

**IN THE MARKET MISCONDUCT TRIBUNAL**

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IN THE MATTER OF the listed securities of China Gas Holdings Limited (Stock Code: 384),

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IN THE MATTER OF Cheng Chak Ngok, Specified Person (“the **Specified person**”)

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AND

IN THE MATTER OF section 252(2) of and Schedule 9 to the Securities and Futures Ordinance, Cap. 571 (“**the Ordinance**”)

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Before: Mr Kenneth Kwok SC (Chairman)

Date of Michael Li & Co’s letter applying for leave to file witness statement out of time: 26 July 2019

Date of Securities and Futures Commission’s letter: 26 July 2019

Date of Michael Li & Co’s further letter: 29 July 2019

Date of Securities and Futures Commission’s further letter: 29 July 2019

Date of Michael Li & Co’s further letter: 29 July 2019 2<sup>nd</sup> letter

Date of Decision: 7 August 2019

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DECISION

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*The Application*

1. By letter dated 26 July 2019, Michael Li & Co applied on behalf of the Specified Person “for leave to file and serve this witness statement on or before 30 July 2019 (and an extension of time for that purpose) ...”

2. On 7 January 2019, Mr Kenneth Kwok SC, the Chairman of the Market Misconduct Tribunal (“**MMT**”), held a directions hearing. After hearing Mr Selwyn Yu SC for the Securities & Futures Commission (“**SFC**”) and Mr Bernard Mak<sup>1</sup> for the Specified Person, Mr Cheng Chak Ngok, the Chairman gave directions for the further conduct of proceedings. The following are the dates for the relevant steps:

<u>Steps</u>	<u>Dates</u>
The Specified Person to file and serve any additional witness statement on the issue of dealing, if so advised, within 12 weeks from 7 January 2019 (i.e. 1 April 2019).	1 April 2019
The Commission to file and serve any witness statement in reply, if so advised, within 4 weeks thereafter (i.e. 29 April 2019)	29 April 2019

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<sup>1</sup> (Mr C Y Ng with him, both instructed by Mr Henry Wong and Ms Anne Tong of Michael Li & Co).

No further witness statement be filed without leave of the Chairman	
The Commission to file and serve its opening submissions 4 weeks before the start of the substantive hearing (i.e. 29 July 2019).	29 July 2019
The Specified Person to file and serve his opening submissions 2 weeks before the start of the substantive hearing (i.e. 12 August 2019).	12 August 2019
The re-hearing on the issue of dealing be fixed to commence at 10:00 am on 26 August 2019, with 5 days reserved (i.e. 26 to 30 August 2019). The Tribunal will be sitting normal court hours for the re-hearing	26 to 30 August 2019
There be liberty to apply to the Chairman	

3. Thus, the Specified Person has 12 weeks from the date of the directions hearing to file further witness statements.

4. 3 months and 26 days after the 1 April 2019 deadline, the Specified Person filed his application to file a further witness statement out of time. According to an unsigned draft of the Specified Person's further witness statement, the further evidence is on 2 points:

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B (1) "... [his] remuneration and personal finances at and around  
C the material time. Put simply, [he] was well-paid by way of  
D salary and bonus. [He] had no need to engage in the  
E misconduct of which [he was] accused, particularly when the  
F sums involved were so small."

E (2) "The ENN Office was operating with Microsoft Windows  
F operating system. That system has a feature known as  
G 'rlogin' or 'remote login', which according [to] the best of  
H my understanding, permits a person to log into a connected  
I computer as an authorised user from another 'remote'  
J computer and there operate the former computer in all ways  
K as if operating from the keyboard of the former computer."

J *Availability of the evidence with reasonable diligence*

K 5. Directions given by the Chairman/MMT are to be complied  
L with, not flouted.

M 6. To obtain an extension of time to file further evidence, the  
N general rule is for the applicant to satisfy the first condition that the  
O evidence could not have been obtained with reasonable diligence by the  
P original deadline. The Specified Person does not allege that the  
Q evidence could not have been obtained with reasonable diligence. On  
R the contrary, he says through Michael Li & Co:

R "It is fair to say that Mr Cheng could and perhaps should have  
S produced the means evidence earlier but, in a case where the  
T Tribunal is asked to decide on misconduct founded upon  
U inference it would also have been reasonable for the  
V Commission to have obtained and put forward that evidence at  
the 1<sup>st</sup> hearing in order that the Tribunal had before it all the  
relevant facts."

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7. This is an admission that the means evidence could have been obtained by the original deadline. The Specified Person was represented throughout by a team of lawyers.

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8. In the judgment of the Chairman, the means evidence could have been obtained with reasonable diligence by the original deadline. That the SFC did not include the means evidence at the first hearing is irrelevant. If the means evidence is relevant, it is all the more reason for the Specified Person to have put forward that evidence by the original deadline.

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9. In the judgment of the Chairman, the remote access and operation of Microsoft Windows Computer(s) is evidence which could have been obtained with reasonable diligence by the original deadline.

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10. The Specified Person's application fails and falls to be dismissed.

*Effect of granting the application on the trial dates*

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11. The Specified Person suggested that SFC has until 5 August 2019 for evidence in reply and for filing of the opening submission and he had until 14 August 2019 for opening submission.

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12. The Specified Person assumed that the Chairman was available to give an immediate decision on his application. His assumption is without any basis and is wrong.

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13. The Specified Person seeks to impose a deadline of 7 days on the SFC to file evidence in reply and to have regard to the further evidence in its opening submission. The time allowed for SFC is unreasonably short.

14. If the SFC is to have 28 days from the date of this decision to file evidence in reply and another 14 days for opening submission, the hearing dates (26 – 30 August 2019) will have to be vacated.

15. §42 of the High Court’s Practice Direction 5.2 on Case Management provides trial dates are immovable save in the most exceptional circumstances and for that purpose, for instance, late instructions from client, change in the team of lawyers, the absence of prejudice to the other party which cannot be compensated for by costs, will not be treated as exceptional circumstances.

16. In this case, the Specified Person alleges a change in the team of lawyers. This does not constitute exceptional circumstances and does not justify moving the trial dates.

17. Adopting the same practice as the High Court, since there is no exceptional circumstances, the trial dates will not be moved. This is another reason for refusing the application.

*Disposition*

18. The Specified Person’s application “for leave to file and serve this witness statement on or before 30 July 2019 (and an extension of time for that purpose) ...” is dismissed. Costs reserved.

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*Kenneth Kwok*

(Mr Kenneth Kwok SC)  
Chairman, Market Misconduct Tribunal