MARKET MISCONDUCT TRIBUNAL

IN THE MATTER OF DEALING IN THE LISTED SECURITIES OF QPL INTERNATIONAL HOLDINGS LIMITED

SPECIFIED PERSONS :

Sun Hung Kai Investment Services Limited

Cheeroll Limited

Mr Chau Chin Hung, Edmund

Ms Cheung Sau Lin, Connie

Date of Delivery of Ruling : 27 December 2007.

RULING

1. Following delivery of the ruling in respect of submissions as to the jurisdiction of the Tribunal to conduct this hearing and the nature of the proceedings before the Tribunal Mr Patterson, as he had foreshadowed in his earlier written submissions, made an application that these proceedings be stayed permanently in respect of Ms Cheung. He did so on the basis of unreasonable and inordinate delay in prosecuting the allegations set out in the Financial Secretary's ("FS") notice on the basis that :

(a) delay had resulted in prejudice to Ms Cheung such that she cannot be assured of the fair hearing guaranteed to her by section 252(6) of the Securities and Futures Ordinance, Cap. 571 ("the Ordinance"), Articles 10 and 11 of the Hong Kong Bill of Rights Ordinance ("HKBOR") and Article 14 of the

International Covenant on Civil and Political Rights ("ICCPR") as imported into the law of Hong Kong by Article 39 of the Basic Law; alternatively

(b) even if a fair hearing is possible, it would constitute an abuse of process to continue with the proceedings.

THE DELAY

2. Mr Patterson submitted, as his argument was refined, that the appropriate period of delay was from 6 June 2003, when the Securities and Futures Commission ("SFC") commenced initial enquiries of Sun Hung Kai Investment Services Ltd in respect of dealings by them in the shares of QPL on 27 May 2003 to 29 August 2007 when Ms Cheung received notice from the Presenting Officer to the Tribunal of the fact of the issue of the notice by the Financial Secretary, dated 6 June 2007, and was informed that the initial hearing of the Tribunal was to take place on 3 September 2007.

<u>The submissions of Mr Patterson as to the relevant law.</u>

3. Mr Patterson submitted that in determining whether or not to exercise its power under section 253(1)(i) of the Ordinance to stay proceedings the Tribunal is to approach the matter on the basis that although these proceedings are not criminal in nature they are "quasi criminal" and guidance is to be found in the judgment of Ribeiro PJ, with whom all the other judges agreed, in the Court of Final Appeal in *HKSAR v Lee Ming Tee* [2001] 4 HKCFAR 133 at 148 F-151 J. In that case the Court of Final Appeal was concerned with an appeal from an order of stay by a trial judge in criminal proceedings in the Court of First Instance. Mr Patterson relied on passages in the judgment of Ribeiro PJ in support of his contentions that a stay of proceedings ought to be ordered :

firstly, if it be the case that notwithstanding the available remedial measures Ms Connie Cheung can no longer be afforded a fair hearing by this Tribunal (page 148 J) and secondly, that even if the Tribunal was to determine that a fair hearing is possible the conduct of the SFC and the FS involves an abuse of power such that the Tribunal's sense of justice and propriety is so offended that these proceedings ought to be stayed (pages 149 J-150 B).

4. Mr Patterson accepted that it is for Ms Connie Cheung to show on the balance of probabilities and that she will suffer serious prejudice to the extent that no fair hearing can be held (page 149 E).

Applications for stay of proceedings on behalf of Mr Edmund Chau, Sun Hung Kai Investment Services Limited and Cheeroll Limited.

5. At the conclusion of the oral evidence Mr Bell, on behalf of Mr Edmund Chau, as he had foreshadowed he might in his written submissions of 20 September 2007, informed the Tribunal that he too had an application for permanent stay of these proceedings. Mr Brewer made a similar application in respect of Sun Hung Kai Investment Services Ltd and Cheeroll Ltd adopting the submissions made by both Mr Patterson and Mr Bell.

The submissions of Mr Bell.

The Law.

6. Mr Bell submitted that in light of the fact that the Tribunal had ruled on 12 October 2007 that these proceedings are not criminal proceedings and, notwithstanding that the Tribunal had not ruled that they were civil proceedings, nevertheless the appropriate approach to be adopted by the Tribunal was that which had been developed in respect of

the power of the High Court to dismiss an action for want of prosecution. Of relevance, he submitted, is the jurisprudence that has developed in respect of the exercise of that power as summarised in Hong Kong Civil Procedure, 2008 in respect of order 25 at 25/L/2 :

> "There are two distinct, though related, circumstances in which an action may be dismissed for want of prosecution, namely (a) when a party has been guilty of intentional and contumelious default, and (b) when there has been inordinate and inexcusable delay in the prosecution of the action.".

Mr Bell did not pray-in-aid limb (a), but he does rely upon limb (b).

7. In construing the term "inordinate and inexcusable delay" he relied upon the commentary of the authors of Hong Kong Civil Procedure 2008 and in particular at 25/L/4 :

> "The requirements: (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third-party.".

8. Mr Bell invited the Tribunal to have regard to the authors' discussions of the terms "inordinate" and "inexcusable delay" but drew particular attention to their discussion of the term "prejudice to the defendant" at 25/L/7 :

> "The effect of the lapse of time on the memory of witnesses or, in the course of such time of their death or disappearance are the most usual factors..... In a case of prolonged culpable delay following long delays in serving of proceedings, the court may readily infer that

memories and reliability of witnesses has further deteriorated in the period of culpable delay.".

9. However, Mr Bell took issue with the assertion that then follows :

"There has to be some indication of prejudice, e.g. that no witness statement was taken at the time so that a particular witness who would have been called on a particular issue has no means of refreshing his memory or that a particular witness was of advanced age and no longer wish to give evidence or has become infirm or unavailable in the period of inordinate and inexcusable delay (Hornagold v Fairclough Building Ltd [1993] P.I.Q.R 400.".

10. In support of his submission that in fact there was no requirement that there be some indication of prejudice, Mr Bell cited the speech of Lord Browne-Wilkinson in the House of Lords, with whom all the other judges agreed in *Roebuck v Mungovin* [1994] 2 AC 224 at page 234 D-G. The case concerned an action in respect of personal injuries in a road accident. The plaintiff was guilty of inordinate and inexcusable delay for a period of nearly 4 years. Then, there followed a period in which the defendant's solicitors took various steps to seek to progress the action. Thereafter, nothing happened in the action until the defendant sought to strike out the plaintiff's claim. At issue, was whether or not it was required of the defendant to show that prejudice was caused by the later period of delay rather than the totality of the delay. Lord Browne-Wilkinson said :

"In the ordinary case the prejudice suffered by defendant caused by the plaintiff's delay is dimming of witnesses memories. Where there are two periods of delay, how can it be shown that a witness has forgotten during the later, rather than the earlier period? We were referred to an unreported decision of the Court of Appeal, Hornagold v Fairclough Building Ltd (unreported) 27 May 1993; Court of Appeal (Civil

Division) Transcript number 634-1993, where there was a difference of opinion as to whether in such a case it was necessary to adduce specific evidence that the prejudice flowed from a loss of memory in the later period. I have no doubt that such evidence is not necessary and that a judge can infer that any substantial delay in whatever period leads to a further loss of recollection.".

11. In further support of his submission that there is no requirement that Mr Edmund Chau point to any specific prejudice suffered in consequence of delay, Mr Bell relied on passages in the judgment of Peter Gibson LJ in the Court of Appeal of England and Wales in *Shtun v Zalejsksa* [1996] 1 WLR270 at 1285 C-D :

> "It is not, in my judgment, essential in every case that there should be evidence of particular respects in which potential witnesses memories have faded, still less that it need be shown that such fading memories occurred in a particular period. That would be to approve of the classically inept question in cross-examination, 'When did you first forget?' Every court in the land is accustomed to drawing inferences from primary facts. So long as there are primary facts from which inferences can properly be drawn, there is nothing wrong with doing so.".

12. It is to be noted in passing that in the judgment of Hobhouse LJ (as he was then) the consequences of what he said was the unnecessary intrusion of judicial authority is addressed (page 1286) :

> "In my judgment this case vividly illustrates the excessive intrusion of authority into the decision of factual questions.".

Later, he went on to note :

> "In this court we have been referred to some 20 authorities again on what is a question of fact and the drawing of inferences in each case turned on its own facts on whether or not, in any given case, it is

appropriate to draw the inference depends upon the circumstances of that case.".

The submissions of Mr Yeung as to the relevant law.

13. Mr Yeung acknowledged that by virtue of section 253(1)(i) this Tribunal has a statutory power to order a stay of proceedings, namely the power to :

> "*stay any of the proceedings on such grounds and on such terms and conditions as it considers appropriate having regard to the interests of justice;*".

14. In the context of criminal proceedings, Mr Yeung accepted that the passages in the judgment of Ribeiro PJ in *Lee Ming Tee* cited by Mr Patterson support the primary proposition that in criminal proceedings no stay should be imposed on the ground of delay unless the defendant shows on the balance of probability that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held. Furthermore, on the authority of the advice of the Privy Council in *A-G v Cheung Wai Bun* [1993] 1 HKCLR 249 he submitted that there is no "presumption of prejudice" because of the length of delay.

15. In the context of civil proceedings, Mr Yeung accepted that the observations of the authors of the Hong Kong White Book at 25/L/1-25/L/22 cited earlier are apposite.

16. Outwith the context of the issue of delay in proceedings of a criminal or "classic" civil nature, Mr Yeung drew the Tribunal's attention to the judgments of the Supreme Court of Canada in *Blencoe v British Columbia* 190 DLR (4^{th}) 513. There, the court was called upon to

consider the issue of delay in the investigation and referral to a Tribunal of allegations of sexual harassment and sexual discrimination by several complainants. In March 1995, the respondent's assistant made public allegations of sexual harassment by the respondent between March 1993 and March 1995. In July and August 1995, two sexual harassment complaints were filed with the British Columbia Council of Human Rights. Whilst there was much intervening communication between the Council and the respondent it was not until 3 July 1997 that the respondent was informed by the Council that the matter was to be referred to the Tribunal for a hearing. On 10 September 1997 the respondent was advised that the two matters would be heard by the Tribunal in mid-March 1998.

17. The respondent's application for judicial review, in which it was contended that the Council had lost jurisdiction in consequence of delay, was rejected by the judge at first instance. However, by a majority of the Court of Appeal of British Columbia held that the delay constituted a breach of the respondent's rights under section 7 of the Charter of Rights and ordered the proceeding stayed. In the result, the Supreme Court ordered the stay lifted and ordered that an expedited hearing be held. Whilst the majority and the minority expressed different views about the need to determine the issue of the respondent's rights under section 7 of the Charter of Rights they were agreed that the matter could be resolved under principles of administrative law. The majority held that the determination of whether or not delay was inordinate had to be resolved against contextual factors. In the judgment of Bastarache J, with whom the majority agreed, the issue was described thus (paragraphs 121-2) :

"121. To constitute a breach of the duty of fairness, the delay must have been unreasonable or inordinate (Brown and Evans, *supra*, at p. 9-68). There is no abuse of process by delay *per se*. The respondent must demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings. While I am prepared to accept that the stress and stigma resulting from an inordinate delay may contribute to an abuse of process, I am not convinced that the delay in this case was 'inordinate'.

122. The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.".

18. Finally, Mr Yeung submitted that in its analysis of all the available evidence relevant to the issue of delay the Tribunal was to have regard to the practical realities of litigation. In particular, he referred to passages in the judgment of Lord Bingham in the House of Lords in *Dyer v Watson* [2002] 3 WLR 1488 at 1408, which passages were cited with approval in the judgment of Tang J (as he was then) in *HKSAR v Lee Ming Tee* (unreported) HCCC 191/1999. At paragraph 53 Lord Bingham said :

"53. It is recognized, realistically enough, that the more complex a case, the greater the number of witnesses, the heavier the burden of documentation, the longer the time which must necessarily be taken to prepare it adequately for trial and for any appellate hearing. But with

any case, however complex, there comes a time when the passage of time becomes excessive and unacceptable.".

Later, at paragraph 55 he added :

"It is plain that contracting states cannot blame unacceptable delays on a general want of prosecutors or judges or courthouses or on chronic underfunding of the legal system. It is, generally speaking, incumbent on contracting states to organise their legal systems so as to ensure that the reasonable time requirement is honoured. But nothing in the Convention jurisprudence requires courts to shut their eyes to the practical realities of litigious life even in a reasonably well-organised legal system. Thus it is not objectionable for a prosecutor to deal with cases according to what he reasonably regards as their priority so as to achieve an orderly dispatch of business. It must be accepted that a prosecutor cannot ordinarily devote his whole time and attention to a single case.".

The evidence adduced by the Presenting Officer.

19. At the outset Mr Yeung placed before the Tribunal material by which it was sought to explain the passage of time from the commencement of the enquiries by the SFC to the commencement of the hearings of the Tribunal. He did so in documentary form, counsel for the Specified Parties indicating in terms that they did not seek to cross-examine the makers of the documents in question. The material comprised :

(a) a letter dated 19 September 2007 by Mr Geoffrey F Harris, Senior Director of Enforcement of the SFC;

(b) a letter dated 21 September 2007 by Ms Jennifer Kwong for the Secretary for Financial Services and the Treasury;

(c) a witness statement dated 10 October 2007 from Mr Mark Robert Steward, an Executive Director of Enforcement of the SFC; and

(d) a witness statement dated 10 October 2007 of Mr Richard Granville Fawls, a Senior Assistant Law Officer (Civil Law) of the Department of Justice.

Ambit of the material available to the Tribunal.

20. In addition to the material specifically addressing the issue of delay there is available to the Tribunal records of interview conducted by officers of the SFC of six witnesses, together with an expert report of Mr Shek Kam Por and various documentary exhibits relating to the dealing in issue.

21. The six witnesses and the compiler of the expert report are :

(i) Mr Edmund Chau Chin Hung, a Specified Person in the Financial Secretary's notice and an executive director and responsible officer of Sun Hung Kai Investment Services Ltd, a director of Sun Hung Kai Securities Ltd, an authorised person of Cheeroll Ltd and a Specified Person in the Financial Secretary's notice. Records of interview of Mr Chau were conducted on 10 September, 20 November 2003 and 19 April 2004.

(ii) Ms Connie Cheung Sau Lin, a Specified Person in the Financial Secretary's notice and a senior dealer of Sun Hung Kai Securities Ltd, an account executive for Chinacal Ltd and a Specified Person in the Financial Secretary's notice. A record of interview of Ms Cheung was conducted on 3 October 2003.

(iii) Mr Lin Xu Ming, a director of Chinacal Ltd and through Delcore Dynamics Corporation a shareholder of Chinacal Limited. A record of interview was conducted of Mr Lin on 24 October 2003.

(iv) Mr Chiu Sau Leung a person authorised to place orders for Honest Opportunity Ltd and an executive director of RIMC Advisors. A record of interview of Mr Chiu was conducted on 14 November 2003.

(v) Mr Ma Yu Lung, a supervisor of dealing and a terminal operator of Sun Hung Kai Securities Ltd. A record of interview of Mr Ma was conducted on 8 December 2003.

(vi) Mr David Hui Yip Wing, the chief executive officer of the Sun Hung Kai Group, a supervisor of Mr Edmund Chau Chin Hung and a director of Cheeroll Limited. A record of interview of Mr Hui was conducted on 27 January 2005.

(vii) Mr Shek Kam Por, the Director of the Enforcement Division (Surveillance) of the SFC, whose expert report is dated 27 February 2006.

A brief chronology of the sequence of events.

22. By a letter dated 6 June 2003, pursuant to section 181(1) the Ordinance, the SFC demanded that Sun Hung Kai Investment Services Ltd :

> *"... provide information about orders input by you in the shares of QPL International Holdings Limited on 27 May 2003.".*

By a notice dated 20 August 2003, pursuant to section 182(1) of the Ordinance, Mr Stephen Suen, Director of Enforcement of the SFC,

directed stipulated persons to investigate and report to the Commission in respect of matters that he declared he had reasonable cause to believe had occurred during round the period from 26 May to 5 June 2003, namely :

> *"(a) offences of false trading and/or price rigging and/or stock market manipulation may have been committed in respect of dealing in the shares of QPL International Holdings Ltd, contrary to section 295 and/or section 296 and/or section 299 of the Securities and Futures Ordinance (Chapter 571); and /or*
>
> *(b) persons may have engaged in false trading and/or price rigging and/or stock market manipulation in respect of dealings in the shares of QPL International Holdings Ltd, contrary to section 274 and/or section 275 and/or section 278 of the Securities and Futures Ordinance (Chapter 571).".*

23. By 8 December 2003 five of the six factual witnesses had been interviewed by officers of the SFC. In fact, Mr Chau had been interviewed twice. Mr David Hui was not interviewed until 27 January 2005. However, it was not until 25 April 2006 that matters were referred by the SFC to the FS, through the Financial Services and the Treasury Bureau ("FSTB") by transmission of three box files containing the eight witness statements of the six witnesses of fact and the expert report.

24. The Department of Justice received that material together with an investigation report on 27 April 2006. On 30 January 2007 the Department of Justice delivered its advice to the Financial Secretary. Having been asked on 2 March 2007 by the FSTB to clarify that advice

and to draft a notice the Department of Justice gave an advice on 4 April 2007 and a draft notice on 5 May 2007. The FS's notice to the Tribunal is dated 6 June 2007.

The explanations offered for delay.

(1). As to the SFC.

25. There is no issue that the relevant period of time in question is from 6 June 2003, when the SFC first made enquiries into the activities that are the subject of these proceedings, and 25 April 2006 when the SFC referred the case to the FS through the FSTB, namely a period of two years and ten and a half months.

(a) The investigation.

26. In his letter to the Tribunal Mr Harris said that whilst *"... most of the evidence contained in the current referral was gathered by 2 March 2004, the investigation was not complete at that point."* Of the additional investigation, Mr Harris referred to suspicion having fallen on past or present directors of Sun Hung Kai, without specifying which company or companies, as being beneficiaries of the trades in question. Of the ambit of those enquiries, Mr Harris said that it *"... involved tracing through four layers of bank accounts and was subject to significant bank delays in obtaining requested information."* Mr Harris said of those enquiries that they *"...failed to establish any evidence that suggested any more than is alleged in the current referral to the Market Misconduct Tribunal."*.

27. In his witness statement Mr Steward said that this line of enquiry stopped in about August or September 2004 and that the extension of the time of the enquiry was approximately six to seven months of the time of the investigation. However, notwithstanding his specific reference to the

letter of Mr Harris and the attached chronology and his related assertion *"I agree with his comments and observations as well as the attached chronology of major milestones."* Mr Steward resiled from Mr Harris's statement that there was an element of delay caused by banks by stating : *"There is no evidence any bank or third-party contributed to the length of time in responding to the information requests."*.

(b) Obtaining an expert opinion.

28. Both Mr Harris and Mr Steward attributed some of the delay in these proceedings to various difficulties relating to obtaining an expert opinion in respect of the alleged conduct. Of that, Mr Harris contended that there is a notorious difficulty for the SFC to obtain independent expert assistance from members of the securities industry. He did not elaborate as to why that was the case. He said that the three experts available within the SFC have many demands upon their time.

29. Mr Steward said that in about September 2004 the SFC expert, Mr Shek, had asked for additional information about the orders that were the subject of his opinion. As a result, four further notices demanding information were served upon Sun Hung Kai Investment Services Ltd in the month from mid-September to mid-October 2004. He acknowledged that the replies of Sun Hung Kai Investment Services Ltd were timely and the last of that information supplied on 25 October 2004. Mr Harris said that in December 2004 an expert report was received in respect of the period 26 May to 5 June 2003. A fifth notice was served upon Sun Hung Kai Investment Services Ltd in February 2005, to which they responded on 1 March 2005. In the result, Mr Steward said :

> *"The time taken to complete the expert opinion added approximately 5 - 6 months to the length of the investigation.*

Some of this time was taken up by the need for additional information. The workload of the expert was also a factor however some of this time was quite simply the time it took for Mr Shek to analyse the relevant materials and to prepare his written opinion.".

(c) Obtaining legal advice.

30. Finally, Mr Steward referred to the time that had been taken in obtaining an internal SFC legal advice. That advice had been sought in May 2005, but was not delivered until December 2005. He explained that, in part, that delay was accounted for by the need to have the transcript of the records of interview translated. Translations had been made available to the person giving that legal advice on and between 2 September and 24 November 2005. He acknowledged that it was difficult to estimate the length of time that had been expended on obtaining translations of those interviews but nevertheless estimated that was between four and six months.

(d) Miscellaneous matters.

31. Of the period between the receipt of the legal advice in December 2006 and the referral of the case to the FS on 25 April 2007 Mr Harris said that in January 2006 a paper had been prepared for reference in an SFC board meeting recommending referral to the FS, which meeting took place in March 2006 and at which a decision was made to refer the case to the FS. In February 2006 Mr Shek had signed off his expert's report.

(2). As to the Department of Justice.

32. Mr Fawls said that on receipt of the case papers from the FSTB on 27 April 2006 he had determined to give the requested advice himself.

However, as a result of pressure of work in August 2006 he had requested another counsel within the Department of Justice, but not one familiar with the related workload of the Insider Dealing Tribunal cases, to produce a draft advice. That advice was produced in mid-September 2006. At that stage, Mr Fawls determined to have all of the documents contained in the materials sent from FSTB translated from Chinese into English. That was completed in mid-October 2006. Given that a year earlier the need to translate the records of interview had caused a similar delay in the giving of legal advice within the SFC, it is difficult to understand why the need arose on a second occasion. Thereafter, Mr Fawls prepared the advice in its final form. That advice was sent to the FSTB on 30 January 2007.

33. Mr Fawls described at some length the pressures of work at that time within the section of the Civil Division of the Department of Justice seized with dealing with insider dealing and market misconduct cases of which he was in charge. It consisted of a team of six other counsel whose remit encompassed not only those two Tribunals but also appellate work on behalf of government in the areas of revenue, telecommunications and commercial litigation. He observed that proceedings in the Insider Dealing Tribunal were brought to a halt in the period from September 2005 until 24 March 2006, as a result of judicial review proceedings and an appeal therefrom arising out of inquiries by the Tribunal into dealing in the shares of Vanda Systems and Communications Holdings Ltd on the one hand and Asia Orient Holdings Ltd on the other. He noted that in consequence of the backlog of inquiries to be conducted and in an attempt to expedite matters no fewer than four inquiries were underway at different times before the Insider Dealing Tribunal in the nine-month period beginning April 2006. In addition, preparatory work was

performed in respect of two other inquiries. In each of the inquiries one of the counsel assisting Mr Fawls had duties either as one of the counsel assisting the Tribunal or as an instructing solicitor. Furthermore, as a result of observations by both Chairmen of the Insider Dealing Tribunal, in respect of the undesirability of counsel who had advised the FS in respect of a matter subsequently appearing as counsel assisting the Tribunal in the same matter, steps were taken to ensure that did not occur. Inevitably, duplication of work ensued. As a result, Mr Fawls contended that he and his team were hard pressed in their work commitments, it appears in particular in the second half of 2006.

34. Mr Fawls drew attention to the fact that the legislation in respect of market misconduct is relatively new and untested by the Tribunal. He says that the first case referred to the Department of Justice for advice for possible referral to this Tribunal was received in August 2005. The proceedings now before the Tribunal was the second case referred by FSTB to the Department of Justice. No doubt, arising out of the element of novelty of proceedings before this Tribunal Mr Fawls said that two cases referred for advice were found to be wholly unsuitable for referral to the Tribunal and in other cases it was necessary to ask that the SFC gather considerable amounts of additional evidence before any advice could be given. As a result, he said that from mid-October 2006 until the advice was rendered on 30 January 2007 there was an ongoing discussion within his section concerning advice in cases that might be referred to this Tribunal. One concern was that a consistent approach be adopted, another that errors be avoided.

<u>The oral evidence called in respect of the issue of delay/abuse of process.</u>

(i) Ms Connie Cheung.

35. Having placed Ms Connie Cheung's witness statement, dated 12 October 2007, before the Tribunal Mr Patterson indicated that the objection was taken to the fact that a notice pursuant to section 253(1) of the Ordinance had been issued on 23 October 2007 requiring her to give testimony. The nub of the objection was the element of compulsion in a person said to be "accused" of market misconduct. In result, the Tribunal having rescinded that notice, Mr Patterson indicated that Ms Connie Cheung wished to give evidence on the issue of delay/abuse of process and she was called to do so. In her evidence in chief, she adopted as true the contents of her witness statement.

36. In paragraph 4 of her witness statement Ms Connie Cheung stated that on 29 September 2003 she had received a letter from the SFC dated 26 September 2003 requesting her attendance for an interview at the SFC to take place on 3 October 2003. In consequence, she attended that interview. She was unaccompanied and answered the questions put to her by Mr Kenneth Ip on behalf of the SFC. The nub of her evidence is her assertion, at paragraph 5 of her witness statement :

> *"At no stage during this interview was I informed by any member of the SFC that I was a suspect or a "persons specified" in relation to the investigation. In fact, I was told by SFC Investigator Kenneth Ip that I was only 'assisting' him in his investigation. At all times, I understood that I was being interviewed as a witness. This was the very strong impression given by the SFC documents which were delivered to me and by the questions of SFC investigator Mr Kenneth Ip.".*

37. In cross-examination by Mr Yeung, Ms Connie Cheung accepted that nowhere in the SFC letter to her of 26 September 2003 was she told her that her status was that of a witness, nor did it state that she was a "person under investigation". She readily agreed that at that time she was unaware of any practice of the SFC to inform persons of the latter status, if that be the way in which those persons were viewed by the SFC. On receipt of that letter she did not consult a lawyer. Similarly, on receipt of a letter from the SFC dated 10 May 2006 in which she was advised in respect of QPL that the *"findings of the above inquiry had been referred to the Financial Secretary for consideration"* she did not consult a lawyer. She said that she did not know the effect that would have upon her.

38. Of the reference in her witness statement to the effect that Mr Kenneth Ip had told her that she was "assisting" him in his investigation Ms Connie Cheung readily agreed that was a reference to what she had been told and what was written in Chinese characters on a document that she signed in the course of the record of interview (bundle B 1 at page 454 in its original and page 349 in the English translation.) There it was stated :

> *"In conducting this investigative interview, I am performing a function under the Ordinance. In attending this investigative interview,* ***you are assisting me*** *in the performance of that function. Section 378 of the Ordinance imposes on you and obligation of secrecy."* **[Emphasis added]**.

39. In the context of her assertion that had she been aware at the time of the fact that she was *"the subject of the SFC investigation and a 'person specified'.."* she would, amongst other things, *"have taken all*

steps necessary to prepare myself for any future response to the specific SFC relegation, including but not limited to receiving legal advice and contacting potential witnesses on my behalf", Ms Connie Cheung accepted that she had not tried to contact any such witnesses after she had become aware of these proceedings in late August 2007. However, she said that she had contacted her solicitors, Haldanes, and the issue of contacting potential witnesses was left to them.

(ii) Mr Kenneth Ip.

40. The Presenting Officer called Mr Kenneth Ip to give oral testimony. He testified that he had worked for the SFC as a manager in the Enforcement Division from September 2002 to September 2005. However, at the latter date he resigned that position, having been convicted after trial in the Magistracy of an offence of assault occasioning actual bodily harm for which he was fined $5,000 and sentenced to serve a term of imprisonment of three months suspended for two years. In cross-examination, he accepted that his appeal to the Court of First Instance had been unsuccessful as had his application for leave to appeal to the Court of Final Appeal.

41. Mr Ip conducted all of the eight records of interview of the six witnesses that are before the Tribunal. Not surprisingly, he described himself as being the principal investigator. Mr Edmund Chau was the first of those persons interviewed by Mr Ip. That interview of 10 September 2003 was preceded by a letter from Mr Ip to Mr Chau dated 28 August 2003 in which he was told that: he was a "person under investigation"; that he was required to attend an interview and that he was entitled to have a lawyer present at the interview. An accompanying Notice of the same date detailed the impugned conduct and reasserted,

this time in bold letters, that he was a "person under investigation". Mr Ip said that in general terms the classification of a person as a person "under investigation" was not a decision that he made but was passed on to him at the time he was given the case papers. He agreed that in the two subsequent interviews of Mr Edmund Chau the information contained in the similar letters and notices sent to him in advance of those interviews were to the same effect as on the first occasion.

42. Mr Ip accepted that in the letter of 26 September 2003, sent to Ms Connie Cheung in advance of her record of interview on 3 October 2003, she was not informed that she was "a person under investigation" nor that she had the right to have a lawyer present at the interview. He explained that she was not a "person under investigation", she was a witness.

Submissions on the evidence of delay, explanations thereof, prejudice and the remedy of stay of proceedings.

A. SUBMISSIONS ON BEHALF OF THE SPECIFIED PARTIES

(i) The length of the investigation.

43. In his analysis of the various activities said to have been under way at particular times from the commencement of the initial inquiries of the SFC of Sun Hung Kai Investment Services Ltd, by their letter of 6 June 2003, followed by the investigation commenced on 20 August 2003 concluding with the issue of the Financial Secretary's notice on 6 June 2007 Mr Bell noted that Mr Harris said that "*while most of the evidence in the current referral was gathered by 2 March 2004 the investigation was not complete at that point*", adding that inquiries into a suspected connection between the impugned traders and "Sun Hung Kai" had been performed that had not resulted in any material being referred to the

Tribunal. Mr Bell pointed out that Mr Harris indicated that those inquiries had continued until December 2004, but Mr Steward had put those inquiries as coming to an end in August/September 2004. Mr Bell said that he took no issue in respect of delay until August/September 2004 as a result of the ultimately fruitless extension of the extended enquiry. However, Mr Patterson contended that the investigation should not have taken as long as it did. He contended that by the conclusion of the interviews by the SFC of Mr Edmund Chau and Ms Connie Cheung on 3 October 2003 the SFC investigations into those persons was effectively over. Alternatively, he said that position had been reached by early December by which time five of the six proposed witnesses in the hearing had been interviewed. He contended that the decision of the SFC to expand the inquiry to determine whether or not there was a link between past and present directors of Sun Hung Kai companies with the conduct of Mr Edmund Chau and Ms Connie Cheung is not a "legitimate reason for the delay incurred".

(ii) The time taken to prepare the expert's report.

44. Mr Bell did take issue with the length of time it took the expert, Mr Shek, to prepare his report for the SFC. Mr Patterson supported that objection. Mr Bell pointed out that Mr Harris said that a version of the expert report, dealing with the period 26 May to 5 June 2003, was received in December 2004 but that then additional broker records were obtained to assist the expert. Mr Steward said that the SFC made a request of SHK to provide "order and client information" in February 2005, which material was supplied on 1 March 2005 and that in May 2005 the case was referred for internal legal advice at the SFC. Mr Bell asked rhetorically: why was there that overall delay?

(iii) The time taken by the SFC to obtain legal advice.

45. Mr Bell pointed out that Mr Steward said that internal legal advice was obtained by the SFC for the case in the period May to December 2005. Of the explanation that translations of the interview transcripts had been necessary, the first of which had not become available until September 2005 and the last on 24 November 2005, Mr Bell contended that in light of the staleness of the case it was appropriate that either the matter be advised upon by counsel able to read the original Chinese transcripts or translations should have been obtained earlier.

(iv) Miscellaneous delay by the SFC.

46. Finally, Mr Bell invited the Tribunal to have regard to the fact that even after legal advice was obtained in December 2005 the file was not referred to the Financial Secretary until 25 April 2006.

(v) Delay in obtaining the advice of the Department of Justice.

47. Mr Bell reminded the Tribunal that Mr Harris said that the material passed on to the FS comprised only three box files containing eight witness statements plus an expert statement. That, it appears, is the same material that has been made available to the Tribunal by the Presenting Officer. That material reached the Department of Justice on 27 April 2006, although it did not render its advice to the FS until 30 January 2007. Of that delay, Mr Bell said that it spoke for itself. For his part, Mr Patterson said that the delay was far too long and that the explanation for the delay offered by Mr Fawls was not reasonable, in particular in respect of a reliance by Mr Fawls on resource limitations and pressure on the specialist unit advising on these matters as "a complete answer to the delay".

(vi) Delay between receipt of the legal advice of the DOJ (30 January 2007) and issue of the FS's notice (6 June 2007) and the Presenting Officer's letter to the Specified Parties (29 August 2007).

48. Mr Bell submitted that this was a period of further unnecessary delay.

49. When asked by the Chairman to identify the actual prejudice caused to Ms Connie Cheung by delay Mr Patterson responded initially by saying "...it would be a natural consequence flowing from the delay that has occurred." However, later he acknowledged "...we have limited actual prejudice in the terms of those items relied upon", that being a reference to Ms Connie Cheung and her husband determining to have a second child and of her not having contacted a lawyer earlier.

50. Mr Bell accepted in the course of his submissions that he was not in a position to identify any evidence of specific prejudice to Mr Edmund Chau caused by delay. Instead, he said that he relied on "inferred prejudice" arising from that delay. He accepted that the fact of the making, the timing and juxtaposition of the orders to buy and sell by the respective parties was established by documentary records. Similarly, no doubt, he would have said that even the erroneous assertions in the returns of Sun Hung Kai Investment Services Ltd to the SFC, as to whom it was who had placed orders on behalf of Chinacal Ltd, had been resolved in the oral interview of Ms Connie Cheung by the SFC of 3 October 2003. The records indicated, as Mr Edmund Chau had accepted in his interview by the SFC of 10 September 2003, that he had placed the orders on behalf of Cheeroll Limited. Mr Bell submitted that the crucial issue in the case of his client was Mr Edmund Chau's explanation for

inputting orders to buy and then cancelling them in the manner that he did. That, Mr Bell said, was not documented. That, was a matter upon which Mr Edmund Chau had to rely upon his memory and, given the passage of time, it was to be inferred that he was prejudiced in his ability to present his account of events.

51. Mr Bell accepted that in the three records of interview conducted of Mr Edmund Chau he had been asked to explain in respect of specific orders and cancellations the purpose or intention of his trading. However, he said that Mr Edmund Chau's explanations were restricted to the transactions in which he was questioned and that was determined by his interrogator Mr Kenneth Ip.

52. Mr Patterson invited the Tribunal to note that on the occasion of the only interview conducted of Ms Cheung by the SFC on 3 October 2003 she was not informed that she was a *"person under investigation"*. By contrast, he pointed to the fact that in all three records of interview conducted of Mr Edmund Chau Chin Hung, also a Person Specified in the FS's notice, he was advised that he was *"...under investigation"*. Furthermore, Mr Patterson submitted that the impression left with Ms Cheung was that she was no more than a witness assisting the SFC with their enquiries. Also, he reminded this Tribunal that Ms Cheung was told in terms at the conclusion of the record of interview that she was subject to the statutory provisions relating to secrecy, prescribed in section 378 of the Ordinance. Finally, he submitted that the letter of 10 May 2006 from the SFC to Ms Cheung advising her that the case had been submitted to the FS in no way alerted her to the fact that consideration was being given as to whether or not the FS should exercise his discretion to initiate proceedings by this Tribunal as to whether or not she ought to be named

as a Stipulated Person in his notice. In the result, Mr Patterson submitted that three years and 11 months has elapsed from the time that Ms Cheung was advised by letter from the SFC dated 28 September 2003 that she was required to attend an interview by the SFC and her being informed, by the Presenting Officer's letter of 29 August 2007, that she was a Specified Person in these proceedings before this Tribunal.

53. Mr Patterson submitted that the consequence of the length of the delay is such that a presumption arises that Ms Cheung has suffered prejudice. Alternatively, he relied upon Ms Cheung's oral evidence and the witness statement she adopted in which she says that, given that she had not been told that she was a person under investigation and in light of the secrecy provisions of section 378 of the Ordinance, she had not discussed the matter with anybody else nor had she sought legal advice from a solicitor. She understood that she was a witness merely assisting the SFC in their enquiries. Had she been told that she was a person under investigation she would have contacted a lawyer sooner and tried to contact witnesses. She says that she has simply gone on working and progressing in her profession. Now, she is a senior manager of Sun Hung Kai and she holds a licence, granted by the SFC in December 2004, to deal in securities and commodities, Type 1 and Type 2 regulated activities.

54. Of what he contends is personal prejudice to Ms Connie Cheung, Mr Patterson pointed to her evidence in her witness statement that on 1 November 2005 she gave birth to a son, an addition to her family then consisting of her daughter born in April 2001. She says that had she known of the ongoing nature of the enquiries which have resulted in her being designated a specified person she and her husband would not have

planned to have the addition of a son to their family at that time. Rather, she says that she would have taken steps to prepare herself to deal with the allegation she now faces, including seeking legal advice and contacting potential witnesses.

B. THE SUBMISSIONS OF THE PRESENTING OFFICER

55. Mr Yeung submitted that the material before the Tribunal for the substantive hearing revealed a simple case in which documentary records would serve to prove the making of the various orders in respect of QPL shares. He acknowledged that the identity of the person's inputting those orders had been established in the initial interview of Mr Edmund Chau and the only interview of Ms Connie Cheung. Mr Yeung was not called upon by the Chairman to address the Tribunal on the issue of the delay resulting from the decision of the SFC to extend the ambit of their enquiries. Of the delays in the various stages of that then followed, Mr Yeung invited the Tribunal to have regard to the explanations proffered by the SFC and the Department of Justice. That was his response in respect of the delay in obtaining the draft report of Mr Shek, which was available in May 2005. Of the delay from May 2005 to 2 December 2005, in the SFC obtaining its internal legal advice, Mr Yeung said that viewed objectively "things can be improved", but he declined to take it upon himself to suggest those improvements. Similarly, in respect of the delay in obtaining the legal advice of the Department of Justice, from 27 April 2006 to 30 January 2007, Mr Yeung pointed to the explanations that had been proffered, but when pressed by the Chairman, given his familiarity now with the same three box files and expert's report it appears that were sent to the Department of Justice, to give an estimate of the time required for counsel to give advice he said that it would take "longer than a couple

of weeks", adding that on the face of it the matter could have been expedited.

A CONSIDERATION OF THE SUBMISSIONS

The Law.

56. As required by the Ordinance the Chairman has directed the Tribunal in respect of the relevant issues of law. The starting point of a consideration of this application of the provisions of section 253(1)(i) of the Ordinance, which provides that the Tribunal may :

> "stay any of the proceedings on such grounds and on such terms and conditions as it considers appropriate having regard to the interests of justice;".

The question that arises is : on what principles and considerations is that power to be exercised properly?

57. The principles and considerations relevant to the issue of whether or not to stay criminal proceedings have received considerable attention in recent years in Hong Kong and in many other common-law jurisdictions. The matter was considered in some detail in the judgment of Ribeiro PJ, with whose judgment all the other judges agreed, in *Lee Ming Tee*.

58. However, on 12 October 2007 the Chairman ruled that these are not criminal proceedings. It follows that Article 11 of the HKBOR and Article 14(2) and (3) of the ICCPR are not directly relevant to the issues raised. Article 10 of the HKBOR and the rights that arise at common law require that the proceedings be fair, in particular that the Specified Persons have a fair hearing. In the earlier ruling, the Chairman noted that

section 252(7) of the Ordinance provides that the standard of proof required to determine any question or issue before the Tribunal shall be the standard of proof applicable to civil proceedings in a court of law. Section 252(3) of the Ordinance provides that the objective of the proceedings instituted by the FS, pursuant to section 252(1), is to determine the matters there adumbrated. Sections 253 and 254 stipulate the powers of the Tribunal and include the power in section 253(1)(a) to receive and consider material even if that material would not be admissible in evidence in civil or criminal proceedings in a court of law. It follows that proceedings in this Tribunal are manifestly not "classic" civil proceedings.

59. There is no dispute that, the matters that the Tribunal is required to determine pursuant to section 253(3) of the Ordinance involve the determination of the "... rights and obligations in a suit of law" of the Specified Persons. In consequence, the provisions of Article 10 of the HKBOR are engaged and the Specified Persons are "...entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.". Undoubtedly, the principles of natural justice and the duty of fairness also give rise to the right to a fair hearing.

60. In the context of criminal proceedings, Ribeiro PJ, in his judgment in *Lee Ming Tee,* noted of the use of the power of the court to stay proceedings (page 148 J) :

> "In most such cases, the court only grants the stay because, notwithstanding the range of remedial measures available at the trial, a fair trial for the accused is found to be impossible and continuing the prosecution would amount to an abuse of process.".

He went on to quote from the judgment of Mason CJ in the High Court of Australia in *Jago v District Court of New South Wales* (1989) 168 CLR 23 at page 28 in respect of the question that arises in an application to stay (page 149 B-C) :

> "The question is not whether the prosecution should have been brought, but whether the court, whose function is to dispense justice with impartiality and fairness both of the parties and to the community which serves, should permit its processes to be employed in a manner which gives rise to unfairness.".

61. Ribeiro PJ went on to endorse the statement of Lord Lane C J in the Court of Appeal of England and Wales in *A-G's Reference (No. 1 of 1990)* [1992] QB 630 at 644 of the limited circumstances in which a stay of criminal proceedings should be imposed :

> "...no stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held: in other words, that the continuance of the prosecution amounts to a misuse of the process of the court.".

62. In the context of a consideration of the necessity for proof of prejudice arising from delay in the context of a hearing before a Tribunal Bastararche J in the judgment of the majority in the Supreme Court of Canada in *Blencoe* said (paragraph 101 at page 559) :

> "...delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period....In the administrative Law context, there must be proof of significant prejudice which results from an unacceptable delay.".

63. The issue of whether or not prejudice is to be presumed from delay in the context of criminal proceedings was addressed in the Advice of the Privy Council articulated in the judgment of Lord Mustill in *Tan v Judge Cameron* [1992] 3 WLR 249 at 264 :

> "Naturally, the longer the delay the more likely it will be that the prosecution is at fault, and that the delay has caused prejudice to the defendant; and the less that the prosecution has to offer by explanation, the more easily can fault be inferred. But the establishment of these facts is only one step on the way to a consideration of whether, in all the circumstances, the situation created by the delay is such as to make it an unfair employment of the powers of the court any longer to hold the defendant to account. This is a question to be considered in the round, and nothing is to be gained by the introduction of shifting burdens of proof, which serves only to break down into formal steps what is in reality a single appreciation of what is or is not an unfair.".

64. That statement of Lord Mustill is entirely consistent with the observations of Lord Browne-Wilkinson in *Roebuck*, in addressing the issue of whether or not a party was estopped from praying-in-aid prejudice that had arisen during a period of his acquiescence in the delay, (page 234 G) :

> ".... a judge can infer that any substantial delay at whatever period leads to a further loss of recollection.".

65. In his judgment in *Shtun* Neil LJ (as he was then) endorsed that statement of Lord Browne-Wilkinson (page 1290 E) :

> "The judge's task is to assess the *likely* effect on the trial and on the defendant's ability to put his case forward. The judge must therefore draw inferences based on all the material before him. These inferences will include inferences as to the effect of delay on the recollection of witnesses.".

66. It follows from an acceptance of the accuracy of those judicial observation and their applicability to the proceedings before this Tribunal that while, on the one hand, prejudice is not to be presumed by delay "per se" nevertheless, on the other hand, the Tribunal is entitled to draw inferences based on all the material before it as to the effect of delay on the Specified Parties and the fairness of these proceedings.

67. In his judgment in *Lee Ming Tee* Ribeiro PJ went on to endorse a second line of cases, in particular the judgment of the House of Lords *R v Horseferry Road Magistrates Court, ex p Bennett* [1994] 1 AC 42], upon which the stay of criminal proceedings was ordered (page 150 A-B) :

> "...where, although the fairness of the trial was not in question, the Court granted a stay because the circumstances involved an abuse of process which so offended the Court's sense of justice and propriety that the entire prosecution was tainted as an abuse of process.".

68. Ribeiro PJ went on to note in his judgment (page 150 B-C) that in criminal proceedings, although the jurisdiction existed on that dual basis, it was only most sparingly exercised and observed that in practice such stays were highly exceptional.

69. In his judgment, on behalf of the majority in *Blencoe*, Bastarache J stated that he accepted the findings of the judge at first instance, that the respondent's right to a fair hearing had not been jeopardised and that proof of prejudice had not been demonstrated to be of a sufficient magnitude to impact on the fairness of the hearing, but then went on to pose the question (page 560 paragraph 104) :

> "...whether the delay in this case could amount to a denial of natural justice or an abuse of process even where the respondent has not been prejudiced in an evidentiary sense.".

70. Later in his judgment, Bastarache J answered that rhetorical question by citing with approval passages in the judgment of L'Heureux-Dubé, J in *Rv Power* [1990] 1 SCR 601 (page 566 paragraph 120) :

> "For there to be an abuse of process, the proceedings must, in the words of L'Heureux-Dubé, J be "unfair to the point that they are contrary to the interests of justice" (page 616). "Cases of this nature will be extremely rare" (*Power, supra* at p 616). In the administrative context, there may be abuse of process where conduct is equally oppressive.".

In the result, the majority in *Blencoe* determined that the delay in that case was not so inordinate as to amount to an abuse of process.

71. The Chairman has directed the Tribunal that, it is for a Specified Person to establish on the balance of probabilities that a "fair hearing" is not possible but that even if the Tribunal is satisfied that the Specified Persons can be afforded a fair hearing in these proceedings, nevertheless it can and should grant a stay of proceedings if the circumstances involved an abuse of process which so offended the Tribunal's sense of justice and propriety that these proceedings were tainted as an abuse of process.

<u>An analysis of the facts established by the evidence.</u>

72. The determinations of fact, in accordance with the Chairman's directions as to the law, have been reached by the Tribunal as a whole. There is no doubt that at the outset of the investigation the SFC moved with commendable speed in making enquiries of Sun Hung Kai Investment Services Ltd in respect of dealings in the shares of QPL. Equally, the company responded to requests to be furnished with

documents timeously. As a result, on 17 June 2003 it responded to the request of the SFC of 6 June 2003 by providing detailed information of their dealings in the shares of QPL on 27 May 2003. Similarly, on 8 August 2003 it provided the SFC with similar detailed information in respect of 26 and 28 May and 2 and 5 June 2003. A direction having been issued to officers of the SFC, pursuant to section 182(1) of the Ordinance, on 20 August 2003 to investigate and report on dealings in the shares of QPL in the period 26 May to 5 June 2003 Mr Edmund Chau and Ms Connie Cheung were interviewed by Mr Kenneth Ip on 10 September and 3 October 2003 respectively. "MSS Stock Activities" record for dealings in the shares of QPL for various relevant dates in the period including 26 May to 5 June 2003 were available and put to the interviewees.

The records of interview.

73. The progress of the SFC investigation is best evidenced by a brief examination of the various records of interview that were conducted. In the interview of 10 September 2003 Mr Edmund Chau confirmed that he was an Executive Director of Sun Hung Kai Securities Ltd responsible for proprietary trading and supervision of the staff including Ms Connie Cheung in the "Hong Kong dealing" department. He acknowledged that he was the "authorised person" for Cheeroll Ltd able to place orders on its behalf and that he had enjoyed that status since 1997. The Directors of Cheeroll Ltd were his colleagues Mr David Hui Yip Wing and Mr Kwok Chee Chung, respectively the "CEO" and Finance Director of the Sun Hung Kai Group. Mr Chau went on to confirm that he had placed all the orders by "outcry" to one or other of two terminal operators on behalf of Cheeroll Ltd, reflected in the records provided by Sun Hung Kai

Investment Services Ltd to the SFC, for 26 and 28 May and 2 and 5 June 2003.

74. Mr Chau explained that in October 2002 and February 2003 QPL had placed shares through Sun Hung Kai International Ltd at $1.50 and $1.52 respectively. He was involved in the arrangements whereby Chinacal Ltd, a client of his employer, subscribed for QPL shares in each of the two placements. He said that Honest Opportunity, a client of his company had also obtained shares in each of the two placements. Mr Lin Xu Ming, known to him as a shareholder and director of Chinacal Ltd, instructed him to sell the QPL shares if the occasion arose. He instructed Ms Connie Cheung to make those sales. In his second interview of 20 November 2003, Mr Chau explained that those instructions had been received on the telephone at the time of the second placement when he was told to sell if there was a profit to be made and that is what he had told Ms Connie Cheung.

75. Mr Edmund Chau said that on 23 May 2003 the volume of QPL shares traded exceeded 30 million and the price had risen to the range of $1.50-$1.60 on an upward trend. Mr David Hui agreed with his proposal to buy up to $20 million worth of QPL shares as proprietary trading. As a result, he began to make bids to buy those shares on 26 May 2003. He decided when and at what price to bid to buy shares. Thereafter, Mr Chau was asked to explain his pattern of bidding to buy QPL shares in the period 26 May to 2 June 2003 only to cancel the bid in due course and to replace it with another bid to buy QPL shares, often at the same price as the earlier cancelled bid. It was suggested to him that the pattern was evident: that his "buy" bids were made in conjunction with offers to sell QPL shares by Chinacal and Honest Opportunity Ltd. In response to a

question, as to why it was that at 11:56 a.m. on to June 2003 he had cancelled a bid to buy 200,000 QPL shares at $1.62 per share shortly after the bid was made and then made a bid to buy 300,000 QPL shares at the same price shortly thereafter, Mr Chau said :

> *"At that time, I did not want to have too many buy orders at $1.62 in the market. Thus, I cancelled them and then input a larger order at $1.62. The reason why I did not want to have too many buy orders in the market was that I did not want to leave the market with the impression that I was* scaffolding.*"* **(Emphasis added).**

76. In her interview of 3 October 2003, Ms Connie Cheung confirmed that she was a senior dealer of Sun Hung Kai Securities Ltd and had been since 1995. She placed her orders to deal in shares by "outcry" to Mr Ma Yu Lung, who sat next to her. Her supervisor was Mr Edmund Chau. She said that in February 2003 after Chinacal Ltd had subscribed for QPL shares in a placement she had been instructed by Mr Edmund Chau to sell those shares if the price was good. That happened immediately after a telephone call that Mr Edmund Chau had with a person at the other end she believed to be Mr Lin Xu Ming. Thereafter, she made the decision when to sell those shares and at what price. She confirmed that she placed all the orders to sell QPL shares on behalf of Chinacal Ltd on 26 and 28 May and 2 and 5 June 2003.

77. Ms Connie Cheung said that she knew that Cheeroll was a "house account" of her employer in the charge of Edmund Chau and Honest Opportunity a "direct dealing" client from whom she received either specific or general instructions from Mr Terry Chiu.

78. When invited to note that, from the records, on days when Chinacal placed orders to sell QPL shares Cheeroll Ltd placed large orders to buy those shares Ms Connie Cheung confirmed that she was aware that those buy orders were "... input by SHK", in particular by Mr Edmund Chau. They sat close to each other and she could hear him place the orders. However, given that Cheeroll Ltd was a house account, she did not ask him any questions at all about those orders.

79. In his second interview of 20 November 2003 Mr Edmund Chau said that he made his "buy" orders by "outcry" to Mr Ma Yu Lung as did Ms Connie Cheung. He denied the suggestion put to him that when he input "buy" orders of QPL shares in the relevant period on behalf of Cheeroll Ltd he was aware of "sell" orders of those shares input by Ms Connie Cheung, although he accepted that it was probable that he became aware of her orders after he had placed his "buy" order. He denied that the aim of his inputting "buy" orders for QPL shares on behalf of Cheeroll Ltd during the relevant period was not in fact to buy QPL shares but with the intention of creating an apparently active buying market for those shares, in order to make it easier for Ms Connie Cheung to sell those shares on behalf of Chinacal Ltd and Honest Opportunity.

80. In an interview with the SFC on 8 December 2003, Mr Ma Yu Lung said that from 1987 he had been employed by Sun Hung Kai Investment Services Ltd to input instructions from dealers to buy and sell shares. He was performing those duties in the period 26 May to 5 June 2003. Orders were placed by outcry. Initially, he said that he received instructions in that period from only Ms Connie Cheung and not Mr Edmund Chau. However, when taken to the records submitted by Sun Hung Kai Investment Services Ltd to the SFC on 8 August 2003 of their

dealing in the shares of QPL in that period, which records detailed Mr Edmund Chau as having given instructions in respect of orders to buy QPL shares on behalf of Cheeroll Ltd, and having been told that that is what Mr Edmund Chau had said himself had happened, Mr Ma explained his initial answer by saying that although Mr Edmund Chau had initiated the order they had been confirmed to him by Ms Connie Cheung. He said that there were seats for four persons at a desk in the dealing room opposite each of whom there was a teletext terminal. He and Mr Edmund Chau sat at the far end of the line of four seats and Ms Connie Cheung had a seat between them.

81. In an interview with the SFC on 24 October 2003, Mr Lin Xu Ming explained that Chinacal was a company that he had acquired in 2001. He was a director. In October 2002 and February 2003 at the suggestion Mr Edmund Chau of Sun Hung Kai International Chinacal Ltd had acquired placement shares of QPL. The QPL shares first acquired were sold at a profit. Following the acquisition of the shares in February 2003 he instructed Mr Edmund Chau to sell those QPL shares when there was a profit to be made. He was not involved subsequently.

82. In an interview with the SFC on 14 November 2003, Mr Terry Chiu Sau Leung said that in May and June 2003 he was an executive director of RIMC Advisors [Hong Kong] whose duties included discretionary management of asset portfolios of clients, one of which was Honest Opportunity Ltd. It had an account with Sun Hung Kai Investment Services Ltd. He was authorised to place orders in that account on behalf of Honest Opportunity Ltd. On the recommendation of Mr Edmund Chau Honest Opportunity Ltd had acquired 21.7 million QPL shares through that account in the placement of QPL shares in

February 2003. In May 2003 he had instructed Ms Connie Cheung to sell the QPL shares held by Honest Opportunity Ltd if a price greater than the acquisition price of $1.50-$1.52 could be obtained. He said that he was unaware of unfulfilled bids made by Cheeroll Ltd for QPL shares made at the time of the disposal of QPL shares held by Honest Opportunity Ltd.

83. In a record of interview conducted of Mr Edmund Chau on 19 April 2004, he accepted that he had begun bidding to buy shares in QPL through Cheeroll as early as 6 May 2003. He accepted that there was prior to the conversation that he had said, in his first interview, that he had with Mr David Hui and was without his authority or approval. He said he did not need his authority or approval because that trading was within his own authority. He had only spoken to Mr David Hui out of courtesy. Thereafter, Mr Edmund Chau was confronted with records in respect of trading by Sun Hung Kai Investment Services Ltd in the shares of QPL in the period 5 to 23 May 2003, which records had been obtained from that company by their letter of 12 March 2004 to the SFC. His attention was drawn to the pattern of trading by Cheeroll Ltd and to the related orders to sell by Honest Opportunity in that period. He denied that the pattern of his trading through Cheeroll Ltd was intended to create a false market and, in particular, that he received instructions so to trade from Honest Opportunity Ltd.

84. Finally, Mr David Hui was interviewed by the SFC on 27 January 2005. In the material period he was Deputy-Chairman and CEO of Sun Hung Kai Co Ltd and a director of Sun Hung Kai Investment Services Ltd. Mr Edmund Chau was one of his subordinates and had authorisation from the board of directors of Sun Hung Kai Co Ltd to deal in securities. Mr David Hui acknowledged that a memorandum of Sun Hung Kai Co

Ltd dated 7 June 2000 designated him to authorise any proprietary trading of the Group and that the minutes of a board meeting of Cheeroll Ltd dated 16 July 1997 authorised Edmund Chau to give oral trading instructions on behalf of that company. He said that during the period between January and June 2003 Mr Edmund Chau had told him that he wanted to invest in the shares of QPL, although he did not specify an amount of the investment. For his part, he said that he did not give him any advice and nor did Mr Edmund Chau need his approval because he was authorised to make a purchase of that nature so long as it was within the monetary limits of his authorization.

85. It is clear, at least in retrospect, that by 8 December 2003 just over six months after the initial inquiry of SHK by the SFC on 6 June 2003 the SFC had gathered almost all of the relevant factual evidence that is now laid before the Tribunal for its consideration in determining the issues posed by the Financial Secretary's notice. The only witness of fact interviewed after 8 December 2003 whose interview is put before us is that of Mr David Hui. There is no explanation for why it was that he was not interviewed until January 2005. As Deputy-Chairman and CEO of Sun Hung Kai Co Ltd and a Director of Sun Hung Kai Investment Services Ltd his whereabouts would appear to have been known.

The length of the investigation.

86. Given that Cheeroll was a company closely associated with senior management of Sun Hung Kai Co Ltd and Sun Hung Kai Investment Services Ltd it is readily understandable and entirely justifiable that the SFC should have determined to broaden the ambit of their enquiries to determine whether or not there was evidence establishing the connection of past and present directors of those companies with the impugned

trading conduct of Cheeroll Ltd. On the material available to the Tribunal there is no reason to doubt that the six to seven months of additional, but as it turned out fruitless, investigation that Mr Steward says was expended in that respect was justifiable.

Delay in obtaining the draft of the expert's report.

87. It appears that a draft of Mr Shek's report was available in about May 2005 and in that month the case was sent for internal SFC legal advice. There is no dispute about Mr Steward's statement in his witness statement that in about September 2004 Mr Shek had asked for additional information about the orders that were the subject of his opinion and as a result four requests had been made of Sun Hung Kai Investment Services Ltd for that information in the month from mid-September to mid-October 2004. Also, he noted that a fifth request had been made in February, to which a response and received on about 1 March 2005. He said that obtaining the expert's report added five to six months to the length of the investigation, the additional line of enquiry having stopped in about August/September 2004. However, there is a dispute, at least on the part of Mr Patterson, as to whether or not that length of time was justified.

Mr Shek's report.

88. A short analysis of Mr Shek's report is of assistance in addressing the complaint made by Mr Patterson. It is to be noted that at the outset of the substantive part of his report (paragraph 7) Mr Shek designates the period 26 May to 5 June 2003 as the "Analysed period". He said that in the period Cheeroll placed 157 buy orders of QPL shares, 110 of which were cancelled, 41 of which buy orders were reduced in size and that the upshot was that Cheeroll bought not one single QPL share. By contrast,

the relevant period stipulated in the FS's notice to the Tribunal under the heading "Statement for Institution of Proceedings" refers to the period between "6 May 2003 and 10 June 2003 (both dates inclusive)".

89. The main structure of the report may be broken down into the following areas :

Order placing patterns in respect of QPL shares of -

(a) Cheeroll (paragraphs 24-52);

(b) Chinacal (paragraphs 53-55); and

(c) Honest Opportunity (paragraphs 56-58).

It is to be noted that there is repeated reference in the analysis to the limited time frame of the "Analysed period", although in the case of each company in addition there is reference to the broader timeframe of April-June 2003.

90. Furthermore, it is to be noted that in the latter part of the report under the title "Additional Comments" (paragraphs 59-72), in which Mr Shek was asked to address the issue of whether : *"the order placing patterns of Cheeroll during the analysed period were consistent with facilitating the offloading of QPL shares by Chinacal and/or Honest"* that there is a more detailed analysis of the trading patterns of those three companies outside the "Analysed period", even intruding into April 2003. In that context Mr Shek makes a number of pertinent observations relevant to the overall time period prescribed in the Financial Secretary's notice. For example, at paragraph 68 he observes :

> *"From 1 April to 5 May 2003, no-bid orders for shares of QPL had been placed by Cheeroll. However, on the trading day immediately after Honest started offloading its shares,*

i.e. 5 May 2003, Cheeroll began to place large quantity bid orders, which lasted for a period of almost 6 weeks. From 6 May to 10 June 2003, a total of 314 buy orders were placed by Cheeroll, but not a single share of QPL had been acquired by it.".

91. The relevance of Mr Shek opinions in respect of the three-month April to June 2003 period, is the fact that, on the information placed before the Tribunal, it was not until the request of the 18 February 2005 followed by the reply of Sun Hung Kai of 1 March 2005 that the SFC asked for and was provided with details of the orders input by Sun Hung Kai in respect of QPL shares for the periods 1 to 30 April, 2 to 5 May and 6 to 30 June 2003. The three replies of the four requests made by the SFC of Sun Hung Kai in mid-September to mid-October 2003 that are available to the Tribunal, namely the replies of 23 September, 4 October and 25 October 2004 all deal with information sought in relation to the "Analysed period". The latter reply corrects mis-information provided to the SFC in the two earlier replies.

92. It is not apparent to the Tribunal why the information relating to the entire three-month period was not sought from Sun Hung Kai at an earlier stage. No doubt, the SFC had available to it some information for that three month period from the MSS Stock Activities Reports. We agree with Mr Steward when he says in his witness statement that it would have been better and preferable for the expert opinion to have been provided more quickly. Also, we agree with his statement that it is appropriate for an expert to request information to be confirmed and for other information to be gathered and with his assertion that a *"...cogent, well organised and thought-out expert opinion will save time for*

prosecution decision-makers and courts and Tribunal's.". Nevertheless, we judge there to have been an element of unexplained and unjustified delay in the production of the draft expert report.

Delay in obtaining legal advice and acting upon it.

93. On any view the period of time expended in the obtaining of legal advice, on the one hand by the SFC internally and on the other hand by the Financial Secretary from the Department of Justice, is extraordinary. The investigation having been completed, the draft expert report was available by May 2005 and yet it was not until 6 June 2007, about 25 months later, that the FS issued his notice. The SFC spent from May to December 2005 obtaining legal advice internally. Even after that length of delay it was not until four months later, on 25 April 2006, that the matter was referred to the FS. The Department of Justice was asked to advise on three box files of material and spent from 27 April 2006 to 30 January 2007 before delivering their advice to the Financial Secretary. Even then, a clarification of that advice and the drafting of the notice consumed several more months before the notice was issued.

94. Notwithstanding the various explanations proffered on behalf of the SFC and the Department of Justice, the facts stated above have merely to be stated for it to be obvious that there was unjustifiable delay. A delay of months by the SFC in obtaining translations of records of interview that had been made 18 months earlier was unacceptable. Whilst of course we accept that the section of the Civil section of the Department of Justice dealing with advice to the FS in respect of matters that might be referred by him to the Market Misconduct Tribunal was under pressure of work a delay of no less than nine months in rendering such advice was wholly unjustifiable.

95. It is not for this Tribunal to proffer suggestions to the SFC or the Department of Justice as to how the lamentable state of affairs described above is to be addressed to avoid its re-occurrence. However, we express the hope that these findings of the Tribunal will result in appropriate remedial measures so that such delays do not occur in future.

96. The issue of delay in proceedings being brought before the Insider Dealing Tribunal ("IDT"), they also being proceedings in which the SFC and the Department of Justice play significant roles prior to the matters reaching the IDT, has received adverse comment by the IDT on a number of occasions. In the Report of the IDT in respect of *"whether insider dealing took place in relation to the listed securities of Vanda Systems and Communications Holdings Ltd between 14 and 17 February 2000 (inclusive)"* the Tribunal considered, but rejected, an application for the stay of proceedings on the basis of delay. The FS's notice constituting the Tribunal was dated 28 October 2003, but the "Salmon letters" were not served until 11 April 2005 and the first preliminary hearing was held on 17 May 2005. In its Ruling on 9 August 2005 on the issue (annexure D of the Report) the Tribunal noted :

> "Mr Patterson is right there has been delay. The events the section 16(2) notice requires us to inquire into occurred in February 2000. That is now five years six months ago (though the last two months have been taken up with various arguments on matters of disclosure relating to these applications). That, in the view of this Tribunal, is a most undesirable period of delay between events and any inquiry into them. And unfortunately the present inquiry is not an exception to the rule. For some time past a delay of about five years and sometimes more has elapsed between events the subject of a section 16(2) notice

and the issue of Salmon letters in enquiries conducted by the Divisions of the Insider Dealing Tribunal.".

A consideration of Prejudice arising from delay.

(i) Mr Edmund Chau.

97. As indicated earlier Mr Bell conceded that he is unable to point to any specific prejudice enuring to Mr Edmund Chau's detriment arising from delay, rather he relies on "inferred prejudice". In particular, he pointed to the single issue of the ability of Mr Edmund Chau to account and give explanation now for the pattern of his trading through Cheeroll in the material period. With respect to Mr Bell, we do not accept that there is any such prejudice arising to Mr Edmund Chau. He was put on notice by the SFC letter of 28 August 2003, about three months after the impugned events, of the nature of the SFC enquiry of the fact that he was a "person under investigation". Moreover, in the first record of interview of 10 September 2003 he was challenged specifically to account for the intention or purpose of his trading in relation to particular trades that were said to evidence an overall pattern. The fact that he was not taken to every single trade is neither here nor there. Clearly, he was alerted to what allegations were being made against him. The fact that Mr Edmund Chau was acutely aware of exactly the nature of the investigation into his conduct and the related allegations is evidenced by his own explanation in respect of his cancellation of a bid shortly after it had been made, which cancellation was soon followed by a new bid at the same price. Mr Edmund Chau explained that he did not want to have too many bids in the market lest he be accused of "scaffolding", the very conduct that the SFC was investigating.

98. Furthermore, in the second and third interviews of Mr Chau by the SFC, namely 20 November 2003 and 19 April 2004 the focus of the SFC's attention on the intention and purpose of his trading through Cheeroll Ltd was re-iterated and emphasised in respect of the trading of Chinacal Ltd and expanded in ambit by reference to the trading of Honest Opportunity Ltd.

99. Having been alerted to the nature of the SFC's enquiries, in particular the fact that he was a person under investigation within three months of the impugned conduct and having been interviewed no less than three times in the ensuing months we are satisfied that Mr Edmund Chau was very well placed to marshal and preserve his memory of the issues in question, so that the subsequent passage of more than four years causes him no or very little prejudice in his participation in these proceedings. Certainly, such minor element of prejudice enuring to his detriment is signally short of the prejudice required to justify the extraordinary remedy of stay of the proceedings.

(ii) Ms Connie Cheung.

100. Ms Connie Cheung was alerted to the ambit of the SFC's enquiries into these matters by their letter to her of 26 September 2003. There is no dispute that she was not informed that she was "a person under investigation". Equally, we accept Mr Kenneth Ip's evidence and are satisfied that she was not such a person at the time of her interview. Whilst there is no requirement in the Ordinance that such a person be informed that he/she falls into that category the apparent practice of the SFC to inform an interviewee of that fact, as evidenced by the interview of Mr Edmund Chau, is clearly the fair and appropriate practice. Furthermore, an appropriate extension of that fair practice would be to

inform a person such as Ms Connie Cheung, when that determination was made, that she had become a "person under investigation". If that stage had been reached by the time of the letter to her from the SFC dated 10 May 2006, in which she was informed that the matter had been referred to the FS for his consideration, that was an ideal opportunity for the information to be imparted.

101. The requirements of the Ordinance governing the interviewing of a person suspected to be possessed of information that might assist the SFC's enquiries were met in full in the case of Ms Connie Cheung. There was no requirement to advise her of the right that she enjoyed in common with all citizens to seek legal advice or, for that matter, to be accompanied by a lawyer to her interview. Ms Connie Cheung was informed of the need to make it known that she asserted her right to self-incrimination, albeit that she was advised that she must nevertheless answer the questions truthfully, and the restrictions on the subsequent use of reponses. She chose to make no such claim. Finally, when informed of the restrictions imposed by operation of the "secrecy" provisions pursuant to section 378 of the Ordinance Ms Connie Cheung was advised of her right nevertheless to consult and inform a lawyer of her circumstances and to obtain advice. On her evidence she chose not to do so.

102. Whilst, on the one hand Ms Connie Cheung has testified that had she been alerted earlier to the fact that she had become a person under investigation or that consideration was being given to her being named a Specified Person in the proceedings that have resulted she would have sought legal advice and sought to locate relevant witnesses on the other hand she has given no testimony of the fact that there are dead or missing

witnesses or even witnesses whose memories have faded through the passage of time. Similarly, she has given no testimony of the fact that documentation is now missing which would otherwise have been available at an earlier stage had she been so alerted. Having been alerted to the fact of the SFC investigations into the impugned transactions within four months of those events and having been questioned closely about her conduct relevant to those matters and, in particular, her knowledge of Mr Edmund Chau's conduct in trading through Cheeroll we are satisfied that not only was Ms Connie Cheung's attention drawn to the very matters that are the focus of the proceedings before this Tribunal but also that she gave detailed answers in respect of those enquiries. Not once did she claim that she had no memory of those events. As a result, we are satisfied she too was well placed to marshal and preserve her memory of relevant events at an early stage.

103. Since Ms Connie Cheung has raised the issue of prejudice arising in her personal life by the decision that she and her husband made, in ignorance of the prospect that she might be named as a Specified Person in these proceedings, to have a second child the Tribunal must address the issue if only to traverse it, as we do. Overcoming, as we do, an initial reluctance to accept that the birth of a child to a family in the circumstances of Ms Connie Cheung could be considered a prejudice to her, nevertheless we are satisfied that very little or no significance is to be attached to this issue in the context of determining whether or not to stay these proceedings.

104. Whilst the passage of time inevitably has an effect in dimming memories and mindful of the fact that more than four years have passed since the impugned events we are satisfied that Ms Connie Cheung has

suffered no or little prejudice as a result. Certainly, as in the case of Mr Edmund Chau, such prejudice falls signally short of that required to justify a stay of these proceedings.

(iii) Cheeroll Ltd and Sun Hung Kai Investment Services Ltd.

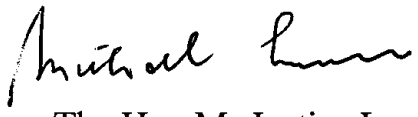
105. Although Mr Brewer has joined in the submissions made by both Mr Patterson and Mr Bell that these proceedings be stayed he has not advanced any arguments whatsoever nor has he articulated any reasoning that is said to apply separately to the two companies. Furthermore, although invited to do so by the Chairman he has not provided any authorities evidencing applications for stay being made or granted in respect of companies. Assuming, that in principle such a right exists, and there seems no reason why it should not, we are satisfied that there is no evidence whatsoever of prejudice arising from delay that would justify the stay of proceedings against these two companies.

CONCLUSION

106. We are satisfied that there is no prejudice arising from delay enuring to the detriment of Mr Edmund Chau, Ms Connie Cheung, Cheeroll Ltd or Sun Hung Kai Investment Services Ltd such that it would be appropriate to stay the proceedings against any or all of those persons.

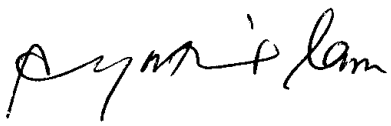
107. Furthermore, having regard to the alternative basis upon which it is appropriate to impose a stay of proceedings, namely that the circumstances involved an abuse of process which so offended the Tribunal's sense of justice and propriety that these proceedings were tainted as abuse of process, we are satisfied that there is no such basis whatsoever for stay of the proceedings against any or all of those persons.

108. In the result, all the applications for stay are refused.



The Hon Mr Justice Lunn

(Chairman)



Dr Cynthia K L Lam

(Member)

Mr Michael T P Sze

(Member)