The report of the Market Misconduct Tribunal into dealings
in the shares of China Overseas Land and Investment Limited
on and between 7 January 2004 to 26 January 2004

Parts I & II : A report pursuant to section 252(3)(a), (b) and (c) of the Securities and Futures Ordinance, Cap 571.

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Abbreviations

ABN AMRO	ABN AMRO Asset Management (Asia) Limited
AMS	Automatic Matching System
COLI	China Overseas Land and Investment Limited
ECDM	Equity Capital and Derivatives Markets Department
ECM	Equity Capital Markets Department
FS	Financial Secretary
HSI	Hang Seng Index
JFAM	JF Asset Management Limited
JP Morgan	JP Morgan Securities (Asia Pacific) Limited
LPP	Legal Professional Privilege
Mr Alex Pang	Mr Pang Cheung Hing, Alex
Mr Andrew Lau	Mr Lau Kin Wai, Andrew
Mr Chang	Mr Jonathan Chang
Mr David Tsien	Mr Tsien Pak Cheong, David
Mr Edmond Leung	Mr Leung Chi Keung, Edmond
Mr Horace Nip	Mr Nip Yun Wing, Horace
Mr Ian Long	Mr Long Tien Ian
Mr Kong	Mr Kong Qingping
Mr Kwan	Mr Jonathan Kwan
Mr Micky Lai	Mr Lai Wai Kei, Mickey
Mr Raymond Lee	Mr Lee Ho Leung, Raymond
Mr Rigby	Mr Rigby, Clive Derek Conway Louis
Mr Rupert Fane	Mr Fane, Rupert John Alexander
Mr Steve Luk	Mr Luk Ka Cheung, Steve
Mr Sussex	Mr Charles Sussex, SC
Mr Witts	Mr Witts, Richard Arthur

Abbreviations

Mr Wu	Mr Wu Jianbin
Ms Ismail	Ms Roxanne Ismail
Ms Muriel Sung	Ms Sung Yerk Kwan, Muriel
Ms Stella Fung	Ms Fung Sau Hong, Stella
Ms Winnie Chan	Ms Chan Ho Yun, Winnie
NAV	Net Asset Value
PII	Public Interest Immunity
SEHK	Stock Exchange of Hong Kong Limited
SFC	Securities and Futures Commission
SforJ	Secretary for Justice
the Ordinance	Securities and Futures Ordinance

CHAPTER 6

A CONSIDERATION OF THE EVIDENCE

Character.

862. The Tribunal has treated all of the Specified Persons as benefiting from the Chairman's direction in respect of "Good Character".

Was Mr David Tsien a person "connected with" COLI?

863. In addressing the question of whether or not it has been proved that Mr David Tsien was a person "connected with" COLI the Tribunal has had regard to the Chairman's directions in respect of section 247(1)(c) and (d) of the Ordinance. Clearly, it is the former provision that is stipulated in paragraph 3 of the FS's Notice. In respect of "relevant information", the former provision requires proof that Mr David Tsien occupied "a position which may reasonably be expected to give him access" and the latter provision that he has "access" to that information.

The position of Mr David Tsien in January 2004.

864. In January 2004, Mr David Tsien held the title of equity salesman in the Sales Department of JP Morgan of which firm he was a long-standing employee. As such, his role in a placement of the shares of a client of JP Morgan included testing the market demand, obtaining an institutional client as anchor and inviting other institutional clients to subscribe to the placement.

The submissions made on behalf of Mr David Tsien.

865. It is submitted on behalf of Mr David Tsien that, given that he was a salesman in the Sales Department of JP Morgan, which was not part of an

"insider area" of JP Morgan it " … can be reasonably expected that staff in such department will *not* have access to insider information".

The submissions made on behalf of Mr Edmond Leung.

866. In supporting the submissions made on behalf of Mr David Tsien it was submitted on behalf of Mr Edmond Leung that in light of the position occupied by Mr David Tsien there was a reasonable expectation not only that he would be insulated from non-public, price sensitive information but also that there would be in place a "Chinese Wall" between the public and private sides of JP Morgan. Whilst it was accepted that it was to be expected that Mr David Tsien, as an equity salesman, would have access to companies and liaise with the ECDM of JP Morgan it was not to be expected that he would have access to non-public price sensitive information from either source.

The position taken on behalf of Mr Steve Luk.

867. In his written submissions Mr Sussex made no reference to any submission in respect of the issue of whether or not Mr David Tsien was a person "connected" with COLI. In his oral closing submissions he confirmed that to be the case.

The approach of the Tribunal.

868. The Tribunal is satisfied that the resolution of the question it has posed, " ... depends on the particular facts of each case". (See the report of the Insider Dealing Tribunal in *Public International Investments Ltd*, Chapter 11.2 (iii).) Regard must be had to the reality of the situation not merely to the labels ascribed to positions of employment.

The role of Mr David Tsien in the placement.

869. There is no doubt that there is a considerable body of unchallenged evidence of a role performed by Mr David Tsien in the COLI placement that went far beyond the role to be expected of an equity salesman not only in respect of JP Morgan itself but also in relation to COLI. There is no doubt that he had actual access to detailed information about the COLI placement : directly and indirectly in respect of COLI's position and directly in respect of JP Morgan's position.

Mr David Tsien's relationship with Mr Horace Nip.

870. There is no dispute that, on the evidence of both Mr Horace Nip and Mr David Tsien, the two of them had enjoyed a business relationship prior to January 2004. They had been introduced months earlier, in 2003, by Mr Raymond Ngai, an Analyst at JP Morgan who produced reports on COLI. Mr Horace Nip was an officer of COLI, being its Financial Controller and an Executive Director. There is no dispute that in late November and early December 2003, Mr David Tsien had played a significant role in the acquisition by JFAM of two blocks of 60 million COLI shares, as a result of which disclosure was made by JP Morgan of an aggregate holding of more than 5% of COLI shares.

871. It is apparent from the telephone recordings that in January 2004 Mr David Tsien and Mr Horace Nip enjoyed a cordial relationship evidenced by their use of first names and informal banter in telephone conversations. Mr David Tsien occupied the role of an active co-ordinator in respect of the lunch meeting between COLI, JFAM and JP Morgan on 5 January 2004. On 2 January 2004 he reminded Mr Ernest Liu of JFAM that he was to attend that meeting and, having advised Mr Edmond Leung of the prospective meeting, informed him that he had bought a lot of COLI shares for JFAM. On 5 January

2004, he reminded Mr Steve Luk that he was to attend the lunch and left a voice message to the same effect with Mr Horace Nip. The lunch meeting was attended by Mr Steve Luk and Mr Ernest Liu of JFAM, Mr Horace Nip and Mr Kong of COLI, and Mr David Tsien and Mr Raymond Ngai of JP Morgan.

872. Also, it is clear from the telephone recordings of their conversations and the evidence of Mr Horace Nip that from 5 January 2004 he was involved in intimate discussions with Mr David Tsien in respect of the ongoing developments in pursuit of the placing of COLI shares. Mr David Tsien occupied the role of mentor and adviser of COLI in that exercise. In the meeting held subsequently at the request of Mr Horace Nip on the afternoon of 5 January 2004 in the Hong Kong Club, Mr Horace Nip told Mr David Tsien that COLI was considering doing a placement of 800 million shares at a price of about $1.70 per share.

873. In their conversation at 11:33 on 7 January 2004, Mr David Tsien told Mr Horace Nip of the price sought by COLI for placing it shares, that the market price :

> " … has to go to about $1.90-$2.00.".

Mr Horace Nip explained in his evidence that he had made it clear to Mr David Tsien that Mr Kong was not interested if the placement price was lower than $1.80 per share. In their telephone conversation at 15:13 on 7 January 2004, Mr Horace Nip confirmed to Mr David Tsien that Mr Kong wanted that price, namely $1.80 per placement share. For his part, Mr David Tsien told Mr Horace Nip of the requisite market price of COLI shares :

> "So, a good price would be near two dollars, between $1.90 and $2.00.".

He went on to assert :

> "If it reaches $2.00, the possibility of $1.70 or $1.80 will be higher than now.".

Mr David Tsien's relationship and contact with Mr Ian Long.

874. Mr Ian Long said that Mr David Tsien had introduced him to Mr Horace Nip in early January 2004. Prior to that meeting, he had been informed by Mr David Tsien that COLI wished to raise money by a placement of its shares.

875. It was a recurring theme in Mr Ian Long's testimony that he regarded Mr David Tsien as the person in JP Morgan enjoying the best "relationship" with COLI. It was in those circumstances that he kept him updated not only in respect of developments in JP Morgan's position on the prospect of a placement but also in respect of his dealings with Mr Horace Nip and others at COLI in relation to the same matter. It is to be noted, for example, that in the first of the recordings of telephone conversations between Mr Ian Long and Mr David Tsien on 7 January 2004, Mr Ian Long said of his earlier meeting with Mr Horace Nip that he wanted to :

> " … give you an update actually on the meeting I had with him.".

After Mr David Tsien had made it clear that he had received his own reports of the meeting, "He's pretty stiff with the price" Mr Ian Long went on to stipulate the price requested by COLI as being 180.

876. In their telephone conversation at 13:07 on 19 January 2004, having exchanged information about current developments in the prospective placement, the telephone conversation concluded with Mr David Tsien saying :

> "Have a check with Horace and.. I will also call him today. And if there is anything new, then we should swap information, okay?".

877. In their telephone conversation at 16:24 on 20 January 2004, Mr David Tsien informed Mr Ian Long of the results of his telephone conversation of a few minutes earlier with Mr Wu that the latter was happy with a placement at a price of $1.70, whereas Mr Kong wanted a placement price of $1.80. For his part, Mr David Tsien said that he had asked for :

> " … a compromise at 1.75 on the basis that the stock price should be above $2.00.".

CONCLUSION.

878. On a consideration of all the evidence we have no doubt that in January 2004 Mr David Tsien occupied a position which "may reasonably be expected to give him access" to information in respect of the placement of COLI shares and had so not only by reason of his own business relationship with Mr Horace Nip and other officers of COLI but also by reason of the business relationship between JP Morgan and COLI. Having successfully brokered two block crossings of COLI shares to JFAM from JP Morgan in November and early December 2003 we are sure that Mr Ian Long's description of Mr David Tsien as the man in JP Morgan with the "relationship" with COLI was accurate and apposite. He played a role in bringing the parties together for the lunch of 5 January 2004, followed up immediately in the afternoon with the meeting at the Hong Kong Club with Mr Horace Nip at which he was informed of the terms upon which COLI were considering a placement of it shares.

879. Furthermore, we are satisfied that beginning on 5 January 2004 and thereafter until the announcement after the market closed on 26 January 2004 Mr David Tsien actually had access to information in relation to COLI's prospective placement. Clearly, on an ongoing basis he was in receipt of updated information of the prospective COLI placement, in particular its price, size and the timing of the placement.

880. Of course, at issue is whether or not the information about the prospective placement of COLI shares to which Mr David Tsien had actual access was "relevant information".

Relevant information : the FS's Notice.

881. Paragraph 1 of the FS's Notice of 12 September 2007 avers that, in the period on and between 7 and 26 January 2004, the three Specified Persons had come into possession of "relevant information" in respect of COLI, namely :

> " ... specific non-public price sensitive information that the Company would announce and carry out a top-up placement of 850 million shares at a price of HK$1.8 per share on or about 26 January 2004.".

Did Mr David Tsien disclose information to (i) Mr Edmond Leung and/or (ii) Mr Steve Luk knowing that it was "relevant information"?

882. There is no dispute that Mr David Tsien disclosed information to both Mr Edmond Leung and Mr Steve Luk in respect of a possible, prospective placement of COLI shares. At issue, is whether it was "relevant information" and whether he knew that to be so.

The submissions made on behalf of Mr David Tsien.

883. It was submitted on behalf of Mr David Tsien that at no time earlier than the close of the stock market on 26 January 2004, namely 4:00 pm, did "relevant information" in relation to the COLI placement exist. Amongst the numerous pieces of evidence received by the Tribunal cited in support of that submission the Tribunal was asked to note that the boards of directors of COLI and its holding company did not meet to discuss and grant a mandate to sign an agreement with JP Morgan for the placement of 850 million COLI shares at $1.80 per share until 14:30/15:30 on 26 January 2004. It was submitted that the events of 20 January 2004, in particular those involving Mr Ian Long, Mr Horace Nip, Mr Fang Fang and Mr Kong amounted to no more than COLI "testing the waters" with JP Morgan in respect of a placement of COLI shares. Similarly, it was suggested that the provision of draft placement agreements by JP Morgan to COLI " … did not symbolise any real progress in the deal closed." The Tribunal was invited to note Mr David Tsien's assertion to Mr Raymond

Ngai, in a telephone conversation at 15:51 on 26 January 2004, that their firm was not prepared to sign a placement agreement in which JP Morgan underwrote the placement unless "50% of the placement was covered by quality demand" and that that was not forthcoming until a little later in conversations Mr David Tsien had with Mr Steve Luk. Furthermore, that even after the negotiations ensued from 4:00 pm on 26 January 2004 there remained an issue about the placement price, JP Morgan trying to persuade COLI to place at around $1.70, whereas Mr Kong remained adamant that the placement price be $1.80.

The submissions made on behalf of Mr Edmond Leung.

884. In her submissions on behalf that Mr Edmond Leung, Ms Ismail, supported the assertion made on behalf Mr David Tsien that no relevant information existed until after the close of the market on 26 January 2004. The information that there "would" be a placement of COLI shares did not come into existence until after the close of the market on 26 January 2004.

Specific information.

885. It was submitted that :

- there was no evidence that in fact JP Morgan had made bids to COLI in respect of the placement of its shares at $1.55 and $1.60, as reported by Mr David Tsien to Mr Edmond Leung. Accordingly, that was not "real information" and not specific information;
- the assertion by JP Morgan that the market price of COLI should reach $2.10 before a placement at $1.80 was not specific information, but merely an opinion any market observer might reach; and
- the expressions by Mr David Tsien to Mr Edmond Leung on 20 and 26 January as to the timing of a placement of COLI shares were merely speculation and not specific information.

Price sensitivity of the relevant information.

886. Issue was taken on behalf of Mr Edmond Leung that general knowledge that there "would" be a placement of COLI shares on or about 26 January 2004 at $1.80 would be "likely to lead to a material drop in the COLI share price". In any event, it was submitted that the evidence in respect of the information actually received by Mr Edmond Leung from Mr David Tsien fell short of establishing that he was informed that "there would be a placement of 850 million COLI shares at $1.80" per share.

887. It was contended that the Tribunal did not have sufficient information to determine that information that COLI wanted a placement price of $1.80 and that JP Morgan was unwilling to offer such a price unless the market price of COLI shares was over $2.10, "would influence an investor or the market price at any time before 26 January". Alternatively, if the contingent factor for a placement at $1.80 was a "closing" price of at least $2.00 per share that was not achieved until close of the market on 26 January 2004. Information as to the "guesses" of Mr David Tsien as to the timing of a current placement would not have influenced an investor.

888. Of the expert evidence, for a host of reasons Ms Ismail invited the Tribunal to prefer the evidence of Mr Witts to that of Mr Rigby. In particular, it was submitted that his opinion that news of the COLI placement would not be considered as "exciting" was "difficult to accept as being representative of an objective prospective view in January 2004". By contrast, the Tribunal was invited to accept the factors identified by Mr Witts as likely to impact positively on a reaction to the news of the placement, namely that raising general capital for a property company in a bullish market is positive, that the placement was for specific reasons and that COLI upgrades of an estimated NAV would be expected to send the price of COLI shares up yet further.

889. The Tribunal was invited to guard against viewing the matter retrospectively, but to do so prospectively. The fact that the price of COLI shares did go down after the placement did not mean that it went down "as a result" of the placement. In that respect, it was invited to have regard to the evidence of Mr Witts in which he had suggested a number of possible reasons, other than the announcement of the placement, for the fall in COLI share price, namely profit-taking to raise funds to subscribe for the Shanghai Forte issue, general property sector weakness on 27 January and general market weakness from 28 January 2004.

<u>The submissions made on behalf of Mr Steve Luk.</u>

890. It was submitted on behalf of Mr Steve Luk that there was insufficient evidence for the Tribunal to be satisfied that at the material time he was possessed of relevant information. In particular, it was contended that having regard to the fact that the COLI placement was not finalised until after the market closed on 26 January 2004, prior to that, "there was no degree of certainty that the placement would go ahead, or indeed the JP Morgan would be involved" the information provided to Mr Steve Luk by Mr David Tsien was "at best unreliable information about a possible placement".

891. Of the expert evidence, it was submitted that the Tribunal should accept the evidence of Mr Witts that it was not possible to conclude on the information proved to have been in the possession of Mr Steve Luk "that it was likely to have a material adverse impact upon COLI's share price". In particular, the Tribunal was invited to take that view in light of the evidence as to the nature of COLI's business and the circumstances prevailing in January 2004. The matter was to be judged prospectively and not retrospectively. Nevertheless, it was suggested that even "with the benefit of hindsight it is impossible to say whether

the drop in the COLI share price was a reaction to the placement, and even if it contributed, it is impossible to quantify".

892. Of the ingredient of "relevant information" that it be "specific" information it was submitted that that simply meant it be specific rather than general.

The ambit of the information disclosed by Mr David Tsien to Mr Edmond Leung.

Background.

893. It is to be noted that in telephone conversations of 2 and 5 January 2004 Mr David Tsien informed Mr Edmond Leung that he was to meet, and then had met, named directors of COLI's board on 5 January 2004.

12 January 2004.

Information : a placement at $1.80.

894. It was not until their conversation on the afternoon of 12 January 2004 that Mr David Tsien first informed Mr Edmond Leung that COLI was "pitching" JP Morgan to do a placement at $1.80 per share. He informed him that JP Morgan had bid $1.55 as the price of COLI's placement shares and turn down its request for a price of $1.55. He added that the COLI share price was then $1.69 per share.

13 January 2004.

895. On 13 January 2004, Mr David Tsien informed Mr Edmond Leung in another telephone conversation that COLI's position was resolute in respect of a placement price of $1.80, asserting that, if there was to be a placement of COLI shares it :

> "will be placed at 180, and will not, will not be under 180.".

15 January 2004.

Information : a placement of 800 million shares at $1.80.

896. On 15 January 2004, Mr David Tsien told Mr Edmond Leung in a telephone conversation at 08:47 :

> "we are having negotiations on China Overseas ... on its 800 million shares, but it cannot agree on a price, because it asks for $1.80.".

In response to Mr Edmond Leung urging, "Should kick it back up first, Big Brother" Mr David Tsien claimed that he had said :

> "If you ask for $1.80, then it has to be $2.10.".

However, in his testimony, in the context of a similar assertion made a few minutes later to Mr Steve Luk, Mr David Tsien resiled from that claim, admitting that it was a mere salesman's puff explaining, " ... by then I have no conversation with the company at all.".

Issue : the market price of COLI shares - the placement price.

(i) $1.90-$2.00.

897. Whilst this particular assertion may have been a salesman's puff, the general assertion was grounded in a degree of reality in that as early as 7 January 2004 Mr David Tsien had advised Mr Horace Nip in two separate telephone conversations (11:53 and 15:13) that, if the COLI placement price was to be $1.80, the share price had to be about $1.90 to $2.00. In the latter conversation, Mr David Tsien told Mr Horace Nip of the market price of COLI shares that:

> " ...if it reaches $2.00, the possibility of $1.70 or $1.80 will be higher than now.".

(ii) $2.10.

898. The desirability of market price of COLI shares of $2.10 for a placement at $1.80 per share was stipulated by Mr David Tsien, in his conversation with Mr Raymond Ngai at 08:29 on 12 January 2004, as a price he would suggest, if

asked, by Mr Ian Long. That price was suggested by Mr David Tsien in the context of his assertion that COLI had responded to Mr Ian Long's placement bid price of $1.55 by asking what the share price should reach if COLI wanted to do the placement at $1.80 per share.

899. In his conversation with Mr Steve Luk at 10:59 on 13 January 2004, Mr David Tsien recited the same response of COLI to JP Morgan's bid for the placement of COLI shares at $1.55 per share, in which he placed himself in the role of having a conversation with an unidentified person at COLI in which he had responded to the question posed by COLI by saying, "$2.10".

19 January 2004.

12:04.

900. On 19 January 2004 (12:04) Mr David Tsien had left a voice message on Mr Edmond Leung's telephone, to which the latter thought it likely he had listened, in which he made reference to the sharp rise in COLI shares of nearly 6% that morning, asserting :

> "I tell you they have to place by the end of the month, or they will have to wait until April. Okay perhaps you could take note of that.".

16:25.

901. Following another voice message left on Mr Edmond Leung's telephone by Mr David Tsien at 15:56, in which the latter made a mere reference to COLI, the two men had a telephone conversation at 16:25. At the outset, Mr Edmond Leung enquired twice of the COLI placement, "Time to place?" to which Mr David Tsien responded, "Not yet." The price of COLI shares at the "Close" that day was $1.81. Once again, Mr David Tsien asserted that COLI wanted the placement price to be $1.80 per share. In response to Mr Edmond Leung urging, "Then ask it to 'kick up' the price to $2.20 before placing the shares at $2.00" Mr David Tsien said, "If it is $2.00 it will not be done by me.".

20 January 2004.

09:13.

902. At 09:13 on 20 January 2004, Mr David Tsien left a voice message on Mr Edmond Leung's telephone in which he informed him of COLI that JP Morgan had :

> "upgraded its target price today, to 235. Yesterday, it closed at 181. So, … there is still about 30% upside. We have pushed the NAV up to $2.06.".

Mr David Tsien expressed the opinion that :

> "If it is based on the book NAV, China Overseas can probably in the short term trade above $2.00. If you're interested, give me a call tomorrow.".

10:53.

Issue : market price - placement price.

903. In a telephone conversation at 10:53 on 20 January 2004, Mr David Tsien told Mr Edmond Leung at the outset of the conversation that the COLI share price had already reached $ 2.00 per share. Later, he said :

> "China Overseas now really looks like it's really going to be $1.80 each. If that is the case, if I really help them do it, I will let you know.".

Mr Edmond Leung responded :

> "Let us know earlier. If it is going to be done, so that I may throw some back to the market Big Brother.".

904. In response to Mr Edmond Leung's enquiry as to the price at which COLI would decide to conduct the placement, Mr David Tsien said, "Somewhere above $2.10 would be better", adding "It wants $1.80.".

905. In response to Mr Edmond Leung's assertion that at $1.80, "you're talking about 5% if that $1.96 it is close to ... wah, it is very dangerous" Mr David Tsien said :

> "That's why I'm unwilling to do so. Now I'm offering them just $1.6 each. Therefore, there was no agreement as a result of the talks in respect of the

> price ... in that case, the exercise had better not proceed. It does not need the funds in the first place. Their gearing ratio is set at just 7 to 8%.".

906. In response to Mr Edmond Leung musing, "if it will be placed at $1.80" Mr David Tsien told him twice, "you had better wait until it reaches $2.10." Mr Edmond Leung rejected that suggestion saying, "$2 will just be about right." For his part, Mr David Tsien went on to reiterate the terms of the placement :

> "It said 15%, 800 million shares … it wants $1.80.".

Issue : timing of the placement.

907. In response to Mr Edmond Leung's enquiry as to the timing of the placement, "Will it be after Chinese New Year … Will it be doing the placement before Chinese New Year?" Mr David Tsien said :

> " … well, if the parties get together to talk, as the announcement was issued yesterday, if the parties get together to talk, it will be at least next week before they talk … but there will be an EGM at the end of next week, and the lead time in February will be very short, and then it will enter into the blackout period.".

908. The conversation concluded with Mr Edmond Leung saying :

> "In that case, at 2, at above $2.00, it is a suitable price for disposal, frankly speaking.".

Having twice responded by saying "$2.10", Mr David Tsien replied in the affirmative to Mr Edmond Leung's query, "Isn't that too close?".

26 January 2004.

08:52.

909. At 08:52 on 26 January 2004 Mr David Tsien informed Mr Edmond Leung in a telephone conversation :

> "We guess that China Overseas will go ahead this week. The price range is from $1.70 to $1.80 ... 800 million shares.".

12:30.

910. In a subsequent telephone conversation at 12:30 that day, Mr David Tsien said of the issue of the timing of the COLI placement, " … it is probably going to be placed this week". Mr Edmond Leung responded by enquiring, "Really? Pushed up enough yet (the price)?" and adding :

> "Why don't I sell it all …".

In reply, Mr David Tsien said :

> "If we go ahead, it will be priced at $1.8. The price should be … $2 and above."

He added :

> "For prices above $2, you can consider taking profit … it rose above $2.10 today, did you know that? ... now it is already $2.075.".

The conversation concluded with Mr David Tsien repeating his statement that if JP Morgan went ahead with a placement it would not be priced at more than $1.80 :

> "So, it is either $1.80, or better.".

15:52.

911. In a telephone conversation at 15:52, Mr David Tsien told Mr Edmond Leung of the placement of COLI shares, "I may do it after the market close". In response to Mr Edmond Leung's enquiry, "Okay -- wow, do it immediately today?" Mr David Tsien explained, "We want to avoid any problems that may be caused by delay." The conversation concluded with Mr David Tsien re-iterating the price of the placement shares, "180 or better." He confirmed that JP Morgan would do the placement itself.

The ambit of the information disclosed by Mr David Tsien to Mr Steve Luk.

Background.

912. In January 2004, Mr Steve Luk was in charge of two funds that JP Morgan had held substantial tranches of COLI shares.

5 January 2004.

913. Mr Steve Luk attended the lunch at the Conrad Hotel together with colleagues from JP Morgan, including Mr David Tsien, at which Mr Horace Nip and Mr Kong were the representatives of COLI. Mr Kong answered in the negative his enquiry as to whether or not COLI had any intention of raising funds by way of a placement.

15:37.

914. At 15:37, in a telephone conversation immediately after he had received a telephone call from Mr Horace Nip and arranged to meet him later that afternoon for a drink, Mr David Tsien informed Mr Steve Luk of that fact. Mr Steve Luk discounted Mr David Tsien's assertion :

> "its trend today looks exactly like it wants to conduct a share placement today. Look at it.".

On that day, turnover of COLI shares was over 125 million and the share closed at $1.75, an increase of over 19% from the previous closing price. The intraday "High" was $1.78.

6 January 2004.

915. At 09:03 on 6 January 2004 Mr David Tsien left a voice message on Mr Steve Luk's telephone, in which he confirmed that he had met Mr Horace Nip the previous afternoon and that the latter had told him that COLI were :

> "talking about issuing new shares to place, place the shares as a top-up placing.".

Having described an arithmetic calculation based on a placement issue of 15% of 5.4 billion issued shares, Mr David Tsien said that the proposed placement involved almost 800 million shares. Of the placement price he said, " ... it wants to have it done around $1.70, just above its book NAV".

7 January 2004.

11:54.

916. At 11:54 on 7 January 2004 Mr David Tsien left a voice message on the telephone of Mr Steve Luk in which he said of COLI :

> "they are generally interested in doing placement, but I want to discuss the price with you.".

12:34.

Issue : market price - placement price.

917. As requested on the voicemail, Mr Steve Luk returned Mr David Tsien's call at 12:34, to be informed by the latter :

> "He wants \$1.8. Horace said that their bottom line is \$1.7.".

Having said that CL had upgraded their NAV to \$2.20 and that the following week Goldman Sachs would announce an NAV of \$2.50, Mr David Tsien said :

> "But I have looked at the earnings, 20 times PE, 2% yield, … my inclination is that the price should be lowered further … Because he is talking about an 8% discount.".

In response to Mr David Tsien's observation that at a market price of \$2.00, a placement price of \$1.60 represented a discount of 20%, Mr Steve Luk said :

> " ... if you do it today, it has to be \$1.6 ... If you push it out to \$1.8 by speculation, then it is another matter. You are smart, right?".

918. Mr Steve Luk responded affirmatively to Mr David Tsien's statement, " … if this is the case, I would for the time being indicate to him that there is interest only at prices below \$1.6" but went on to conclude :

> "We don't mind \$1.6 or below. I think we have bought the shares before at \$1.6 or below, so I don't mind.".

15:35.

919. In their conversation at 15:35 on 7 January 2004, Mr David Tsien responded to Mr Steve Luk's enquiry in respect of the performance of COLI shares that day, namely an intraday "High" of \$1.83 against a closing price previous day of \$1.68, by saying :

> "It said to push the price up to $2 by speculation, and then they would be given to us for placement.".

Mr David Tsien went on to say that the placement was to be of 15% of the shares of COLI, namely 800 million shares. He added :

> " … for 800 million shares he, this Kong Qing Ping said he wanted $1.8 per share.".

In response to Mr Steve Luk's enquiry, "So, he wanted it to be $1.8?" Mr David Tsien confirmed that to be the case.

9 January 2004.

09:32.

920. In their telephone conversation at 09:32 on 9 January 2004, Mr Steve Luk responded to Mr David Tsien's statement that JP Morgan were only prepared to offer a price of $1.55 as the placement price of COLI shares, that being a discount of 8% to the closing price of $1.68 the previous day, by saying, "if it is $1.50 odd we will be interested ... " Later in the conversation, Mr David Tsien explained the thinking behind the price of $1.55 firstly, by reference to the fact that, "As he wanted to make it $1.80 per share and Horace said there would be room for negotiation at $1.70 per share" and secondly, "We think $1.50 to $1.55 per share will be much safer." He added :

> " ... the price may be bargained to around $1.60 per share at the end, but anyway we will not make it higher than $1.60 per share. We will give him an offer at $1.55 per share.".

921. In response to Mr David Tsien's assertion that he had been asked to obtain an indication of demand for the placement from Mr Steve Luk, the latter said that there was "absolutely no problem" for demand of US$20 million, adding that if his colleagues were aggressive, demand of US$50 million.

16:44.

Issue : JP Morgan's bid price of $1.55.

922. In a voice message that he left on Mr Steve Luk's telephone at 16:44 on 9 January 2004 Mr Steve Luk informed him that :

> "Li Hui of CL will issue a report regarding China Overseas on Monday, stating that its NAV is $2.50 per share. It is because she feels that only if the NAV is $2.50 per share it would be possible for the placement to be conducted at $1.80. But anyway, we have decided to bid the whole block today at $1.55 per share ... ".

12 January 2004.

12:00.

Issue : offer and refusal of a bid of $1.55.

923. In a telephone conversation at 12:00 on 12 January 2004 initiated by Mr Steve Luk, Mr David Tsien responded affirmatively to his enquiry as to whether or not JP Morgan were going to do the placement of COLI shares. Mr David Tsien went on to say :

> " ... we offered only $1.55 to him last week.".

He did not respond directly to the immediate assertion by Mr Luk that the offer had been refused, rather he said :

> "Then he said immediately, he said 'You seem to have mistaken my meaning. What I want to ask you was that if we want to place the shares at $1.80, what do you want the share price to be?' "

Mr David Tsien went on to say :

> "Then I said okay. I said, then -- I said, $2 is -- since it's – it's a barrier, I said what about $2.10. If it's $2.10 you can make it at $1.80 for sure because it is a discount of over 10%.".

Mr David Tsien described a conversation that he said he had with Mr Horace Nip, in which, amongst other things, he explained to Mr Horace Nip why it was that JP Morgan could not upgrade its NAV of COLI.

Issue : Market Price : placement price.

924. Having informed Mr Steve Luk that COLI would make an announcement that week in respect of China Overseas Construction and of a distribution to existing shareholders of in specie, Mr David Tsien said :

> "Well as for, that is, whether it can go up to $2, a $2.10, I think that's possible because there is a lot of money floating around in the market.".

Mr David Tsien went on to assert :

> " … BOCI was making a big purchase in these few days. It seems that it is probably obtained financing from BOCI and then use the financing to push up its share price, thinking that it could place shares at $1.80 if the price has gone up.".

925. Mr David Tsien confirmed Mr Steve Luk's enquiry that JP Morgan might not be able to make the placement at a price of $1.55 per share, saying, "$1.55, cannot make it for sure" adding, "I ... have talked to him ... he didn't even want ... to answer me.".

Issue : timing of the placement.

926. Mr David Tsien went on to say, " … but he said if he is to do it, it would be either this week or next week." Of the possible timing of the placement Mr David Tsien said :

> "Therefore, we are left with two … Wednesdays, the one this week and that in the week of the 26th, and of the 19th, I think most people won't be in.".

Mr Steve Luk responded by saying, "Right, towards the end of this week, speculate, speculate, speculate" and with words of approval on being told, "if he is to do it, I would tell you about it." The conversation concluded with Mr David Tsien saying :

> " ... if he does it, perhaps there may be some changes. I will alert you anyway.".

13 January 2004.

10:59.

Issue : market Price - placement price.

927. In a telephone conversation with Mr David Tsien that he initiated at 10:59 on 13 January 2004 Mr Steve Luk referred to the then current price of COLI shares in the market, namely $1.65 and enquired sarcastically whether the placement could take place at $1.55. He obtained the anticipated negative answer in response from Mr David Tsien, who went on to say, "And he was still insisting on $1.80". He went on to explain :

> "I tactfully said to him, 'Look this is JP Morgan, we want to strike a deal, but it's $1.55 or below -- or 8% discount of market whichever is lower' ".

He said that in response he was greeted with the statement that he misunderstood COLI's intention and repeated the account he had given in a telephone conversation with Mr Steve Luk at 12:00 on 12 January 2004, of being asked at what price COLI's shares should reach in order to be placed at $1.80 per share. Consistent with his earlier account, he said that he had responded by quoting the price of $2.10, a discount of 15% to the proposed placement price of $1.80.

928. During the conversation Mr David Tsien informed Mr Steve Luk of prospective analysts reports of COLI's NAV, saying that :

> "Li Wei will publish a full report stating that NAV is 250. Morgan Stanley is going to publish one this week. Also 250.".

11:44.

929. In the course of a short telephone, Mr David Tsien told Mr Steve Luk that COLI had said that its placement price was "Not okay". It wanted $1.80 before it would do it.

15 January 2004.

09:23.

Issue : JP Morgan re-bid at $1.55.

930. In the course of a telephone conversation began at 09:23 on 15 January 2004 Mr David Tsien informed Mr Steve Luk :

> " ... today we would go back and bid for that China Overseas, the price is $1.55.".

He added :

> "It wants it to be $1.8. I said no discussion until it reaches $2.10.".

Of course, Mr David Tsien admitted in his evidence that this purported conversation with someone at COLI had not taken place, it was mere salesman's puff.

931. Later in the conversation, Mr Steve Luk said to Mr David Tsien in respect of the possible placement of COLI shares :

> "Give it a push, because I suspect that it is possible that people may be buying China Overseas shares today. So, you may not be able to do the deal at $1.55 again.".

For his part, Mr David Tsien responded, "no, price is flexible ... ". He went on to explain of the discount to market price to be given by JP Morgan that it :

> "will not be very big … talking about 8.5%.".

Issue : timing of the placement.

932. Of the timing of a prospective placement, Mr David Tsien explained that, if it could not be done by the end of January 2004, a "blackout" period prevented it from being done until after the announcement of the company results. He said :

> "Probably it cannot be done next week, because some people will be on leave.".

10:04.

933. In a voice message that he left on Mr Steve Luk's telephone at 10:04 on 15 January 2004 Mr David Tsien informed him that within one or two days COLI shares would be suspended from trading as a result of issues arising about disclosure in respect of China Overseas Property. Of developments in respect of the placement of COLI shares, he said :

> "According to Florence, they will only start negotiating with us on Monday at the earliest … and it will be even better in the week of the 26th. Well, if anything needs to be done it will not be done within these two days.".

16:30.

934. In a voice message that he left on Mr Steve Luk's telephone at 16:30 on 15 January 2004 Mr David Tsien told him twice in respect of COLI's placement :

> "Officially I'm supposed to know nothing at all.".

He added that in consequence he wished Mr Steve Luk to contact either Mr Ian Long or Mr Rupert Fane of JP Morgan's ECDM.

16:52.

935. As requested on the voice message of 16:30, Mr Steve Luk returned the telephone call to Mr David Tsien and explained to him in some detail why he would not make contact with personnel of JP Morgan's ECM :

> " ... look, the things that you've told me are all rumours … the things that I've told you are based on your rumour. I will think in this way ... if I talk with him and he tells me right away that it would probably be done, then I'll be dammed ... His are not rumours, he really goes to make a bid ... Yep, while we are very -- that is being in the same company, it's even more outrageous, even more dangerous.".

For his part, Mr David Tsien responded on a number of occasions indicating that he understood the assertions being made by Mr Steve Luk.

936. Later in the conversation, Mr Steve Luk confirmed his earlier response in respect of the level of demand for a placement at $1.55 as being "ranging

from 20 million US dollars to 50 million US dollars." He added that demand for a placement at $1.60 would depend on the market, "Of course it will be okay when the market is crazy". In response to Mr David Tsien's re-confirmation that the discount from the market price for the placement shares would be "at least 8%" Mr Steve Luk indicated that if the discount was lower it would be difficult to do the deal.

Issue : timing of the placement.

937. Of the timing of a possible placement of COLI shares, Mr Steve Luk asserted :

> "Well, it will be done in times like this or it cannot be done. That is the market may be a little bit crazy.".

In response Mr David Tsien said:

> "Horace told me that, he said, 'it doesn't matter if you take days off next week'. He said it would probably be the week after next, yep after January.".

19 January 2004.

11:01.

938. At the outset of their conversation at 11:01 on 19 January 2004 Mr David Tsien told Mr Steve Luk, "You were right. That China Overseas keeps flying", that being a reference to its rising share price. From a closing price on the previous trading day of $1.70 it rose to an intra-day "High" of $1.86 on a turnover of over 105 million shares. Of COLI, Mr Steve Luk replied, "They can't wait". Mr David Tsien said, "Those buggers, indeed, obviously marking up".

15:03.

939. In a conversation between Mr Steve Luk and Mr David Tsien at 15:03 on 19 January 2004 Mr David Tsien addressed and amplified pieces of information that he had left on Mr Steve Luk's voicemail earlier, at 14:28. In

the context of the sharp rise in the price of COLI shares that day, he informed Mr Steve Luk that CL had made it known that COLI was not going to place shares. In saying to Mr Steve Luk, “You actually believe what CL said?” he invited rejection of that assertion, going on to say “maybe not for this week.” Later in the conversation, in addressing the timing of a placement he said :

> “Well, if there is something to be done, it will be in the week of the 26 or in early February, that is next week.”.

20 January 2004.

09:13.

940. At 09:13 on 20 January 2004, Mr David Tsien left a voice message on Mr Steve Luk’s telephone informing him that JP Morgan was going to revise its “target price” for COLI to $2.35 and had revised its estimated NAV to $2.06, noting that the “Closing” price of COLI shares the previous day was $1.81. He went on to assert :

> “If it’s based on the book NAV, China Overseas can probably in the short run trade above two dollars. If you are interested, give me a call tomorrow.”.

15:50.

941. In a short telephone conversation at 15:50 on 20 January 2004 Mr David Tsien enquired of Mr Steve Luk of demand for a COLI placement at $1.70 per share. “Is it okay for you if it is 170?” He told him that JP Morgan had now revised its “target price” for COLI to $2.35. Mr Steve Luk replied that there would be buyers at that price, but that he did not know how many.

16:06.

Issue : price of and timing for the placement.

942. At the outset, or their telephone conversation at 16:06 on 20 January 2004 Mr David Tsien told Mr Steve Luk of the price of COLI shares in the placement :

> "They want $1.75. Why is that the case? Director Wu wants $1.7, Kong Qing Ping wants it to be $1.8. I said to him, 'It's best if you can make some concession to us'. For this, it will be done tomorrow at the earliest, next week the latest.".

In reply to Mr Steve Luk's statement, "Not today -- no agreement has been reached yet", Mr David Tsien said :

> "No it would not be today because we still have some due diligence to do.".

Mr David Tsien returned to the issue of due diligence at the end of the conversation, "So, begin to do due diligence."

Of the negotiations, Mr David Tsien went on to say of Mr Wu Jian Bin :

> "He is the real boss ... I was taken by surprise ... because when we came together to negotiate the price, it was he whom we were negotiating with.".

Issue : market price - placement price.

943. Mr Steve Luk observed :

> "$1.75, if it is done tomorrow, so if the price goes up like this, this is possible.".

Mr David Tsien went on to say :

> "I said to him, 'If at $1.75, it is best that the share price is over $2.1.' ".

Mr Steve Luk responded :

> "No way, it's so big, no way, $2, over $2 ... around $2 ... aim for $2 … 10% discount, that's about right …".

Issue : "real" information.

944. Of the issue of whether or not assertions made by Mr David Tsien in respect of alleged conversations with officers of COLI were true, so that the information was "real", it is to be noted that immediately before the conversation with Mr Steve Luk, at 16:05 Mr David Tsien had telephone conversation with Mr Wu. At the outset, Mr David Tsien informed Mr Wu, "At 170, we can definitely make it." He had been informed that Mr Kong would insist on $1.80 and had suggested a compromise of $1.75. That conversation concluded with Mr Wu saying, "So you can come tomorrow to do it, okay.".

16:27.

Issue : the timing of the placement.

945. In a telephone conversation at 16:27 on 20 January 2004, Mr Steve Luk answered affirmatively Mr David Tsien's enquiry as to whether or not he would be in the office the following day. In the short voicemail that preceded the dialogue, Mr David Tsien explained his interest in knowing Mr Steve Luk's whereabouts as being related to the COLI placement, "if we can agree on a price we may act quickly." In the conversation, he reaffirmed that position :

> "It will be tomorrow at the earliest and next week the latest.".

17:33.

Issue : timing of the placement.

946. In the telephone conversation that he had with Mr Steve Luk at 17:33 on 20 January 2004 Mr David Tsien gave him an update on the timing of the placement :

> "Will not do it until next week ... tomorrow … it would not be done tomorrow, because too many people are absent. Next week, next week ... The deal will be confirmed next week ... they have already called me back asking me to get everything ready next week.".

Issue : price of the placement.

947. In response to Mr Steve Luk's enquiry as to whether Mr David Tsien was sure that the price of the placement shares was to be $1.75 or whether that was to be determined subsequently, Mr David Tsien said, "$1.75 or better." He confirmed that he meant $1.75 or lower.

26 January 2004.

08:57.

948. In a telephone conversation with Mr David Tsien at 08:57 on 26 January 2004 Mr David Tsien referred to the COLI placement :

> "China Overseas may open the offer with a price range, for 800 million shares, at 170 to 180 ... the clients will indicate what the demand is ... because it wanted it to be 180, of course, but if it is 180 there is only 7% -- less than 7% discount. I feel it is not worth doing it … For 170, Chief Ng (Mr Wu) said, 'I think 170 is better.' So, maybe his compromise is 175.".

In response, Mr Steve Luk said :

> "But if it is so, then go ahead. Do it quickly, be it at 170 or 180.".

<u>14:33.</u>

<u>Issue : the placement price.</u>

949. In a telephone conversation at 14:33 on 26 January 2004, Mr David Tsien informed Mr Steve Luk of the COLI placement, "It should be doing at 175.".

In response to Mr Steve Luk's enquiry of that price, Mr David Tsien said :

> "Not more than 180. They really keep their words, that is the price they want to do.".

Mr Steve Luk responded by saying :

> "Hurry up then. Is it okay yet? Now can it be okay? Okay today?".

In his first response, Mr David Tsien said, "Even Mark Bamber came to ask me about it" and, in face of a repeated enquiry by Mr Steve Luk said :

> "I will tell you when it is okay. I am telling you that it should be done at 175.".

<u>15:27.</u>

950. In a telephone conversation at 15:27 on 26 January 2004, Mr David Tsien informed Mr Steve Luk of the COLI placement, "It's price range is 175 to 185." In doing so he confirmed the information that he had left on Mr Steve Luk's voicemail a few minutes earlier at 15:18. Having reminded Mr Steve Luk the COLI had indicated the placement price at which it would be happy was $1.80, Mr David Tsien said :

> "We will try to price it at 180. We feel that the price today is a bit high ... it will probably be done after the market closes.".

<u>15:54.</u>

951. In a telephone conversation at 15:54 and 26 January 2004, Mr David Tsien enquired of Mr Steve Luk in respect of the price of COLI placement shares :

> "If 180 … they need you to give them an indication ... because if your order does not come in, they may not be willing to sign this deal.".

Of the size of the placement Mr David Tsien said :

> "The whole deal 782 million. 117 million is greenshoe, so it is 900 million shares.".

In the result, Mr Steve Luk said :

> "No, I will take it 180. I will take it. I am afraid that you will … only give me a very small amount of shares.".

Later in the conversation, he confirmed his interest in the placement at $1.80, "180, no problem. 175 would be the best, but no-forget it, ay, don't ask too much.".

<u>"Specific information".</u>

952. It is clear that from the time of the meeting at 5:00 pm on 5 January 2004 in the Hong Kong Club the nature of the business proposal was clearly identified by Mr Horace Nip to Mr David Tsien, namely a placement of COLI shares. Mr David Tsien said that at that meeting Mr Horace Nip stipulated the size of the placement as being 800 million shares and the price at about $1.70 per share. However, on 7 January 2004 in their conversation at 12:34 Mr David Tsien informed Mr Steve Luk that the price COLI wanted was $1.80 per share and that their "bottom line" was $1.70 per share. Of the discount of the price of the placement shares to the market price, Mr David Tsien said, "he's talking about 8% discount". In their subsequent conversation at 15:35, Mr David Tsien identified to Mr Steve Luk the size of the prospective placement as being 800 million shares adding, "For 800 million shares he, this Kong Qing Ping said that he wanted $1.8 per share.".

953. In their conversation at 12:00 on 12 January 2004, Mr David Tsien explained to Mr Steve Luk that JP Morgan's bid of a placement at $1.55 the previous week had been met with an enquiry from COLI as to the price at which the market price of COLI shares had to reach in order for the placement to take place at $1.80 per share. He claimed that he had responded to COLI by saying, "$2 -- since it's a barrier ... what about $2.10. If it's $2.10 you can make it at $1.80 for sure because it's a discount of over 10%." Mr Tsien had gone on to say, " ... whether it can go up to $2, $2.10, I think it is possible because there is a lot of money floating around in the market." In their conversation at 09:23 on 15 January 2004, Mr David Tsien told Mr Steve Luk that JP Morgan proposed re-biding a price of $1.55 per share to COLI but that " ... price is flexible", adding that was at a discount of 8.5%.

954. Of the issue of a timing of a placement of COLI shares, Mr David Tsien told Mr Steve Luk in their conversation at 16:52 on 15 January 2004 that Mr Horace Nip had said, " … it would probably be the week after next, yep after January.".

955. Mr Edmond Leung was first informed that COLI was "pitching" for a placement of its shares at $1.80 in a telephone conversation with Mr David Tsien on 12 January 2004. He was told that JP Morgan had bid $1.55 as the price of the placement shares and turned down the requested price of $1.80. On 13 January 2004, he was told by Mr David Tsien that if there was to be a placement of COLI shares it "will be placed at 180, and will not … be under 180." On 15 January 2004, he was told by Mr David Tsien that JP Morgan were in negotiations with COLI for a placement of 800 million of its shares but that "it cannot agree a price, because it asks for $1.80." Of the issue of the timing of the placement, Mr David Tsien left a voicemail on Mr Edmond Leung's telephone at 12:04 on 19 January 2004 in which he told him, "I tell you

they have to place by the end of the month, or they will have to wait until April.”.

956. Issue was taken by Ms Ismail, as to whether or not the assertion that JP Morgan had actually made a bid to COLI at $1.55 for the placement shares was “real” information, in other words true. There is no direct evidence on the point. In their two telephone conversations of 9 January 2004 it was resolved between Mr Stefan Weiner and Mr David Tsien that the former would make an offer on behalf of JP Morgan to COLI in respect of its placed shares at $1.55 per share. Immediately after the second of those conversations, at 09:57, Mr David Tsien left a voice message for Mr Horace Nip in which he advised him that a colleague was coming to see him that day to “provide you with the offer price”. Mr David Tsien repeated that information to both Mr Wu and then Mr Horace Nip in telephone conversations held shortly afterwards. In particular, he told Mr Horace Nip that the information would be delivered in person not in a document saying :

> “not in black and white ... let us agree first ... then it will be put down in black and white, is that all right?”.

957. In his conversation with Mr Raymond Ngai on 12 January 2004, Mr David Tsien referred specifically to the offer of $1.55 being rejected by COLI in circumstances in which Mr Ian Long was asked what price COLI shares had to reach for the placement to take place at $1.80 per share. In their conversation at 09:23 on 15 January 2004, Mr David Tsien told Mr Edmond Leung that JP Morgan was going to go back to COLI that day to bid $1.55 again for the placement shares. It is in that context that the conversation between Mr David Tsien and Mr Horace Nip at 10:42 on 15 January 2004 is to be viewed. Mr David Tsien informed him :

> “If you are not satisfied with the price indicated by me to you, we can discuss a price, as my client is willing to pay a bit more.”.

958. In the result, we are satisfied that JP Morgan did communicate an offer of $1.55 per placement share to COLI. Such relevance as it has is that it evidences, to some extent, the fact that there were real commercial negotiations between the parties at an early stage and that COLI remained resolute in its pursuit of a placement price of $1.80.

959. Clearly the information of which Mr Steve Luk and Mr Edmond Leung were possessed, set out in the three paragraphs described above, was not of a general nature. It particularised the business plan in some detail, which plan was under active negotiation between the parties. For its part, COLI wished to place 800 million of its shares at $1.80 per share. It was acknowledged between the parties that to do so, the placement price had to be at a discount to the market share price, in the range of 8-10%. For its part, JP Morgan was clearly interested in bringing the plan to a successful fruition and remained in negotiations with COLI on the issue of the placement price, notwithstanding that its bid of $1.55 per share had been met by COLI insisting on $1.80 per share. Finally, the timeframe for the placement was identified as being around end of the month of January 2004. All of those matters were not merely "capable of being identified, defined and unequivocally expressed" but also they were so identified. There was a "substantial commercial reality to such negotiations which goes beyond a merely exploratory testing of the waters …".

960. The Tribunal accepts, with respect, as correct the approach taken in the report of the Insider Dealing Tribunal in "*Stime Watch International holding Limited*" (14 February 2003 - page 86) to the issue :

> "The requirement that information be specific relates to the characteristics and contents of the information concerning the company's affairs itself and does not logically depend on whether or not the subject matter of the information, if a proposed course of action, has any particular likelihood of fruition or success.".

The Tribunal went on to note (page 88) :

> "Connected persons who divulge information about inchoate transactions which may be otherwise specific, but where the probabilities of any commercial completion of that transaction is low would be protected from any allegation that they divulged relevant information by the requirement of proof that information was price sensitive. It would be more difficult to establish that the information was price sensitive the lower the probability was that the project or transaction would reach fruition. Further, it would be more difficult to establish that those persons were aware of the price sensitivity of the information.".

CONCLUSION : "Specific".

961. The Tribunal is satisfied that by 20 January 2004, if not before that date, the information of the prospective COLI placement of which Mr Edmond Leung and Mr Steve Luk were possessed was "specific" for purposes of section 245(2) of the Ordinance.

<u>"Not generally known to the persons who are accustomed or would be likely to deal in the listed securities of the corporation but which if it were generally known to them would be likely to materially affect the price of the listed securities."</u>

(i) <u>"Non-public" information.</u>

962. The Tribunal is satisfied that prior to the announcement of the prospective placement of COLI's shares that information was "non-public", in particular not known to those who were accustomed or would be likely to deal in COLI shares. In so determining, we have had regard to the absence of any reference whatsoever to a prospective placement of COLI shares in the box file of media reports received by the Tribunal for the period 2 December 2003 to 26 January 2004 inclusive and to the evidence of Mr Witts to the same effect.

963. We are mindful of the fact that Mr Steve Luk asserted to the SFC in his record of interview of 22 March 2005, repeated in his evidence, that he was aware of "rumours" in the market place of a possible placement of COLI shares in January 2004. However, we note that both then and now he was unable to

substantiate that claim with the provision of any particulars whatsoever. We have not overlooked the fact that in tape-recorded conversations made in January 2004 Mr David Tsien informed a number of other fund managers of details of the COLI placement. In a telephone conversation at 10:24 on 9 January 2004 he informed Mr Norman Ho of Value Partners that JP Morgan had bid a price of $1.55 per placement share, but went on to say that they expected a counter offer. In a telephone conversation at 17:52 on 15 January 2004 he informed a lady by the name of Julia Lo of Citigroup Asset Management that COLI wished to place 800 million shares at $1.80 per share and that whilst JP Morgan were not interested at that price they were interested at $1.50 per share. In telephone conversations in the morning of 20 January 2004 Mr David Tsien informed both Ms Samantha Ho of Manulife and Mr Fukuyama of JFAM that COLI wished to place 800 million shares at $1.80 per share. Finally, in a telephone conversation at 10:13 on 26 January 2004 Mr David Tsien informed Mr Norman Ho that the COLI placement was going ahead, that COLI sought $1.80 and that in response to JP Morgan's suggestion of a range at $1.70-$1.80 they hoped for a price of $1.75. In other telephone conversations on the same morning Mr David Tsien passed on most if not all of that same information.

CONCLUSION.

964. As we determined earlier we are satisfied, notwithstanding the fact that several persons other than the Specified Persons were the recipients of information about COLI's prospective placement, that the information remained "non-public".

(ii) <u>Likely to materially affect the price of the listed shares.</u>

965. At the outset, the Tribunal acknowledges that, in addressing the question of whether or not the information of the prospective placement of COLI shares was "likely to materially affect the price" of COLI shares, it is to reach its

determination from a perspective in time prior to that of the announcement of the placement by COLI. Nevertheless, in the opinion of the Tribunal it is relevant to examine the reaction of the market in respect of COLI shares in the context of the market generally, including media commentators and Analysts, but more particularly the Property Sub-Index and even more particularly the performance of Mainland property companies. Having said that, in the opinion of the Tribunal there is no direct comparator with COLI : the businesses of the constituent companies of the Hang Seng Property Sub-Index were much more focused on Hong Kong than was the business of COLI. The Mainland property companies were of a different size.

The evidence of witnesses other than the expert witnesses.

966. The Tribunal has had regard to the evidence of the witnesses that have spoken to the chronology of the ongoing negotiations that led ultimately to the signing of the placement agreement between JP Morgan and COLI after 6:00 pm on 26 January 2004. The Tribunal rejects Mr Ian Long's assertion in paragraph 9 of his statement of 19 January 2007, in which he claimed that in a second telephone conversation with Mr Horace Nip on 20 January 2004 he was told that Mr Kong had given a "green light" to do a placement because the share price had reached their target level. On the other hand, we accept his oral testimony that he reached that conclusion himself as a result of what he was told by Mr David Tsien, in their telephone conversation at 16:24 on 20 January 2004, of what he claimed he had just been told by Mr Wu was Mr Kong's position, namely " ... Kong wants 1.80". It notes in respect of 26 January 2004 that due diligence of COLI by JP Morgan did not take place until 10:00; the boards of COLI and its holding company did not meet until 14:30; the mandate given to the COLI representative was to sign an agreement for a placement at $1.80 per share; the negotiations between JP Morgan and COLI did not commence until 16:00 and that there followed negotiations on the price in the range of

$1.70-$1.80. Of the latter negotiations, Mr Fang Fang said that it was “not a ‘slamdunk’ deal”. The “sticky” matter was price. Of the issue of the likelihood of agreement being reached between JP Morgan and COLI, Mr Rupert Fane said :

> “Nothing is likely until -- it sounds ridiculous but I do not think it is likely until they agree.”.

967. The Tribunal rejects the express/implied assertions made on behalf of the Specified Persons that information in respect of the prospective placement of COLI shares by JP Morgan only became “relevant information”, in particular information that was materially likely to affect the price of the shares if known to those accustomed or likely to deal in COLI shares, at the time that the representatives of the parties appended their pens to the agreement between JP Morgan and COLI or, for that matter, when there was “certainty” that agreement would be reached. The probability of commercial negotiations between the parties coming to fruition was a moving tableau obviously closely related to the market price of COLI shares. The greater the market price of COLI shares above $1.80 per share the greater was the probability that a discount of about 8-10% would permit placement of COLI at $1.80 per share and there would be agreement between the parties so to do.

<u>The expert evidence of Mr Rigby and Mr Witts.</u>

<u>The issue of whether or not “top-up” placements are generally “bearish”.</u>

968. In the course of the hearing, the Tribunal was treated to an informative and entertaining diversion into the issue of whether or not top up placements are generally regarded as being “bearish”. With caveats, Mr Rigby expressed the view that they were bearish whereas, again with caveats, Mr Witts expressed the contrary view. Nevertheless, in examining the market response to many other placements of shares by companies the Tribunal was assisted by the focus put on the “factors”, in the context of the unique circumstances of a particular

placement, that impact upon the prospective market reaction upon its shares. At the end of the day, the Tribunal is satisfied that it is to the unique factual matrix obtaining at the time of the announcement of the COLI placement to which it must give its attention.

969. The Tribunal does not accept Mr Witts's opinion that it was : "impossible to predict whether the information would have any effect on COLI's share price, and if it were to have an effect, what that effect would be (in terms of the share price going up or down)." The Tribunal is satisfied that it is relevant to have regard to the various factors that Mr Witts identified as being "company specific" factors together with the prevailing market sentiment as being relevant to judging the prospective reaction of the market to an announcement of the replacement of company shares.

Need for and/or use of the proceeds.

(i) Need for the proceeds.

970. There is no dispute that with its low gearing COLI had no need to raise the cash that it did. To that extent the Tribunal accepts the opinion expressed in the Merrill Lynch Analyst's report of 27 January 2004 :

> "With gearing set to reduce further from 13% to some 6% post placement, the cash call was not necessary, in our view.".

Also, the Tribunal notes that Mr David Tsien expressed that same opinion, without demure, to Mr Steve Luk in their telephone conversation at 10:53 on 20 January 2004 :

> "It does not need the funds in the first place. Their gearing ratio is set just 7 to 8%.".

The Tribunal accepts that is a negative factor when viewing the prospective reaction to the announcement of placement. Such conduct is often described by Analysts and media observers as being "opportunistic", by which is meant

the company is judged to be taking advantage of what it considers to be its overvalued share price to raise funds it does not need.

(ii) <u>The use of the proceeds.</u>

971. Of the asserted proposed use of the proceeds, namely as to two thirds to accelerate an existing development in Shanghai and as to the balance to acquire land on the Mainland the Tribunal accepts Mr Rigby's opinion that it contained nothing new and/or exciting, so that it did not carry with it any positive impact upon the prospective reaction to the announcement of the placement, rather it was to be viewed as carrying a negative impact. The Tribunal notes that the announcement had identified four cities as being "major cities" and five cities described as being "secondary cities" in which it was developing business, but that the announcement contained no particulars whatsoever as to where or when the land acquisitions were to be made stating only that they would be made :

> "after the company has finalised its plans for the same.".

Dilution of NAV and EPS.

972. The fact that in prospect the EPS of COLI was to be viewed as being diluted by the placement is evidenced by the consensus of the Analysts reports on 27 January 2004 (Deutsche Bank, CLSA and Merrill Lynch). The raised EPS forecast issued by ING on 28 January 2004 was based on a bullish view taken in respect of the number of factors, stated to incorporate :

> "a writeback of provisions for Regalia Bay in HK, 6-8% rise in the selling price of two Shanghai projects, 850m new shares and new land bank acquired in 2003.".

By contrast, for example Deutsche Bank regarded the writeback of the Regalia Bay provisions as being a mere possibility and apparently not taken into account in a revaluation of EPS. Similarly, the three Analysts reports published on 27 January 2004 all gave estimates of a dilution of NAV, albeit to varying degrees.

973. We are satisfied that viewed in prospect of the placement the factors of the dilution of NAV and EPS of COLI shares were bearish factors in estimating the impact of the placement upon the market share price of COLI shares.

Shanghai Forte Land.

974. The Tribunal is satisfied that is not without significance that Mr Witts did not even advert to the issue of the publication of the Shanghai Land prospectus on 27 January 2004, as being a factor that "very likely" impacted upon COLI share price that day and following, until his second statement dated 4 February 2009, over a month into the substantive hearings before the Tribunal. Other than his bare assertion that it was, "very likely that investors were induced to sell COLI shares on 27 January 2004 to raise funds to subscribe to its competitor Shanghai Forte Land, in its upcoming share offer", he was unable to point to any supporting evidence. Certainly, none of the Analysts reports or media reports on or subsequent to 27 January 2004 ascribed the drop in COLI shares as being in any way attributed to the factor identified by Mr Witts.

Whilst, as Mr Rigby conceded, it may have had some insignificant negative impact on the price of COLI shares, as indeed may other factors, of which more in due course, we are satisfied that neither it nor they had a material impact upon that price. In accepting that he was unable to quantify the impact of the issue of the Shanghai Forte Land prospectus upon the share price of COLI shares we are sure that Mr Rigby was not resiling in anyway whatsoever from his primary proposition that the announcement of the placement of COLI shares was the factor, to the exclusion of others, that had the material impact upon COLI share price and was to be so viewed in prospect.

27 January 2004 : a comparison of the fall in the COLI share price with the position of the HSI, the Hang Seng Property Sub-Index and the performance of the three Mainland companies.

975. On 27 January 2004 :

- COLI share price fell 5.5%;
- HSI rose 0.25%,
- HS Property Sub-Index fell 1.6%; and
- (i) Beijing North Star fell 2.5%;
  (ii) China Resources Land fell 1.3%; and
  (iii) Beijing Capital Land fell 1.8%.

976. As stated earlier, when having regard to a comparison of the performance of COLI shares against that of the HSI, the Hang Seng Property Sub-Index and the performance of the shares of the three Mainland property companies, in the context of measuring in prospect the impact upon the price of COLI shares in consequence of the announcement of its placement, we are conscious of the obvious differences COLI and the nature of the indices or share price of the others. At that time, COLI was a large company the overwhelming majority of whose business was property on the Mainland. The HSI is a very broad-based measure of the performance of shares. The six companies making up the Hang Seng Property Sub-Index had much greater property interests in Hong Kong than in the Mainland. The three other Mainland property companies were smaller than COLI.

977. Nevertheless, it is to be noted that the fall in the price of COLI shares on 27 January 2004 at its "Close" was more than three times the fall measured on the Hang Seng Property Sub-Index. Furthermore, both at its "Close" and its intraday "Low" namely, 5.5% and 9.5%, the fall in the price of COLI shares was more than double the fall experienced by Beijing North Star, the company

whose shares fell most of the three Mainland companies, and more than three times the fall in the shares of the other two companies at their "Close".

Sentiment : Market/property market/Mainland property market.

978. There is no dispute that for the month of January 2004 the Hang Seng Property Sub-Index reached its highest level at its "Close" on 26 January 2004 and that date proved to be the highest level for the "Close" of COLI and all three Mainland companies for the preceding four-month period. On the days that followed there was a weakness in property shares as measured by the Hang Seng Property Sub-Index and, more particularly, in the shares of COLI and the three Mainland property companies. However, the fact remains that on 27 January 2004 there was a multiple in the difference in the fall of COLI shares as compared with the other measures. Why was that the case?

Share price volatility : Beta coefficient.

979. We accept Mr Rigby's advice of the use of great caution in respect of the use "Beta" as a measure of volatility of a share price, in particular that it was to be viewed as an art, not a science. We note that the fall in COLI share price on 27 January 2004, namely 5.5%, was its greatest fall in a share price for two years. By contrast, the fall in the price of China Resources Land shares, 1.25%, was only its 138th largest drop in price in the same two-year period. Similarly, the drop in the price of shares on 27 January 2004 for Beijing Capital Land and Beijing North Star represented for the former, in a shorter period of trading, its 31st largest drop and for the latter, in a two-year period, its 60th largest drop. Furthermore, although the measure of the "Beta" coefficient obtained by Mr Witts from Bloomberg for China Resources Land, at 1.544, was the highest coefficient of the three Mainland companies and closest to that of COLI, at 1.798, its shares fell only 1.3% on 27 January 2004, whereas those of the other Mainland companies fell only 2.5% and 1.8% respectively.

980. In the result, we reject Mr Witts's evidence that the greater fall in the value of COLI shares on 27 January 2004 than the fall in the price of the shares of the other three Mainland property companies is to be explained, or explained in part, by COLI's greater share price volatility, as measured by "Beta" coefficient.

Ambit of the "relevant information".

981. The "Particulars" provided in the FS's notice stipulates of the "Relevant information" that it was that COLI " … would announce and carry out a top-up placement of 850 million shares at a price of HK$1.80 per share on or about 26th of January 2004". It is to be noted that two of the three ingredients are expressed exactly whilst the third ingredient, as to time, is qualified. Nevertheless, we are satisfied that the "relevant information" was constituted by information relating not only to the exact amount stipulated but also to close approximations to that amount. For example, we are satisfied that information in relation to a top-up placement of 800 million shares, rather than 850 million shares, falls within the term "relevant information". Similarly, in respect of the issue of price we are satisfied that information in relation to a placement of approximately or within the range of $1.80 per share falls within that term.

CONCLUSION.

982. In the result, we are satisfied that the information possessed by both Mr Edmond Leung and Mr Steve Luk at and after the end of 20 January 2004 was "relevant information" not known to those accustomed to or likely to deal in the shares of COLI but which, if known to them, was likely to materially affect the share price of COLI shares.

Did Mr David Tsien know that the information he disclosed to (i) Mr Edmond Leung and/or (ii) Mr Steve Luk was relevant information?

The submissions made on behalf of Mr David Tsien.

983. It was submitted on behalf of Mr David Tsien that it was his understanding that at any time prior to a deal being struck between JP Morgan and COLI about placement of the latter's shares it could not be said whether or not it was probable that a placement deal would go ahead, on which day or at all or with JP Morgan as placing agent. A "deal" required not only agreement on price but also that the requisite demand for the placement was forthcoming from investors. In effect, it was contended that since neither was in place until after the market closed on 26 January 2004, Mr David Tsien could not and did not know that he was in possession of relevant information prior to that time.

984. In respect of the issue of Mr David Tsien's knowledge, the Tribunal was invited to have regard to the evidence that no one at JP Morgan, in particular Mr Ian Long, Mr Rupert Fane, Mr Stefan Weiner, Mr Xen Gladstone or Mr Mark Bamber, had told him that the information given to him was "relevant information". Also, it was submitted that it was Mr David Tsien's expectation that if he was possessed of such information he would be "brought over the wall". Conversely, it was suggested that the fact that Mr Horace Nip talked to him "freely and openly about COLI's interest in the potential placement deal ..." led him not to suspect that the information was "relevant information". Furthermore, the Tribunal was reminded that it was Mr David Tsien's evidence that he was not aware of any restrictions on "communications between an equity salesperson and the investors", it being pointed out that the "*Market Sounding Policy*" of JP Morgan postdated the events with which the Tribunal is concerned.

985. The Tribunal was invited to have regard to the fact that Mr David Tsien communicated information about the COLI placement to various fund managers, not only Mr Steve Luk and Mr Edmond Leung, and did so in recorded telephone conversations over a protracted period of time.

The background of Mr David Tsien.

986. Clearly, of considerable relevance to the Tribunal's consideration of the issue of whether or not Mr David Tsien knew that the information he disclosed to Mr Edmond Leung and/or Mr Steve Luk was "relevant information" is a consideration of his experience in the financial services industry. By January 2004, he had more than 16 years experience in the financial services industry, including positions as an analyst, a marketing executive, a broker and an equity salesman. He acknowledged that at the material time he was aware of JP Morgan's "Chinese Wall policy", in particular that he, as a "public side" employee, should not be in possession of material non-public information unless he had been "brought across the wall". In cases in which the information had been disclosed inadvertently, contact was to be made with JP Morgan's Control Room. Similarly, he acknowledged that he was aware that there was a prohibition against a person who was aware of material price sensitive non-public information from disclosing that information to a person likely to trade in the securities.

Mr David Tsien's use of telephone lines on which recordings were made by JP Morgan.

987. The Tribunal takes note of the fact that Mr David Tsien not only conducted telephone conversations that were recorded but also that he knew that to be the fact. Certainly, that much is evidenced by his conversation with Mr Ian Long at 14:21 on 19 January 2004 in which he answered in the affirmative Mr Ian Long's enquiry as to whether or not he was on a recorded line and agreed

to terminate the conversation and call Mr Ian Long back on his mobile telephone number. The conversation was held about an hour after an earlier conversation between the two of them about the COLI placement, in particular whether or not Mr Ian Long should call Mr Horace Nip. Subsequently, Mr David Tsien conducted many telephone conversations with Mr Steve Luk and Mr Ian Long, some with Mr Edmond Leung, one with Mr Wu and others with other fund managers in which details of the prospective COLI placement were discussed.

Mr David Tsien's contact with officers of COLI and with his colleagues in ECDM in JP Morgan in respect of the COLI placement.

Mr David Tsien : a conflict of interest.

988. A detailed account of Mr David Tsien's contacts with officers of COLI on the one hand and Mr Ian Long of JP Morgan's ECDM on the other hand is set out elsewhere. However, the obvious conflict of interest that arose thereby is illustrated by reference to a few of those occasions. Clearly, such "Chinese Wall" that ought to have existed in JP Morgan were trampled underfoot by Mr David Tsien.

989. Having received information from Mr Horace Nip at the Hong Kong Club on the afternoon of 5 January 2004 that COLI wished to do a placement at about $1.70 per share, far from disclosing the information to the Control Room of JP Morgan and desisting from further contact, Mr David Tsien not only actively initiated ongoing contact with Mr Horace Nip and then Mr Wu in relation to COLI's position on the placement but also entered into detailed communications with his colleague Mr Ian Long. In those conversations, the two of them exchanged and discussed information that each of them obtained separately from officers of COLI, in respect of COLI's position in the placement and discussed the response to be made by JP Morgan in respect of the placement price of COLI shares.

990. In their conversation at 11:53 on 7 January 2004, Mr Ian Long informed Mr David Tsien that Mr Horace Nip had said that COLI wished to have a placement price of $1.80. For his part, Mr David Tsien passed on that information to Mr Steve Luk in their conversation at 12:34 that day. In their conversation at 09:32 on 9 January 2004, having discussed the issue of a bid by JP Morgan for the placement price of COLI shares, it was agreed between Mr Stefan Weiner and Mr David Tsien that an offer be made at $1.55, with Mr David Tsien suggesting "then maybe, eventually offer them 160". Immediately after that conversation, Mr David Tsien passed on that information to Mr Steve Luk. At 09:57 on 9 January 2004, Mr David Tsien left a voice message for Mr Horace Nip informing him of the fact of a prospective offer and, more particularly, that it was negotiable :

> "I will have a colleague coming back today, who will provide you with the offer price … if the price is not right, there is still slightly more leeway for negotiations.".

991. Mr David Tsien's ongoing knowledge of JP Morgan's bids in respect of the COLI placement is evidenced by his conversation with Mr Steve Luk at 09:23 on 15 January 2004, in which he informed the latter :

> "Today, we would go back and bid for that China Overseas, the price is $1.55 ... ".

His ongoing involvement with negotiations about the price of the COLI placement shares with officers of COLI is illustrated by the conversation that he had with Mr Horace Nip, at 10:42 on 15 January 2004, in which he said :

> "If you are not satisfied with the price indicated by me to you, we can discuss a price, because my client is willing to pay a bit more.".

992. Further evidence of Mr David Tsien's ongoing dual roles in relation to discussions with COLI and ECDM of JP Morgan is to be found in a conversation that he initiated with Mr Wu at 16:05 on 20 January 2004. Earlier, in a conversation at 15:50 on 20 January 2004, Mr David Tsien was told by Mr

Ian Long that in a conversation he had with Mr Horace Nip he had been informed of the issue of the COLI placement price that :

> "Wu Jong is only interested in recommending to Kong if we can do a deal about 170.".

In the conversation with Mr Wu, Mr David Tsien clearly became involved in a negotiating role about the issue of the price of COLI shares. Firstly, he informed Mr Wu that the placement could "definitely be done" at $1.70 per share and secondly, having been informed that Mr Kong insisted on $1.80, he suggested a compromise price of $1.75 per share.

993. Immediately after that conversation, Mr David Tsien initiated a conversation with Mr Steve Luk in which he gave him details of his discussions with Mr Wu. Similarly, in a conversation at 16:24 he informed Mr Ian Long of the details of the conversation and the suggested compromise price suggesting to him of JP Morgan's position, "So at $2.00, if they offer you $1.75, just sign it."

<u>Mr David Tsien's knowledge of the conflict of interest in the position he had chosen to occupy.</u>

994. Graphic evidence of the knowledge possessed by Mr David Tsien of the fundamental conflict of interest that he had, given the position and role that he had chosen to occupy and perform in relation to COLI and ECDM at JP Morgan, is to be found in his conversation with Mr Horace Nip at 10:24 on 9 January 2004 in which, having advised him of the fact that a colleague was to come that day to make JP Morgan's price offer for the placement shares, he went on to say :

> "Look, I'm not supposed to know this. Why? A deal being done by the big firm, we are being considered as the public side … we're not supposed to know anything ... treat me as not knowing anything, okay.".

995. Whilst Mr David Tsien provided information on an ongoing basis to Mr Steve Luk of the positions taken by COLI and JP Morgan respectively about the

issue of the placement of COLI shares on occasions, also he sought and received an indication of his demand for placement shares. In a voice message that Mr David Tsien left on Mr Steve Luk's telephone at 16:30 on 15 January 2004, he informed him:

> "China Overseas, because officially I'm supposed to know nothing at all, well -- I wonder if you can ask ECM -- either you ask for the Singapore guy named Ian Long, or the guy named Rupert Fane … to come and see you next week ... to have a look at the price of the number of shares.".

996. The true significance of the conflict of interest being addressed, is illustrated in the telephone conversation that followed at 16:52 that day when Mr Steve Luk responded to the voice message, explaining why he refused to meet personnel from ECDM of JP Morgan :

> "Look, the things that you have told me are all rumours … the things that I have told you are based on your rumour, I will think in this way. If I talk with him, and he tells right away that it would probably be done then I will dammed … yours are just rumours … his are not rumours, he really goes to make a bid ... Yep, well, we are very -- that is, being in the same company it is even more outrageous, even more dangerous.".

Having responded to the various assertions with either an affirmative response or an indication that he understood Mr David Tsien responded to the final assertion by saying :

> "I know, I know, right, correct, right, I know.".

997. The Tribunal is satisfied that the position agreed upon by both Mr David Tsien and Mr Steve Luk was utterly disingenuous. To the knowledge of each men labelling the information provided by Mr David Tsien to Mr Steve Luk as "rumour" was false.

<u>Mr David Tsien's evidence that he believed that he would not be told of "relevant information" by either officers of COLI or his colleagues in JP Morgan.</u>

998. Having regard to Mr David Tsien's considerable experience in the financial services industry, in particular as an equity salesman, we had no hesitation whatsoever in rejecting his evidence that, because he relied on an expectation that information provided to him by either COLI or colleagues in ECDM of JP Morgan would not be "relevant information", unless he was told so and/or "brought over the wall", he did not know that such information as he was provided fell into that category. As we have just noted, Mr David Tsien took the initiative with both Mr Horace Nip and Mr Steve Luk in relation to matters about which he was "not supposed to know".

999. In respect of Mr Horace Nip, his assertion in support of that belief was fortified in part by his evidence that he believed that at the outset, in the Hong Kong Club on the afternoon of 5 January 2004, that he had told Mr Horace Nip not to reveal to him "sensitive information" about the COLI placement. That evidence emerged only in cross-examination of Mr David Tsien by Mr Kwan. Notwithstanding the fact that his witness statement condescended to great detail, that assertion found no place whatsoever. We reject Mr David Tsien's evidence in this respect as being false and invented in cross-examination. It is to be noted that it is not a matter that was suggested on behalf of Mr David Tsien to Mr Horace Nip in cross-examination. It is perfectly clear from the recordings of his telephone conversations with Mr Horace Nip that the information provided to him by Mr Horace Nip was of the most intimate nature of COLI's position in respect of the placement of its shares, including different positions taken within its Board of Directors. We are sure that Mr David Tsien knew that to be the case. In particular, that he knew it to be "relevant information". Nowhere did he object to being provided with that information.

1000. We reject Mr David Tsien's evidence that he did not know that there were any restrictions as to what information in respect of a placement he could disclose to those of his clients who were potential participants in such a placement. His reliance on the fact that JP Morgan's "Market Sounding Policy" was not published until December 2004 is misplaced. We are sure that in January 2004 he knew that information about :

> " (a) the amount of capital to be raised or shares to be transacted;
>
> (b) the price or price range of the transaction;
>
> (c) the timing of the transaction;
>
> (d) …
>
> (g) the likelihood of the transaction even worthy about details are not finalised
>
> may be considered material non-public information.".

1001. Equally, we reject Mr David Tsien's evidence that he believed that no "relevant information" came into being until agreement was reached or was certain to be reached, in this case between JP Morgan and COLI about the placement of its shares. Once again, we are sure that the articulation of this issue in the JP Morgan "Sounding Out Policy" did no more than state that which was known to be the case to Mr David Tsien in January 2004, namely :

> "A transaction need not be certain for information to be material. The tests for material non-public information are based on the likely effect on price or a person's decision to invest or not. Even though a placement at a discount may only be 50% likely, if known publicly, that information may be relevant to the investment decision of a potential investor. The less likely or the more remote a transaction is, the less likely it will have an impact upon the decision making of an investor and the less likely it will be considered material non-public information. The more imminent a transaction is the more material it becomes.".

CONCLUSION.

1002. The Tribunal is satisfied that Mr David Tsien knew that the information that he passed to each of Mr Edmond Leung and Mr Steve Luk in respect of the

COLI placement which we have found to be "relevant information" was information of that status.

In disclosing relevant information to Mr Edmond Leung and/or Mr Steve Luk did Mr David Tsien do so "Knowing or having reasonable cause to believe that the other person will make use of the information for the purpose of dealing" in COLI shares?

The submissions made on behalf of Mr David Tsien.

1003. The submissions made on behalf of Mr David Tsien in this respect are in the alternative to the primary submissions that have been made. On that basis, issue was taken with the suggestion that there was evidence to establish that Mr David Tsien had reasonable cause to believe that Mr Edmond Leung and Mr Steve Luk "will make use" of the information to sell COLI shares. It was suggested that regard was to be had to the fact that both men were highly qualified fund managers employed by highly reputable companies over many years. An important factor to be considered from Mr David Tsien's perspective, it was suggested, was whether he had reasonable cause to believe that they would jeopardise those careers by misconduct in respect of information supplied by him to each of them respectively. Also, Mr David Tsien expected their employers to have in place stringent compliance requirements and that, given that they were institutional funds, their interests would be long-term rather than short-term trading.

Mr Edmond Leung's assertions/indications to Mr David Tsien that he would sell COLI shares.

1004. It was submitted on behalf of Mr David Tsien that the telephone conversations he had with Mr Edmond Leung :

- at 08:47 on 15 January 2004; and
- at 10:53 on 20 January 2004

in which Mr Edmond Leung had made reference to " … Let's hope that it can be kicked up first, at least it can dispose of some first" and "let us know earlier. If it is going to be done ... so that I may throw some back to the market, Big Brother" was an insufficient basis upon which to prove that Mr David Tsien had reasonable grounds to believe that Mr Edmond Leung "will make use" of the information to sell COLI shares. Similarly, it was submitted that any apparent lack of surprise by Mr David Tsien on being told by Mr Edmond Leung in their conversation at 16:33 on 26 January 2004 that he had sold "4, 5 million" COLI shares and wished to replace them in the placement provided no evidence as to when the shares were sold or that they had been sold by use of the information supplied by Mr David Tsien.

1005. Furthermore, it was submitted of the conversations between Mr Edmond Leung and Mr David Tsien that the former did not show any interest in the COLI placement until after the market had closed on 26 January 2004.

<u>Mr Steve Luk's assertions/indications to Mr David Tsien that he would sell COLI shares.</u>

1006. It was submitted on behalf of Mr David Tsien that Mr Steve Luk's assertion, in the context of a potential COLI placement, in their telephone conversation at 11:01 on 19 January 2004 on being told that COLI shares were trading up that, "With it, there is a chance any time today, but if I were to sell it I would wait until 3:45", was an insufficient basis to prove that Mr David Tsien had reasonable cause to believe that Mr Steve Luk "will make use" of the information supplied to him by Mr David Tsien to sell COLI shares. Also, the Tribunal was invited to note that Mr David Tsien knew JFAM to be a substantial holder of COLI shares, having assisted in their recent acquisition of two blocks of 60 million shares in November and December 2003. In those circumstances,

there was reasonable cause to believe that Mr Steve Luk held a bullish long-term view of COLI.

Mr David Tsien's knowledge that Mr Steve Luk and Mr Edmond Leung held COLI shares in January 2004.

(i) Mr Steve Luk.

1007. There is no dispute that having assisted Mr Steve Luk to buy COLI shares in the league to block crossings of 60 million shares at the end of 2003 that Mr David Tsien was aware that funds of which he was a manager in JFAM held substantial tranches of COLI shares. Indeed, in the course of their telephone conversations Mr David Tsien indicated by reference to a price of $1.60 that JFAM had bought other COLI shares up to that price, clearly subsequent to the block crossings.

(ii) Mr Edmond Leung.

Background.

1008. It is to be noted that in the first telephone recorded conversation, namely 2 January 2004, in which Mr David Tsien informed Mr Edmond Leung of the fact that he was to meet directors of COLI on 5 January 2004, Mr Edmond Leung asked several times if the shares were "recommendable", that is recommended to buy. Mr David Tsien responded by informing Mr Edmond Leung that he had assisted JFAM to obtain the two block crossing of shares and referred him to the SEHK website in respect of "Securities Disclosures of Interests" for details.

1009. The Tribunal is satisfied that in consequence of the various assertions made by Mr Edmond Leung in their telephone conversations subsequently, which will be considered in more detail below, Mr David Tsien knew that Mr Edmond Leung held COLI shares at material times in January 2004.

Issue : did Mr David Tsien have reasonable cause to believe that Mr Edmond Leung "will make use" of the information he provided to him to sell COLI shares?

15 January 2004 - 08:47.

1010. In their conversation at 08:47 on 15 January 2004, Mr David Tsien informed Mr Edmond Leung that there were ongoing negotiations with COLI about placement of its 800 million shares but that "it cannot agree on the price because it asks for $1.80." In that context, there ensued a conversation in which Mr Edmond Leung repeatedly urged Mr David Tsien that the market price of COLI shares be "kicked up" :

> " EL. I know, if -- if it can be kicked up, let's hope that it can be kicked up first, at least he can/disperse/reduce [dispose of] some first. (Chuckle)
>
> DT. Yes. Well, it -- it wants to do it at $1.80, okay.
>
> EL. Yep, that means it has to be kicked up to $2.00, right?
>
> DT. It now insists on $1.80, if it asks for $1.80, I would tell it that it would have to be $2.00 to $2.10.
>
> EL. That is -- that is, kick it up to $2.00 first, kicking it up to $2.00 first, would you please? Yep.
>
> DT. Yes, yes, I've told that already.".

1011. We reject Mr Edmond Leung's testimony that his use of the term "kick up" was jargon that, "doesn't imply anything, you know it doesn't have a very special meaning." We are satisfied that he was expressing the hope, and was so understood by Mr David Tsien, that, one way or the other, the market share price of COLI be pushed up to $2.00, at which point he could sell some of his COLI shares.

19 January 2004 - 16:25.

1012. Mr Edmond Leung continued to express his interest in the timing of a COLI placement and his desire that the shares be "kicked up" first in their

telephone conversation at 16:25 on 19 January 2004. At the outset, he twice asked "Time to place?" It was in response to being told by Mr David Tsien, "Not yet" that Mr Edmond Leung responded, "Ask them to kick it up to $2.2 first.".

20 January 2004 - 10:53.

1013. Mr Edmond Leung re-asserted his statement to Mr David Tsien that, if the COLI placement was to be done, he was interested in selling some COLI shares in their telephone conversation at 10:53 on 20 January 2004. Having been told by Mr David Tsien that COLI's market price had reached $2.00 per share and that, "Now really looks like it's going to be $1.8 (each). If that's the case, if I really help them do it I will let you know." Mr Edmond Leung said :

> "Let us know earlier if it's going to be done, so that I may throw some back to the market Big Brother. (Chuckle)".

1014. The Tribunal is satisfied that Mr Edmond Leung intended to communicate to Mr David Tsien, and the latter understood that to be the case, that he wished to be informed in advance of a placement being announced, so that he could sell some of the COLI shares held in his funds.

26 January 2004 - 12:30.

1015. The fact that Mr David Tsien understood the intention of Mr Edmond Leung to be as described above is evidenced by their conversation at 12:30 on 26 January 2004. Having been told by Mr David Tsien that COLI's shares were probably going to be placed that week, Mr Edmond Leung responded by saying :

> "Pushed up enough yet (the price?) Why don't I sell all? (Chuckle).".

For his part, Mr David Tsien advised Mr Edmond Leung :

> "Well -- if we go ahead, it will be priced at $1.8 -- the price may be 2, $2 and above. You may consider.".

In response to Mr Edmond Leung's enquiry, "Anywhere below $2 may be considered. Is that right?" Mr David Tsien re-asserted :

> "For prices above $2, you may consider taking profit.".

1016. We reject Mr David Tsien's evidence, that his reference to prices above $2.00 as being a price at which Mr Edmond Leung could consider taking a profit, was addressed at the situation after Mr Edmond Leung had obtained shares in the placement and being the price he could then sell those shares for a profit. We have no doubt whatsoever, that it related to the period prior to the announcement of a placement of shares by COLI, not afterwards.

CONCLUSION.

1017. The Tribunal is satisfied that there is not only compelling but also overwhelming evidence that Mr David Tsien had reasonable cause to believe and did believe that Mr Edmond Leung would sell COLI shares on the basis of the relevant information with which he supplied him in respect of the prospective COLI placement.

<u>Issue : did Mr David Tsien have reasonable cause to believe that Mr Steve Luk "will make use" of the information he provided to him to sell COLI shares?</u>

1018. In contrast to the several occasions in recorded telephone conversations in which Mr Edmond Leung told Mr David Tsien that he was considering selling COLI shares, there is only one such occasion in a recorded telephone conversation between Mr Steve Luk and Mr David Tsien, namely at 11:01 on 19 January 2004.

<u>Issue : the share price of COLI being "pushed up".</u>

1019. In the context of information given to Mr Steve Luk by Mr David Tsien, that Mr Kong of COLI was insisting on a placement price of $1.80 against a

proposed discount from the market price of 8% or more, the issue of the share price of COLI being "pushed up" was discussed in a number of the recorded telephone conversations between Mr Steve Luk and Mr David Tsien.

1020. In their conversation at 12:34 on 7 January 2004, having said that if the placement took place that day the placement price, "has to be $1.60" Mr Steve Luk went on to say :

> " … if you push it up to $1.8 by way of speculation, then it is another matter (you are) smart, right?".

In their conversation at 12:00 on 12 January 2004, Mr David Tsien, having expressed the opinion that he thought it was possible that the COLI market share price could go up to "$2.00, $2.10", said that, "BOCI was making a big purchase in these few days, it seems that it has probably obtained financing from BOCI and then used the financing to push up its share price, thinking that it could place shares at $1.80 if the price has gone up." In response to being told by Mr David Tsien that possible dates for the placement were the Wednesdays of the weeks beginning 19 and 26 January 2004, Mr Steve Luk said :

> "Right, ie, towards the end of this week, speculate, speculate, speculate.".

1021. In their conversation at 09:23 on 15 January 2004, Mr David Tsien told Mr Steve Luk that JP Morgan were going to go back that day to COLI to re-bid for the placement at $1.55. Later in the conversation, Mr Steve Luk returned to the subject of COLI and said :

> " … give it a push, because I suspect that it is possible that people may be buying China overseas shares today ... So you may not be able to do the deal at $1.55 again.".

The assertion by Mr Steve Luk to Mr David Tsien that he was considering selling COLI shares.

19 January 2004 -11:01.

1022. At the outset of their conversation at 11:01 on 19 January 2004, the following interchange occurred between Mr David Tsien and Mr Steve Luk :

> " DT. You were right. That China Overseas keeps flying.
>
> SL. Regarding China Overseas, they can't wait.
>
> DT. ... that means
>
> SL. With it, there's a chance any time today, but if I were to sell it, (I'd) wait until 3:45.
>
> DT. Ha, ha, ha, ha, ha, ha, ha.
>
> SL. Every day, order will be placed (sic) 3:45.
>
> DT. Those buggers, indeed obviously marking up.
>
> SL. They can't wait. That's money, man money …
>
> DT. I am quite happy, as previously I got a batch of shares at a low price for you. But, you see now -- you see, for those placements on Friday, all three were 'down', all three were 'down'.
>
> SL. Yes, that's the good thing about China Overseas, that is, it rises and rises; falls and then rallies, in a nutshell huh?".

1023. There is no dispute that the opening remark was a reference to the fact that on 19 January 2004 the price of COLI shares was rising sharply in the market. The share rose from the "Closing" price on the previous trading day, 16 January 2004, of $1.70 to an intraday "High" of $1.86 on a turnover of over 105 million shares, before closing at $1.81, a rise of 6.47% on the day. Clearly, in stating, "Those buggers, indeed obviously marking up" Mr David Tsien was adverting to his previously expressed belief that COLI shares were being "pushed up", specifically by COLI itself.

1024. Of importance in the short interchange between the two men, is what was intended to be meant by Mr Steve Luk when he adverted to the issue of selling COLI shares and, more importantly for these purposes, what was understood by Mr David Tsien. We reject the convoluted explanation

advanced by Mr David Tsien that he understood Mr Steve Luk to be joking, in particular that he understood him to be saying that he was considering selling COLI shares, "every day shortly before the market closed, to make life difficult for COLI to do a placement at $1.80." We note that in his evidence, Mr Steve Luk also said that he was joking and has advanced two separate explanations for what he said. In his statement of 19 February 2009, which he adopted in his oral evidence, he explained that in the asserting that he would place a sell order at 3:45 every day he meant, "so that I could buy more shares in the placement". In his oral evidence, initially he denied that that was the meaning he intended to convey to Mr David Tsien. However, on being confronted with his witness statement he said that that was "one of the meanings", but he went on to say that, "The whole conversation was a joke on the counter.".

1025. We are satisfied that Mr David Tsien understood Mr Steve Luk to be saying that, in the context of COLI shares being "pushed up" he was considering selling at a late stage in the trading day when such activity was underway. We are sure that it was that understanding of Mr Steve Luk's meaning that prompted Mr David Tsien to advert to the fact that he had assisted in Mr Steve Luk purchasing COLI shares at a "low price". That was a reference, we are satisfied, to his assistance in the purchase by JFAM of two block crossings of COLI shares in late November and 3 December 2003. Those shares were purchased at $1.20 and $1.26 per share, respectively. The true context of the remark is to be judged by the price of COLI shares of $1.86 at its intraday "High" on 19 January 2004. We are satisfied that in responding as he did Mr David Tsien understood that if Mr Steve Luk chose to sell COLI shares then he could do so at a considerable profit. Of course, that position remained true in the following days up and until the announcement of the placement of COLI shares following close of trading on 26 January 2004.

CONCLUSION.

1026. The Tribunal is satisfied that following their telephone conversation at 11:01 on 19 January 2004 and thereafter Mr David Tsien had reasonable cause to believe and did believe that Mr Steve Luk would sell COLI shares on the basis of the relevant information with which he supplied him in respect of the prospective COLI placement.

Submissions on behalf of Mr David Tsien in respect of Section 271(3) of the Ordinance.

1027. It was submitted on behalf of Mr David Tsien that, if necessary, he is able to rely upon the provisions of section 271(3), with the result that the Tribunal is required to find that he is not to be regarded as having engaged in market misconduct by reason of insider dealing taking place through his disclosure of information. The sub-section provides that the Specified Person is not culpable of insider dealing if he establishes that the purpose for which he disclosed the information in question was not, or, where there was more than one purpose, the purposes for which he disclosed the information in question did not include :

> " ... the purpose of securing or increasing a profit or avoiding or reducing a loss, whether for himself or another, by using relevant information.".

1028. It was accepted on Mr David Tsien's behalf that the burden lay on him to point to material received by the Tribunal to establish the defence on the balance of probabilities.

1029. By reference to the "Particulars" of the FS's notice, in which it is stipulated (paragraphs 2.2 and 2.3) that, in selling 4.392 and 9.109 million shares respectively, Mr Edmond Leung and Mr Steve Luk each made a stipulated profit, "based on the placement price of $1.80 for the funds he

managed". It was submitted that the question for the Tribunal to address is whether Mr David Tsien's disclosure of information to the two men was :

> " ... for the purpose of, or included the purpose of, securing or increasing their subject profit through the aforesaid mode, ie) to sell and buy back cheap in the placement, by using the relevant information.".

1030. It was submitted on Mr David Tsien's behalf that in disclosing information about the prospective COLI placement, not only to Mr Edmond Leung and Mr Steve Luk but also to other fund managers :

> "David Tsien had one goal in mind, which was to help JP Morgan strike a placement deal with COLI so that a successful placement could take place; and the value of his input in the whole negotiation exercise was to gauge the market response from his institutional clients, and to keep them warm in the potential deal.".

Specifically, it was contended that it was Mr David Tsien's purpose, in disclosing the information, that the fund managers become interested in and apply for COLI shares in the placement. In addition, it was submitted that :

- Mr Steve Luk had been "targeted at the outset as a potential anchor client for the placement deal"; and
- Mr David Tsien wished to present Mr Edmond Leung with an opportunity of subscribing for the COLI placement, "to ease his unhappiness and dissatisfaction after the recent failure in the Asia Aluminium placement exercise".

Further, it was submitted that Mr David Tsien did not disclose information about the prospective COLI placement for the purpose of securing or increasing the profits of any of the fund managers, Mr Steve Luk or Mr Edmond Leung by " … their making use of the information to sell their COLI shares ahead of the placement and then get shares back at a cheaper price in the placement exercise.".

1031. Finally, the Tribunal was reminded that in considering Mr David Tsien's position in respect of section 271(3) of the Ordinance, it was not to view matters

retrospectively, having regard to what Mr Steve Luk and Mr Edmond Leung did, rather it had to, "decide why David Tsien did what he had done".

The ambit of Mr David Tsien's disclosure of information in respect of the COLI placement.

1032. The Tribunal readily accepts that Mr David Tsien was in contact with a number of fund managers in the period 6-26 January 2004 to whom he disclosed the fact that COLI wished to make a placement of its shares, its position as to the price of those shares and his/JP Morgan's response to COLI's proposal.

Mr David Tsien's disclosure of information to Value Partners.

1033. It is apparent from the recorded telephone conversations that Mr Norman Ho and Mr Cheah Ching Hye of Value Partners, in particular, benefited from a regular flow of information from Mr David Tsien updating them on the progress of the prospective COLI placement. On 6 January 2004 Mr Cheah Ching Hye was told that Mr David Tsien had a "long chat with China Overseas yesterday and that they were planning to issue up to 15% new shares at around 170." On 7 January 2004, Mr Norman Ho was told that COLI wanted a placement price of $1.80 and that, "Horace's personal baseline is $ 1.7." Mr David Tsien went on to inform him that he had obtained "one more institutional investor" for them, it being a holder of 7% of the shares obtained at an average of below $1.60 per share. He went on to explain that that is why he was not interested in a placement at $1.70-$1.80, but was interested at or below $1.60. In response to his enquiry, as to whether or not Value Partners was interested in the placement, Mr Norman Ho said, "I'm not interested as it is so expensive." On 8 January 2004 Mr David Tsien informed Mr Norman Ho, "that China Overseas, I've turned it down already.".

1034. On 9 January 2004, Mr David Tsien informed Mr Norman Ho of the possible COLI placement :

> " … we have offered them a price which we think is feasible ... the price is $1.55 per share ... well I guess he will make a counter offer … but we will not offer a price higher than $1.60 per share ... if you are interested at $1.55 per share, then please let me know.".

No positive indication of interest was forthcoming. On 14 January 2004, Mr Cheah Ching Hye was told by Mr David Tsien that he had already told Mr Norman Ho of COLI's wish to place 800 million shares at $1.80 and that his position and response was, "We like China Overseas, ... but not at 180, maybe 155". On 15 January 2004, Mr Norman Ho was told that Mr David Tsien had responded to COLI, "I said 'For $1.80, your share price must be higher than $2.10 before I will be interested'. I gave it a bid at $1.55." He went on to say "if it's not done by the end of January, after the EGM, then it cannot do anything until April.".

1035. In a conversation at 11:56 on 21 January 2004, Mr David Tsien told Mr Norman Ho :

> "I just want to tell you that regarding this China Overseas, it really intends to place its shares. We are now thinking the possibility of doing it next week; the price won't exceed -- alternatively, it's been said that the price is probably going to be $1.80 or better.".

When Mr David Tsien enquired, "But you people are not interested at this price, are you?" Mr Norman Ho said, "We may be interested if that's for short term ..." Of the price of $2.00 Mr David Tsien said, "I think it better be done at a price below $1.80 if possible." He added, "But originally, we also suggested $1.55 to $1.60, and he refused to accept the offer.".

1036. In their conversation at 10:13 on 26 January 2004, Mr David Tsien told Mr Norman Ho :

> "We would try doing this China Overseas this week. It wants to be 180. We told it, I (suggest) 170 to 180. It is hoped that the price fixed is 175.".

Mr David Tsien added, "It is only we are really going ahead that I told you this.".

Mr David Tsien's disclosure of information in respect of the COLI placement to other fund managers.

1037. Examples of Mr David Tsien's disclosure of information to other fund managers, in circumstances in which he specifically sought an indication of their interest in participating in the COLI placement, are to be found in his telephone conversations and voice mails with Ms Julia Lo, Citigroup, and Mr Nelson Tang, of PMA Investment Advisors.

(i) DT : Ms Julia Lo.

1038. In their conversation at 17:52 on 15 January 2004, Mr David Tsien told Ms Julia Lo of COLI :

> "It is interested in conducting a placement of 15% new shares, about 800 million shares, but it asks for $1.80. I'm not interested in taking it up at $1.80. I would be … interested if it is $1.50.".

Mr David Tsien added that he had quoted a price to COLI.

1039. In a voicemail that Mr David Tsien left on Ms Julia Lo's telephone at 13:47 on 16 January 2004 Mr David Tsien enquired :

> " ... want to check with you an issue … I am handling it for JP Morgan, and I am not sure if you are interested in China Overseas. If you are interested, let's discuss it. If not, don't worry, okay. It is because … you may see the shares of Asia Aluminium, which resume(d) trading today, are not doing very well. Well ... if the price is not very good -- very attractive ... I don't intend to undertake this deal. But if you are interested -- you let me know, because ... I want to find one more anchor. Well, see if you are interested.".

(ii) DT : Mr Nelson Tang.

1040. In a voicemail that Mr David Tsien left on Mr Nelson Tang's telephone at 12:35 on 19 January 2004, he informed him of COLI :

> "If this China Overseas issues 800 million new shares, well ... they want to issue them at 180, which is of course unlikely as it has yet to reach 180 at present ... They asked us what's the share price at which we would be willing to do it, and I said ... that with a NAV of $1.99, I was not interested at 180, but would be interested at 155, maximum 160 … I just want to see if you are interested.".

Mr David Tsien's purposes for disclosing information in respect of the COLI placement.

1041. The Tribunal is satisfied that, in making some of his disclosures in respect of the COLI placement, Mr David Tsien was possessed of more than one purpose in making the disclosure. The Tribunal accepts that the disclosures made by Mr David Tsien to Ms Julia Lo of Citigroup and Mr Nelson Tang of PMA Investment Advisors, cited above, were made only to establish their interest in the respective COLI placement. However, an illustration of circumstances in which Mr David Tsien had a purpose, additional to that of seeking an indication of interest, in making a disclosure of information relevant to the COLI replacement is to be found in the voicemail that he left on the telephone of Mr Motoji Fukuyama, a colleague of Mr Steve Luk at JFAM, at 10:27 on 20 January 2004 having told Mr Fukuyama that JP Morgan had published a report with a target price of $2.35 for COLI he said :

> " ... only thing you should be aware of is that the company is planning to issue 800 million new shares, which CL has vigorously denied. But I was closely involved in the process and I think you should take a look at this company and put in buy order -- if it trades below 1.80 -- if it trades below 1.80, because that is the price the company wants.".

Having gone on to give information about to other stocks, Mr David Tsien said :

> "if you have interest in these three stocks let me know I will get the analysts to talk to you … Raymond Ngai on China Overseas.".

The purposes of David Tsien's disclosure of information about the COLI placement to Mr Steve Luk.

1042. The Tribunal is satisfied that it is perfectly clear that one purpose that Mr David Tsien had in disclosing information about the COLI placement to Mr

Steve Luk was to obtain indications of his interest in participating in that placement, in particular an indication of his demand for the placement of a size that would cast him in the role of "an anchor" in the placement. It is clear that that was a purpose of their conversation at 12:34 on 7 January 2004. Similarly, the matter was pursued in their conversation at 09:32 on 9 January 2004, in which Mr David Tsien said to Mr Steve Luk, "We only want to find one or two anchors because if it's not taken up by even one institution the deal cannot be proceeded with." In response, Mr Steve Luk indicated that demand for US$20 million was "absolutely no problem" and that demand of US$50 million was possible. Of course, the issue of Mr Steve Luk's demand was pursued in subsequent telephone conversations, culminating in the multiple conversations on that issue on the afternoon of 26 January 2004.

1043. The Tribunal is satisfied that Mr David Tsien knew that the information that he was disclosing to Mr Steve Luk in respect of the COLI placement was "non-public price sensitive". He acknowledged as much in the voicemail that he left Mr Steve Luk's telephone at 16:30 on 15 January 2004. We are sure that in agreeing with Mr Steve Luk's suggested way of viewing the disclosure as "rumours" in their conversation at 16:52 on 15 January 2004, Mr David Tsien knew that to be disingenuous and false. Equally, we are sure that Mr David Tsien knew and was mindful of the fact throughout the time of his disclosures to Mr Steve Luk, that the latter held a substantial tranche of COLI shares. Indeed, in their conversation at 09:32 on 9 January 2004, Mr David Tsien observed to Mr Steve Luk of JFAM's holding of COLI shares, "But you have already got 7% now.".

1044. It is in the circumstances described above that the Tribunal must consider Mr David Tsien's purposes in disclosing information about the COLI placement to Mr Steve Luk, in particular in light of their conversation of 11:01

on 19 January 2004, in which Mr Steve Luk indicated that he was considering selling COLI shares. The Tribunal is satisfied that Mr David Tsien's response was in effect to encourage the sale by noting that Mr Steve Luk had acquired the COLI shares at a "low price" and pointing out that three recent placement of shares had resulted in the shares trading down on the market. Notwithstanding Mr David Tsien's knowledge of Mr Steve Luk's assertion that he was considering selling COLI shares, Mr David Tsien continued to provide him with "non-public price sensitive" information about the COLI placement.

"Securing or increasing a profit or avoiding or reducing a loss for another".

1045. The Tribunal is satisfied that one of the purposes that Mr David Tsien supplied information about the COLI placement to Mr Steve Luk was so that the latter could decide to sell COLI shares before COLI announced that it was to place about 800 million COLI shares at $1.80 per share. Mr David Tsien knew that publication of that information was likely to materially affect the price of COLI shares in a negative way : that is, those shares would drop in price in comparison to their pre-announcement market price. In selling COLI shares prior to the announcement Mr David Tsien knew that Mr Steve Luk would avoid a loss. Also, he knew that Mr Steve Luk would be able to obtain COLI shares in the placement at $1.80 per share.

CONCLUSION.

1046. The Tribunal is satisfied that not only has Mr David Tsien failed to establish on the balance of probabilities that one of the purposes of his disclosing information about the COLI placement to Mr Steve Luk did not include the purpose that thereby Mr Steve Luk would avoid a loss to his COLI shares but we are satisfied that that indeed was one of his purposes.

The purpose of Mr David Tsien disclosing information in respect of the COLI placement to Mr Edmond Leung.

1047. In contrast to Mr David Tsien raising directly with Mr Steve Luk on a number of occasions the issue of his interest in participating in the prospective placement of COLI shares, Mr David Tsien did not raise the matter in terms with Mr Edmond Leung. However, it is quite clear that Mr David Tsien anticipated that in the event that Mr Edmond Leung sold a parcel of his COLI shares he would subscribe for COLI shares in the placement.

1048. As we have noted elsewhere, Mr Edmond Leung told Mr David Tsien on a number of occasions that he was considering selling COLI shares. He did so first of all in their conversation at 08:47 on 15 January 2004, in the context of the prospect of a placement of COLI shares at $1.80 per share, when he repeatedly urged that the market price of COLI shares be "kicked up" making it clear, as we find, that in those circumstances he could dispose of some COLI shares first. He returned to that issue in their conversation at 10:53 on 20 January 2004, when he asked to be informed in advance of the announcement of a COLI placement, " …so that I may throw some back to the market Big Brother". At the end of the conversation, Mr Edmond Leung asserted "In that case, at 2, at above $2.00, it is a suitable price for disposal, frankly speaking." Finally, in their conversation at 12:30 on 26 January 2004 Mr Edmond Leung said, "Pushed up enough yet (the price)? Why don't I sell all?" in response Mr David Tsien advised Mr Edmond Leung, "For prices above $2, you may consider taking profit.".

"Securing or increasing a profit or avoiding or reducing a loss".

1049. The Tribunal is satisfied that one of the purposes that Mr David Tsien supplied information about the COLI placement to Mr Edmond Leung was so that the latter could decide to sell COLI shares before COLI announced that it

was to place about 800 million COLI shares at $1.80 per share. Mr David Tsien knew that publication of that information was likely to materially affect the price of COLI shares in a negative way : that is, those shares would drop in price in comparison to their pre-announcement market price. In selling COLI shares prior to the announcement Mr David Tsien knew that Mr Edmond Leung would avoid a loss. Also, he knew that Mr Edmond Leung would be able to obtain COLI shares in the placement at $1.80 per share.

CONCLUSION.

1050. The Tribunal is satisfied that not only has Mr David Tsien failed to establish on the balance of probabilities that one of the purposes of his disclosing information about the COLI placement to Mr Edmond Leung did not include the purpose that thereby Mr Edmond Leung would avoid a loss to his COLI shares but we are satisfied that that indeed was his purpose, or at least one of his purposes.

Did Mr Edmond Leung know that the information of which he was possessed in respect of the COLI placement was "relevant information"?

1051. Having found earlier (paragraph 982), that on and after 20 January 2004 Mr Edmond Leung was possessed of "relevant information" in respect of the COLI placement, we turn to the issue of whether or not Mr Edmond Leung knew that to be the case.

Submissions on behalf of Mr Edmond Leung.

1052. The Tribunal was invited to accept Mr Edmond Leung's evidence that he believed that the information given to him by Mr David Tsien in respect of the COLI placement was public information and, in particular to have regard to the evidence that :

- Mr David Tsien was a public side equity sales broker with whom Mr Edmond Leung had regular contact in his capacity as a fund manager;
- Mr Edmond Leung believed that as such Mr David Tsien would not have access to "non public" information, but that if he did he would be prevented by "Chinese Wall" provisions within JP Morgan from disclosing that information;
- Mr Edmond Leung was not told that the information disclosed to him by Mr David Tsien was "relevant information";
- although Mr Edmond Leung was told by Mr David Tsien of contact he had with the management of COLI on 5 January 2004, Mr David Tsien did not tell him that he had spoken to any COLI management after that date;
- Mr Edmond Leung was not told by Mr David Tsien that he had conversations with the ECDM of JP Morgan; and
- Mr Edmond Leung believed that Mr David Tsien was circulating "market rumour" and exaggerating his own involvement - in support of the latter, the Tribunal was invited to consider Mr David Tsien's admissions that some of his assertions in recorded telephone conversations were "salesman's talk", that is not true.

<u>Background.</u>

1053. Although Mr Edmond Leung was not told by Mr David Tsien that COLI was considering a placement of its shares until their telephone conversation at 15:20 on 12 January 2004, events prior to that date in January 2004 are relevant to a consideration of the issue of whether or not Mr Edmond Leung knew that he was possessed of "relevant information".

(i) Mr David Tsien's meeting with officers of COLI on 5 January 2004.

1054. In their telephone conversation at 09:59 on 2 January 2004, Mr David Tsien informed Mr Edmond Leung of his prospective meeting on 5 January 2004 with officers of COLI, naming Mr Kong and Horace. It was Mr Edmond Leung who brought the conversation back to the subject of COLI, naming it by its stock number twice, asking if it was to be recommended as a stock to buy. In response to the second enquiry, Mr David Tsien explained that he had bought a lot of its shares for JFAM "at this price level", inviting him to check the price on the website of the SEHK under "SDI Disclosure". In their telephone conversation at 15:52 on 5 January 2004, Mr David Tsien confirmed that the meeting with officers of COLI had taken place claiming, "Just now I met with the whole board of China Overseas -- Ah Sing of finance, Horace, Hung Hing Ping.".

(ii) Mr Edmond Leung's purchases of COLI shares.

1055. Mr Edmond Leung bought three separate parcels of COLI shares of 2 million each on each of 2, 6 and 7 January 2004 he did so at average purchase prices of approximately $1.46, $1.69 and $1.77 per share. His purchase order on 2 January 2004 was at 10:12, namely 13 minutes after his conversation with Mr David Tsien had begun the day. Mr Edmond Leung made two further purchases of parcels of COLI shares, one of 2 million and the other of 1.392 million on 13 and 19 January 2004, at average prices of $1.6575 and $1.7961 respectively.

1056. The Tribunal is satisfied that in those circumstances in the telephone conversations that ensued with Mr David Tsien in respect of the COLI placement, beginning on 12 January 2004, Mr Edmond Leung not only had cause to but did pay attention and was alert to the information he was given. That much is made clear, for example, by Mr Edmond Leung's response to the

information he was provided in the telephone conversation of 12 January 2004, namely that COLI was "pitching" to do a placement of 800 million of its shares at $1.80, which JP Morgan had turned down and bid $1.55. Mr Edmond Leung responded :

> "I think that this price does not offer enough (profit margin) to be frank, this is the worst part of it. You -- it would be okay if it is at $1.6.".

1057. Mr Edmond Leung denied in his evidence that he knew the information supplied to him on 12 January 2004 was non-public potentially price sensitive information, albeit that he accepted in hindsight, "there may be some problem". We reject that evidence. We are satisfied that he knew at the time that he received the information that it was not simply market rumour, exaggeration or speculation but "non-public potentially price sensitive information" that Mr David Tsien had obtained from either or both COLI and/or ECDM of JP Morgan.

1058. In their conversation at 08:47 on 15 January 2004, Mr Edmond Leung responded to being informed by Mr David Tsien that, although negotiations were ongoing between COLI and JP Morgan on the placement of COLI shares, there was no agreement on price because COLI asked for $1.80 and JP Morgan were biding $1.55, by repeatedly urging that the market price of the shares be "kicked up" to $2.00. The Tribunal is satisfied that proactive and sustained response by Mr Edmond Leung is further evidence of the fact that he was attentive to information provided by Mr David Tsien. We are sure that he knew that detailed information about the state of negotiations between the parties was available to Mr David Tsien only through his contact with ECDM of JP Morgan and/or COLI and was "non-public potentially price sensitive information".

1059. Mr Edmond Leung initiated the conversation that he had with Mr David Tsien at 16:25 on 19 January 2004, asking immediately "Time to place?" The very fact of that enquiry of Mr David Tsien is at odds with Mr Edmond Leung's evidence that he believed him to be passing information to him that was market rumour, speculation or exaggeration. Similarly, Mr Edmond Leung's response in his conversation with Mr David Tsien at 10:53 on 20 January 2004, on being told that it looked likely that the COLI placement would be done at $1.80 and that he, Mr David Tsien, would let him know if he was to play a part, namely : "Let us know earlier. If it is to be done, I'd -- so that I may throw some back to the market Big Brother.", is at odds with Mr Edmond Leung's evidence that he believed the information to be market rumour only. On the other hand, it is consistent with knowledge that Mr David Tsien had contact with either or both ECDM and/or COLI about the progress of placement negotiations. Of similar significance, was Mr Edmond Leung's enquiry of Mr David Tsien, "At which price would it decide to conduct the placing?" and the ensuing discussion as to the price, culminating with Mr Edmond Leung's assertion " ... at above $2.00 is a suitable price for disposal, frankly speaking." It is to be noted that on the following day, namely 21 January 2004, Mr Edmond Leung sold 2.392 million COLI shares at an average price of $1.9683.

1060. In their brief conversation at 08:52 on 26 January 2004, Mr David Tsien told Mr Edmond Leung, "We guess that China Overseas will go ahead this week. The price range is from $1.70 to $1.80 … 800 million shares". It is to be noted that at 10:38 that day Mr Edmond Leung placed an order to sell 2 million COLI shares, which would leave him with a balance of 5 million COLI shares. In their subsequent telephone conversation at 12:30 that day, Mr Edmond Leung posed the strange question, "What are you going to do today?" Mr David Tsien responded by informing him that the COLI placement shares were probably going to be placed that week. In response, Mr Edmond Leung said :

"Pushed up enough yet (the price)? Why don't I sell all (chuckle).".

Once again, such a reaction is at odds with Mr Edmond Leung's evidence that he believed Mr David Tsien's information to be mere market rumour. We reject that evidence. We are satisfied that he knew that Mr David Tsien was disclosing information about the progress of the negotiations in respect of the COLI placement that he had obtained from either or both COLI or ECDM of JP Morgan.

CONCLUSION.

1061. The Tribunal is satisfied that at the time that Mr Edmond Leung sold COLI shares on 21 and 26 January 2004 he knew that he was possessed of relevant information disclosed to him by Mr David Tsien in respect of the placement of COLI shares.

Did Mr Edmond Leung receive "relevant information" in respect of the COLI placement directly or indirectly from Mr David Tsien?

1062. No issue was taken on behalf of Mr Edmond Leung that such information that he did obtain about the prospective COLI placement was obtained directly from Mr David Tsien. The recorded telephone conversations between the two men in January 2004 pay eloquent testimony to that fact. Accordingly, the Tribunal is satisfied that Mr Edmond Leung received that information directly from Mr David Tsien.

Did Mr Edmond Leung know that Mr David Tsien was a person "connected with" COLI?

1063. The Tribunal has determined that Mr David Tsien was a person "connected with" COLI, it being satisfied that was established on the evidence under both section 247(1)(c) and (d) of the Ordinance. We now turn to

consider whether or not at the material time Mr Edmond Leung knew that Mr David Tsien was a person "connected with" COLI.

Submissions on behalf of Mr Edmond Leung.

1064. On behalf of Mr Edmond Leung, Ms Ismail, reminded the Tribunal that it was Mr Edmond Leung's evidence that he did not know that Mr David Tsien "was or might have been regarded as a person connected to COLI". The Tribunal was invited to have regard to Mr Edmond Leung's evidence :

- that he was not aware of any contact between Mr David Tsien and officers of COLI after 5 January 2004; and
- that Mr David Tsien did not make him aware that he was providing him with "non-public price sensitive information", in particular that he did not regard contact between an equity sales broker and the senior management of a listed company as something out of the ordinary.

Background.

1065. It was Mr Edmond Leung's evidence that in January 2004, COLI was a company known to him in that on 9 December 2003, as part of a tour of Mainland property companies organised by Morgan Stanley, he had met representatives of COLI in Shanghai.

2 January 2004.

1066. In the course of their telephone conversation at 09:59 on 2 January 2004, Mr Edmond Leung was given various pieces of information by Mr David Tsien of the latter's connection with COLI. First, that he was to meet officers of COLI, in particular Mr Kong, whom he described as the new Mainland boss, and Mr Horace Nip on Monday 5 January 2004. Second, that it was going to "spin-off" its construction company from the property business, "For

construction, it is all given to the shareholders for free". Third, in the course of a discussion initiated by Mr Edmond Leung, as to whether it was recommended that the stock be brought, Mr David Tsien asserted, "the stock has been doubled already last year". Mr Edmond Leung responded, "But it was only $1.2 in September, that is not an exceptionally good rise." For his part, Mr David Tsien said :

> "I have brought a lot for JFAM at this price level … for our fund management arm … if you go to Stock Exchange's website it is something called SDI Disclosure ... that is to say ... go to see the major shareholder, then ... you can check the price. At around this price level, they will buy the shares again … this company is one of the companies … this year would become very big.".

1067. The Tribunal accepts Mr Edmond Leung's evidence that he thought that in this conversation Mr David Tsien was encouraging him to have confidence in the outlook for COLI shares. However, the Tribunal is satisfied that Mr Edmond Leung understood the real significance of that fact lay in what else was being asserted, namely that Mr David Tsien had been involved in a transaction which had resulted in JFAM, a well-known institutional fund and "our fund management arm", holding a lot of COLI shares and was now to meet its senior management.

<u>5 January 2004.</u>

1068. In the course of their telephone conversation at 15:52 on 5 January 2004, Mr David Tsien confirmed to Mr Edmond Leung that he had met officers of COLI :

> "But just now I met with the whole board of China Overseas -- Ah Sing of finance, Horace, Hung Hing Ping. They are not going to be floated on the Mainland so soon. Now it's going to be put off until at least the end of next year.".

The Tribunal is satisfied that Mr Edmond Leung realised that one significant factor of the two conversations was that, in prospect, Mr David Tsien had informed him of his meeting with COLI and now he was reporting to him information from the meeting.

The telephone conversations between Mr David Tsien and Mr Edmond Leung on 12, 13, 15, 19 and 20 January 2004.

1069. The Tribunal is satisfied that, having received the information contained in the telephone conversations of 12, 13, 15, 19 and 20 January 2004, Mr Edmond Leung knew that Mr David Tsien had access to and was disclosing to him relevant information about the COLI placement. Initially, the details provided concerned issues of price and size of the placement. On 12 January 2004, Mr Edmond Leung was told that COLI wished to place 800 million shares at $1.80, that JP Morgan had turned down that proposal and bid $1.55. We reject Mr Edmond Leung's denial that he knew that Mr David Tsien had obtained this information from ECDM of JP Morgan. Further, we are satisfied that he knew, from the telephone conversations of 13 and 15 January 2004, that if there was to be a placement it would be at the price COLI was insisting upon, $1.80, that as yet there was no agreement on price, and that the information came from the parties to those negotiations.

1070. In their telephone conversation at 16:25 on 19 January 2004, Mr David Tsien again re-asserted the position taken by COLI, when asked by Mr Edmond Leung whether it was "Time to place?", namely "He wants it to be $1.8". In their telephone conversation at 10:53 on 20 January 2004, he informed Mr Edmond Leung that JP Morgan were offering $1.60, in response to COLI's demand for $1.80 for the placement of its shares, and that :

> "Therefore, there was no agreement as a result of the talks, in respect of price.".

Again, the Tribunal is satisfied that Mr Edmond Leung knew that this information was "non-public price sensitive information" and came from the parties. Clearly, it was only in light of the rising market price of COLI shares, given the resolute position occupied by COLI as to the placement price it wished

to obtain of $1.80, that Mr David Tsien said, " ... now really looks like it's really going to be $1.80.".

1071. The Tribunal is satisfied that when he was informed by Mr David Tsien in their telephone conversation at 08:52 on 26 January 2004, of the COLI placement that he would go ahead that week and that, "The price range is from $1.70 to $1.80", Mr Edmond Leung knew that the information as to the difference between the parties on the issue of price was "non-public price sensitive information" that came from the parties.

CONCLUSION.

1072. In the result, the Tribunal is satisfied that Mr Edmond Leung knew that Mr David Tsien was a person "connected with" COLI in terms of both subsection 247(1)(c) and (d) of the Ordinance.

Did Mr Edmond Leung "know or have reasonable cause to believe" that the information that he received from Mr David Tsien was held by the latter as a result of his being connected with COLI?

CONCLUSION.

1073. It is obvious, from our consideration of the evidence and our determination in respect of the issue of whether or not Mr Edmond Leung knew Mr David Tsien to be a person "connected with" COLI, that the Tribunal is satisfied that Mr Edmond Leung knew that Mr David Tsien held the relevant information he disclosed to him as a result of being connected with COLI. We so find. In the alternative, the Tribunal is satisfied that Mr Edmond Leung had reasonable cause to believe that to be the case and did so believe.

Section 271(3) of the Ordinance.

Submissions on the behalf of Mr Edmond Leung.

1074. It was submitted on behalf of Mr Edmond Leung that he is able to avail himself of the provisions of section 271(3) of the Ordinance, with the consequence that he "shall not be regarded as having engaged in market misconduct by reason of insider dealing", in that he has established on the material received by the Tribunal that the purpose, or one of the purposes, of his dealing COLI shares did not include :

> "the purpose of securing or increasing a profit or avoiding or reducing a loss, whether to himself or another, by using relevant information.".

There is no dispute that the burden of proof upon Mr Edmond Leung is the balance of probabilities.

Mr Edmond Leung's sale of COLI shares was not to avoid a loss or make a profit.

1075. It was submitted that there is no evidence that Mr Edmond Leung sold COLI shares prior to the placement to "avoid a loss", since any negative impact of the placement on the price of COLI shares could only be expected to be of short-term effect and there was no suggestion that he had to sell within a short time frame. Conversely, it is submitted that any allegation that Mr Edmond Leung sold COLI shares prior to the placement "to make a profit" is based on a false premise that he would be allocated shares in the placement. There was no such certainty. In the result, it is submitted that it was highly unlikely that Mr Edmond Leung would have been motivated to sell COLI shares to obtain a profit by reference to the anticipated placement price.

Mr Edmond Leung's reasons for the sale of COLI shares on 21 and 26 January 2004.

1076. The Tribunal was invited to accept Mr Edmond Leung's evidence of the reasons that he sold COLI shares on 21 and 26 January 2004, namely to obtain a

short-term profit in light of a sharp rise in the market share price of COLI shares, which rise placed the market price too close to the estimated NAV. Of the factor of a sharp share price rise, he said that the rise of 10% over a short period would cause him to " ... consider whether there would be any other further good news to support the price". Of NAV of a property company, he said that he would consider selling when the share price reached 10% of its NAV. The Analyst's report of which he was aware at the time placed estimates of NAV for COLI in the range $1.99-$2.30, giving a 10% discount range of $1.854-$2.07.

The sale of COLI shares on 21 and 26 January 2004.

1077. Mr Edmond Leung placed the order for the sale of 2.392 million COLI shares on a "Careful Discretion", "Day only" basis at 10:12 on 21 January 2004, noting on the Order form the price at that time of COLI shares, namely $2.025. Of the factor of the rise in the price of COLI shares, it was his evidence, "I saw the price had been rising. As I looked at the Bloomberg screen on the 21st, when compared to the 19th, the share price had risen more than 10%." Of the factor of NAV, he said, "at that price, around $2, which actually was very close to the estimated net asset value per share of COLI at that time by different brokers, so I decided to sell.".

1078. Mr Edmond Leung placed his order for the sale of 2 million COLI shares on a "Careful Discretion", "Day Only" basis at 10:38 on 26 January 2004. At that time the market price of COLI shares was $2.05. It was his evidence that at the time that he had placed the order he had noticed that the share price of COLI shares had increased 10% over the closing price of the previous trading day, 21 January 2004, when it closed $1.92. That was one of the reasons that he had sold the shares. Another factor was to "lock in" profit for his fund. The average price at which this parcel of shares was sold, $2.0563, represented a, "23.4% increase on the average weighted cost used to purchase the shares.".

The ambit of the material relevant to the consideration of section 271(3) of the Ordinance.

1079. The Tribunal has had regard to all of the material that it has received in considering the operation of section 271(3) in the case of Mr Edmond Leung. In particular, it is relevant to examine Mr Edmond Leung's explanation for his sale of COLI shares on 21 and 26 January 2004 in the context of his tape-recorded conversations with Mr David Tsien prior to and during that period in January 2004.

Mr Edmond Leung's telephone conversations with Mr David Tsien on 15 and 20 January 2004.

1080. As has been noted earlier, in the telephone conversation at 08:47 on 15 January 2004, having been informed of COLI's resolute position that placement of a shares should be at $1.80 per share, Mr Edmond Leung was proactive in urging that the shares be "kicked up", so that "(he) can dispose of some first." We are satisfied that Mr Edmond Leung was stating that in those circumstances he would sell COLI shares prior to the announcement of the placement. In response to Mr David Tsien's statement, "It now insists on $1.80, if it asked for $1.80, I would tell it that it would have to be $2.00 to $2.10." Mr Edmond Leung responded with the suggestion of a lower price, "Kick it up to $2.00 first." Again, as noted earlier in their telephone conversation of 10:53 on 20 January 2004, having been told by Mr David Tsien of the COLI placement that, "Now really looks like it's really going to be $1.8" and having been told that Mr David Tsien would let him know if he was doing the placement, Mr Edmond Leung responded by saying that he wished to be told earlier "so that I may throw some back to the market Big Brother." The conversation closed with Mr Edmond Leung saying of an appropriate price to sell COLI shares in those

circumstances, "above two dollars, it's a suitable price for disposal frankly speaking.".

1081. The Tribunal is satisfied that the position articulated by Mr Edmond Leung to Mr David Tsien in the morning of 20 January 2004, was that in prospect of a placement of COLI shares at $1.80 he was considering selling shares at above $2.00 per share, the latter price being selected on the basis of it being an appropriate discount to market price for the placement to take place. Nowhere in that conversation did Mr Edmond Leung suggest in anyway that the price of $2.00 was chosen on the basis of either a sharp rise in the market price of COLI shares or the market price becoming close to COLI's estimated NAV or a combination of both factors. It is to be noted that having touched the price of $2.00 per share in respect of one small transaction 10 minutes prior to their conversation at 10:53, COLI shares did not achieve that price again until 15:17 that afternoon when it traded at or above that price for almost all the period until 15:23. A "High" of $2.025 was obtained briefly in the period 15:17-15:24.

Mr Edmond Leung's sale of COLI shares on 21 January 2004.

1082. Apart from the first minute of trading on 21 January 2004 the COLI share price was at $2.00 or above up and until Mr Edmond Leung placed his order to sell 2.392 million COLI shares at 10:12. At that time, the share price was $2.025. It follows that at the time he placed his order the price had been reached which he had described the previous morning, in the context of a prospective placement of COLI shares, as being "a suitable price for disposal of COLI shares".

1083. Mr Edmond Leung did not point to any documents contemporaneous to his sales of shares on 21 and 26 January 2004 that evidence a pre-existing policy to sell COLI shares on a sharp price rise of 10% and/or when the market price

came close to COLI's estimated NAV. As the Presenting Officer has pointed out, Mr Edmond Leung gave accounts to the SFC (on 18 November 2004 and 6 May 2005) that differ from the account given to the Tribunal. In explaining his decision to sell COLI shares on 21 January 2004, he told the SFC on 18 November 2004 :

> " ... on 20 to 21 January, its share price rose by close to 10%, and at that time some brokers estimated the NAV ... of COLI could reach $2 to $2.3 per share. The market price then was close to this price, so I decided to take short-term profit.".

On 6 May 2005, he reaffirmed the position in respect of the rise in COLI share price, explaining that he had sold COLI shares :

> " ... solely because the share price then was about 10% higher than the previous closing price ...".

1084. By contrast, in his evidence he told the Tribunal that the sharp rise in COLI share price to which he had regard on 21 January 2004 was the rise that morning when compared with the closing price on 19 January 2004. In fact, the market price of COLI shares at the time Mr Edmond Leung placed his order at 10:12 on 21 January, namely $2.025, represented a rise of less than 3% from the "Closing" price of the previous day on 20 January 2004, namely $1.97. In cross-examination, Mr Edmond Leung agreed that if a "two trading days" spread was taken then the intraday "High" on 19 January 2004, namely $1.86, represented a 9.4% increase over the "Closing" price of COLI shares on 16 January 2004. Also, it is to be noted that that "High" of $1.86 was within the 10% discount at the lower end of estimated NAV. Rather than selling COLI shares, Mr Edmond Leung bought a parcel of COLI shares on 19 January 2004.

<u>Mr Edmond Leung's sale of COLI shares on 26 January 2004.</u>

1085. Mr Edmond Leung placed his order to sell COLI shares at 10:38 on 26 January 2004. In their telephone conversation at 08:52, Mr Edmond Leung had been told by Mr David Tsien :

> "We guess that China Overseas will go ahead this week. The price range is from $1.70 to $1.80.".

In their subsequent telephone conversation at 12:30, Mr Edmond Leung responded to being told by Mr David Tsien that the COLI placement would probably go ahead that week by saying :

> "Pushed up enough yet (the price)? Why don't I sell it all.".

Once again, the Tribunal notes that Mr Edmond Leung's reference to selling COLI shares was in the context of a consideration of the COLI placement, not by reference to a sharp increase in its share price or the fact that the market price had reached close to its estimated NAV.

"Securing or increasing a profit or avoiding or reducing a loss for himself or another".

1086. The Tribunal is satisfied that one of the purposes for which Mr Edmond Leung sold COLI shares in the fund that he managed on 21 and 26 January 2004 was to do so in advance of the publication of an announcement of the fact of COLI's placement of about 800 million shares at $1.80 per share, the publication of which information he knew was likely to materially affect the price of COLI shares in a negative way. It was one of Mr Edmond Leung's purposes to avoid a loss on those COLI shares, namely the difference between the market price of the COLI shares at the time he sold those shares and the market price of COLI shares at the time that the market had digested the information of the announcement of the COLI placement and reflected it in market price. Also, Mr Edmond Leung knew that he would be able to obtain COLI shares in the placement at $1.80 per share.

CONCLUSION.

1087. The Tribunal is satisfied that not only has Mr Edmond Leung failed to establish on the balance of probabilities that one of the purposes of his selling COLI shares on 21 and 26 January 2004 did not include the purpose that the

fund of which he was manager would avoid a loss on the COLI shares but we are satisfied that indeed was one of his purposes.

Issue : is the case against Mr Steve Luk "legally flawed"?

Submissions on behalf of Mr Steve Luk.

1088. For the first time, at the outset of his written closing submissions, Mr Sussex submitted that the case against Mr Steve Luk as stipulated in the FS's Notice was an allegation that :

> " ... he sold shares with the intention of replacing them with cheaper placement shares, rather than to avoid a loss.".

He submitted that the case advanced by the Presenting Officer in the hearing was of the same nature. It was contended that was "legally flawed" in that the conduct "does not amount to insider dealing".

1089. Mr Sussex submitted that :

> "In order to make out a case against Steve Luk, the Presenting Officer must demonstrate that Steve Luk was aware of the impending COLI placement, knew that the announcement would cause COLI shares to fall and sold his shares in order to avoid that loss.".

Of the case against Mr Steve Luk, as stipulated in the FS's Notice and the manner in which the Presenting Officer had presented it in the hearing, Mr Sussex contended :

> "However, the Presenting Officer has not sought to prove that Steve Luk was aware of the impending COLI placement, knew that the announcement would cause COLI shares to fall and sold his shares in order to avoid that loss. Instead, consistent with the 'suspected market misconduct' identified in the Financial Secretary's Notice (D1/p. 49), the Presenting Officer has sought to prove that Steve Luk was aware of the impending COLI placement and sold the shares in the market with the intention of replacing them with cheaper shares by means of subscribing in the COLI placement.".

1090. Mr Sussex asserted that it had never been suggested to Mr Steve Luk in cross-examination that he had sold COLI shares "to avoid a loss", rather it was

suggested that he had sought to swap COLI shares. Of those circumstances, it was submitted that :

> "swapping shares in that manner would not amount to market misconduct by reason of insider dealing because :-
>
> (1) It does not involve exploitation of knowledge of price sensitivity. The placement shares, being offered at a discount to the market price, would still be cheaper whatever impact on the placement announcement was likely to have, or indeed eventually in fact had, on the share price.
>
> (2) The benefit which accrues to a shareholder who swapped shares in that way is not taken directly or indirectly from the market. The new shares are obtained by way of private placement and by means of an opportunity not available to the public generally. In the present case the benefit (such as it was) was only available to institutional clients of JP Morgan who were offered the placement shares.".

The FS's Notice.

1091. It is to be noted that the "Particulars of suspected market misconduct activities" described in the FS's Notice stipulate the "relevant information" as being information, that COLI "would announce and carry out a top up placement of 850 million shares at a price of HK$1.80 per share on or about 26th January 2004." Paragraph 4 of the Particulars stipulates in respect of all three Specified Persons that they :

> "at all material times during the relevant period knew ... that the relevant information was material non-public, price sensitive and *would have a depressing effect on the price of the company shares* traded on the Hong Kong Stock Exchange." [italics added].

1092. In Paragraph 7 of the Particulars, it is asserted that in selling COLI shares Mr Edmond Leung and/or Mr Steve Luk acted in contravention of section 270(1)(e)(i) of the Ordinance. One of the ingredients of that subsection, is that it be proved that the Specified Person dealing in the shares of COLI "has information which he knows is relevant information" in relation to COLI. One of the ingredients of "relevant information", is that it be not only "non-public" but also "price sensitive", in particular that it is information :

> "which is not generally known to the persons who are accustomed or would be likely to deal in the listed securities of the corporation but which would if it

> were generally known to them be likely to materially affect the price of the listed securities.".

Expert evidence.

1093. As has been noted earlier, the Tribunal received expert evidence from two expert witnesses, Mr Rigby called by the Presenting Officer and Mr Witts called on behalf of Mr Steve Luk. A considerable part of their lengthy evidence addressed the issue of whether or not, in prospect, the announcement of the placement of shares by COLI made on 26 January 2004 was likely to have a "bearish" effect on the market price of COLI shares.

Cross-examination of Mr Steve Luk.

1094. It is to be noted that when it was suggested to Mr Steve Luk that, as a result of his telephone conversations with Mr David Tsien culminating in the telephone conversation at 14:33 on 26 January 2004, he knew that he had received, "non-public price sensitive information in relation to the COLI placement", Mr Steve Luk disagreed :

> "As to whether the information is share price sensitive, I think, for me, I believe the placement is positive, if there is a placement, a placement is positive to COLI and the COLI share price.".

It is quite clear that in responding that way, Mr Steve Luk understood that the allegation being made was that the information was "bearish" as to the COLI share price. It was in that context, that Mr Kwan put to Mr Steve Luk :

> "I suggest to you that you were prompted by this particular telephone conversation with Mr Tsien to sell your COLI shares, as a result of receiving non-public price sensitive information from Mr Tsien.".

CONCLUSION.

1095. In the result, the Tribunal is satisfied that it was made perfectly clear in the FS's Notice and in the manner in which the Presenting Officer presented his case that it was alleged that, in prospect, it was known to Mr Steve Luk that the announcement of the COLI placement would be likely to materially affect the

price of COLI shares in a negative way and that it was with the knowledge of those circumstances that he had sold the shares.

1096. The issue of whether or not Mr Steve Luk's purpose or one of his purposes in selling COLI shares was for, "the purpose of securing or increasing a profit or avoiding or reducing a loss, whether for himself or another, by using relevant information" arises in the Tribunal's consideration of section 271(3) of the Ordinance.

Did Mr Steve Luk know that the information of which he was possessed in respect of the COLI placement was "relevant information"?

1097. Having found earlier (paragraph 982) that on and after 20 January 2004 Mr Steve Luk was possessed of "relevant information", we turn to the issue of whether or not Mr Steve Luk knew that to be the case.

Submissions on behalf of Mr Steve Luk.

1098. On behalf of Mr Steve Luk, the Tribunal was invited to accept his evidence that he did not consider the information communicated to him by Mr David Tsien to be "price sensitive", in particular that he did not regard it as likely that COLI share price would fall following the placement. In that respect, it is to be noted that in his statement dated 19 February 2009, Mr Steve Luk asserted:

> "Obviously, I did not believe the price of COLI shares would fall after the placement was announced. Rather, I felt it was a good prospect that the share price would rise, given the recent positive developments surrounding COLI and the strong performance of shares over the period 19th January to 26th January 2004.".

Background.

1099. In considering the issue of whether or not Mr Steve Luk knew that the information he received from Mr David Tsien was "relevant information" the

Tribunal is mindful of the evidence of events prior to January 2004 that give context to the events of that month. Mr Steve Luk accepted that, prior to January 2004, he knew that Mr David Tsien had contact with Mr Horace Nip. Also, Mr Steve Luk testified that he had met Mr Horace Nip at a meeting on 18 November 2003. On 26 November and 3 December 2003, Mr David Tsien was instrumental in arranging two block crossings, each of 60 million COLI shares, for JFAM, including the funds managed by Mr Steve Luk. As a result, disclosure was made under the Securities (Disclosure of Interests) Ordinance of an overall holding by JFAM and JP Morgan of more than 5% of the shares of COLI. It is to be noted that in their conversation on 5 January 2004, in which Mr David Tsien reminded Mr Steve Luk of their lunch appointment with COLI management, Mr David Tsien indicated that the meeting could be postponed if Mr Steve Luk was unavailable. In his evidence, Mr Steve Luk said that he thought that was a reflection of the shareholding held by JFAM.

“Non-public” information.

1100. Not surprisingly, Mr Steve Luk readily agreed that many pieces of information provided to him by Mr David Tsien in respect of the potential COLI placement were “non-public” information. That much was obvious. For example, he agreed that in informing him in a voice message at 09:03 on 6 January 2004, that COLI was considering doing a placement of 800 million shares at about $1.70 per share, Mr David Tsien was disclosing to him information not known to the public. Mr Steve Luk took issue over the question of what information really came from Mr Horace Nip and what was invented by Mr David Tsien. Similarly, he agreed that in being told by Mr David Tsien, in their telephone conversations at 12:34 and 15:35 on 7 January 2004, that Mr Kong wanted a share placement price of $1.80 and that Mr Horace Nip had said that COLI’s bottom line was $1.70, if the information was real it was “non-public”. He said that he did not know whether it was real or not.

“Price sensitive” information.

1101. In his evidence, Mr Steve Luk repeatedly said that he did not believe, doubted or did not know if information given to him by Mr David Tsien in respect of the COLI placement was “real” or true. In those circumstances, he asserted the information could not be “price sensitive”. It was merely rumour or speculation. Mr Steve Luk said that he doubted Mr David Tsien’s assertion, in their telephone conversations at 09:32 on 15 January 2004, that JP Morgan would offer COLI a share placement price of $1.55, “I didn’t know whether he got the information from whoever that JP Morgan is going to offer $1.55, so I treated as something that is unreliable, despite being told to me directly by Mr Tsien”. Of Mr David Tsien’s assertion, in their conversation on 12 January 2004, that COLI had rejected JP Morgan’s offer of $1.55 and the other assertions made by Mr David Tsien, Mr Steve Luk said that he treated it as “rumour”. Of Mr David Tsien’s assertion to him in their telephone conversation at 16:08 on 20 January 2004 of COLI’s position :

> “They want $1.75. Why is that the case? Director Wu wants $1.7, Kong Qing Ping wants it to be $1.8. I said to him, ‘It’s best if you can make some concession to us’. For this, it will be done tomorrow at the earliest, next week the latest.”.

Mr Steve Luk said that whilst he accepted that Mr David Tsien was describing having had negotiations with COLI, he did not believe him.

A consideration of Mr Steve Luk’s evidence of his doubts of the provenance and veracity of the information provided to him by Mr David Tsien.

1102. The manner in which Mr Steve Luk continued to conduct telephone conversations with Mr David Tsien about the prospective COLI placement, in particular his positive suggestions on occasions and his failure to take issue with Mr David Tsien’s assertions at all belies his claim that he did not accept or believe much of the information that he was receiving. As far as the latter issue is concerned, it is to be noted that in their telephone conversation at 15:37

on 5 January 2004, Mr Steve Luk readily and immediately dissented from the opinion expressed by Mr David Tsien that the performance of COLI shares that day suggested that COLI wished to make a placement of its shares. Of the former issue, for example it is to be noted that Mr Steve Luk responded to Mr David Tsien, in their telephone conversation at 12:34 on 7 January 2004, to being told that COLI wanted $1.80 per share and that their bottom line was $1.70 by suggesting :

> "If you do it today, it has to be $1.6. If you push it up to $1.8 by speculation, then it is another matter, you are smart right?".

1103. Although Mr Steve Luk said that he treated as unreliable Mr David Tsien's assertion to him, in their telephone conversation at 09:32 on 9 January 2004, that JP Morgan proposed to bid $1.55 to COLI for the placement, nevertheless he went on to indicate his "demand" and that of JFAM fund managers as a whole for the placement to Mr David Tsien, indicating demand of US$20 million-US$50 million. In response, to being told by Mr David Tsien, in their telephone conversation at 09:23 on 15 January 2004, that JP Morgan proposed to re-bid a price of $1.55, Mr Steve Luk responded by suggesting that the deal might not be done at that price and suggested that a higher price would be necessary. Finally, in their conversation at 16:06 on 20 January 2004, in which Mr David Tsien asserted that he had direct negotiations with Mr Wu and that the compromise price, between the range indicated by COLI of $1.80 and $1.70, was $ 1.75, Mr Steve Luk engaged in discussions with Mr David Tsien as to the appropriate market price that needed to be reached, he suggesting $2.00.

"Officially I'm supposed to know nothing at all".

1104. Mr Steve Luk's statements, in his telephone conversation with Mr David Tsien at 16:52 on 15 January 2004, speak eloquently to his knowledge that the material he was receiving from Mr David Tsien was "non-public potentially price sensitive" information. In a voice message left on Mr Steve Luk's

telephone at 16:30 on 15 January 2004, in the context of inviting him to contact either Mr Ian Long or Mr Rupert Fane of JP Morgan's ECDM, Mr David Tsien said twice of the COLI placement, "Officially I am supposed to know nothing at all". In their conversation at 16:52, Mr Steve Luk addressed the issue of his receipt of information from Mr David Tsien:

> " ... look, the things that you've told me are all rumours … the things that I've told you are based on your rumour. I will think in this way ... if I talk with him and he tells me right away that it would probably be done, then I'll be dammed ... His are not rumours, he really goes to make a bid ... Yep, while we are very -- that is being in the same company, it's even more outrageous, even more dangerous.'.

1105. The Tribunal is satisfied that in setting out for Mr David Tsien an approach to be taken to the issue of the flow of information from Mr David Tsien to Mr Steve Luk, the latter was being utterly disingenuous. He knew that the information was "real", true and price sensitive, but was indicating how he proposed, if necessary, to contend that it was mere rumour.

CONCLUSION.

1106. The Tribunal is satisfied that at the time Mr Steve Luk placed the order to sell COLI shares at 14:36 and 15:33 on 26 January 2004 he knew that he was possessed of relevant information received by him from Mr David Tsien in respect of the placement of COLI shares.

<u>Did Mr Steve Luk receive "relevant information" in respect of the COLI placement directly or indirectly from Mr David Tsien?</u>

1107. No issue was taken on behalf of Mr Steve Luk that such information that he did obtain in respect of the prospective COLI placement was obtained directly from Mr David Tsien. As in the case of Mr Edmond Leung, the recorded telephone conversation speak eloquently to that fact. Accordingly,

the Tribunal is satisfied that Mr Steve Luk received that “relevant information” directly from Mr David Tsien.

Did Mr Steve Luk know that Mr David Tsien was a person “connected with” COLI?

1108. The Tribunal has determined that Mr David Tsien was a person “connected with” COLI, it being satisfied that was established on the evidence under both section 247(1)(c) and (d). We turn now to consider whether or not at the material time Mr Steve Luk knew that Mr David Tsien was a “person connected” with COLI.

Submissions on behalf of Mr Steve Luk.

1109. As noted earlier, Mr Sussex made no written or oral submissions in relation to the issue of whether Mr David Tsien was a person “connected with” COLI. Similarly, he has made no submission in respect of Mr Steve Luk’s knowledge that Mr David Tsien was a person “connected with” COLI.

CONCLUSION.

1110. The Tribunal is satisfied that there is overwhelming evidence that Mr Steve Luk knew Mr David Tsien to be a person “connected with” COLI. In reaching that determination the Tribunal is mindful, in the first place, of the evidence that Mr Steve Luk was aware of Mr David Tsien’s contacts with COLI prior to January 2004. Secondly, of the evidence of the role that Mr David Tsien played, to the knowledge of Mr Steve Luk, in securing Mr Steve Luk’s attendance at the lunch on 5 January 2004 with the management of COLI and his immediate report to Mr Steve Luk in the afternoon of Mr Horace Nip’s request for a meeting with Mr David Tsien. Thirdly, the Tribunal notes that in the days that followed Mr Steve Luk was the recipient of a torrent of information about the respective positions adopted by COLI on the one hand and

JP Morgan on the other hand in their negotiations about the prospective placement.

Did Mr Steve Luk "know or have reasonable cause to believe" that the information that he received from Mr David Tsien was held by the latter as a result of his being connected with COLI?

Submissions on behalf of Mr Steve Luk.

1111. Mr Sussex has made no submissions on behalf of Mr Steve Luk on this issue.

CONCLUSION.

1112. As is obvious from our consideration and determination of the issue of whether or not Mr Steve Luk knew Mr David Tsien to be a person "connected with" COLI, the Tribunal is satisfied that Mr Steve Luk knew that information that he received from Mr David Tsien came from JP Morgan and/or COLI and was held by Mr David Tsien as a result of his being connected with COLI. In the alternative, the Tribunal is satisfied that Mr Steve Luk had reasonable cause to believe that to be the case and did so believe.

Section 271(3) of the Ordinance.

Submissions on behalf of Mr Steve Luk.

1113. The Tribunal was invited to accept Mr Steve Luk's evidence that he regarded the information supplied by Mr David Tsien as "unreliable and nothing more than market rumour" and that he sold COLI shares on the afternoon of 26 January 2004 solely because of the fact that the market price had reached his target price of $2.00. The Tribunal is invited to note that initially he set a price limit of $2.05, reduced subsequently to $2.00. It was submitted that his subsequent conduct in subscribing for placement shares and keeping the shares

allotted to him for several days after the placement in face of a falling price of COLI shares was :

> "… not at all consistent with knowing that COLI share price would fall and selling to avoid a loss. It is also not consistent with selling to swap shares for cheaper placement shares, because the Alger SICAV China Fund did not subscribe to placement shares.".

<u>Mr Steve Luk's evidence of his "loose target price" for COLI shares in January 2004.</u>

1114. It was Mr Steve Luk's evidence that, in January 2004, he had adopted a "loose target price" for the sale of COLI shares. In his statement of 19 February 2009, he identified that price as being between $1.80 and $2.00. He explained his reasoning as being, "that at the end of 2003, a number of analysts had reviewed COLI's business and upgraded their estimates of the company's NAV per share to around $2.00." He made reference to Mr Raymond Ngai's report dated 29 December 2003, in which the estimated NAV was $1.99 per share. He went on to say :

> "It was my view that these estimates were accurate and that the shares of COLI should ultimately trade at a price which was equal to or only slightly below the company's NAV per share.".

<u>Revised "loose target price".</u>

1115. Mr Steve Luk went on to describe in his statement, circumstances that had led him to revise upwards his "loose target price". Against a background of a surge in COLI's share price after 16 January 2004, he said that he took into account : firstly, the announcement by COLI of the spin-off of its construction business; secondly, the marketing of the Shanghai Forte IPO and thirdly, information he received from Mr David Tsien about the upward revision of estimates of NAV by analysts. In the result, he said that :

> "I increased my short-term target price from a range of $1.80 to $2.00, to $2.00 (ie the upper end of my previous range).".

In cross-examination, Mr Steve Luk said that he was unable to, "pinpoint a date on the 20th or the 19th or the 16th that I raised the target price. As I mentioned, buying and selling of stock and setting the target price is no science.".

Mr Steve Luk's evidence as to the reasons for the sale orders he placed for COLI shares on 26 January 2004.

14:36.

1116. It was Mr Steve Luk's evidence that he had placed orders to sell 8.744 million COLI shares held by the JPM and China Fund and 1.656 million COLI shares held by the JPM Greater China Open Fund at a price limit of $2.05 at 14:36 pm on 26 January 2004 as a result of his attention being drawn to a computer screen displaying COLI's market price in a conversation that he had with Mr David Tsien at 14:33 that day. He placed those orders because, "I realised the share price had risen and, as a consequence, the shares were now trading at a level which was over my target price of $2.00". He went on to assert :

> "The only reason that I disposed of shares in COLI on 26 January 2004 was because the share price went up by more than 10% and had reached my short-term target price of $2.00, and there had been a dramatic rise in the share price against the background of falls in the Hang Seng China Enterprises Index generally.".

15:30.

1117. Mr Steve Luk gave evidence that in another telephone conversation with Mr David Tsien, at 15:27 on 26 January 2004, had :

> " … prompted me to think about COLI. At that time, whilst the price was above my target price of $2.00, it had fallen below the price limit I had placed on my sale order of $2.05. I therefore called the central dealing department and reduced the price limit of my order to my target price.".

15:33.

1118. It was Mr Steve Luk's evidence that at 15:33 he had placed an order for the sale of 188,000 COLI shares held in the fund managed by an absent

colleague, Mr Ernest Liu, at no price limit attempting to "lock in a profit" for that fund.

Was there a "loose target price" for the sale of COLI shares?

1119. At the outset, the Tribunal observes that Mr Steve Luk has not pointed to any pre-existing documentation that evidence the "loose price target" which he says that he applied to the sale of COLI shares. In those circumstances, the Tribunal has considered with particular interest the cross-examination of Mr Steve Luk of the circumstances obtaining at the time that he placed sales orders and when he did not do so in January 2004.

Non-dealing.

1120. Mr Steve Luk accepted in cross-examination that there were a number of days on which he did not place sales orders in respect of COLI shares, although COLI shares traded at, in or above his "loose target price", when there was :

(i) a significant surge in COLI share price; and
(ii) COLI shares outperformed the HSI and the Hang Seng China Enterprises Index.

He agreed that on 5 January 2004 the intraday "High" of COLI shares, namely $1.78, represented a 21% increase on the closing price of the previous trading day. On 7 January 2004, the intraday "High" of COLI shares, namely $1.83, represented an 8.9% increase on the closing price of the previous trading day. The intraday "High" of $1.86 on 19 January 2004, represented an increase of 9.4% on the closing price of the previous trading day. Finally, the intraday "High" of $2.025 on 20 January 2004, represented a 12% increase on the closing price of the previous trading day. Clearly, the intraday "High" on 7 and 19 January 2004 were within Mr Steve Luk's "loose target price" range, whereas the intraday "High" of $2.025 on 20 January 2004 was above even the revised

"loose target price". Although the price increase of the intraday "High" on 21 January 2004, namely $2.05, represented a price increase of only 4% over the previous closing price, clearly that share price was above even the revised range that Mr Steve Luk said that he had set as his "loose target price". On none of those days did Mr Steve Luk place sale orders in respect of COLI shares.

<u>Sales of COLI shares : 13 and 16 January 2004.</u>

1121. By contrast, Mr Steve Luk's sale of COLI shares on 13 and 16 January 2004, at average prices of $1.648 and $1.7027 respectively, were at prices outside his "loose target price" range. Furthermore, on 13 January 2004 the intraday "High", $1.72, was the same price as the closing price on the previous trading day. The Tribunal is mindful of Mr Steve Luk's explanation in his evidence that his sale of shares on 13 January 2004 was made against the background of a surge in COLI shares in the period from 2 January 2004 and his asserted belief that there was to be a "downward correction" and that he wished to "lock in" some profit.

1122. The Tribunal notes that having accepted in his evidence that setting a "loose price target" was not a "science", Mr Steve Luk went on to advert to the difficulties of explaining a particular dealing in shares :

> "It is very difficult to explain a buy and sell transaction and the consideration a fund manager would take into account to do a transaction, there is a number of factors.".

CONCLUSION.

1123. It is abundantly clear on the material received by the Tribunal, and the Tribunal so finds, that Mr Steve Luk's dealing or non-dealing in COLI shares in January 2004 is not explained by the application of a so-called "loose target price" policy, as described in his testimony.

The significance of Mr Steve Luk's tape-recorded conversations with Mr David Tsien.

1124. The Tribunal is satisfied that, in addressing the issue of what was Mr Steve Luk's purpose in placing orders to sell COLI shares on 26 January 2004, great significance is to be attached to the tape-recorded conversations held between Mr David Tsien and Mr Steve Luk. Importantly, they are contemporaneous assertions, rather than a retrospective explanation for earlier conduct. It is clear, that by his assertions in those conversations as the month of January progressed Mr Steve Luk expressed a sustained interest in the prospective placement of COLI shares. We are satisfied that he knew, on the one hand, that COLI was resolute in seeking a placement price of $1.80 per share and that, on the other hand, whilst JP Morgan were flexible as to the price of the placement shares they were resolute that the market price of COLI shares had to be such that the placement price of $1.80 was at a discount of at least 8% and preferably more. Similarly, Mr Steve Luk knew that the likelihood of a placement taking place at $1.80 per share was directly, positively correlated to the upward movement of the market price of COLI shares. Of course, a market price for COLI shares of $2.00 afforded a discount of 10% for a placement at $1.80.

1125. It is to be noted that it was in a conversation with Mr David Tsien at 11:01 on 19 January 2004, in the context of a sharp upward rise in the price of COLI shares that Mr Steve Luk observed of COLI, "They can't wait". Clearly, that was a reference to the issue of there being parties who were pushing up the market price of COLI shares so that the placement of its shares could take place. Having said, "With it there is a chance any time today", which we are satisfied with a reference to an announcement of the placement of COLI shares, Mr Steve Luk made a reference to selling COLI shares, "but if I were to sell I would wait

until 3:45." Significantly, that statement was made in the context of the increasing prospect of a placement of COLI shares.

1126. Mr David Tsien's voice message to Mr Steve Luk at 09:13 on 20 January 2004 predicted, correctly as it turned out, that COLI shares would trade above $2.00 that day. On a turnover of over 103 million shares the intraday "High" was $2.025. When Mr David Tsien enquired of Mr Steve Luk, in their telephone conversation at 15:50 on 20 January 2004, of his interest in a COLI placement at $1.70 per share COLI shares, the market price of COLI shares was $1.98-$1.99 per share. Having been told, in their telephone conversation at 16:06 that day, that COLI wanted $1.75 per share, there being a compromise between the prices of $1.70 and $1.80, sought respectively by Mr Wu and Mr Kong, Mr Steve Luk took issue with Mr David Tsien's assertion that a placement at that price required a market price of $2.10. Mr Steve Luk said :

> "no way, its so big, no way, $2, over $2 ... Around $2 ... 10% discount, that's about right. Because you still have do … you people will not just look at the share price for one day, will look at the average, right.".

1127. In responding as he did, we are satisfied that Mr Steve Luk was addressing the issue of the price COLI shares had to reach, namely $2.00 or above, on the market to permit a discount of 10% to be placed at $1.80. Similarly, we are satisfied that Mr Steve Luk knew that the probabilities of the placement taking place at $1.80 per share had increased enormously.

1128. In their final conversation on 20 January 2004 at 17:33, Mr David Tsien updated his information to Mr Steve Luk in their conversation at 16:06 in which he had said that the placement "will be done tomorrow at the earliest, next week the latest", by saying that it would not be done until the following week. Of course, 21 January 2004 was the day before the Lunar New Year holidays and

had been the subject of discussions between Mr David Tsien and Mr Steve Luk as an inopportune day to announce a placement.

1129. Having been told by Mr David Tsien in their telephone conversation at 08:57 on 26 January 2004, "China Overseas may open their offer with a price range, for 800 million shares, at 170 to 180", at 14:33 that day Mr David Tsien told Mr Steve Luk of the COLI placement, "It should be done at 175". He repeated that assertion at the end of the conversation, although in between those assertions he had said "Not more than 180". We are satisfied that in responding, "Hurry up then. Is it okay yet? Now can it be okay-okay today?" that Mr Steve Luk knew that the circumstances necessary to permit a placement of COLI shares at $1.80 were in place and that, in consequence, the probabilities of agreement being reached and an announcement made of the placement were great.

1130. The Tribunal is satisfied that it was in consequence of that knowledge that Mr Steve Luk placed orders to sell COLI shares at 14:36. We reject his evidence that he had done so because the shares had reached and gone beyond his "loose price target" of $2.00 per share. We are satisfied that no significance is to be attached to the fact that Mr Steve Luk placed a price limit of $2.05 on his initial orders at 14:36. Clearly, as in fact transpired, that limit was capable of being changed. We accept Mr Steve Luk's evidence that it was Mr David Tsien's telephone call at 15:27 that prompted him to review the then current market price of COLI shares and to determine that, they having fallen beneath the price limit of $2.05 that he had placed on his initial orders, to change that limit to $2.00 at 15:30.

1131. The Tribunal is satisfied that in placing limits on the sale orders that he made on 26 January 2004, Mr Steve Luk was doing no more than trying to

maximise the monies to be received from the sale of shares. In the event, he simply got it wrong and was too optimistic with the result that, although COLI shares closed at $2.00 per share he had been unable to sell all the shares he placed on sale.

15:33

1132. In placing an order to sell 188,000 COLI shares without price limit in the Alger fund, of which his colleague was manager, the Tribunal is satisfied that Mr Steve Luk knew and had taken into account in placing that order the information that he had that the probability of an agreement and an announcement of the placement of COLI shares had become great.

"Securing or increasing a profit or avoiding or reducing a loss for himself or another".

1133. The Tribunal is satisfied that one of the purposes of Mr Steve Luk selling COLI shares on 26 January 2004, in consequence of placing orders at 14:36 and 15:33 that day, was to do so in advance of the publication of an announcement of the fact of COLI's placement of about 800 million shares at $1.80 per share, the publication of which information he knew was likely to materially affect the price of COLI shares in a negative way. It was Mr Steve Luk's purpose to avoid a loss on those COLI shares between the market price of the COLI shares at the time he sold the shares and the market price of COLI shares at the time the market had digested the information of the announcement of the COLI placement and reflected in the market price of COLI shares. Also, Mr Steve Luk knew, in the case of the two funds of which he was the manager, that he would be able to obtain COLI shares in the placement itself.

The sale and subscription for an allotment of COLI shares.

1134. As noted earlier, the Tribunal notes that on 26 January 2004, Mr Steve Luk placed orders to sell 1.656 million COLI shares in the Greater China Open Fund, of which 1.42 million were sold, and 8.7 million COLI shares in the China Fund, of which only 7.492 million shares were sold. In the allotment of COLI shares following the placement, Mr Steve Luk's two funds were allotted a total of 45.252 million COLI shares. Although Mr Steve Luk was unable to remember specifically the size of his subscription it is clear that it was in the range of double the amount of shares that he was allotted. The limiting factor was simply the size of a holding in COLI shares permitted of JP Morgan and JFAM by internal guidelines. The Tribunal is satisfied, in particular from the telephone conversations between Mr David Tsien and Mr Steve Luk, that the latter knew that he would be allotted that part of his subscription to COLI shares that he was permitted to take up by JP Morgan/JFAM guidelines.

1135. Of course, the sale of COLI shares by Mr Steve Luk on 26 January 2004 was not a necessary step in his subscription for an allotment of COLI shares. The various events are separate. Mr Steve Luk did not "swap" COLI shares. He sold old COLI shares to avoid a loss. He was issued with new COLI shares.

CONCLUSION.

1136. The Tribunal is satisfied that not only has Mr Steve Luk failed to establish on the balance of probabilities that one of the purposes of his selling COLI shares on 26 January 2004 did not include the purpose that the two funds of which he was manager and the fund of his colleague would avoid a loss on the COLI shares but we are satisfied that indeed was one of his purposes.

CHAPTER 7

CONCLUSION

1137. In light of the findings made by the Tribunal in Chapter 6, pursuant to section 252(3)(a) and (b) of the Ordinance the Tribunal determines that :

(I) Mr David Tsien Pak Cheong is culpable of market misconduct, contrary to section 270(1)(c) of the Ordinance; and

(II) Mr Edmond Leung Chi Keung and Mr Steve Luk Ka Cheung are culpable of market misconduct, contrary to section 270(1)(e)(i) of the Ordinance.

The Hon Mr Justice Lunn
(Chairman)

Mr Neville Watkins (Member)	Mr Chan Kam Wing, Clement (Member)

Dated 8 July 2009

CHAPTER 8

A DETERMINATION OF THE AMOUNT OF THE LOSSES AVOIDED IN THE SALE OF COLI SHARES

1138. As required by the Financial Secretary's notice dated 12 September 2007, and having found that in January 2004 Mr David Tsien, Mr Edmond Leung and Mr Steve Luk were each culpable of insider dealing, the former contrary to section 270(1)(c) and the later two persons, contrary to section 270(1)(e) of the Ordinance, the Tribunal went on to consider the issue identified in section 252(3)(c) of the Ordinance, namely :

> " ... the amount of any profit gained or loss avoided as a result of the market misconduct.".

A. <u>The Law</u>.

1139. Although section 252(3)(c) of the Ordinance requires that the Tribunal determine the amount of any profit gained or loss avoided as a result of the market misconduct, the Ordinance gives no specific guidance of how the calculation is to be made. However, the proper construction and ambit of the terms " ... profit gained or loss avoided", in the context of their use in section 23(1)(b) of the Securities (Insider Dealing) Ordinance, Cap 395, namely " ... as a result of the insider dealing", was considered by the Court of Final Appeal in the *Insider Dealing Tribunal v Shek Mei Ling* [1999] 2 HKCFAR 205. In his judgment, with which all the other judges agreed, Lord Nicholls of Birkenhead noted of the construction of the phrase "loss avoided" (page 212I - 213C) :

> "This could arise if the confidential information were unexpectedly bad news about a company's business. Of necessity, calculation of the amount of a loss avoided is different from calculation of the amount of profit gained. The amount of profit gained by an insider dealer is an actual amount and can be calculated accordingly. By way of contrast, the amount of a loss avoided by an insider dealer is a notional exercise, because *ex hypothesi* the loss was not actually sustained by the insider dealer : the loss was avoided. Thus, in the case of the dealing in shares, calculation of the amount of loss avoided will

> typically involve comparison of two elements, one actual (the shares were sold) and the other notional (what would have happened if the shares had been retained). The actual element in the calculation will comprise the amount realised by the insider dealer from the shares sold before the market learned the bad news. The notional element will comprise the market value of the shares at a date which has to be identified as the appropriate date. Failing cogent evidence that, in any event, the shares would have been sold before the market announcement, the date will usually be the date by which the market learned and absorbed the information. This will usually be the appropriate date because it can normally be expected that, save for the misuse of the confidential information, the insider dealer would still have held his shares at that date and, hence, would have suffered loss accordingly.".

1140. Section 257(1)(d) of the Ordinance empowers the Tribunal to make an order in respect of a person identified as having engaged in market misconduct pursuant to section 252(3)(b), namely :

> " …that the person pay to the Government an amount not exceeding the amount of any profit gained or loss avoided by the person as a result of the market misconduct in question;".

B. Evidence.

Mr Alex Pang Cheung Hing ("Mr Alex Pang").

1141. Without objection from any of the Specified Persons the Tribunal received from Mr Alex Pang, as an expert, his opinion of the "loss avoided" in the funds managed by Mr Edmond Leung and Mr Steve Luk respectively by the sale of COLI shares in those funds on 26 January 2004. None of the counsel representing the Specified Persons cross-examined Mr Alex Pang. In addition to his oral testimony, the Tribunal received three statements from Mr Alex Pang, dated 17, 22 July and 3 August 2009.

Expertise.

1142. Since 1987, Mr Alex Pang has been a "fellow member" of the Hong Kong Institute of Certified Public Accountants, of which body he has been a member since 1980. From 1983 until 2001, Mr Alex Pang was employed, first in the Office of the Commission of the Securities and Commodities Trading and,

since 1989, by the Securities and Futures Commission. In both organisations his duties included market surveillance. At the time of his resignation from the SFC he was a Senior Director of Enforcement. Since 1993, his expert opinion has been received on no less than 16 occasions in proceedings conducted by various differently constituted Tribunals of the Insider Dealing Tribunal in respect of issues including "relevant information", "price materiality" and "profits made and/or losses avoided".

<u>Basis of calculation of "loss avoided".</u>

1143. Mr Alex Pang said that in calculating the loss avoided in the various funds in consequence of the sale of COLI shares he had adopted the method accepted on numerous occasions by the Insider Dealing Tribunal, namely a calculation of "notional loss avoided". That is, the calculation of :

> " … the difference between the actual sale price of a security and the value of the security as measured by the re-rated trading price of the security a reasonable period after pubic dissemination of relevant information.".

In his opinion, that method was appropriate to the proceedings before this Tribunal.

<u>The time period during which the market re-rated the price of COLI shares.</u>

1144. Of the time period during which the market re-rated the price of COLI shares, it was his opinion that :

> "two trading days after public dissemination of the relevant information is the 'reasonable period' in this case in measuring the value of COLI, which was a second liner stock at the relevant time. It only became a constituent stock of the Hang Seng Index on 10 December 2007. Hong Kong is a mature market and investors usually react quite rapidly and efficiently to any information which may have effect on the share price. Usually, on the first trading day when the price-sensitive information is disseminated to the public, it would significantly hit the market and most investors would react to that piece of information rapidly and directly. If the shares are second liner stocks in which relatively less institutional investors are interested, some of the retail/non-professional investors who are used to deal in that stock would probably take another day to absorb, digest and react to that information.".

1145. In support of his opinion that it was necessary to take a two-day period over which the market had absorbed, digested and reacted to the relevant information, in his oral testimony Mr Alex Pang pointed to the fact that the COLI's "board lot" of shares was 2,000 shares so that, given that COLI's share price was less than $2 per share, an investor could trade in COLI shares for amounts of less than $4,000.00. It followed that there were many retail investors as well as institutional investors. He invited the Tribunal to note that on 27 January 2004 there were 2,333 trades of COLI shares in the Automatic Matching System ("AMS") to an aggregate value of over $227 million.

The re-rated value.

1146. It was Mr Alex Pang's opinion that the re-rated value that it was appropriate for the Tribunal to take was :

> "the weighted average price of all the market trading executed through the Automatic Matching System ('AMS') of SEHK during the first two trading days immediately after the publication of the relevant information (i.e. 27 and 28 January 2004).".

In his opinion :

> "Such weighted average price would be the fairest way to take into account the price and volume of all the market transactions during the two days period.".

1147. Mr Alex Pang explained in his oral testimony that this method gave weight to the number of shares traded at a particular price. It was to be contrasted with an alternative method of simply identifying the lowest and highest price at which a share traded on a particular day and taking the average price at which they had traded. That approach took no account of the volume of shares traded at any particular price.

Data relied upon in making the calculations.

1148. Mr Alex Pang stated that in calculating "the weighted average price" he had relied on the *MSS Stock Trade Details Report* and *MSS Market Turnover*

Summary Report for COLI shares for both 27 and 28 January 2004, which reports were generated by the SFC and were based on data provided by the SEHK. He excluded all Non-AMS trades (previous trades, placement shares and manual cross trades). In the result, he calculated the number of COLI shares traded on those two days in the various categories to be :

Date	Non-AMS Trades Number of shares	AMS Trades Number of shares	Total Number of shares
27 January 2004	872,494,000	122,268,000	994,762,000
28 January 2004	5,322,000	56,002,000	61,324,000
Collective 2 days	877,816,000	178,270,000	1,056,086,000

From data as to "the value of trades" of COLI shares for the 2 days contained in the *MSS Market Turnover Summary Report* he calculated the "weighted average price" for the 2 days respectively and collectively to be :

Date	AMS Trades Number of Shares	AMS Trades Total Value (HK$)	Weighted Average Price
27 January 2004	122,268,000	227,409,000.00	1.8599
28 January 2004	56,002,000	103,716,000.00	1.8520
Collective 2 days	178,270,000	331,125,000.00	1.8574

1149. He noted that the "weighted average price" of $1.8574 was very close to the actual pre-opening "auction price" of $1.85 fixed at 09:50 on 27 January 2004, immediately following the release of the relevant information.

“Notional loss avoided”.

1150. Mr Alex Pang said that by using $1.8574 as the re-rated trading price he calculated the notional loss avoided in the funds managed by Mr Steve Luk and Mr Edmond Leung in consequence of their sale of COLI shares on 26 January 2004 and 21 and 26 January 2004 respectively.

A. Notional loss avoided in the fund managed by Mr Edmond Leung.

(i) Actual sale proceeds received :

Number of COLI shares	Average Executed Price (HK$)	Total Value (HK$)
2,392,000	1.9683	4,708,174.00
2,000,000	2.0563	4,112,600.00
4,392,000		8,820,774.00

(ii) Net sale proceeds received after transaction costs :

	(HK$)
Actual sale proceeds received	8,820,774.00
Less : Transaction costs	31,932.00
	8,788,842.00

(iii) Notional sale proceeds at notional price after transaction costs :

4,392,000 shares @ $1.8574 less 0.362%[1]	8,128,170.00

(iv) Notional loss avoided 660,672.00

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[1] Actual amounts charged by ABN AMRO – 0.362% (comprising broker commission 0.25%; stamp duty 0.1% and transaction levies 0.012%).

B. Notional loss avoided in the funds managed by Mr Steve Luk.

(i) Actual sale proceeds received :

Number of COLI shares	Average Executed Price (HK$)	Total Value (HK$)
7,492,000	2.0141	15,089,637.00
1,420,000	2.0141	2,860,022.00
188,000	1.9968	375,398.00
9,100,000		18,325,057.00

(ii) Net sale proceeds received after transaction costs :

	(HK$)
Actual sale proceeds received	18,325,057.00
Less : actual transaction costs	57,176.00
	18,267,881.00

(iii) Notional sale proceeds at notional price after transaction costs[1]

9,100,000 shares @ $1.8574 less 0.312%	16,849,605.00

(iv) Notional loss avoided 1,418,276.00

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The Tribunal's determination of the loss avoided.

1151. In his written submissions, Mr Sussex contended that the opinion of Mr Alex Pang was contrary to evidence already received by the Tribunal from Mr Rigby and that it was inappropriate for the Tribunal to rely upon Mr Rigby's testimony for the purposes of determining liability but to "... rely upon contradictory evidence from another expert for the purposes of determining

[1] Actual amount of 0.312% charged by JFAM previously : broker commission 0.2%; stamp duty 0.1% and transaction levy 0.012%.

quantum". In his evidence, Mr Rigby had pointed to the intraday "Low" of 27 January 2004 of COLI shares of $1.81 as better indicating the material effect of dissemination of the relevant information to the market than the "Closing" price of $1.89, to which price Mr Witts had made reference. For her part, Ms Sara Tong also drew the Tribunal's attention to Mr Rigby's evidence of the anticipated short-term bearish effect the relevant information would have on the price of COLI shares. She submitted :

> "It is therefore wrong to conclude (as Mr. Pang has done and as would be the case if the formula for the calculation of "notional loss avoided" adopted by him is used) that a professional fund manager would sell the COLI shares in order to avoid a loss which might be experienced as a result of a temporary drop in share price.".

1152. In the event, as indicated in advance of Mr Alex Pang's testimony and evidenced by the absence of cross-examination, neither counsel took issue in their oral submissions with the method of calculation of the loss avoided adopted by Mr Alex Pang. We are satisfied that they were right so to do. Mr Rigby did not give evidence as to the "re-rated price" of COLI shares following the absorption, digestion and reaction of the market to the dissemination of relevant information. He pointed to the intraday "Low price" of COLI shares on 27 January 2004 as evidencing a greater material negative reaction to the dissemination of that information than as evidenced by the "Closing" price, to which Mr Witts had drawn attention.

Conclusion.

1153. In the result, the Tribunal is satisfied that the notional "loss avoided" in the respective funds managed by Mr Edmond Leung and Mr Steve Luk was as stipulated by Mr Alex Pang, namely :

A. managed by Mr Edmond Leung

(i) CEF $660,672.00

B. <u>managed by Mr Steve Luk</u>

		HK$
(i)	JF Greater China Open	1,170,333.00
(ii)	JPM FF-China Fund	221,819.00
(iii)	Alger SICAV-China	26,124.00
	Total :	1,418,276.00

CHAPTER 9

SUBMISSIONS : ORDERS THAT THE TRIBUNAL MAY MAKE PURSUANT TO SECTION 257(1) OF THE ORDINANCE

The submissions of the Presenting Officer.

(i) Section 257(1)(d) - disgorgement.

1154. The Presenting Officer submitted that there was no evidence that Mr David Tsien had gained any profit or avoided a loss as a result of his market misconduct. He reminded the Tribunal that it had found Mr Edmond Leung and Mr Steve Luk culpable of insider dealing in selling shares in funds that they managed in order to avoid a loss. Nevertheless, he submitted that there was no evidence that either of them had avoided a loss for themselves, as opposed to the funds that they managed. Noting that section 257(1)(d) required that a disgorgement order could only be made against a person identified as having engaged in market misconduct in respect of, " ... loss avoided by the person as a result of the market misconduct in question", he submitted that all three Specified Persons fell outwith that provision. Accordingly, he submitted that the Tribunal could not make such an order.

(ii) Section 257(1)(a), (b), (c) and (g).

1155. The Presenting Officer made no submissions as to the orders the Tribunal might make pursuant to section 257(1)(a), (b), (c) and (g).

(iii) Section 257(1)(e) - an order for payment of costs and expenses to the Government.

1156. The Presenting Officer invited the Tribunal to make an order against each of the Specified Persons that they pay an unspecified part of the total costs and expenses of the Government, initially calculated by the DoJ in a schedule

entitled "Summary Assessment of Costs" as amounting to $3,322,682.00 as of 3 June 2009 [**Appendix III**]. Subsequently, the Presenting Officer provided a more detailed amended "Summary Assessment of Costs" [**Appendix IV**]. At the conclusion of the hearing on 3 August 2009 the Presenting Officer provided a revised and re-amended "Summary Assessment of Costs" in which the total sum claimed was $3,165,624.00 [**Appendix V**]. At the invitation of the Tribunal, the DoJ on behalf of the Government provided a "Summary Assessment of Costs" for the period 4 June to 4 August 2009 of $387,395.00, of which the Presenting Officers fees were $69,800.00 and the claim made for work performed by the Assisting Presenting Officer was stipulated to be $312,000.00 on the basis of 78 hours of work [**Appendix VI**].

(iv) section 257(1)(f) - an order for payment of costs and expenses of the SFC.

1157. The Presenting Officer invited the Tribunal to make an order against each of the Specified Persons that they each pay an unspecified part of the total costs and expenses of the SFC in the investigation of the events and in the subsequent proceedings before the Tribunal, amounting to $523,804.00 as at 3 July 2009, comprised of [**Appendix VII**] :

- a claim based on the hours of work performed by specified SFC officers;
- a related claim in respect of "overhead costs" of each SFC officer per hour ; and
- the fees of Mr Rigby, for his advice to the SFC.

Costs and expenses of the SFC arising out of a legal argument before the Tribunal.

1158. Separately, in a discrete claim the SFC sought an order against Mr Edmond Leung, pursuant to section 257(1)(f) of the Ordinance, for their costs

and expenses in relation to proceedings before the Tribunal arising from issues of public interest immunity ("PII") and legal professional privilege ("LPP") raised on Mr Edmond Leung's behalf. That claim for $166,178.00 comprised the fees of counsel who appeared before the Tribunal on behalf of the SFC, together with a claim for an hourly rate together with related hourly "overhead costs" for an in-house counsel of the SFC [**Appendix VIII**].

Costs in relation to preparation for and attendance at the Tribunal on 3 and 4 August 2009.

1159. Finally, the SFC claimed costs and expenses of $21,075.00 for work performed in responding to the submissions of the Specified Persons and attending the Tribunal on 3 and 4 August 2009 [**Appendix IX**].

Section 260(1)(a) - witness costs.

(i) Expert witnesses.

1160. The Presenting Officer provided the Tribunal with the fee notes of Mr Rigby and Mr Alex Pang, arising from the work performed by them in providing reports to the Tribunal and giving evidence as expert witnesses, and invited the Tribunal to make orders of "such sum as it considers appropriate in respect of the costs reasonably incurred by the person in relation to the proceedings" [**Appendix X(i) and (ii)**].

(ii) Other witnesses.

1161. Further, having made enquiries of all the other witnesses that had attended the Tribunal if they had any claims for such an order, the Presenting Officer provided the Tribunal with the only claim that was made, being one made on behalf of Mr Kong, Mr Wu and Mr Horace Nip, all employees of COLI, for $545,436.88 [**Appendix X(iii)**]. That claim was based on what was said to be "Legal cost" and "Time cost". Of the four components of the "Time cost"

only one related to attendance at the Tribunal. That claim appeared to be based on a calculation of a daily rate of the salary of the three witnesses. No element of the claim was based on travel expenses incurred in attending the Tribunal.

The submissions made on behalf of Mr David Tsien.

(i) section 257(1)(d) - disgorgement.

1162. The Tribunal was invited to accept the submissions of the Presenting Officer that, there being no evidence of any profit made or loss avoided by Mr David Tsien as a result of his insider dealing, and in light of the requirement that such a finding is a precondition for the making of a disgorgement order, no such order could or should be made against Mr David Tsien.

(ii) section 257(1)(a), (b) and (c) - "disqualification", "cold shoulder" and "cease and desist" orders.

General.

1163. It was submitted on behalf of Mr David Tsien that in considering whether or not to impose orders of "disqualification", "cold shoulder" and "cease and desist" the Tribunal ought to have regard to evidence of :

(a) Mr David Tsien's character, in particular the evidence of Mr Rupert Fane of the reputation he enjoyed, which reputation had suffered irreparable damage by the findings of this Tribunal;

(b) the circumstances of the commission of the conduct of which he had been found culpable : in particular, the absence of any elaborate scheme to conceal his conduct together with the fact that no attempt was made to hide his conversations with Mr Edmond Leung or Mr Steve Luk; and that he had not dealt personally in COLI shares and had not made, or expected to make, personal profit directly or indirectly;

(c) the "considerable delay (through no fault of Mr David Tsien) in bringing this case to a hearing" :

   (i) January 2004 - the events the subject of the proceedings;

   (ii) August 2005 - completion by the SFC of the taking of witness statements;

   (iii) July 2006 - transfer of the case from the SFC to the FS;

   (iv) 12 September 2007 - issue of the FS's Notice; and

   (v) 5 January 2009 - commencement of the substantive proceedings before the Tribunal.

   The Tribunal was invited to take into account the, "stress of the uncertainty of what might lie ahead", under which Mr David Tsien lived from the service on him on 4 February 2005 of a notice under section 183 of the Ordinance by the SFC, in which he was informed that he was "a person under investigation", until he was informed after the issue of the FS's notice of 12 September 2007 of the institution of these proceedings. Also, since 2006 the SFC had declined to process his application for the grant of a licence, with the consequence that he had been unable to perform activities that required such a licence.

(d) his resignation from his employment as managing director of Value Partners Equity Management, a subsidiary company of the publicly listed company, Value Partners, on the day of publication of Part I of the Tribunal's report, namely 9 July 2009, which employment he had enjoyed for the three years since his resignation from JP Morgan.

Specific.

Section 257(1)(a) - "disqualification" order.

1164. In support of his submission, that there was no basis upon which it would be appropriate to disqualify Mr David Tsien from being a director of either a public listed company or a private company Mr Jonathan Chang invited the Tribunal to note that Mr David Tsien was not a director of either COLI or JP Morgan and that at no time did he have any function in managing COLI. Further, he submitted that there was no basis to make an order that would have the effect of disqualifying him from being "related directly or indirectly to the operations of a private company".

Section 257(1)(b) - "cold shoulder" order.

1165. Having invited the Tribunal to note that Mr David Tsien's market misconduct did not involve his own dealing in shares, Mr Chang submitted that it would be :

> " … wholly unnecessary, and indeed disproportionate and unduly draconian, to deny him access to the financial markets by imposing any cold shoulder order.".

Section 257(1)(c) -"cease and desist" order.

1166. It was submitted on behalf of Mr David Tsien that the likelihood of his "re-offending" was remote, in which circumstances it was suggested that it was not necessary to impose a "cease and desist" order.

Section 257(1)(e) and (f) - "costs and expenses reasonably incurred" of the Government and the SFC.

I. Costs and expenses of the Government (DoJ).

1167. In his written submissions, Mr Chang took issue with the paucity of detail contained in the single page "Summary Assessment of Costs" **[Appendix III]** submitted in support of the claim for costs and expenses of the Government

pursuant to section 257(1)(e) of the Ordinance. In his oral submissions, he took issue with the accuracy of the amended more detailed "Summary Assessment of Costs" **[Appendix IV]** submitted by the Presenting Officer on behalf of the DoJ in his written reply. He pointed out that claims had been made for "Attendance at Tribunal hearings" in respect of dates on which there were no hearings and that those claims had been made, almost entirely, on the basis that each hearing day was five hours, when none was of such duration.

1168. He took issue with three items for which claims were made :

(a) *"photocopies* *$85,539.00"*

In particular, he expressed concern that the volume of such photocopying included photocopying of earlier versions of transcripts of telephone conversations that were replaced by corrected versions of those transcripts, which costs he submitted ought to be disallowed.

(b) the fees of the Assistant Presenting Officer, Ms Winnie Ho

"554 hours by WH *$2,216,000.00"*

In particular, he took issue with the total number of hours of work for which a claim was made, submitting that such part of the claim that was incurred :

> " ... to sort out the appalling transcriptions/translations of the taped conversations must be deducted, which was caused and unreasonably incurred as a result of the SFC not doing their job properly …".

(c) both the rate at which fees were charged for work performed by Mr William Liu and the work performed

"William Liu (WL), admitted in 2007, rate charged at $2,500.00/hr

59 hrs 15 mins by WL *$148,125.00"*

1169. At the hearing of the Tribunal on 4 August 2009, a re-amended "Summary Assessment of Costs" of the costs of the Government **[Appendix V]** was submitted by the Presenting Officer to the Tribunal claiming $3,165,624.00.

(i) The claim for the "rate charged" for work performed by Mr William Liu was reduced from $2,500.00 to $2,000.00 per hour and the number of hours claimed for work performed by him in attending the Tribunal was reduced from 25 hours to 19 hours and 17 minutes.

(ii) The number of hours claimed for work performed by Ms Winnie Ho was reduced from 554 hours to 525 hours, reflecting :

- a reduction in the earlier uniform claim of five hours for attendance at hearings of the Tribunal on all but two occasions to different specific daily amounts, all of which were less than five hours per day;
- the withdrawal of claims in respect of certain dates upon which the Tribunal did not sit; and
- the addition of claims in respect of other dates, omitted in the earlier assessments, on which the Tribunal did sit.

1170. Once again, Mr Chang challenged the accuracy of the revised amended "Summary Assessment of Costs" **[Appendix V]**. He pointed out that the total number of hours claimed in respect of work performed by the Assistant Presenting Officer had been reduced in this version to 525 hours, in contrast to the 554 hours claimed in the earlier two versions of the Summary Assessment of Costs **[Appendices III and IV]**. He noted that in Appendix IV, there was a significant error in the arithmetic calculation of the hours of her attendance at the proceedings of the Tribunal in 2009. The total was stipulated to be 145 hours, whereas in fact it was 170 hours. He suggested that if that figure was added to the hours of attendance claimed for 2008, namely 22 hours, the total

number of hours of attendance claimed in Appendix IV was 192 hours. On the assumption that deducting that figure from the total number of hours claimed, namely 554 hours, was the basis on which the hours of work performed outside the Tribunal had been calculated he asserted that the number of hours of work performed outside the Tribunal could be calculated as having been 362 hours. Noting that the number of hours now claimed for attendance at the Tribunal was in total 145 hours and 40 minutes, Mr Chang suggested that it followed that the total number of hours of work performed by the Assistant Presenting Officer was almost 500 in total and not the 525 hours claimed. The amount thereby over claimed, he calculated to be $100,000.00.

The costs claimed by the Government for the period 4 June to 4 August 2009.

1171. Mr Chang took issue with the claim made by the Government for $312,000.00 for 78 hours of work said to have been performed by the Assistant Presenting Officer in the period for 4 June to 4 August 2009. In particular, he took issue with the claim of 16 hours as being the time spent reading Part I of the Tribunal's report, 12 hours in constructing a chronology and the unspecified amount of time said to have been spent in connection with instructing and assisting Mr Alex Pang as an expert witness. He suggested that the Tribunal discount the amount claimed in this respect by at least 50%.

"Gross sum" assessment of costs.

1172. Mr Chang invited the Tribunal to take a "broad brush" view of the claim for the costs and expenses of Government and to assess the amount as reasonably incurred at about 60% of that claimed.

II. The costs and expenses of the SFC.

1173. Once again, in his written submissions Mr Chang took issue with the paucity of detail contained in the three-page schedule submitted by the

Presenting Officer in support of the SFC's claim for costs and expenses. The Tribunal was invited to :

> " … disallow a significant part of the SFC's costs and expenses to reflect the poor manner in which they had conducted the investigation and prepared for the enquiry … ".

In particular, issue was taken in respect of the time and effort expended by those representing the Specified Persons that arose from the need, " ... to do the job of the SFC and verifying and correcting the transcripts". Also, it was submitted that the necessity that arose in the course of the Tribunal's proceedings to obtain documentation and call additional witnesses arose from, " ... various evidential gaps that could, and should, have been dealt with in the SFC investigation.".

Gross sum assessment of costs.

1174. In his written submissions, Mr Chang submitted that, taking a broad view of the SFC claim, the Tribunal to allow no more than $200,000.00 as being reasonably incurred.

"Overheads".

1175. In his oral submissions, Mr Chang took issue with the claim made on behalf of the SFC, in respect of an aggregate of $107,136.55, described as "overheads" reflecting the running expenses of the SFC such as utility bills, claimed separately in respect of work performed by each of the SFC officers in respect of the investigation and the proceedings before the Tribunal. He submitted that such expenses arose in any event and were not a part of the SFC's claim for costs and expenses "reasonably incurred" either in the investigation of this case or in the proceedings before the Tribunal.

III. Costs related to specific issues raised and evidence received in the proceedings unrelated to Mr David Tsien.

1176. Mr Chang identified a number of areas of specific issues raised in evidence received in the proceedings that he submitted were unrelated to Mr David Tsien and for which he ought not to be asked to bear any part of the costs and expenses :

(a) the challenge to the jurisdiction of the Tribunal mounted on behalf of Mr Steve Luk;

(b) the issue raised on behalf of Mr Edmond Leung in respect of PII and LPP;

(c) the half day of the proceedings (14 January 2009) of the Tribunal taken up with the receipt of oral testimony from witnesses addressing the recordings made of telephone conversations at JP Morgan, which evidence it was submitted ought to have been received by witness statements prepared in advance;

(d) the half day of the proceedings (10 February 2009) of the Tribunal taken up with the receipt of oral testimony from a witness addressing the sale of COLI shares by Mr Edmond Leung;

(e) half of the days of the proceedings of the Tribunal during which testimony was received from Mr Rigby, it being submitted that his testimony was "significantly and unnecessarily prolonged since he needed to explain and correct the errors in his table, and elaborate on his various tables and further voluminous documents supplied midway through the enquiry that were not self-explanatory.".

Section 257(1)(g) - recommendation to take disciplinary action.

1177. Mr Chang informed the Tribunal that Mr David Tsien was not a member of any regulatory body that might take disciplinary action against him.

The submissions made on behalf of Mr Edmond Leung.

General.

1178. In determining what, if any, orders to make in respect of Mr Edmond Leung under section 257 of the Ordinance in her written submissions Ms Sara Tong invited the Tribunal to have regard to the following factors of mitigation :

(i) Character - that during a long and successful career since 1988 in the financial services industry Mr Edmond Leung had never been involved in any disciplinary matter nor had he been the subject of an investigation by any professional body of which he was a member. Furthermore, since 1996 he had made a significant positive contribution to the welfare of the community through his ministry in the Star of the Sea Church, his voluntary work with immigrant children for the Missionaries for Charity since 2006 and, in 2004 to 2006, as a member of the Central Policy Unit.

(ii) Consequences of the market misconduct - it was asserted that no loss had been caused to "other persons/entities", but noted that if such loss had been incurred any such loser had a right of action under section 281(1) of the Ordinance, it being said that no such action had been brought as yet.

(iii) Motive - that Mr Edmond Leung was not motivated in pursuing his course of conduct by "personal financial gain".

(iv) Misconduct over a short period of time - Mr Edmond Leung's misconduct had occurred over a short period of time, namely on 21 and 26 January 2004.

(v) There had been no further misconduct by Mr Edmond Leung in the ensuing 5½ years.

(vi) Delay - as a result of delay by the SFC in bringing the proceedings Mr Edmond Leung had, "suffered distress and anxiety of having these proceedings hanging over his head longer than would be the case had the SFC acted expeditiously and in a reasonable manner".

(vii) Adverse effects to Mr Edmond Leung as a result of the proceedings : (a) the findings of the Tribunal had caused damage to Mr Edmond Leung's reputation; (b) in performing his work as a portfolio manager of Cheetah Investment Management Limited he had encountered "significant difficulties … attracting new money from investors for the funds managed by Cheetah"; and (c) his personal life had been adversely affected.

Delay.

1179. Of the issue of delay, Ms Sara Tong submitted that Mr Edmond Leung "had been subjected to a long period of delay for which he was in no way responsible". In particular, she pointed to the fact that the substantive hearing before the Tribunal began only on 5 January 2009, almost 5 years after the impugned dealing in COLI shares on 21 and 26 January 2004. She pointed out that whereas on 18 October 2004 Mr Edmond Leung had been served by the SFC with a notice of interview pursuant to section 183 of the Ordinance, in which he was identified as "a person under investigation", the FS's Notice instituting the proceedings before the Tribunal had not been issued until 12 September 2007.

Specific.

Section 257(1)(d) - disgorgement.

1180. It was submitted on behalf of Mr Edmond Leung that it is a pre-condition to making an order pursuant to section 257(1)(d) that the Tribunal determine that he avoided a loss for himself personally. There is no such finding. On the contrary, the Tribunal determined that the loss avoided was to CEF, a fund managed by Mr Edmond Leung. It was submitted that any benefits that might have flowed from the conduct was possibly to ABN AMRO in that they received annual management fees in respect of the management of the fund. Of the evidence that Mr Edmond Leung received a cash bonus in 2004 of HK$960,000.00 and share options to a value of Euro 66,341, it was submitted that, firstly it is impossible to determine what have any effect the impugned conduct had in the determination of the size of that discretionary bonus and, secondly such "profit gained", being indirectly obtained, is outside a proper construction of the ambit of section 257(1)(d) of the Ordinance. Accordingly, it was submitted that the Tribunal cannot make a disgorgement order.

Section 257(1)(a), (b) and (c).

1181. The Tribunal was asked to note of the issue of the "purpose" of the orders available to it pursuant to section 257(1)(a), (b) and (c) that, in the judgment of Hartmann, J (as Hartmann JA was then) and Lam, J in *Chau Chin Hung v Market Misconduct Tribunal* (unreported HCAL 123/2007, 124/2007 and 22/2008) the purpose of those powers was described as being "protective" of the public, the public and financial institutions and, finally, the financial markets respectively.

Section 257(1)(a) - disqualification order.

1182. It is accepted that now Mr Edmond Leung is a director and majority shareholder of Pedder Street Investment Management Limited, of which company his employer, Cheetah Investment Management Limited is the majority shareholder. The former company provides investment research to one of the funds managed by Cheetah. However, in Ms Sara Tong's written submissions the Tribunal was asked to note that the insider dealing of which Mr Edmond Leung has been found culpable was perpetrated as a fund manager and employee of ABN AMRO, not as a director of that company or any of its subsidiaries. Accordingly, so it was suggested, it is not necessary to impose a disqualification order for the protection of the public.

Section 257(1)(b) - "cold shoulder" order.

1183. It was submitted that the imposition of a "cold shoulder" order upon Mr Edmond Leung pursuant to section 257(1)(b) of the Ordinance would be "inappropriate and disproportionate in the circumstances of the present case". It was contended that such an order would have the effect of preventing Mr Edmond Leung from continuing in his present employment as a portfolio manager at Cheetah Investment Management Limited, thereby depriving him of his means of earning his livelihood upon which his wife, two children and mother depend.

Section 257(1)(c) - "a cease and desist".

1184. Having regard to the fact of the passage of 5½ years since time of the events of which Mr Edmond Leung has been found culpable of insider dealing, it was submitted that the imposition of a "cease and desist" order pursuant to section 257(1)(c) of the Ordinance is unnecessary.

Section 257(1)(g) - a recommendation to a body to take disciplinary action.

1185. The Tribunal has been informed by Mr Edmond Leung in his witness statement dated 27 July 2009 that he is a member of the following professional bodies :

> " A. Hong Kong Society of Financial Analysts;
>
> B. Hong Kong Securities Institute;
>
> C. Hong Kong Institute of Directors;
>
> D. Hong Kong Institute of Public Accountants; and
>
> E. CPA (Australia)".

1186. It was contended that an order made by the Tribunal, pursuant to section 257(1)(g) of the Ordinance, to a body or bodies which may take disciplinary action against Mr Edmond Leung that they be recommended to take such action is not only not necessary for the protection of the public but also "disproportionate to the seriousness of the misconduct which occurred". In this respect, the Tribunal was invited to have regard to the "stress and anxiety" under which Mr Edmond Leung has lived in the 4½ years that have followed his learning, in October 2004, that he was "a person under investigation". Also, that he had incurred significant legal costs in respect of the proceedings before the Tribunal. Furthermore, it was said that a disciplinary enquiry would be a disproportion burden upon him, damaging his reputation and career prospects. Finally, it was contended that that the professional bodies of which he is a member are "entirely unrelated to the market misconduct in question or to the securities fund/management industry".

Section 257(1)(e) and (f) - costs and expenses of the Government and the SFC.

1187. It was accepted on behalf of Mr Edmond Leung that in principle the Tribunal may order that he pay a proportion of the costs and expenses of the Government, including that of the Tribunal itself, and the SFC. It was

submitted that the Specified Persons should share the costs and expenses equally, as between one another. However, it was submitted that such an order ought not to include all the costs incurred by the Government and the SFC. The Tribunal was invited "to make an appropriate deduction from any costs which EL may be ordered to pay", in consequence of unnecessary/wasted costs incurred by Mr Edmond Leung in consequence of inadequate/inaccurate preparation of material for the hearing. In particular, it was contended that :

(i) there was inadequate preparation of the transcripts and translations of the telephone conversations recorded at JP Morgan and JFAM, and unnecessary costs were incurred by Mr Edmond Leung as a result of it being necessary for those representing him to identify all the relevant telephone conversations, determine the time of those conversations and making or correcting transcriptions and translations of the conversations. The estimated total cost thereby incurred is $245,583.53;

(ii) the entire hearing of 19 February 2009 was wasted in cross-examination aimed at the identification and correction of mistakes contained in a table presented to the Tribunal by the expert witness, Mr Rigby, which time would not have been wasted if the table had been checked in advance of the hearing by Mr Rigby and/or the SFC; and

(iii) the proceedings before the Tribunal on 3 April 2009 were unnecessarily truncated at the outset and an adjournment granted, in consequence of the late service by the Presenting Officer of four box files of material on the Specified Persons and the Tribunal.

It was contended that the "wasted costs" incurred by Mr Edmond Leung as a result of the events described in (ii) and (iii) was $63,990.00.

The application by the SFC for the costs of their appearance before the Tribunal in respect of directions sought from the Tribunal on behalf of Mr Edmond Leung against the SFC in respect of claims of PII and LPP.

1188. The SFC's application for costs, for its appearances before the Tribunal in respect of the application to the Tribunal made on behalf of Mr Edmond Leung arising from claims of PII and LPP by the SFC, was opposed by the those representing Mr Edmond Leung. It was contended, on the contrary, that the SFC ought to be ordered to pay his costs or, alternatively that those costs should be deducted from any costs that he was ordered to pay to the SFC in respect of the general claim made on behalf of the SFC.

1189. It was submitted on behalf of Mr Edmond Leung that the issues raised as regards "discovery and the SFC's claims to withhold documents on the basis of LPP/PII (were) justified, reasonable and necessary in the circumstances to ensure the proper discovery was made". It was contended that, in consequence of the SFC's refusal to provide sufficient information, so that those representing Mr Edmond Leung could assess whether "proper discovery was made on whether LPP/PII was properly claimed", that the applications made, up to and including the hearing of 18 December 2008, were justified. It was asserted that it was only in face of "information/confirmation provided by the SFC" during the latter hearing that the application for a substantive order from the Tribunal made on behalf of Mr Edmond Leung had not been pursued before the Tribunal.

1190. Finally, it was submitted, on behalf of Mr Edmond Leung that, if the Tribunal were to award the SFC its costs in respect of this discrete issue :

> " … such costs should be shared equally as between the three Specified Persons given that they each benefited equally from the subsequent steps taken by the SFC to remedy the errors/inadequacies of its initial discovery of documents and claims to LPP/PII, and the confirmation subsequently given by the SFC as regards the extent of discovery given.".

Reply on behalf of Mr David Tsien.

1191. It is convenient to note at this point, that this submission was opposed by counsel on behalf of Mr David Tsien, who pointed out that he had not joined in the argument on behalf of Mr David Tsien and that nothing could have been done on his behalf to stop the argument being mounted or pursued.

Overall submission.

1192. In the result, the overall submission made on behalf of Mr Edmond Leung was that the Tribunal was asked :

> "not to impose any sanction other than an order for costs against EL, which is already a substantial burden in itself.".

It was contended that :

> "The very fact of being a Specified Person in these proceedings, the adverse findings by the MMT, and the inevitable detriment to reputation and career prospects should be considered in this case to be adequate.".

Submissions made on behalf of Mr Steve Luk.

Section 257(1)(d) - disgorgement order.

1193. In common with all other counsel, Mr Sussex submitted that it is a precondition to the making of an order pursuant to section 257(1)(d), namely disgorgement of "profit gained" or "loss avoided", that the Tribunal determine that the Specified Person against whom the order is made himself make that profit or avoid that loss. He submitted that, in the case of Mr Steve Luk, the loss avoided, as determined by the Tribunal, was in the three funds managed by Mr Steve Luk, not by Mr Steve Luk himself. Accordingly, the Tribunal cannot make an order pursuant to section 257(1)(d) against Mr Steve Luk.

LAW.

1194. In support of his submissions, Mr Sussex has helpfully reminded the Tribunal of various reports by the Insider Dealing Tribunal in which the

Tribunal considered a similarly worded provision in section 23(1)(b) of the now repealed Securities (Insider Dealing) Ordinance and reached conclusions consistent with his submissions.[1]

Section 257(1)(a) and (b) - "disqualification" and "cold shoulder" orders.

1195. Mr Sussex invited the Tribunal to have regard to the following factors of mitigation in its consideration of whether not to make orders under section 257(1)(a) and (b) :

(i) the significant penalty that Mr Steve Luk suffered when, following an enquiry into his conduct, JFAM imposed a reduction in his remuneration for 2004 (in an interview with an officer of the SFC, Mr Steve Luk said that the penalty amounted to 20% of his bonus for 2004);

(ii) the delay in bringing these proceedings on for hearing; and the consequential adverse impact on Mr Steve Luk's ability to obtain and retain employment : in particular, his resignation in December 2006 as Deputy Chief Investment Officer of Mirae Asset Global Investment Management Ltd, in consequence of his inability to obtain registration by the SFC as a "Responsible Officer" in light of the SFC investigation into the matters the subject of these proceedings; the withdrawal of the offer of employment with a hedge fund, Winnington Capital, in February/March 2007 following his disclosure of the SFC's investigation into the matters the subject of these proceedings; and the constraints placed upon his performance of his duties as Head of Research (Hong Kong and China) for his current employer CIMB GK Securities (HK) Ltd, in consequence of the SFC's refusal of his application for a "Type 4" licence.

[1] Public International Investments Limited at 22.11.3; Firstone International Holdings Limited at page 235; Gilbert Holdings Limited at paragraph 291; and Easy Concepts International Holdings Limited at page 176.

Overall submission.

1196. It was submitted on behalf of Mr Steve Luk that, in light of the fact that he had "suffered a great deal by reason of the protracted investigation" and the asserted fact that he was "not a danger to other market participants", he ought not to be made the subject by the Tribunal of orders of disqualification or "cold shoulder".

Membership of professional bodies.

1197. Although Mr Sussex made no reference in his written submissions in respect of the Tribunal's exercise of its powers under section 257(1)(g) of the Ordinance to recommend to bodies of which Mr Steve Luk was a member that it/they take disciplinary action against him, in his oral submissions he submitted that it would be not appropriate for the Tribunal to make such a recommendation. In his evidence, Mr Steve Luk had testified that he was a Chartered Financial Analyst, a Fellow Member of the Institute of Chartered Accountants and an associate member of a Hong Kong Society of Accountants. Mr Sussex submitted that the market misconduct of which Mr Steve Luk had been found culpable was not committed in the role of an accountant or connected thereto. Accordingly, so he submitted, a recommendation by the Tribunal to a professional body of accountants to which Mr Steve Luk belonged would not be for the protection of the public, rather it would be "punitive" and therefore beyond the ambit of the powers of the Tribunal.

Other submissions.

1198. In light of the criticisms made on behalf of some of the Specified Persons of the conduct of the SFC and the Government/DoJ, together with their challenge to elements of the costs and expenses claimed on behalf of the Government and the SFC the Tribunal invited those parties (the DoJ on behalf

of the Government) and the Presenting Officer to make written and/or oral submissions in reply.

I. Submissions on behalf of the DoJ and the Government.

1199. On behalf of the DoJ and the Government, Mr Fawls responded in three discrete areas :

(i) delay;

(ii) inadequacies in relation to transcripts, evidence and what discovery;

(iii) excessive time charged by DoJ and unnecessary photocopying.

As to delay.

1200. Of the events that had occurred in the period between receipt of the case on the reference of the FSTB to the DoJ, namely 28 July 2006, to the issue of the FS's notice, namely 12 September 2007, Mr Fawls provided a "Chronology" [**Appendix XI**].

1201. It is apparent on the face of the Chronology that, having received the case papers from the FSTB on 28 July 2006, the next step taken by the DoJ was to write on 13 November 2006 to the SFC requesting "further materials/clarifications". There followed correspondence and a meeting on 24 November 2006 between the FSTB and SFC, at which meeting representatives of the DoJ attended. On 30 March 2007, the SFC replied to the letter of 13 November 2006, after which there followed further correspondence in mid-April, in which further documents and/or clarifications were sought from the SFC. Although a "draft advice" was prepared by the DoJ by 27 April 2007, and advice from leading counsel received by 25 June 2007, it was not until 20 July 2007 that the DoJ delivered its advice to the FSTB. Following a request by the FSTB on 31 July 2007 that the DoJ draft a notice pursuant to section 252 of the

Ordinance, the DoJ provided that draft notice on 3 September 2007. On 12 September 2007 the FS issued a notice pursuant to section 252 of the Ordinance.

As to inadequacies of transcription and translation of transcripts.

1202. Mr Fawls asserted that responsibility for, "the preparation of evidence, including transcripts of telephone conversations, together with other material to be put before the Tribunal, rests with the SFC." Having noted that, "the Government have no power to investigate and do not direct the investigation" and having pointed out that similarly it provides no legal advice to the SFC, Mr Fawls explained that :

> "The first notice DoJ has of an investigation is after the SFC has completed its investigation and the Board of the SFC has resolved to refer the matter to FS for referral to the MMT. Only at that point is DoJ are asked to advise FS. Once the matter has been referred to the Tribunal the matter is then in the hands of the Tribunal itself.".

1203. In the result, Mr Fawls submitted that, "complaint as regards transcripts, evidence and discovery is misconceived in so far as it is directed at DoJ or the Government." Of the contention that additional costs had been incurred by Mr Edmond Leung in consequence of time spent by his lawyers checking the accuracy or otherwise of transcriptions and translations of tape recordings, Mr Fawls invited the Tribunal to consider whether not that is in fact the works normally performed by solicitors in checking unused material.

As to the contention that excessive time was charged and there was unnecessary photocopying.

1204. In the first place, Mr Fawls pointed out that the costs claimed on behalf of Government, "relate only to costs incurred from the time FS decided to refer the case to the Tribunal and not the earlier advisory stage". He made no submission in relation to the merits of the allegation, suggesting that is a matter in respect of which the Presenting Officer is best placed to address the Tribunal.

II. Submissions on behalf of the SFC.

Costs "reasonably incurred" : statutory functions and duties of the SFC.

1205. In written submissions to the Tribunal made on behalf of the SFC by Mr Lawrence Tse, counsel in the Legal Services Division of the SFC, it was submitted that in its consideration of whether or not costs and expenses claimed by the SFC were "reasonably incurred" by the SFC, either in the investigation stage or in relation to the proceedings before the Tribunal, the Tribunal is to have regard to the fact that the SFC has statutory duties and functions imposed upon it by the Ordinance. First, when the SFC has "reasonable cause to believe that market misconduct may have taken place", it may commence an investigation. (See section 182(1)(c) of the Ordinance). Second, when the SFC "reasonably believes or suspects" that the occurrence of any event constitutes market misconduct it may report that fact to the FS. (See section 252(8) of the Ordinance). Thereafter, the FS may institute proceedings before the Tribunal (see section 252(1)) or the FS may refer the matter to the SforJ, if it appears to the FS that an offence under Part XIV "has or may have been committed" (see section 252(10)). Finally, during the course of the proceedings, the Tribunal itself may authorize the SFC to exercise the powers set out in section 254(2) of the Ordinance to obtain and provide to the Tribunal, "records, documents and information".

Breakdown of SFC's costs.

1206. Attached to Mr Lawrence Tse's written submission were two schedules.

- Attachment A, provided details of the work performed by various officers of the SFC and Mr Rigby in respect of work that they had performed, previously claimed in Annexure C of the Presenting Officer's submissions.

- Attachment B, provided details of the work performed by Ms Lisa Chen, a legal officer of the SFC, together with the professional fees of counsel instructed by the SFC in respect of the submissions made to the Tribunal in relation to claims of legal professional privilege and public interest immunity.

In both Attachments, against each SFC officer, a claim was stipulated in respect of "overhead costs".

As to delay.

1207. Although in its written submissions the SFC has not addressed the issue of delay by the SFC specifically it has provided a "Chronology of events in relation to SFC's initial investigation", which is relevant to that issue **[Appendix XII]**.

1208. 22 September 2004, is described as the date upon which the "SFC commenced investigation of this matter". That is a reference to an appointment in writing, pursuant to section 182(1) of the Ordinance, by the SFC of stipulated employees to investigate the matters the subject matter of these proceedings. 8 December 2005, is described as the date on which the SFC received the last of the documentation it had required under exercise of its powers in the Ordinance. Having been engaged on 5 November 2005, Mr Rigby provided an expert report to the SFC on 10 February 2006. In the proceedings that report was received by the Tribunal. Having sought preliminary legal advice from the "SFC's in-house lawyers" on 22 April 2005, the SFC referred the case to those lawyers for legal advice on 16 February 2006. On 27 July 2006, the SFC reported the matter to the FS. On 21 March 2007, Mr Rigby provided the SFC with a second expert report. Finally, on 12 September 2007, the FS issued a notice under section 252(2) of the Ordinance.

As to allegedly deficient transcripts and translations of telephone conversations and evidence as to the times of those conversations.

1209. The Tribunal was invited to note, in respect of the allegations of the provision of deficient transcripts and translations of telephone conversations of one or more of the Specified Persons that, in the first place, the audio recordings, transcripts and translations thereof had been provided to the SFC by JP Morgan and JFAM. Secondly, both before and during the currency of the proceedings before the Tribunal the SFC had engaged *Wordwave International Limited*, an external transcriber and translator, to prepare "transcripts and translations of all the audio recordings". In the result, it was submitted that the SFC had acted with "reasonable care in the circumstances".

1210. Furthermore, the Tribunal was invited to have regard to the fact that the SFC was under a duty to disclose all of this material to the Specified Persons, so that the work done on behalf of the Specified Persons and in "perusing reviewing and verifying the material" was no more than part and parcel of general preparation work in defending the case and cannot be said to have brought about extra costs for the Specified Persons.

III. Submissions by the Presenting Officer in Reply.

1211. As noted earlier, attached to the Presenting Officers written submissions was a more detailed amended "Summary Assessment of Costs" of the costs claimed on behalf of Government [**Appendix IV**].

A. As to photocopying costs and expenses claimed by Government.

1212. Of the $85,539.00 claimed by Government in respect of "Photocopies" the Presenting Officer provided more detail :

(i) photocopying of transcripts and translations of telephone conversations.

1213. On each occasion that copies had been made at least eight sets had been required. Further copies had been made as and when required to reflect amendments of the transcript and translation suggested by the Specified Persons. Also, further copies had been made to reflect a change in the format of the presentation of the transcript to a version, which contained four pages of transcript per single page.

(ii) copies of documentation/material obtained by the SFC and received by the Tribunal, pursuant to 23 orders issued under section 254 of the Ordinance.

1214. In the first instance, the documents were served upon the Specified Persons and Tribunal as received, after which they were repaginated, copied again and re-served.

B. As to the issue of costs and expenses incurred by the Specified Persons in checking and verifying the transcripts and translations of telephone conversations.

1215. The Tribunal was invited to accept that, given their importance to the proceedings, it was inevitable that Specified Persons would check and verify the transcriptions and translations of the telephone conversations, so that it was "unfair to place the blame on the SFC or the Government as a result of the verification and amending done by the Specified Persons".

C. As to the time allegedly wasted in cross examination of Mr Rigby arising from errors in material placed before the Tribunal and arising from the late service of additional material.

(i) errors in tables put forward in Mr Rigby's evidence.

1216. All that was said by the Presenting Officer in respect of errors in tables put forward in Mr Rigby's evidence was that such mistakes were not made in bad faith by either the SFC or Government.

(ii) additional material provided during the course of Mr Rigby's evidence.

1217. It was submitted that the additional material provided during the course of Mr Rigby's evidence had resulted from reliance by counsel for Mr Steve Luk on over 400 pages of documents presented to Mr Rigby for the first time during the course of cross-examination on 1 April 2009 and that the material had been served as expeditiously as possible prior to the next hearing date, 3 April 2009.

CHAPTER 10

ORDERS

The seriousness of insider dealing.

1218. In his judgment in *Koon Wing Yee and Insider Dealing Tribunal* [2008] 11 HKCFAR 170 Sir Anthony Mason, NPJ described the serious nature of insider dealing and the legislative response as it developed (page 190-191, paragraphs 45-48) :

> "45. Insider dealing is an 'insidious mischief'[1] which threatens the integrity of financial markets and public and investor confidence in the markets. The object of SIDO 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.
>
> 47. Moreover, insider dealing is a form of conduct which can be readily characterized as criminal conduct. Indeed, the SFO, 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

[1] *Insider Dealing Tribunal v. Shek Mei Ling* (1999) 2 HKCFAR 205 at 207I, per Lord Nicholls of Birkenhead NPJ.

> without power to impose a fine or penalty.".

Operation of the "dual regime".

1219. Section 252(1) of the Ordinance reposes power in the FS alone to institute proceedings before the Market Misconduct Tribunal. Section 252(10) of the Ordinance provides that the FS may refer any matter to the SforJ where it appears to the FS "that an offence under Part XIV has or may have been committed." However, it appears from observations made by the Chief Judge of the District Court in the sentencing in *HKSAR v Ma Hon Yeung and others* (unreported, DCCC 229-240 of 2008) that the FS is assisted in the discharge of that duty, at least in respect of cases of insider dealing, by advice from the Director of Public Prosecutions (paragraph 25) :

> "According to the Prosecution, as a matter of practice, SFC would refer all cases to the Director of Public Prosecution for consideration from 28 May 2007 onwards. The main consideration is adequacy of evidence and public interest.".

Proceedings before the Market Misconduct Tribunal.

1220. The nature of proceedings before the Market Misconduct Tribunal was considered at length in the judgment of A Cheung, J, with whom Hartmann, JA agreed, in the application for judicial review made by Mr Steve Luk, in *Luk Ka Cheung and the Market Misconduct Tribunal* [2009] 1 HKC 1. At paragraph 47 (pages 23-24) A Cheung, J noted :

> "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.".

A CONSIDERATION OF THE SUBMISSIONS.

Law.

Section 257(1)(d) - disgorgement order.

1221. The Chairman has directed the Tribunal that an order pursuant to section 257(1)(d) of the Ordinance, namely an order that the person pay to the Government an amount not exceeding, “the amount of any ... loss avoided by the person as a result of the market misconduct in question” may only be made if that person has avoided that loss for himself. That is the construction of section 257(1)(d) applied by a differently constituted Market Misconduct Tribunal in its report in respect of dealings in the shares of *Sunny Global Holdings Limited*[1], citing with approval the same construction that was placed on a similarly worded provision in section 23(1)(b) of the Securities (Insider Dealing) Ordinance, Cap 395 in the report of the Insider Dealing Tribunal in *Firstone International Holdings Limited*[2].

1222. The Tribunal as a whole determines that none of the Specified Persons whom it has found to be culpable of insider dealing avoided a loss for himself. Accordingly, the Tribunal makes no orders pursuant to section 257(1)(d).

Character.

1223. The Tribunal takes into account the fact that the hitherto good character of all three Specified Persons is necessarily sullied by the findings of this Tribunal. We regard the material we have received in respect of Mr Edmond Leung’s character as evidencing a significant positive contribution to the community.

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[1] See paragraphs 328-330, pages 136-138.

[2] See page 235.

Delay.

1224. The Tribunal notes that the commencement of the substantive hearings of these proceedings, 5 January 2009, was not until the fifth anniversary of the month in which the insider dealing took place, namely 21 and 26 January 2004. **Appendix XIII** is a composite "Chronology" of events. All three Specified Persons contend that in consequence they have suffered in one way or the other : personally; from the impact of the fact and/or knowledge of others of the investigation and/or proceedings on their employment and/or the grant of licences to them by the SFC.

1225. At the time that each of the Specified Persons received a letter (October 2004 to February 2005) from the SFC requiring them to attend an interview they were informed that they were each a "person under investigation". The accompanying "Direction to investigate" stipulated that enquiries were being made in respect of offences of insider dealing, contrary to section 291 of the Ordinance, namely a criminal offence, and conduct contrary to section 270 the Ordinance, namely the subject of the proceedings before the Tribunal. However, on 27 July 2007 each of the Specified Persons was informed that the SFC had, "concluded the investigation and referred the matter to the FS with a recommendation that a Market Misconduct Tribunal be convened.".

1226. The Tribunal accepts that from the time each of the Specified Persons received a letter from the SFC informing them that they were a "person under investigation" until the receipt of the letter from the SFC dated 27 July 2007, in which they were informed of the recommendation that proceedings be instituted before the Tribunal, confirmed by the Presenting Officer's letter of 26 October 2007 that such proceedings had commenced, each of the Specified Persons would have been anxiously concerned about the possibility of being subjected to criminal proceedings in respect of their respective conduct.

(i) <u>the investigation and/advice period prior to the FS's notice of 12 September 2007.</u>

1227. The Tribunal has not been informed when it was that the SFC's attention was drawn to the conduct the subject of these proceedings. However, it notes that as early as 20 July 2004 the SFC requested information from the employers of all three Specified Persons and COLI. Following the SFC's determination to appoint stipulated SFC officers to "investigate" these events on 22 September 2004, demands were made by the SFC of, JFAM and JP Morgan and others, inter-alia, that they provide tape recordings of relevant telephone conversations in January 2004 involving their employees, respectively Mr Steve Luk and Mr David Tsien. By letters of 6 and 8 October 2004 to the SFC, from JFAM and JP Morgan respectively, not only discs of those recordings but also transcriptions and translations were provided. The apparently gratuitous provision of the transcriptions and translations, no doubt unwittingly, proved to be a Trojan horse, given that they contained many errors. Clearly, matters moved apace in that the SFC interviewed the three Specified Persons : Mr Edmond Leung on 18 November 2004, Mr David Tsien on 17 February 2005 and Mr Steve Luk on 22 March 2005.

1228. Having referred the matter for in-house legal advice on 22 April 2005, the SFC moved to interview other witnesses in the period 9 May-15 July 2005. The last of the documentation that the SFC required, pursuant to section 183 notices, was received by the SFC on 8 December 2005. Mr Rigby gave an opinion, which the Tribunal has received as a report in these proceedings, on 10 February 2006.

1229. The Tribunal is satisfied that thus far the SFC had moved with reasonable speed, given the nature of its investigation. However, after matters

were referred to the SFC's in-house lawyers for further legal advice on 16 February 2006 a delay of 5½ months, until 27 July 2006, occurred before the case was referred to the FS with a recommendation that a Market Misconduct Tribunal be constituted. No explanation has been given for that period of delay.

1230. Thereafter, with considerable dispatch the case was referred by the FS, through the FSTB, to the DoJ on 28 July 2006. However, it was not until 3½ months later, by a letter of 13 November 2006, that the DoJ initiated requests for further material and clarifications. Although a meeting took place on 24 November 2006 between the FSTB and the SFC, at which the DoJ attended, it appears that it was not until 30 March 2007 the DoJ received a response from the SFC to the enquiries raised by the DoJ in their letter of 13 November 2006. Further clarifications and/or documentation were sought by the DoJ from the SFC in the period 13 to 18 April 2004. The Tribunal has been given no information as to the nature of those several enquiries. However, it does note that, following his re-interview in December 2006, a second witness statement was signed by Mr Ian Long on 19 January 2007 and that Mr Rigby provided a supplemental statement on 21 March 2007.

1231. Although the DoJ had prepared a draft advice for the FSTB by 27 April 2007, the final advice was not presented to the FSTB until almost 3 months later on 20 July 2007, following receipt of advice from leading counsel on 25 June 2007. The DoJ responded to the FSTB's request of 31 July 2007 for a draft notice pursuant to section 252(1) on 3 September 2007 and the FS's notice was issued on 12 September 2007.

1232. The Tribunal notes that following the receipt on 28 July 2006, from the SFC through the FS/FSTB, of the case with a recommendation from the SFC

that a Market Misconduct Tribunal be constituted, a period of 13½ months ensued before the issue of the FS's notice. On its face that is a lengthy delay in proceedings, given the stage that had then been reached. As indicated earlier, the only material of which the Tribunal has been made aware that was obtained thereafter was a further statement from Mr Ian Long and a supplemental opinion of Mr Rigby.

(ii) Proceedings before the Tribunal from 12 September 2007 onwards.

1233. Following the appointment of the Presenting Officer by the SforJ and the ordinary members by the FS, on 23 and 25 October 2007 respectively, the Tribunal's first hearing was held on 31 October 2007. At that hearing, the Tribunal indicated tentative dates for the substantive hearing of 18 February 2008.

1234. At a preliminary hearing of the Tribunal on 9 November 2007, counsel for Mr David Tsien applied for a stay of the proceedings of the Tribunal, "pending the final resolution of the judicial review proceedings" of rulings made in a differently constituted Market Misconduct Tribunal in respect of dealings in the shares of QPL which challenge was to the jurisdiction of the Tribunal. Having vacated the preliminary dates for the substantive hearing the Tribunal laid down a timetable for the articulation of any other preliminary/jurisdictional challenges to the Tribunal. By written submission dated 7 December 2007, those representing Mr Steve Luk challenged the Tribunal's jurisdiction.

1235. Although the Tribunal heard and ruled on the challenge mounted on behalf of Mr Steve Luk to its jurisdiction on 25 and 28 February 2008 respectively, it was not until 20 May 2008 that an application for judicial review arising therefrom was filed with the High Court. Prior to the hearing fixed for 5 June 2008, solicitors acting for Mr Steve Luk asked the Tribunal to "adjourn

these proceedings sine die until final determination of Mr Steve Luk's application for judicial review". Mr David Tsien's solicitors wrote to the Tribunal informing it that they agreed with that application. In the result, the Tribunal adjourned these proceedings until further order.

1236. Following the handing down of judgment on 18 November 2008 in the judicial review proceedings brought by Mr Steve Luk, HCAL 49/2008, the Tribunal held a Directions hearing on 21 November 2008 at which it fixed 5 January 2009 as the date for the commencement of the substantive hearing. Solicitors representing Mr Steve Luk informed the Tribunal that, although they did not have instructions, "there was a significant prospect of an appeal" of the judgment in HCAL 49/2008, in which event it was anticipated that an adjournment of the proceedings would be sought. In the event, no appeal was mounted and no application made for an adjournment of the proceedings.

<u>Conclusion.</u>

1237. Whilst the Tribunal is satisfied that the events the subject of these proceedings necessitated an investigation over a relatively lengthy period, nevertheless it finds, as noted earlier, that there were periods of unexplained delay in the three years and two months of which it is aware during which enquiries were underway, namely from 20 July 2004 to the issue of the FS's notice on 12 September 2007. The Tribunal takes those periods of unexplained delay into account in favour of the Specified Persons in determining the appropriate orders to make.

1238. After the latter date, a considerable part of the delay prior to the commencement of the substantive hearings on 5 January 2009 was caused by the unmeritorious and unsuccessful jurisdictional challenge mounted on behalf of Mr Steve Luk, before the Tribunal and in subsequent judicial review

proceedings. Also, the Tribunal notes that on 9 November 2007 those representing Mr David Tsien sought a stay of these proceedings to await the equally unsuccessful jurisdictional challenge by way of judicial review mounted in other proceedings before the Tribunal in respect of dealings in QPL shares. Further, it is to be noted that those representing Mr David Tsien agreed with the application made on behalf of Mr Steve Luk on 5 June 2008 that these proceedings be adjourned "sine die" pending final determination of the judicial review proceedings mounted by Mr Steve Luk. It ill behoves those who are instrumental in or assent to the causing of such delay to seek to pray-in-aid such periods of delay in their favour. On the other hand, the Tribunal takes into account that those representing Mr Edmond Leung made no such applications nor did they lend their support.

"Victims" of the loss avoided.

1239. It is clear that in avoiding loss for the funds that they managed Mr Edmond Leung and Mr Steve Luk did so to the disadvantage of those that were buyers of those shares. It appears that no civil actions have been instituted. In answer to enquiries from the Tribunal, the SFC stated that they had not sought to identify the buyers of those shares and, accordingly, it follows that those buyers of COLI shares have not had their attention drawn to the relevant circumstances in which they bought COLI shares on 21 and 26 January 2004.

Orders that a body be recommended to take disciplinary action against a Specified Person, pursuant to section 257(1)(g).

1240. All three Specified Persons testified that they were members of various professional bodies. In Hong Kong a regime of self-regulation of obtains in the professions. As a differently constituted Market Misconduct Tribunal noted, in its report in *Sunny Global Holdings Limited* (paragraph 391) :

> "In order that the various professional associations can discharge their duties properly it is important that they received adequate relevant information in respect of the misconduct of their members.".

The Tribunal has no doubt whatsoever that it is necessary and appropriate that the Tribunal make recommendations to the various professional bodies to which the Specified Persons belong that they take such disciplinary action as they deem appropriate in respect of the three Specified Persons.

Orders for "Costs and Expenses" of the Government and the SFC : the division between the Specified Persons

1241. The Tribunal is satisfied that, subject to a determination of the Tribunal to disallow or reduce elements of costs and expenses claimed generally, and subject to the issue of costs and expenses arising from discrete issues, the costs and expenses of the proceedings are to be divided equally between the three Specified Persons.

The "Costs and Expenses" of Government - section 257(1)(e).

1242. The Tribunal notes that DoJ/Government disclaim responsibility for the preparation of transcripts and translations of telephone conversations, contending that, "responsibilities with investigation and for the preparation of evidence, including transcripts of telephone conversations, together with other materials to be put before the Tribunal, rests with the SFC.". For its part, the SFC contends that in engaging an external transcriber/translator to transcribe and translate the material it had taken "all reasonable care".

1243. The Tribunal is satisfied that the fact remains that the transcripts and related translations remained inaccurate into the substantive proceedings. Those inaccuracies ought to have been remedied much earlier, at the very least after attention had been drawn to the problem by counsel then appearing for Mr David Tsien on 31 October 2007, by counsel appearing for Mr Edmond Leung

in her written submission dated 5 December 2007, and certainly following the identification by Mr Chang on 21 November 2008 of the continued presence of inaccuracies in the transcripts and translations. The duty to have the shortcomings remedied lay on the Presenting Officer (Mr Peter Ip until 25 April 2008 and thereafter Mr Kwan) and the Assistant Presenting Officer, whose costs and expenses are claimed on behalf of Government. Certainly, at no stage did that duty ever lie on the Specified Persons. Clearly, unnecessary time was wasted by all parties not only in preparations made for hearings (in unnecessary preparations, for example in the photocopying of wrongly transcribed and mistranslated documents) but also in the hearings themselves. The Tribunal is satisfied that fact is to be reflected as an element of part of the discount that the Tribunal will apply to the costs and expenses claimed on behalf of Government.

Inaccurate "Summary Assessment of Costs".

1244. The Tribunal regrets that it is forced to reach the conclusion that it is unable to repose the degree of trust it ought to be able to repose in a claim for costs and expenses submitted on behalf of the Government. Not only have the various drafts of the "Summary Assessment of Costs" contained egregious arithmetic errors but also a particularised version of the initial document **[Appendix IV]** contained claims for attendances at hearings that did not take place and claims that, as was readily accepted in the hearing, were exaggerated claims for those that did take place. Reasonable claims for hearings that had taken place were omitted altogether. In those circumstances, the Tribunal is satisfied that it would be unreasonable to allow any of the claim of $51,200.00, as being the costs of such inaccurate assessments.

Discount.

1245. In assessing the claim for costs and expenses made on behalf of Government on a gross sum basis and having regard to the basis of an

assessment of costs on a "Party and Party" basis, the Tribunal determines that the costs of the two Presenting Officer's fees together with those of leading counsel ($774,900.00) are to be accepted in full, but that, after the deduction of the claim for the cost assessment of $51,200.00, all other costs and expenses are to be discounted by 40%. In the result, the total claim in respect of the costs and expenses of Government allowed under this head is $2,178,614.40, of which amount a one third share is $726,204.80.

The claim on behalf of Government for Costs and Expenses for the period 4 June to 4 August 2009.

1246. Whilst the Tribunal accepts that the fees of the Presenting Officer incurred in the period 4 June to 4 August 2004 were costs and expenses of the Government reasonably incurred, the Tribunal is unable to accept that a period of 78 hours of work performed by the Assistant Presenting Officer in assisting him falls to be so regarded. In particular, the Tribunal takes into account the relatively limited areas that had to be addressed by the Tribunal following the publication of Part I of its Report on 9 July 2009, in respect of which the assistance of the Presenting Officer and Assistant Presenting Officer was required. Whilst the Tribunal has no hesitation in accepting the Assistant Presenting Officer's assertion that she had worked the hours claimed, it by no means follows that all of the time of such work is a cost and expense "reasonably incurred" to be visited upon the Specified Persons. The Ordinance does not permit the Tribunal to make an order in respect of prospective cost of Government, for example the cost of the DoJ in registering its orders.

Discount.

1247. In assessing the claim for costs and expenses made on behalf of Government for the period 4 June to 4 August 2009 on a gross sum basis and having regard to the basis of an assessment of costs on a "Party and Party" basis,

the Tribunal determines that the costs of the Presenting Officer's fees, $69,800.00, are to be accepted in full but that all other costs and expenses are to be discounted by 70%. In the result, the total claim for costs and expenses of the Government allowed under this head is $165,078.50, of which amount a one third share is $55,026.00.

<u>Costs and expenses of the SFC - section 257(1)(f).</u>

1248. The claim for costs and expenses made by the SFC is made in two discrete areas, first and generally in respect of work performed both before and after the FS referred the matter to the Tribunal ($523,804.00) and, second in respect of the discrete issue arising out of directions sought by Mr Edmond Leung in respect of claims by the SFC for PII and LPP ($166,178.00). In both cases, the basis of the claim in respect of work performed by officers of the SFC is that of an hourly rate based on "Staff costs", calculated in part on the cost of employment of the particular member of staff. In the former case, as part of the "Staff costs" a constituent element of "overhead costs" was identified, $107,136.55 in addition to staff costs of $385,507.78 based on "remuneration structure and benefits". In neither case, although legal advice was given twice in the former case and the work of a solicitor was performed in the latter case, has a claim been made on the basis of work performed by a SFC officer as a lawyer on an allowable rate based on seniority, in contrast to the claim made on behalf of the Government. Had such a claim being made on behalf on Ms Lisa Chen at the hourly rate appropriate to her seniority, namely $4,000.00, for the 33 hours of work she performed, the total of that element of the claim would have been $132,000.00 rather than $26,178.00.

1249. The Tribunal is satisfied that the basis of the SFC's claim for costs and expenses, namely staff costs including an element of "overhead costs", is justified and reasonable in principle. Certainly, in respect of work performed

by lawyers employed by the SFC it is a very modest basis of claim. The Tribunal is satisfied that the SFC's claim for costs and expenses in respect of "general matters", namely its investigations before the matter was referred to the Tribunal and its assistance to the Tribunal thereafter, of $523,804.00 is for costs and expenses reasonably incurred. The Tribunal determines that those costs and expenses are to be divided equally between the Specified Persons. A one third share of those cost is $174,601.00. The discrete issue of the SFC's claim for costs and expenses in respect of PII and LPP is addressed separately.

The costs and expenses arising out of the part of the proceedings in which directions were sought by those representing Mr Edmond Leung in respect of claims for legal professional privilege and public interest immunity made by the SFC.

1250. Although the SFC was responsible for investigating the events that are the subject of the proceedings before the Tribunal following the institution of these proceedings, by the issue of the FS's notice of 12 September 2007, the role of the SFC thereafter is to act on the authorization of the Tribunal, pursuant to section 254, to obtain records, documents and information. The SFC was not provided with a copy of the FS's notice, prior to the Tribunal requesting that be done at the hearing on 25 February 2008.

Background.

1251. By a letter dated 26 October 2007, the Presenting Officer informed the Specified Persons of the fact of the institution of the proceedings before the Tribunal and enclosed, "the hearing bundle containing documents currently intended to be used in the proceedings." In response to a request from those acting on behalf of Mr Edmond Leung to be informed, "whether there are materials collected by the Commission during its investigation against our client, on which you are not seeking to rely at the substantive proceedings" and to be

provided with copies of the same, the Presenting Officer replied by letter dated 7 November 2007 enclosing, inter-alia, 8 pages of "List of Documents" and 6 pages of "List of Privileged Documents" provided to him that day by the SFC. The latter list asserted the basis of privilege as being either PII or LPP.

1252. Following correspondence between the Presenting Officer and those representing Mr Edmond Leung the former asserted in a letter dated 4 December 2007 :

> "Any privilege claimed over the materials on the list from the SFC is claimed by the SFC. Neither the Presenting Officer nor his assistant acts for the SFC or the Financial Secretary for that matter in these proceedings.".

Applications to the Tribunal on behalf of Mr Edmond Leung.

1253. In response, by letter to the SFC of 5 December 2007, those representing Mr Edmond Leung sought detailed particularisation of the ambit and basis of the claims to privilege made by the SFC. On the same date, those representing Mr Edmond Leung filed with the Tribunal written submissions on preliminary issues, as required by the Tribunal, in which, inter-alia, they sought :

> "a direction pursuant to section 253(1)(j) of the SFO that the Presenting Officer ... and/or the SFC should produce a complete list of documents in their possession custody or power relating to matters set out in the s. 252 notice; and that if it is desired to claim that any document is privileged from production, the claim must be made in the list with a sufficient statement of the grounds of the privilege".

1254. The hearing on 25 February 2008, at which the application for such a direction was pursued on behalf of those who represented Mr Edmond Leung, was adjourned by the Tribunal, so that the SFC could be invited to attend and make such representations as they wished. By letter dated 10 March 2008, the SFC responded to a request made on behalf of Mr Edmond Leung on 12 February 2008 that they provide particulars of the basis upon which the LPP had been claimed, by asserting that the documents were, " … confidential communications passing between the Commission's Enforcement Division and

Legal Services Division for the purpose of obtaining or giving legal advice". Of the documents in respect of which PII was claimed, it was asserted that they were :

> "(1) confidential communications and working papers produced by and amongst officers and employees of the Commission which came into existence for the purpose of the investigation of this case;
>
> (2) confidential communications between a Commission on the one hand and Government Departments or other regulators on the other hand which came into existence for the purpose of the investigation of this case.".

Also, it was accepted that certain documents listed hitherto as subject to a claim of "privilege" had been so listed in error. Nevertheless, objection was taken to their production on the basis of relevance.

1255. The hearing of 13 March 2008, at which the SFC was represented by counsel, was adjourned so that the SFC could be provided with the FS's notice of 12 September 2007, together with the bundles of material served upon the Tribunal. The Tribunal directed that if the SFC persisted with its claim of PII it was to do so, on notice to the DoJ, by certificate supported by an affidavit.

Certificate of PII.

1256. By a certificate and an affidavit of Mr Martin Wheatley, the Chief Executive Officer of the SFC, dated 22 May 2008, PII was claimed in respect of three classes of documentation, including :

> "(a) confidential internal reports, minutes and correspondence which came into existence for the purpose of the investigation of and in contemplation of possible MMT proceedings … "

Of the basis upon which he had formed the opinion that the documents should not be disclosed in the public interest, Mr Wheatley asserted :

> " … to ensure the proper functioning of the Commission, its staff must be allowed freely to communicate internally without the fear that such communication would be investigated by defendants in future proceedings. Also, the effectiveness of the Commission's operations might be weakened if it is required to disclose internal report, minutes and correspondence which contain information of tactics or plans in carrying out its functions.".

Basis of the LPP claim.

1257. By letter dated 22 May 2008, the SFC informed those representing Mr Edmond Leung that the basis of the LPP claim was in respect of :

> " … confidential communications passing between the Commission and its legal advisers in Legal Services Division for the purposes of seeking or obtaining legal advice and evidence thereof.".

1258. In light of the date of the service on the parties of Mr Wheatley's Certificate and Affidavit claiming PII together with the SFC's letter, the hearing on 23rd of May 2008 was adjourned to permit those representing Mr Edmond Leung to consider that material. In consequence of the grant by the High Court of the application for leave to apply for judicial review in respect of issues going to the jurisdiction of the Tribunal, and in face of an application made on behalf of Mr Steve Luk for an adjournment until the final determination of those proceedings, the proceedings of 5 June 2008, at which issues of LPP and PII were to be argued, was adjourned.

1259. In anticipation of the hearing of 5 June 2008, in their letter to the SFC of 30 May 2008 and in their written submissions to the Tribunal dated 2 June 2008 those representing Mr Edmond Leung took issue with the position of the SFC.

(i) As to LPP.

1260. Of the issue of the ambit of LPP, it was asserted that in consequence of the decision of the Court of Appeal of England and Wales in *Three Rivers District Council v Governor and Company of the Bank of England* [2003] QB 1556 LPP attached only to communications between the individual officers of the SFC "who actually conducted the investigation in practice" and not to all of the SFC officers named in the section 182 Direction, the Enforcement Division or the SFC as a whole. Further, it was asserted that, "the onus is on the SFC to

identify “the client within the client” and delineate the precise boundary of the client to the exclusion of everyone else as third-party.”.

(ii) As to PII.

1261. Of the basis upon which PII had been claimed in respect of class (a) documents, as explained in Mr Wheatley’s affidavit, quoted earlier in paragraph 1254, it was asserted that the reasons “appear to be inadequate to justify immunity and, in some respects, contrary to the public interest..

1262. In its letter of 2 June 2008 and in counsel’s written submissions of 4 June 2008, issue was taken on behalf of the SFC in respect of LPP of the asserted onus to identify a “client within the client” and of the distinction sought to be drawn of officers of the SFC who could seek legal advice. Of PII, it was asserted that the basis advanced for the claim in respect of class (a) was a well established basis for the claim.

1263. At the hearing of 18 December 2008, counsel for Mr Edmond Leung advanced arguments in support of the application for directions sought of the Tribunal directed at the SFC in respect of the issues of both LPP and PII outstanding between them. In the event, following several hours of submissions counsel did not persist in the application.

1264. In the course of the hearing, counsel for the SFC responded to the Chairman’s enquiries as to the identity of the persons in respect of whom LPP was claimed, by identifying them by name as persons stipulated by name in the section 182 notice, being Mr Tong Hon Fai a “case handler” and perhaps others likewise so stipulated. Of the issue of dissemination of the legal advice so obtained by those officers, the Tribunal was informed that there was a hierarchy of reporting up to and including Mr Geoff Harris a director of the SFC.

1265. Of the issue of PII, counsel for the SFC informed the Tribunal during the hearing that :

> " … no statement or original documents obtained by the SFC during the investigation are the subject of the claim. Other than the correspondence specified, no public interest immunity is claimed for documents obtained by the SFC.".

1266. Having expressed concern that the PII certificate Mr Martin Wheatley did not make it clear whether or not all primary evidence had been disclosed, counsel for Mr Edmond Leung accepted that by inference the class (a) claim in respect of "confidential internal report, minutes and correspondence which came into in existence for the purpose of the investigation ... " applied to secondary documents. Nevertheless, counsel for the SFC undertook to ensure that if there existed any attendance notes of interviews not hitherto disclosed they would be disclosed to those representing Mr Edmond Leung.

1267. It was in those circumstances that counsel for Mr Edmond Leung informed the Tribunal :

> "We are not pursuing a challenge to PII at this stage on the basis of the fact that we going to get confirmation from the SFC as to the extent of disclosure that we have been given.".

Of her application for directions in respect of the issue of LPP, counsel for Mr Edmond Leung indicated that she reserved her position, but sought no ruling from the Tribunal. No ruling has ever been sought subsequently.

Conclusion.

1268. The Tribunal is satisfied that in the circumstances described above, in particular having regard to the fact that understandably the submissions made on behalf of Mr Edmond Leung were not persisted with at the hearing of 18 December 2008 and that nothing, that could not have been anticipated easily and obviously by the SFC's position articulated in correspondence and in the

Certificate of PII, emerged in the hearing, the SFC is entitled to its costs. The Tribunal is satisfied that the sums claimed by the SFC of $166,178.00 and $21,075.00, in respect of the preparation and argument in respect of issues of LPP and PII and the argument as to cost respectively were reasonably incurred by the SFC.

1269. Furthermore, the Tribunal is satisfied that this argument having been mounted on behalf of Mr Edmond Leung alone those costs are to be borne by him alone, and not shared between the other Specified Persons. In addition, he must bear the costs of the Tribunal related to the litigation of that discrete issue, which costs, namely $108,637.73, are set out in **Appendix XIV**. The Presenting Officer and his assistant having played no part in this issue it is not necessary to address their costs separately.

<u>The Costs and Expenses in respect of the jurisdictional challenge to the Tribunal taken before the Tribunal on behalf of Mr Steve Luk.</u>

1270. The Tribunal is satisfied that the costs and expenses arising out of the part of the proceedings in respect of the challenge to the jurisdiction of the Tribunal mounted on behalf of Mr Steve Luk are costs for which Mr Steve Luk is alone responsible. Accordingly, those costs are to be separated out from the other costs and expenses ordered to be shared equally between the Specified Persons. The Tribunal's costs in respect of that discrete issue, namely $77,485.16, are set out in **Appendix XV**. Given the very limited role played by the Presenting Officer in the litigation of this issue it is not appropriate to separate out those costs.

Witness expenses.

(i) Mr Rigby and Mr Alex Pang.

1271. The Tribunal is satisfied that the costs stipulated in the fee notes of Mr Rigby and Mr Alex Pang, being the costs related to the preparation of expert reports and their oral testimony as expert witnesses, were reasonably incurred in relation to these proceedings. Accordingly, pursuant to section 260(1)(a) of the Ordinance the Tribunal orders payment to Mr Rigby of the sum of $537,170.00 and to Mr Alex Pang the sum of $86,000.00.

(ii) Mr Kong, Mr Wu and Mr Horace Nip.

1272. Clearly Mr Kong, Mr Wu and Mr Horace Nip were witnesses of fact. They are entitled to recover costs for their reasonable expenses for attending the Tribunal and for a reasonable amount for any loss of income actually incurred by them. They are not entitled to claim for legal expenses for advice. No claim has been advanced in respect of travel expenses and the claim in respect of loss of income is not framed as personal to them but appears to be made on behalf of their employer, COLI. In those circumstances, the Tribunal makes no order of costs in their favour.

The Costs and Expenses of the Tribunal.

1273. The Tribunal has followed the practice adopted in previous reports of the Market Misconduct Tribunal[1] and has included within the order of costs made in favour of the Government, the costs and expenses of the Tribunal itself, namely $3,539,141.66 of which ⅓ is $1,179,713.80 **[Appendix XVI]**. In so doing, those Tribunals followed the well-established practice of the Insider Dealing Tribunal and did so on the basis articulated in the report of the Insider

[1] Sunny Global Holdings Limited (paragraph 385); QPL International Holdings Limited (paragraph 213); and Mobicon Group Limited (paragraph 411).

Dealing Tribunal of October 1996 in *Yannion International Holdings Limited* (page 80), namely :

> " ... the costs of the Tribunal have been limited to the fees and salaries of the Chairman, the ordinary members and the Tribunal staff together with the costs of the verbatim reporters and the Court interpreters. Costs of machinery, accommodation stationery have not been included.".

Calculations in respect of the costs and expenses of the Chairman and the Tribunal staff are based on their respective annual staff costs, as described in the "*Staff Costs Ready Reckoner"* prepared by the Director of Accounting Services.

1274. The costs and expenses of Mr Rigby and Mr Alex Pang in preparing reports for and giving evidence at the Tribunal are part of the costs of the Tribunal. No issue was taken by any of the Specified Persons in respect of the fees incurred in respect of Mr Alex Pang. However, as described earlier, issue was taken in respect of part of the fees incurred in respect of Mr Rigby. In all the circumstances, and taking the matter in the round, the Tribunal determines that it would be appropriate to discount by 30% the total of the fees of Mr Rigby. That amount, namely $376,019.00, together with the fees of Mr Alex Pang, $86,000.00 is to be shared equally between the three Specified Persons.

<u>The culpability of the Specified Persons.</u>

A. <u>Mr David Tsien.</u>

1275. The seriousness of the insider dealing, of which the Tribunal has found Mr David Tsien to be culpable lies in the circumstances in which it was committed, namely by a man of considerable experience, then in the financial services industry (16 years), who had occupied a position as an equity salesman within JP Morgan (or the companies taken over by it earlier) for some years, who was fully conversant with the "Chinese Wall" policy, which he "trampled underfoot" (see paragraph 988 of Part I of the Report). He set about deliberately using his excellent personal connections with COLI and the status

that afforded him within JP Morgan, as the man with the "relationship" with COLI, to obtain information about developments in the negotiations between the two institutions in respect of the prospective placement from each of them, which information he passed on regularly not only to the other party to the negotiations but also to Mr Steve Luk and Mr Edmond Leung.

1276. Whilst the Tribunal accepts readily that Mr David Tsien did not deal in COLI shares himself and did not receive any direct monetary benefit for providing the relevant information to Mr Edmond Leung and Mr Steve Luk, the Tribunal is satisfied that his misconduct is to be viewed in a broader context. Clearly, throughout the steps taken towards the securing of the placement agreement with COLI, Mr David Tsien regarded Mr Steve Luk as the "Anchor" for the prospective placement. In the event, Mr Steve Luk was one of a number of fund managers at JP Morgan who were allotted in total no less than 182 million COLI shares in the placement. The funds managed by Mr Steve Luk were allotted over 47 million COLI shares. As the Tribunal noted in Part I of its Report (see paragraph 1025) during the time that he was passing relevant information to Mr Steve Luk in telephone conversations, Mr David Tsien adverted to the fact that he had assisted Mr Steve Luk to acquire COLI shares at much lower prices ($1.20 and $1.26) than that at which they could now be sold in late January 2004.

1277. Equally clearly, Mr David Tsien knew that as the Placing Agent JP Morgan stood to gain considerable commission from COLI for placing its shares. In fact, the Placing Agreement provided for a 2% commission based on the share price multiplied by the number of shares placed ($1.80 x 850 million), net of expenses of the Placing Agent. Those fees were earned by the Investment Banking Division of JP Morgan. The allottees of placement shares paid 1% on the monetary value of the shares allotted. Those fees were earned by the Equity

Sales Division of JP Morgan, of which Mr David Tsien was a member, and aggregated into a pool for general annual distribution within the Equity Sales Division.

1278. The Tribunal notes that in his witness statement and oral evidence, Mr David Tsien said that, following his tendering his resignation in February 2004 in face of a lower than expected bonus, in order to retain his services he had been given a bonus of US$25,000.00, " … in appreciation of my hard work over the year, in particular for my contribution in bringing in the COLI placement".

B. Mr Edmond Leung.

1279. At the time of the commission of the conduct of which he has been found culpable of insider dealing Mr Edmond Leung had been involved in the financial services industry for about 16 years, of which he had been employed as a fund manager for 14 years. In 1988, he obtained a degree in Business Administration from the Chinese University of Hong Kong. Obviously, as someone in sole charge of the CEF fund, valued at about US$220 million in 2004, Mr Edmond Leung was a person in whom ABN AMRO reposed considerable trust and who bore significant responsibility. Clearly, his market misconduct was a breach of that trust.

1280. As is apparent from Part I of our Report, the Tribunal found that Mr Edmond Leung was not merely the passive recipient of relevant information from Mr David Tsien, but also someone who actively sought confirmation from him of the prospects of the placement proceeding, the better to judge when to sell COLI shares. Also, the Tribunal notes that his market misconduct was committed on two separate occasions, namely on 21 and 26 January 2004 and that he sold a total of 4.392 million shares in the fund he managed.

1281. The Tribunal accepts, as indicated earlier, that Mr Edmond Leung did not avoid loss personally by the sales of the COLI shares in the fund that he managed. That loss was avoided by the fund. Whilst it is not possible to identify any specific direct benefit accruing to Mr Edmond Leung from his insider dealing, the Tribunal is satisfied that he was mindful that, on the one hand, his conduct was beneficial to the fund and that, on the other hand, the performance of the fund was a matter upon which his own performance was judged not only by reputation and retention of his employment but also ultimately by monetary reward by way of bonus.

C. Mr Steve Luk.

1282. In common with the other Specified Persons, Mr Steve Luk was a man of considerable experience in the financial services industry at the time of the commission of his acts of insider dealing. In 1990, he obtained an MBA degree from Columbia University. In 2004, he was a Vice-President of JFAM and manager of two of its funds, having been employed by that organisation for 14 years. At the time of the insider dealing one of the funds, JPM China Fund, held shares to a value of US$600 million whilst the other fund, JF Greater China Open Fund, held shares to the value of US$250 million. He was permitted to trade in the funds without requiring the permission of others. Clearly, Mr Steve Luk was a man in whom JFAM reposed considerable trust and who bore considerable responsibility. His insider dealing was a breach of that trust.

1283. Although Mr Steve Luk's acts of insider dealing were committed in a period of not much more than an hour on the afternoon of 26 January 2004, it is to be noted that, having placed the original order to sell COLI shares in the two funds that he managed, a little later he intervened to reduce the price limit at which they could be sold and placed a third sell order for the fund of a colleague. In all, he sold 9.1 million COLI shares in the three funds.

1284. The Tribunal accepts that Mr Steve Luk received no direct benefit of having succeeded in avoiding loss in the three funds by his sale of COLI shares. However, in so far as the two funds that he managed benefited from his market misconduct in avoiding loss, that was to be reflected in the assessment of his performance as a fund manager, measured by the funds outperforming the MSCI China Index, and ultimately in monetary terms in the bonus he received.

Orders.

1285. In making the orders it does against each of the Specified Persons the Tribunal is mindful of the very likely consequences to them in respect of their employment, obviously in particular during the duration of the orders. In respect of Mr David Tsien, the Tribunal is aware that it has been submitted on his behalf that he has "resigned from Value Partners".

1286. Pursuant to section 257(1) of the Ordinance the Tribunal makes the following orders **[Appendix XVII]** :

As to Mr David Tsien Pak Cheong

(i) pursuant to section 257(1)(a), that for a period of nine months Mr David Tsien Pak Cheong shall not, without the leave of the Court of First Instance, be concerned or take part in the management of Value Partners Group Limited or of any company that is now or becomes a subsidiary of Value Partners Group Limited;

(ii) pursuant to section 257(1)(b), that for a period of nine months he shall not, without the leave of the Court of First Instance, in Hong Kong, directly or indirectly, in any way acquire, dispose of or otherwise deal in any securities or an interest in any securities;

(iii) pursuant to section 257(1)(e), that he shall pay the Government the sum of $1,960,944.69;

(iv) pursuant to section 257(1)(f), that he shall pay the Securities and Futures Commission the sum of $174,601.00; and

(v) pursuant to section 257(1)(g), that the Hong Kong Securities Institute be recommended to take disciplinary action against him.

As to Mr Edmond Leung Chi Keung.

(i) pursuant to section 257(1)(a), that for a period of eight months he shall not, without the leave of the Court of First Instance, be concerned or take part in the management of Cheetah Investment Management Limited or of any company that is now or becomes a subsidiary of Cheetah Investment Management Limited;

(ii) pursuant to section 257(1)(b), that for a period of eight months he shall not, without the leave of the Court of First Instance, in Hong Kong, directly or indirectly, in any way acquire, dispose of or otherwise deal in any securities or an interest in any securities;

(iii) pursuant to section 257(1)(e), that he shall pay the Government the sum of $2,069,582.42;

(iv) pursuant to section 257(1)(f), that he shall pay the Securities and Futures Commission the sum of $361,854.00; and

(v) pursuant to section 257(1)(g), that the Hong Kong Institute of Certified Public Accountants, CPA Australia, the Hong Kong Society of Financial Analysts; the Hong Kong Securities Institute; and the Hong Kong Institute of Directors be recommended to take disciplinary action against him.

As to Mr Steve Luk Ka Cheung.

(i) pursuant to section 257(1)(a), that for a period of nine months he shall not, without the leave of the Court of First Instance, be concerned or take part in the management of CIMB-GK Securities (HK) Limited or of

any company that is now or becomes a subsidiary of CIMB-GK Securities (HK) Limited;

(ii) pursuant to section 257(1)(b), that for a period of nine months he shall not, without the leave of the Court of First Instance, in Hong Kong, directly or indirectly in any way acquire, dispose of or otherwise deal in any securities or an interest in any securities;

(iii) pursuant to section 257(1)(e), that he shall pay the Government the sum of $2,038,429.85;

(iv) pursuant to section 257(1)(f), that he shall pay the Securities and Futures Commission the sum of $174,601.00; and

(v) pursuant to section 257(1)(g), that the Hong Kong Institute of Certified Public Accountants and the Hong Kong Society of Financial Analysts be recommended to take disciplinary action against him.

1287. Pursuant to section 264(1) of the Ordinance, the Tribunal directs the Secretary to give notice to the Court of First Instance to register its orders made pursuant to section 257(1)(a), (b), (e) and (f).

1288. The Tribunal directs the Secretary to provide copies of its Report to those bodies to whom the Tribunal has made recommendations that they take disciplinary action against one or more of the Specified Persons.

CHAPTER 11

MISCELLANEOUS MATTERS

Representation.

(i) The Presenting Officer.

1289. From 23 October 2007 to 25 April 2008, the Presenting Officer was Mr Peter Ip Tak Keung of counsel; thereafter it was Mr Jonathan Kwan of counsel. Throughout the proceedings the Assistant Presenting Officer was Ms Winnie Ho.

(ii) Mr David Tsien.

1290. Throughout the proceedings Mr David Tsien was represented by Messrs K B Chau, who instructed Mr Graham Harris of counsel, on the initial hearing of 31 October 2007, and thereafter Mr Chang of counsel.

(iii) Mr Edmond Leung.

1291. Throughout the proceedings Mr Edmond Leung was represented by Messrs Simmons and Simmons, who instructed Ms Roxanne Ismail of counsel for the hearings up and until those of 3 and 4 August 2009 when Ms Sara Tong of counsel appeared on behalf of Mr Edmond Leung.

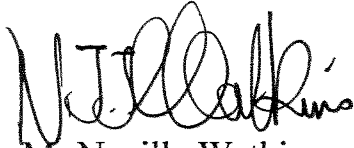
(iv) Mr Steve Luk.

1292. Throughout the proceedings Mr Steve Luk was represented by Messrs Richards Butler, who instructed Mr Gerard McCoy, SC to appear on the hearing of 25 February 2008 and Mr Charles Sussex SC for subsequent hearings.

Acknowledgement.

1293. The Tribunal acknowledges with thanks the assistance of counsel and their instructing solicitors throughout these proceedings.

The Hon Mr Justice Lunn
(Chairman)



Mr Neville Watkins
(Member)

Mr Chan Kam Wing, Clement
(Member)

Dated 8 July 2009