The Market Misconduct Tribunal
In the Matter of the Listed Securities of
China Vanguard Group Limited, now known as Sinopharm Tech Holdings Limited (stock code 8156) and Yunbo Digital Synergy Group Limited, now known as Quantum Thinking Limited (stock code 8050)

Ruling on the Interpretation of Section 257(1)(d) of the SFO

Introduction

1. On 5 August 2022 the Securities and Futures Commission ("the SFC") filed a Notice with the Market Misconduct Tribunal ("the MMT" or "the Tribunal") pursuant to section 252(2) and Schedule 9 of the Securities and Futures Ordinance ("the SFO"). In this Notice the SFC alleged that Mr Jonathan Dominic Wai Ching Iu had, between 1 August 2014 and 30 September 2014, engaged in market misconduct, in the form of false trading within the meaning of section 274 of the SFO, in relation to the shares of China Vanguard Group Limited, now known as Sinopharm Tech Holdings Limited (Stock Code 8156) ("CVG") and in relation to the shares of Yunbo Digital Synergy Group Limited, now known as Quantum Thinking Limited (Stock Code 8050) ("YBD").

2. The SFC's Notice went on to state that proceedings were being instituted before the Tribunal for it to determine the matters set out in section 252(3) of the SFO, namely:

(i) whether market misconduct within the meaning of section 274 of the SFO had taken place;

(ii) if so, the identity of any person who has engaged in the market

misconduct; and

(iii) the amount of any profit gained or loss avoided as a result of the market misconduct.

3. The false trading was done through trading accounts operated by Mr Iu's mother, to which Mr Iu had authorised internet access, and by Tarascon Capital Management (Hong Kong) Limited ("Tarascon"). Mr Iu was a director and the chief investment officer of Tarascon and owned 80% of its shares. Tarascon managed a hedge fund for which Mr Iu made investment decisions. As a result of Mr Iu's false trading the hedge fund suffered a loss of approximately HK$5.35 million and Ms Iu's account enjoyed a profit of HK$5,616,040.

4. At the second preliminary conference of this matter, held on 24 March 2023, Mr Iu was represented by Mr Edwin Choy SC. Mr Choy informed the Tribunal that Mr Iu would not contest liability and it was anticipated that a set of admitted facts would ultimately be placed before the Tribunal.

5. Subsequently a Statement of Agreed and Admitted Facts ("the SoAAF") signed by both the SFC and Mr Iu's legal representatives was filed with the Tribunal. This document contained detailed admissions in proof of the allegations in the SFC's Notice. However, nothing was said in the SoAAF revealing what had happened to the monies in Ms Iu's account that were the profits from the false trading and nothing was said about Mr Iu's motivation for his illegal conduct and specifically who it was that he was seeking to benefit by it.

6. Also in the bundle of documents filed with the Tribunal was a document entitled "Orders Jointly Proposed by the SFC and the Specified Person".[1] This document made no mention of an order under section 257(1)(d) of the SFO. Section 257(1)(d) of the SFO empowers the Tribunal to order any person it identifies as having engaged in market misconduct to "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". The order that the subsection empowers the Tribunal to make has at times been referred to as a disgorgement order but its purpose is simply to prevent the identified person from profiting from his market misconduct. If no order is made under this section the consequence would be that no action was being taken by the Tribunal in respect of the profit of HK$5,616,040 that was gained from the market misconduct.

A Concern Raised by the Tribunal

7. The Tribunal was concerned by two matters arising from the two documents filed by the parties. In respect of the SoAAF the Tribunal was troubled by the absence of any mention of Mr Iu's motivation for the false trading and of the disbursement and ultimate location of the profits gained from it. In respect of the proposed orders, the Tribunal noted the absence of an order under section 257(1)(d) of the SFO in respect of the profit that was gained from the false trading.

8. These concerns prompted the Chairman to write to the parties on

[1] The "Specified Person" is Mr Iu as he is the person that the SFC specifies in its Notice as having committed market misconduct. If this person is determined by the Tribunal to have engaged in market misconduct then he, arguably, becomes the "identified person" because, in accordance with its duty under section 252(3)(b) of the SFO, the Tribunal has determined the identity of the person who has engaged in market misconduct.

28 April 2023. In that letter the Chairman invited the parties to indicate firstly what their positions were in respect of Mr Iu's motivation as that was relevant to the Tribunal's assessment of his culpability. Secondly, the Chairman enquired what had happened to the profit gained and why no order under section 257(1)(d) of the SFO was being sought in respect of it.

9. Anticipating that the parties' answers to the Tribunal's second question might be that section 257(1)(d) did not apply to a profit that is gained by another and only applied to a profit gained by the identified person, the Chairman invited submissions on the correct interpretation of this statutory provision.

10. In its written submission to the Tribunal the SFC said of Mr Iu's motive:

> "The materials available to the SFC do not directly show what Mr Iu's motive was. However, given that his false trading would naturally result and has in fact resulted in substantial gains to his mother, i.e. Ms Iu's Account, it is probable that his motive was to benefit his mother."

11. It is, perhaps, stating the obvious in asserting that Mr Iu's motive was to gain a profit, but for whom he was seeking to gain a profit is less obvious. Was he being a devoted son seeking to confer a financial windfall, albeit an illicit one, on his mother or was he simply abusing his mother's generosity by making use of her account so that he could distance himself from his wrongdoing and still keep for himself the proceeds of it? After all, it is not unusual for those engaged in unlawful conduct to make use of third parties and their accounts in order to conceal their own involvement in that unlawful conduct.

12. It was the Tribunal's view that these questions needed to be addressed as the answers to them would not only be highly relevant to the Tribunal's assessment of Mr Iu's culpability but could also be relevant to the question of whether an order under section 257(1)(d) can be made by the Tribunal in respect of the profit gained from the market misconduct.

13. The SFC went on to explain in its submission that it had "attempted fund tracing to identify the source of funds for the relevant trading in Ms Iu's account and any possibility of the proceeds or any part thereof flowing to Mr Iu". However, its efforts in this regard did not reveal "the eventual destination of the proceeds or suffice to establish that Mr Iu has any beneficial interest in the shares and/or the proceeds in Ms Iu's Account". In these circumstances it was the SFC's view that Mr Iu "cannot be ordered to disgorge the profits apparently gained by Ms Iu simply because of their family relationship".

14. In respect of Mr Iu's mother, the SFC expressed its position as being:

(1) because the false trading benefited the mother, Mr Iu's motive "was probably to benefit his mother"; but

(2) an order of disgorgement cannot be made against Ms Iu as she "has not been identified as having engaged in any market misconduct".

15. The legal representatives for Mr Iu agreed with the SFC's response to the Tribunal's questions and asserted that "there is insufficient basis in law for an order of disgorgement".

16. In response to these submissions, on 4 May 2023, the Chairman again wrote to the parties noting the interpretation of section 257(1)(d) of the SFO that underlay their position and noting that the section says nothing about who the person committing the market misconduct gains the profit for and does not require that he enjoys the benefit of the profit. The Chairman directed that more detailed written submissions in respect of the construction of section 257(1)(d) be filed with the Tribunal by 8 May 2023.

17. In its further written submission in response to this direction the SFC argued that the legislative policy underlying the section is that an identified person should not be allowed to benefit from his market misconduct, and that a natural reading of the language of the section points to it as empowering the Tribunal to make only a disgorgement order. Furthermore, the SFC claimed, this is how the section has been regarded in the case law dealing with it and with its predecessor provision in section 23 of the Securities (Insider Dealing) Ordinance (Cap 395) ("SIDO").

18. Having labelled the section a disgorgement order, the SFC then argued that such an order cannot be made against a person other than a person identified by the Tribunal as having engaged in market misconduct and only then when the profit from the market misconduct is gained for the benefit of that identified person. The SFC interpreted section 257(1)(d) "as applying only to the profit/loss gained/avoided **by the person** who has engaged in market misconduct **to himself**. This is consistent with the very concept of disgorgement". Underlying the SFC argument is the assumption that the section is properly to be regarded as a disgorgement order and that disgorgement, as a legal concept,

requires that the person against whom the order is to be made, has an illicit profit, gain or benefit to disgorge and this, therefore, requires that he be shown to have taken to himself this illicit profit, gain or benefit before a disgorgement order can be made against him.

19. The SFC concluded its submission by stating that "the present matter is not a suitable case for the MMT to exercise its power under SFO s.257(1)(d)".

20. In the course of its written submissions the SFC referred to a statement made by another Tribunal in respect of the SIDO power. This statement extended the disgorgement power to situations where the identified person has exercised control over the disposition of the illicitly gained profit to the benefit of another. This extension of the power to order disgorgement when the profit flows to another was articulated by the Insider Dealing Tribunal in its report in relation to the securities of Firstone International Holdings Limited dated 8 July 2004 ("the Firstone Report"). There, the Tribunal said that the identified person need not be shown to have himself enjoyed the profit that was gained by his market misconduct but the profit must effectively have been his to use and dispose of as he wished. This would suggest that the identified person must be able to exercise control over its disposition. Thus, if an identified person possesses the power to control what happens to the illicitly gained profit and exercises this power to transfer it to another then, under this principle, a disgorgement order can be made against him.

21. On 10 May 2023, at the hearing set aside for the substantive disposition of this matter, the Tribunal ventilated its concern at the common position of the

parties that, in the particular circumstances of this case, it was not able to make a section 257(1)(d) order in respect of the profit gained. In so far as resolving this concern would involve the Tribunal having to interpret the meaning of section 257(1)(d), the Tribunal made clear to the parties that it would require detailed submissions on this important legal issue. In particular it would require the parties to state their position in respect of the applicability of the law as articulated by the Tribunal in the Firstone Report in respect of section 23 of SIDO, to section 257(1)(d) of the SFO.

22. After the hearing of 10 May 2023 the Tribunal received a letter from Jack Fong & Co, solicitors for Mr Iu, dated 15 May 2023. In this letter this firm stated that Mr Iu had terminated their retainer and the retainer of the two counsel and that, accordingly, they had "no authority and instructions to act for the abovenamed Specified Person in the above proceedings any further".

23. In subsequent correspondence by the Tribunal with the SFC it was agreed that the SFC would carry out further investigation as requested by the Tribunal and in due course update the Tribunal on the results of its efforts. In its letter of 12 June 2023 the Tribunal required the SFC to provide a progress report to the Tribunal by letter no later than 15 September 2023.

24. In September 2023, after receiving the SFC's report, the Chairman directed that a hearing take place for the purpose of receiving oral submissions on the interpretation of section 257(1)(d) of the SFO. This being an exercise of

statutory interpretation it is a question of law which the SFO requires the Chairman alone to determine.[2]

25. As Mr Iu was legally unrepresented I wrote to him informing him of my directions and invited him to participate in this hearing, which had been set down for 17 November 2023, either by engaging legal representatives or by appearing in person or by video conferencing, or alternately to file with the Tribunal any written submissions he may wish to make on this issue. Mr Iu did not appear before the Tribunal either personally or by legal representatives and no written submissions were received from him in respect of this legal issue. I am satisfied that Mr Iu has been given a reasonable opportunity to be heard and that the right afforded him by section 307K of the SFO has been met.

26. Subsequently, further written submissions were received from the SFC. In these submissions the SFC adhered to the position it had adopted in earlier written submissions and at the hearing on 10 May 2023. In this submission, Mr Li for the SFC argued:

> "2. As noted in the Response, a disgorgement order under section 257(1)(d) of the SFO is confined to the profit gained or loss avoided by the specified person who had engaged in market misconduct. The narrow scope was a deliberate legislative choice. This is recognised by the CFA in ***Koon Wing Yee*** **[SFC#21]** and has been consistently applied in the case law: ¶¶8-20.
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> 3. The logic is that "disgorgement" by a wrongdoer is disgorgement of his gains. To order him to pay something other than his own gains would be to impose

[2] See section 24(c) of Schedule 9 of the SFO.

> a penalty. Different jurisdictions have made different choices about whether to allow such a penalty."

27. Mr Li referred to the position in the English regime which he distinguished from the position in section 257 and of which he concluded:

> "7. The SFO and case authorities in Hong Kong have made a different choice and do not allow the imposition of a penalty."

28. Mr Li then referred to the statement in the Firstone Report and submitted that it "accords with the logic and the rule that disgorgement is of the specified person's own benefits".

29. At the hearing on 17 November 2023 Mr Li developed his written submissions, maintaining the stance that an order could not be made by the Market Misconduct Tribunal under section 257(1)(d) of the SFO unless it could be shown that the Specified Person personally enjoyed the profit gained from his market misconduct or was able to, and did in fact, exercise control over its disposition to another. In doing so Mr Li relied heavily on the judgment of the Court of Final Appeal in *Insider Dealing Tribunal v Shek Mei Ling*[3] which he submitted was binding authority on me and from which it was clear that the Court of Final Appeal was of the view, when discussing section 23(1)(c) of SIDO, that extending the provision to a person who did not receive the money would transform it into a criminal penalty. This was especially so given that any financial order imposed under section 23(1)(c) would put the person substantially out of pocket. Mr Li

[3] (1999) 2 HKCFAR 205.

also presented a new argument based upon the Chinese language version of the section. He developed this argument in a written submission that he subsequently filed with the Tribunal.

Section 257(1)(d) of the SFO

30. Section 257(1)(d) of the SFO provides:

> **"257. Orders, etc. of Tribunal**
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> (1) Subject to subsection (3), the Tribunal may at the conclusion of any proceedings instituted under section 252 make one or more of the following orders in respect of a person identified as having engaged in market misconduct pursuant to section 252(3)(b)–
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> …
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> (d) an order 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;"

31. The key words of subsection (d) that fall to be interpreted are "any profit gained or loss avoided by the person as a result of the market misconduct in question". However, before embarking on an interpretation process in regard to these words it is helpful to have some knowledge of the legislative history of the power to make such an order.

The Predecessor of Section 257(1)(d)

32. The predecessor provision of section 257(1)(d) of the SFO was section 23(1)(b) of SIDO. However, significantly, section 23(1), unlike section 257(1), contained two provisions dealing with profits gained from insider dealing. They were section 23(1)(b) and (c) and they provided as follows:

> "**23 Orders etc. of Tribunal**
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> (1) At the conclusion of an inquiry or as soon as is reasonably practicable thereafter, where a person has been identified in a determination under section 16(3) or in a written report prepared under section 22(1) as an insider dealer, the Tribunal may in respect of such person make any or all of the following orders– *(Amended 61 of 1995 s. 8)*
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> …
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> (b) an order that that person pay to the Government an amount not exceeding the amount of any profit gained or loss avoided by that person as a result of the insider dealing;
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> (c) an order imposing on that person a penalty of an amount not exceeding "300%" 3 times the amount of any profit gained or loss avoided by any person as a result of the insider dealing."

33. The first occasion that these two financial orders came under appellate consideration was in *Insider Dealing Tribunal v Shek Mei Ling*[4]. In this case the judgement of the Court of Final Appeal was given by Lord Nicholls of Birkenhead

[4] (1999) 2 HKCFAR 205.

NPJ and at pages 209I to 210B he said:

> "The basic scheme of the Ordinance is clear enough. The purpose of an order under s.23(1)(b) is to strip from the insider dealer the amount of the profit gained by him as a result of the insider dealing. He is not to be allowed to retain his ill-gotten gains. An order under s.23(1)(c) goes further than this. Although not so described, an order under s.23(1)(c) is comparable to a fine.
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> Its purpose is to deter insider dealing, and it seeks to do so by leaving a person who engages in such conduct substantially out of pocket. The amount of the penalty can be up to treble the amount, not of the benefit gained by the insider dealer himself, but of the benefit gained by the insider dealer *and anyone else* as a result of the insider dealing. Thus, an insider dealer can be subjected to a substantial penalty order even though he himself gained no profit."

34. What was of importance to Lord Nicholls in contrasting the two provisions was the quite different purposes that each sought to serve. Section 23(1)(b) served the purpose of preventing a wrongdoer retaining "his ill-gotten gains". Section 23(1)(c), on the other hand, served the purpose of deterring insider dealing by means of a punitive fine which would leave the wrongdoer "substantially out of pocket". In order to achieve this the Tribunal was entitled to impose a maximum fine up to treble the amount of the profit gained and, in doing so, to have regard to the profit gained not just by the insider dealer but by any person.

35. The next occasion that these two provisions came under consideration was by the Insider Dealing Tribunal in the Firstone Report. This Report, dated

8 July 2004, was issued by a Tribunal presided over by McMahon J as Chairman. The Tribunal interpreted these two subsections as performing quite different and separate roles. In doing so the Tribunal was influenced in its interpretation of section 23(1)(b) by the existence of section 23(1)(c). Because there existed a separate penalty provision, the Tribunal said section 23(1)(b) was not intended to be a punitive provision but was merely an unjust enrichment section. The Tribunal also noted that section 23(1)(b) referred to "that person" which was a reference to the person identified by the Tribunal as an insider dealer whereas section 23(1)(c) referred to "any profit gained or loss avoided by *any person*". It is helpful to set out those passages from the Tribunal's Report which reveal its reasoning:

> " In our view a person should not be ordered to "disgorge" a profit pursuant to the provisions of section 23(b) unless that person has gained that profit for himself. The purpose of section 23(b) is not to penalize an insider dealer, that is the function of section 23(c), but to take away from the person who is found to be an insider dealer any gain he made as a result of his insider dealing.
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> That interpretation is supported by the terms of section 23(b) which relate only to "the amount of any profit gained ….. by that person as a result of the insider dealing" (emphasis added).
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> It is supported also by the contrasting reference in section 23(c) to the imposition of a penalty on the insider dealer being limited by "the amount of any profit gained ….. by any person as a result of the insider dealing" (emphasis added).
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> That being so however the profits of insider dealers may be dealt with in many ways by them. They may be reinvested, used to repay a debt or otherwise dealt with so that they are not retained by that person but were nevertheless profits

"gained" by him.

The question is always one of fact. Did the insider dealer gain a profit in the sense that the monies were effectively his to use and dispose of as he wished or at his discretion? In answering that question all the circumstances of the potential gain by the insider dealer should be taken into account."

36. Given that the existence of section 23(1)(c) of SIDO influenced the construction of section 23(1)(b), it is very important to note that a similar provision was not replicated in the powers given to the MMT and to understand why that was not done.

37. The reason it was not done can be found in the Hong Kong Government's Consultation Document on the Securities and Futures Bill, dated April 2000 where it was said:

"A DUAL ROUTE

11.9 At present, the IDT[5] has the power to impose pecuniary fine orders of up to three times the profit made or loss avoided. Other market misconduct (such as market manipulation) may only be dealt with through criminal prosecution.

11.10. It was initially proposed that the MMT would have the power to impose pecuniary fine orders of the same gravity as those within the jurisdiction of the IDT, and that all forms of market misconduct be decriminalised. The advantages of this model are that a civil system, where on a civil standard

[5] The Insider Dealing Tribunal.

of proof there would be better prospects of securing a finding of market misconduct having been committed and where adequate sanctions could be imposed, would be a more effective system to reduce and minimize market misconduct. The proposal that the MMT could impose pecuniary fines of up to three times the profit made or loss avoided was seen as an effective sanction.

11.11 In the course of developing this proposal, the Government has been advised that *the jurisprudence developing before the European Court of Human Rights involving human rights protections similar to those under the Basic Law and the Hong Kong Bill of Rights Ordinance cautions that pecuniary fine orders could, in certain cases, be "criminal" for human rights purposes.* In light of such advice, the Government has decided that, while the original imperatives behind the creation of the MMT remain, *a more prudent way forward would be not to pursue the original proposal to give the MMT the power to impose pecuniary fine orders,* but to build in a series of effective civil measures to protect investors.

11.12. The decision is therefore to continue with extending the effective civil tribunal inquiry system beyond insider dealing to market manipulation and other types of market misconduct. *As the MMT will no longer impose heavy pecuniary fine orders,* the range of civil sanctions available will be enriched by the addition of new powers such as imposing "cold shoulder" orders and "cease and desist" orders. These sanctions, which have been carefully considered both for compliance with human rights protection and for their credibility as sanctions, will enable the MMT to deal appropriately and flexibly with those who engage in market misconduct."

(Emphasis added.)

38. This legal advice proved to be sound for, on 18 March 2008, the Court of Final Appeal in its judgment in *Koon Wing Yee v Insider Dealing Tribunal*[6], declared section 23(1)(c) to be invalid. The judgment of the Court was given by Sir Anthony Mason NPJ and before explaining why section 23(1)(c) was invalid he adverted to the changes brought about by the SFO and compared the different regimes in the two ordinances. He said:

> "48. As an element in the new civil regime, the SFO set up the Market Misconduct Tribunal (the MMT) to hear cases of suspected market misconduct. *The MMT was given power to impose civil sanctions, including surrender of any profit made or increased by market misconduct, but without power to impose a fine or penalty. The decision to leave the MMT without power to impose a fine was influenced by legal advice received by the Government to the effect that the existence of such a power might lead to a breach of the BOR.*"
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> (Emphasis added.)

39. The declaration of invalidity was on the ground that the section was a power to impose a penalty and this resulted in the proceedings involving the determination of a criminal charge, thereby violating articles 10 and 11 of the Hong Kong Bill of Rights. The reasons why he concluded that section 23(1)(c) was a penalty provision can be found in the following passage from his judgment:

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[6] (2008) 11 HKCFAR 170.

"49. Not only does insider dealing amount to very serious misconduct, *the penalty imposed under s.23(1)(c) is comparable to a fine and its purpose is punitive and deterrent.* The penalty provision seeks to deter insider dealing by leaving a person who engages in such dealing substantially out of pocket. The Tribunal noted that when the Bill was originally presented to the Legislature, the provision which became s.23(1)(c) called what is now a penalty a "fine". In its context, this seems to be a classic example of a distinction without a difference. Because the amount of the penalty can be up to treble the amount, not of the benefit gained by the insider dealer himself, but of the benefit gained by the insider dealer and anyone else as a result of the insider dealing, the amount of the penalty is "potentially swingeing". An insider dealer who has made no profit himself may nevertheless be subjected to a substantial fine. That the amount of the penalty is limited by reference to the amount of profit gained does not, in my view, detract from its punitive and deterrent character and endow it with a compensatory character. *The imposition of the penalty amounts to punishment for very serious misconduct.*"

(Emphasis added.)

40. Thus, it is clear that the reason section 23(1)(c) of SIDO was not replicated in the SFO in the powers given to the Market Misconduct Tribunal was because it was anticipated that it might be regarded as being in breach of the Bill of Rights Ordinance, as indeed the Court of Final Appeal so ruled.

41. There can be no doubt that at the time the provisions of the SFO were being considered by the legislature there was a clear legislative policy to enact a

provision which would prevent persons who were identified by the Market Misconduct Tribunal as having engaged in market misconduct from profiting from their wrongdoing, and doing so by a provision which could not be regarded as a criminal penalty. It would be at risk of being regarded as a criminal penalty if it could be said of it that its purpose is to punish the wrongdoer. The result was section 257(1)(d).

The Issue Raised by the Present Case

42. Whenever market misconduct takes place, whatever form it may take, the motivation of those who engage in it will inevitably be to obtain an advantage not available to the market and, by doing so, to either gain a profit or avoid a loss. If it is to gain a profit then, realistically, those profits will have been disbursed or dissipated by the time the SFC comes calling. As the Tribunal said in the Firstone Report:

> "… the profits of insider dealers may be dealt with in many ways by them. They may be reinvested, used to repay a debt or otherwise dealt with so that they are not retained by that person but were nevertheless profits "gained" by him."

43. Clearly, the legislative policy behind section 257(1)(d) would be defeated if the section was construed as being just a disgorgement power that could only be deployed against profits still existing, in their original form, in the hands of the identified person. To have any meaningful effect the Tribunal must be able to make an order against an identified person even though any gained profit is not in his possession or under his control at the time the Tribunal is making its order. The question is whether section 257(1)(d) empowers the

Market Misconduct Tribunal to make an order in these circumstances and, if it does, what limitations, if any, constrain the Market Misconduct Tribunal in doing so.

44. In the present case, the issue before this Tribunal of the true construction of section 257(1)(d) arises because the identified person may not be able to be shown to have personally been the beneficiary of the profit gained from his market misconduct. This is because that profit was never in his possession or under his control but was deposited into the trading account of his mother and he was not authorised to transfer monies out of that account. Thus, the question arises of whether a profit that is gained by the identified person for the benefit of another who is not identified by the Tribunal as having engaged in market misconduct, can be the subject of a section 257(1)(d) order.

45. There are two issues arising in respect of section 257(1)(d). The first is the purely legal one of how subsection (1)(d) should be interpreted. Being a purely legal issue it will be a matter for the Chairman to decide and having so decided to direct the Tribunal.

46. The second issue is the factual one for the Tribunal to decide of whether, on the evidence before it, and applying the legal directions of the Chairman on the construction of section 257(1)(d), an order can be made under the subsection by the Tribunal and, if so, whether it should, in the circumstances, be made and, if so, the terms of that order. Whether this second issue will have to be addressed will depend largely upon how the first issue is resolved and the outcome of the SFC's further investigations.

Legal Principles Relating to the Interpretative Process

47. The approach to be taken to an exercise of statutory interpretation has been the subject of much discussion by our Court of Final Appeal. In *HKSAR v Cheung Kwun Yin*[7] Li CJ had this to say:

> "***Approach***
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> 11. In interpreting a statute, the court's task is to ascertain the intention of the legislature as expressed in the language of the statute. This is of course an objective exercise. The court is not engaged in an exercise of ascertaining the legislative intent on its own. As Lord Reid pointed out in *Black-Clawson International Ltd v Papierwerke Waldhof – Aschaffenburg AG* [1975] AC 591 at 613G.
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> > "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used."
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> 12. The modern approach is to adopt a purposive interpretation. The statutory language is construed, having regard to its context and purpose. Words are given their natural and ordinary meaning unless the context or purpose points to a different meaning. Context and purpose are considered when interpreting the words used and not only when an ambiguity may be thought to arise. In *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574 at 606E, Sir Anthony Mason NPJ stated:
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> > "The modern approach to statutory interpretation insists that context and purpose be considered in the first instance, especially in the case of general

[7] (2009) 12 HKCFAR 568, 574 – 575.

words, and not merely at some later stage when ambiguity may be thought to arise."

…

13. The context of a statutory provision should be taken in its widest sense and certainly includes the other provisions of the statute and the existing state of the law. …

14. The purpose of a statutory provision may be evident from the provision itself. Where the legislation in question implements the recommendations of a report, such as a Law Reform Commission report, the report may be referred to in order to identify the purpose of the legislation. The purpose of the statutory provision may be ascertained from the Explanatory Memorandum to the bill. Similarly, a statement made by the responsible official of the Government in relation to the bill in the Legislative Council may also be used to this end."

48. In *HKSAR v Lam Kwong Wai & Another*[8] Sir Anthony Mason NPJ also said:

"A court may, of course, imply words into the statute, so long as the court in doing so, is giving effect to the legislative intention as ascertained on a proper application of the interpretative process. What a court cannot do is to read words into a statute in order to bring about a result which does not accord with the legislative intention properly ascertained."

49. In *China Field Ltd v Appeal Tribunal (Buildings) (No. 2)*[9], the Court of

[8] (2006) 9 HKCFAR 574 at 606 G–N, [63].
[9] (2009) 12 HKCFAR 342.

Final Appeal emphasised that a purposive approach to statutory interpretation is not a license for a court "to distort or even ignore the plain meaning of the text and construe the statute in whatever manner achieves a result which they consider desirable".[10] Lord Millett NPJ, in giving a judgment with which all the members of the Court agreed, went on to say:

> "Purposive construction means only that statutory provisions are to be interpreted to give effect to the intention of the legislature, and that intention must be ascertained by a proper application of the interpretative process. This does not permit the Court to attribute to a statutory provision a meaning which the language of the statute, understood in the light of its context and the statutory purpose, is incapable of bearing: See *HKSAR v Lam Kwong Wai*."[11]

50. In *T v Commissioner of Police*[12] Ma CJ, in a dissenting judgment, emphasised the importance of having regard to context and purpose as the starting point in any exercise of statutory interpretation:

> "The starting point in any exercise of statutory interpretation is to look at the context and purpose of the relevant provisions. … It is context and purpose that will, in the vast majority of cases, be determinative of the meaning of the words sought to be construed, rather than attempting as a starting point to look at words in a vacuum."

51. More recently Cheung CJ in *HKSAR v Chan Chun Kit*[13] distilled from the case law the following summary of the legal principles:

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[10] Ibid, at 358G, [36].
[11] Ibid, at 358 H–J, [36].
[12] (2014) 17 HKCFAR 593, 604–605, [4].
[13] (2022) 25 HKCFAR 191 at 203, [10].

"**Principles of statutory interpretation**

10. The rules of statutory construction are well established. Words are construed in their context and purpose. They are given their natural and ordinary meaning with context and purpose to be considered alongside the expressed wording from the start, and not merely at some later stage when an ambiguity is thought to arise. A purposive and contextual interpretation does not mean that one can disregard the actual words used in a statute. Rather, the court is to ascertain the intention of the legislature as expressed in the language of the statute. As has been repeatedly pointed out, one cannot give a provision a meaning which the language of the statute, understood in the light of its context and purpose, cannot bear."

52. It is clear from the comments made by the Court of Final Appeal in the above cited cases that starting with context and purpose does not mean ignoring the words being construed. Because purpose and context are ultimately only "a tool or aid to assist a court in arriving at an interpretation that gives effect to the legislative intention, one must always have regard to the particular words used by the legislature in expressing its will. A court cannot attribute to a statutory provision a meaning which the language of the statute, understood in the light of its context and the statutory purpose, is incapable of bearing. For that reason, one must necessarily look to the statutory language to see what meaning or meanings it is capable of bearing".[14]

[14] Per Fok PJ in giving the Reasons for Judgment of the Court of Final Appeal in *HKSAR v Fugro Geotechnical Services Ltd* (2014) 17 HKCFAR 755, 765-766, [22].

The Context and Purpose of Section 257(1)(d)

53. An examination of context and purpose can be a broad ranging exercise as was explained by Cheung CJ in *Chan Chun Kit* at [11] of the judgment:

> "11. Context here is to be taken in its widest sense and includes other statutory provisions and the general law. The purpose of a statutory provision may be evident from the provision itself, the recommendation of a report such as that published by the Law Reform Commission, the explanatory memorandum to the relevant bill or a statement by the responsible official of the government in relation to that bill in the Legislative Council. It may also be relevant in any given case to look at the history of the provision concerned."

54. The starting point for an examination of context is the SFO itself. The context in which section 257(1)(d) was enacted is that there is within the SFO a dual regime for dealing with market misconduct. It can be dealt with by either a civil or criminal process. The civil process is by an inquiry by a statutory tribunal, the Market Misconduct Tribunal, created by the SFO, and the criminal process by a prosecution in the courts of Hong Kong. The market misconduct that is prohibited is the same whether, for false trading, it be defined under section 274 for the purposes of a Market Misconduct Tribunal inquiry or it be defined under section 295 in the offence creating provision.

55. When the Market Misconduct Tribunal conducts a hearing, it is a civil hearing in which it makes its findings of facts and ultimate determinations by applying the civil standard of proof and when it imposes sanctions against an identified person it does so with the primary purpose of protecting the public.

This is unlike the criminal process for the prosecution of a person who engages in market misconduct for, as with any prosecution, the guilt of the offender must be proven to the higher standard of beyond reasonable doubt and if the defendant is convicted, then the primary purpose of the criminal penalty imposed on him is punishment for his wrongdoing.

56. Consequently, when the Market Misconduct Tribunal imposes sanctions on persons it has identified as having engaged in market misconduct, the orders it makes must, consistent with the civil nature of its proceedings, have a civil character and cannot take on the character of a criminal penalty.

57. But, in order to understand why it was that the SFO came to be enacted in this form, and especially what lay behind section 257(1)(d) being enacted in the way it was, it is necessary to delve deeper into the legislative history. This is all part of the context that goes to providing guidance on the legislative purpose. In this respect we are fortunate to have the benefit of the judgment of Sir Anthony Mason NPJ in *Koon Wing Yee* where he traces the legislative history of section 257(1)(d) in the course of his examination of section 23(1)(c) of SIDO. From his judgment we know what led to his decision that the SIDO provision was a criminal penalty and why it was that it was not replicated in the SFO. Thus, one of the lessons that we take from the Court of Final Appeal's judgment in *Koon Wing Yee* is that section 257(1)(d) must not be interpreted in a way that cloaks it with the character of a criminal penalty; firstly, because that could render it unconstitutional and, secondly, because it was never intended that the Market Misconduct Tribunal should have the power to "impose heavy pecuniary fine

orders".[15]

58. Of course, this is not the only lesson to be taken from the SIDO history and the Court of Final Appeal's judgment on that legislation, but it is the primary one. As will become apparent later in this ruling, another important part of the context on which Mr Li relies are the different words employed in the Chinese text of the SIDO and SFO provisions.

59. The purpose of the legislature in enacting section 257(1)(d) was to give a statutory tribunal, created by the SFO, power to make an order against a person that would implement the social policy that no person who engages in illegal conduct should be allowed to profit from that conduct and to do so by ordering a person whom it had identified as having engaged in market misconduct, to pay an amount of money no greater than the amount of any profit gained or loss avoided as a result of that misconduct.

60. The legislative purpose in enacting section 257(1)(d) was the subject of comment in *Chau Chin Hung and another v Market Misconduct Tribunal and another*[16] by Hartmann and Lam JJ, sitting jointly in the Court of First Instance of the High Court, when they discussed section 257(1) of the SFO and said of section 257(1)(d):

> "42. In our judgement, the intention of the legislature in providing for disgorgement orders is clear. It is to the effect that any person identified as being the perpetrator of any form of civil infraction of the market conduct provisions

[15] From the Hong Kong Government's Consultation Document on the Securities and Futures Bill, quoted at [35] of this Ruling.
[16] HCAL 123/2007, 124/2007, 22/2008.

> contained in the Ordinance should not be permitted – in the discretion of the Tribunal – to retain the fruits of their infraction. That, we believe, is not a punishment. It is no more than an application of the ancient principle – based on natural justice – that a wrongdoer should not be permitted to retain the proceeds of his wrongdoing. Effectively, in so far as it is possible, it seeks to restore the *status quo ante*."

61. It is by having regard to the context in which section 257(1)(d) was enacted, the purpose underlying its enactment and the *Koon Wing Yee* and SIDO history limitation on the interpretation of the subsection, that the words "any profit gained or loss avoided by the person as a result of the market misconduct" must be interpreted.

Interpreting Section 257(1)(d)

62. The argument that there should be read into the subsection a further limitation that an order can only be made if the identified person has personally benefited from the profit is, essentially, based upon five grounds. The first ground is that when emphasis is given to, or focus placed upon, the words "by the person" which follow on immediately from the words "any profit gained or loss avoided", the natural and ordinary, meaning of the words dictate that what is meant or, at the very least, what is clearly being implied, is that this person must have gained the profit for himself. The second ground is that the nature of the order in the subsection is that of a disgorgement order and it would be contrary to the concept of disgorgement to order a person to disgorge monies the person does not have and has never had. The third ground is that a broad interpretation of

the section that extends it to profits enjoyed by another is contrary to the law as laid down by the Court of Final Appeal. The fourth ground is that it is unfair to a person who has never had the money to be required to disgorge it, and so using the power against such a person would have the effect of employing the civil sanction as a form of punishment, thereby changing it into a penalty in the form of a criminal fine. The fifth ground is that the Chinese version of the section makes it clear that the profit being referred to is the profit the identified person gained for himself.

(i) The literal ground

63. In support of his contention that the natural meaning of the words used imply that the profit being referred to is the profit gained by the identified person for himself, Mr Li argues:

> "When one speaks of some person as having gained a profit or avoided a loss, the natural meaning is that the person has gained a profit for/to himself."

64. With respect to Mr Li this is too simplistic an approach. The natural meaning of the words has to be determined by having regard to the context in which they are used. That context is of a person engaging in unlawful conduct in the stock market of Hong Kong to generate an illicit profit. These is nothing at all unusual in that situation that the illicit profit might be generated in order to benefit, or at least share with, others. That is especially so when, as happened here, the unlawful conduct involved the use of another's account. In the context of the SFO and its efforts to address market misconduct, and the illicit profits generated by it, I do not agree that the natural meaning of the words confines the

profit to only that amount personally enjoyed by the identified person.

65. The words of the subsection require that there be: (i) market misconduct; (ii) by an identified person; (iii) with a profit gained or a loss avoided by the person; (iv) as a result of the market misconduct. It is clear that the words "the person" can only refer to the person identified by the Tribunal under section 252(3)(b) as the person who has engaged in market misconduct. But, nowhere does the subsection expressly state that the order can only be made for the amount of the profit actually enjoyed by the identified person. In this regard it is worthy of note that the duty imposed on the Tribunal by section 252(3) of the SFO is to determine, in respect of the third element, "the amount of any profit gained or loss avoided as a result of the market misconduct".[17] This places emphasis on the link between the profit gained or loss avoided and the market misconduct rather than the person committing the market misconduct. Significantly, it does not confine the Tribunal's determination to only the amount gained, if any, by the identified person. There would seem little point in determining the amount of the profit gained if the Tribunal was powerless to do anything about it when the profit is not in the hands of the identified person.

66. The interpretation of section 257(1)(d) requires analysis of the link between its three elemental phrases. They are:

(i) "any *profit gained or loss avoided*;

(ii) "*by the person"*; and

[17] Section 252(3)(c) of the SFO.

(iii) *"as a result of* the market misconduct in question".[18]

The key words linking each of these three phrases are "by" and "as a result of" and the question becomes what emphasis should be given to these words, or where the focus should be, when interpreting the subsection. If emphasis is given to, or focus is placed on, the word "by", then, as Mr Li contends, the subsection arguably requires that this person also be shown to be the beneficiary of the profit gained or loss avoided. This construction would effectively imply additional words, such as "for himself", into the subsection so that it in fact reads:

"any profit gained or loss avoided by the person *for himself* as a result of …"

Further support for the first ground comes from the statement by the Tribunal in the Firstone Report to this effect.[19]

67. A second approach is to give a broad interpretation to the words "gained" and "avoided" so that a profit is gained from the market misconduct when it flows from the actions of the Specified Person irrespective of the person into whose hands it might ultimately be received. That is, a person still gains a profit from his market misconduct when he gains it for another. This interpretation gives less emphasis to the word "by" and more emphasis to the words "as a result of". Mr Li argues that this interpretation requires that the words "whether for/to himself and or other person" be read into the subsection.

68. Mr Li then refers to a third approach where the word 'by' is read as relating to the market misconduct so that, "in effect, the phrase would be read as: 'profit gained or loss avoided by the person's market misconduct'". This

[18] Emphasis added.
[19] See the quotation from the Firstone Report at [35] of this Ruling.

interpretation would only require that the market misconduct results in a profit gained or loss avoided, irrespective of who might be the beneficiary of it, and it is the occurrence of this specified result or outcome of the market misconduct that triggers the deployment of the power. Mr Li, however, submits that this is tying the word "by" to the market misconduct and such a link is harder to justify and consequently this possible interpretation should be ignored.

69. Mr Li's position, on behalf of the SFC, is that the first interpretation is to be preferred as the correct one and cites six reasons for so saying. They are:

> "(1) It is the more natural reading.
>
> (2) It tallies with the understanding and judicial dicta to date that section 257(1)(d) is about "disgorgement".
>
> (3) It is the reading which the CFA has given to section 23(1)(b) of the SDIO, which the legislature specifically re-enacted into section 257(1)(d) of the SFO.
>
> (4) In re-enacting section 23(1)(b) into section 257(1)(d), the legislature did not adopt a reference to *"any person"* in section 23(1)(c) of the SDIO. This runs against the second reading.
>
> (5) The second reading risks rendering section 257(1)(d) as providing a criminal penalty, which the legislature was expressly keen to avoid.
>
> (6) The Chinese version of section 257(1)(d) makes the first reading all the more clear. The Chinese version does not permit the second reading."

70. In considering the competing interpretations I am conscious that I must be wary of doing what Sir Anthony Mason in *Lam Kwong Wai* said was

impermissible, namely, reading words into a statute in order to bring about a result which does not accord with the legislative intention properly ascertained.[20] Nor must I fall into the trap of doing what Lord Millett NPJ and Fok PJ cautioned against, namely, ignoring the plain meaning of the text and attributing to a statutory provision a meaning which the language of the statute, understood in the light of its context and statutory purpose, is incapable of bearing.[21] However, whilst recognizing that Mr Li's first interpretation is available from the language of the subsection, I am also of the view that when that language is understood in the light of its context, especially the determination the Tribunal is required to make by section 252(3), and its statutory purpose, the second and the third interpretations are also available.

71. For reasons which I shall shortly explain, I am of the view that once regard is had to context and purpose the only one meaning that can be ascribed to the words of section 257(1)(d) is the expansive one. However, even if I am wrong in so concluding, and even if it can be said that the language of the section creates an ambiguity by allowing for these two alternative meanings, then, in determining which of the competing interpretations is the correct interpretation, regard must be had to the context and purpose of section 257(1)[22]. It is only by so doing that it will be possible to determine which interpretation gives effect "to the legislative intention as ascertained on a proper application of the interpretative process".[23]

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[20] See the comments of Sir Anthony Mason NPJ in *HKSAR v Lam Kwong Wai & Another* (2006) 9 HKCFAR 574, quoted at [48] of this Ruling.

[21] See the comments of Lord Millett NPJ in *China Field Limited v Appeal Tribunal (Buildings) (No. 2)* (2009) 12 HKCFAR 342, quoted at [49] of this Ruling and the comments of Fok PJ in *HKSAR v Fugro Geotechnical Services Ltd* (2014) 17 HKCFAR 755, quoted at [52] of this Ruling.

[22] See the comments of Ma CJ in *T v Commissioner of Police* (2014) 17 HKCFAR 593 that are quoted at [50] of this Ruling.

[23] Per Sir Anthony Mason NPJ in *HKSAR v Lam Kwong Wai & Another* (2006) 9 HKCFAR 574, quoted at [48] of this Ruling.

(ii) Section 257(1)(d) is a disgorgement order

72. Support for the second ground comes from comments made by courts and tribunals on the two provisions in SIDO and the fact that the section 23(1)(c) provision in SIDO was not replicated in the SFO. However, it is necessary to place these observations in context. In making these observations the courts were recognising, and emphasising, the distinction between a civil law power (the disgorgement order) and a criminal law punishment (the imposition of a fine).

73. But, what the courts were not doing was formally construing section 23(1)(b) of SIDO or section 257(1)(d) of SFO by adopting the civil law relating to unjust enrichment or the civil law principles applicable to disgorgement orders and using that body of law as the context and purpose of the section as part of an interpretative process in respect of section 257(1)(d).

74. The purpose in enacting section 257(1)(d), and the only purpose, was to implement the important social policy of not allowing a person who has engaged in illegal conduct to profit from that conduct. There was not any additional purpose of incorporating into a statutory provision the civil law of unjust enrichment or the legal principles relating to disgorgement orders.

75. Consequently, there is a fundamental objection to the use of the civil law of unjust enrichment and disgorgement orders to limit the operation of section 257(1)(d) and that is because it is contrary to the way in which an exercise of statutory interpretation is conducted. This civil law influenced approach proceeds by first making an assumption about the nature of the statutory provision

being interpreted; then giving it a label, here the label of "disgorgement power", and then interpreting the words of the section within the parameters that the civil law has set for such a power. One of those parameters is the principle that a disgorgement order cannot be made against a person who has nothing to disgorge because he never unjustly enriched himself with the illicit profit that was gained from the illegal conduct.

76. This is not the correct approach to an exercise of statutory interpretation. Merely because a disgorgement order and section 257(1)(d) share the same social purpose, that is, preventing persons from profiting from their illegal conduct, does not mean that the section is to be construed as a disgorgement order and limited in its operation by the common law principles relating to such orders. Mr Li agreed to this and submitted that labelling the order a disgorgement order should only be done if, after conducting a proper exercise of statutory construction, it is concluded that section 257(1)(d) has the same ambit as a disgorgement order.

77. The meaning of section 257(1)(d) and the parameters of its operation fall to be determined by subjecting the words of the subsection to an interpretative process and, as I have made clear, this is done by applying the established principles of statutory interpretation, subject only to the qualification that I have mentioned that any interpretation of the subsection must not cause it to lose its character of a civil order and transform it into a criminal penalty. But, and this is crucial, it will only be at risk of losing its civil character if it can be said that its purpose has changed from depriving the wrongdoer of the profit of his wrongdoing to punishing the wrongdoer.

(iii) The jurisprudence of the Court of Final Appeal

78. This argument is based upon an assertion that it is clear from Court of Final Appeal judgments that extending the section by requiring the identified person to repay a profit that he gained for another causes it to lose its character of a civil order. It is said that support for this proposition comes from statements by Lord Nicholls NPJ in *Shek Mei Ling*[24] and also by Sir Anthony Mason in *Koon Wing Yee*[25] when dealing with section 23(1)(c) of SIDO. However, there are three matters of context that must be taken into account when analyzing the impact that their comments have upon an interpretative exercise that is being conducted in respect of section 257(1)(d).

79. The first contextual matter is that their comments were made in the process of comparing the elements of both section 23(1)(b) and (c) and distinguishing these two provisions. They were not made as part of an interpretative exercise being conducted in respect of section 23(1)(b) and certainly not of the subsection as a stand-alone provision.

80. It is here that the legislative history argument assumes prominence for the SFO simply repeated section 23(1)(b) when drafting section 257(1)(d) and left out section 23(1)(c), including leaving out the words "any person" so that section 257(1)(d), like section 23(1)(b), only allowed the Tribunal to make an order against the person it identified as having engaged in market misconduct. But, that does not mean, in my view, that the legislature intended that section 257(1)(d) should be nothing more than section 23(1)(b) with a different section number.

[24] See the passage from *Shek Mei Ling* that is quoted at [33] of this Ruling.
[25] See the passage from *Koon Wing Yee* that is quoted at [39] of this Ruling.

The legislature intended that the SFO should have a stand-alone civil order which served a similar purpose but the fact that it is a stand-alone provision will necessarily impact upon the interpretative analysis of it.

81. The second contextual matter is that underlying the comments of Lord Nicholls NPJ and Sir Anthony Mason NPJ is the distinction between the two concepts of the purpose of the power and the effect of the power. The former concept refers to the underlying reason for the power and what it was the legislature was seeking to achieve by it. The latter refers to the consequences that flow from the exercise of the power for they may indicate the real nature of the power and disclose its true purpose.

82. The third contextual matter is that what Lord Nicholls NPJ and Sir Anthony Mason NPJ were dealing with was a provision in section 23(1)(c) of SIDO whose purpose could not be the prevention of wrongdoers benefiting from their wrongdoing simply because there already existed a provision that served this purpose in section 23(1)(b).

83. If the purpose of section 23(1)(c) was not disgorgement then what was its purpose? Its purpose was really quite clear from the formula that was employed to calculate the maximum amount of the financial order that the Tribunal could impose. Permitting the Tribunal to make an order that went beyond the actual amount of the profit gained and which could be up to three times the amount of that profit was a clear indicator that the order was intended to have as its purpose the punishment of the identified person. Likewise, the fact that the Tribunal could also have regard to the amount of profit gained by persons

other than the identified person.

84. Section 23(1)(c) was an order which was intended to encompass all of the consequences of the identified person's wrongdoing. This is precisely the approach of the criminal law which looks not just to the benefit the defendant receives from his conduct but to all that flows from his wrongdoing, whether these consequences are beneficial or adverse to the interests of others. The comments of Lord Nicholls NPJ and Sir Anthony Mason NPJ must be understood in the context in which they were made; namely in contrasting two different sections in different legislation with a view to identifying the purposes which each was seeking to serve.

85. Given the context in which their comments were made, a context which lay behind and which influenced what they said, I do not take from these cases a binding statement of legal principle that a statutory provision that empowers the Tribunal to order an identified person to pay to the Government monies he has intentionally generated by his unlawful conduct for the benefit of another must, by reason of that fact alone, have as its purpose the punishment of the identified person.

86. In the present case we have only one section whose purpose is clear and beyond dispute. Even when deployed against an identified person who has personally profited from his market misconduct the effect it will have on the identified person is, standing in his shoes, a punitive one. But, as the case law makes clear, and as I have sought to emphasise, purpose and effect are different and the mere fact that an identified person feels a punitive effect when the order

is made does not mean that the order ceases to have as its purpose the repayment of a profit gained and to now have as its purpose the punishment of the identified person.

87. Mr Li also refers me to the comments made in these two Court of Final Appeal cases about the impact that the section 23(1)(c) order has on the identified person of leaving him "substantially out of pocket", and suggests that such a consequence may point to an order under section 257(1)(d) being regarded as having a punitive purpose. I do not agree. These observations on the financial impact of the section 23(1)(c) order refer to power granted to the Tribunal to make an order for up to three times the profit gained. Under section 257(1)(d) the order the Tribunal can make is limited to the actual profit gained by the market misconduct.

88. Mr Li was also concerned that a broad construction would open the way for the Tribunal to have regard to any profit gained by any person unconnected with the identified person but who was a participant in the market and happened to benefit from the identified person's abuse of the market. Again, I do not agree. Once the purpose of the section is identified as preventing the wrongdoer from benefiting from his wrongdoing then it will be interpreted and applied accordingly, and the Tribunal will only be concerned with the profit that the identified person generated for himself and for any person on whom he conferred the profit and not with profits serendipitously gained by innocent participants in the market.

(iv) Unfairness causing Section 257(1)(d) to become a fine

89. The third ground raises the spectre of a broad construction of the subsection in which the words, with the assistance of context and purpose, are given a meaning that transforms the power from a civil order into a criminal penalty. The broader the ambit of the power's area of operation, so the argument goes, the greater the risk that it may be perceived as operating in a way more characteristic of a criminal penalty than of a civil order. Underlying the argument that the provision's purpose has changed to one of punishment is the assertion that to order a person to disgorge monies he does not have is so unfair that the effect of the order is to penalise the identified person and consequently the order is being taken outside the scope of a civil sanction and into the realm of a criminal penalty.

90. But, the subsection contains in-built limits on the scope of its application. The first, is that the order can only be for the amount of the profit gained or loss avoided. The second is that the Tribunal may only make the order against the person it has identified as having engaged in the market misconduct from which the profit has flowed. No matter how many persons benefit from the illicit profit, no order can be made against them unless the Tribunal identifies them as also having engaged in the market misconduct. These features are clearly intended to provide the power with the character of a civil sanction and are key to achieving this goal.

91. But, a person can, in a broad sense, "profit" from his market misconduct without being the beneficiary of the profits generated by it. If a person embarks

upon a course of illegal conduct in order to financially benefit another, and succeeds in doing so, then he has achieved the goal he set himself. Why, then, has he not profited from his conduct? He intended to carry out a course of illegal conduct; he intended that illegal conduct to generate an illicit financial gain and he intended that another should be the beneficiary of that illicit gain. He has succeeded in all he set out to do. In short, he has profited from his wrongdoing.

92. When this set of circumstances is encountered there is nothing necessarily unfair in requiring him to repay the profits gained from the market misconduct. It is no answer to say that this is punishing him and that consequently the civil sanction now operates as a fine. As I have noted, every such order in section 257(1) will be felt punitively by the person affected by it. But, as Sir Anthony Mason NPJ noted in *Koon Wing Yee* in respect of section 257(1)(a) disqualification orders, the deterrent and punitive effect "is incidental and subservient to the purpose of protecting shareholders, investors and the public from corporate officers who are unfit to hold office".[26] Thus, having a punitive effect does not, by virtue of that fact alone, change its purpose from depriving the wrongdoer of the profit he has gained and "restoring the *status quo ante*"[27] into the purpose of punishing the wrongdoer and thereby cloaking the order with the character of a criminal fine.

93. The order is limited to a particular person who is guilty of wrongdoing and to a particular amount, namely the amount of the profit gained from the wrongdoing. Ultimately, any issue of unfairness can be left to the Market

[26] *Koon Wing Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 10, 197.
[27] Per Hartmann and Lam JJ in *Chau Chin Hung & another v Market Misconduct Tribunal* quoted at [60] of this Ruling.

Misconduct Tribunal to determine on the facts of the market misconduct committed and the circumstances of the identified person before it. In this regard it is well to remember that the amount the Tribunal may order is a maximum amount which every Tribunal may, in its discretion, reduce or the Tribunal may decide not to invoke the power in the subsection at all.

(v) The Chinese text of section 257(1)(d)

94. It is Mr Li's contention that the Chinese version of section 257(1)(d) makes clear that his first interpretation is the correct reading of the subsection. He submits that although the legislature adopted in the English text of section 257(1)(d) an essentially identical wording to section 23(1)(b) of SIDO, the Chinese text of section 257(1)(d) was refined "to make expressly clear that the provision covers only the profit gained or loss avoided by the specified person for/to himself". He argues that section 257(1)(d) in its Chinese text cannot bear the expansive meaning of the second and third interpretations.

95. Mr Li referred me to section 10B of the Interpretation and General Clauses Ordinance (Cap. 1) which states:

> "(1) The English language text and the Chinese language text of an Ordinance shall be equally authentic, and the Ordinance shall be construed accordingly.
>
> (2) The provisions of an Ordinance are presumed to have the same meaning in each authentic text.
>
> (3) Where a comparison of the authentic texts of an Ordinance discloses a difference of meaning which the rules of statutory interpretation ordinarily

> applicable do not resolve, the meaning which best reconciles the texts, having regard to the object and purposes of the Ordinance, shall be adopted."

96. In respect of this provision, Mr Li relied on the Court of Appeal decision in *HKSAR v Tam Yuk Ha*[28] where it was said:

> "Under s.10B of Cap. 1, both the English and Chinese texts of an ordinance are equally authentic and they are presumed to have the same meaning. The court should try to interpret the relevant provisions of the ordinance on that basis. This must be the approach to be adopted …"

This approach was affirmed by the Court of Final Appeal for legislation which is enacted in both the English and Chinese languages.[29] The SFO, and also the SIDO, were both enacted in the English and Chinese languages.

97. Mr Li informed me that a literal translation of the Chinese text of section 257(1)(d) is:

> "Order him to government pay a sum of money the amount shall not exceed that person because (of) that misconduct thus caused him gained profit or avoided loss of amount".

He submitted in respect of this literal translation:

> "The express words … 'caused him' put beyond doubt that section 257(1)(d) covers only the profit gained or loss avoided by the specified person for/to himself. The first reading of the provision is the correct one."

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[28] [1997] HKLRD 1031 at 1037J.
[29] See *HKSAR v Chan Chun Kit* (2022) 25 HKCFAR 191 at 222, [58].

98. Mr Li then contrasted the Chinese words that were employed in the text of section 257(1)(d) with the Chinese words employed in the text of section 23(1)(b) of SIDO. The Chinese text of the SIDO provision is, according to Mr Li, literally translated as:

> "Order that person to government pay a sum money the amount shall not exceed that person because engage in that insider dealing."

After conducting this comparison of the two Chinese texts, Mr Li submitted:

> "Thus, when the legislature re-enacted section 23(1)(b) of the SDIO (sic) into section 257(1)(d) of the SFO, it adopted the English version in materially identical wording, but refined the Chinese wording to make expressly clear that the provision covers only the profit gained or loss avoided by the specified person for/to himself."

99. From his analysis of the Chinese texts of section 23(1)(b) of SIDO and section 257(1)(d) of the SFO, Mr Li concluded:

> "The first reading is made clear by the Chinese version of section 257(1)(d) of the SFO. Since the English and Chinese texts are presumed to have the same meaning, this reading is the correct one."

100. Mr Li's argument essentially comes down to this. The Chinese text, on its own, makes clear that what the legislature meant by section 257(1)(d) was what he describes as the first reading of the section; that is, that the section only applies to a profit gained or loss avoided by the Specified Person for or to himself. That this is what is meant by the Chinese text becomes more apparent when the Chinese text is subjected to a contextual analysis. This contextual analysis is done by

taking into account that while section 257(1)(d) is, in its English text, essentially merely a repeat of section 23(1)(b), there is a difference between the Chinese text in section 23(1)(b) and the Chinese text in section 257(1)(d). This difference, it is said, strengthens the conclusion that the Chinese text means that the section only applies to a profit gained or loss avoided by the Specified Person for himself.

101. Section 257(1)(d), in its English text, applies to:

> "…any profit gained or loss avoided by the person as a result of the market misconduct…"

In its Chinese text, the section applies to:

> "…that person because (of) that misconduct thus *caused him* gained profit or avoided loss of amount …"
>
> (Emphasis added)

Section 23(1)(b) of SIDO, in its Chinese text, applied to:

> "…a sum money the amount shall not exceed that person because engage in that insider dealing."

102. I am not persuaded by Mr Li's argument. I say this for the reasons set out below, but I do wish to make clear that in reaching my conclusions I have taken into account that I am not a native Chinese speaker and that there may be nuances in the Chinese texts which I cannot appreciate and which a literal translation of the Chinese texts does not do justice in conveying.

103. A side-by-side comparison of the English and Chinese texts of section

257(1)(d) does not, in my view, resolve the issue that I must decide. The literal translation of the Chinese text raises the same issue of interpretation. To achieve complete clarity the Chinese text, like the English text, would have to contain the words "for himself" so that the Chinese text would read:

> "…that person because (of) that misconduct thus caused him gained profit or avoided loss *for himself* of amount."

104. The words "caused him" simply link the market misconduct to the profit gained or loss avoided and do not necessarily encompass the sole meaning that the profit gained or loss avoided be only for the Specified Person.

105. I now turn to the question of whether, once regard is had to the change made in the Chinese text from what was in section 23(1)(b) of SIDO to what is now in section 257(1)(d), the meaning of the Chinese text in section 257(1)(d) becomes clearer. I do not think that this contextual analysis assists Mr Li – indeed, quite the contrary, it positively assists the contrary conclusion. I shall explain why.

106. In context, section 23(1)(b) was one of two provisions in section 23 dealing with the orders that a Tribunal could make against a Specified Person in respect of the profit gained or loss avoided. Section 23(1)(b) was a civil disgorgement-like provision which, when read with section 23(1)(c), was interpreted as applying only to the profit gained or loss avoided by the Specified Person for himself. This, it will be recalled, was the reason the Firstone Tribunal sought to extend the operation of the subsection to profits controlled by the Specified Person but disbursed by him to others. In contrast, section 23(1)(c) was a punitive provision which empowered the Tribunal to make an order against the

Specified Person for up to three times the amount of any profit gained or loss avoided by *any* person.

107. The Chinese text in section 23(1)(b) was, presumably, employing language intended to implement the distinction between the two subsections; language that made it clear that the section 23(1)(b) power could only be used against profits gained by the Specified Person for himself. If this was so, and if it was intended to similarly confine section 257(1)(d) in its operation, then why was there a need to change the wording of the Chinese text in section 257(1)(d)? Could it have been to ensure that when section 257(1)(d) was to be enacted as a stand-alone provision, any profits gained or losses avoided by others could be brought within the operation of the section?

108. Section 23(1)(b)'s Chinese text arguably implies the word "received" after the words "that person" as if it read:

> "…shall not exceed (what) that person (received) because engage in that insider dealing."

109. But, the language of the Chinese text in section 257(1)(d) changed to:

> "…shall not exceed that person because (of) that misconduct thus caused him gained profit or avoided loss of amount."

110. Contrary to Mr Li's submission, I am of the view that, once placed in context, the more likely explanation for this change in the Chinese text was to broaden section 257(1)(d) beyond the parameters of section 23(1)(b) so that it

now included the profits gained or losses avoided by others.

111. For these reasons, I am not persuaded that the Chinese text in section 257(1)(d), whether considered on its own or in conjunction with the Chinese text in section 23(1)(b), compels me to adopt an interpretation of section 257(1)(d) that confines its application to only profits gained or losses avoided by the Specified Person for himself.

Resolving the Competing Meanings

112. As I have already indicated, it is the position of the SFC, as articulated by Mr Li, that it is not possible to interpret section 257(1)(d) so that it empowers the Tribunal to make an order against a Specified Person who neither enjoyed the profit gained nor was able to exercise control over it. The SFC recognises the problems that such an interpretation causes and it appreciates that an interpretation that empowers the Tribunal to make an order against the Specified Person in these circumstances is desirable. Mr Li has been assiduous in identifying for my benefit all the impediments that stand in the way of such an interpretation. This he has done in order to assist me and I wish to record that I have, indeed, benefited enormously from his written and oral submissions. This has been particularly important as I have not had the benefit of detailed written legal submissions on behalf of the Specified Person.

113. On the assumption that the language of the subsection gives rise to competing meanings, and on the assumption that the judgments of the Court of Final Appeal and the words employed in the Chinese texts do not compel me to

adopt the narrow interpretation, then, having determined the context and purpose of section 257(1)(d) as previously set out, it becomes necessary to examine the words of the subsection, uninfluenced by the civil law of unjust enrichment and disgorgement orders, and interpret them by reference to that context and purpose.

114. One way of testing which of the two interpretations truly reflects the legislature's intention and best implements the social policy underlying it is to examine how each would operate in practice. Requiring proof that the identified person personally profited from his market misconduct would mean that in all but the most straightforward of cases a fund tracing exercise will have to be conducted in order to determine what has happened to the profit gained from the market misconduct. This is because, as we have said, there is nothing unusual in a wrongdoer employing the accounts of others to distance himself from his wrongdoing with a view to concealing his involvement in it.

115. The question then arises of what the position would be if the tracing exercise is inconclusive, as indeed it may be in the present case. Does it mean that no order can be made against the identified person, as the parties assert is the position with Mr Iu? Also, if a number of persons are jointly involved in the market misconduct is it necessary to establish how much each received of the profit gained and to make section 257(1)(d) orders against each offender only in respect of the specific amount that each received? Similarly, if there is only one identified person but it is clear that he did not receive the whole of the profit gained, must the order be limited to only that which he did receive?

116. Asking these questions reveals how an interpretation requiring proof of

personal enjoyment of the illicit profit would result in a clumsy and inefficient, and potentially ineffective, implementation of the social policy for which the subsection was enacted. That this interpretation would produce this result is not contested by Mr Li for the SFC but it is his position that this unhappy consequence is simply the result of the way the subsection is drafted and, given the legislative and judicial history of the power, must be interpreted.

117. Returning to the present case, let us assume that the Mr Iu never intended to keep his illicit profit for himself but all along intended to confer the profit on his mother. It is proven that he intentionally engaged in market misconduct and that he intended by so doing to gain a profit. He successfully achieved his goal in that he gained a profit as a result of his market misconduct, albeit it was a profit that he did not personally enjoy. Had he used his own trading account and transferred the profit to his mother, a section 257(1)(d) order could be made because he would have gained ownership of the profit from his market misconduct before exercising control over it to transfer it to his mother. However, because he was using his mother's trading account it was not necessary for him to take any further action in order to ensure that his mother could enjoy the illicitly gained profit. In this latter situation no order could be made if it is necessary to prove that the identified person gained the profit for himself or at least exercised control over its disposition.

118. Yet, Mr Iu achieved his goal of conferring an illicitly gained profit on his mother and if no section 257(1)(d) order is made against him it can be said that he is being allowed to profit from his wrongdoing. This is completely contrary to the policy underlying the creation of the section 257(1)(d) power and

makes a mockery of the law as it rewards Mr Iu for his cleverness in carrying out his market misconduct in a way which distances him from the profit he gained from it when the generation of this illicit profit for the benefit of another was the whole purpose of his wrongdoing.

119. Arguably, it could be said that at the time Mr Iu decided to make use of his mother's account he was then exercising control over any future illicit profits he might gain and at that time making the decision as to who would be the beneficiary of any profit gained from his market misconduct. But, it is hardly desirable to have to resort to such reasoning in order to arrive at a result that the legislature intended.

120. Furthermore, preventing persons who engage in market misconduct from profiting from that conduct can be achieved in two ways. The first, and perhaps most obvious, way is to deprive them of the profit that they, personally, have gained. This is the situation that the civil law of disgorgement addresses. But, a second way is to change the nature of the monies that were generated by the market misconduct from a profit that was illicitly obtained into a personal payment by the wrongdoer. By making the wrongdoer reimburse Government for the monies he generated as an illicit profit, and which he then disbursed directly or, as in the present case indirectly, to others, the illicit profit becomes in effect, a personal payment by the wrongdoer to that other and its character of an illicit profit generated by wrongdoing, is neutralised. When this is done, the legislative purpose of ensuring that persons do not profit from illegal conduct is not defeated by the manner in which the Specified Person conducts his market misconduct or deals with any profit gained from it. Rather, in the words of

Hartmann and Lam JJ in *Chau Chin Hung*, it applies "the ancient principle – based on natural justice – that a wrongdoer should not be permitted to retain the proceeds of his wrongdoing. Effectively, insofar as it is possible, it seeks to restore the *status quo ante*"[30].

121. The interpretation that the identified person must have personally enjoyed, or at least exercised control over, the profit gained from his market misconduct relies exclusively on a literal meaning attributed to the words used with emphasis on the specific words "by the person". It may be easy to be seduced by the power of these words but they, and the other words of the subsection, must always be interpreted by reference to context and purpose in order to avoid the trap described by Ma CJ in *T v Commissioner of Police*.[31]

122. The statutory purpose embodies a very simple, but extraordinarily important, social policy and the statutory provision implementing this policy should be viewed in equally simple and clear terms. It should not be complicated by viewing it through the lens of the civil law of unjust enrichment and disgorgement orders or by limiting its operation by reference to the history of an earlier legislative incarnation of the power. Requiring that the identified person also be the beneficiary of the profit gained as a result of his market misconduct does not give effect to the intention of the legislature because it does not effectively implement and advance the legislative purpose for which the subsection was enacted. However, not implying this additional requirement into the subsection does advance the purpose for which the subsection was enacted and it prevents that purpose from being defeated by the manner in which the

[30] See the full quotation at [60] of this Ruling.
[31] (2014) 17 HKCFAR 593, quoted at [50] of this Ruling.

market misconduct is carried out or by what is done with the unlawful profit that has been gained. Importantly, because it is against the person who deliberately embarked upon the market misconduct in order to gain this profit, and because it is for no more than the actual profit gained, it does not make the purpose of the order punitive.

123. In my view, once regard is had to context and purpose there can be no doubt over which interpretation most accurately reflects the intention of the legislature, most effectively implements the social purpose for which the subsection was enacted and remains consistent with its statutory context. That is not the interpretation that the Specified Person must have personally enjoyed the profit gained or, at the very least, been able to exercise control over its disposition, as that interpretation actually undermines that legislative purpose and, in the circumstances of the present case, defeats it.

124. For the reasons I have given I am not persuaded that the legislative history of this power, and the case law concerning its predecessor provision, prevent me from interpreting section 257(1)(d) in the way which best advances its legislative purpose.

Conclusion

125. The Tribunal is directed that in determining whether it should make an order under section 257(1)(d) of the SFO the Tribunal does not have to be satisfied that the identified person received or enjoyed the benefit of the illicit profit or was in a position to exercise control over it. All that needs to be shown are that the

identified person committed market misconduct as a result of which a profit was gained or a loss was avoided. Once that is proven the Market Misconduct Tribunal is empowered to make a section 257(1)(d) order. Whether it does so and in what amount will be a matter for the Tribunal in the exercise of its discretion.

Mr Ian McWalters, GBS

(Chairman)

Dated this 11th day of January 2024