuant to section 252(3)(b) of the Ordinance the Tribunal may make a range of orders.

Submissions by Mr Mak on behalf of Mr Wilfred Hung, Mr Joe Chan, Ms Tsoi and Ms Katherine Yu.

General submissions.

352. By way of a general submission Mr Mak asks that the Tribunal has regard to the nature of the individual market misconduct, the personal circumstances of a specified person and the substantial delay that has occurred from the misconduct to the imposition of orders. Of Ms Katherine Yu, Mr Mak suggested that her failing was to have followed Mr Lee's instructions and not to have exercised independent judgment in an area that was not her expertise.

Delay.

353. In support of his submission that it is appropriate to have regard to delay in mitigation of the orders to be made Mr Mak drew the Tribunal's attention to the report of the Insider Dealing Tribunal in *Vanda Systems and Communications Holdings Limited*, dated 26 March 2007. That Tribunal commenced its inquiry on 17 May 2005 into alleged misconduct are said to have occurred in mid-February 2000. In March 2007, seven years after the impugned conduct, it considered the imposition of appropriate orders. Part of the delay had occurred in consequence of applications to the Tribunal by two of the implicated parties, *inter alia*, that the

proceedings be stayed for delay, it being said that it would be unfair to proceed. Further delay ensued in consequence of an application for judicial review of the Tribunal's ruling refusing to stay the proceedings and an appeal from the dismissal of that application to the Court of Appeal.

354. Of the fact that it was imposing orders seven years after the impugned conduct, the Tribunal said : (page 206)

“That delay in our view is considerable and went to mitigate the disqualification, financial and cost orders we imposed on the insider dealers pursuant to section 23(1)(a), (b), (c) and section 27 of the Ordinance.

So far as disqualification orders were concerned we took into account in each insider dealer's case that the event occurred some seven years ago and that in our view wide-ranging disqualification orders were unnecessary. As will be seen hereunder we restricted our disqualification orders in the main to the insider dealer acting in a director's or management capacity in a listed company.

So far as financial orders pursuant to section 23(1)(b) and (c) were concerned we reduced those orders by 25% and so far as costs orders pursuant to section 27 were concerned by 10%.”.

#### Disqualification order.

355. Mr Mak submitted that in respect of Mr Wilfred Hung and Mr Joe Chan any such disqualification order ought to be restricted to the directorship of a listed company or its subsidiaries and not extend to the post of manager, asserting that to so extend the order would be to deprive them of their livelihood.

#### Disgorgement order.

356. As stated earlier, Mr Mak indicated that he took no issue with the approach, calculation and results in respect of the issue of “profit gained” as set out in Ms Stella Fung's second report. However, he invited the Tribunal to afford a discount from the maximum disgorgement order identified in Ms Stella Fung's calculations

to reflect the element of delay. He submitted that Ms Katherine Yu had made no “gain” and therefore no order for disgorgement could be made in her case.

Costs order.

357. Mr Mak took issue with the hourly rate of \$4,000.00 sought by the Department of Justice (“DoJ”) for the services of Mr Johnny Chan, a Senior Government Counsel of 14 years seniority following admission as a solicitor. He asserted that the DoJ was not entitled in principle to charge for any “profit costs” and he pointed to the fact that in the *Vanda* report the Tribunal had reduced the hourly rate, sought by the DoJ, in the order which was made for the services of counsel from the DoJ, who had assisted the leading counsel appearing as counsel to the Tribunal, to \$2,500.00 per hour.

358. Of the proportion of costs to be attributed to the consideration by the Tribunal of the insider dealing that occurred in June 2003 in contrast to that of the disclosure of false or misleading information in July and August 2003 Mr Mak submitted that a “broad brush” approach ought to be adopted by the Tribunal and that a larger proportion should be attributed to the consideration of the latter events. On behalf of Ms Katherine Yu, Mr Mak submitted that her share of the costs of the inquiry ought not to be greater than those of Mr Lee and Info Fortune.

An order in respect of the expenses of the investigation by the SFC.

359. Again, Mr Mak submitted that a discount ought to be permitted on account of delay. Secondly, he said that a larger portion of these expenses should be attributed to inquiries of Mr Lee and Info Fortune, in particular, arising out of inquiries that were made into their connection with others who dealt in Sunny Global shares.

A referral order to a body that may take disciplinary action.

360. Mr Mak submitted that the finding of the Tribunal of market misconduct by a Specified Person was itself a stigma which, together with a disqualification order, made it “apt and necessary” to make a referral order to a body that may take disciplinary action only in cases where persons “...committed market misconduct in their professional capacity or in performance of professional functions”.

The submissions of the Presenting Officers.

361. The Presenting Officers provided the Tribunal with schedules of the costs and expenses sought by the Government and the SFC which are attached as Annexures IV(a) and V.

Delay.

362. In response to Mr Mak’s reliance upon the decision of the Insider Dealing Tribunal in *Vanda* to afford those found culpable of insider dealing a discount in relation to disqualification, financial and costs orders in consequence of the delay between the impugned conduct and the imposition of the orders Ms Juliana Chow (“Ms Chow”) submitted that this Tribunal ought to have regard to the considerable length of that delay, namely seven years, and to the fact that the regime of the Insider Dealing Tribunal was well established by the time of the events themselves let alone the hearing. By contrast, she asked this Tribunal to take into account that this Ordinance is relatively new and that, at the time of the issue of the FS’s notice, there were no precedents established by the Tribunal for the construction of the statutory framework. Of specific matters relevant to the length of delay, Ms Chow informed the Tribunal that in addition to the two matters into which this Tribunal

has been required to inquire there was a third area of suspected market misconduct into which investigation was made.

363. In addition, Ms Chow invited the Tribunal to have regard to the following chronology of events :

### **2003**

28 August - the Surveillance Department of the SFC commenced inquiries;

1 December - the Surveillance Department referred the case to the Investigation Department;

### **2005**

24 January to 13 May - expert opinion was sought and received;

14 June - the case was referred for internal legal advice at the SFC;

### **2006**

25 April - internal legal advice at the SFC was received;

25 May - the case was referred to the FS;

26 May - the FS referred the case to the DoJ for advice;

### **2007**

29 January - the DoJ gave its advice to the Financial Services and the Treasury Bureau (“FSTB”);

30 July - FSTB asked the DoJ to settle a Notice under section 252 of the Ordinance;

8 August - the DoJ settled a section 252 Notice and provided them to FSTB;

27 August - FS issued that the section 252 Notice constituting this Tribunal.



364. Finally, Ms Chow informed the Tribunal that she was unaware of orders made by any Insider Dealing Tribunal, other than in *Vanda*, in which a discount was made on account of delay in respect of orders of disgorgement and costs.

Costs and expenses Claim.

365. Ms Chow responded to Mr Mak's objection to the hourly rate of \$4000.00 per hour sought for the time spent by Mr Johnny Chan, as Assistant Presenting Officer, in preparing for and appearing before the Tribunal by indicating that the hourly rate was based on the upper rate applicable for the relevant time period for work conducted in the High Court by a solicitor of his years of practice.

Costs and expenses claimed by the SFC.

366. Ms Chow explained that the claim made by the SFC for its costs and expenses was based on hourly rates directly proportional to the officer's salary and overheads. It is to be noted that in consequence the hourly rate claimed for internal legal advice and expert advice within the SFC is less than that claimed by the DoJ for the services of a law clerk in compiling bundles!

367. Finally, Ms Chow explained that no claim had been made in respect of costs and expenses incurred by the SFC in relation to interviews and inquiries that in the event were "unused" in these proceedings.

Miscellaneous matters.

368. In light of the submission made by Mr Mak firstly, that there was delay in bringing proceedings before the Tribunal and secondly, that in consequence a discount ought to be afforded to the Specified Persons in respect of orders, *inter-alia*, relating to costs and expenses claimed by the SFC the Tribunal invited the

SFC to make submissions and representations in respect of those matters if it wished to do so. However, by letter the SFC informed the Tribunal that it did not wish to avail itself of that opportunity.

## A CONSIDERATION OF THE SUBMISSIONS

### Delay.

369. In Part I of this report (Chapter 2, paragraph 2 at page 5) the Tribunal expressed its disquiet :

“... about the considerable delay which has occurred in bringing this case to a hearing.”.

Noting that the last of the interviews of witnesses, including the Specified Persons, had concluded in April 2005 we went on to observe :

“Thereafter, well over 2 years elapsed before the proceedings before this Tribunal were formally initiated by the Financial Secretary’s Notice, dated 27 August 2007.”.

370. An explanation for the delay in that period has been provided by Ms Chow in her closing submissions. Legal advice obtained internally by the SFC occupied the period 14 June 2005 to 25 April 2006, namely 10½ months. The DoJ took from 26 May 2006 until 29 January 2007, namely eight months in rendering advice to the FSTB. The delay ensuing thereafter, before the FS’s notice was issued on 27 August 2007, is very substantially unexplained.

371. Whilst we accept that consideration was given by those lawyers to events and conduct that are not before this Tribunal, we have no doubt whatsoever that the 18 months period over which legal advice was rendered was unjustified and a wholly unacceptable delay. Furthermore, in the absence of any explanation for the delay following the rendering of legal advice to the issue of the FS’s notice that

delay, on its face, is likewise unacceptable. On a number of occasions the Insider Dealing Tribunal has found it necessary to note with concern the delay between the events the subject of its enquiry and the hearing itself (see *Vanda* : Ruling 9 August 2005 paragraph 92; *Tingyi (Cayman Islands) Holding Corp.*, Report dated 8 December 2006 at page 22 and *Asia Orient Holdings Limited*, Report dated 14 December 2006 at paragraphs 466-469 at pages 117 and 118). In the latter Report, the Tribunal said :

“469. No explanation was offered to the Tribunal for the very long delay between the time in which the case files were first sent to the Financial secretary for advice, and the time of the Notice was issued. Again, having regard to the straightforward nature of the matter, that it should take 1 year and 7 months to give legal advice to the Financial Secretary, seems to the Tribunal to be excessive.”.

In its Ruling, dated 27 December 2007, in *QPL International Holdings Limited* the Market Misconduct Tribunal voiced similar concerns in respect of delay of the same nature (paragraph 93 page 45).

372. It is difficult to avoid the conclusion that a considerable degree of lassitude prevails over those charged with bringing alleged market misconduct before this Tribunal and alleged insider dealing before the Insider Dealing Tribunal and that there is an indifference to unnecessary delay.

373. Notwithstanding our conclusions in respect of the issue of delay, we are satisfied that no prejudice has ensued to the disadvantage of the Specified Persons in this hearing. With all due respect to the Insider Dealing Tribunal in *Vanda*, we do not accept that in the matters before us the delay in bringing these proceedings before this Tribunal is relevant to the issue of orders of disgorgement and orders of costs and expenses incurred by the Government and the SFC. Why should an order

of disgorgement, of the benefit gained by a malefactor culpable of market misconduct, be reduced in circumstances of delay in bringing the proceedings where the malefactor has been able to retain his ill-gotten gains longer? Why should orders of costs and expenses in favour of the Government and the SFC incurred in bringing that malefactor to justice be reduced because of delay in achieving justice? By contrast, we accept that the passage of five years since the market misconduct, during which time the Specified Persons have carried on their careers and have not been culpable of misconduct, is relevant to the making of other orders by the Tribunal.

An order for disgorgement, pursuant to section 257(1)(d) of the Ordinance.

374. Quite understandably there is no dispute that the Tribunal should exercise its power to order disgorgement of profit gained by the respective Specified Persons. We determine so to do.

An order that the monies ordered to be disgorged bear compound interest, pursuant to section 259(a) and (b) of the Ordinance.

375. The power granted to the Tribunal, pursuant to section 259(a) and (b) of the Ordinance, to order that monies ordered to be disgorged pursuant to section 257(1)(d) of compound interest and to fix the periodic rest periods is a power that is not available to the Insider Dealing Tribunal. The grant of this new power to this Tribunal is consistent with the aim of ensuring that the malefactor is deprived of all the ill-gotten gains obtained by his market misconduct. The potentially swingeing effects of such an order on a Specified Person can be mitigated by use of the power available to the Tribunal, pursuant to section 259(b), to determine the rests at which compound interest is to be calculated. It is to be noted that, in circumstances of a conspiracy to defraud, in *China Everbright-IHD Pacific Limited and Ch'ng Poh*

(2002) 5 HKCFAR 630, the Court of Final Appeal did not interfere with the exercise of the trial judge's discretion to order compound interest with monthly rests. Of course, the circumstances of the market misconduct we have found to have occurred is not a conspiracy to defraud. In the circumstances obtaining in the case before the Tribunal we are satisfied that an order of compound interest with one yearly rests is the appropriate order for the Tribunal to make.

An order of prohibition against the Specified Person from being a director, *et cetera*, of a listed or other specified corporation, pursuant to section 257(1)(a) of the Ordinance.

376. As we stated earlier, the delay of four years in bringing these proceedings before the Tribunal and of a total of five years before the imposition of orders by the Tribunal is relevant to the making of orders, other than in respect of disgorgement and costs and expenses. In particular, the Specified Persons have continued their careers without committing further misconduct. Nevertheless, the purpose of such orders being the protection of the public we feel it is appropriate to make prohibition orders in respect of Mr Wilfred Hung, Mr Joe Chan, Ms Katherine Yu and Mr Lee. The first three persons are professionally qualified accountants. Mr Wilfred Hung and Mr Joe Chan were the Business Development Manager and Assistant Business Development Manager respectively of a subsidiary of the publicly listed company, Sunny Global, at the time of the market misconduct. That misconduct yielded them not insignificant personal gain. Both have continued their business careers, the former working in his own company whereas the latter is an accountant for a publicly listed company, Jilin Qifeng Chemical Fibre Company Limited.

377. Ms Katherine Yu was the Finance Director and Company Secretary and Mr Lee Chairman of Sunny Global. Each was involved in the disclosure of false or misleading information to the market on numerous occasions in a period of over a month whilst, during most of that time, each was involved in the sale of Sunny Global shares by Info Fortune. As a result of that market misconduct the profit gained by Mr Lee exceeded \$7 million. We regard that market misconduct as very serious. We were told that, notwithstanding her early active corporate career, Ms Katherine Yu is now a full-time mother and housewife residing in Canada. Mr Lee not having participated in these proceedings, the Tribunal is unaware of what business or other activities he pursues.

Orders that the specified Persons pay to the Government costs and expenses in respect of these proceedings pursuant to section 257(1)(e) of the Ordinance and to the SFC in respect of its costs and expenses of its investigation and incidental to these proceedings pursuant to section 257(1)(f).

(i) Costs of the video-link with Ms Katherine Yu in Canada.

378. Ms Katherine Yu was the subject of an order of the Tribunal pursuant to section 253(1)(b) of the Ordinance dated 25 April 2008 to attend and give evidence before the Tribunal.

379. By letter and through counsel she said that she now resided in Canada and asked to give evidence by video-link. Although she articulated a lengthy list of adverse consequences to her, her family and her husband's pharmacy business if they were to travel to Hong Kong for her to give evidence here, her primary objection was based on the fact that she was pregnant. At the request of the Tribunal, she provided a letter dated 8 May 2008 from a doctor in Canada. That doctor stated that Ms Katherine Yu was "...10+ weeks of intrauterine gestation"

and recommended that she delay travel plans "... till after 12 weeks of gestation". Also, it was recommended that she gets IPS Part I blood work done at 12-13 weeks. When it was pointed out that her evidence would not be taken until after the end of the 13<sup>th</sup> week of pregnancy she provided no further medical notes and simply re-asserted her wish not to travel to Hong Kong and her desire to give evidence by video-link.

380. In the event, the Tribunal did receive her evidence by video-link from Canada on 3-5 June 2008. The costs of that video-link was \$30,482.46.

381. Section 260(1) of the Ordinance provides that at the conclusion of proceedings the Tribunal may by award to :

- “ (a) any person whose attendance, whether as a witness or otherwise, has been necessary or required for the purposes of the proceedings;
- (b) any person whose conduct is the subject, whether wholly or in part, of the proceedings,

such sum as it considers appropriate in respect of the costs reasonably incurred by the person in relation to the proceedings.”.

However, subsection 4 of that section operates to exclude such an award to a person identified as having engaged in market misconduct. If Ms Katherine Yu had traveled to Hong Kong to testify the Ordinance would have operated to exclude any award to her of the costs reasonably incurred by her attendance.

382. The Tribunal is satisfied that Ms Katherine Yu cannot be made better off by declining to come to Hong Kong, in the absence of medical justification by a doctor, and having thereby required the Government to bear the costs incurred at the time. Furthermore, the Tribunal is satisfied that it would be unfair to the other Specified

Persons to attribute these costs as part of the overall costs to shared by the Specified Persons in the proportion to be addressed next.

383. In the result, we determine that the order for costs to be made against Ms Katherine Yu include in addition the sum of \$30,482.46 in respect of the costs of the video-link to Canada.

(ii) General

The basis of a calculation of costs and expenses of the Government.

384. There are two separate components of the costs and expenses incurred by the Government and recoverable pursuant to section 257(1)(e) :

- (i) the costs and expenses of the Department of Justice and
- (ii) the costs and expenses of the Tribunal.

385. The Tribunal has been presented with the calculation of the costs and expenses of the DoJ by the Presenting Officer. The total is \$897,748.50. As to the costs and expenses of the Tribunal, we have determined to follow the well-established practice of the Insider Dealing Tribunal, first articulated in the Insider Dealing Tribunal's report October 1996, in *Yanion International Holdings Limited* at page 80 :

“... the costs of the Tribunal have been limited to the fees and salaries of the Chairman, the ordinary members and the Tribunal staff, together with the costs of verbatim reporters and the court interpreters. Costs of machinery, accommodation and stationery have not been included.”.

Calculations in respect of the costs and expenses of the Chairman and the Tribunal staff are based on their respective annual staff costs as described in the “Staff Cost Ready Reckoner” prepared by the Director of Accounting



Services. The schedule of costs and expenses of the Tribunal is attached as Annexure IV(b). The total is \$1,121,097.81.

The basis of the calculation of the costs and expenses of the SFC.

386. As noted at paragraph 361 the schedule of costs and expenses of the SFC has been provided to the Tribunal through the Presenting Officer and calculated as described in that paragraph. The total is \$122,036.00.

The attribution of costs and expenses to the investigation and proceedings in respect of the two areas of market misconduct.

387. The proceedings before the Tribunal concerned two separate areas of market misconduct involving two different groups of Specified Persons. However, in both the investigation by the SFC and in the material received by the Tribunal in these proceedings there has been a degree of overlap. For example, Mr Charles Wong of Kim Eng provided records of interview and gave evidence before the Tribunal in relation to both areas of market misconduct. Others did likewise. In those circumstances, doing the best we can to do justice to individual Specified Persons the Tribunal has adopted a broad brush approach to the allocation of costs and expenses and determines that one third is attributable to the investigation and proceedings relating to insider dealing and two thirds to that in respect of disclosures of false or misleading information. One third of the costs and expenses payable to the Government is \$672,948.77; two thirds is \$1,345,897.54. One third of the costs payable to the SFC is \$40,678.66; two thirds is \$81,357.33.

388. We determine that Mr Wilfred Hung, Mr Joe Chan and Ms Tsoi should bear the cost and expenses of the investigation and proceedings relating to insider dealing equally, that is one third each.

389. In respect of the costs and expenses of the investigation and proceedings relating to the disclosure of false or misleading information we are satisfied that Ms Katherine Yu and Mr Lee are to be treated equally. Although we have determined that the profit gained by the market misconduct was that of Mr Lee, nevertheless we have found Info Fortune culpable of market misconduct. It was necessary for that misconduct to be investigated and the subject of evidence in the proceedings. We determine that Ms Katherine Yu and Mr Lee are each to bear 40% of the costs and expenses of the investigation and proceedings into the disclosure of false or misleading information, whereas Info Fortune is to bear 20%.

390. Of the issue taken by Mr Mak of the need for the services of Mr Johnny Chan in the course of the proceedings and as to the hourly rate sought for all his services we are satisfied that the preparation for and conduct of these proceedings required the assistance given to counsel by an experienced solicitor. For our part, we accept the hourly rate for Mr Johnny Chan of \$4,000.00 and note that, pursuant to section 258(6) of the Ordinance, Order 62 of the rules of the High Court is applicable to taxation of orders made under section 257(1)(e) and (f).

An order that a body be recommended to take disciplinary action against a specified person, pursuant to section 257(1)(g) of the Ordinance.

391. Mr Wilfred Hung, Mr Joe Chan and Ms Katherine Yu are all professionally qualified accountants and members of professional bodies, including the Hong Kong Institute of Certified Public Accountants. In Hong Kong a regime of self-regulation continues to subsist in the professions. In order that the various professional associations can discharge their duties properly it is important that they receive adequate relevant information in respect of the misconduct of their

members. We have no doubt whatsoever that it is necessary that we make a recommendation to the Hong Kong Institute of Certified Public Accountants that they take such disciplinary action as they deem appropriate in respect of those three Specified Persons. To assist them in discharging their duties we will order service upon them, pursuant to section 262(2)(v) of the Ordinance, of the whole of the Tribunal's report.

## ORDERS

The Tribunal makes the following orders under the Ordinance  
in respect of the following persons :

Mr Wilfred Hung Fan Wai.

- (i) pursuant to section 257(1)(a), an order that he shall not, without the leave of the Court of First Instance, be a director, liquidator, or receiver or manager of the property or business of a listed corporation for the period of 12 months;
- (ii) pursuant to section 257(1)(d), an order that he shall pay to the Government \$83,847.00;
- (iii) pursuant to section 259(a) and (b), an order that he shall pay to the Government compound interest on the sum of \$83,847.00, ordered at (ii), from 11 June 2003, at the rate from time to time applicable to judgment debts under section 49 of the High Court Ordinance, Cap. 4, calculated at one yearly rests;
- (iv) pursuant to section 257(1)(e), an order that he shall pay to the Government \$224,316.25;
- (v) pursuant to section 257(1)(f), an order that he shall pay to the Securities and Futures Commission \$13,559.55;
- (vi) pursuant to section 257(1)(g) an order that the Hong Kong Institute of Certified Public Accountants be recommended to take disciplinary action against him; and
- (vii) pursuant to section 262(2)(b)(v), an order that the whole of the report of the Tribunal be served upon the Hong Kong Institute of Certified Public Accountants.

Mr Joe Chan Cheung.

- (i) pursuant to section 257(1)(a), an order that he shall not, without the leave of the Court of First Instance, be a director, liquidator, or receiver or manager of the property or business of a listed corporation for the period of 12 months;
- (ii) pursuant to section 257(1)(d), an order that he shall pay to the Government \$287,301.00;
- (iii) pursuant to section 259(a) and (b), an order that he shall pay to the Government compound interest on the sum of \$287,301.00, ordered at (ii), from 20 June 2003, at the rate from time to time applicable to judgment debts under section 49 of the High Court Ordinance, Cap. 4, calculated at one yearly rests;
- (iv) pursuant to section 257(1)(e), an order that he shall pay to the Government \$224,316.25;
- (v) pursuant to section 257(1)(f) an order that he shall pay to the Securities and Futures Commission \$13,559.55;
- (vi) pursuant to section 257(1)(g), an order that the Hong Kong Institute of Certified Public Accountants be recommended to take disciplinary action against him; and
- (vii) pursuant to section 262(2)(v) an order that the whole of the Tribunal's report be served upon the Hong Kong Institute of Certified Public Accountants.

Ms Tsoi Yung Yung.

- (i) pursuant to section 257(1)(d), an order that she pay to the Government \$221,748.00;
- (ii) pursuant to section 259(a) and (b), an order that she shall pay to the Government compound interest on the sum of \$221,748.00, ordered at (i), from 23 June 2003, at the rate from time to time applicable to judgment debts under section 49 of the High Court Ordinance, Cap. 4, calculated at one yearly rests;
- (iii) pursuant to section 257(1)(e), and order that she pay to the Government \$224,316.25; and
- (iv) pursuant to section 257(1)(f), an order that she pay to the Securities and Futures Commission \$13,559.55.

Ms Katherine Yu Kin Ling.

- (i) pursuant to section 257(1)(a), an order that she shall not, without the leave of the Court of First Instance, be a director, liquidator, or receiver or manager of the property or business of a listed corporation for the period of four years;
- (ii) pursuant to section 257(1)(e), an order that she pay to the Government the sum of \$568,841.46;
- (iii) pursuant to section 257(1)(f), an order that she pay to the Securities and Futures Commission the sum of \$32,542.92;
- (iv) pursuant to section 257(1)(g) and order that the Hong Kong Institute of Certified Public Accountants be recommended to take disciplinary action against her; and
- (v) pursuant to section 262(2)(b), an order that the whole of the Tribunal's report be served upon the Hong Kong Institute of Certified Public Accountants.

Mr Lee Man Fa.

- (i) pursuant to section 257(1)(a), an order that he shall not without the leave of the Court of First Instance, be a director, liquidator, or receiver or manager of the property or business of a listed corporation for the period of four years;
- (ii) pursuant to section 257(1)(d), an order that he pay to the Government \$7,388,260.00; and
- (iii) pursuant to section 259(a) and (b), an order that he shall pay to the Government compound interest on the sum of \$7,388,260.00, ordered at (ii), from 25 August 2003, at the rate from time to time applicable to judgment debts under section 49 of the High Court Ordinance, Cap. 4, calculated at one yearly rests;
- (iv) pursuant to section 257(1)(e), an order that he pay to the Government the sum of \$538,359.00 and
- (v) pursuant to section 257(1)(f), an order that he pay to the Securities and Futures Commission the sum of \$32,542.92;

Info Fortune Holdings Limited.

- (i) pursuant to section 257(1)(e), an order that it pay to the Government \$269,179.50; and
- (ii) pursuant to section 257(1)(f), an order that it pay to the Securities and Futures Commission \$16,271.46.

Pursuant to section 264(1) of the Ordinance the Tribunal orders that the orders that it has made be registered in the Court of First Instance and, pursuant to section

264(2), that the orders made under section 257(1)(a) be filed with the Registrar of Companies.

Costs incurred by attendance as a witness.

Pursuant to section 260(1)(a) of the Ordinance we order an award of \$96.74 in favour of Ms Charlotte Kong in respect of her costs reasonably incurred in attending the proceedings held by video-link from Shanghai, PRC.



## CHAPTER 18

### MISCELLANEOUS MATTERS

(i) The Hearings conducted by the Tribunal.

392. The Tribunal conducted hearings on the following dates :

5 November 2007- Preliminary hearing;

17 January 2008 - Application for Stay/adjournment by some of the  
Specified Persons;

13 May 2008 - Directions hearing.

Part I substantive hearings

15, 16, 22, 23, 26, 28-30 May 2008

3-5, 10, 18 and 19 June 2008

Part II substantive hearings

28 July 2008

8 and 26 August 2008

(ii) Representation and Appearances.

Presenting Officer.

393. Throughout the proceedings Ms Juliana Chow appeared as the Presenting Officer. Mr Johnny Chan was the Assistant Presenting Officer until he was replaced by Mr Sunny Li on 18 July 2008 and thereafter.

Mr Wilfred Hung Fan Wai, Mr Joe Chan Cheung, Ms Tsoi Yung Yung and Ms Katherine Yu Kin Ling.

394. Mr Bernard Mak (instructed by Tung, Ng, Tse & Heung), appearing for Mr Chan Cheung, Mr Hung Fan Wai, Wilfred and Ms Tsoi Yung Yung; and

(instructed by Michael Li & Co), appearing for Ms Yu Kin Ling, Katherine attended all hearings of the Tribunal save those of 8 and 26 August 2008.

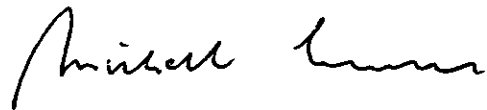
395. Mr Henry Wong of Michael Li & Co appeared for Ms Katherine Yu at the hearings of 5 November 2007 and 8 August 2008. On the latter date Ms Au of Tung, Ng, Tse & Heung represented Mr Wilfred Hung, Mr Joe Chan and Ms Tsoi.

Mr Lee Man Fa.

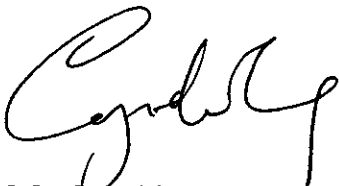
396. Mr Henry Wong of Michael Li & Co appeared on behalf of Mr Lee at the hearings of 5 November 2007 and 17 January 2008. Thereafter, Mr Lee was unrepresented and did not attend the hearings of the Tribunal.

Info Fortune.

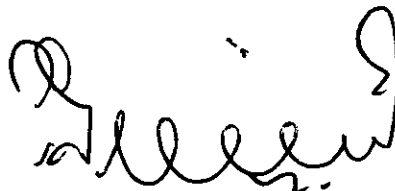
397. Mr Henry Wong purported to appear for Info Fortune at the hearings of 5 November 2007 and 17 January 2008. Thereafter, Info Fortune was unrepresented until 10 June 2008 and thereafter when Mr Hylas Chung, instructed by Huen and Partners appeared on its behalf.



The Hon Mr Justice Lunn  
(Chairman)



Ms Cynthia Tang Yuen Shun  
(Member)



Mr Peter R Griffiths  
(Member)

Dated 29<sup>th</sup> August 2008