Appendix I

由此

HCAL 49/2008

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO 49 OF 2008

BETWEEN

LUK KA CHEUNG Applicant

and

THE MARKET MISCONDUCT TRIBUNAL 1st Respondent

THE FINANCIAL SECRETARY 2nd Respondent

Before: Hon Hartmann JA (sitting as an additional judge of the Court of First Instance) and A Cheung J in Court

Dates of hearing: 3 and 4 November 2008

Date of judgment: 18 November 2008

JUDGMENT

Hon Hartmann JA:

1. I am in full agreement with the judgment of my brother and have nothing to add.

Hon A Cheung J:

Background

2. In this application for judicial review, the applicant challenges the decision of the Chairman of the Market Misconduct Tribunal (MMT) dated 28 February 2008 that the Tribunal is validly constituted and has jurisdiction to determine the matters referred to it by the Financial Secretary's notice dated 12 September 2007.

3. The facts leading to this judicial review application are uncontroversial. The Tribunal was set up by s 257 of the Securities and Futures Ordinance (Cap 571), which came into force in April 2003. On 12 September 2007, the Financial Secretary instituted the second ever proceedings of the Tribunal by issuing a notice pursuant to s 252(2) of the Ordinance. The notice directed the Tribunal to institute and conduct proceedings to determine whether any market misconduct within the meaning of Part XIII of the Ordinance had taken place in relation to the dealings in the securities of China Overseas Land and Investment Ltd. The notice specified three persons suspected of having engaged in market misconduct – the applicant was one of them.

4. At a preliminary hearing on 9 November 2007, the Tribunal directed that the specified persons identify, supported by full written submissions, any and all issues to be taken, other than the substantive matters, by 7 December 2007. In accordance with that direction, the applicant filed a detailed written submission dated 7 December 2007 to challenge, amongst other things, the constitutionality of the proceedings.

5. Despite doubts over the Tribunal's jurisdiction to determine its own constitutionality, the Tribunal, chaired by a judge of the Court of First Instance who sat with two members, nonetheless conducted a hearing on 25 February 2008. In a written ruling dated 28 February 2008, the Chairman determined that the Tribunal had jurisdiction to determine the issue of its own constitutionality and then dismissed the applicant's challenge.

6. Leave to apply for judicial review against the Tribunal's determination on its own constitutionality was granted on 29 May 2008 and a direction for holding an expedited hearing was also given.

Separation of powers and the Basic Law

7. In this application for judicial review, Mr Jonathan Harris SC, appearing for the applicant, contends, in essence, that what the Ordinance requires the Tribunal to do is to exercise the judicial power of the State, which is reserved exclusively under the Basic Law for the courts of judicature of the Hong Kong Special Administrative Region to exercise. This offends against the doctrine of separation of powers, which underlies the political and legal structures set up under the Basic Law.

8. Counsel points out, quite correctly, that s 291 in Part XIV of the Ordinance provides, *inter alia*, that conduct commonly described as insider dealing constitutes a criminal offence. S 303 specifies the penalties that a court may impose on a person that is convicted of such an offence. Yet Part XIII of the same Ordinance provides an alternative

regime by which the Tribunal, a statutory body established by the Ordinance and consisting of three people, two of whom are not judges and are appointed by the Financial Secretary, may at the Financial Secretary's instigation determine whether conduct identified in s 270 under Part XIII has taken place. Counsel correctly points out that such conduct is identical in all material respects to the criminal conduct that is set out in s 291 under Part XIV.

9. Mr Harris therefore argues that what the Tribunal purports to do in an inquiry is, in substance, to decide whether or not insider dealing has taken place, and thus whether a criminal offence has been committed, by acting as a court or a 'shadow court' in the sense of exercising what on a proper analysis is the judicial power of the State, reserved for the Judiciary of the HKSAR.

10. This is, counsel contends, constitutionally objectionable. First, arts 19 and 80 of the Basic Law provide that the courts of judicature of the HKSAR only shall exercise the judicial power of the Special Administrative Region. The Tribunal is not such a court and therefore cannot exercise the judicial power in question. Secondly and alternatively, if the Tribunal is in law and in substance such a court, its constitution and procedures do not comply with arts 80 to 96 of the Basic Law.

11. It is common ground that, in relation to the second point made by counsel, indeed the Tribunal's constitution and procedures do not comply with arts 80 to 96 of the Basic Law. The only and all important issue in the present application is whether the Tribunal does

purport to exercise the judicial power of the HKSAR, which is vested exclusively in the Judiciary of the HKSAR, pursuant to the provisions in the Basic Law. In other words, the issue is: is the Tribunal purporting to function as a 'court' or a 'court of the classic kind', when it is not such a court?

12. This is not a novel contention in Hong Kong. In the leading case of *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd* (2006) 9 HKCFAR 234, Ribeiro PJ described the relevant issues as follows (at pp 263-264):

> "77. Another context in which the concept of 'a court' may be in issue concerns cases where a challenge is made to a tribunal's jurisdiction on the ground that it is performing a function which involves exercise of the judicial power whereas it is not a properly constituted 'court' and therefore cannot lawfully exercise such power.
>
> 78. Thus, in *Shell Company of Australia Ltd v Federal Commissioner of Taxation* [1931] AC 275, the question was whether the Board of Review set up under Australian tax legislation to review decisions of the Commissioner of Taxation was exercising the judicial power of the Commonwealth within the meaning of s 71 of the Constitution. If so, the taxpayer contended that it was not a properly constituted 'court' since the terms of appointment of its members lacked the entrenched security of tenure enjoyed by judges. The challenge was unsuccessful since the Board of Review was held not to be exercising the judicial power but merely acting administratively.
>
> 79. In our own jurisdiction, a challenge based on similar grounds succeeded in *Lai Hung Wai v Secretary for Security* (Unreported, HCAL 1596/2001, Hartmann J; 9 September 2002; see also *Yau Kwong Man & Lai Hung Wai v Secretary for Security* CACV 377/2002, 2 July 2003). Young persons who had been convicted of murder had been made subject to an indefinite sentence of imprisonment. Legislation (s 67C of the Criminal Procedure Ordinance, Cap 221) was passed to modify that sentence so that there would be a fixed minimum term. It was provided that this task would be performed by the Chief

> Executive on the recommendation of the Chief Justice. The constitutionality of that legislation was successfully challenged on the basis that the fixing of the term of imprisonment involved an exercise of the judicial power which had to be exercised by a court of law as provided for by Art 80 of the Basic Law and not by the Chief Executive. Section 67C was consequently further amended to vest the function in the court instead.
>
> 80. ... In this category of cases, there is no doubt that if the function in question involves exercising the judicial power, only a court of law is qualified to exercise it. The argument is about the nature of the function and whether the body performing it is in fact a court of law."

Legislative materials

13. Mr Harris has, without objection from the Financial Secretary, referred the Court to various legislative materials, to explain the genesis and policy intention behind the relevant provisions in the Ordinance. A Bills Committee paper (Paper No 12/01) is particularly informative. This is what it says:

> **"INTRODUCTION**
>
> This paper outlines the provisions in Parts XIII and XIV of and Schedule 8 to the Securities and Futures Bill ('SF Bill') and the policy intention behind them. The provisions are principally concerned with defining and dealing with 'market misconduct', and seek to –
>
> (a) establish the Market Misconduct Tribunal ('MMT'), and detail its composition and procedures and its powers to inquire into and punish market misconduct on a civil basis;
>
> (b) create dual civil and criminal regimes for dealing with market misconduct;
>
> (c) create a comprehensive right of civil action for those who suffer pecuniary loss owing to market misconduct; and

(d) create a number of criminal offence targeted at various acts of fraud, deception or misrepresentation involving securities, futures contracts or leveraged foreign exchange trading.

...

DUAL CIVIL AND CRIMINAL REGIMES TO DEAL WITH MARKET MISCONDUCT

3. The existing regulatory regime is inconsistent and inadequate in dealing with market misconduct and needs to be improved.

4. At present, insider dealing is a civil wrong defined in the Securities (Insider Dealing) Ordinance (Cap 395) ('S(ID)O'). Under the S(ID)O, the Insider Dealing Tribunal ('IDT') inquiries into cases of suspected insider dealing referred to it by Financial Secretary. Civil procedures are adopted, and a high civil standard of proof is applied. The IDT is not bound by the civil or criminal laws of evidence. At the end of an inquiry, the IDT makes a report of its findings and may punish anyone it finds to have engaged in insider dealing with a variety of orders, as follows-

(a) to prohibit a person from being involved in the management of any named corporations for up to 5 years;

(b) to pay to the Government an amount up to that of the profit made or loss avoided as a result of the insider dealing; and

(c) to pay a penalty of an amount up to three times the profit made or loss avoided as a result of the insider dealing.

5. All other forms of market misconduct are, on the other hand, criminal offences under the Securities Ordinance (Cap 333) ('SO') and the Commodities Trading Ordinance (Cap 250) ('CTO'). The offences cover-

(a) false markets and trading;

(b) restrictions on fixing prices for securities; and

(c) false or misleading statements.

6. In addition, the SO and the CTO criminalize fraud and the employment of fraudulent or deceptive devices, offences

which are more in the nature of a one-on-one fraud or deception, rather than conduct which affects the market for securities or futures contracts as a whole.

7. These offences are limited and have proven inadequate in effectively dealing with all forms of misconduct that are prejudicial to the interests of the investing public and the public interests, and in particular, different forms of market manipulation.

8. The criminal standard of proof (i.e. beyond reasonable doubt) and the restrictive rules of criminal evidence have inhibited successful criminal prosecutions in some instances of market manipulation. To date, there have been 10 successful prosecutions for market manipulation out of 12 cases brought. The maximum penalties under the SO and the CTO for similar offences are inconsistent and inadequate. For the 10 successful cases, the court has imposed suspended sentences in two instances, and the average fine of the other eight cases imposed has been only $40,000.

9. The civil regime for dealing with insider dealing under the IDT has been relatively successful, for the following reasons-

(a) obligation to answer questions put by the investigator which may later be used as evidence against the person before the IDT;

(b) absence of the right to silence before the Tribunal;

(c) use of a standard of proof below the criminal standard;

(d) the fact that the IDT is not bound by the formal rules of evidence and may consider any evidence it considers relevant and probative;

(e) the fact that a judge of the Court of First Instance sits with 2 lay persons who are experts; and

(f) the IDT's ability to impose a range of heavy financial penalties.

10. We therefore propose the establishment of a tribunal modelled on the IDT to be called the MMT that would have jurisdiction to inquire into and punish all forms of market misconduct, including insider dealing, and to make similar orders to those available to the IDT.

> ...
>
> 13. However, the success of the IDT has been primarily due to the absence of the right to silence and its ability to consider compelled self-incriminating statements gathered during SFC investigations. The incorporation of procedural criminal safeguards into the market misconduct proceedings, despite the retention of heavy financial penalties as a sanction, would therefore render the MMT little or no more effective than criminal prosecution in deterring and punishing market misconduct, and would not better protect investors.
>
> 14. To bolster the punishment and therefore deterrent effect of the proposed civil regime, the Bill will add two additional elements to the market misconduct regime.
>
> ...
>
> 16. Secondly, the Bill will make it procedurally easier for those who suffer pecuniary loss as a result of market misconduct to bring a civil action. The Bill will make the findings of the MMT in relation to market misconduct admissible evidence in civil proceedings (see paragraph 59 below). This will in turn enhance the deterrent effect of the proposed regime."

14. Mr Harris also points out to the Court, by reference to the evidence filed, that a key criterion as to whether or not a case of suspected market misconduct will be pursued in the Tribunal is whether, in the view of the Securities and Futures Commission, it is likely a prosecution in the criminal courts will be successful. Where it appears a conviction by the courts will be difficult to secure, the Commission will recommend the Financial Secretary initiate proceedings in the Tribunal instead: LegCo Panel on Financial Affairs Paper dated 27 March 2006 (LC paper no CB(1)1179/05-06(07)) at para 7.

Australian cases

15. Mr Harris relies on a number of Australian cases to support his contention that where the doctrine of separation of powers is constitutionally enshrined, the judicial power of the State can only be exercised by the courts of judicature, or courts of the classic kind, established under the constitution. Australia is such a case where s 71 of the Constitution vests the judicial power of the Commonwealth in a Federal Supreme Court (the High Court of Australia) and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. These Australian authorities include, amongst others, *Huddart, Parker & Co Pty Ltd v Moorehead* (1908) 8 CLR 330; *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350 and *Brandy v Human Rights and Equal Opportunity Commission* (1994-1995) 183 CLR 245. Moreover, in the passage from the judgment of Ribeiro PJ in *New World* that has been extracted above, *Shell Company of Australia Ltd v Federal Commissioner of Taxation* is also such a case. In a great many of these cases, the courts had to determine whether a power given to a body to determine a particular matter was in truth and in substance a judicial power that could only be exercised by the federal courts pursuant to s 71 of the Australian Constitution.

16. In *Albarran*, what was in issue was whether the power conferred by s 1292(2) of the Corporations Act 2001 (Cth) on the Companies Auditors and Liquidators Disciplinary Board to cancel or suspend the registration of a person as a liquidator for a specified period if satisfied that certain conditions were fulfilled was judicial or not. In

the highly illuminating judgment of Kirby J, a number of matters were examined in order to decide the question. Amongst other things, the judge looked at the history and the origin of the current federal legislative regime for the registration of auditors and liquidators. This was because the history of the determination of early legal controversies, factually similar and apparently analogous to a later controversy, could sometimes be useful as indicating a function which, by the Constitution, was reserved, in the case of federal law, to the necessary exercise of the judicial power (para 94). The judge also took into account the history of Australian companies legislation, particularly the need for a more systematic and detailed regulation of company liquidators by procedures involving registration due to the growth of the economy. In the judge's view, the establishment of professional disciplinary boards to supervise such a registration became a logical and natural development (para 95). Furthermore, the judge took the view that legally and functionally, the purpose of the provision in question was to uphold the standards of registered liquidators, to ensure the compliance with an adequate and proper performance of the duties imposed on company liquidators, to protect company shareholders, creditors, officers and employees, and the public, and to uphold professional and business expectations in that regard (para 96). Regard having had to the function which the Board performed and the interpretation of the section in question, as well as the intramural or domestic disciplinary arrangements, Kirby J concluded that the Board was not engaged in the adjudication or determination of guilt, still less of criminal guilt, or in the imposition of punishment as such. He therefore came to the view that the Board did not exercise a judicial power (para 97).

17. Lastly, the judge carried out a function check of his conclusion against the basic objective, reflected in the Constitution, of reserving the exercise of federal judicial power to the federal courts, which has been described in another Australian case, *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 11 (*per* Jacobs J) in the following terms:

> "The historical approach to the question whether a power is exclusively a judicial power is based upon the recognition that we have inherited and were intended by our *Constitution* to live under a system of law and government which has traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of the parliament and the executive. But the rights referred to in such an enunciation are the basic rights which traditionally, and therefore historically, are judged by that independent judiciary which is the bulwark of freedom. The governance of a trial for the determination of criminal guilt is the classic example."

18. Kirby J took the view that orders made by the Board did not require the intervention of courts as 'the bulwark of freedom' for the protection of what had been traditionally regarded as 'basic legal rights' (para 99). Rather, the judge considered the case under determination differently (para 100):

> "On the contrary, what is involved in the appellant's cases is no more than the operation of a disciplinary scheme designed ultimately to uphold standards of integrity and competence in the liquidation of companies. Such a disciplinary scheme involves functions apt to an administrative body. The Board is thus an unremarkable disciplinary institution which, for functional reasons, includes relevant professional and business expertise. The Board cannot enforce its own decisions and its decisions are subject to facilities of administrative review of which the appellants have availed themselves."

19. In *Brandy, supra*, the High Court of Australia dealt with the question of whether the Human Rights and Equal Opportunity Commission charged with the obligation to hold inquiries into conduct allegedly amounting to racial discrimination was actually exercising a judicial power reserved for the federal courts. The Court answered the question in the affirmative. A major factor that the Court took into account was that although a determination by the Commission was not binding or conclusive between any of the parties to it, yet the Commission was obliged by the statutory provisions to lodge a determination in a registry of the Federal Court as soon as practicable and the Registrar was required to register it – upon registration the determination was to have effect as if it were an order made by that court.

20. In the joint judgment of Mason CJ, Brennan and Toohey JJ, the judges explained the general principles as follows (258-259):

> "Although many decision-making functions may take their character as an exercise of judicial, executive or legislative power from their legislative setting, the character of the decision-maker and the nature of the decision-making process, some decision-making functions are exclusive and inalienable exercises of judicial power. As Dixon CJ and McTiernan J observed in *R v Davison*:
>
> > 'The truth is that the ascertainment of existing rights by the judicial determination of issues of fact or law falls exclusively within judicial power so that the Parliament cannot confide the function to any person or body but a court constituted under ss 71 and 72 of the Constitution.'
>
> In that statement, the expression 'judicial determination' means an authoritative determination by means of the judicial method, that is, an enforceable decision reached by applying the relevant principles of law to the facts as found.
>
> Thus, it has always been accepted that the punishment of criminal offences and the trial of actions for breach of contract

> and for wrongs are inalienable exercises of judicial power. The validity of that proposition rests not only on history and precedent but also on the principle that the process of the trial results in a binding and authoritative judicial determination which ascertains the rights of the parties. ... The determination involves an exercise of such power not simply because it is made by a court but because the determination is made by reference to the application of principles and standards 'supposed already to exist'. And the determination is binding and authoritative in the sense that there is what has been described as an immediately enforceable liability ... Consequently, even if the determination in such a case were to be made by an administrative tribunal and not by a court, the determination would constitute an exercise of judicial power, although not one in conformity with Ch III of the Constitution."

21. What eventually tipped the scales was the automatic registration of the Commission's determination (pages 259-260):

> "But s 25ZAB goes beyond providing the machinery for the enforcement of a determination. It purports to give a registered determination effect 'as if it were an order made by the Federal Court'. A judicial order made by the Federal Court takes effect as an exercise of Commonwealth judicial power, but a determination by the Commission is neither made nor registered in the exercise of judicial power. An exercise of executive power by the Commission and the performance of an administrative function by the Registrar of the Federal Court simply cannot create an order which takes effect as an exercise of judicial power; conversely, an order which takes effect as an exercise of judicial power cannot be made except after the making of a judicial determination. Thus, s 25ZAB purports to prescribe what the Constitution does not permit."

22. The joint judgment of Deane, Dawson, Gaudron and McHugh JJ was also to the same effect so far as these general principles were concerned. Having pointed out the difficulty, if not impossibility, of framing a definition of judicial power that is at once exclusive and exhaustive, the judges stated the general principles, including the one

concerning the enforceability of decisions, in the following terms (pages 267-268):

> "It is traditional to start with the definition advanced by Griffith CJ in *Huddart, Parker & Co Pty Ltd v Moorehead* in which he spoke of the concept of judicial power in terms of the binding and authoritative decision of controversies between subjects or between subjects and the Crown made by a tribunal which is called upon to take action. However, it is not every binding and authoritative decision made in the determination of a dispute which constitutes the exercise of judicial power. A legislative or administrative decision may answer that description. Another important element which distinguishes a judicial decision is that it determines existing rights and duties and does so according to law. That is to say, it does so by the application of a pre-existing standard rather than by the formulation of policy or the exercise of an administrative decision. ... But again, as was pointed out in *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd*, the exercise of non-judicial functions, for example, arbitral powers, may also involve the determination of existing rights and obligations if only as the basis for prescribing future rights and obligations.
>
> However, there is one aspect of judicial power which may serve to characterise a function as judicial when it is otherwise equivocal. That is the enforceability of decisions given in the exercise of judicial power. In *Waterside Workers' Federation of Australia v J W Alexander Ltd*, Barton J said:
>
> > 'It is important to observe that the judicial power includes with the decision and the pronouncement of judgment the power to carry that judgment into effect between the contending parties. Whether the power of enforcement is essential to be conferred or not, when it is conferred as part of the whole the judicial power is undeniably complete.'"

Applicant's arguments

23. As described, Mr Harris relies heavily on these Australian authorities. First, he submits that the Tribunal purports to perform a function which is judicial in nature and which has only previously been performed by the criminal courts. He argues that the forms of market

misconduct that the Tribunal is empowered to inquire into under Part XIII of the Ordinance are exactly the same as the offences that the criminal courts are required to try under Part XIV. The effect of the institution of proceedings in the Tribunal, it is contended, is to oust the jurisdiction of the criminal courts and usurp that function from the courts. He argues that s 307, enacted to prevent 'dual punishment', in the sense that persons who are the subjects of proceedings before the Tribunal cannot be charged in a criminal court for the same conduct, necessarily 'equates' the function performed by the Tribunal with that performed by the criminal courts.

24. Secondly, Mr Harris argues that the Tribunal wields powers which are intrinsically judicial powers, such as compelling people to attend and give evidence on oath, authorising the Securities and Futures Commission to conduct searches of premises and compel people to attend interviews and give statements, and punishing people for contempt in the same manner as the Court of First Instance by means of fines and imprisonment. The Tribunal may also impose various orders by way of sanctions, such as disgorgement orders, Government costs orders, Commission costs orders and Financial Reporting Council costs orders. Further, the Tribunal may, through the imposition of disqualification orders, cold shoulder orders and disciplinary orders, prevent a specified person from practising his trade or profession and participating in the economic life of the community.

25. Mr Harris further makes the side point that by determining whether the specified person has been guilty of market misconduct, the

Tribunal is in substance exercising an authority to label him as a criminal in the eyes of the public.

26. Thirdly, Mr Harris points out, rather correctly, that under s 264 of the Ordinance, the Court of First Instance may, on notice in writing given by the Tribunal, register an order of the Tribunal in the Court of First Instance and the order shall, on registration, become for all purposes an order of the Court of First Instance made within the jurisdiction of that Court. Mr Harris relies on *Brandy* and contends that such a feature points strongly to the conclusion that the Tribunal is in fact exercising the judicial power reserved for the courts of judicature.

27. Fourthly, Mr Harris also points out, again correctly, that a determination by the Tribunal that a person has engaged in market misconduct is admissible in evidence for the purposes of related civil proceedings and must be deemed correct by the civil court unless the contrary is proven: s 281(8). The Tribunal, counsel argues, therefore purports to perform the fact-finding role of the civil courts and to determine the legal liability of specified persons to third parties.

28. In summary, counsel submits that the Tribunal's power falls squarely within the judicial definition of 'judicial power', in that the Tribunal is purporting to determine a controversy between the State and a specified person, by reference to pre-existing rights and in accordance with law, and to issue a binding and authoritative decision. The Tribunal, in the words of Mr Harris, constitutes a 'shadow judiciary system'.

Interpreting the Basic Law – importance of context

29. It is true that the principle of separation of powers is enshrined in the Basic Law, and the judicial power of the Special Administrative Region is exclusively vested in the Judiciary: see *Lau Cheong v HKSAR* (2002) 5 HKCFAR 415, 447-448 (para 101). The task in the present case is to determine whether the Market Misconduct Tribunal is required by the Ordinance to exercise such a power. That necessarily involves the interpretation of the relevant provisions in the Basic Law in order to understand what the judicial power of the State (or the HKSAR) is.

30. As Hartmann J (as he then was) has observed in *Lau Kwok Fai Bernard v Secretary for Justice*, HCAL 177/2002 and 180/2002 (10 June 2003), para 23:

> "While therefore I accept that the Basic Law incorporates the principle of the separation of powers (subject of course to the meaning and purpose of specific articles which may act to modify that principle), it is apparent that whether the Ordinance, in respect of any individual article or in respect of the Basic Law generally, offends that Law is a matter which may only be determined by looking at the Ordinance 'in context'. As the Privy Council said in *Liyanage* : each case must be decided in the light of its own facts and circumstances, including the *true purpose of the legislation* and *the situation to which it is directed*."

31. And as was also observed during the course of counsel's submission, 'each constitution is the child of its environment'. It is, therefore, unsafe to simply borrow and apply the Australian jurisprudence on separation of powers in general and on judicial power in particular without first recognising the rationale behind the Australian approach,

which is a 'strict' one: *per* Kirby J in *Albarran*, para 61. And there are reasons for that strict approach to separation of powers, as Kirby J explained in para 62:

> "The governing principle can be traced to concepts expounded in Alexander Hamilton's views concerning the special need in a federation to have a branch of government, the judiciary, which was insulated from the other branches of government so as to be able to perform the functions essential to its purposes. Hamilton considered the independence of the judiciary from the other arms of government essential to ensure impartial decision-making in those matters where, otherwise, there was a risk of encroachment and partiality in the administration of federal laws affecting such matters as the 'life, liberty or property' of those who are subject to such laws."

32. In Hong Kong, we certainly do not have a federal system. Rather, under the principle of 'one country, two systems' the HKSAR is vested with independent judicial power, including that of final adjudication (art 19). A main theme of the Joint Declaration and the Basic Law, as Mr Duncan SC (Mr Conney with him) for the Financial Secretary has reminded the Court, is that of continuity, including continuity between the pre-existing and the present court and judicial systems: *New World* at para 43. And art 8 of the Basic Law specifically provides that subject to exceptions, the laws previously in force in Hong Kong shall be maintained.

33. In this regard, the warning sounded by Sir Anthony Mason in his article, *The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong* (2007) 37 HKLJ 299, 305-306 is apposite:

> "Quite apart from political differentiations, there are doctrinal differences, such as those mentioned above. These doctrinal differences, which are not always based on political differentiations, present obstacles to the importation of principles based on different doctrinal foundations. Take, for example, the separation of powers. The United States and Australian Constitutions incorporate a separation of powers, as does the Constitution of Canada (at least impliedly), while United Kingdom public law also asserts a separation of powers. But the content of that separation varies across the four jurisdictions. Although the United States and the Australian separation of powers is similar in some respects, the difference between the presidential system and the Westminster system, with its doctrine of responsible government, means that there is a substantial cleavage between the two systems. Neither in Canada nor in the United Kingdom has the doctrine been taken as far as it has in Australia, let alone the United States.
>
> The consequence is that judicial decisions on the separation of powers need to be treated with great care before they can be imported from one jurisdiction to another. This proposition has significance for Hong Kong. The Basic Law incorporates a separation of powers. So far, however, the courts of the HKSAR have not had occasion to consider what the doctrine may entail in Hong Kong. It would not follow that the Basic Law, when construed in the light of its context and the preservation of the English common law by Article 8 of the Basic Law, necessarily mandates a separation of powers that conforms either to the United States or Australian model."

See also Anthony Mason, *The Role of The Common Law in Hong Kong* in *The Common Law Lecture Series 2005* (HKU) 1, 22-24.

34. Unlike the Australian Constitution which came into being at the beginning of the last century – well before the development of administrative bodies and tribunals, the Basic Law became Hong Kong's Constitution under very different circumstances. By then, following developments in the United Kingdom and elsewhere, particularly after the Second World War, administrative bodies and tribunals had become prevalent and they performed or discharged numerous functions that had

superficial resemblance to the judicial process. Amongst other things, by reason of the requirement under public law, these tribunals and bodies had to act judicially in their decision-making process. And they even exercised some sort of 'judicial power'. As Robert Walker LJ (as he then was) pointed out in *General Medical Council v British Broadcasting Corporation* [1998] 1 WLR 1573, 1580C-F:

> "[Counsel] submitted, correctly, that the P.C.C. of the G.M.C. has to adjudicate in a formal and judicial manner on very serious issues which are of public importance and may also have the gravest effect on the reputation and career of an accused medical practitioner. Mr Henderson was correct in submitting that the PCC is exercising a sort of judicial power but in our judgment it is not the judicial power of the state which is being exercised. ..... In this case, by contrast, the P.C.C. is a statutory committee of a professional body specially incorporated by statute. It exercises a function which is recognisably a judicial function, and does so in the public interest. It acts in accordance with detailed procedural rules which have close similarities to those followed in courts of law. Nevertheless it is not part of the judicial system of the state. Instead it is exercising (albeit with statutory sanction) the self-regulatory power and duty of the medical profession to monitor and maintain standards of professional conduct."

This passage was cited with approval by Ribeiro PJ in *New World* (para 85); the case was also relied on in *Tse Wai Chun v Solicitors Disciplinary Tribunal* [2002] 3 HKLRD 712, 722 (para 16).

35. Wade & Forsyth, *Administrative Law* (9th edn), Chap 23 contains a highly informative discussion on statutory tribunals in the United Kingdom, which is helpful to a significant extent in understanding the tribunal system in Hong Kong which, before 1997, was naturally based on the UK model. The authors point out the advantages of tribunals on pages 907-908 – they can offer speedier, cheaper and more accessible justice. Another advantage is that of expertise. Specialised

tribunals can deal both more expertly and more rapidly with special classes of cases, whereas in the High Court counsel may take a day or more to explain to the judge how some statutory scheme is designed to operate. Even without technical expertise, a specialised tribunal quickly builds up expertise in its own field. At pages 908-910, the chapter goes on to discuss other characteristics of statutory tribunals, including the so-called 'administrative tribunals':

> "The system of tribunals has now long been an essential part of the machinery of government. The supplementary network of adjudicatory bodies has grown up side by side with the traditional courts of law. There is a close relationship between the two systems, both because under the ordinary law the tribunals are subject to control by the courts and also because Parliament has in the majority of cases provided a right of appeal from the tribunals to the courts on any question of law. A case which starts, say, in a social security or employment tribunal may therefore end in the House of Lords, having passed through four or five stages of litigation. This is a rare event, since otherwise the tribunal system would be self-defeating. But the tribunals must in some way be integrated with the machinery of justice generally. As will be seen, it has proved necessary to increase the supervisory powers of the courts, as well as to extend rights of appeal.
>
> Tribunals are subject to a law of evolution which fosters diversity of species. Each one is devised for the purposes of some particular statute and is therefore, so to speak, tailor-made. When any new scheme of social welfare or regulation is introduced the line of least resistance is usually to set up new ad hoc tribunals rather than reorganise those already existing. Uncontrolled growth has produced over fifty different types of tribunal falling within the Tribunals and Inquiries Act 1992. When all their local subdivisions are aggregated the total (including Scotland) exceeds 2,000. They range from extremely busy tribunals such as those dealing with social security, employment, valuation appeals and rent assessment to tribunals which have no business at all and have therefore never been appointed, such as the mines and quarries tribunals. ...
>
> The responsibilities of tribunals are in general no less important than those of courts of law. Large awards of money may be made by tribunals, for example, in cases of industrial injuries.

> Mental health review tribunals determine whether a patient ought to be compulsorily detained, and so lose his personal liberty, whereas the administration of his property is a matter for the courts of law.
>
> ...
>
> ... the decisions of most tribunals are in truth judicial rather than administrative, in the sense that the tribunal has to find facts and then apply legal rules to them impartially, without regard to executive policy. Such tribunals have in substance the same functions as courts of law. When, for example, jobseeker's allowance is awarded by a social security tribunal, its decision is as objective as that of any court of law. Only two elements enter into it: the facts as they are proved, and the statutory rules which have to be applied. The rules may sometimes give the tribunal a measure of discretion. But discretion is given to be used objectively, and no more alters the nature of the decision than does the 'judicial discretion' which is familiar in courts of law. These tribunals therefore have the character of courts, even though they are enmeshed in the administrative machinery of the state. They are 'administrative' only because they are part of an administrative system for which a minister is responsible to Parliament, and because the reasons for preferring them to the ordinary courts are administrative reasons.
>
> ...
>
> Fourthly, and most important of all, tribunals are independent. They are in no way subject to administrative interference as to how they decide any particular case. No minister can be held responsible for any tribunal's decision. Nor are tribunals composed of officials or of people who owe obedience to the administration. It would be as improper for a minister to try to influence a tribunal's decision as it would be in the case of a court of law."

For academic discussion on the Hong Kong position, see also P Wesley-Smith, *Judges and Judicial Power under the Hong Kong Basic Law* (2004) 34 HKLJ 83, 94-102; B Hsu, *Judicial Independence Under the Basic Law* (2004) 34 HKLJ 279, 280-286.

36. It is plain that in a modern society like Hong Kong, administrative tribunals and bodies have an important role to play. This is not a new phenomenon. It was already the case before the Basic Law was promulgated. Given the theme of continuity, it would be very surprising if the effect of the Basic Law, upon its proper interpretation, were to outlaw these administrative tribunals and bodies for ousting the jurisdiction or usurping the judicial functions of the courts of judicature of the HKSAR. Or put another way, the Basic Law should be interpreted in such a way as to enable, so far as violence is not done to the principle of separation of powers as understood in the tradition of English common law, the continued existence and development of administrative tribunals and bodies. This calls for a flexible and realistic, as opposed to an idealistic, approach to the doctrine of separation of powers, and a purposive and contextualised interpretation of the scope and meaning of 'judicial power' in the Basic Law, rather than following indiscriminately the strict interpretation adopted by the Australian courts towards their own Constitution, which was written under very different circumstances in order to serve its own unique purposes.

Combating insider dealing in Hong Kong

37. This theme of continuity brings me to the fact that the Insider Dealing Tribunal, the predecessor of the Market Misconduct Tribunal, was already in existence for some years before 1997, pursuant to the provisions in the Securities (Insider Dealing) Ordinance (Cap 395) (now repealed). Some of the background facts can be gleaned from the judgment of Sir Anthony Mason NPJ in *Koon Wing Yee v Insider*

Dealing Tribunal [2008] 3 HKLRD 372, 389 to 391. As his Lordship explained (at paras 45 and 46):

> "45. Insider dealing is an 'insidious mischief' which threatens the integrity of financial markets and public and investor confidence in the markets. The object of SIDO [Securities (Insider Dealing) Ordinance] was to eliminate insider dealing and to reinforce the transparency of the markets, thereby enhancing and preserving Hong Kong's position as an international financial centre. The importance of attaining this object led to the decision to arm the Tribunal with the additional powers of imposing a penalty and ordering disqualification.
>
> 46. That insider dealing amounts to very serious misconduct admits of no doubt. It is a species of dishonest misconduct. It consists of using price-sensitive information (which is not in the public realm) about a public company for private gain in circumstances where the wrongdoer's misconduct is based on knowledge of, or his having reason to believe, critical prescribed elements of the misconduct described by s 9 of SIDO. That public censure was thought earlier to be an adequate sanction is indicative that insider dealing is considered to be very serious misconduct and that severe injury to reputation may flow from such a finding."

38. I have already quoted from the relevant legislative materials which throw light on the purposes and policy intention behind the replacement of the old Ordinance with the present Securities and Futures Ordinance and the setting up of the Market Misconduct Tribunal to combat insider dealing. The new scheme has been described by Sir Anthony Mason NPJ as providing for dual civil and criminal regimes to deal with insider dealing (at p 391):

> "47. Moreover, insider dealing is a form of conduct which can be readily characterized as criminal conduct. Indeed, the SFO [Securities and Futures Ordinance], which enacted the present legislation governing insider dealing, provides for dual civil and criminal regimes to deal with six types of market misconduct. The purpose of the SFO was to enhance the

> deterrent and punitive effect of the available sanctions for insider dealing on the basis that the regime under SIDO was insufficient to combat effectively acts of market misconduct. Similar dual regimes had by then been adopted in the United Kingdom, the United States and Australia.
>
> 48. As an element in the new civil regime, the SFO set up the Market Misconduct Tribunal ('the MMT') to hear cases of suspected market misconduct. The MMT was given power to impose civil sanctions, including surrender of any profit made or increased by market misconduct, but without power to impose a fine or penalty. The decision to leave the MMT without power to impose a fine was influenced by legal advice received by the Government to the effect that the existence of such a power might lead to a breach of the BOR."

39. It is interesting to note that neither the Court of Final Appeal, nor apparently the eminent counsel appearing in *Koon Wing Yee*, which was concerned with whether the proceedings before the Insider Dealing Tribunal were compatible with human right requirements, raised the question of whether the Insider Dealing Tribunal was exercising the judicial power of the HKSAR that is exclusively vested in the courts of judicature, if they ever thought that it was a potential problem. This is particularly so when the Court of Final Appeal actually concluded that the nature of the charges before the Insider Dealing Tribunal was criminal.

40. That, if nothing else, tends to support my earlier observation that the (pertinent) philosophy behind the Basic Law is one of continuity, and it would be a very surprising suggestion indeed if anybody were to suggest that the Insider Dealing Tribunal, which had been established before 1997 to deal with a particular type of evils affecting the financial markets that had been identified by the executive/legislature, had

suddenly become a usurper of judicial authority after the coming into force of the Basic Law.

41. This is a highly relevant background fact, in the sense that how, historically, the subject matter under discussion has been dealt with and how the present regime came into being are material to determining whether the judicial power of the State is involved: see *Albarran, supra*, paras 91 and 95.

A novel subject matter

42. Another important fact, in my view, is this: As the Australian authorities have pointed out, if the subject matter is one that has, traditionally or historically, been the subject of adjudication by the courts of judicature, that is an indication that what is involved is the judicial power of the State. Thus, subjects such as crimes, or claims in contract or tort, are subjects traditionally dealt with by the courts in exercise of their judicial power of the State. Hiving off any such subject matters from the court's jurisdiction to a tribunal could therefore be problematic.

43. The same consideration does not apply where the subject matter is novel to the common law. Insider dealing is such a subject. It is not a common law offence. Nor does it sit comfortably well with traditional causes of action based on contract, tort, trust, agency or companies law – although I am not saying that given the right facts, some causes of action could not be framed under the common law.

44. Likewise, the sanctions that the Tribunal can impose, namely, orders of disqualification, cold shoulders orders, cease and desist orders, disgorgement orders and extensive costs orders, are, by and large, sanctions not known to the common law. They are creatures of statute. There is therefore, again, no question of hiving off remedies that are traditionally dispensed by courts of law to an administrative tribunal.

45. In short, it is not a case of removing from the jurisdiction of the court a subject matter and giving it to a statutory tribunal to deal with. What actually happens is that by legislative intervention, a new subject matter is identified as one that requires regulation or policing, and, for policy or administrative reasons, the task is given, not to the traditional courts, but to a statutory tribunal specially established for such purposes. In those circumstances, the case for saying that the judicial power of the State, exercisable only by the courts of judicature, is removed from the courts and given to a statutory tribunal, is not particularly convincing.

46. Having said that, of course, if the statutory intervention results in the creation of criminal offences, and the determination of those offences is left in the hands of a statutory tribunal instead of the criminal courts, that would be a quite different story. For, regardless of whether the offences are statutory in origin, the trying of crimes is, from all perspectives, an exercise of the judicial power of the State that should, under the doctrine of separation of powers, be reserved exclusively for the criminal courts.

MMT does not decide criminal guilt

47. This brings me to Mr Harris' point that the Market Misconduct Tribunal is, in truth and in substance, required to try criminal offences. I do not accept this argument. As has been observed by Sir Anthony Mason NPJ in *Koon Wing Yee*, the new Ordinance provides for dual civil and criminal regimes to deal with six types of market misconduct. At the choice of the Financial Secretary, the same conduct may be referred to the criminal courts for trial or the Market Misconduct Tribunal for investigation (but not both). If the Part XIV route is taken, it is a criminal court, applying criminal rules and procedures, including the criminal standard of proof, which will decide whether a criminal offence has been committed and the appropriate criminal punishment. The Market Misconduct Tribunal will have nothing to do with it. On the other hand, if the Part XIII route is chosen, the Market Misconduct Tribunal will, applying its own rules and procedures which are civil (and inquisitorial) in nature, carry out investigations into the matter and determine whether market misconduct has taken place. That determination will not be the determination of the commission of a crime. No such determination will be made. Nor is it relevant to any criminal proceedings for – by definition – there will not be any parallel criminal proceedings. Nobody will be labelled a criminal – to do so would be defamatory, for the Tribunal's determination, based on the civil standard and according to rules and procedures that are civil and inquisitorial in nature, is not a determination of *criminal* guilt. That there is a distinction between guilt and criminal guilt, as Mr Duncan SC has argued, is clearly borne out by Kirby J's judgment in *Albarran, supra*, at para 97, where the learned judge concluded that the Companies Board was not

engaged 'in the adjudication or determination of guilt, still less of criminal guilt'.

MMT does not decide civil liability

48. Nor is the Market Misconduct Tribunal required to determine civil liability. It is noteworthy that the Ordinance creates a civil cause of action based on market misconduct (s 281) but does not give the jurisdiction to determine such liability to the Tribunal. Rather such civil liability is to be determined by the civil courts. What the legislature has done is to render the determination by the Tribunal admissible evidence in the civil proceedings and to create a rebuttable presumption based on the determination of market misconduct against the defendant.

49. That does not make the Market Misconduct Tribunal the adjudicator of civil liability or of the primary facts necessary to found such liability. What has been done is nothing more than the creation of an evidential aid in the civil proceedings before the courts. If the legislation had provided that the determination by the Tribunal is conclusive evidence of the commission of the market misconduct in the civil proceedings, that would have been a different matter. But that is not the case here.

Nature of the function of MMT

50. What then is the nature of the function of the Tribunal? What function, in the statutory scheme, does the Tribunal perform, for the

purposes of which it is given the power of determination – hence the nature of such power?

51. Speaking of the repealed Securities (Insider Dealing) Ordinance and the now defunct Insider Dealing Tribunal, Sir Anthony Mason NPJ observed in *Koon Wing Yee* that the object of the Ordinance was to eliminate insider dealing and to reinforce the transparency of the markets, thereby enhancing and preserving Hong Kong's position as an international financial centre (para 45). As a successor to the former statutory regime, in my view, the present Ordinance and the Market Misconduct Tribunal it has established are there to serve, hopefully in a more effective manner, the same purposes. This is fully borne out by the legislative materials that have been referred to. The same conclusion has been reached by Hartmann J (as he then was) and Lam J in *Chau Chin Hung v Market Misconduct Tribunal*, HCAL 123/2007, 124/2007 and 22/2008 (22 September 2008), although the focus of that decision was on the nature and severity of the sanctions that the Tribunal could impose. The Court had no difficulty in concluding, in respect of those sanctions, namely disqualification, cold shoulder orders, cease and desist orders, disgorgement orders, reference of an identified person to his own professional body for possible disciplinary proceedings, as well as extensive costs orders, that they are all designed to protect financial institutions and the investing public, or, in the case of costs orders, to serve a compensatory purpose.

52. In my view, quite plainly, looking at the dual regimes under the Ordinance, and particularly the Part XIII scheme, the purpose is to protect and maintain the integrity of the financial markets in Hong Kong,

thereby enhancing and preserving Hong Kong's reputation as an international financial centre. It is regulatory in nature. The investing public, and therefore public interest at large, is protected in the sense that the regime ensures the integrity of the financial markets in which the investing public carry on their investment or trading activities. It is very different from the case, for instance, dealt with by the Australian court in *Brandy*, concerning racial discrimination, which, of course, is a problem cutting across all strata of the society.

53. It is true that the sanctions are potentially severe, and therefore carry with it a deterrent effect, but that does not render the sanctions any less protective in nature. This has been decided by *Chau Chin Hung*, against which Mr Harris has mounted no challenge. In particular, the power to disqualify is protective rather than punitive in character, namely, that the primary purpose of the power is to protect investors and the public. In so far as the making of such an order has a deterrent effect, that effect is incidental and subservient to the purpose of protecting shareholders, investors and the public from people who are unfit to hold office: *Koon Wing Yee* at paras 72 and 73; *Chau Chin Hung* at paras 29-32. In other words, nothing penal is involved here and, as I have already concluded, the Tribunal is not required to determine any criminal liability or to impose any penal sanction or punishment. That is not the purpose of the scheme laid down in Part XIII. Rather, that is the business of the criminal courts pursuant to Part XIV of the Ordinance.

54. In my view, to a substantial extent the Tribunal is performing a function comparable to that performed by a regulating body or disciplinary tribunal established to self-regulate a particular type of

activities amongst a specific class of people in the society. Of course, like solicitors disciplinary proceedings, the public at large has a stake in the matter in the sense that solicitors are here to provide legal services to the public and it is in the interest of the public that professional misconduct of solicitors be investigated into and dealt with accordingly. Likewise, the Market Misconduct Tribunal is there to regulate the conduct of those involved in the financial markets in Hong Kong. The investing public and the reputation of Hong Kong as a serious financial centre all have a stake in it. But it is very different in nature from, say, the determination of a criminal offence by a criminal court, or the adjudication of civil disputes before a civil court. The functions performed by the courts in those cases are qualitatively different from that performed by the Tribunal. Maybe this is just another way of putting the distinction between exercising the judicial power and exercising a judicial power of the State.

Registration of MMT's orders

55. It is true that an order of the Tribunal may be registered in the Court of First Instance, and once registered, it shall take effect as if it were an order of that court (s 264(1)). In this regard, the Australian decision in *Brandy* is of course highly relevant.

56. But first, unlike *Brandy*, registration is not automatic. The court plainly retains a discretion whether to register an order under s 264(1) ('the Court of First Instance *may* ... register an order of the Tribunal ...'). It cannot be assumed that the discretion is anything other than a real one.

57. Secondly, I do not see *Brandy* as laying down the rule that if an order by a tribunal is automatically registrable as an order or judgment of a court of the classic kind, the tribunal must be exercising the judicial power of the State. In my view, taken at the highest, that is only a pointer, albeit an important one, that what is being exercised is the judicial power of the State.

58. Moreover, the actual decision in *Brandy* was heavily influenced by its context, namely racial discrimination, a subject matter which, one would have thought, ought to be dealt with by the courts of the classic kind.

59. In any event, as I said at the outset, in interpreting our Basic Law, the historical context – the use of administrative tribunals in general and the use of a specialised tribunal to combat insider dealing in particular in Hong Kong – cannot be ignored. A flexible and sensitive approach must be adopted.

60. Furthermore, under the former legislation, registration of the orders of the Insider Dealing Tribunal was automatic: s 29 of the Securities (Insider Dealing) Ordinance. Viewed historically, such provision was already in existence prior to 1997, and assuming that the Basic Law did not intend to create a sea change in terms of regulating insider dealing in Hong Kong, it is difficult to see how a *discretionary* power to register could turn the successor to the Insider Dealing Tribunal into a tribunal seeking to exercise the judicial power of the State.

61. In my view, all things considered, what is being sought to achieve in s 264(1) is nothing more than to provide a convenient aid to execution. Imagine, for the purposes of argument, that s 264(1) were not included in the legislation: there would have to be put in place instead elaborate provisions to set up a machinery of execution of the Tribunal's orders. But not only that: efforts and expenses would have to be incurred in order to implement the machinery of execution designed on paper in the legislation. The registration provisions in s 264(1) simply provide a convenient shortcut to the problem. In my view, it is never intended to affect the substance of the matter, that is to say, that the Tribunal is established to police and regulate market behaviour.

MMT's powers

62. That the Tribunal is given powers regarding gathering evidence and punishing people for contempt cannot be conclusive of the matter. Understandably, those powers are required to enable the Tribunal to do an effective job, particularly bearing in mind that proceedings before the Tribunal are essentially inquisitorial in nature: *Chau Chin Hung, supra,* at para 56. (Likewise, proceedings in the Insider Dealing Tribunal were also inquisitorial. There was no *lis* as such. *Riady v Insider Dealing Tribunal* [2003] 2 HKC 10, 18, para 23(2).)

63. The Tribunal's power to commit people for contempt is not unique to it. The Solicitors Disciplinary Tribunal certainly possesses such a power. In *Tse Wai Chun, supra*, at paras 18 to 21, the Court of Appeal held that at least in the local context, possession of a statutory

power to commit people for contempt in the face of a tribunal is nothing unusual.

64. Taking a step back, the whole question of whether a tribunal is in fact exercising the judicial power of the State cannot possibly be determined by the single question of whether it has a power to commit for contempt in the face of the tribunal.

65. Just as that fact does not turn the Solicitors Disciplinary Tribunal in *Tse Wai Chun* into a court of the classic kind, exercising the judicial power of the State, it alone cannot be dispositive of the question under discussion.

Policy intention

66. It is true that the legislative materials sometimes used words which would tend to suggest that the Tribunal is there to 'punish' activities of insider dealing and to impose 'sanctions'. But there is a limit to what one can derive from these legislative materials, which were policy papers or explanatory notes, rather than the legislation itself. Ultimately, the legislation, as enacted, must be looked at with care to determine whether the Tribunal is in substance seeking to determine criminal guilt, and whether the sanctions that the Tribunal can impose are penal, with deterrent and punishment being its primary objectives. The fact that it is thought that securing a Part XIV conviction is difficult and thus there is a need to set up a Part XIII alternative does not turn the Part XIII scheme into one whereby the judicial power of the State is exercised.

One must not confuse the reasons for needing an alternative regime with the true nature of that alternative regime.

Double jeopardy

67. The question of 'double jeopardy' does not take Mr Harris' case very far. The same or similar policy considerations can lead to the enactment of provisions against double jeopardy irrespective of whether the two set of proceedings in question are both legal proceedings belonging properly to the province of courts of the classic kind, or whether one set of proceedings is legal in nature (in the above sense) and the other administrative in nature. That, in the absence of provisions safeguarding against double jeopardy, a person may be vexed in two sets of proceedings does not necessarily or logically mean that the nature of those two sets of proceedings is the same or similar.

Conclusion

68. Having considered all the relevant circumstances, I have no hesitation in concluding that the Market Misconduct Tribunal is not required by the Ordinance to exercise the judicial power of the HKSAR. It does not oust the jurisdiction of the criminal courts in Hong Kong, nor does it usurp their function. It is established to perform a regulatory and protective role in Hong Kong's financial markets. It is there to ensure that those engaged in market misconduct do not profit from their wrongs. In a fairly general sense, it performs a function that protects and benefits the interests of the society as a whole. But it does not determine criminal guilt nor impose penal sanction. Certainly it wields extensive powers and indeed it must act judicially. But one thing it does not do is

to exercise the judicial power of the HKSAR. Hong Kong has a long history of using administrative bodies and tribunals for similar functions. They are, to a certain extent, integrated into and form part of the 'machinery of justice', a phrase used in *Wade & Forsyth, op cit*, at page 906. In my view, their place in Hong Kong is not affected by the provisions in the Basic Law.

69. I would therefore dismiss the application for judicial review. I would also make a costs order *nisi* that the Financial Secretary have the costs of these proceedings (including any costs previously reserved), with a certificate for two counsel.

(M.J. Hartmann)
Justice of Appeal

(Andrew Cheung)
Judge of the Court of First Instance
High Court

Mr Jonathan Harris SC, instructed by Richards Butler, for the applicant

The 1st respondent, in person, absent

Mr Peter Duncan SC and Mr Nicholas Cooney, instructed by the Department of Justice, for the 2nd respondent

Appendix II

Stock Historical Data

Stock: 00688 - CHINA OVERSEAS

Date	Volume	$ Turnover	High	Low	Close	% Change	HSI Close	% Change
26/11/2003	81,540,000	98,042,740	1.230	1.170	1.220	5.17	12,086.67	0.65
27/11/2003	24,792,000	30,687,080	1.260	1.210	1.240	1.64	12,075.99	-0.09
28/11/2003	8,498,000	10,361,280	1.240	1.210	1.220	-1.61	12,317.47	2.00
01/12/2003	5,781,258	7,140,497	1.250	1.220	1.240	1.64	12,456.99	1.13
02/12/2003	8,508,000	10,539,520	1.250	1.230	1.240	0.00	12,412.23	-0.36
03/12/2003	74,736,400	94,247,664	1.290	1.230	1.270	2.42	12,361.18	-0.41
04/12/2003	48,375,228	64,222,976	1.350	1.260	1.340	5.51	12,342.65	-0.15
05/12/2003	12,612,725	16,622,784	1.340	1.300	1.320	-1.49	12,314.73	-0.23
08/12/2003	4,237,575	5,537,984	1.310	1.300	1.310	-0.76	12,177.44	-1.11
09/12/2003	17,610,000	23,507,660	1.360	1.310	1.350	3.05	12,393.64	1.78
10/12/2003	31,446,320	43,907,712	1.420	1.360	1.400	3.70	12.398.38	0.04
11/12/2003	40,423,574	59,178,147	1.490	1.420	1.480	5.71	12,554.58	1.26
12/12/2003	17,344,400	25,186,948	1.480	1.430	1.450	-2.03	12,594.42	0.32
15/12/2003	22,400,000	32,671,960	1.490	1.420	1.430	-1.38	12,520.17	-0.59
16/12/2003	13,470,000	19,224,240	1.460	1.400	1.420	-0.70	12,260.33	-2.08
17/12/2003	9,728,522	13,315,389	1.430	1.320	1.370	-3.52	12,193.12	-0.55
18/12/2003	10,264,000	13,973,180	1.390	1.310	1.390	1.46	12,240.25	0.39
19/12/2003	13,938,000	19,868,520	1.460	1.400	1.420	2.16	12,371.75	1.07
22/12/2003	17,115,000	24,761,743	1.460	1.420	1.460	2.82	12,487,99	0.94
23/12/2003	10,902,600	15,634,048	1.470	1.410	1.420	-2.74	12,420.51	-0.54
24/12/2003	2,308,000	3,259,320	1.420	1.400	1.420	0.00	12,456.70	0.29
29/12/2003	4,638,000	6,596,640	1.450	1.390	1.440	1.41	12,464.29	0.06
30/12/2003	4,754,000	6,777,580	1.450	1.410	1.410	-2.08	12,526.74	0.50
31/12/2003	9,148,000	13,255,180	1.470	1.410	1.420	0.71	12,575.94	0.39
02/01/2004	10,254,000	15,011,160	1.480	1.430	1.470	3.52	12,801.48	1.79
05/01/2004	75.167,123	125,306,349	1.780	1.450	1.750	19.05	13,005.33	1.59
06/01/2004	34,197,978	57,426,618	1.730	1.640	1.680	-4.00	13,036.32	0.24
07/01/2004	45,066,911	79,170,796	1.830	1.690	1.740	3.57	13,157.68	0.93
08/01/2004	21,362,000	36,207,540	1.740	1.660	1.680	-3.45	13,203.59	0.35
09/01/2004	21,232,000	35,842,660	1.720	1.650	1.710	1.79	13,385.80	1.38
12/01/2004	12,390,000	21,126,340	1.730	1.670	1.720	0.58	13,352.22	-0.25
13/01/2004	21,106,798	34,613,869	1.720	1.570	1.660	-3.49	13,396.65	0.33
14/01/2004	24,897,984	42,163,213	1.730	1.650	1.700	2.41	13,320.88	-0.57
15/01/2004	23,772,000	40,381,160	1.730	1.650	1.660	-2.35	13,249.81	-0.53
16/01/2004	24,826,400	42,208,600	1.720	1.660	1.700	2.41	13,167.76	-0.62
19/01/2004	58,943,000	105,283,348	1.860	1.700	1.810	6.47	13,253.31	0.65
20/01/2004	103,509,200	203,206,652	2.025	1.850	1.970	8.84	13,570.43	2.39
21/01/2004	62,191,518	123,242,820	2.050	1.910	1.920	-2.54	13,750.58	1.33
26/01/2004	92,903,357	189,671,999	2.125	1.950	2.000	4.17	13,727.27	-0.17
27/01/2004	994,762,000	1,798,302,580	1.910	1.810	1.890	-5.50	13,761.88	0.25
28/01/2004	61,324,000	113,649,410	1.880	1.830	1.840	-2.65	13,431.78	-2.40
29/01/2004	53,948,000	97,705,960	1.830	1.770	1.820	-1.09	13,334.01	-0.73
30/01/2004	46,541,099	81,816,711	1.820	1.720	1.750	-3.85	13,289.37	-0.33

Appendix III

Summary Assessment of Costs
Market Misconduct Tribunal Proceedings –
China Overseas Land and Investment Limited
(as of 3.6.2009)

A. General information

A1 Order dated -----
A2 Type of proceedings : Market Misconduct Tribunal
A3 Receiving party : Secretary for the Financial Services & Treasury
A4 Fee earners
Winnie Ho(WH), admitted in 1997, rate charged at $4,000/hr
William Liu(LW), admitted in 2007, rate charged at $2,500/hr
Law Clerk(LC), rate charged at $1,000/hr

			$
B.	Manual Work		
B1	Production of documents		4,853.00
B2	Photocopies		85,539.00
B3	Attendance by Law Clerk :40 hrs		40,000.00
B4	Delivery by hand : 41 trips x $50		2,050.00
		Sub-total:	132,442.00
C.	No. of hours spent by Government Counsel		
C1	554 hrs by WH		2,216,000.00
C2	59 hrs 15 mins by LW		148,125.00
		Sub-total:	2,364,125.00
D.	Counsel fees		
D1	Jonathan Kwan		686,400.00
D2	Ip Tak Keung Peter		83,000.00
D3	Jat Sew Tong		5,500.00
		Sub-total:	774,900.00
E.	Other disbursements		
E1	Postage :		15.00
		Sub-total:	15.00
F.	Costs of this assessment : 32 hrs at $1,600/hr		51,200.00
		Sub-total:	51,200.00

Total: 3,322,682.00

File ref: MMTI 3/07C
#1009822 ml

Appendix IV

Summary Assessment of Costs
Market Misconduct Tribunal Proceedings –
China Overseas Land and Investment Limited
(as of 3.6.2009)

A. General information

A1 Order dated -----
A2 Type of proceedings : Market Misconduct Tribunal
A3 Receiving party : Secretary for the Financial Services & Treasury
A4 Fee earners
Winnie Ho(WH), admitted in 1997, rate charged at $4,000/hr
William Liu(LW), admitted in 2007, rate charged at $2,500/hr
Law Clerk(LC), rate charged at $1,000/hr

B. Manual Work

		$
B1	Production of documents	4,853.00
B2	Photocopies	85,539.00
B3	Attendance by Law Clerk :40 hrs	40,000.00
B4	Delivery by hand : 41 trips x $50	2,050.00
	Sub-total:	132,442.00

C. No. of hours spent by Government Counsel

C1 554 hrs by WH 2,216,000.00

- Correspondence :
  no. of emails : 602
  no. of letters : 285

- Conference :
  12.12.2007 : 1 hr 15 mins (with Mr Peter Ip)
  30.12.2008 : 1 hr 30 mins (at Simmons & Simmons)
  31.12.2008 : 1 hr (at Richards Butler)
  22.01.2009 : 2 hrs 30 mins (with Mr Clive Rigby)
  17.03.2009 : 1 hr 25 mins (with Mr Clive Rigby)

- Attendance at Tribunal hearings :
  2008
  23.05.(1 hr)
  05.06.(30 mins)
  14.07.(5 hrs)
  15.08.(5 hrs)
  21.11.(30 mins)
  28.11.(5 hrs)
  18.12.(5 hrs)
  Time spent : 22 hrs

2009
05. - 09.01.(25 hrs)
12. - 16.01.(25 hrs)
19. - 20.01.(10 hrs)
09. - 10.02.(10 hrs)
23. - 26.02.(20 hrs)
09. - 13.03.(25 hrs)
16. - 19.03.(20 hrs)
31.03.(5 hrs)
01.04.(5 hrs)
03.04.(5 hrs)
06. – 07.04(10 hrs)
26.05.(5 hrs)
29.05.(5 hrs)
Time spent : 145 hrs

- Drafting, research, perusal of documents, attendance on counsel, SFC, witnesses, Tribunal's secretary, expert, others and general administrative matters.

C2	59 hrs 15 mins by LW - Correspondence : no. of emails : 60 - Conference on 11.2.2009 : 2 hrs 40 mins - Attendance at Tribunal's hearing 16-20.2.2009 : 25 hrs - Perusal of documents/ verifying phone transcripts : 13 hrs	148,125.00
	Sub-total:	2,364,125.00

D. Counsel fees

D1	Jonathan Kwan	686,400.00
D2	Ip Tak Keung Peter	83,000.00
D3	Jat Sew Tong	5,500.00
	Sub-total:	774,900.00

E. Other disbursements

E1	Postage :	15.00
	Sub-total:	15.00

F. Costs of this assessment : 32 hrs at $1,600/hr 51,200.00
Sub-total: 51,200.00

Total: 3,322,682.00

File ref: MMTI 3/07C
#1014181

Appendix V

Summary Assessment of Costs
Market Misconduct Tribunal Proceedings –
China Overseas Land and Investment Limited
(as of 3.6.2009)

A. General information

A1 Order dated -----
A2 Type of proceedings : Market Misconduct Tribunal
A3 Receiving party : Secretary for the Financial Services & Treasury
A4 Fee earners
Winnie Ho(WH), admitted in 1997, rate charged at $4,000/hr
William Liu(LW), admitted in 2007, rate charged at $2,000/hr
Law Clerk(LC), rate charged at $1,000/hr

B. Manual Work

			$
B1	Production of documents		4,853.00
B2	Photocopies		85,539.00
B3	Attendance by Law Clerk :40 hrs		40,000.00
B4	Delivery by hand : 41 trips x $50		2,050.00
		Sub-total:	132,442.00

C. No. of hours spent by Government Counsel

C1 525 hrs by WH 2,100,000.00

- Correspondence :
  no. of emails : 602
  no. of letters : 285
- Conference :
  12.12.2007 : 1 hr 15 mins (with Peter Ip)
  30.12.2008 : 1 hr 30 mins (with Simmons & Simmons)
  31.12.2008 : 1 hr (with Richard Butler)
  22.01.2009 : 2 hrs 30 mins (with Clive Rigby)
  17.03.2009 : 1 hr 25 mins (with Clive Rigby)
- Attendance at Tribunal hearings :

2007
30.10 (30 mins)
09.11 (33 mins)

2008
25.02 (2 hrs 10 mins)
28.02 (no appearance by the parties)
13.03 (1 hr 5 mins)
23.05 (56 mins)
05.06(10 mins)
21.11(38 mins)
18.12(3 hrs 57 mins)
05.01(4 hrs 6 mins)

2009
06.01(3 hrs 58 mins)
07.01(4 hrs)
08.01(4 hrs 5 mins)
09.01(4 hrs 23 mins)
12.01(4 hrs 20 mins)
13.01(4 hrs 5 mins)
14.01(3 hrs 53 mins)
15.01(3 hrs 59 mins)
16.01(3 hrs 57 mins)
19.01(4 hrs 2 mins)
20.01(4 hrs 7 mins)
09.02(4 hrs 10 mins)

10.02(3 hrs 48 mins)
23.02(4 hrs 2 mins)
24.02(4 hrs 3 mins)
25.02(4 hrs 7 mins)
26.02(4 hrs 16 mins)
09.03(4 hrs 6 mins)
10.03(3 hrs 59 mins)
11.03(4 hrs 3 mins)
12.03(4 hrs 6 mins)
13.03(3 hrs 48 mins)
16.03(3 hrs 59 mins)
17.03(4 hrs 3 mins)
18.03(4 hrs 2 mins)
19.03(4 hrs 4 mins)
31.03(4 hrs 8 mins)
01.04(1 hr 36 mins)
03.04(20 mins)
06.04(3 hrs 37 mins)
07.04(4 hrs 9 mins)
28.04(1 hr 10 mins)
26.04(35 mins)
29.05(2 hrs 55 mins)
09.07(no appearance by the parties)
Time spent : 138 hrs

- Drafting, research, perusal of documents, attendance on counsel, SFC, witnesses, Tribunal's secretary, expert, others and general administrative matters.

C2	53 hrs 32 mins by LW - Correspondence : no. of emails : 60 - Conference on 11.2.2009 : 2 hrs 40 mins - Court attendance 16-20.2.2009 : 19 hrs 17 mins - Persual of documents : 13 hrs	107,067.00
	Sub-total:	2,207,067.00

D. Counsel fees

D1	Jonathan Kwan	686,400.00
D2	Ip Tak Keung Peter	83,000.00
D3	Jat Sew Tong	5,500.00
	Sub-total:	774,900.00

E. Other disbursements

E1	Postage :	15.00
	Sub-total:	15.00

F. Costs of this assessment : 32 hrs at $1,600/hr 51,200.00

Sub-total: 51,200.00

Total: 3,165,624.00

File ref: MMTI 3/07C
#1009822 v5

Appendix VI

Summary Assessment of Costs
incurred by the Government
Market Misconduct Tribunal Proceedings –
China Overseas Land & Investment Limited
(4.6.09 – 4.8.09)

A.	Fee earners Winnie Ho (WH), admitted in 1997, rate charged at $4,000 per hour Law Clerk, rate charged at $1,000 per hour	
B.	Manual work	
	Photocopies	$2,445
	Attendance by Law Clerk : 2 hrs	$2,000
	Delivery by hand : 23 trips x $50	$1,150
C.	Counsel fees	
	Mr Jonathan Kwan	$69,800
D.	Hours spent by WH : 78 hrs	$312,000
	Conference with expert on 17.7.09 (1430 – 1515 hrs) Tribunal hearing on 3.8.09 (0937 – 1310 hrs) Tribunal hearing on 4.8.09 (0937 – 1350 hrs)	
	Correspondence : 31 letters & 176 emails	
	Drafting, research, perusal of documents, attendance on counsel, SFC, witnesses, Tribunal's secretary, expert, others and general administrative matters.	
	TOTAL	**$387,395**

* * * *

Projected costs post orders by the Tribunal

Perusal of report, drafting of order, correspondence, attendance on Tribunal's secretary and others (WH 2 hrs)	$8,000
Photocopying & registration of order at CFI by Law Clerk (0.5 hrs)	$500
Registration fees payable to the Court of First instance	$1,045
Service of sealed order on parties, SFC, FSTB and the Tribunal (6 trips x $50)	$300
TOTAL	**$9,845**

Appendix VII

Ref. : 508/EN/1013

Name of staff	Rank	06/07	07/08	08/09	09/10	Total	Overhead costs
Geoff Harris	SD		1.17			1.17	181.42
Keith Choy	D			1		1	186.09
Karen Smyth	D		4.84			4.84	750.49
Joe Kenny	D		1	3.99	6.92	11.91	2,185.30
Kenneth Luk	D		0.75			0.75	116.30
Tong, Hon Fai Jimmy	AD/SM	66	99.25	120.75	25.5	311.5	39,346.43
Ng, Chun Ling Agnes	M			327.92		327.92	34,146.31
Stephen Wong	M		17.16	35.5	6.67	59.33	5,851.13
Kenny Ko	M		42.25			42.25	3,594.63
Benny Fung	M			1		1	104.13
Polly Tse	M			11.5	6	17.5	1,822.28
Angela Wong	M				9	9	937.17
Fion Li	Sr Sec	2.5	11.16	3.84	1.5	19	1,546.77
Josephine Wong	Sr Sec	0.58	0.17			0.75	56.27
Emily Mok	Sr Sec			24.66	1.25	25.91	2,445.13
Zoe Lam	Clerk		2	5.5		7.5	672.54
Greenie Wong	Clerk			8.75		8.75	825.74
Irene Tse	Sec			3.5		3.5	330.30
Sophia Shiu	Exe Sec/Sr Sec			96.5	11.5	108	10,191.96
Jones Tsang	Clerk			10.25		10.25	967.29
Christine Choy	Clerk				2.5	2.5	235.93
Candy Wu	Clerk		1	1.25		2.25	194.71
Teresa Ho	Sr Sec			4.75		4.75	448.26
Total		69.08	172.99	655.67	63.92	981.33	107,136.55

Total overhead costs for the above : **$107,137**

Prepared by : Heidi Lo
Manager-Finance & Administration

03-Jul-09

Statement of Costs
508/EN/1013

Officer	Year*	Hours
Choy, Chung Fai Keith		1.00
	2008/09	1.00
Choy, Kwun Yuk Christine		2.50
	2009/10	2.50
Fung, Ho Yin Benny		1.00
	2008/09	1.00
Harris, Geoffrey Frank		1.17
	2007/08	1.17
Ho, Wai Man Teresa		4.75
	2008/09	4.75
Kenny, Michael Joseph		11.92
	2007/08	1.00
	2008/09	4.00
	2009/10	6.92
Ko, Lai Kee Kenny		42.25
	2007/08	42.25
Lam, Wai Ling Zoe		7.50
	2007/08	2.00
	2008/09	5.50
Li, Cho Fun Fion		19.00
	2006/07	2.50
	2007/08	11.17
	2008/09	3.83
	2009/10	1.50
Luk, King Yip Kenneth		0.75
	2007/08	0.75
Mok, Yuen Ting Emily		25.92
	2008/09	24.67
	2009/10	1.25
Ng, Chun Ling Agnes		327.92
	2008/09	327.92
Shiu, Ka Pui Sophia		108.00
	2008/09	96.50
	2009/10	11.50
Smyth, Karen		4.83
	2007/08	4.83
Tong, Hon Fai Jimmy		311.50
	2006/07	66.00
	2007/08	75.25
	2008/09	144.75
	2009/10	25.50
Tsang, Tsz Chung Jones		10.25
	2008/09	10.25
Tse, Oi Lin Irene		3.50
	2007/08	3.50
Tse, Po Shan Polly		17.50
	2008/09	11.50
	2009/10	6.00
Wong, Kai Ho Stephen		59.33
	2007/08	20.67
	2008/09	32.00
	2009/10	6.67
Wong, Mei Mei Angela		9.00
	2009/10	9.00
Wong, Mei Yee Josephine		0.75
	2006/07	0.58
	2007/08	0.17
Wong, Shuk Kiu Greenie		8.75
	2008/09	8.75
Wu, Kam Ting Candy		2.25
	2007/08	1.00
	2008/09	1.25
Grand Total		981.33

Total Cost	$	385,507.78

Prepared by : Ross Hui

Verified by : Mavis Ip

Remarks : The above staff costs are computed per 2006/07, 2007/2008, 2008/2009, 2009/10 remuneration structure and benefits as shown under (*).

June 17th 2008

Mr Geoff Harris
SFC
8th Floor, Chater House
8 Connaught Road Central
Hong Kong

Clive Rigby
c/o Lippo Securities Ltd
Room 2302, Tower One
Lippo Centre
89 Queensway
Central
Hong Kong

Dear Mr Harris

Re: China Overseas

PAID

Here is my fee note for services rendered to date in respect of the above case.

In Conference

Jan 31st 2007	Stephen Suen & Jimmy at Lippo	16:00 – 17:05	1 hour 05 minutes
Feb 12th 2007	Stephen Suen & Jimmy at Lippo	11:00 – 11:12	0 hour 12 minutes

Reading, Notes, Drafting & Telephone

Feb 6th 2007	Supplementary report	2 hours 20 minutes
Feb 9th 2007	Reading, drafting & telephone with Stephen Suen	1 hour 45 minutes
Mar 5th 2007	Supplementary report (15:00-16:35;17:15-18:30)	2 hours 50 minutes
	Total:	8 hours 12 minutes

8 hours 12 minutes @ HK$3,800 per hour **HK$31,160**

Yours sincerely

Clive Rigby

* checked correct.

Jimmy Tong
SM(I)
2.7.2008

Appendix VIII

Attachment B

A Breakdown of SFC costs and expenses reasonably incurred in relation to the proceedings before the Tribunal arising from the issues of public interest immunity and legal professional privilege

Handling Solicitor in SFC

SFC's In-house Counsel (Practising Solicitor)	Year of Admission
Lisa Chen (LC)	1995 (HK)

Breakdown of SFC staff costs

(i) Communications Including Conferences, Telephone Calls and Letters/ e-mails

Attendance on client	LC	5.2 hr
Attendance on Simmons & Simmons	LC	6.9 hr
Attendance on MMT	LC	0.8 hr
Attendance on DOJ	LC	2.2 hr
Attendance on counsel	LC	4.1 hr
	Sub total:	19.2 hr

(ii) Professional Work

Perusal and review of documents and preparing the PII certificate	LC	7.3 hr
Preparation for conference with Counsel	LC	0.3 hr
Meeting with Counsel	LC	0.7 hr
Preparation for hearings before the Tribunal	LC	2.3 hr
Attending hearings before the Tribunal	LC	3.2 hr
	Sub total:	13.8 hr

Total	**:**	**33 hours**
SFC Staff Costs :		**$26,178**

Counsel fees

Mr. Roger Beresford's fees	**$140,000**
Grand Total:	**$166,178**

Appendix IX

Attachment C

A Breakdown of SFC costs and expenses reasonably incurred in relation to or incidental to the hearings before the Tribunal on 3rd and 4th August 2009

Handling Solicitor in SFC

SFC's In-house Counsel (Practising Solicitor)	Hourly Rate	Year of Admission
Evelyn Tsang (ET)	$850	1996 (HK) (call to the Bar)
Lawrence Tse (LT)	$750	1995 (HK) (practising solicitor)

Breakdown of SFC staff costs

(i) Communication Including Conferences, Telephone Calls and Letters / emails

		ET	LT
Attendance on client		0.5 hr	1 hr
Attendance on Presenting Officer			0.3 hr
	Sub-total for (i):	0.5 hr	1.3 hr

(ii) Professional Work

Perusal and review of correspondence file, hearing bundles, parties' submissions, transcripts of hearings		3 hr	5 hr
Preparing written submissions		2.5 hr	5 hr
Preparation for hearings on 3 & 4 August 2009			2 hr
Attending hearings before the Tribunal On 3 & 4 August 2009			8 hr
	Sub-total for (ii):	5.5 hr	20 hr
	Grand total (i) + (ii):	**6 hr**	**21.3 hr**

SFC Staff Costs: **$21,075**

Appendix X

May 29th 2009

Ms Winnie Ho
Department of Justice
3/F High Block QGO
66 Queensway
Hong Kong

Clive Rigby
c/o Lippo Securities Ltd
2302 Tower One
Lippo Centre
89 Queensway
Central
Hong Kong

Dear Winnie

Re: China Overseas

Here is my fee note for services rendered to date in respect of the above case.

In Conference

Jan 22nd 09	Winnie & Counsel, Jonathan at Chambers (10:00-12:45)	02 hrs 45 mins
Feb 11th 09	Jonathan, William at Chambers (14:30 – 17:15)	02 hrs 45 mins
Mar 16th 09	Telephone conference with Winnie Ho	00 hr 20 mins
Mar 17th 09	Jonathan Kwan at Chambers (14:30 – 15:55)	01 hr 25 mins

Reading, Notes, Drafting & Telephone

Dec 22nd 08		00 hr 45 mins
Dec 29th 08	Response to Witts	01 hr 35 mins
Jan 22nd 09	Reviewing & compiling Index, charts & placement table	02 hrs 00 min
Feb 4th 09	Reviewing Jonathan Kwan's opening statement	00 hr 40 mins
Feb 4th 09	Reviewing Witts latest statement (19:00 – 20:15)	01 hr 15 mins
Feb 5th 09	Reviewing Witts statement- research including Conversation with Winnie & requests to SFC for data & statements	02 hrs 55 mins
Feb 5th 09	Response to Witts, reviewing data (16:30 – 17:00)	00 hr 30 mins
Feb 5th 09	Reviewing data, responding to Witts (18:00 – 19:05)	01 hr 05 mins
Feb 6th 09	Drafting (10:20 – 12:45 ; 14:45 – 18:15)	05 hrs 55 mins
Feb 7th 09	Drafting (13:15 – 15:02 ; 15:30 – 16:15)	02 hrs 32 mins
Feb 8th 09	Drafting (10:25 – 12:05 ; 21:45 – 22:55)	02 hrs 50 mins
Feb 9th 09	Drafting, reading & research(12:05 –12:45 ; 14:30 – 18:40)	04 hrs 50 mins
Feb 9th 09	Read drafting, reading & research (18:40 – 22:53)	04 hrs 13 mins
Feb 10th 09	Compiling charts & analysis (9:30 – 11:00)	01 hr 30 mins
Feb 10th 09	Reading research & notes(11:00 – 12:40 ; 15:05 – 17:00)	03 hrs 35 mins
Feb 11th 09	Drafting	00 hr 40 mins
Feb 16th 09	Phone transcript reading	02 hrs 40 mins
Feb 18th 09	Reviewing data, responding to counsel	12 hrs 20 mins
Feb 19th 09	Reviewing data (8:30 – 9:30)	01 hr 00 min
Feb 19th 09	Reviewing data, responding to counsel	06 hrs 13 mins
Feb 20th 09	Reviewing data, responding to counsel (8:15 – 9:15)	01 hr 00 min
Mar 9th 09	Resorting stock data	02 hrs 06 mins
Apr 2nd 09	Reading & notes	02 hrs 00 min
Apr 3rd 09	Reading & notes (10:20-12:30 ; 14:28-16:15)	03 hrs 47 mins
Apr 3rd 09	Reading & notes at home	00 hr 20mins
	Sub-total:	75 hrs 31 mins

75 hours 31 minutes @ HK$4,200 per hour: HK$ 317,170

In Court

Feb 16th 09	MMT attendance (10:00 – 13:30)	HK$20,000
Feb 17th 09	MMT attendance (9:30 – 13:30)	HK$20,000
Feb 18th 09	MMT attendance (9:30 –13:30)	HK$20,000
Feb 19th 09	MMT attendance (9:30 – 13:30)	HK$20,000
Feb 20th 09	MMT attendance (9:30 – 11:00)	HK$20,000
Mar 19th 09	MMT attendance (10:00 – 13:30)	HK$20,000
Mar 31st 09	MMT attendance (10:00 – 13:30)	HK$20,000
Apr 1st 09	MMT attendance (14:00 – 16:00)	HK$20,000
Apr 6th 09	MMT attendance (9:30 – 13:30)	HK$20,000
Apr 7th 09	MMT attendance (9:30 – 13:30)	HK$20,000
Apr 28th 09	MMT attendance (9:30 – 10:30)	HK$20,000
	Sub-total:	HK$220,000

Total: HK$ 537,170

Yours sincerely

Clive Rigby

PANG CHEUNG HING ALEXANDER

26G Valiant Park, 50 Conduit Road, Central, Hong Kong

4 August 2009

FEE NOTE

To: Market Misconduct Tribunal
c/o 3/F High Block
Queensway Government Offices
66 Queensway, Hong Kong

Attn. Mrs. Winnie W Y HO

Re: **Expert Witness Fee**
China Overseas Land and Investment Limited

	HK$
Lump Sum Fee for preparing the relevant expert statements	80,000
Hearing Fee on 3 August 2009 1.5 Hours at $4,000 per hour	6,000
Total Amount	86,000

(HK DOLLARS EIGHTY SIX THOUSAND ONLY)

(Alex Pang)

(Settlement can be made by transferring to my account No. **608-161303-888 with HSBC***)*

Appendix 1

Breakdown of Legal Cost

Date of invoice	Invoice number	Invoice amount
10 November 2004	1087824	HK$41,513.00
3 March 2005	1100101	HK$146,585.70
28 September 2005	1121734	HK$115,000.00
6 February 2009	1272127	HK$56,038.18
Total:		HK$359,136.88

Appendix 2

Breakdown of Time Cost

Days			Particulars
Mr. Kong	**Mr. Wu**	**Mr. Nip**	
1	1.5	3.5	Attending the Tribunal
1	1	1	Meeting with the lawyers
0	1	1	Interviews at SFC
2	2	2.5	Preparing for the case

Total: 4 Days 6 Days 8 Days

Amount: HK$67,600.- HK$62,700.- HK$56,000.- Total: HK$186,300.-

Daily rate based on 22 working days a month:-

(1) Mr. Kong: HK$16,900.-
(2) Mr. Wu: HK$10,450.-
(3) Mr. Nip: HK$7,000.-

Appendix XI

(Attachment to the letter dated 31 July 2009 from the DoJ)
Chronology – China Overseas Land & Investment Limited

Date	Event
27.7.06	SFC's letter referring a suspected market misconduct matter to FS.
28.7.06	FSTB's referral to DoJ for advice.
13.11.06	DoJ's letter on behalf of the FS requesting materials/clarifications from the SFC.
14.11.06	SFC's request for a meeting followed by a letter dated 21.11.06.
22.11.06	DoJ's letter to SFC addressing queries by SFC.
24.11.06	Meeting between FSTB and SFC (DoJ in attendance as FSTB's advisor).
22.3.07	DoJ's letter to SFC enquiring about progress.
30.3.07	SFC's reply to DoJ's letter of 13.11.06.
13.4.07	DoJ's email seeking further documents from the SFC arising from the 30.3.07 letter.
18-23.4.07	Correspondence between DoJ and SFC, DoJ seeking further documents and/or clarifications from SFC.
27.4.07	DoJ's draft advice prepared.
8.6.07	DoJ's instructions to leading counsel for advice.
25.6.07	Advice from leading counsel.
20.7.07	DoJ's advice to FSTB.
31.7.07	FSTB's request to DoJ for a draft s252 notice referring matter to the MMT.
3.9.07	DoJ's draft s252 notice to FSTB.
10.9.07	FSTB seek approval from FS to issue s252 notice.

12.9.07	FS's approval s252 notice issued.

Appendix XII

(Reproduced from paragraph 6 of the Supplemental Submissions of the Securities and Futures Commission (SFC) dated 31 July 2009 in respect of the Application under section 257(1)(f) of the Securities and Futures Ordinance for investigation costs)

Chronology of events in relation to SFC's initial investigation

Date	Event
22.9.2004	SFC commenced investigation of this matter.
22.4.2005	SFC investigators sought preliminary legal advice on evidence from SFC's in-house lawyers.
5.11.2005	SFC engaged Clive Rigby to give expert evidence in the case.
8.12.2005	The last reply received by SFC in response to its demands for records and documents.
10.2.2006	Clive Rigby gave his first expert statement.
16.2.2006	The matter was referred to SFC's in-house lawyers for legal advice.
27.7.2006	SFC reported the matter to the Financial Secretary.
21.3.2007	Clive Rigby gave his first supplemental expert statement.
12.9.2007	Financial Secretary's Notice to the Tribunal under s252(2) of the SFO.

Appendix XIII

"Composite Chronology" of significant steps taken in the investigation of the dealing in COLI shares in January 2004 and the proceedings before the Tribunal

January 2004	
7-26	the period of time stipulated as relevant in the FS's notice to the Tribunal;
21 and 26	the sale of COLI shares in the fund managed by Mr Edmond Leung; 26 January-the sale of shares in the funds managed by Mr Steve Luk;
July 2004	
20	SFC letters to JPM, ABN AMRO, JFAM and COLI requesting information in respect of the announcement on 26 January 2004 of the placement of COLI shares;
September 2004	
22	SFC commenced "investigation" under section 182;
23	section 183 notices from the SFC to COLI, ING Securities (for ABN AMRO), JFAM and JPM requesting tapes and transcripts of telephone conversations of the Specified Persons, together with other documentation;
October 2004	
27	section 183 notice from the SFC to Mr Edmond Leung informing him that he was a "person under investigation" and requiring him to attend an interview;
	section 183 notice from SFC to JFAM requesting information;
November 2004	
18	SFC interview of Mr Edmond Leung;
December 2004	
1	section 183 notice from the SFC to COLI requesting documentation;
February 2005	
4	section 183 notice from the SFC to Mr David Tsien informing him that he was a "person under investigation" and requiring him to attend an interview;
17	SFC interview of Mr David Tsien;
March 2005	
8	section 183 notice from the SFC to Mr Steve Luk informing him that he was a "person under investigation" and requiring him to attend an interview;
22	SFC interview of Mr Steve Luk;
May 2005	
6	second SFC interview of Mr Edmond Leung;
9 May-15 July	SFC interviews of witnesses (Mr Nip, Mr Kong, Mr Long, Mr Fane and Mr Weiner);
June 2005	
7	section 183 notice from the SFC to JPM requesting information;

November 2005	
30	section 183 notices from the SFC to ABN AMRO and JFAM requesting documentation;
December 2005	
8	SFC received last documentation request under section 183;
February 2006	
10	first expert report of Mr Clive Rigby;
July 2006	
27	the SFC informed all three Specified Persons that they had concluded the investigation in which each of them had been a "person under investigation" and that they had "referred the matter to the FS with a recommendation that a Market Misconduct Tribunal be convened"; the SFC referred the case to the FS;
28	FS referred the case to the DoJ;
November 2006	
13-24	correspondence in which the DoJ on behalf of the FS requested further material/clarifications from the SFC; meeting between FSTB (DoJ) and SFC;
December 2006/ January 2007	Mr Ian Long was re-interviewed by the SFC and provided a further statement dated 19 January 2007;
March 2007	
13	DoJ's enquiry of SFC of progress;
30	SFCs reply to the DoJ's request of 13 November 2006 for further material/clarifications;
April 2007	
13-23	DoJ's request of SFC for further documents/clarifications;
27	DoJ's draft advice prepared;
June 2007	
8-25	DoJ sought and received advice from leading counsel;
July 2007	
20	DoJ's advice to FSTB;
31	FSTB requested DOJ to draft section 252 notice;
September 2007	
3	DoJ sent FSTB draft section 252 notice;
12	FS's notice pursuant to section 252;
October 2007	
23	S for J appointed the Presenting Officer;
25	the FS, acting for the Chief Executive, appointed the ordinary members of the Tribunal;

26	by letter the Presenting Officer informed the Specified Persons of the date of the first hearing of the Tribunal;
31	first hearing of the Tribunal at which the Tribunal indicated tentatively that it proposed conducting the substantive hearing commencing 18 February 2008; also, the parties were informed that on 29 October Hartmann, J had granted the Specified Persons in the proceedings before the Tribunal in respect of QPL leave to apply for judicial review, inter-alia, in respect of the jurisdiction of the Tribunal;
November 2007	
9	counsel for Mr David Tsien applied for a stay of the proceedings before the Tribunal "pending the final resolution of the judicial review proceedings" in QPL. Counsel for Mr Edmond Leung and Mr Steve Luk indicated that they were neutral to the application, whereas the Presenting Officer supported the application. The Tribunal vacated the dates tentatively fixed for the substantive hearing to commence on 18 February 2008, set a timetable for the provision of written submissions in respect of "any and all" preliminary issues, reserving three days in February 2008 for any such hearing;
December 2007	
5	counsel for Mr Edmond Leung filed written submissions with the Tribunal seeking directions against the SFC in respect of its claims of LPP and PII;
7	counsel for Mr David Tsien filed written submissions with the Tribunal;
	counsel for Mr Steve Luk filed written submissions with the Tribunal challenging its jurisdiction;
February 2008	
25	hearing of the Tribunal at which the challenge was made to its jurisdiction on behalf of Mr Steve Luk; an application was made on behalf of Mr Edmond Leung that directions be given to the SFC in respect of their claims to LPP and PII; and an order made that the Presenting Officer give particulars of the conduct relied upon in paragraph 2.1 of the FS's notice;
28	ruling of the Tribunal that it had jurisdiction;
March 2008	
13	hearing of the Tribunal on the application of counsel for Mr Edmond Leung in respect of issues of legal professional privilege and public interest immunity, adjourned part heard;
18	judgment of the Court of Final Appeal in *Koon Wing Yee and Insider Dealing Tribunal*;
20	the Tribunal informed the parties that the substantive hearing in these proceedings were fixed for 14 July to 15 August 2008;
May 2008	
20	solicitors for Mr Steve Luk informed the Tribunal by letter that an application for judicial review of the Tribunal's jurisdiction to conduct these proceedings had been filed in the High Court;

23	Directions hearing of the Tribunal-the parties were given a timetable, inter-alia, for the filing of written submissions in respect of the issue of legal professional privilege and public interest immunity, which hearing was fixed at 5 June 2008;
29	letter to the Tribunal from the solicitors representing Mr Steve Luk advising that Hartmann, J had granted an application for leave to apply for judicial review of the Tribunal's ruling and ordered an expedited hearing (HCAL 49/2008);
30	letter to the Tribunal from solicitors representing Mr Steve Luk requesting that the Tribunal to "adjourn these proceedings *sine die* until final determination of Mr Luk's application for judicial review";
June 2008	
5	letter to the Tribunal from solicitors representing Mr David Tsien indicating the agreement to the proposed adjournment of the proceedings before the Tribunal on the basis outlined in the letter of Mr Luk's solicitors of 30 May 2008; the Presenting Officer supported the application and the solicitors for Mr Edmond Leung indicated they were neutral to the application; hearing before the Tribunal at which the proceedings were adjourned until further order;
November 2008	
18	judgment delivered by Hartmann, JA and A Cheung, J in HCAL 49/2008 dismissing the application for judicial review;
19	the Tribunal informed the parties that a "Directions" hearing was fixed for 21 November 2008;
21	at the hearing before the Tribunal a solicitor acting on behalf of Mr Steve Luk informed the Tribunal in respect of the judgment in HCAL 49/2008 and that although his firm did not have instructions, "there is a significant prospect of an appeal", in which event it was anticipated that an adjournment of these proceedings would be sought "pending final determination of those judicial review proceedings"; the Tribunal fixed 18 December 2008 for the adjourned hearing of the issue of legal professional privilege and public interest immunity and 5 January 2009 for the commencement of the substantive hearing;
December 2008	
18	Hearing of application on behalf of Mr Edmond Leung for directions against the SFC in respect of their claims of LPP and PII.

The hearings conducted by the Tribunal thereafter is set out at page 8 of volume 1 of Part I of the Tribunal's report.

Appendix XIV

Market Misconduct Tribunal Proceedings
China Overseas Land and Investment Limited

Costs and Expenses incurred by the Tribunal in relation to the hearing of and matters incidental to the application made on behalf of Mr Edmond Leung for directions in respect of claims of LPP and PII

Item	Costs Incurred ($)
1. Chairman of the Tribunal *	66,007.47
2. Tribunal Secretariat *	9,294.84
3. Fees for Members, Court Reporter and Court Interpreter	33,335.42
Total:	**108,637.73**

* Based on the hours worked on an hourly rate calculated by reference to "Staff Cost Ready Reckoner" for 2007-2008 and 2008-2009.

Appendix XV

Market Misconduct Tribunal Proceedings
China Overseas Land and Investment Limited

Costs and Expenses incurred by the Tribunal
in relation to the hearing of and matters incidental to the challenge
made on behalf of Mr Steve Luk to the jurisdiction of the Tribunal

Item	Costs Incurred ($)
1. Chairman of the Tribunal *	57,251.14
2. Tribunal Secretariat *	6,107.14
3. Fees for Members, Court Reporter and Court Interpreter	14,126.88
Total:	**77,485.16**

* Based on the hours worked on an hourly rate calculated by reference to "Staff Cost Ready Reckoner" for 2007-2008.

Appendix XVI

Market Misconduct Tribunal Proceedings
China Overseas Land and Investment Limited

Tribunal's Costs and Expenses in respect of and incidental to the proceedings before the Tribunal (excluding those related to the issues of LPP and PII, and the challenge to the jurisdiction of the Tribunal)

Item	Cost ($)
1. Tribunal Chairman *	1,896,580.56
2. Tribunal Members	418,895.68
3. Tribunal Secretariat *	476,293.02
4. Fees for Court Interpreters	58,800.00
5. Fees for Court Reporters	226,475.00
6. Fees for Expert Witnesses (a) Mr Clive Rigby (discounted by 30% as per paragraph 1272) (b) Mr Pang Cheung Hing	462,019.00
7. Postage	78.40
Total:	**3,539,141.66**

* Based on the hours worked on an hourly rate calculated by reference to "Staff Cost Ready Reckoner" for 2007-2008 and 2008-2009.

Appendix XVII

Basis of the calculations of the monetary orders made under Section 257(1)(e) and Section 257 (1)(f).

(I) Section 257(1)(e).

	Amount to be paid to the Government by		
	Mr David Tsien	**Mr Edmond Leung**	**Mr Steve Luk**
DoJ			
Paragraph 1245	$726,204.80	$726,204.80	$726,204.80
Paragraph 1247	$55,026.00	$55,026.00	$55,026.00
Tribunal (Paragraph 1273-4)	$1,179,713.89	$1,179,713.89	$1,179,713.89
Tribunal - LPP/PII (Paragraph 1269)	-	$108,637.73	-
Tribunal - Jurisdication (Paragraph 1270)	-	-	$77,485.16
Total:	**$1,960,944.69**	**$2,069,582.42**	**$2,038,429.85**

(II) Section 257(1)(f).

	Amount to be paid to the SFC by		
	Mr David Tsien	**Mr Edmond Leung**	**Mr Steve Luk**
Paragraph 1249	$174,601.00	$174,601.00	$174,601.00
SFC-LPP/PII Paragraph 1268	-	$166,178.00	-
Paragraph 1268		$21,075.00	-
Total:	**$174,601.00**	**$361,854.00**	**$174,601.00**