Market Misconduct Tribunal

In the matter of dealings in the shares of QPL International Holdings Ltd

Specified Persons:

Sun Hung Kai Investment Services Ltd

Cheeroll Limited

Mr Chau Chin Hung Edmond

Miss Connie Cheung Sau Lin

RULING

1. By a notice issued pursuant to section 252(2) of the Securities and Futures Ordinance, Cap. 571 ("the Ordinance") dated 6 June 2007 the then Financial Secretary, Mr Henry Tang, required the Market Misconduct Tribunal to conduct proceedings and to determine the matters set out in section 252(3)(a) to (c) of the Ordinance. The notice is in the following terms:

> **"IN THE MATTER OF THE LISTED SECURITIES OF QPL INTERNATIONAL HOLDINGS LIMITED (Stock Code 243)**
>
> **NOTICE TO THE MARKET MISCONDUCT TRIBUNAL PURSUANT TO SECTION 252(2) AND SCHEDULE 9 OF THE SECURITIES AND FUTURES ORDINANCE, CAP 571 ("THE ORDINANCE")**
>
> WHEREAS it appears to me that market misconduct, within the meaning (sic) section 274 (*"False Trading"*) and/or section 275 (*"Price Rigging"*) and/or section 278 (*"Stock Market Manipulation"*) of Part XIII of the Ordinance, has or may have taken place arising out of dealings in the securities of QPL International Holdings Ltd (Stock Code 243) ("the Company"), the Market Misconduct Tribunal is hereby required to conduct proceedings and determine-
>
> (a) whether any market misconduct has taken place;

(b) the identity of every person who has engaged in market misconduct; and

(c) The amount of any profit gained or lost avoided, if any as a result of the market misconduct.

Persons and/or Corporate Bodies Specified

Mr CHAU Chin Hung, Miss Connie CHEUNG Sau Lin, Cheeroll Limited and Sun Hung Kai Investment Services Limited

Statement for institution of proceedings

1. During the period between 6 May 2003 and 10 June 2003 (both days inclusive), CHAU Chin Hung (acting as a director and a responsible officer of Sun Hung Kai Investment Services Limited) placed a significant number of bid orders with the authority and on behalf of Cheeroll Limited (an associated company of Sun Hung Kai Investment Services Limited) for the purchase of shares of the company. The said orders were generally immediately cancelled, reduced in size cancelled later on the same day or cancelled and re-issued at the same price shortly thereafter. Not one of Cheeroll Limited's bid orders was executed during the said period. The placing of the orders followed by the revisions mentioned above created a false appearance of strong market demand for the Company's shares resulting in artificial support for and/or an increase in the price of the Company's shares in order to facilitate the share sales mentioned in paragraph 2 (*post*).

2. During the same period, Connie CHEUNG Sau Lin (acting as an employee or agent of Sun Hung Kai Investment Services Limited) sold through Sun Hung Kai Investment Services Limited substantial quantities of the Company's shares on behalf of Chinacal Limited and Honest Opportunity Limited respectively, (sic) The said sales were facilitated, as Connie CHEUNG Sau Lin was aware, by the false appearance of strong market demand for the Company's shares resulting from the artificial support and/or increase in the price of the Company's shares created pursuant to the conduct of CHAU Chin Hung, Cheeroll Limited and Sun Hung Kai investment Services Limited mentioned in paragraph 1 (*ante*).

3. Accordingly, CHAU Chin Hung, Cheeroll Limited, Sun Hung Kai Investment Services Limited and Connie CHEUNG Sau Lin engaged or may have engaged jointly or severally in market misconduct, contrary to sections 274, 275 and 278 of the Ordinance."

BACKGROUND

2. In exercise of his powers under Schedule 9 of the Ordinance on 27 August 2007 the Chief Executive appointed Miss Cynthia K L Lam and Mr Michael T P Sze as the two ordinary members to sit together with the Chairman on this Tribunal. On the same day the Secretary for Justice exercise his powers pursuant to section 251(4) of the Ordinance and appointed Mr Keith Yeung as the Presenting Officer and Ms Winnie Ho to assist the Presenting Officer. By letter dated 29 August 2007 the Presenting Officer informed the persons identified in the Notice pursuant to section 13(b) of Schedule 9 of the Ordinance ("the Specified Persons") of the Notice of the Financial Secretary and the appointment of the ordinary members by the Chief Executive and the Presenting Officer by the Secretary for Justice and advised them that a hearing of this Tribunal was to take place 9:30 a.m. on 3 September 2007.

3. At the hearing of 3 September 2007 Mr Geoffrey Booth of Haldanes informed the Tribunal that on that occasion he appeared on behalf of all the Specified Persons. That hearing was adjourned to 24 September 2007 to permit the Specified Persons to better acquaint themselves with the material provided to them by the Presenting Officer, to consider whether or not they ought to be separately represented and to determine whether or not they might wish to make any preliminary submissions at the adjourned hearing. The parties were asked to provide written submissions in advance of 24 September 2007.

4. At the hearing of 24 September 2007 the Specified Persons were all represented by counsel: Cheeroll Limited and Sun Hung Kai

Investment Services Ltd by Mr Brewer; Miss Connie Cheung by Mr Patterson; and Mr Edmond Chau by Mr Bell. As requested by the Tribunal each of those counsel had provided written submissions of matters that they wished to raise with the Tribunal at the outset. In the event, as foreshadowed by those written submissions, various oral applications were advanced by counsel. Those applications may be summarised thus:

(i) (by Mr Patterson, but supported by Mr Bell and Mr Brewer) that the Tribunal lacked jurisdiction to proceed with matters given that the requirements of the Ordinance had not been met, in particular by the failure of the Financial Secretary to comply with sections 13 and 14 of Schedule 9 in the drafting of the notice;

(ii) (by all counsel for the Specified Persons) that these proceedings before the Tribunal are criminal in nature, with the various ensuing consequences, including the standard of proof, the use in these proceedings of compelled testimony of the specified Persons obtained outwith the Tribunal and the compellability as witnesses of the Specified Persons in these proceedings;

(iii) (by Mr Patterson) that the proceedings ought to be stayed in consequence of delay; (by Mr Bell) that on its face delay is inordinate and requires explanation, in light of which an application may or may not be made;

(iv) (by all counsel for the Specified Persons) submissions in respect of the apposite standard of proof in the event that the proceedings are not criminal in nature.

5. At the hearing of 5 October 2005 I indicated that I would deliver the rulings that pursuant to section 24(c) of Schedule 9 of the Ordinance I am required to make alone, in respect of the issues of jurisdiction and the nature of the proceedings in advance of receiving oral argument and such evidence as is necessary in respect of the other matters.

THE ISSUE OF THE JURISDICTION OF THE TRIBUNAL

SUBMISSIONS ON BEHALF OF Ms CONNIE CHEUNG

6. The nub of the submission made in respect of the jurisdiction of the Tribunal to commence and continue with these proceedings is that the Tribunal is not properly constituted because of a failure by the Financial Secretary to comply with the mandatory provisions of section 252(2) of the Ordinance, namely:

> "The Financial Secretary shall institute proceedings before the Tribunal by giving the Tribunal a notice in writing which shall contain a statement specifying such measures as are prescribed in Schedule 9."

7. The relevant provisions of Schedule 9 are in the following terms:

> **"Statements for institution of proceedings**
>
> 13. The statement required to be contained in a notice given by the Financial Secretary under section 252(2) of this Ordinance shall specify-
>
> (a) the provision or provisions of Part XIII of this Ordinance by reference to which any person appears to have perpetrated any conduct which constitutes market misconduct; and
>
> (b) the identity of the person, and such brief particulars as are sufficient to disclose reasonable information concerning the nature and essential elements of the market misconduct.
>
> 14. Where it appears to the Financial Secretary that a person may have perpetrated any conduct which constitutes market misconduct by

reference to more than one provision of Part XIII of this Ordinance, the statement described in section 13 may specify separately or in the alternative the market misconduct by reference to those provisions."

8. In essence, Mr Patterson's submission is that the requirement of section 13(a) of Schedule 9 that the Notice specify *"...the provision or provisions of Part XIII of this Ordinance by reference to which any person appears to have perpetrated any conduct constitutes market misconduct"* requires specification in the Ordinance not only of the provision by reference to a section but also to the subsections of that section. Mr Patterson points out that, for example, section 274 of the Ordinance encompasses a range of different impugned conduct within different subsections of that section. For example, section 274(1) relates to conduct which has, or is likely to have, the effect of creating a false or misleading appearance-

"(a) of active trading in securities or futures contracts "

Whereas (b) merely provides

" with respect to the market for, or the price in, securities or futures contracts".

Rhetorically Mr Patterson asks which misconduct is alleged?

9. Also, Mr Patterson points out that section 274(1) and (3) relates to conduct *"in Hong Kong or elsewhere"* whereas section 274(2) and (4) relates to conduct in Hong Kong only. Again, rhetorically, Mr Patterson asks where is the impugned conduct alleged to have taken place?

10. Mr Patterson contends that the same observations in respect of the geographical limit of the impugned conduct apply in respect of sections 275 and 278 of the Ordinance. Furthermore, for example he submits that

section 275(1)(a) and (b) specify different impugned conduct. By section 275(1) price rigging takes place when a person:

> *"(a) enters into or carries out, directly or indirectly, any transaction of sale or purchase of securities that does not involve a change in the beneficial ownership of the securities, which has the effect of maintaining, increasing, reducing, stabilising or causing fluctuations in, the price of securities....."*

By contrast the impugned conduct specified by subsection (b) occurs when a person:

> *" enters into or carries out, directly or indirectly, any fictitious or artificial transaction or device with the intention that, or being reckless as to whether, it has the effect of maintaining, increasing, reducing, stabilising, or causing fluctuations in, the price of securities....."*

Rhetorically, Mr Patterson asks which is the impugned conduct and where is it alleged to have been convicted? He makes the same observations in respect of section 278 of the Ordinance.

11. Of the requirements of section 13(b) of Schedule 9, namely that the notice specify not only the identity of the person but also:

> *"such a brief particulars as are sufficient to disclose reasonable information concerning the nature and essential elements of the market misconduct."*

Mr Patterson submits that the information disclosed in the notice is deficient in disclosing reasonable information concerning the nature and essential elements of the market misconduct.

12. Of the requirements of section 14 of Schedule 9 that where it appears to the Financial Secretary that a person may have perpetrated conduct which constitutes market misconduct by reference to more than one of the provisions of Part XIII the statement described in section 13:

> *"...may specify separately or in the alternative the market misconduct by reference to those provisions."*

Mr Patterson submits that the notice is deficient.

13. Finally, Mr Patterson submits that the failure to comply with the provisions of sections 13 and 14 of Schedule 9 of the Ordinance cannot be cured by exercise of the powers of the tribunal under section 15. He submits that the notice is void and the Tribunal improperly constituted, as a consequence of which it has no powers.

14. When asked by the Chairman what was the purpose of the legislature in couching sections 13 and 14 of schedule 9 of the Ordinance in the language as drafted Mr Patterson submitted that it required of the Financial Secretary that he:

> "fully drafts what I call a civil indictment, if I may, clearly setting out the allegations specifically against the identified parties, by name, and by specific reference to the particular provisions of the Ordinance, subsections and paragraphs, which is almost invariably appropriate and required and brief details of the offending. In some instances you would have overt acts; I think you would always have overt acts particularly if you use expressions like 'jointly and severally', as is done in this terms of reference, Mr Chairman."

THE SUBMISSIONS OF THE PRESENTING OFFICER

15. In his concise submissions Mr Yeung contended that there was no question of the notice being fundamentally defective. He submits that the notice complies with the mandatory requirements of sections 13 and 14 of Schedule 9 of the Ordinance. Miss Connie Cheung, Mr Patterson's lay client, has been identified. The relevant provisions of Part XIII have been specified as being sections 274, 275 and 278 of the Ordinance and the notice discloses reasonable information concerning the nature and

essential elements of the market misconduct. Similarly, he contends that the exercise of the discretion, under section 14 of Schedule 9, enjoyed by the Financial Secretary to specify separately or alternatively the market misconduct by reference to the provisions has been properly exercised as is evidenced by the preamble of the notice.

A CONSIDERATION OF THE SUBMISSIONS

16. It is clear that one of the purposes of the requirements of section 252(2) of the Ordinance when read together with the provisions of Schedule 9, in particular sections 13 to 15, is to direct the Tribunal to the matters in respect of which it is required to determine the matters set out in section 252(3). Equally clearly, another purpose of those provisions is so that the person or persons so identified by operation of section 13(b) of the Ordinance are made aware of the factual and legal basis of their impugned conduct and the matters to which the Tribunal had been directed.

17. In my judgment the effect of those provisions is not to import into the Market Misconduct Tribunal the rigours of indictments in criminal proceedings or pleadings in civil proceedings. The nature of the proceedings in this Tribunal is illustrated by the wide-ranging powers granted to it in section 253(1) of the Ordinance. It may receive and consider material inadmissible in evidence in civil or criminal proceedings and it may determine the procedure it follows. The consequence of the fact that the notice does not condescend to detailed particularity in each of the sections of the Ordinance, identified as a relevant provision pursuant to section 13(a), is that all of the various modes of impugned conduct is before the Tribunal. In due course, either

by the Presenting Officer indicating at the outset the ambit of the evidence to be led or in consequence of the evidence that is led in these proceedings the Tribunal will be in a position to determine which, if any, of the modes of impugned conduct is proved. The absence of such detail being specified in the notice does not render it defective or these proceedings void.

CONCLUSION

18. In my judgment the information supplied in the Notice provides both the tribunal and the specified persons with the material which the Financial Secretary is required to provide by section 13 and which he has chosen to provide pursuant to section 14 of Schedule 9. In consequence, the notice is valid and this Tribunal has jurisdiction to proceed as directed by the Financial Secretary.

NATURE OF THE PROCEEDINGS

SUBMISSIONS ON BEHALF OF ALL THE SPECIFIED PARTIES

19. Submissions have been made by counsel on behalf of all the Specified parties that these proceedings in the Tribunal are criminal in nature and are to be viewed as parallel criminal proceedings to those that may be brought in the courts of Hong Kong. Mr Bell, with whom all other counsel agreed, submits that the criteria to be applied by this Tribunal in considering that issue are the criteria accepted as being the appropriate ones in the judgment of the Court of Appeal in **Koon Wing Yee and Insider Dealing Tribunal** and another (unreported) CACV 360/2005. In the judgment of the Court of Appeal, delivered by Tang VP, the matter was addressed thus:

"35. The European Court of Human Rights has decided that the concept of a criminal charge' under Article 6 has an ' autonomous' Convention meaning, and that the criteria to determine whether proceedings are criminal within the meaning of the European Convention:

1) the categorisation of the allegation in domestic law;

2) the nature of the offence;

3) the nature and degree of severity of the penalty.

36. These criteria have been adopted in Britain in ***Han****, and* ***in R (McCann) v Manchester Crown Court*** *[2003] 1 AC 787, a decision of the House of Lords.*

37. In ***Han****, Potter LJ, with whose judgment Mance LJ agreed, said of the relative weight of these criteria that:*

> *".. the Strasbourg court does not in practice treat these three requirements as analytically distinct or as a ' three-stage test', but as factors together to be weighed in seeking to decide whether, taken cumulatively, the relevant measures should be treated as ' criminal'. When coming to such decision in the courts of the courts 'autonomous' approach, factors (b) and (c) carry substantially greater weight than factor (a)."*

38. Mr Duncan,SC, appearing on behalf of the Financial Secretary, did not contend that these are not the correct criteria, or that some other criteria should be adopted."

20. Thereafter, Tang VP went on to test the relevant provisions of the Securities (Insider Dealing) Ordinance, Cap 395 against the three criteria. He noted that that the legislature clearly regarded those provisions as civil proceedings (paragraph 42). However, he went on to say that in examining the effect of the legislation:

> *"...it is incumbent upon us to look at the substance rather than the form of the legislation."*

21. Noting that, in his dissenting judgment in **Han,** Sir Martin Nourse had said that the greater importance was to be attributed to the first of the three criteria, namely the classification, Tang VP said:

> *"53. With respect, we agree with the majority in* ***Han*** *that the other two factors should carry a substantially greater weight. Indeed, we are of the view that the third criterion is the most important because it*

is this element that will usually be decisive in tipping the scales as to whether any given set of proceedings is to be regarded as civil or criminal for purposes of HKBOR.

*54. **McCann** further supports the view that the third criterion should carry substantially greater weight than the legislature's classification of the act."*

22. In considering the penalty that could be imposed under section 23(1)(c) of the Securities(Insider Dealing) Ordinance, namely:

"an order imposing on that person a penalty of an amount not exceeding three times the amount of any profit gained or lost avoided by any person as a result of the insider dealing."

Tang VP said:

"61. Here the penalty which could be imposed under section 23(1)(c) is treble the potential profit or loss; also elements of dishonesty (or at least the absence of bona fides) are involved in the nature of insider dealing.....There is no question that the penalty that can be imposed under section 23(1)(c) of the SIDO is somehow restitutionary in nature. The fact that a penalty is expressed in terms of the percentage makes no difference if otherwise the effect of the penalty is to deter and punish."

23. In the result, having noted that there was no question of a charge being laid or of a criminal conviction resulting from the findings of an Insider Dealing Tribunal, Tang VP concluded:

"63. Having regard to the seriousness of the penalty, which was intended to punish and to deter, the therefore obliged now to conclude that the proceedings involve the determination of a criminal charge within the meaning of HKBOR."

<u>As to categorization.</u>

24. Mr Bell submits that these proceedings are not civil proceedings because Part XIII of the Ordinance does not specifically categorise the nature of these proceedings. He accepts that Part XIV is headed: "OFFENCES RELATING TO DEALINGS IN SECUITIES.." and that section 252(7) 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. However, he invites the Tribunal to note that section 257 provides for payment to the Government, not to a party who has suffered loss and damage as a result of market misconduct. Furthermore, he points out that section 281 creates a statutory cause of action for such a victim. Relying on the judgment of the Court of Appeal in **Koon** (paragraph 47) he submits that these proceedings are not disciplinary. In the result, he submits that these proceedings are criminal in nature.

As to the nature of the offence.

25. Mr Bell submits that the impugned conduct, namely false trading, price rigging and stock market manipulation are serious matters. He notes that there are criminal offence making provisions in identical terms in Part XIV and that convicted offenders are liable to imprisonment for up to 10 years and to a fine of $10 million. In consequence, he submits that the activity complained of is criminal in nature, even where not the subject of criminal prosecution.

As to the nature and degree of severity of the penalty.

26. Mr Bell invites the Tribunal to note that the powers of the Tribunal to make orders, at the conclusion of a hearing against persons identified as having engaged in market misconduct, under section 257(1)(a)-(g). He accepts that the power of the Tribunal under section 257(1)(a) to order that such a person shall not be a director, liquidator, or receiver or manager of the property business of a listed company or other specified corporations is a matter that the Court of Appeal addressed in **Koon**, in

the context of the Insider Dealing Tribunal, determining that it did not turn the insider dealing enquiry into, criminal proceedings:

> *" 49. ..... the power to disqualify was not designed to punished but to protect the investing public".*

27. Of section 257(1)(b), namely the power to order such a person not to acquire, dispose of or otherwise deal in any securities etc, Mr Bell submits that it is penal in nature.

28. However, the main thrust of Mr Bell's submissions relate to section 257(1)(d), namely:

> *"an order that the person paid to the government an amount not exceeding the amount of any profit gained or lost avoided by the person as a result of the market misconduct in question;"*

Mr Bell invites the Tribunal to note that this provision exists alongside section 281, which creates a new statutory cause of action for a 'victim' of market misconduct in addition to the pre-existing common law right of action. Whilst he accepts that the amount of money that may be ordered to be paid pursuant to section 257(1)(d) may not exceed the profit gained or lost avoided he contends that it is not compensatory in nature. Firstly, the payment is ordered to be made to the Government, not the person who has suffered loss. Secondly, the person found culpable of market misconduct remains liable in a civil action to pay an additional amount.

29. For his part, Mr Patterson contends that another power of the Tribunal indicative of the fact that these are criminal proceedings is the power provided for by section 257(1)(g), namely:

> *(to)"...order that any body which may take disciplinary action against the person has one of its members be recommended to take disciplinary action against him."*

He submits that this power must be read in conjunction with the power of the Securities and Futures Commission ("SFC") to deal with licensees and others in disciplinary proceedings, in particular section 194(2) of the Ordinance, which gives the power to the SFC in a disciplinary proceedings in addition to its other powers:

> *".. to order the regulated person to pay a pecuniary penalty not exceeding the amount which is the greater of:*
> *(i) $10 million; or*
> *(ii) three times the amount of the profit gained or lost avoided by the regulated person as a result of his misconduct...."*

30. Mr Patterson says that the power of this Tribunal to make a recommendation under section 257(1)(g), when read in conjunction with the powers of the SFC in disciplinary proceedings and when taking into consideration the other powers of this Tribunal, renders these proceedings criminal in nature.

31. In addition, Mr Patterson submits that the effect of the power of the tribunal under section 259 to make an order against a person in respect of a payment of money order to be paid by him that it be subject to compound interest, for example from the date of the occurrence of the market misconduct, is a penal provision relevant to a consideration of the nature of these proceedings.

32. In his submissions to the Tribunal Mr Brewer submitted that a relevant consideration for the tribunal in considering the nature of these proceedings is the powers granted to the SFC in the investigation stage that leads to the constitution of this tribunal. He points to section 184(4) of the Ordinance, which provides that a person required by section 183, for example to give an explanation and to answer any questions put by an investigator of the SFC, is not excused from complying with that

requirement on the grounds that the answers may tend to incriminate that person. These are powers not available in normal civil proceedings. In like manner whereas in civil proceedings the purpose is to secure compensation for the wronged party that these proceedings primarily assign culpability and not compensation. Finally, he points out that section 279 of the Ordinance imposes upon an officer of a corporation a duty to take all reasonable measures to ensure that proper safeguards exist to prevent the corporation from acting in a way that would result in the corporation perpetrating conduct which constitutes market misconduct. In circumstances where such a corporation is found culpable of market misconduct section 258(1) of the Ordinance enables the Tribunal to make any of the orders under section 257(1)(a)-(g) against such an officer found to be in breach of the duty imposed upon him by section 279.

THE SUBMISSIONS OF THE PRESENTING OFFICER

33. As indicated earlier all counsel, including the Presenting Officer, submit that the appropriate criteria by which the nature of the proceedings before this tribunal is to be determined are those identified in **Han** and adopted by the Court of Appeal in **Koon.**

<u>As to categorization.</u>

34. Mr Yeung submits that the Ordinance establishes a dual civil and criminal regime for regulating market misconduct. Divisions 5 and 6 of Part XIII make provision for proceedings before the Tribunal, whereas Divisions 2 and 3 of Part XIV provide for the prosecution of the same activities as those proscribed in Part XIII as criminal offences. He submits that the intention of the legislature is made clear by the Legislative Council Brief 'Regulatory Reform for the Securities and

Futures Market' prepared by the Financial Services Bureau dated 10 November 2000. At paragraph 22 the regime to be established under this Tribunal is described thus:

> *"The Bill creates an alternative civil route to the existing criminal route for dealing with certain forms of market misconduct. It will build on the strength of the Insider Dealing Tribunal which already provides a means of dealing with insider dealing and expand it into a Market Misconduct Tribunal (MMT) to handle, in addition to insider dealing, five other specified types of market misconduct on the civil standard of proof and using civil procedures."*

35. Later, in the same paragraph the range of powers open to the Tribunal following upon a determination of market misconduct is described:

> *"The MMT may, by way of civil sanctions, order payment to Government of the profit gained or lost avoided ("disgorgement"), issue a "cold shoulder" order to restrict a person's access to the markets, issue a "disqualification" order to disqualify a person from being a director or other officer of any corporation, and order a person to cease and desist from committing any further acts of market misconduct. Separately, the MMT may order a person to pay the costs of investigating his market misconduct. A "cold shoulder" order or "disqualification" order may be for a period of up to five years. Non-compliance with an order issued by the MMT may be punished either as contempt or as a common law offence."*

36. The need for and ambit of the proposed regime of criminal proceedings is addressed at paragraph 23:

> *"Reliance on the above civil sanctions is considered inadequate to deter and punish market misconduct. Hence, in parallel to the MMT regime the Bill will retain, modernise and expand the existing common law regime to deal with market misconduct where there is sufficient evidence that a criminal offence has been committed by an identifiable person, that there is a reasonable prospect of a conviction, and it is in the public interest to bring a prosecution. Insider dealing and five other specified types of market misconduct will be made criminal offences."*

37. In addition to pointing to the expressed intention of the proponents of the Bill in the legislature, Mr Yeung invites the Tribunal to take note

of the provisions of the Ordinance itself. Section 253(1)(a) provides that the tribunal may:

> *"receive and consider any material by way of oral evidence, written statement or documents, even if the material would not be admissible in evidence in civil or criminal proceedings in a court of law;"*

Section 253(1)(j) provides that the Tribunal may determine the procedure to be followed in the proceedings. Finally, section 252(7) 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.

As to the nature of the activities.

38. Mr Yeung accepts that the same conduct may be proceeded upon before the Tribunal or prosecuted as criminal acts and that on conviction on indictment the maximum penalty available to a court dealing with a conviction for an offence of insider dealing or one of the five new market misconduct offences is 10 years imprisonment and a fine of $10 million. He submits that the effect of sections 283 and 307 is that once criminal or civil proceedings respectively have been instituted proceedings under the alternative regime cannot be begun.

As to the nature and degree of severity of the penalties.

39. Mr Yeung submits that the Tribunal's powers, section 257(1)(a) to (c) to order disqualification, 'cold shoulder' and to restrain further perpetration of market misconduct respectively are clearly intended not to punish but to protect the investing public. In respect of the issue of disqualification, he points out that in the judgment of the Court of Appeal in **Koon** the effect of a similar power to disqualify, provided for by the

Securities (Insider Dealing) Ordinance, on the nature of the proceedings was addressed:

> *"49. In this context, Sir John also argued (although he did not press the point) that the power to disqualify under section 2 (1)(a) could on its own be a sufficient penalty to turn the insider dealing enquiry into criminal proceedings. With respect, we do not agree with the submission. The power to disqualify was not designed to punish but to protect the investing public."*

40. Of the power in the Tribunal to order disgorgement of profit gained or lost avoided provided for by section 257(1)(d) Mr Yeung reminds the Tribunal that section 23(1)(a) of the Securities (Insider Dealing) Ordinance provides for a similar power in the Insider Dealing Tribunal. Relevant to that, he says, is the fact that in addressing a consideration of the nature of the proceedings in the Insider Dealing Tribunal the Court of Appeal in **Koon** noted the fact of the creation of the Market Misconduct Tribunal and said:

> *"73. We note that under Part XIII of the SFO, a Market Misconduct Tribunal has been established for the purpose of inquiring into market misconduct including insider dealing. This tribunal is similarly constituted. The only material difference between Part XIII and SIDO is that under Part XIII there is no longer any power to order the payment of any penalty (this of course being the very feature that has persuaded us that IDT proceedings under the SIDO are criminal in nature).*

Mr Yeung invites the Tribunal to note that although the attention of the Court of Appeal was clearly focused on the provisions of Part XIII of the Ordinance it is significant that the only feature that persuaded the Court of Appeal that the proceedings of the Insider Dealing Tribunal were criminal in nature was the power to impose a penalty of three times the potential profit or loss, it making no reference at all to the power to order disgorgement.

41. Furthermore, Mr Yeung relies upon a judgment of Saunders J. in **In the matter of an application by Koon Wing Yee for Judicial Review and In the Matter of Section 183(1) of the Securities and Futures Ordinance, Cap 571** (unreported HCLA 7/2007), an application for leave to make an application for judicial review by the same Koon Wing Yee. The applicant's argument was described as being:

> *" 16. .....that because the order that may be made by the Market Misconduct Tribunal will, in circumstances where shares have been retained, deal with notional profits, that his profits which have not been made but which could have been made, or losses avoided, which are always by their very nature notional losses, the order made will constitute a penalty."*

In refusing the application in respect of this submission, Saunders J. said:

> *"24. I am satisfied that the disgorgement orders that may be made by the Market Misconduct Tribunal cannot reasonably be argued to constitute a penalty that is criminal in nature."*

42. Mr Yeung submits that the effect of a disgorgement order is to ensure that a person culpable of market misconduct is deprived of his ill-gotten gains. By contrast, he says the creation by section 281 of the Ordinance of a statutory cause of action for any person who has suffered a pecuniary loss as a result of market misconduct provides no more than a more efficient mechanism to give effect to a right of action that exists at common law. The Tribunal cannot order anyone to take action and plays no part in those proceedings. The power to order a person to pay compensation is vested in the court, which may not make such an order unless:

> *".. it is fair, just and reasonable in the circumstances of the case..."*

43. Of the power in the Tribunal under section 257(1)(g) of the Ordinance to order that any body which may take disciplinary action against a person found culpable of market misconduct be recommended

to take such action and, in particular, in response to Mr Patterson's submissions in respect of the powers of the SFC in a disciplinary proceedings in certain circumstances to impose a penalty upon a person of three times the profit gained or loss avoided, Mr Yeung submits that is not a power enjoyed by the Tribunal the penal nature which would render these proceedings criminal in nature.

44. Of the power in the Tribunal under section 259 to order that compound interest be paid in respect of an order requiring the payment of money by a person Mr Yeung submits that such an order may not necessarily be penal, for example the person found culpable of market misconduct may have earned compound interest on the profits gained in that misconduct. The power to order compound interest would ensure that the Tribunal can deprive the culpable party of all of his ill-gotten gains obtained through market misconduct.

A CONSIDERATION OF THE SUBMISSIONS

45. I accept that the appropriate criteria to apply to the legislation in determining the nature of these proceedings are the criteria referred to in **Han** and approved of by the Court of Appeal in **Koon**. Similarly, I accept that the most important criterion is the third criterion, namely the nature and degree of severity of the penalty.

<u>As to categorization.</u>

46. There is no doubt whatsoever from the 'Brief' to the Legislative Council that those proposing the Bill to the Legislative Council believed that the Ordinance contained a dual scheme in which the proceedings before the Tribunal provided for by part XIII were civil proceedings and

those provided for by part XIV were criminal proceedings. Consistent with that approach is the provision by section 253(7) that the applicable standard of proof required to determine any question or issue before the tribunal is the standard of proof applicable to civil proceedings in a court of law. The power of the Tribunal to receive and consider any material even if it would not be admissible in evidence in either civil or criminal proceedings, section 253(1)(a), together with the power to determine the procedure to be followed in the Tribunal, section 253(1)(j), is the antithesis of the provisions that would be appropriate to criminal proceedings. However, as the Court of Appeal noted in **Koon** (paragraph 23) a similar belief in the legislature in respect of the Securities (Insider Dealing) Ordinance at the time of the legislative debates leading up to its enactment was anything but determining of the issue of the nature of the proceedings in that Tribunal.

47. In the result, I am satisfied that the legislature categorised these proceedings as of a civil nature. Clearly, these proceedings are not in the nature of 'classic' civil proceedings. There is no plaintiff seeking to redress an alleged wrong by a claim for compensation from a defendant. Nevertheless, the weight to be attached to that categorisation is relatively small compared to the weight to be attached to the other criteria.

<u>As to the nature of the activity.</u>

48. The impugned conduct stipulated in the notice of the Financial Secretary, namely 'false trading' (section 274), 'price rigging' (section 275) and 'stock market manipulation' (section 278) is conduct that gives rise to liability in criminal proceedings in sections 295, 296 and 299 respectively of the Ordinance. The maximum penalty that may be

imposed upon conviction on indictment for those offences, namely 10 years imprisonment and a fine of up to $10 million, is indicative of the seriousness with which these activities are to be viewed.

The nature and severity of the penalty.

49. I accept Mr Yeung submission that the power in section 257(1)(a)-(c) respectively to order disqualification, the imposition of a 'cold shoulder' and an order that the conduct be not repeated are not penal in nature but are designed to protect the investing public.

50. The power in section 257(1)(d) to order disgorgement of profits made or losses avoided is not penal in nature. It does not seek to punish or deter, rather it deprives a person culpable of market misconduct of the benefits of his or her misconduct. **In the matter of an application by Koon Wing Yee for Judicial Review** Saunders J. said of the power of this tribunal to order disgorgement:

> *"19. Where the actual profits made, notional profits made, or notional losses avoided ordered to be paid to the Government, the sums ordered are merely a restitution to the State of an assessment of the benefit achieved by the person found to have carried out market misconduct, which benefit, having accrued by virtue of market misconduct, that person ought not to be entitled to retain."*

51. However, the statutory scheme does not make the money paid by the culpable party to the Government pursuant to such an order available and payable to any 'victim' of his conduct. The culpable party remains liable to civil suit by the latter. None of the counsel appearing before the Tribunal was aware of any such civil proceedings having been brought hitherto in Hong Kong on the basis of a common law cause of action. Nevertheless, the provisions of section 281 are clearly designed to make it easier for the 'victim' of market misconduct to seek redress.

52. I note that In England and Wales the Financial Services Authority may apply to the High Court pursuant to section 383 of the Financial Services and Markets Act 2000 for an order of the court that a person culpable of market abuse pay to the Authority such sum of money as appears to the court just having regard to the profits appearing to the court to having accrued or the loss or adverse effect. Then, the Authority is required to pay such monies to the qualifying person or persons as directed by the court. A qualifying person is a person to whom those profits are attributable or who has suffered the loss or adverse effect. In effect, the provisions permit restitution to be made to the 'victim' of the market abuse.

53. The fact that there exists, independently of the power of the Tribunal to order disgorgement pursuant to section 257(1)(d) of the Ordinance, a cause of action in common law or now, by virtue of section 259 of the Ordinance, a statutory cause of action does not render a disgorgement order itself penal. It remains no more than a power to order the removal of the benefit accruing to a person culpable of market misconduct.

54. The power in the Tribunal enjoyed under section 257(1)(g) to recommend to a body that it take disciplinary action against a person found to be culpable of market misconduct is far removed from what may be the ultimate sanctions imposed by such a disciplinary body upon that person. Firstly, it is a mere recommendation. The disciplinary body is required to exercise its discretion to determine whether or not it is appropriate to institute disciplinary action and it may do so whether or not a recommendation is received from this Tribunal. Secondly, it then falls

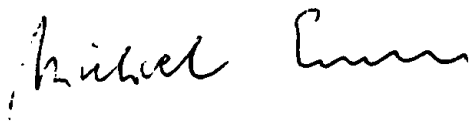
to the disciplinary tribunal to determine whether or not that person is culpable in those proceedings and thirdly, if the person is found culpable, to determine the appropriate sanction, if any, to impose. The power to make such a recommendation is most certainly not penal.

55. The discretionary power in the Tribunal to order that compound interest accrue on monies ordered to be paid by a person pursuant to section 257(1) or 258(1) from the date of the occurrence of the market misconduct is clearly not necessarily penal. For example, as Mr Yeung has suggested, in the event that the malefactor has employed the gain made in a way in which it attracted compound interest such a power would be necessary to ensure disgorgement of all the benefits of market misconduct.

CONCLUSION

56. In my judgment it is clear that the powers given to the Tribunal to make orders pursuant to section 257(1) of the Ordinance are to protect the public and to deprive a person culpable of market misconduct of the benefits of that conduct. They are not to punish and deter. None of the submissions advanced in support of the contention that the powers of the Tribunal are penal and that, in consequence, these proceedings are criminal proceedings taken either individually or collectively persuade me that is the case. These proceedings are not criminal proceedings or proceedings of a criminal nature. They are proceedings conducted by a Tribunal directed to apply the civil standard of proof to determine the matters set out in section 252(3) of the Ordinance and stipulated in the Financial Secretary's notice, in a regime in which material may be received and considered that may be inadmissible, even in civil

proceedings, and where the procedure to be followed may be determined by the Tribunal itself.



Michael Lunn
Chairman of the Market Misconduct Tribunal
12 October 2007