

MARKET MISCONDUCT TRIBUNAL

In the matter of dealings in the shares of
China Overseas Land and Investment Ltd
(Stock Code 688)

Specified Persons:

Mr Tsien Pak Cheong, David
Mr Leung Chi Keung, Edmond
Mr Luk Ka Cheung, Steve

Before : Mr Justice Lunn (Chairman)

Mr Neville Watkins (Member)

Mr Clement Chan (Member)

Date of Hearing : 25 February 2008.

Date of Ruling : 28 February 2008.

RULING

SUBMISSIONS ON BEHALF OF MR STEVE LUK

1. In written submissions dated 7 December 2007 it was submitted on behalf of Mr Steve Luk Ka Cheung that this Tribunal has no jurisdiction to hear this matter because, either this Tribunal is purporting to “exercise the judicial power of the state” in circumstances where it is not a “court” for the purposes of the Basic Law, contrary to Article 19 of the Basic Law, or this Tribunal is a “court” for the purposes of the Basic Law but its composition and procedures do not comply with the constitutional requirements for “courts” as set out in Articles 80 to 96 of the Basic Law. The Tribunal was invited to note that the Chairman was

appointed by the Chief Executive, on the recommendation of the Chief Justice, and the members appointed by the Financial Secretary on the delegated authority of the Chief Executive. It was submitted that those methods of appointment do not accord with the required mechanisms for the appointment of members of the judiciary laid down in Articles 88 to 93 of the Basic Law. Furthermore, it was contended that :

“The process that this Tribunal proposes to adopt for the purposes of determining these proceedings is an inquisitorial process, in which the rules of evidence applicable in civil and criminal proceedings before the courts of law do not apply.”

It was submitted that such process do not comply with the requirements of Articles 84 and 87 of the Basic Law.

2 Complaint was made that this Tribunal is purporting to “exercise the judicial power of the state”, but that it is not constituted nor does it operate in accordance with the requirements applicable to a “court” under the Basic Law. As such, it was contended that this Tribunal is unconstitutional and has no lawful jurisdiction to hear this matter. In consequence, the Tribunal was invited to rule that it has no jurisdiction to hear this case, alternatively to order that the proceedings be permanently stayed or dismissed.

THE SUBMISSIONS OF THE PRESENTING OFFICER

3. In his written reply dated 27 December 2007 the Presenting Officer, Mr Peter Ip, submitted that this Tribunal did not have jurisdiction to hear and determine the issue of whether or not it has been constituted in an unconstitutional way. He submitted that the Tribunal is the creation

of statute, namely the Securities and Futures Ordinance, Cap. 571 (“the Ordinance”). Section 251(1) of the Ordinance makes provision for the establishment of the Tribunal :

“There is established a Tribunal to be known as the Market Misconduct Tribunal which shall have jurisdiction to hear and determine in accordance with this Part and Schedule 9 any question or issue arising out of or in connection with the proceedings instituted under section 252.”.

Section 252 of the Ordinance provides for the mode of commencement of proceedings in the Tribunal, namely by the Financial Secretary giving the Tribunal notice in writing. Section 252(3) of the Ordinance describes the object of the proceedings :

“Without limiting the generality of section 251(1), the object of the proceedings instituted under subsection (1) is for the Tribunal to determine -

- (a) whether any market misconduct has taken place;
- (b) the identity of any person who has engaged in the market misconduct; and
- (c) the amount of any profit gained or lost avoided as a result of the market misconduct.”.

4. Mr Ip contended that, although the Tribunal has wide power in hearing and determining issues arising out of or in connection with the proceedings, its power to hear and determine issues is limited to those relating to the proceedings, that is to hear and determine whether any market misconduct has taken place. He submitted that the Tribunal has no power to consider whether or not it has been constituted in compliance with the Basic Law.

FURTHER SUBMISSIONS ON BEHALF OF MR STEVE LUK

5. By way of a letter to the Tribunal, dated 18 February 2008, it was submitted on behalf of Mr Luk that, having regard to Mr Ip's written submission summarised above, those representing Mr Luk were "... *inclined to agree with the Presenting Officer's submission in paragraph 35 that the Tribunal has no jurisdiction to determine the question of its own constitutionality. If the Tribunal rules that this is correct, then Mr Luk would propose to have his challenge to the constitutionality of the Tribunal resolved by the High Court.*".

Article 158 of the Basic Law.

6. At the hearing of 25 February 2008 Mr McCoy, SC appeared on behalf of Mr Steve Luk. He had been briefed to do so during the course of the day and was not the author of the earlier written submissions or the letter. For the first time, the point was taken that Article 158 of the Basic Law was relevant to the issue of the jurisdiction of the Tribunal to entertain this argument. Article 158 provides :

"The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress.

The Standing Committee of the National People's Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.

The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning

affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.

The Standing Committee of the National People's Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law.”.

7. Mr McCoy drew the attention of the Tribunal to the judgment of the Court of Final Appeal in *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, in which the issues of the constitutional jurisdiction of the courts in the HKSAR and their approach to the interpretation of the Basic Law were addressed. At page 25, F-H Li CJ said :

“Constitutional jurisdiction of the courts

Before turning to the issues, it is important for us first, to state the position as to the constitutional jurisdiction of the courts in the Hong Kong Special Administrative Region and, secondly, to lay down the proper approach to the interpretation of the Basic Law.

The Region is vested with independent judicial power, including that of final adjudication. Article 19(1). The courts of

the Region at all levels shall be the judiciary of the Region exercising the judicial power of the Region. Article 80.

In exercising their judicial power conferred by the Basic Law, the courts of the Region have a duty to enforce and interpret that Law.”.

8. Of the proper approach to interpretation of the Basic Law, Li CJ went on to say : (page 28 C-F)

“We must begin by recognizing and appreciating the character of the document. The Basic Law is an entrenched constitutional instrument to implement the unique principle of ‘one country, two systems’. As is usual for constitutional instruments, it uses ample and general language. It is a living instrument intended to meet changing needs and circumstances.

It is generally accepted that in the interpretation of a constitution such as the Basic Law a purposive approach is to be applied. The adoption of a purposive approach is necessary because a constitution states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the constitution and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context, context being of particular importance in the interpretation of a constitutional instrument.”.

9. Mr McCoy submitted that this Tribunal, not being a “court” as described in the Basic Law, was not permitted to review its processes to

determine whether or not thereby it was exercising the “judicial power of the state” because to do so was to “interpret” the Basic Law. The Presenting Officer joined in that submission.

A CONSIDERATION OF THE SUBMISSIONS : the Tribunal’s jurisdiction to determine the nature of its processes and whether or not it is constituted in accordance with the Basic Law.

10. Although the Chairman is a judge of the Court of First Instance of the High Court of Hong Kong, in his capacity as Chairman of the Market Misconduct Tribunal he enjoys only the powers given to this Tribunal under the Ordinance. There is no live issue that this Tribunal is a “court” as described in the Basic Law. Accordingly, it has no power to “interpret” the Basic Law. However, on the other hand it is bound by the decisions of the courts of the High Court and the Court of Final Appeal. In the written submissions submitted on behalf of Mr Steve Luk the Tribunal’s attention was drawn to the judgment of the Court of Final Appeal *Stock Exchange of Hong Kong Limited v New World Development and Others* (2006) 9 HKCFAR 234. In that case, the Court of Final Appeal was seized of an appeal from the Court of Appeal, which had determined that the Disciplinary Committee of the Stock Exchange of Hong Kong was a “court” for the purposes of Article 35 of the Basic Law, in consequence of which the respondents, persons subject to the disciplinary enquiry, were entitled to full legal representation at those proceedings. The Court of Final Appeal concluded that Article 35 of the Basic Law only applied to “courts of law” and the Disciplinary Committee of the Stock Exchange was not such a court.

11. In his analysis, of what he described as the “constitutional architecture” of the Basic Law in respect of the legal system and the role

of the courts, Ribeiro PJ noted, at paragraph 42, with reference to Article 2 that the “*first evident objective*” was the establishment in the HKSAR of a legal system separate from that obtaining on the mainland. He went on to observe that Article 19 provided that such independent judicial power is to be exercised by the courts of the HKSAR, which courts constituted the “judiciary” (Article 80) and which were specifically identified in Article 81. Further, that by operation of Articles 81 and 87 the Basic Law provided for continuity between the pre-existing and the present courts and judicial system (paragraph 43). Finally, (paragraph 44) Ribeiro PJ noted that the “*third evident purpose*” of the Basic Law was to entrench the independence of the judiciary who operated those courts, noting that that was made express by Article 85, was reflected by Article 88, which laid down the machinery for the appointment of judges, and by Article 89 which provided for their removal. At paragraph 45, Ribeiro PJ concluded :

“It is therefore entirely clear that when, in such Articles, the Basic Law refers to the ‘the courts’ it is referring to the Court of judicature: the institutions which constitute the judicial system, entrusted with the exercise of the judicial power in the HKSAR. I will refer to them simply as ‘courts of law’.”

12. Later in his judgment, Ribeiro PJ reviewed the case law on the concept of a “court” at some length (paragraphs 70-89). He did so in the context of three separate areas of consideration, namely contempt, absolute privilege and the circumstances in which only a “court” could exercise the judicial power. Of the issue of contempt, he noted that in their speeches in the *Attorney-General v BBC* both Lord Fraser of Tullybelton and Lord Scarman concluded that only “courts of law”

exercising the judicial power of the state were protected by the law of contempt (see paragraph 73). He observed that in that context the common law accorded with the same concept adopted by the Basic Law.

13. Of the issue of whether or not the circumstances were such that only a “court” could exercise the judicial power, which is the primary point taken on behalf of Mr Luk, Ribeiro PJ said (paragraph 77) :

“Another context in which the concept of ‘a court’ may be in *issue* concerns cases where a challenge is made to a Tribunal’s jurisdiction on the ground that it is performing a function which involves exercise of the judicial power whereas it is not a properly constituted ‘court’ and therefore cannot lawfully exercise such power.”.

Ribeiro PJ cited examples in which the issue had been resolved. He noted that in *Shell Co. of Australia Limited v Federal Commissioner of Taxation* [1931] AC 275 the Privy Council had determined that the Board of Review set up to review decisions of the Commissioner of Taxation was not exercising the judicial power of the Commonwealth of Australia but merely acting administratively. By contrast, in *Yau Kwong man and Another v Secretary for Security* (unreported HCAL 1595 and 1596/2001 and CACV 377/2002) it was held at first instance and confirmed in the Court of Appeal that the determination, in which a fixed minimum term of imprisonment was imposed upon young persons convicted of murder and subject to indefinite detention, involved the exercise of judicial power, which had to be exercised by a court of law as provided for by Article 80 of the Basic Law and not by the Chief Executive.

14. In the context of the issue at hand, namely whether the Disciplinary Committee of the Stock Exchange was a “court” he went on to observe (paragraph 81) :

“These cases also highlight a difficulty with holding that tribunals like the Disciplinary Committee constitute ‘courts’ for the purposes of the Basic Law. If that was so, it might be thought logically follow that their composition might be subject to challenge on the ground that they are not manned by judges or other members of the judiciary, which would of course be absurd.”.

Of course, albeit not in the context of a disciplinary committee, that is the very argument mounted on behalf of Mr Luk.

15. Of the significance to be attached to the fact that a tribunal has been created by statute, in determining whether not it is to be regarded as a “court” Ribeiro PJ said (paragraph 86) :

“However, while it is true that a purely domestic tribunal derived wholly from private contractual relations is most unlikely to be considered ‘a court’ the fact that a tribunal has been created by statute or is integral to a statutory scheme is plainly not sufficient to qualify it as ‘a court’ for requisite purpose.”.

16. In the concluding parts of his judgment in this aspect, Ribeiro PJ overruled earlier decisions of the Court of Appeal, in which it had been held that the Solicitors Disciplinary Tribunal and the Medical Council were courts of law. Both Tribunals are the creatures of statute (see paragraph 89) but :

“Neither are the SDT and the Medical Council courts of law.”.

CONCLUSION

17. In the course of his judgment interpreting the Basic Law in respect of the provisions that relate to “the exercise of the judicial power of the state” and the related concept of a “court” Ribeiro PJ has not only articulated the relevant principles in detail but also has applied them to three separate tribunals. In those circumstances, in my judgment this Tribunal may apply those principles to a review of its own processes to determine whether not they are an exercise of the judicial power of the state. Accordingly, I rule that this Tribunal has jurisdiction to conduct that review.

THE ISSUES

18. It is clear that the issues raised behalf of Mr Luk are issues of law, although the alternative remedy sought of stay of the proceedings is a matter for the Tribunal as a whole to determine. Section 24(c) of Schedule 9 of the Ordinance requires that questions of law are to be determined by the Chairman alone. The issues of law may be identified thus : are the powers granted to the Tribunal under the Ordinance that govern its processes the exercise of the “judicial power of the state”, which may be exercised only by a “court of law”? If so, is the manner in which the Tribunal been constituted unconstitutional, in that it does not comply with the requirements of the Basic Law in respect of a court of law?

THE SUBMISSIONS ON BEHALF OF MR LUK : the substantive issues.

Exercise of the “judicial power of the state”

19. It was submitted on behalf of Mr Luk that this Tribunal is purporting to exercise the “judicial power of the state”, that is acting as a

“court” as described in the Basic Law. The Tribunal was invited to note that the proceedings were instituted by a Notice from the Financial Secretary, following a referral by the Securities and Futures Commission. A “Presenting Officer”, appointed by the Secretary for Justice, presents evidence to the Tribunal in proceedings, which are conducted in public. The Tribunal is required to determine whether or not “Specified Persons” have engaged in market misconduct, which misconduct could otherwise be the subject of criminal prosecution. It is submitted that the powers available to the Tribunal “...are generally associated with the determination of judicial proceedings” : including, the power to compel parties to give evidence on oath, prohibit publication of the proceedings and punish for contempt in the same way as in the Court of First Instance. Furthermore, it was submitted that the orders that the Tribunal may make against a “Specified Person” determined to have engaged in market misconduct are not only punitive in nature, including the power to deprive a person of his property and to prohibit future conduct, but also may take effect as orders of the Court of First Instance. A determination by the Tribunal that a person has engaged in market misconduct is admissible in evidence in civil proceedings that may be begun by a “victim” of such conduct pursuant to section 281 of the Ordinance. Finally, a person determined by the Tribunal to have engaged in market misconduct may seek redress by way of appeal to the Court of Appeal.

The appointment of the members of the Tribunal.

20. It was contended on behalf of Mr Luk that this Tribunal is not constituted nor does it operate in accordance with the requirements applicable to “courts” in the Basic Law. There is no dispute that the Chairman of the Tribunal has been appointed by the Chief Executive on the recommendation of the Chief Justice and that the ordinary members

have been appointed by the Financial Secretary, acting on the delegated authority of the Chief Executive. That, it is submitted, is not in accordance with the requisite mechanism for the appointment of judges and other members of the judiciary as provided for by Articles 88 to 93 of the Basic Law.

The process of the Tribunal.

21. It was submitted that the power of the Tribunal, provided for by Section 253(1)(a) of the Ordinance, to receive and consider material “...even if the material would not be admissible in evidence in civil or criminal proceedings in a court of law”

does not comply with the requirements of Articles 84 and 87 of the Basic Law.

22. Of the judgment of Ribeiro PJ in the *Stock Exchange of Hong Kong Limited v New World Development and Others* it was submitted that it is clear that the “judicial power of the state” is to be exercised by an independent judiciary and that the structure of the courts and the fundamental rights and protections afforded to Hong Kong citizens prior to 1 July 1997 are to be preserved and that, in consequence, to the extent that any legislation enacted contravenes the requirements or provisions of the Basic Law is ultra vires and invalid.

THE SUBMISSIONS OF THE PRESENTING OFFICER

23. The Presenting Officer submitted that although the Tribunal may discharge its duties “judiciously” or in a “judicial manner” it is, nevertheless, not a “court” in the context of Articles 80 to 96 of the Basic Law. He contended that the submissions made on behalf of Mr Luk

ignore the fact that whilst a tribunal may discharge its duties “judiciously or in a judicial manner” nevertheless, it may do so without “exercising the judicial power of the state”. He submitted that the Basic Law does not preclude the setting up of statutory bodies or tribunals to adjudicate on matters outside the judicial system provided for by Article 81 of the Basic Law.

24. In support of his submissions, Mr Ip cited passages from the speeches of the House of Lords in the *Attorney-General and British Broadcasting Corporation* [1981] AC 303. At issue in that case, was whether or not a local valuation court at Andover was a court for purposes of the law of contempt. Their Lordships held that it was not a court to which the law of contempt applied. At page 358 C Lord Scarman said :

“But, in my judgment not every court is a court of judicature, ie a court in law. Nor am I prepared to assume the Parliament intends to establish court as part of the country’s judicial system whenever it constitute a court. The word “court” does, in modern English usage, emphasised that the body so described as judicial functions to exercise but it is frequently used to describe bodies which, though they exercise judicial functions, are not part of the judicial system of the Kingdom.”.

25. Also, he relied upon dictum of Lord Edmund-Davies, at 351 D, in describing the function and duty of the local valuation court :

“They are, of course, expected to discharge their functions in accordance with the rules of natural justice. It may thus be said that they must act ‘judicially’. But it emphatically does not follow that they are to be classed as a judicial body or a court. The point is important and in the *Royal Aquarium and Summer*

and Winter Garden Society Ltd. v Parkinson (1892) 1 QB 431,
Lopes LJ dealt with it by saying, at p. 452 :

‘The word “judicial” has two meanings. It may refer to the discharge of duties exercisable by a judge or by justices in court, or to administrative duties which need not be performed in court but in respect of which it is necessary to bring a judicial mind—that is, a mind to determine what is fair and just in respect of matters under consideration...’

At the end of the day it has unfortunately to be said that there emerges no short guide, no unmistakable hallmark by which a ‘court’ or ‘inferior court’ may unerringly be identified. It is largely a matter of impression.”.

The characteristics of the Market Misconduct Tribunal.

26. Mr Ip identified various characteristics of the Tribunal which he submitted led to the conclusion that the Tribunal is not “exercising the judicial power of the state”. First, he observed that the Tribunal does not deliver a verdict or judgment rather, pursuant to Section 262 of the Ordinance, it is required to prepare a written report containing any determination it has made under Section 252(3) and any consequential orders it has made under Sections 257 to 260 and the reasons for such determinations and orders, which report it is required to serve first on the Financial Secretary and then, in normal circumstances, to publish. Secondly, by virtue of section 253(1)(a) of the Ordinance the rules of evidence do not bind the Tribunal. Thirdly, although the Tribunal may register an order in the Court of First Instance, which upon registration becomes for all purposes an order of that court, the Tribunal has no power to enforce its own order. Fourthly, the mechanism for the

appointment and removal of members of the Tribunal is different from the mechanism for the appointment and removal of judges, provision for which is made in Articles 88 and 89 of the Basic Law.

A CONSIDERATION OF THE SUBMISSIONS

The characteristics of the Tribunal.

27. At the outset it is to be noted that several characteristics of the Tribunal stand out. Section 253(1) of the Ordinance provides that the Tribunal :

“... may on its own motion or on the application of any party before it -

(a) receive and consider any material by way of oral evidence, written statements or documents, **even if the material would not be admissible in evidence in civil or criminal proceedings in a court of law;**... (emphasis added)

(h) determine the manner in which any material referred to in paragraph (a) is received;

(j) determine the procedure to be followed in the proceedings.”.

28. Furthermore, although section 257(1) of the Ordinance gives the Tribunal the power to make the various orders there enumerated the Tribunal has no power to enforce those orders. In order to give any effect to the orders, it must register them as an order of the Court of First Instance pursuant to Section 264 of the Ordinance.

29. Of the submission made on behalf of Mr Luk that the powers of the Tribunal are those “...*generally associated with the determination*

of judicial proceedings” it is to be noted that the powers of the Solicitors Disciplinary Tribunal include (Section 11 of the Legal Practitioner’s Ordinance, Cap. 159) :

“(1) For the purpose of conducting any such enquiry or investigation, a Solicitors Disciplinary Tribunal shall have all such powers as vested in the court or in any judge in the course of any action or suit in respect of the following matters -

- (a) enforcing the attendance of witnesses and examining them upon oath or otherwise;
- (b) compelling the production of documents;
- (c) punishing persons guilty of contempt;
- (d) ordering the inspection of property;
- (e) conducting the examination of witnesses.”.

30. The orders that may be made by the Solicitors Disciplinary Tribunal, provided for by Section 10 of the Legal Practitioner’s Ordinance, include a power to strike off a solicitor from the roll of solicitors, impose a penalty in amount not exceeding \$500,000 and the payment of the costs of and incidental to the proceedings of the Tribunal. Clearly, the Disciplinary Tribunal must act “judicially,” but nevertheless it is not a court in law.

31. Section 22 of the Medical Registration Ordinance, Cap 161 provides that the Medical Council of Hong Kong shall have the following powers for purposes of conducting an inquiry under Section 21 of the Ordinance, namely the power to :

- “(a) to hear, receive and examine evidence on oath;

- (b) to summon any person to attend the inquiry to give evidence or produce any document or other thing in his possession and to examine him as a witness or require him to produce any document or other thing in his possession, subject to all just exceptions;
- (c) to admit or exclude the public or any member of the public from the inquiry;
- (d) to admit or exclude the press from the inquiry; ...”.

32. Section 23 of the Medical Registration Ordinance provides that, if a person summoned to attend the Inquiry refuses to do so or refuses to answer questions asked of him, he commits an offence, conviction in respect of which may lead to a sentence of imprisonment of up to six months. However, the right against self-incrimination is specifically preserved. Section 21 of the Medical Registration Ordinance provides for various orders that may be made by the Council if it is satisfied that a practitioner has been, inter-alia, guilty of professional misconduct. Those orders include the removal of the practitioner’s name from the General and/or Specialist Register and an award of costs, which may be recovered as a civil debt. Section 31(1) of the Medical Practitioners (Registration and Disciplinary Procedure) Regulations provides that the rules of evidence do not apply to the proceedings of an Inquiry and Section 36(6) provides that the Council may admit or take into account matters “...*whether or not they would be admissible in a court of law.*” Section 26(3) of the Regulations provides that at the conclusion of the proceedings :

“...the Council shall consider and determine whether the facts alleged on any charge before the Council had been proved to its

satisfaction and whether the defendant is guilty of the offence charged.”.

CONCLUSION

33. In my judgment, having regard to the detailed *analysis* and articulation of principles contained in the judgment of Ribeiro PJ in the *Stock Exchange* case cited earlier, the powers and processes of the Market Misconduct Tribunal are manifestly not those that may only be exercised by a “court of law” exercising the “judicial power of the state”. Quite clearly, in providing by Section 253(1)(a) of the Ordinance that this Tribunal may receive and consider material that is “...*not admissible in criminal or civil proceedings in a court of law*” and providing that it may determine its own procedures, when considered with the whole range of powers and duties of the Tribunal, the Legislature intended to create a Tribunal that was not a “court of law”. They did so. Accordingly, the second limb of the argument mounted on behalf of Mr Luk, namely that this Tribunal is not properly constituted as required by the Basic Law, falls by the wayside. It is not necessary that the members of this Tribunal, it not being a “court of law” exercising the “judicial power of the state”, be appointed in accordance with the Basic Law. Of course, it is accepted that the members of the Tribunal have been appointed in accordance with the Ordinance. In the result, I rule that the Tribunal is not unconstitutional and that it does have lawful jurisdiction to hear these proceedings.

The issue of stay of proceedings.

34. One of the remedies sought on behalf on Mr Luk is that these proceedings should be permanently stayed. That is a matter for the Tribunal as a whole, not only the Chairman. The Tribunal as a whole has

considered that matter and, there being no basis at all on which a stay should be granted, refuses that application.

MISCELLANEOUS MATTERS

35. As part of the omnibus submissions made on behalf of Mr Luk it is said that he repeats the arguments presented by the appellant in *Koon Wing Yee v Insider Dealing Tribunal* (unreported-CACV 358/2005 and 360/2007) and those of the applicants in *Chau Chin Hung and Cheung Sau Lin v the Market Misconduct Tribunal* HCAL 123/2007 and *Cheeroll Limited v The Market Misconduct Tribunal* HCAL 124/2007). In particular, it is submitted that :

- (i) These proceedings are criminal in nature and that, in consequence, by reason of Article 39 of the Basic Law and Articles 10 and 11 of the Hong Kong Bill of Rights Ordinance :
 - (a) any evidence of answers/statements to the SFC in interviews in which they were compelled to participate in respect of which the specified persons have claimed privilege against self-incrimination is inadmissible in these proceedings;
 - (b) further, that the specified persons may not be compelled to give evidence; and
 - (c) finally, that the applicable standard of proof is the criminal standard, namely beyond reasonable doubt.

(ii) That the notice of the Financial Secretary of 12 September 2007, by which these proceedings were instituted, is invalid in that it fails to comply with the requirements of Section 252(2) and Schedule 9 of the Ordinance, in consequence of which this Tribunal does not have a valid mandate and lacks jurisdiction to conduct the proceedings.

(iii) In the alternative to the proposition at (ii), it is submitted that to the extent that the notice is valid the Tribunal has no power to conduct an inquisitorial hearing. It may only receive evidence presented to it by the Presenting Officer and by or on behalf of the Specified Persons.

The validity of the Financial Secretary's Notice to the Tribunal.

36. At the written request of the Tribunal those representing Mr Luk provided further particulars of the submissions in *respect* of the invalidity of the Financial Secretary's Notice to the Tribunal of 12 September 2007. The notice states :

"WHEREAS it appears to me that market misconduct within the meaning of section 270 (" insider dealing") of Part XIII of the Securities and Futures Ordinance (Cap. 571)("the Ordinance") has or may have taken place arising out of dealings in the securities of China Overseas Land and Investment Ltd..."

and requires the Tribunal to institute and conduct proceedings to determine the matters set out in Section 252 (3) of the Ordinance.

37. Objection was taken on behalf of Mr Luk in respect of the first particular, which is couched in the following terms :

“(1) *whether any market misconduct in the nature of insider dealing **or otherwise** has taken place;*”
(emphasis added).

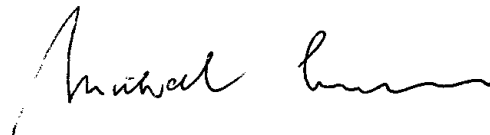
Attention was drawn to the fact that having set out the factual basis of the averments in the notice it was asserted at paragraph 7 that “... *in selling the shares of the company....Mr Edmond Leung Chi Keung and/or Mr Steve Luk Ka Cheung had acted in contravention of section 27 (1)(e)(i) of the Ordinance.*”.

If that was compliance with Section 13(a) of Schedule 9 of the Ordinance, namely the requirement that the notice specify the provision or provisions of Part XIII “... by reference to which the person appears to have perpetrated any conduct which constitute market misconduct;” it was submitted that it was rendered invalid by the addition of the phrase “or otherwise”, in consequence of which the Tribunal does not have a valid mandate and lacks jurisdiction to conduct these proceedings.

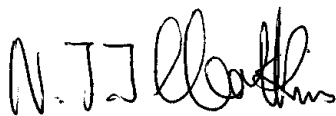
38. When his attention was drawn to this written submission in the course of oral submissions, as was to be expected, Mr McCoy immediately disavowed it, describing it as “surplusage”. He was right to do so. It is no more than meaningless legalese surplusage and can be ignored.

39. On the day that the Tribunal received oral submissions the Court of Final Appeal was hearing an appeal from the Court of Appeal in

the *Financial Secretary and Koon Wing Yee* FACV 19/2007. It is understood that, in the context of the Insider Dealing Tribunal, but of relevance to this Tribunal, issues of the nature of the proceedings before the Insider Dealing Tribunal and its processes are being canvassed. Accordingly, if in due course the judgment of the Court of Final Appeal in the case is relevant to issues taken before this Tribunal the parties have liberty to raise them.



The Hon Mr Justice Lunn
(Chairman)



Mr Neville Watkins
(Member)



Mr Clement Chan
(Member)