

The report of the Market Misconduct Tribunal into dealings
in the shares of Chaoda Modern Agriculture (Holdings) Limited
on and between 15 June 2009 and 17 June 2009

**Part II : A report determining the issue raised by section 252(3)(c) and
setting out the Orders made pursuant to section 257 of the
Securities and Futures Ordinance, Cap 571**

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CHAPTER 5

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

329. As required by the Financial Secretary's Notice of 25 July 2011, and having found Mr George Stairs culpable of market misconduct, namely insider dealing contrary to section 270(1)(e) of the Ordinance, the Tribunal went on to determine the amount of loss avoided as a result of the market misconduct.

THE LAW

330. Although section 252(3)(c) of the Ordinance requires the Tribunal to determine the amount of the loss avoided as a result of the market misconduct, which the Tribunal has found to have occurred, the Ordinance gives no specific guidance of how the calculation is to be made. At the direction of the Chairman, the Tribunal has approached the issue in accordance with the guidance given in the judgment of Lord Nicholls of Birkenhead, with whom all the other judges agreed, in the Court of Final Appeal in the *Insider Dealing Tribunal v Shek Mei Ling* [1999] 2 HKCFAR 205 at 212 I – 213 C :

“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 a 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 about news. The notional element will comprise a 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.”.

Evidence

331. To assist in the determination of the loss avoided by the sale of Chaoda shares by Mr George Stairs the Tribunal received a witness statement from Mr Cheng Kai Sum, a Senior Director of the Surveillance Department, of the Enforcement Division of the SFC dated 10 May 2012. However, the Tribunal declined to receive an e-mail dated 18 April 2012 from Mr Cheng Kai Sum to Ms Agnes Man of the Enforcement Division of the SFC, in which the former addressed the written submission advanced to the Tribunal by Mr Huggins SC on behalf of Mr George Stairs. Mr Huggins suggested that the loss avoided was to be calculated on the basis of the price that Mr George Stairs had been told by Mr Kwok Ho and Mr Andy Chan was to be the placement price, namely \$5.00 per share, so that “he could not have been seeking to avoid a loss of more than 30 cents a share when Mr Stairs sold at \$5.30 on 15 June 2009.” The Tribunal was satisfied that the resolution of that issue did not require the assistance of Mr Cheng’s opinions.

Calculation of the loss avoided

(i) the re-rating period

332. We accept the opinion of Mr Cheng that the market had fully digested the information of the announcement of the placement of Chaoda shares during the two-day period of 18 and 19 June 2009. The volume of shares traded on those two days was significantly higher than trading on the days prior to

suspension of the shares. However, beginning on 22 June 2009 and in the days that followed trading returned to the earlier significantly lower volume.

(ii) the re-rated price

333. Again, we accept the opinion of Mr Cheng that the appropriate method by which to calculate the re-rated price was by way of the volume weighted average price. That price is calculated by dividing the aggregate sum of the transaction value by the total number of shares transacted over the relevant period. We accept that it was appropriate to exclude from a calculation the relatively small number of non-AMS transactions.

334. In the result, we accept Mr Cheng's calculation of the volume weighted average price as being \$4.55127.

Conclusion

335. For the purpose of determining the loss avoided by the sale of Chaoda shares by Mr Stairs we are satisfied that it is not appropriate to make the determination, as Mr Huggins had submitted, on the basis of the loss that he intended to avoid. The determination is to be made on the notional loss avoided after the re-rating period. We accept Mr Cheng's calculation of the notional loss avoided, after the deduction of transaction costs, namely \$280,554.96 as set out at Appendix 2.

CHAPTER 6

ORDERS

336. The solicitors representing Mr Kwok Ho and Mr Andy Chan informed the Tribunal in advance of the hearing of 21 May 2012 that they did not wish to make any submissions at that hearing. Neither Mr Kwok Ho or Mr Andy Chan attended that hearing or were represented. The Tribunal received written submissions from Mr Huggins, on behalf of Mr George Stairs. Mr Huggins appeared at that hearing.

337. The orders that the Tribunal may make at the conclusion of proceedings instituted under section 252 are those provided for by section 257 of the Ordinance.

Section 257(1)(d) : disgorgement

338. 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) 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.” [Italics added.]

339. As the Tribunal noted in paragraph 326 in Part I of its report Mr George Stairs had no personal interest in the fund from which he sold the Chaoda shares on 16 June 2009. Accordingly, it follows that he did not avoid a loss as a result of his market misconduct. The loss avoided was to the fund that he managed. The power to order disgorgement of the loss avoided is not engaged. (See the

reports of the differently constituted Market Misconduct Tribunals in respect of dealings in the shares of *Sunny Global Holdings Limited*¹ and *China Overseas Land and Investment Limited*².)

Section 257(1)(b) : cold shoulder order

340. Notwithstanding the submission of Mr Huggins to the contrary, we are satisfied that it is appropriate for the Tribunal to make an order pursuant to section 257(1)(b) that, without the leave of the Court of First Instance, Mr George Stairs shall not in Hong Kong directly or indirectly in any way acquire, dispose of or otherwise deal in any securities for a period of two years.

Costs and expenses of the Government and the SFC

341. Mr Huggins submitted that, in what he described as the “unusual” circumstances of the case, and having regard to the “significant hardship” already suffered by Mr George Stairs the Tribunal would be justified in making no order as to costs of the Government and the SFC. We do not accept that to be the appropriate approach. Mr George Stairs has been found culpable of insider dealing after a contested hearing. There is no reason why he should not bear a portion of the costs and expenses of the Government and the SFC.

The proportion of the costs and expenses

342. We accept the observation of Mr Huggins that the material provided in respect of the costs and expenses of the SFC of its enquiries and the Government in respect of the conduct of the proceedings before the Tribunal does not

¹ See paragraphs 328-330.

² See paragraph 1221.

condescend to details of what was attributable to a particular Specified Person. (A summary of that material, together with the costs and expenses of the Tribunal, is set out at Appendix 3.) Mr Huggins suggested that, if the Tribunal was minded to make an order against Mr George Stairs, the “appropriate fraction” of the costs and expenses to be ordered against him was one quarter, with one third as the “very uppermost limit”.

343. The Tribunal has had the advantage of having received and reviewed not only the material obtained prior to the commencement of these proceedings by the SFC but also the considerable volume of material made available during the hearing itself. On any view, Mr George Stairs occupied a pivotal role in the enquiries of the SFC and in the conduct of the proceedings before the Tribunal. Having regard to those matters, we are satisfied that it is appropriate that Mr George Stairs be ordered to pay one third of costs and expenses of the SFC and the Government. The Tribunal has followed the practice adopted in previous reports of the Market Misconduct Tribunal³ and has included with the order of costs and expenses made in favour of the Government a portion of the costs and expenses of the Tribunal

Section 257(1)(g): recommendation to take disciplinary action

344. Given that Mr George Stairs is not a member of a professional body in Hong Kong, or otherwise a regulated person in Hong Kong, which body or regulator might take disciplinary action against him, it is not appropriate to make an order under section 257(1)(g) of the Ordinance. However, since it is

³ China Overseas Land and Investment Limited (paragraph 1273).

very likely that he enjoys such a position in the United States of America we think it appropriate to invite the SFC to provide the SEC with the Tribunal's report, so that the SEC are fully informed of the material received by this Tribunal and its determinations.

ORDERS

345. The Tribunal makes the following orders pursuant to section 257(1) of the Ordinance :

- (i) pursuant to section 257(1)(b), that for a period of two years Mr George Stairs 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;
- (ii) pursuant to section 257(1)(e) that Mr George Stairs pay to the Government of the Hong Kong Special Administrative Region the sum of \$784,421.00; and
- (iii) pursuant to section 257(1)(f) that Mr George Stairs pay to the Securities and Futures Commission the sum of \$75,233.00.

CHAPTER 7
MISCELLANEOUS MATTERS

The international nature of the conduct the subject of these proceedings

346. The international nature of the conduct the subject of these proceeding has necessarily brought into focus the consequential jurisdictional issues. The nub of the enquiry was concerned with the communication of ‘inside information’ by the directors of a publicly listed company in Hong Kong by telephone conference call to the recipients of that information in the United States of America. Mr George Stairs and his colleague at Fidelity, Ms Jessamyn Larrabee, were employees of only one of a total of six different institutional investors that received such telephone conference calls on 15 June 2009 EDT.

347. In order to have a better overview of the manner in which those conference calls were conducted the Tribunal sought to receive oral testimony from a number of employees of those institutional investors. Some of them, Ms Angela Yu of Blackrock and Mr Matthew Sigel then of Alliance Bernstein, gave generously of their time to the Tribunal by providing oral testimony by video link. The Tribunal thanks them, Mr Tim Lynch of Merrill Lynch in Boston and Mr George Stairs’s two colleagues for assisting the Tribunal by giving oral testimony by video link.

348. Others, including Mr George Stairs’s former colleague Ms Jessamyn Larrabee, who has since left the employment of Fidelity, and no less than five employees of Wellington Management (see paragraphs 165 and 166 of the

report), all of whom had participated in the telephone conference calls with Mr Kwok Ho and Mr Andy Chan, declined to assist the Tribunal by providing oral testimony by video link. While they were within their rights to do so, since they were outside the jurisdictional powers of this Tribunal, nevertheless it is a matter of both frustration and disappointment to the Tribunal that professionals employed by well-known international companies, who trade in shares in Hong Kong, have thought it appropriate to decline the specific requests of this Tribunal for assistance.

349. The Tribunal wishes to record its thanks to the SEC for the assistance afforded to it, made at the request of the SFC, during the proceedings before the Tribunal.

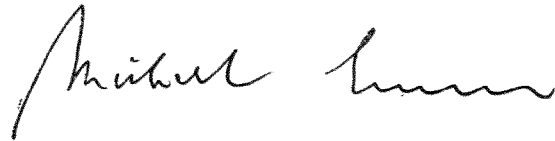
Representation

350. Mr Jonathan Kwan was the Presenting Officer. The Assistant Presenting Officer was Ms Winnie WY Ho.


Mr Kwok Ho was represented by Mr Warren Chan SC and Mr Rimsky Yuen SC, leading Ms Bonnie Cheng, instructed by Messrs Chiu & Partners.

Mr Andy Chan was represented by Mr Lawrence Lok SC leading Mr Edwin Choy, instructed by David Lo & Partners.

Mr George Stairs was represented by Mr Adrian Huggins SC, instructed by Messrs Reed Smith Richards Butler.



The Hon Mr Justice Lunn
(Chairman)



Mr Malcolm A Barnett
(Member)



Mrs Christine M K Koo
(Member)

Dated 22 May 2012