

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. Mr Patterson submitted that the Tribunal does not have power to compel Ms Connie Cheung, a specified person, to give testimony in the proceedings before this Tribunal nor does it have power to admit into evidence before the Tribunal the record of the interview conducted of her under compulsion by officers of the Securities and Futures Commission (“the SFC”) on 3 October 2003. Mr Bell made no submissions on this issue. For his part, Mr Brewer made a short submission in support of Mr Patterson at the conclusion of Mr Patterson’s oral submissions. In his full written submissions Mr Patterson reduced those submissions to four propositions.

Proposition 1

2. By proposition 1 he submitted that :

“Ms Cheung (‘Ms C’) cannot be compelled by the Tribunal, pursuant to section 253(1)(b) of the Securities and Futures Ordinance Cap. 571, or otherwise to give testimony in these proceedings.”.

The relevant provisions of the Securities and Futures Ordinance.

3. Section 253(1)(b) of the Securities and Futures Ordinance, Cap. 571 (“the Ordinance”) provides that the Tribunal may :

“...require a person to attend before it at any sitting and to give evidence and produce any article, record or document in his possession relating to the subject matter of the proceedings;”.

Mr Patterson acknowledged that section 253(1)(d) empowered the Tribunal to cause such a person to be examined on oath or otherwise and :

“...answer truthfully any question which the tribunal considers appropriate for the purposes of the proceedings”

and that section 253(2) makes provision for the of the commission of a criminal offence, punishable under section 253(3), in a person who, without reasonable excuse :

“(a) fails to comply with an order, notice, prohibition or requirement of the Tribunal made or given under or pursuant to subsection (1);”.

Section 253(4) provides that :

“A person is not excused from complying with an order, notice, prohibition or requirement of the Tribunal made or given under or pursuant to subsection (1) only on the ground that to do so might tend to incriminate that person.”

4. Notwithstanding the fact that the powers of the Tribunal under section 253(1)(b) and (c) refer simply to “a person”, without any qualification whatsoever, Mr Patterson submitted that a proper construction of the ambit of that phrase does not extend to what he has termed “an accused person”, namely a person specified in the Financial Secretary’s notice.

5. In the alternative, Mr Patterson submitted that Ms Connie Cheung enjoys the right to a “fair hearing” under Article 10 of the Hong Kong Bill of Rights Ordinance, Cap. 383 (“HKBOR”) and Article 14(1) of the International Covenant of Civil and Political Rights (“ICCPR”), as engaged by Article 39 of the Basic Law. In consequence, so he submitted, the power in the Tribunal to compel her to testify in these proceedings would not only undermine her rights to a “fair hearing”, which includes the right against self-incrimination but also be a disproportionate response to a legitimate public interest in the proper regulation of the financial markets of the HKSAR.

6. In addition, Mr Patterson submitted that empowering the Tribunal to compel “an accused person” to testify in the proceedings before it would compromise the perception of the Tribunal as an independent and impartial judicial body.

Proposition 2

7. In the event that the Chairman of the Tribunal was to rule against his submissions in respect of Proposition 1, so that Ms Connie Cheung is compellable to testify before the Tribunal, Mr Patterson submitted that, notwithstanding the statutory provisions that require her to answer truthfully such questions that are posed, Ms Connie Cheung may rely on her right against self-incrimination and refuse to answer questions and have a reasonable excuse for so doing, namely :

“... on the grounds that her answers may incriminate in relation to matters criminal outwith the jurisdiction of the Tribunal. Section 255 and ss. 283 and 307 (the ‘double jeopardy’ provisions), jointly and severally do not eliminate entirely, or at all, the risks associated with Ms Cheung being compelled to give testimony against her interests.”

Proposition 3

8. Mr Patterson submitted that the Tribunal is not entitled to admit into evidence the compelled record of interview obtained by the SFC on 3 October 2003 from Ms Connie Cheung. He made that submission notwithstanding the undisputed fact that the interview was conducted under the exercise of the powers of the SFC under section 183(1)(a) and section 184(4) to require Ms Connie Cheung to answer questions posed of her outwith the Tribunal, in the context of the protection in respect of the use of that material afforded to her by section 187, and the powers of the Tribunal pursuant to section 253(1)(a) of the Ordinance to receive and consider any material, even if it would not be admissible in evidence in civil or criminal proceedings in a court of law. He submitted that the employment of those powers would breach Ms Connie Cheung's right to a "fair hearing" pursuant to Article 10 of the HKBOR and Article 14(1) of the ICCPR, as engaged by Article 39 of the Basic Law.

9. The protection against the subsequent use of requirements/questions and explanation/statement/answers given under compulsion in SFC interviews pursuant to section 183, where the interviewee makes a claim that the answers might tend to incriminate him before providing that answer, is set out in section 187(2)(b) :

"... then the requirement as well as the explanation or statement, the explanation or further particulars, or the question and answer (as the case may be) shall not be admissible in evidence against the person in **criminal proceedings in a court of law** other than those in which the person is charged with an offence under section 179(13), (14) or (15) or 184, or under section 219(2)(a), 253(2)(a) or 254(6)(a) or (b), or under Part V of the Crimes Ordinance (Cap. 200), or for perjury, in respect of the explanation or statement, the explanation or further particulars, or the answer (as the case may be)." **(Emphasis added).**

10. Mr Patterson submitted that, notwithstanding the ruling of the Chairman on 12 October 2007 that the proceedings before the Tribunal were not criminal proceedings, that the proceedings are nevertheless “quasi criminal” such that the prohibition of use provided for by section 187(2) is engaged. However, in the course of oral argument Mr Patterson conceded that in any event Ms Connie Cheung had made no claim in respect of self-incrimination prior to answering any of the questions in the interview by the SFC.

11. Mr Patterson acknowledged that in *Fu Kin Chi v The Secretary of Justice* [1998] 1HKLRD 271 the Court of Final Appeal had determined that by necessary implication, in particular by section 30 of the Police Force Ordinance, Cap. 232, the privilege against self-incrimination had been abrogated in relation to a police disciplinary investigation. In that case, the officer under investigation had been told in terms that the interview “cannot and will not” be used in any criminal proceedings but was to be used for internal police investigations including disciplinary action against him. Nevertheless, the officer refused to answer questions. His conviction in disciplinary proceedings for having thereby prejudiced good order and discipline was sustained. As Bokhary PJ noted, any attempt to use any compelled admissions in criminal proceedings could be met with the assertion that the answers were involuntary, having being compelled.

Proposition 4

12. In the alternative to Proposition 3, Mr Patterson submitted that the Tribunal in its discretion and/or because of natural justice ought to rule inadmissible Ms Connie Cheung’s compelled interview by the SFC on the grounds that :

- (i) it was obtained under compulsion without her being advised properly or at all of her right to legal representation;
- (ii) it was obtained without her being advised of the fact that what she said could be used against her in market misconduct proceedings, criminal or civil; and
- (iii) from the time of that interview, 3 October 2003, until advised of her status as a specified person on 29 August 2007 she was not advised that she was exposed to the risk of criminal or civil sanctions or that there came a time when her status changed from that of a witness.

THE SUBMISSIONS OF THE PRESENTING OFFICER

Issue : the compellability of Ms Connie Cheung to give testimony before the Tribunal.

13. During the course of argument Mr Yeung indicated that although there is no extant request from him as Presenting Officer for an order pursuant to section 253(1)(d) that Ms Connie Cheung give evidence before the Tribunal he intends making such an application. No doubt, he intends doing so in discharge of his duties under section 21 of Schedule 9 of the Ordinance. Mr Yeung's initial submission was that the starting point in respect of the issue of the compellability of Ms Connie Cheung as a witness before the Tribunal is section 5 of the Evidence Ordinance, namely :

“In all proceedings before the court, the parties ...and the persons in (sic) whose behalf any proceedings may be brought, or instituted, or opposed, or defended...shall, except as hereinafter excepted, be competent and compellable to give evidence either viva voce...on behalf of either or any of the parties to the proceedings.”.

14. Section 2 of the Evidence Ordinance defines “court” as including :

“the Chief Justice and any other judge, also every magistrate, justice, officer of any court, commissioner, arbitrator, or other person having, by law or by consent of parties authority to hear, receive, and examine evidence with respect to or concerning any action, suit, or other proceedings civil or criminal, or with respect to any matters submitted to arbitration or ordered to be inquired into or investigated under any commission.”.

15. Next, as a derogation from the general power Mr Yeung drew to the Tribunal’s attention the provisions of section 10 of the Evidence Ordinance, the first limb of which exempts any person who in any criminal proceedings is charged with an indictable offence for any offence punishable on summary conviction from being compelled to give testimony for or against himself.

The Tribunal’s powers within the Ordinance to compel testimony.

16. Mr Yeung acknowledged that independent of his submissions in respect of section 5 of the Evidence Ordinance the Tribunal has power under section 253(1)(b) to :

“...require a person to attend before it at any sitting and to give evidence...”

and, under section 253(1)(d), to cause that person to be examined on oath or otherwise and to be required :

“...to answer truthfully any question which the tribunal considers appropriate for the purposes of the proceedings;”.

The provisions of section 253(2) to (4) provide for criminal liability for failure to comply in a person so required in the absence of a reasonable excuse, the latter subsection providing that a person is not so excused :

“... only on the ground that to do so might tend to incriminate the person.”.

17. Mr Yeung pointed out that the specific powers within section 253(1) of the Ordinance that are relevant to this issue are directed to “a

person”, although there is a reference in section 253(1)(e), in the context of being required to provide an affidavit, to the person as “a witness”. It was his submission, that there is no limitation or qualification of the ambit of the term “a person” and that phrase is to be construed as encompassing a person stipulated as a “Specified Person” in the FS’s notice. Accordingly, so he submitted, the Tribunal has power to compel Ms Connie Cheung to give testimony in these proceeding.

Article 10 of the HKBOR and Article 14(1) of the ICCPR.

18. Mr Yeung submitted that relevant to the issues before the Tribunal, following the Chairman’s ruling that these proceedings are not criminal proceedings, is the provision of Article 10 of the HKBOR that :

“in the determination.... of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”.

19. Of the issue of whether or not these proceedings fall to be considered as the determination of “rights and obligations in a suit at law”, Mr Yeung conceded that they do so fall to be considered. In so conceding, he drew the attention of this Tribunal to the judgment in *Chong Wai Lee Charles and another v The Insider Dealing Tribunal and the Financial Secretary* (unreported) HCA 116/2005. Reyes J, in the judgment of the court (Lam and Reyes JJs), observed at paragraph 50 :

“There is no dispute that ICCPR art. 14(1) and HKBORO art.10 apply to an IDT.”.

20. Of the ambit of the rights afforded under Article 10 of the HKBOR to have “a fair and public hearing” Mr Yeung drew the attention of the Tribunal at the outset to the general nature of those rights, as contrasted with the detailed and specific rights provided under Article 11 of the HKBOR in respect of criminal proceedings. Furthermore, Mr Yeung

submitted that the judgment of the Court of Appeal in *Koon Wing Yee and The Insider Dealing Tribunal and the Financial Secretary* (unreported) CACV 385/2005 is of no direct assistance because of its determination that those proceedings were criminal proceedings.

21. Of civil proceedings Mr Yeung pointed to the observations of the authors of Phipson on Evidence (16th edition) at 8-06 to the effect that it is not :

“...abusive or oppressive for a party to issue and serve a witness summons upon his opponent.”.

He points out that in *Halford v Brookes* [1992] PIQR 175, an action for damages arising out of an alleged murder, Rougier J ruled (page 177) :

“that the court is entitled to draw adverse inferences from a defendant’s failure to give evidence. There is no right of silence in civil actions...”.

That dicta was followed by Chu J in *Ming Hsing Development Company Ltd and Ming Shiu Tong* (unreported) HCA 671/1995 at paragraph 28.

22. Mr Yeung submitted that the civil procedure governing all civil causes is premised upon an absence of a right of silence in a party and the compellability of litigants. He pointed to the fact that a defendant in a civil action is required to file a defence, is subject to interrogatories, disclosure and discovery of documents. He submitted that, nevertheless, the purpose of such requirements is to produce a fair trial.

23. Furthermore, Mr Yeung submitted that in assessing whether or not the power of the Tribunal to compel Ms Connie Cheung to give evidence infringes her rights to a fair hearing, as provided by Article 10 of the HKBOR and Article 14(1) of the ICCPR, the Tribunal is to have regard to

the protection afforded by the Ordinance to the use of such material.

Section 255(1) of the Ordinance provides :

“Notwithstanding any other provisions of this Ordinance, evidence given by any person at or for the purposes of any proceedings instituted under section 252 (including any material, record or document received by the Tribunal from the person or produced to the Tribunal by the person under section 253, and any record or document information given, provided, produced or disclosed to the Tribunal by the person under section 254) shall be admissible in evidence for all the purposes of this Part (including any proceedings (civil or criminal) instituted and or pursuant to this Part) but, subject to subsection (2), shall not be admissible in evidence against that person for any other purpose in any proceedings (civil or criminal) in a court of law brought by or against him.” **(Emphasis added).**

Mr Yeung submitted that the effect of those provisions is to provide appropriate substituted protection in light of the power to compel testimony and the abrogation of the right of self-incrimination.

Issue : the abrogation of the right against self-incrimination in a witness compelled to testify in the proceedings before the Tribunal (Proposition 2).

24. Mr Yeung submitted that, absent considerations of the Bill of Rights, there are many examples of the statutory abrogation of the right against self-incrimination, in the context of compelled testimony, together with a statutory prohibition on how the answer can be used. He pointed to the statement to that effect in the judgment of Ribeiro PJ in *HKSAR v Lee Ming Tee* (2001) 4 HKCFAR 133 at 156 G-J in the context of section 145 (3A) of the Companies Ordinance, Cap. 32. Also, he drew the attention of the Tribunal to the observations of the authors of Phipson on Evidence (16th edition) Chapter 24, paragraph 55 :

“There are a number of statutory abrogations of the privilege. Here Art. 6 has had a very great effect. A number of statutes have been amended to provide that whilst the privilege is abrogated, the evidence may not be admissible in any subsequent **criminal** proceedings. Where this is done, no problem arises. Where the statute does not so

provide, the court will need to consider whether the privilege has been abrogated but will start from the presumption that it was not Parliaments intention to take away the privilege without clear words.”
(Emphasis added).

25. Schedule C of Mr Yeung’s written submission dated 30 November 2007 contains a list of such enactments, for example :

- (i) section 33(1) of the Theft Ordinance, Cap. 210;
- (ii) section 66 of the Crimes Ordinance, Cap. 200;
- (iii) section 3 (11) and (12) of the Organised and Serious Crimes Ordinance, Cap. 455;
- (iv) section 30(2) and sections 43(2) and 44(2) of the Financial Reporting Council Ordinance;
- (v) section 37 of the Clearing and Settlement Systems Ordinance, Cap. 584;
- (vi) section 43 of the Deposit Protection Scheme Ordinance, Cap. 581;
- (vii) section 17(7) and (8) of the Occupational Safety and Health Ordinance, Cap. 509;
- (viii) section 10(13) of the Mutual Legal Assistance in Criminal Matters Ordinance, Cap. 525;
- (ix) section 8(6) and (7) of the Official Secret Ordinance, Cap. 521;
- (x) section 18 of the Merchant Shipping (Local Vessels) Ordinance, Cap. 548, in the context of an inquiry into the fitness or conduct of the holder of a local certificate of competency;
- (xi) section 113 of the Merchant Shipping (Seafarers) Ordinance, Cap. 478 in the context of an inquiry into the fitness or conduct of an officer; and

- (xii) sections 146, 148, 149, 151, 152, 165, 166, 179, 184, 186, 187, 219, 220, 253, 254, 255 and 359 of the Securities and Futures Ordinance, Cap. 571.

Issue : the admissibility of compelled answers to questions posed by the SFC outwith the Tribunal (Proposition 3).

26. Mr Yeung invited the Tribunal to note the reference in the judgment of Ribeiro PJ in *Lee Ming Tee* to the acceptance by the Privy Council in *Brown v Stott* [2001]2 WLR 817 that the privilege against self-incrimination deduced from article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“the European Convention”) was not absolute in its operation (175 G-H) :

“The Privy Council held that even *direct use* of compulsorily obtained self-incriminating materials was not absolutely prohibited by art. 6(1) but could be justified if it was not a disproportionate response to a serious social problem and did not undermine the accused’s right to a fair trial viewed in the round.”.

That case concerned a statutory power in the police under the Road Traffic Act 1988, section 172(2) to require someone to name the person driving a particular car at a stated time. The compelled testimony was relevant to a prosecution for drunk-driving of that same person.

27. Furthermore, Mr Yeung drew the attention of the Tribunal to the decision of the European Court of Human Rights in *O’Halloran and Francis v The United Kingdom* (application numbers 15809/02 and 25624/02-judgment delivered on 29 June 2007) in which that court approved of the principle enunciated in *Brown v Stott* and its application to two other examples in the road traffic legislation of the United Kingdom. In *R v Kearns* [2002] 1 WLR 2815 the Court of Appeal of England and Wales dismissed an appeal in which the appellant had

argued at his trial, for an offence of failing without reasonable excuse to account for the loss of a sum of money between the date of the presentation of a bankruptcy petition and the date he was adjudicated bankrupt, that it was in breach of his right to silence, in particular the right not to incriminate himself, and therefore in breach of article 6 of the European Convention for the protection of Human Rights.

28. Outwith criminal proceedings Mr Yeung pointed to the power to obtain compelled answers/testimony for use in various proceedings and the approved use of such material. In the *Official Receiver v Stern and another* [2000] 1 WL 2230 the Court of Appeal of England and Wales approved of the judgment of Sir Richard Scott V-C, as he then was, at first instance determining that the prospective use, in proceedings brought under section 6(1) of the Company Directors Disqualification Act, 1986 seeking to disqualify two directors, of compelled evidence obtained from them, pursuant to section 235 of the Insolvency Act 1986 did not necessarily breach the right to a fair trial secured by article 6(1) of the European Convention. Mr Yeung pointed to the reference by Henry LJ in his judgment (page 2255 D-E) to the judgment of Rimmer J at first instance in *R v Secretary of State of Trade and Industry ex parte McCormick* [1998] BCC 379 at 386 in which he described the nature of disqualification proceedings under the Company Directors Disqualification Act, 1986 that as including (page 2255 D-E) :

“... the following : (i) such proceedings are taken only on the initiative of public authorities; (ii) they involve the levelling of specific allegations against the respondents; (iii) they can result in penalties of considerable severity on the respondents, also involving the suffering by them of some element of stigma.”.

That description, so Mr Yeung said, resonates with the position in which this Tribunal finds itself.

29. Elsewhere in his judgment, Henry LJ noted that the European Court of Human Rights had accepted in *WGS and MSLS v United Kingdom* [2000] BCC 719 that the disqualification proceedings in issue were the determination of civil rights, and not criminal proceedings, for the purposes of Article 6(1) of the European Convention but had gone on to state (page 2251 B-C) :

*“The court stresses, however, that the fact that such proceedings are to be treated as regulatory civil proceedings and not criminal proceedings for the purposes of article 6(1) does not remove from the applicants their right to a fair hearing. While contracting states have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases, it is still incumbent on them to secure fairness in the determination of civil rights and obligations : see *Dombo Beheer BV v The Netherlands* (1993) 18 EHRR 213, 229, paras. 32-33.”.*

30. In dismissing the appeal, Henry LJ concluded that the Vice-Chancellor had been correct to reject the submission that the use in disqualification proceedings of statements obtained outwith those proceedings under compulsion necessarily involved a breach of article 6(1) of the European Convention : (page 2258 B)

“The issue of fair trial is one that must be considered in the round, having regard to all relevant factors.”.

31. Next, Mr Yeung relied upon the judgment of the Court of Appeal of England and Wales in *Fleurose v Securities and Futures Authority Limited* (unreported) [2001] EWHC Admin 1085. The appellant, a

Senior Cash Arbitrage Trader, had been found guilty of improper conduct as a trader by a Disciplinary Tribunal of the Securities and Futures Authority. His appeal against that finding was dismissed by the Disciplinary Appeal Tribunal, as was his application for judicial review of that decision. In the Court of Appeal, it was argued that answers given by the appellant under questioning firstly, by the London Stock Exchange and secondly, before the Disciplinary Tribunal itself were improperly admitted, so that the hearing was unfair in that they infringed his civil rights as provided for by Article 6(1) of the European Convention.

32. However, in the judgment of the Court of Appeal Schieman LJ noted that no objection had been taken to the admissibility of either the interview or to questioning before the Disciplinary Tribunal and further that the appellant was in fact under no compulsion to answer the questions of the London Stock Exchange nor was he under any compulsion to answer questions before the Disciplinary Tribunal. Such relevance as the case has lies, perhaps, in the fact that the court adopted the approach enunciated in *Stern* in dismissing the appeal, namely (paragraph 26) :

“In the last analysis, looking at the matter in the round in the manner which was adopted in *Stern*, we see no ground whatever for suggesting that the hearing was in any way unfair.”.

A CONSIDERATION OF THE SUBMISSIONS

Issue : the admissibility of compelled answers to the SFC by Ms Connie Cheung outwith the Tribunal.

(i) the ambit of section 253(1) (a) of the Ordinance.

33. Section 253(1)(a) of the Ordinance is couched in the broadest of terms, permitting this Tribunal to receive and consider, inter-alia,

“... written statements or documents, even if the material would not be admissible in evidence in civil or criminal proceedings in a court of law;”.

(ii) the effect of the operation of Article 10 of the HKBOR and Article 14(1) of the ICCPR.

34. It is clear that the answers to the questions posed of Ms Cheung were obtained under compulsion and in face of criminal penalty, of which she was made aware, pursuant to section 183(1)(c) of the Ordinance. Equally, it is clear that she was made aware that the privilege in respect of self-incrimination was abrogated by operation of section 184(3) of the Ordinance but that if she made a claim under section 187(2) of the Ordinance provided that :

“... the requirement as well as the explanation or statement, the explanation or further particulars, or the question and answer (as the case may be) shall not be admissible in evidence against the person in **criminal proceedings in a court of law other than** those in which the person is charged with an offence under section 179(13), (14) or (15) or 184, or under section 219(2)(a), 253(2)(a) or 254(6)(a) or (b), or under Part V of the Crimes Ordinance (Cap. 200), or for perjury, in respect of the explanation or statement, the explanation or further particulars, or the answer (as the case may be).” **(Emphasis added).**

As noted earlier, Mr Patterson conceded, Ms Connie Cheung made no claim of the right against self-incrimination at any stage during her interview by the SFC.

35. In the context of criminal proceedings, as has been noted earlier, the Court of Final Appeal in *Lee Ming Tee* acknowledging with approval the advice of the Privy Council in *Brown v Stott*, and subsequently the European Court of Human Rights in *O'Halloran and Francis* have both stated that, even in criminal proceedings, there is no absolute privilege against self-incrimination. Of course, it is appropriate to note that in the latter two cases of *Brown v Stott* and *O'Halloran and Francis* the

compelled testimony was an answer, in effect, to a single question and no more, as to whom it was had been the driver of a motor vehicle on a particular occasion. Also, in both cases the courts took into account not only the limited nature of the interrogation and compelled answers but also, in the context of “proportionality”, the undoubted significant ills to society of the misuse of motor vehicles.

36. In the context of an investigation within the police force that might have led to disciplinary proceedings, in *Fu Kin Chi* the Court of Final Appeal approved of the propriety of legislation that required a police officer to answer questions, in prospect of the fact that they might be used in those disciplinary proceedings, although not in criminal proceedings. Finally, in the context of proceedings brought in England and Wales to seek the disqualification of company directors the Court of Appeal of England Wales in both *Stern* and in *McCormick* and the European Court of Human Rights in *WGS and MSLS v United Kingdom* have decided that such proceedings are not criminal proceedings in nature, so that the use of compelled testimony in those proceedings obtained under compulsion outwith the disqualification proceedings themselves did not necessarily breach the rights of those appellants to a “fair hearing” in the determination of their civil rights provided for by article 6(1) of the European Convention. However, as noted earlier in *WGS and MSLS v United Kingdom* the Court of European Human Rights pointed out :

“... the fact that such proceedings are to be treated as regulatory civil proceedings and not criminal proceedings for the purposes of article 6(1) does not remove from the applicants their right to a fair hearing.”

37. In determining whether or not the power to admit into evidence Ms Connie Cheung's interview with SFC outwith the Tribunal would infringe her right to a "fair hearing" the approach suggested in *Stern*, in the context of company director disqualification proceedings, that the matter be approached "in the round" has much to recommend itself. Firstly, it is to be noted that the interview was conducted in the course of investigations of her as a person the investigator, so he asserted, had reasonable cause to believe possessed information relevant to the investigation and on notice of several days, in which notice that fact and the details of the subject matter of the enquiry were disclosed to Ms Connie Cheung. Secondly, she was obviously at liberty to be accompanied by a legal representative if she had so chosen. Thirdly, she was informed of her right, in the event that she claimed the privilege against self-incrimination in advance of an answer, that the question and answer could not be adduced in criminal proceedings, save for the limited exceptions described in section 187(2) of the Ordinance. These observations, although made in respect of Ms Connie Cheung, are of general application to all the persons interviewed by the SFC in these proceedings. Fourthly, the events about which she was being questioned were relatively recent, some four months prior to the date of her interview. Finally, of the interview itself, it is to be noticed that it was of limited duration, namely two hours and 35 minutes during which time only 45 substantive questions were posed.

38. In considering matters "in the round" it is clearly relevant to have regard to the nature of these proceedings. They are instigated by the public authorities, namely by the notice of the Financial Secretary, and are, perhaps, best regarded as being civil regulatory proceedings in nature. The ambit of the orders that may be made by the Tribunal pursuant to

sections 257 and 258 of the Ordinance in the event that it determines, pursuant to section 252(3), that market misconduct has taken place and that it identifies any person engaged in that market misconduct are limited in nature. In general terms, they may be described as, on the one hand, requiring the disgorgement of benefits accrued in consequence of market misconduct and, on the other hand encompassing a range of protective orders, for example : a prohibition for up to five years on acting as a director or manager of the property or business of a listed corporation; a prohibition for up to five years on dealing in any securities and a recommendation that any body which may take disciplinary action against that person be recommended to do so. Those powers are clearly aimed at protecting the public from the future misconduct of the malefactors. They are not aimed at punishing those malefactors.

CONCLUSION

39. In those circumstances, the Chairman has advised the Tribunal that it is possessed of the power to admit the record of the interview of Ms Connie Cheung by the SFC and that to do so would not infringe her rights under Article 10 of the HKBOR or Article 14(1) of the ICCPR.

Issue : the exercise of the Tribunal's discretion as to whether or not to "receive and consider" Ms Connie Cheung's record of interview by the SFC of 3 October 2003.

40. Although the Tribunal has before it not only the written record of Ms Connie Cheung's interview but also the oral testimony of both former SFC investigator Kenneth Ip and that of Ms Connie Cheung herself, the oral evidence being relevant in large part to the issues raised by Mr Patterson as being relevant to the exercise of the Tribunal's discretion, it is to be remembered that this part of these proceedings have ensued on a

limited basis only. That limitation arises from Hartmann J's partial lifting of the stay of these proceedings of 9 November 2007 following his earlier order of stay of 29 October 2007. The effect of the partial lifting of the order of stay was to permit this Tribunal, at its discretion, to hear and determine issues that went to its jurisdiction. The Chairman has directed the resolution of this issue does not go to jurisdiction and must await such resumed hearing as may be permitted.

Issues : the compellability of a "specified person" as a witness before the Tribunal and the right against self-incrimination.

(i) the ambit of section 253(1).

41. There is no dispute that the power of the Tribunal, articulated in section 253(1)(b) and (d) of the Ordinance, to require the attendance, the giving of truthful evidence, on oath or otherwise, relating to the subject matter of the proceedings, is directed in an unlimited way to "a person". Similarly, the relevant criminal offence creating provisions of section 253(2)(a) for failure to comply with the exercise of those powers and the specific abrogation of the right against self-incrimination are couched in the same terms, namely addressed to "a person". A variant of that term, "any person", resonates throughout the various provisions of section 254 of the Ordinance, which makes provision for additional powers of the Tribunal.

42. The "Statements for institution of proceedings" contained in the Financial Secretary's notice instituting these proceedings, as required by section 252(2) and section 13 of Schedule 9 of the Ordinance, specifies the identity of the person who appears to have perpetrated "...any conduct which constitutes market misconduct". However, such person is not designated with any other description, certainly not the term

“accused” that Mr Patterson has referred to in the course of his submissions. Adopting the language of that provision the Tribunal has described such a person as a “specified person”.

43. There being no words of limitation whatsoever on the term “a person” in section 253 and in the absence of relevant limitations to that phrase expressed elsewhere in related parts of the Ordinance by exercise of the usual canons of construction, subject to a consideration of the submissions in respect of the requirements of a “fair hearing pursuant to Article 10 of the HKBOR and Article 14(1) of the ICCPR,” Ms Connie Cheung is clearly compellable to testify before the Tribunal pursuant to section 253(1)(b) and (d).

(ii) the effect of the operation of Article 10 of the HKBOR and Article 14(1) of the ICCPR.

44. Whilst it may be the case in civil actions generally that persons, including the parties to the action themselves, may be compellable as witnesses in those proceedings and, no doubt, potentially subject to contempt of court proceedings if they refuse to answer questions posed of them, nevertheless it is clear that the regime in this Tribunal provided for by section 253 condescends to much greater specific detail of its powers. Section 253 empowers the Tribunal to require a person to give evidence, on oath or otherwise, and to answer questions truthfully, failing which, absent a reasonable excuse, he is liable to prosecution for a criminal offence, for which he may be sentenced to two years imprisonment and a \$1 million fine.

Restriction on the use of compelled testimony in the Tribunal.

45. At the outset it is to be noted that section 255 of the Ordinance provides for considerable restrictions on the use of evidence given by any person in these proceedings. It provides that :

“(1) Notwithstanding any other provisions of this Ordinance, evidence given by any person at or for the purposes of any proceedings instituted under section 252 (including any material, record or document received by the Tribunal from the person or produced to the Tribunal by the person under section 253, and any record or document or information given, provided, produced or disclosed to the Tribunal by the person under section 254) shall be admissible in evidence for all the purposes of this Part (including any proceedings (civil or criminal) instituted under or pursuant to this Part) but, subject to subsection (2), **shall not be admissible in evidence against that person for any other purposes in any proceedings (civil or criminal) in a court of law brought by or against him.**

(2) The evidence given by any person at or for the purposes of any proceedings instituted under section 252 as referred to in subsection (1) shall be admissible in evidence against that person -

- (a) in civil proceedings instituted under or pursuant to Part XI;
- (b) in proceedings instituted under section 305;
- (c) in civil proceedings in a court of law arising out of the giving of evidence at or for the purposes of the proceedings instituted under section 252;
- (d) in criminal proceedings where the person is charged with an offence under section 219(2)(a), or under Part V of the Crimes Ordinance (Cap. 200), or for perjury, in respect of answers given by that person to questions put to him at or for the purposes of the proceedings instituted under section 252.”
(Emphasis added).

46. It is to be noted that, in contrast to the prohibition in respect of the use of answers and questions posed of a person provided for by section 187(2) of the Ordinance, the ambit of the protection provided by section 255 is wider and encompasses civil as well as criminal proceedings, save in respect of civil proceedings for the matters stipulated in section 255(2)(a) and (c) of the Ordinance.

47. Notwithstanding the restricted use of evidence that may be forthcoming from a person compelled to testify in the Tribunal the gravamen of Mr Patterson's complaint is that it would be unfair to compel Ms Connie Cheung to testify in these proceedings, given that her conduct is a focal point of the enquiry, she having been specified in the Financial Secretary's notice, pursuant to section 252(2) and Schedule 13 of the Ordinance, as a person who appears to have perpetrated "conduct which constitutes market misconduct". The suggested unfairness lies in the assertion that the investigation stage of proceedings has ended with the institution of the proceedings before the Tribunal which is now embarked upon a trial, albeit described as an inquiry to determine, inter alia, whether or not market misconduct has taken place and, if so, by whom.

48. Relevant to the submissions of Mr Patterson that the independence and impartiality, or at least the appearance of those qualities, would be impugned were the Tribunal to exercise its powers pursuant to section 253(1)(d) in respect of Ms Connie Cheung that she answer questions truthfully in these proceedings is the fact that the prospective application is that of the Presenting Officer. Section 21 of Schedule 9 of the Ordinance provides of the powers and functions of the Presenting Officer that he shall :

"... present to the Tribunal such available evidence, including any evidence which Tribunal requests him to present to it, as shall enable the Tribunal to reach an informed decision as to whether market misconduct has taken place and, if so, the nature of the market misconduct."

49. In spite of the efforts of counsel, in response to the Chairman's request for the identification of legislation in which similar powers were

granted in broadly similar circumstances in principle to the operation of this Tribunal, no direct parallel has been identified. Although the Securities and Futures Appeals Tribunal, established under the Ordinance, possesses powers similar to that of this Tribunal, pursuant to section 219(d), to compel a person to give evidence and answer questions truthfully under penalty of committing a criminal offence for failure to so comply, it is clear that the nature of that Tribunal is quite different from the Market Misconduct Tribunal. It is concerned with appeals from findings and orders made by the SFC in a Disciplinary Tribunal. From the available reports of that Tribunal it appears that it has never compelled such an appellant to give testimony. In the context of appellate proceedings that is hardly surprising.

50. Many of the Ordinances, to which Mr Yeung referred in Schedule C of his written submission of 30 November 2007, in which persons are required under penalty to answer questions, albeit that the use of such answers is circumscribed in criminal proceedings, are concerned with the grant of powers to bodies or persons involved in the “investigation stage” of matters, for example the power given to a company inspector pursuant to section 145 of the Companies Ordinance, Cap. 32 or the power granted under sections 3 and 4 of the Organized and Serious Crimes Ordinance, Cap. 455. Alternatively, some of the other Ordinances are concerned with the holding of inquiries into persons holding certificates or licences, for example under section 18 of the Merchant Shipping (Local Vessels) and section 113 of the Merchant Shipping (Seafarers) Ordinance, Cap. 548 and 478, respectively.

51. In the proceedings before the Tribunal some of the specified parties happen to be persons registered or licensed by the SFC. However, it is

clear that the ambit of the Ordinance is much greater and encompasses those that are not so registered or licensed. Nevertheless, it is clear that the relevant legislation is aimed at addressing the issue that gives this Tribunal its title, namely “market misconduct”. At issue, as Ribeiro PJ observed of the advice of the Privy Council in *Brown v Stott* in his judgment in *Lee Ming Tee* is whether or not (page 176 J) :

“... a fair balance has been struck between the general interest of the community in realising the legislative aim and the protection of the fundamental rights of the individual.”.

52. The financial services industry in Hong Kong is of very considerable importance to the community. Accordingly, there is a directly proportionate interest in the community to ensure that the market in securities is not only well regulated but also that the public at large are protected from the misconduct of those that seek to obtain impermissible personal advantage to the disadvantage of the market generally. The widespread recognition in other jurisdictions, as well as in Hong Kong, of the difficulty of achieving this objective, given the complexity of the operations of the market, is a factor to be borne in mind in weighing the proportionality of the measures adopted in Hong Kong. On the other hand, great weight is to be given to the importance of protecting the fundamental rights of individuals. There is no more fundamental right than the right to a “fair hearing”. Relevant to those concerns are the protections provided pursuant to section 255 of the Ordinance to persons compelled to testify before the Tribunal and the ambit of the orders that may be made by the Tribunal in consequence of a finding of market misconduct in an individual as noted earlier. In particular the power of the Tribunal to order that a malefactor disgorge the benefits of his market misconduct and to make orders to protect the public.

CONCLUSION

53. The Chairman has directed the Tribunal that its power to order Ms Connie Cheung to be examined on oath or otherwise and to answer questions put to her truthfully in these proceedings does not infringe her right to a “fair hearing”. Whether or not the Tribunal determines to exercise that power is a matter for it to determine in due course. Furthermore, the Chairman has directed that if the Tribunal so orders, she will be required to answer those questions and to do so truthfully.

A handwritten signature in black ink, appearing to read "Michael Lunn". The signature is written in a cursive, flowing style.

The Hon Mr Justice Lunn
(Chairman)