The report of the Market Misconduct Tribunal into dealings in the shares of Greencool Technology Holdings Limited between 2001 and 2005

A report pursuant to section 252(3)(a) and (b) of the Securities and Futures Ordinance, Cap. 571

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CHAPTER 1

INTRODUCTION

An initial overview

1. Expressed in broad terms, this report considers the alleged regulatory culpability of nine 'Specified Persons', eight being directors and one being the senior financial officer, of a company that was listed on the Growth Enterprise Market ('GEM') of the Stock Exchange of Hong Kong but is now delisted. The company was called Greencool Technology Holdings Limited ('Greencool'), an investment holding company. Greencool, it seems, had offices in Hong Kong and Beijing. It conducted its commercial activities through various subsidiary companies on the Mainland.

2. The allegations of culpability are based on the assertion that over a span of five years covering the financial years 2000, 2001, 2002, 2003 and 2004, a systemic fraud took place within the Greencool Group. In layman's terms, it may be described as an 'accounting fraud' in that the purpose of the fraud was to give the impression through the accounts of the Group that its results were far stronger than in truth they were. This accounting fraud was perpetrated within certain – but not all – of the subsidiary companies in the Group and consisted essentially of materially inflating assets (cash held in various bank accounts in the PRC) and substantially understating or failing to disclose liabilities (loans due to various banks in the PRC).

3. The inflation of assets and earnings of the various subsidiary companies required the creation of fictitious business projects and through those projects the

receipt of fictitious income. This in turn required the creation of false commercial papers. In order to ensure that the true financial affairs of the subsidiaries were kept distinct from their fictitious financial affairs it was necessary in a number of subsidiaries for separate books of account to be maintained, the accounts that reflected the reality of business affairs being withheld from outsiders, more particularly the auditors.

4. Although the frauds originated in certain of the subsidiary companies operating on the Mainland, it is asserted that the false information contained in the accounts of those individual subsidiaries was fed into the Annual Accounts and Final Results of the holding company, Greencool, those accounts (subject to the GEM Listing Rules) being published in Hong Kong. It is asserted that the consolidated accounts overstated the net asset value of the Group in each of the five financial years by hundreds of millions of renminbi. The distortion, for example, in respect of the year ended 31 December 2004, being in excess of RMB 900 million.

5. The fraudulent scheme that was perpetrated was complex and sophisticated. A great deal of care went into its concealment, an assertion supported by the fact that the fraud ran for over five years despite the scrutiny of the listing sponsors and the Group auditors. In perpetrating the fraud, it is asserted that a select number of employees worked behind closed doors to ensure its management and concealment. The fraud, however, not being limited to a single subsidiary but being essentially systemic, required to be planned and controlled by senior managers.

6. As to the culpability of the Specified Persons, it is asserted that each may have contravened section 277(1) of the Securities and Futures Ordinance,

Cap 571 ('the Ordinance'). The essential elements of section 277(1) will be considered later in this report. In truncated form, however, it may be said that market misconduct is committed if a person is involved in the dissemination of information (such as a set of corporate accounts) which is false or misleading in a material way and which is likely to have an impact on the market if the person knows that it is false or misleading or is reckless or negligent as to that fact.

7. In respect of the six Specified Persons who were at the material time Executive Directors[1], it is asserted that each *knew* that the audited accounts of Greencool and its subsidiaries, and the combined final accounts, were false or misleading or, if that is not demonstrated, they were reckless or negligent as to that fact. Although no direct allegation has been made, it is to be implied that the Executive Directors knew that the Group Accounts were false or misleading because each of them in some way was complicit in the fraud.

8. In respect of the two Specified Persons who were at the material time Independent Non-Executive Directors, and in respect of the single Specified Person who was the senior financial officer of Greencool, it is not asserted that any of them had actual knowledge that the Group accounts were false or misleading but rather that each, in failing his or her corporate duties, may have been reckless or negligent as to that fact.

[1] In this report, the distinction between Executive Directors and Non-Executive Directors is important. In seeking the distinction, it may be said that the essential characteristic of an executive director is his or her discharge, usually as an employee, of executive functions in the management and administration of a company. By contrast, a non-executive director is usually independent of corporate management and administration, his or her duties being performed at periodic board meetings and at meetings of any committees of the board. Appointment as a non-executive director carries no express or implied grant of executive power.

The origins of Greencool

9. Greencool was incorporated in the Cayman Islands in January 2000. Its subsidiary companies were principally engaged in two inter-related forms of commercial activity in the PRC; first, in the marketing and sale to authorised agents of a new form of refrigerant known as Greencool Refrigerant which contained no chlorofluocarbon ('CFC') and was therefore, it was said, more efficient and more environmentally friendly, and, second, in the business of treating air-conditioning and refrigeration systems by replacing the existing CFC refrigerant with Greencool Refrigerant.

10. According to the literature, Greencool Refrigerant had been invented in or about 1989 by Mr Gu Chu Jun ('Mr Gu') who set up Tianjin Greencool, a joint-venture company in which he held more than an 80% interest, in order to develop and produce the refrigerant.

11. Thereafter, Mr Gu played a leading role in setting up Greencool and its various subsidiaries. Although Tianjin Greencool always remained independent, it did enter into an exclusive 20-year distribution agreement with Greencool and its subsidiaries.

12. In order to promote its business of replacing polluting CFC refrigerant with Greencool Refrigerant, Greencool and its subsidiaries devised a pricing strategy (advertised as 'zero cost' and 'zero risk'). This strategy was based on the assertion that the use of non-CFC refrigerant would result in 15% to 25% savings in energy costs and was based on a mathematical formula in terms of which the customer was charged an amount equivalent to 10% of its estimated

energy charges for a specific period – say six months – after replacement had been completed.

13. In July 2000, Greencool was listed on the GEM, its stock code being 8056. The GEM was established to accommodate 'emerging companies', companies that held out the promise of growth but to which a high investment risk may be attached. As such, the greater risk profile made it a market more suited to professional and other sophisticated investors.

14. Greencool's prospectus contained Group accounts for 1998, 1999 and the first four months of 2000. The accounts were audited by Arthur Andersen & Co ('Arthur Anderson') as 'reporting accountants'. The listing was sponsored and due diligence carried out by two investment banks, ING Barings Asia Limited ('ING') and Standard Chartered Bank.

15. It is relevant to note that Arthur Anderson remained Greencool's auditors for the balance of 2000 and 2001. In 2002, for reasons entirely unrelated to the matters that are the subject of this report, Deloitte Touche Tohmatsu ('Deloitte') became the Group's auditors, holding that position for the financial years of 2002, 2003 and 2004.

16. A matter emphasised to the Tribunal – a matter going to the well concealed nature of the systemic fraud within the Greencool Group – was that at all material times, both Arthur Andersen and Deloitte expressed unqualified opinions that the Group's accounts gave a true and fair view of its finances.

The key personalities

17. In Greencool's prospectus, mention was made of the nine Specified Persons who are the subject of this report, that is, the six Executive Directors of Greencool, the two Independent Non-Executive Directors (and members of the Audit Committee) and the senior financial officer, that is, the Group's Qualified Accountant and Company Secretary.

18. Mention was made of the following Executive Directors –

(1) 'Mr Gu', described as the "Chairman of the Board, President and Chief Executive Officer ('the CEO')" of Greencool, the founder of the Group with responsibility for setting the Group's overall business development and corporate strategies;

(2) Mr Zhang Xi Han ('Mr Zhang'), an engineer, Vice President of Greencool, having joined the group in 1993 and being responsible, among other matters, for "marketing and management of the Group";

(3) Mr Hu Xiao Hui ('Mr Hu'), Vice-Chairman of the Board since June 2000, having responsibility for assisting in "setting the Group's overall business strategies and coordinating its operations";

(4) Mr Liu Cong Men ('Mr Liu'), Vice President of Greencool since June 2000, being experienced in matters of environmental protection, international cooperation and management;

(5) Mr Xu Wan Ping ('Mr Xu'), also a Vice President of Greencool since June 2000, having joined the Group in December 1998 and being responsible for setting and implementing the Group's marketing strategies; and

(6) Mr Chen Chang Bei ('Mr Chen'), Greencool's Compliance Officer since June 2000, being responsible for implementing Greencool's development strategies.

19. Mention was further made of the following two Independent Non-Executive Directors –

(7) Mr Fan Jia Yan ('Mr Fan'), with a background in banking, for example, having been with CITIC Industrial Bank in Beijing for more than 10 years; he was appointed as an Independent Non-Executive Director in January 2000; and

(8) Ms Margaret Man, also with considerable experience in banking, for example, having been a Division Chief in the People's Bank of China for seven years; she was appointed as an Independent Non-Executive Director in February 2000.

20. Finally, mention was made of Mr Mok Henry Wing Kai ('Mr Henry Mok'), describing him as "the Qualified Accountant and Company Secretary of the Group", a Fellow Member of the Hong Kong Society of Accountants who had joined the group in April 2000.

21. In the prospectus, it was acknowledged that Greencool's success to a large extent was attributable to the expertise and experience of Mr Gu himself and the other members of his senior management team.

22. In setting out the risks associated with investment in Greencool, it was admitted that Greencool had a limited operating history, having only commenced business in May 1998. A further identified risk was the Group's absolute reliance on Tianjin Greencool for the supply of refrigerant, there being no other similar non-CFC refrigerant available in the PRC at the time.

23. After the listing of Greencool on the GEM, Mr Gu continued to hold and control the majority of the issued shares of Greencool. The records show that at the end of 2000, he held and controlled some 71% of the issued shares in Greencool, doing so through a wholly-owned company incorporated in the British Virgin Islands: Greencool Capital Limited.

Consolidation of the Group accounts

24. As stated earlier, although the frauds originated in certain of the subsidiary companies operating on the Mainland, it is asserted that the false information contained in the accounts of individual subsidiaries was fed into the Group accounts and thereby into the published accounts of the listed holding company. On the evidence put before the Tribunal, this process of consolidation did not take place in Hong Kong, the (effective) head office of Greencool, but for all practical purposes took place in the offices of one of the Mainland subsidiaries, Shenzhen Greencool.

25. According to Mr Henry Mok, described in Greencool's prospectus as the Qualified Accountant and Company Secretary of the Group, the Greencool board authorised Mr Zhang, one of the Executive Directors, to oversee the consolidation exercises. As Mr Henry Mok put it in his witness statement of 18 June 2015, as most of the relevant accounting records were on the Mainland and as the accounting team in the office of Shenzhen Greencool had the necessary language skills and established efficiency in the collection and correlation of financial information from the subsidiaries, the consolidation exercises took place not in Hong Kong but in the Shenzhen office where a number of staff of the auditors, initially Arthur Andersen, also worked.

26. By way of an overview, therefore, it can be said that the accounts[2] would be prepared by the accounting teams in each of the Mainland subsidiaries, those accounts being approved by the directors of the subsidiaries. The false information would be contained in those accounts. Those accounts[3] would then be delivered to the offices of Shenzhen Greencool where they would be reviewed and consolidated by the Shenzhen accounting team managed by one of the Mainland employees, Mr Chen Wei, who was answerable only to Mr Zhang who, in his turn, was answerable to the founder and Chairman, Mr Gu[4]. Thereafter, the consolidated accounts would be reviewed by the Hong Kong accounting department and placed before the Audit Committee for approval.

27. In the result, all matters relevant to the preparation of the Group accounts remained on the Mainland and under the control of a limited number of Executive Directors and Mainland employees. By way of illustration, in his witness

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[2] Including the quarterly management accounts and the annual financial statements and reports.

[3] Which were subject to audit by local Mainland auditors.

[4] According to Mr Henry Mok, it was therefore standard process for the Shenzhen accounting team to prepare consolidated worksheets, inter-company reconciliations and the footnotes to the consolidated worksheets.

statement of 18 June 2015 Mr Henry Mok said that he would request Mr Zhang to liaise with the Mainland subsidiaries to provide copies of bank statements, bank facilities letters, loan agreements and other relevant information. Such relevant information and documentation, therefore, came through Mr Zhang and/or employees under his supervision.[5]

Assertions that Greencool was not all it seemed

28. In June 2001, just short of a year after Greencool's listing, an anonymous letter was received by the Stock Exchange of Hong Kong alleging that the Greencool Group had inflated its sales figures for 1999 and 2000 and had misused funds raised via the listing. Greencool's continuing sponsor, ING, and Arthur Anderson, the auditors, entered into correspondence with the Stock Exchange. In that correspondence – conducted through Greencool's solicitors - Arthur Anderson outlined the steps taken to investigate the complaints and stood by its unqualified report. The Stock Exchange took the matter no further.

29. Several months later, in late 2001, Mr Gu orchestrated a take-over of Guangdong Kelon Electrical Holdings Company Limited ('Guangdong Kelon'), a major Mainland supplier of domestic refrigerators and air-conditioning systems[6]. Mr Gu was later to be appointed Chairman. On the evidence, it appears that this was the first time that a private entrepreneur had engineered the take-over of a state owned enterprise and naturally it aroused considerable curiosity in the media.

[5] Mr Henry Mok said that effectively all other relevant information would come through Mr Zhang too; for example, details of all connected transactions of the Mainland subsidiaries and details of such matters as provisions made for doubtful debts.

[6] The evidence indicates that Guangdong Kelon was acquired by Greencool Enterprise Development Company Limited, a private company controlled by Mr Gu and not part of the Greencool Group.

30. In November 2001, in an article published in *Caijing Magazine*, a degree of scepticism was expressed at the "unbelievably high" sales income of Mr Gu's company, Tianjin Greencool.

31. In early December 2001 a further article was published in *Caijing Magazine*, questioning whether Mr Gu's new refrigerant was as effective as held out, whether in fact the Greencool Group had secured all the business it held out as securing and whether the Group's business model was viable. The article was picked up by other media outlets. The price of Greencool shares fell substantially.

32. The senior management of Greencool refuted the various assertions. A number of analysts also found the assertions to be unsustainable. For example, UBS Warburg Asia Limited circulated clients in the following terms:

> "Our views are that the stock will continue to be under some confusion (given the scientific nature of its products), but we think Mr Gu's clarifications are convincing. We have seen some of its customers and we believe that it offers a credible product… We reiterate our 'Buy' recommendation."

The delisting of Greencool

33. In 2005, Mr Gu was arrested in the PRC, being charged with various 'economic crimes'. Shortly thereafter, on 1 August 2005, trading in the shares of Greencool was suspended. Some two years later, on 18 May 2007, Greencool was delisted.

The SFC enquiries

34. Subsequent to these events, evidence arose that the combined accounts of the Greencool Group for the five years ended 31 December 2000, 2001, 2002, 2003 and 2004 were materially false, more particularly in that the value of bank deposits had been materially inflated while loans due to various banks in the PRC had not been disclosed. In its press release of 23 June 2014, the Securities and Futures Commission ("SFC") said that the investigation had taken seven years, making it the most complex investigation conducted at the time.

35. The investigations, said the SFC, had revealed that, in order to make the business operations of the Greencool Group appear more successful than in truth they were, within certain of the subsidiaries of the Group fictitious sales and commercial projects had been created, this, in turn, resulting in the creation of false profits. In order to manage this fraud, false commercial papers had been created: contracts, invoices, even bank documents. In addition, certain of the subsidiaries had been forced to maintain up to 3 separate books of account, the book containing a true record being withheld from the Group auditors.

36. In addition, in order to ensure that the fraud was not discovered, individual officials in a number of banks that dealt with the Group had been prevailed upon to supply false bank records as to the value of Greencool deposits and/or the existence of loans advanced to companies in the Greencool Group.

37. In the result, it was said, principally by means of the overstatement of bank deposits and the non-disclosure of bank loans, it had been possible to materially overstate the net asset value of the Group for the financial years ended

31 December 2000 to 2004 (inclusive), thereby making the shares of Greencool more attractive to investors.

38. The SFC asserted that, in light of this evidence, six Executive Directors, two Independent Non-Executive Directors and the senior financial officer of the Group, each having been involved in the publication of the Greencool accounts pursuant to the GEM Listing Rules, may be culpable of market misconduct, specifically a contravention of section 277(1) of the Ordinance.

The Notice

39. In the result, on 17 June 2014, seven years after the delisting of Greencool, the SFC issued a Notice pursuant to section 252 (2) and Schedule 9 of the Ordinance. The Notice began –

> "Whereas it appears to the Commission that market misconduct within the meaning of section 277 of Part XIII of the Ordinance has or may have taken place in relation to the securities of Greencool Technology Holdings Limited (Stock Code 8056) listed on the Growth Enterprise Market of the Stock Exchange of Hong Kong Limited, the Market Misconduct Tribunal is hereby required to conduct proceedings and determine:
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> (a) whether any market misconduct has taken place;
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> (b) the identity of any person who has engaged in the market misconduct; and
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> (c) the amount of any profit gained or loss avoided as a result of the market misconduct."

The Synopsis

40. The Notice was accompanied by a detailed Synopsis, 29 pages in length, a copy of the Synopsis being annexed to this Report as Annexure "A".

The nine Specified Persons

41. The persons identified in the Notice as persons who may have been culpable of a breach of section 277(1) of the Ordinance, that is, the 'Specified Persons', were the nine persons identified in paragraphs 18, 19 and 20 above.

Details in the Notice of culpability

42. In setting out the brief particulars concerning the nature and essential elements of the suggested culpability of the nine persons, the Notice said the following:

> "…
>
> 4. At all material times, Greencool was a holding company with no trading business. It had various subsidiaries that purported to carry on a business in the manufacturing and replacement of energy efficient chlorofluorocarbon-free coolants for refrigeration and air-conditioning systems in the People's Republic of China ("PRC"). These subsidiaries (collectively "Greencool subsidiaries") included:
>
> 4.1 Greencool Environmental Protection Engineering (Shenzhen) Company Limited ("Shenzhen Greencool");
>
> 4.2 Beijing Greencool Environmental Protection Engineering Company Limited ("Beijing Greencool");

4.3 Beijing Greencool New Model Refrigerants Conversion Engineering Company Limited ("Beijing Greencool New Model");

4.4 Hainan Greencool Environmental Protection Engineering Company Limited ("Hainan Greencool");

4.5 Hubei Greencool Environmental Protection Engineering Company Limited ("Hubei Greencool");

4.6 Wuhan Greencool Refrigerants Replacement Engineering Company Limited ("Wuhan Greencool");

4.7 Jiangsu Greencool Environmental Protection Engineering Company Limited ("Jiangsu Greencool");

4.8 Shanghai Greencool Environmental Protection Engineering Company Limited ("Shanghai Greencool"); and

4.9 Tianjin Greencool Environmental Protection Engineering Company Limited ("Tianjin Greencool").

5. At various times, the Specified Persons were officers of Greencool occupying the following positions.

Name	Role(s)	Appointment date	Resignation date
Gu	Chairman	10 Jan 2000	-
	Chief Executive Officer	10 Jan 2000	25 Apr 2002
Zhang	Chief Operating Officer	25 Apr 2002	-
	Executive Director	1 Jun 2000	-

Name	Role(s)	Appointment date	Resignation date
Hu	Chief Executive Officer	25 Apr 2002	-
	Vice Chairman	1 Jun 2000	-
	Audit Committee Member	1 Jun 2000	23 Sept 2004
Liu	Executive Director	1 Jun 2000	4 Aug 2005
Xu	Executive Director	1 Jun 2000	-
Chen	Executive Director	1 Jun 2000	-
	Compliance Officer	1 Jun 2000	-
Fan	Independent Non-Executive Director	1 Jun 2000	3 Feb 2006
	Chairman of the Audit Committee	1 Jun 2000	3 Feb 2006
Man	Independent Non-Executive Director	1 Jun 2000	3 Feb 2006
	Audit Committee Member	1 Jun 2000	3 Feb 2006
Mok	Qualified Accountant and Company Secretary	1 Jun 2000	5 May 2006

6. On various dates between 2001 and 2005, Greencool and the Specified Persons disclosed, circulated or disseminated or alternatively authorized or were concerned in the disclosure, circulation or dissemination of:

6.1 The audited accounts of Greencool and its subsidiaries for the financial years ended 31 December 2000, 31 December 2001, 31 December 2002, 31 December 2003 and 31 December 2004 respectively (collectively "Annual Accounts").

6.2 The combined final results of Greencool and its subsidiaries for the financial years ended 31 December 2000, 31 December 2001, 31 December 2002, 31 December 2003 and 31 December 2004 respectively as stated in the Annual Results Announcements made by Greencool for those years (collectively "Final Results").

7. The Annual Accounts contained, inter alia, the following information about Greencool and its subsidiaries (collectively "Group"):

Financial year ended	Bank deposits and cash (RMB)	Bank loans (RMB)	Net asset value (RMB)	Sales (Revenue/ Turnover) (RMB)	Profit after tax (RMB)	Trade Receivables (RMB)
31.12.2000	850,695,000	20,000,000	1,140,010,000	363,897,000	269,124,000	86,207,000
31.12.2001	850,621,000	80,000,000	1,295,254,000	516,330,000	314,342,000	96,666,000
31.12.2002	1,031,033,000	68,000,000	1,325,115,000	321,420,000	82,688,000	52,700,000
31.12.2003	1,114,560,000	75,000,000	1,333,572,000	106,834,000	8,624,000	17,095,000
31.12.2004	977,729,000	24,000,000	1,350,193,000	184,845,000	16,621,000	30,439,000

8. The information contained in the Annual Accounts as referred to in paragraph 7 (bank deposits, bank loans, net asset value, sales, profit after tax and trade receivables) above was false or misleading as to a material fact or was false or misleading through the omission of a material fact:

8.1 In relation to bank deposits:

8.1.1 The amounts of the Group's bank deposits stated in the Annual Accounts for the financial years ended 31 December 2000 to 31 December 2004 were overstated by approximately RMB 388,795,191.11, RMB 500,836,133.78, RMB 741,646,761.41, RMB 877,741,235.98 and RMB 625,379,047.40 respectively.

8.1.2 In particular, Shenzhen Greencool maintained 3 sets of accounts, designated the 001, 002 and 003 accounts respectively. The 001 accounts were the real accounts but were never produced to the auditors of Greencool who audited the Annual Accounts ("Hong Kong auditors"). The Hong Kong auditors were only given the 002 accounts which inflated, inter alia, the amounts of bank deposits.

8.1.3 Hainan Greencool maintained 3 sets of accounts, designated the 001, 002 and 003 accounts respectively. The 001 accounts were the real accounts but were never produced to the Hong Kong auditors. The Hong Kong auditors were only given the 002 accounts which inflated, inter alia, the amounts of bank deposits.

8.1.4 Hubei Greencool had maintained 2 sets of accounts. The first set of accounts was the real accounts but was never produced to the Hong Kong auditors. The Hong Kong auditors were supplied with the second set of accounts which contained inflated or incorrect figures on, inter alia, the amounts of bank deposits.

8.1.5 The Hong Kong auditors were supplied with 1 set of accounts with regard to Wuhan Greencool which contained inflated or incorrect figures on, inter alia, the amounts of bank deposits.

8.1.6 Beijing Greencool maintained 1 set of accounts which was produced to the Hong Kong auditors. The amounts of bank deposits stated in the accounts were inflated.

8.1.7 Beijing Greencool New Model maintained 1 set of accounts which was produced to the Hong Kong auditors. The amounts of bank deposits stated in the accounts were inflated.

8.2 In relation to bank loans, a substantial amount of the bank loans owed by Beijing Greencool, Hubei Greencool, Jiangsu Greencool and Shenzhen Greencool were not disclosed in the Annual Accounts.

8.2.1 The undisclosed amount of bank loans outstanding as at 31 December 2000 was RMB 98,000,000.

8.2.2 The undisclosed amount of bank loans outstanding as at 31 December 2001 was RMB 152,000,000.

8.2.3 The undisclosed amount of bank loans outstanding as at 31 December 2002 was RMB 240,200,000.

8.2.4 The undisclosed amount of bank loans outstanding as at 31 December 2003 was RMB 184,000,000.

8.2.5 The undisclosed amount of bank loans outstanding as at 31 December 2004 was RMB 279,000,000.

8.3 In relation to net asset value, as a result of the overstatement of bank deposits referred to in paragraph 8.1 above and the non-disclosure of the bank loans referred to in paragraph 8.2 above, the net asset value of the Group for the financial years ended 31 December 2000 to 2004 was overstated in the Annual Accounts by approximately RMB 486,795,191, RMB 652,836,134, RMB 981,846,761, RMB 1,061,741,236 and RMB 904,379,047 respectively.

8.4 In relation to sales, profit after tax and trade receivables:

8.4.1 Shenzhen Greencool maintained 3 sets of accounts, designated the 001, 002 and 003 accounts respectively. The 001 accounts were the real accounts but were never produced to the Hong Kong auditors. The Hong Kong auditors were only given the 002 accounts which inflated, inter alia, the amounts of sales, profit after tax and trade receivables.

8.4.2 Hainan Greencool maintained 3 sets of accounts, designated the 001, 002 and 003 accounts respectively. The 001 accounts were the real accounts but were never produced to the Hong Kong auditors. The Hong Kong auditors were only given the 002 accounts which inflated, inter alia, the amounts of sales, profit after tax and trade receivables.

8.4.3 Hubei Greencool had maintained 2 sets of accounts. The first set of accounts was the real accounts but was never produced to the Hong Kong auditors. The Hong Kong auditors were supplied with the second set of accounts which contained inflated or incorrect figures on, inter alia, sales, profit after tax and trade receivables.

8.4.4 The Hong Kong auditors were supplied with 1 set of accounts of Wuhan Greencool which contained inflated or incorrect figures on, inter alia, sales, profit after tax and trade receivables.

8.4.5 Beijing Greencool maintained 1 set of accounts which was produced to the Hong Kong auditors. The amounts of, inter alia, sales, profit after tax and trade receivables stated in the accounts were inflated.

8.4.6 Beijing Greencool New Model maintained 1 set of accounts which was produced to the Hong Kong auditors. The amounts of, inter alia, sales, profit after tax and trade receivables stated in the accounts were inflated.

9. The Final Results contained, inter alia, the following information about the Group:

9.1 For the financial year ended 31 December 2000, the Group had revenue of RMB 363,897,000, profit after tax of RMB 269,124,000 and earnings per share of RMB 31 cents.

9.2 For the financial year ended 31 December 2001, the Group had revenue of RMB 516,330,000, profit after tax of RMB 314,342,000 and earnings per share of RMB 31 cents.

9.3 For the financial year ended 31 December 2002, the Group had revenue of RMB 321,420,000, profit after tax of RMB 82,688,000 and earnings per share of RMB 8.3 cents.

9.4 For the financial year ended 31 December 2003, the Group had revenue of RMB 106,834,000, profit after tax of RMB 8,624,000 and earnings per share of RMB 0.9 cent.

9.5 For the financial year ended 31 December 2004, the Group had revenue of RMB 184,845,000, profit after tax of RMB 16,621,000 with earnings per share of RMB 1.7 cents.

10. The information referred to in paragraphs 7 and 9 above separately and together was likely to induce the subscription, sale or purchase in Hong Kong of the securities of Greencool by another person or to maintain, increase, reduce or stabilize the price of the securities of Greencool in Hong Kong….."

Asserted culpability of the individual Specified Persons

43. As to the asserted culpability of each of the nine Specified Persons, this was set out in some detail in the Synopsis. For ease of reference, these assertions, extracted from the Synopsis, are set out below:

Mr Gu

"12.1 Gu was the Chairman of the Group and an Executive Director of Greencool from 10 January 2000 until at least the suspension of the Greencool shares on 1 August 2005. Between 10 January 2000 and 24 April 2002, he was the Chief Executive Officer of Greencool. He was also a director of Shenzhen Greencool, Beijing Greencool and Hubei Greencool between 2000 and 2004, a director of Jiangsu Greencool between 2001 and 2004, a director of Hainan Greencool between 2000 and 2003, a director of Beijing Greencool New Model between 2001 and 2003 and a director of Wuhan Greencool between 2003 and 2004.

12.2 Gu had full knowledge of and control over all financial matters concerning the Group including, inter alia, the compilation of accounts.

12.3 Each year, Gu would decide on the inflated amounts of sales and bank deposits that would be recorded in the accounts of the Greencool subsidiaries. Gu would inform Zhang who would execute Gu's decision.

12.4 Gu approved and executed most of the loan and guarantee agreements on behalf of the Greencool subsidiaries for their bank loans. He therefore knew or ought to have known that the amounts of bank loans set out in the false accounts of the Greencool subsidiaries (as particularized in paragraph 8 above) and the Annual Accounts were understated.

12.5 Gu directed and caused the accounts of the Greencool subsidiaries to be falsified in the manner described in paragraph 8 above.

12.6 Gu caused the accounts of the Greencool subsidiaries which contained false or misleading information (as particularized in paragraph 8 above) to be made available to the Hong Kong auditors for the purposes of their audit of the Annual Accounts when he knew or ought to have known that the said accounts contained false or misleading information. Gu also signed the letters of

representation to the Hong Kong auditors stating that the directors of Greencool had kept proper accounts of the Group.

12.7 Gu approved the Annual Accounts and the Final Results when he knew or ought to have known that they contained false or misleading information.

12.8 In any event, the continuously high bank balances reported for the years 2000 to 2004 would have alerted Gu to question the accuracy of the bank balances, given also the overall performance, business nature and operations of the Group. Further, in early 2002, the Company's auditors alerted the directors to deficiencies in the financial management of the Group, including matters pertaining to bank balances and bank loans. Also, at about this time the directors were aware of media comment suggesting falsities in the accounts.

12.9 Further, as a director of Greencool, Gu would have received copies of the relevant board resolutions or minutes pertaining to the bank loans shortly after they had been signed and would therefore have been aware of the amounts of the bank loans."

44. Mr Gu, it was asserted in the Notice, *knew* that the information contained in the relevant accounts was materially false or misleading or, if he did not possess actual knowledge of the fact, he was reckless or negligent in respect of it.

Mr Zhang

"13.1 Zhang was the Chief Operating Officer of the Group from 2002 until at least the suspension of the Greencool shares on 1 August 2005 and was in charge of the Group's affairs within the PRC. He was also an Executive Director of Greencool since 1 June 2000. The accountants of the Greencool subsidiaries reported to Zhang.

13.2 Furthermore, Zhang was a director of Beijing Greencool between 2000 and 2003, a director of Hainan Greencool between 2000 and 2002, a director of

Shenzhen Greencool between 2000 and 2004 and a director of Hubei Greencool between 2000 and 2001.

13.3 Every year, after Gu had informed Zhang as to the inflated amounts of sales and bank deposits to be recorded in the accounts of the Greencool subsidiaries, Zhang would work out the number of fictitious transactions required to achieve the inflated amounts of sales and bank deposits set by Gu. Zhang would then allocate the fictitious transactions to the Greencool subsidiaries and give instructions to the accountants of these subsidiaries to compile accounts to reflect the inflated amounts set by Gu.

13.4 Zhang, with the assistance of Messrs. Xia Ju Xing and Shan Yong Hua, caused forged documents such as sales contracts, inventory records, bank statements and bank audit confirmations to be produced and supplied to the accountants of the Greencool subsidiaries to support the inflated sales and bank deposits recorded in the false accounts of these subsidiaries. Zhang also caused forged company seals of Shenzhen Greencool's customers to be made. The forged seals would be affixed to the forged sales contracts.

13.5 Zhang also executed most of the loan and guarantee agreements on behalf of the Greencool subsidiaries for their bank loans. He therefore knew or ought to have known that the amounts of bank loans set out in the false accounts of the Greencool subsidiaries (as particularized in paragraph 8 above) and the Annual Accounts were understated.

13.6 Zhang knew that Shenzhen Greencool retained two different auditors to audit respectively the 002 and 003 accounts and that Hubei Greencool retained two different auditors to audit its 2 sets of accounts.

13.7 Zhang knowingly misled the Hong Kong auditors in their audit of the Annual Accounts and the Final Results:

13.7.1 The false accounts of the Greencool subsidiaries (as particularized in paragraph 8 above) were produced to the Hong Kong auditors for the purposes of their audit of the Annual Accounts with Zhang's knowledge and approval.

13.7.2 The forged documents produced to support the inflated sales and bank deposits referred to in paragraph 8 above were supplied to the Hong Kong auditors for the purpose of their audit of the Annual Accounts with Zhang's knowledge and approval.

13.7.3 Zhang instructed or caused his subordinates to mislead the Hong Kong auditors during their visits to the banks and clients of Shenzhen Greencool into thinking that the figures of sales, bank deposits and bank loans shown in the 002 accounts were correct.

13.7.4 Zhang signed the letters of representation stating to the Hong Kong auditors that the directors of Greencool had kept proper accounts of the Group when he knew or ought to have known that was not the case.

13.8 Zhang approved the Annual Accounts and the Final Results when he knew or ought to have known that they contained false or misleading information.

13.9 In any event, the continuously high bank balances reported for the years 2000 to 2004 would have alerted Zhang to question the accuracy of the bank balances, given also the overall performance, business nature and operations of the Group. Further, in early 2002, the Company's auditors alerted the directors to deficiencies in the financial management of the Group, including matters pertaining to bank balances and bank loans. Also, at about this time the directors were aware of media comment suggesting falsities in the accounts.

13.10 Further, as a director of Greencool, Zhang would have received copies of the relevant board resolutions or minutes pertaining to the bank loans shortly after they had been signed and would therefore have been aware of the amounts of the bank loans."

45. Mr Zhang, it was asserted in the Notice, *knew* that the information contained in the relevant accounts was materially false or misleading or, if he did not possess actual knowledge of the fact, he was reckless or negligent in respect of it.

Mr Hu

"14.1 Hu was the Chief Executive Officer (from 25 April 2002) and the Vice Chairman of the Group (from 1 June 2000) until at least the suspension of the Greencool shares on 1 August 2005. He had extensive knowledge of the operations, management and business environment of the Group.

14.2 Hu was also an Executive Director and a member of the Audit Committee the Board of Directors of Greencool from 1 June 2000. He resigned from the Audit Committee of the Board of Directors on 23 September 2004.

14.3 Furthermore, Hu was a director of Shenzhen Greencool between 2000 and 2002.

14.4 During his term as a member of the Audit Committee of the Board of Directors of Greencool, it appears that Hu signed a total of 3 board resolutions to approve the relevant loans and 14 board resolutions to approve the relevant guarantee agreements in respect of the undisclosed bank loans.

14.5 Hu knew or ought to have known that many of the bank loans obtained by the Greencool subsidiaries were not disclosed in their accounts and in the Annual Accounts.

14.6 Hu knew or ought to have known that the balance sheets of Beijing Greencool and Beijing Greencool New Model for the financial years ended 31 December 2002 and 31 December 2004 that were supplied to the Hong Kong auditors for the purpose of compiling and producing the Annual Accounts contained inflated sales figures.

14.7 Hu signed the letters of representation to the Hong Kong auditors stating that the directors of Greencool had kept proper accounts of the Group when he knew or ought to have known that they had not.

14.8 Hu approved the Annual Accounts and the Final Results when he knew or ought to have known that they contained false or misleading information.

14.9 In about January 2002, the Hong Kong auditors had informed members of the Audit Committee of which Hu was a member that an anonymous complaint had been made to the Stock Exchange of Hong Kong Limited alleging that the Group had inflated its sales figures for 1999 and 2000 and misused funds raised through its listing.

14.10 In any event, the continuously high bank balances reported for the years 2000 to 2004 would have alerted Hu to question the accuracy of the bank balances, given also the overall performance, business nature and operations of the Group. Further, in early 2002 the Company's auditors alerted the directors to deficiencies in the financial management of the Group, including matters pertaining to bank balances and bank loans. Also, at about this time the directors had also been made aware of media comment suggesting falsities in the accounts.

14.11 Further, as a director of Greencool, Hu would have received copies of the relevant board resolutions or minutes pertaining to the bank loans shortly after they had been signed and would therefore have been aware of the amounts of the bank loans."

46. Mr Hu, it was asserted in the Notice, *knew* that the information contained in the relevant accounts was materially false or misleading or, if he did not possess actual knowledge of the fact, he was reckless or negligent in respect of it.

Mr Liu

"15.1 Liu was an Executive Director of Greencool between 1 June 2000 and 3 August 2005. He was also a director of Shenzhen Greencool between 2000 and 2002 and a director of Beijing Greencool between 2000 and 2003.

15.2 Liu admitted during an interview attended by the investigators of the Securities and Futures Commission that the actual sales of the Greencool subsidiaries

were poor and that he suspected that the revenue and profit figures stated in the Annual Accounts and the Final Results were inflated.

15.3 Despite his suspicion, Liu approved the Annual Accounts and the Final Results without investigating whether the information contained therein was false or misleading.

15.4 Further, Liu approved most of the bank loans obtained by Shenzhen Greencool and Beijing Greencool by signing the relevant board resolutions. He knew or ought to have known that the amounts of bank loans stated in the false accounts of the two subsidiaries (as particularized in paragraph 8 above) and the Annual Accounts were understated.

15.5 Liu approved the Annual Accounts and the Final Results when he knew or ought to have known that they contained false or misleading information.

15.6 In any event, the continuously high bank balances reported for the years 2000 to 2004 would have alerted Liu to question the accuracy of the bank balances, given also the overall performance, business nature and operations of the Group. Further, in early 2002 the Company's auditors alerted the directors to deficiencies in the financial management of the Group, including matters pertaining to bank balances and bank loans. Also, at about this time the directors had also been made aware of media comment suggesting falsities in the accounts.

15.7 Further, as a director of Greencool, Liu would have received copies of the relevant board resolutions or minutes pertaining to the bank loans shortly after they had been signed and would therefore have been aware of the amounts of the bank loans."

47. Mr Liu, it was asserted in the Notice, *knew* that the information contained in the relevant accounts was materially false or misleading or, if he did not possess actual knowledge of the fact, he was reckless or negligent in respect of it.

Mr Xu

"16.1 Xu was an Executive Director of Greencool from 1 June 2000 until at least the suspension of the Greencool shares on 1 August 2005. He was also a director of Beijing Greencool and Hainan Greencool between 2000 and 2003 and a director of Shenzhen Greencool between 2000 and 2002.

16.2 Xu, who was in charge of Hainan Greencool, knew or ought to have known that Hainan Greencool had maintained 3 sets of accounts as described in paragraph 8 above and that the 002 accounts contained false or misleading information.

16.3 Xu knew or ought to have known that Hainan Greencool retained two firms of auditors to audit the 002 and 003 sets of accounts.

16.4 Xu knew or ought to have known that the balance sheets and profit and loss accounts of Hainan Greencool which contained false or misleading information were supplied to the Hong Kong auditors for the purpose of their audit of the Annual Accounts.

16.5 Xu approved most of the bank loans obtained by Shenzhen Greencool and Beijing Greencool by signing the relevant board resolutions. He knew or ought to have known that the amounts of bank loans stated in the false accounts of the 2 subsidiaries (as particularized in paragraph 8 above) and the Annual Accounts were understated.

16.6 Xu approved the Annual Accounts and the Final Results when he knew or ought to have known that they contained false or misleading information.

16.7 In any event, the continuously high bank balances reported for the years 2000 to 2004 would have alerted Xu to question the accuracy of the bank balances, given also the overall performance, business nature and operations of the Group. Further, in early 2002 the Company's auditors alerted the directors to deficiencies in the financial management of the Group, including matters pertaining to bank balances and bank loans. Also, at about this time the

directors had also been made aware of media comment suggesting falsities in the accounts.

16.8 Further, as a director of Greencool, Xu would have received copies of the relevant board resolutions or minutes pertaining to the bank loans shortly after they had been signed and would therefore have been aware of the amounts of the bank loans."

48. Mr Xu, it was asserted in the Notice, *knew* that the information contained in the relevant accounts was materially false or misleading or, if he did not possess actual knowledge of the fact, he was reckless or negligent in respect of it.

Mr Chen

"17.1 Chen was an Executive Director of Greencool from 1 June 2000 until at least the suspension of the Greencool shares on 1 August 2005. He was also a director of Shenzhen Greencool between 2000 and 2002, a director of Hainan Greencool between 2000 and 2002 and a director of Hubei Greencool between 2000 and 2001.

17.2 Chen knew or ought to have known that the accounts of the Greencool subsidiaries that were supplied to the Hong Kong auditors for the purpose of compiling and producing the Annual Accounts contained false or misleading information because he gave instructions in relation to the compilation of and approved the accounts of the Greencool subsidiaries, and made approvals in the daily operations of the Greencool subsidiaries. He also belonged to the senior management of Greencool and directly reported to Gu.

17.3 Chen knew or ought to know that the revenue and profit figures in the Final Results were inflated because he knew or ought to have known that the actual sales of the Greencool subsidiaries did not justify such figures.

17.4 Chen approved most of the bank loans obtained by Shenzhen Greencool by signing the relevant board resolutions. He knew or ought to have known that the amounts of bank loans stated in the false accounts of Shenzhen Greencool

and the Annual Accounts (as particularized in paragraph 8 above) were understated.

17.5 Chen signed the letters of representation to the Hong Kong auditors stating that the directors of Greencool had kept proper accounts of the Group when he knew or ought to have known that they had not.

17.6 Chen approved the Annual Accounts and the Final Results when he knew or ought to have known that they contained false or misleading information. He signed the Annual Accounts and the Final Results were issued in his name, Gu's name and/or Mok's name. See paragraphs 6.1 and 6.2 above.

17.7 In any event, the continuously high bank balances reported for the years 2000 to 2004 would have alerted Chen to question the accuracy of the bank balances, given also the overall performance, business nature and operations of the Group. Further, in early 2002, the Company's auditors alerted the directors to deficiencies in the financial management of the Group, including matters pertaining to bank balances and bank loans. Also, at about this time the directors had also been made aware of media comment suggesting falsities in the accounts.

17.8 Further, as a director of Greencool, Chen would have received copies of the relevant board resolutions or minutes pertaining to the bank loans shortly after they had been signed and would therefore have been aware of the amounts of the bank loans."

49. Mr Chen, it was asserted in the Notice, *knew* that the information contained in the relevant accounts was materially false or misleading or, if he did not possess actual knowledge of the fact, he was reckless or negligent in respect of it.

Mr Fan and Ms Margaret Man

"18.1 Each of them was an Independent Non-executive Director of Greencool between 1 June 2000 and 2 February 2006 and Fan was the Chairman and Man was a member of the Audit Committee of the Board of Directors between the same dates. Both of them came predominately from a banking or finance background.

18.2 In around 2001, there were widespread reports in the media, which Fan and Man knew or ought to have known about, with regard to Greencool maintaining false accounts and falsifying its transactions.

18.3 In about January 2002, the Hong Kong auditors had informed members of the Audit Committee of which Fan and Man were members that an anonymous complaint had been made to the Stock Exchange of Hong Kong Limited alleging that the Group had inflated its sales figures for 1999 and 2000 and misused funds raised through its listing.

18.4 Despite being aware of the said complaint and reports and, as a result, a risk that the information set out in the Annual Accounts and the Final Results for the financial years ended 31 December 2000 and 2001 was false or misleading, both Fan and Man approved the same and neither of them asked for further information as to, or investigated, the said complaint and reports.

18.5 Further, Fan and Man approved the Annual Accounts and the Final Results, without ensuring that the information contained therein was not false or misleading.

18.6 In any event, the continuously high bank balances reported for the years 2000 to 2004 would have alerted Fan and Man to question the accuracy of the bank balances, given also the overall performance, business nature and operations of the Group. Further, in early 2002 the Company's auditors alerted the directors to deficiencies in the financial management of the Group, including matters pertaining to bank balances and bank loans. During this time the directors had also been made aware of media comment suggesting falsities in the accounts.

18.7 Further, as the directors of Greencool, Fan and Man would have received copies of the relevant board resolutions or minutes pertaining to the bank loans shortly after they had been signed and would therefore have been aware of the amounts of the bank loans."

50. Both Mr Fan and Ms Margaret Man, it was said in the Notice, were reckless or negligent as to whether the information in the relevant accounts was materially false or misleading.

Mr Mok

"19.1. Mok was the Qualified Accountant and Company Secretary of Greencool between 1 June 2000 and 4 May 2006.

19.2 Inter alia, he was responsible for the financial reporting of Greencool.

19.3 Mok signed the letters of representation to the Hong Kong auditors stating that the directors of Greencool had kept proper accounts of the Group when he knew or ought to have known that they had not.

19.4 The continuously high bank balances reported for the years 2000 to 2004 would have alerted Mok to question the accuracy of the bank balances, given also the overall performance, business nature and operations of the Group. Further, in early 2002 the Company's auditors alerted the directors to deficiencies in the financial management of the Group, including matters pertaining to bank balances and bank loans. Also, at about this time the directors had also been made aware of media comment suggesting falsities in the accounts. Members of the Audit Committee were also aware of the anonymous complaint referred to in paragraphs 14.9 and 18.3 above. As the Qualified Accountant and Company Secretary of Greencool, Mok was also aware of these matters.

19.5 In addition, as the Qualified Accountant and Company Secretary of Greencool, it was Mok's duty to keep minutes and resolutions of board and committee meetings so that these could be inspected by any director. Accordingly, Mok

> was and/or ought to have been aware of the undisclosed bank loans and therefore had and/or ought to have had valid reasons to question the accuracy of the bank loans actually reported."

51. Mr Henry Mok, it was said in the Notice, was reckless or negligent as to whether the information in the relevant accounts was materially false or misleading.

52. Both the Notice and the Synopsis concluded by stating the following:

> "By reason of the matters aforesaid, the specified persons have or may have contravened section 277(1) of the Ordinance and therefore have or may have engaged in market misconduct."

The first directions hearing

53. The first directions hearing was held on 29 October 2014 before the Chairman. At that hearing only the 8th Specified Person, Ms Margaret Man, and the 9th Specified Person, Mr Henry Mok, both residing in Hong Kong, were legally represented.

54. However, written representations were received from the 6th Specified Person, Mr Chen, who was living in Canada. The representations were addressed to the SFC but Mr Chen asked that they be passed to the Tribunal.

55. In his first letter, having acknowledged receipt of the Notice and all accompanying papers, Mr Chen said the following (this being in translation):

> "In regard to the Notice dated 17 June 2014 and the synopsis from SFC, I really did not know anything about the problems or misconduct listed in the

> SFC document, like overstatement of bank deposits, non-disclosure of bank loans, etc."

56. As to the fact that he had signed the final results, Mr Chen said that he had been authorised to sign simply because –

> "… I was working in Hong Kong and it was unreasonable for the other directors to leave their work and come to Hong Kong only to sign when an authorised signature was acceptable. I signed because the results had been closely supervised and controlled by the management team of each subsidiary and, most importantly, by the Chairman and Vice-Chairman and CFO and by the Audit Committee, and because the results had been strictly audited by professional accountants. I believed that the final results were true and accurate."

57. None of the remaining six Specified Persons, all of whom were believed to be residing in the PRC, chose to make any form of representation, direct or indirect, whether by way of legal representation or otherwise.

58. During the course of the directions hearing, it was stressed to the Chairman by Mr Peter Duncan SC, leading counsel for the SFC, that, in light of the limited response, it was unlikely that the six remaining Specified Persons would wish to be represented in any way at the substantive enquiry. It would not therefore be possible to agree uncontentious evidence in order to shorten proceedings. The SFC would be required to formally prove its case against each of the six Specified Persons. Bearing in mind the very large amount of evidential material, anticipated to be in excess of 60 volumes, it was agreed that a minimum of 20 days would be required for the conduct of the enquiry, prudence dictating that extra days be reserved.

59. In the result, in order to meet counsel's diaries and the Chairman's other obligations, the enquiry was set to commence on 14 September 2015. The enquiry ran for 26 sitting days, the final day, being 1 December 2015. The hearing was then adjourned until February 2016 to enable counsel to prepare written submissions. Final oral submissions in support of those written submissions were heard on 18 February 2016.

60. On the day following – 19 February 2016 – counsel for Mr Henry Mok filed written submissions concerning the application of the law of negligence. The SFC responded with its own written submissions on 1 March 2016. No further submissions were filed thereafter.

The hearing of the enquiry

61. As anticipated, leaving aside the limited representations made by Mr Chen which will be considered later in this report, only Ms Margaret Man, one of the two Independent Non-Executive Directors, and Mr Henry Mok, the Qualified Accountant and Company Secretary, were legally represented at the hearing of the enquiry.

CHAPTER 2

WERE THE FIRST SEVEN SPECIFIED PERSONS GIVEN A REASONABLE OPPORTUNITY OF BEING HEARD?

62. As stated earlier, Ms Margaret Man and Mr Henry Mok were both legally represented at the hearing of the enquiry and indeed both gave evidence. As also stated, although he did not seek legal representation nor attend the hearing of the enquiry, Mr Chen did make written representations and he was given the opportunity to consider the daily transcripts of evidence.[7]

63. However, none of the remaining six Specified Persons sought in any way to have their interests protected before the Tribunal. Indeed, the issue arises of whether they even received service of necessary process. In the result, the question must be asked whether any of these six are capable of being made subject to the Tribunal's enquiry.

64. Section 252(6) of the Ordinance directs that the Tribunal shall not identify a person as having engaged in market conduct "without first giving the person a reasonable opportunity of being heard".

65. It is well established that a disciplinary and/or regulatory tribunal has a discretion to commence and/or continue the hearing of an enquiry into the conduct of an individual even though that individual may be absent. The

[7] In this regard, in a letter dated 22 September 2015, Mr Chen spoke of being shocked by the evidence produced by ex-employees of Greencool, writing (in translation) to the Secretary of the Tribunal: "I must apologise first for rushing to write you an email on 20 October 2015 as I have been fully occupied with my everyday living and have been suffering from severe sleeping disorder and, as a result, I went roughly through only some questions and answers, but not all. When I looked [at] the file names last night, I noticed that I missed the files from Trial 1 to Trial 8 which I forgot to download. I have not got the time to read them all, but I did quickly go through a couple of the files and I was really shocked by the evidence provided by the ex-employees of the Greencool subsidiaries."

discretion, however, is one that must be exercised with "utmost care and caution"[8], the overriding concern being to ensure that the hearing of the enquiry is as fair as circumstances permit and thereby leads to a just outcome.

66. When looking to what is as fair as circumstances permit, it is to be noted that section 252(6) of the Ordinance requires that a Specified Person should be given a reasonable opportunity of being heard, it does not require that he should take up the opportunity.[9]

67. What constitutes a reasonable opportunity is to be determined in accordance with the circumstances of each case and in respect of this present enquiry must be determined by having regard to the circumstances particular to each of the seven Specified Persons.

(1) Mr Gu, Mr Zhang and Mr Hu

68. In a statement dated 24 October 2014, Ms Vickie Ng Lai Lin ('Ms Vickie Ng'), an Associate Director of the Enforcement Division of the SFC, said that it was on 19 June 2014 that the SFC's Notice, together with a detailed Synopsis (giving greater detail of the SFC case) was served on Mr Gu, Mr Zhang and Mr Hu in Beijing.

69. In respect of Mr Gu, she said the documents were delivered by a DHL delivery person to what the SFC had learnt was the residential address of Mr Gu,

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[8] The need for "utmost care and caution" was set out by Lord Bingham in *R v Jones (Anthony)* [2002] 2 WLR 524, a criminal case. However, as a guiding principle, it has been followed generally in disciplinary and/or regulatory proceedings. In this latter regard, see, for example, *Raheem v Nursing and Midwifery Council* [2010] EWHC 2549 (Admin), paragraphs 30 and 31.

[9] As stated in the *Report of the Market Misconduct Tribunal on Yue Da Mining Holdings Limited* dated 8 May 2014; paragraph 168.

the documents being accepted (without apparent demure) by a person by the name of Zhong Hong Mei who signed the DHL receipt.

70. In addition, in respect of Mr Gu, Mr Zhang and Mr Hu, the documents addressed to each of them were delivered by a DHL delivery person to the office address of a company in Beijing called Super Genius. All three sets of documents were accepted (again without apparent demure) by a person at the office who signed the three receipts in the name of Wang Fei.

71. Super Genius, it would appear, was some sort of academy teaching commercial skills. A study of the company's website in March 2014, and again in early June 2014, had revealed that Mr Gu held a leading position with the company as 'Honorary Chairman' while Mr Zhang and Mr Hu had been appointed by the company as 'Final Adjudicators'. On any mundane basis, therefore, with all three men having a connection with the company, there was every reason to accept documents on their behalf.

72. The documents were not served personally on the three Specified Persons. Personal service, however, is not mandatory. The question to be asked is whether, on a consideration of the evidence, the Tribunal can be satisfied that all three men would have received the documents.

73. In respect of the service effective at Mr Gu's residence, in respect of delivery by courier service, common sense dictates that if he was not known at that residence – if it was not his home – it would have been highly unlikely that the documents would have been accepted at that address on his behalf and indeed a receipt signed.

74. Equally, if any of the three men had not been known at Super Genius, it is highly unlikely that the documents would nevertheless have been accepted on behalf of each of them by an office employee.

75. In respect of Mr Gu, the evidence of his knowledge of the SFC proceedings in or about June 2014 does not end there.

76. In an affirmation dated 24 October 2014, Ms Vickie Ng spoke of the service of process in ancillary proceedings also issued in June 2014 by the SFC against Mr Gu[10], permission having been granted to serve the writ of summons and the statement of claim on the Mainland through the judicial authorities in that jurisdiction.

77. According to Ms Vickie Ng, the institution of proceedings (both in the matter which is the subject of this report and the ancillary Court of First Instance proceedings) was widely reported in the Hong Kong press. The evidence, she said, suggested that Mr Gu came to learn of both actions and indeed sought to express his indignation in regard to them. This he did by means of an internet entry in his account – the Weibo Account – placed on a popular internet platform. In translation, the entry was to the following effect –

> "Today I heard from some media and the website of the Hong Kong Securities and Futures Commission that the Hong Kong Securities and Futures Commission commenced proceedings against me and asked the court to freeze the so-called "$1.59 billion assets". I am astonished!

[10] This was in proceedings issued pursuant to section 213 of the Ordinance: Case HCA 1142/2014.

> I deny all allegations against me stated in the relevant media reports and on the website of the Hong Kong Securities and Futures Commission. Again, history will tell that everything is fabricated. It is to throw mud at me."

78. Mr Gu, therefore, was not simply reacting to media stories but had taken the trouble to look at the SFC website which gave specific details of the two actions.

79. As Ms Vickie Ng also pointed out, a number of court documents bearing the official seal of the judicial authorities of the Mainland were posted on the Weibo Account together with documents in opposition bearing Mr Gu's name. Importantly, those documents detailed the residential address in Beijing at which service of the Notice and Synopsis had been served; further confirmation of the accuracy of the residential address.

80. By the summer of 2014, Mr Gu had established very considerable experience in the corporate world, not only in the PRC but also in Hong Kong. His expression of indignation in his internet entry makes it clear that he knew of the two actions instituted by the SFC and must have understood, in large measure at least, the nature of their ramifications.

81. Within a month or so, however, the situation in respect of Mr Gu, Mr Zhang and Mr Hu had changed. On or about 9 September 2014, when a DHL delivery person attempted to deliver an SFC letter (concerning the first directions hearing before this Tribunal) upon the three persons in the same manner as before, delivery was rejected.

82. The person at Mr Gu's residential address in Beijing said that Mr Gu had moved away from that address. Although it would be expected perhaps that

details of Mr Gu's new address would have been given in order to secure onward delivery, it appears that no such details were offered. More than that, when a DHL delivery person attempted to deliver the letter at the offices of Super Genius on or about the same day, delivery was again rejected on the basis that none of the three persons – Mr Gu, Mr Zhang, Mr Hu – were known.

83. Almost a year later, however, in June 2015, when a further attempt was made to bring proceedings to the notice of the three Specified Persons, a check of the Super Genius website confirmed that its current address remained the same as the address at which the notices and synopses had been served earlier and, more than that, the website confirmed that all three men remained connected to the organisation.

84. Mr Gu, it was said, was the 'Honorary Chairman' and 'Head of the Disciplinary and Supervisory Committee' while Mr Zhang and Mr Hu remained 'Final Adjudicators'.

85. In respect of Mr Gu, the website said the following:

> "It is well-known that Mr Gu Chu Jun has gone through rollercoaster-like life challenges, and has accumulated profound experiences and learnt unforgettable lessons in prevention and control of risks that are fatal to enterprises – which are precisely the most valuable assets for developing modern Chinese entrepreneurs into international entrepreneurs."

86. In respect of Mr Zhang, the website said that he had been engaged as a Final Adjudicator and that he was currently the Chairman of Super Genius Technology Development (Beijing) Company Limited, almost certainly a related

company, having been the Chief Operating Officer ('COO') of the Greencool Group.

87. In respect of Mr Hu, the website said that he too had been engaged as a Final Adjudicator and that he was currently the Chairman of (in transliteration) Tian Cai Zong Heng International Corporate Management (Beijing) Company. It further said that Mr Hu had been Vice-Chairman of the Board of Directors and the CEO of Greencool.

88. In light of the information contained on the website, on 8 June 2015 Ms Vickie Ng, together with two SFC colleagues and two officers of the China Securities Regulatory Commission ('the CSRC') visited the offices of Super Genius to deliver a further SFC letter to all three men. At the offices, there was a conversation with a man identified as Chen Xiao Jun who said that Mr Gu was not present in the office and that he was not prepared to accept delivery of any letter in order to pass it on. This conversation was interrupted when an unknown member of the office staff ordered them to leave the building. Outside the building, however, Mr Chen said that he would pass a message to Mr Gu, Mr Zhang and Mr Hu but it would be up to those persons whether to respond or not. In respect of the letters themselves, Mr Chen said that they could be left at reception but there was no guarantee that they would be passed to the recipients. The letters were therefore left at reception.

89. The SFC team also left their telephone contact numbers. However, they received no call from any of the three Specified Persons in the following days.

90. In light of these events, the question has to be asked, if in June 2014 documents had been accepted without apparent demure at the offices of Super

Genius, why now was acceptance refused? There can only be one reasonable explanation, namely, that, having learnt of the SFC enquiry, the three Specified Persons were now seeking to evade further service of documentation.

91. In light of the relevant evidence, and for the reasons given, the Tribunal is satisfied that all three specified Persons – Mr Gu, Mr Zhang and Mr Hu – would have received the SFC's Notice and Synopsis and were given a reasonable opportunity of being heard if they so wished. The fact that they chose not to be heard, indeed to distance themselves entirely, was their choice.

(2) Mr Liu

92. The SFC attempted to serve the Notice and Synopsis on Mr Liu on 7 July and again on 10 July 2014 by delivering it to his last known residential address in the PRC. However, the DHL delivery person was informed by the person then at that address that Mr Liu no longer lived there. The DHL delivery person then attempted to contact Mr Liu by calling his last known telephone number. The telephone was answered by a person who identified himself as somebody other than Mr Liu who said that the number was now his; in short, that Mr Liu had given up the number some time earlier, resulting in its re-allocation. There was therefore no service on Mr Liu at that time.

93. Approximately a year later, on 14 July 2015, Ms Vickie Ng, together with officers of the CSRC, went themselves to the last known address of Mr Liu. They were met by a man who identified himself as Mr Xu who said that the apartment had been sold to him by Mr Liu several years earlier. He said that they did not have any contact with Mr Liu and was not, therefore, able to assist the SFC to forward the letter. Again, therefore, there was no service on Mr Liu.

94. At the first directions hearing before the Tribunal held on 29 October 2014, directions were sought for Mr Liu to be notified of the SFC enquiry by way of placing notices into newspapers circulating in the PRC, that is, the *Securities Times* and *Ta Kung Pao*. The Tribunal made the directions and notices were published on three days in November 2014. The notices elicited no response.

95. At the commencement of the enquiry hearing in September 2015, there was therefore no evidence that Mr Liu had been made aware of the proceedings and that he was a Specified Person in them.

96. The publication of notices in two newspapers circulating in the PRC was not done by way of substituted service; in short, it was not intended to constitute effective service of itself. In this regard, during the course of the directions hearing the Chairman commented that the directions being sought went to the essential requirement of being able to show that the persons addressed in the notices had received sufficient notice and were therefore in a position to make representations if they wished to do so. There is, however, no evidence, direct or indirect, that Mr Liu did receive notice.

97. In summary, the Tribunal has no evidence before it that Mr Liu was ever made aware of the SFC enquiry. In the circumstances, the Tribunal is of the view that it is unable to consider whether Mr Liu should be identified as a person having engaged in market misconduct because he has not been given a reasonable opportunity of being heard.

Mr Xu

98. In respect of Mr Xu, the evidence shows that SFC Notice and Synopsis was served on him on 20 June 2014 at an address in Beijing and on 23 June 2014 at another address, on both occasions the DHL receipt being signed by a Xu Wan Ping, that being Mr Xu's full name. In addition, on 23 June 2014, the documents were served at the offices of a Beijing law firm believed to represent Mr Xu.

99. In addition, pursuant to the directions of the Tribunal given at the first directions hearing on 29 October 2014, relevant notices as to the progress of the SFC enquiry was sent to Mr Xu by way of ordinary post to the addresses at which service had been effected in June 2014. Mr Xu was also included in the notifications published in the two newspapers circulating in the PRC.

100. In light of this evidence, the Tribunal is satisfied that Mr Xu did receive the opening documents, that is, the Notice and the Synopsis, and in all probability also received further notices by ordinary post. He was therefore given a reasonable opportunity of being heard. The fact that he chose not to be heard was a matter for him.

(3) Mr Fan

101. On 20 June 2014, the SFC Notice and Synopsis were delivered by a DHL delivery person at an address in Beijing believed after due enquiries to be the residential address of Mr Fan. A person at that address accepted the documents and signed on the receipt under the name of Zhang Xiao.

102. In addition, pursuant to the directions of the Tribunal given at the first directions hearing on 29 October 2014, relevant notices as to the progress of the SFC enquiry were sent to Mr Fan by way of ordinary post to the address at which service had been effected on 20 June 2014. Mr Fan was also included in the notifications published in the two newspapers circulating in the PRC.

103. Although the evidence related to Mr Fan is not the strongest, there is no reason to think that the documents served by DHL on 20 June 2014 were not properly served. As the Tribunal has noted earlier, it is highly unlikely that a delivery by courier service would be accepted if in fact the person to whom the package is addressed is unknown. That being the case, there is no reason to think that later notices sent by ordinary post at the same address would not also have been received.

104. Accordingly, the Tribunal is satisfied that Mr Fan was given a reasonable opportunity of being heard. The fact that he chose not to be heard was a matter for him.

Summary

105. For the reasons given, the Tribunal is satisfied that the seven Specified Persons – with the exception only of Mr Liu – who made no appearance at the substantive enquiry hearing were nevertheless given a reasonable opportunity of being heard. As Mr Liu himself was denied that opportunity, the Tribunal will make no findings in respect of him.

CHAPTER 3

DIRECTIONS AS TO LAW

106. The issues to be determined by the Tribunal in this enquiry have been determined in accordance with the following directions as to law.

The fundamental issue of the burden and standard of proof

107. The SFC bore the burden of proof. In respect of the standard of proof, section 252(7) of the Ordinance provides that –

> "… the standard of proof required to determine any question or issue before the Tribunal shall be the standard of proof applicable to civil proceedings in a court of law."

108. The standard is the balance of probabilities which has been expressed as follows –

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not."

Looking to the requisite elements of section 277(1)

109. Section 277(1) of the Ordinance states as follows:

> "Disclosure of false or misleading information inducing transactions takes place when, in Hong Kong or elsewhere, a person discloses, circulates or

disseminates, or authorizes or is concerned in the disclosure, circulation or dissemination of, information that is likely –

(a) to induce another person to subscribe for securities, or deal in future contracts, in Hong Kong;

(b) to induce the sale or purchase in Hong Kong of securities by another person; or

(c) to maintain, increase, reduce or stabilize the price of securities, or the price for dealings in futures contracts, in Hong Kong,

if –

(i) the information is false or misleading as to a material fact, or is false or misleading through the omission of a material fact; and

(ii) the person knows that, or is reckless or negligent as to whether, the information is false or misleading as to a material fact, or is false or misleading through the omission of a material fact."

110. In the opinion of the Tribunal, in his opening submissions Mr Duncan SC accurately set out the four requisite elements of section 277(1) of the Ordinance by saying that market misconduct is committed if:

(i) a person, whether in Hong Kong or elsewhere, discloses, circulates or disseminates or authorises or is concerned in the disclosure, circulation or dissemination of information ('the first element');

(ii) the information in question is false or misleading as to a material fact or is false or misleading through the omission of a material fact ('the second element');

(iii) the information in question is likely to induce another person to subscribe for securities, or deal in futures contracts, in Hong Kong, or is likely to induce the sale or purchase in Hong Kong of securities by another person, or is likely to maintain, increase, reduce or stabilise the price of securities, or the price for dealings in futures contracts, in Hong Kong ('the third element');

(iv) the person in question knows that, or is reckless or negligent as to, whether the information is false or misleading as to a material fact, or is false or misleading through the omission of a material fact ('the fourth element').

The first element

111. The information which is the focus of this report is information of a financial nature contained in company accounts, more particularly in the Annual Accounts and the Final Results of the Greencool Group, information intended for publication and which was published in respect of each of the five years considered in this report. Publication is one form of dissemination. Whether a person is concerned in, that is, involved in, such dissemination is always a matter of fact. By way of illustration, if a person approves accounts containing such information knowing that such approval is part of the process leading to publication, that person is involved in the publication.

The second element

112. As to the language of this element –

(i) The word ‘false’ is plain enough. It means ‘untrue’. The word ‘misleading’ is also plain enough. It means to cause an incorrect impression. If information is misleading, it is information that is inconsistent with the true state of affairs;

(ii) For the purposes of this report, a ‘fact’ may be said to be an item of verified information, for example, a figure set out in a set of accounts that purports to show a credit balance held in a bank account ; and

(iii) A ‘material fact’ is a fact that is sufficiently significant to influence a reasonable person to take a course of action, for example, in the present case, to deal in Greencool shares. It is to be contrasted with an immaterial fact, one that is unimportant and would not reasonably influence a course of action.

The third element

113. In respect of this element, the only word that requires explanation is ‘likely’. If information is likely to induce others to a course of action, it is probable that it will do so; put another way, there is a real chance it will do so and not a remote chance.

The fourth element

114. This element enunciates what may broadly be termed the 'mental element' of the culpability: knowledge, recklessness and negligence.

(i) Knowledge

115. In respect of knowledge, it need only be said that nothing short of actual knowledge suffices. During the course of submissions, it was said that a person may know something if he shuts his eyes to the obvious. What must be emphasised, however, is that this is not a dilution of the straightforward concept of knowledge. It merely takes into account those circumstances in which it is proved that the person knows the truth but, by way of a façade, seeks not to have confirmed what he already knows.

(ii) Recklessness

116. By way of introduction, it can be said that recklessness describes the state of mind of a person who pursues a course of action consciously disregarding the fact that it gives rise to a real and unjustified risk. The test is a subjective one, going to a person's state of mind. In the present case, the test may be formulated in the following three questions –

(a) When each Specified Person became involved in the publication of the accounts, was he aware of the risk that the information contained in the accounts was false and/or misleading as to a material fact?

(b) Was he aware that in the circumstances the risk was of such substance that it was unreasonable to ignore it?

(c) Did he nevertheless continue with his involvement in the publication?

(iii) Negligence

117. Expressed succinctly, the concept of negligence has been defined as "the failure to exercise that care which circumstances demand".[11]

118. In contrast to recklessness, a subjective concept in which the state of mind of an individual is sought to be ascertained, the concept of negligence is an objective one, being judged through the eyes of the 'reasonable man'. In an earlier report[12], the Tribunal has commented that the concept of negligence has been well expressed (in whimsical fashion) in a Canadian judgment in which it has been defined as –

> "... the failure, in certain circumstances, to exercise that degree of foresight which a court, in its aftersight, thinks ought to have been exercised. The proper standards of foresight and care are those attributed by a court to a reasonably careful, skillful person. The ideal of that person exists only in the minds of men and exists in different forms in the minds of different men. The standard is therefore far from fixed as stable. But it is the best all-round guide that the law can devise…"[13]

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[11] See *Carmarthenshire County Council v Lewis* [1955] 1 All ER 565 (HL)

[12] See *The Report of the Market Misconduct Tribunal of Hong Kong in respect of Evergrande Real Estate Group Limited* dated 26th of August 2016

[13] See *Carlson v Chochinov* [1947] WWR 755 at 759

119. In the present case, negligence may be expressed in the following question. When each Specified Person involved himself in the publication of the accounts, did he exercise that level of care to avoid the inclusion of false or misleading information as to a material fact that may be expected of a reasonably diligent person, with the same knowledge and experience, discharging the same corporate duties?

The disputed issue of 'causation'

120. It was submitted by Mr Ng, counsel for Mr Henry Mok, that, even if recklessness or negligence on the part of Mr Henry Mok was demonstrated by the SFC, that of itself was not sufficient to prove culpability under s.277(1) of the Ordinance. An additional matter fell to be proved, namely, that it was Mr Henry Mok's recklessness or negligence that was the dominant – or co-dominate – cause of the publication of the false information in the accounts.

121. But that, said Mr Ng, could never be proved against Mr Henry Mok because, on the evidence, it was plain that the falsification of the accounts was the work of a core of senior directors and senior management of Greencool. Mr Henry Mok may have failed to detect the falsities in the accounts but he had not brought about, that is, caused, those falsities and therefore caused the dissemination of false or misleading information.[14] Even if it was shown that Mr Henry Mok had fallen below the standards expected of a professional accountant,

[14] In support of his submissions, Mr Ng cited the following dictum of Lord Reid in *Stapley v Gypsum Mines* [1953] AC 63 at 681: "One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

said Mr Ng, that failure was simply too remote to be in any way causative of the publication of the false accounts.

122. In the view of the Tribunal, however, while the issue of causation may be critical to determining culpability in common law tort, s.277(1) of the Ordinance does not incorporate the principles of common law tort. Pursuant to s.277(1) of the Ordinance, a person who plays a role in the publication of information likely to have an impact on the market is only held liable if it is demonstrated, first, that the information is false or misleading as to a material fact and, second, that the person knows or is reckless or negligent as to whether the information is false or misleading as to a material fact. On this basis, any number of persons can be found liable provided each is found to know that the published information is false or misleading or is found to be reckless or negligent in that regard. There may therefore be degrees of culpability; a person who knows that information is false or misleading is likely (all else being equal) to be held to a more serious degree of culpability than a person whose culpability is founded on negligence as to that fact. In the circumstances, as the Tribunal sees it, the principle of causation (as argued by Mr Ng) is not applicable in determining culpability pursuant to the terms of s.277(1).

123. The principles of relevance and remoteness of course are applicable. A person's culpable state of mind must relate to the fact that the published information is false or misleading as to material matters and in that regard must be sufficiently immediate.

124. During the course of submissions, mention was made of a Legislative Council brief that spoke to the contemplated provisions of s.277 of the Ordinance. In that brief it was said that the common law concepts of recklessness and

negligence had been incorporated into the section. The Tribunal accepts that to have been the case and it has directed itself accordingly, its directions (given earlier) meeting its understanding of the two concepts in common law. But that said, the concepts must be read within the context of the statutory language passed into law and, as already set out, the Tribunal cannot see how the principle of causation can be read into s.277(1) of the Ordinance without distorting the otherwise clear language of the section.[15]

Drawing inferences

125. Inferences are not to be drawn by way of conjecture nor on a balance of probabilities. In so far as it has been necessary to draw inferences, the Tribunal has directed itself that any conclusions reached must be plainly established as a matter of inference from proved facts. The proceedings being civil in nature, it would not be right to say that the requisite standard prescribes that the inference is to be the only inference that can be drawn, that being the standard which applies to criminal matters. However, an inference must be established as a compelling inference.

The scope of the evidence to be considered by the Tribunal

126. In addition to hearing witnesses give oral evidence, the Tribunal has had to consider a large number of statements, records of interview and the like of persons who, for one reason or another, were not available to give testimony before it. In this regard, pursuant to section 253(1)(a) of the Ordinance, the Tribunal does have the power to receive and consider written statements or

[15] In the course of submissions, Mr Ng placed considerable weight on the Australian authority of *ASIC v MacDonald (No 11)* [2009] NSWSC 287 but, upon analysis, the Tribunal did not find it to be of any material assistance.

documents, even though they may not be admissible in civil or criminal proceedings in a court of law. That said, care must be exercised when considering what weight, if any, is to be given to such evidential material.

Separate consideration of the case against each Specified Person

127. The Tribunal has considered the case against and for each of the Specified Persons separately.

Avoiding determining culpability with the benefit of hindsight

128. For the reasons set out later in this report, the Tribunal has come to the determination that evidence of a systemic fraud in the Greencool subsidiaries is overwhelming. It does not follow, however, that it would have been as apparent at the time; indeed, to the contrary, the evidence is that it was well concealed at the time. Nor, as pointed out by counsel, did the market possess as much experience (good and bad) in the early 2000s of emerging Mainland companies as it now possesses. The guidance urged upon the Tribunal is given in the words of the court in *The Wagon Mound (No 1)*[16]:

> "After the event even a fool is wise. But it is not the hindsight of a fool; it is the foresight of the reasonable man which alone can determine responsibility."

[16] [1961] AC 388 (PC) at 424

Good character

129. The Chairman has directed the Tribunal that a Specified Person of good character is less likely than otherwise might be the case to have committed the misconduct alleged and that good character supports his credibility in respect of both his evidence in the Tribunal and in his records of interview.

Expert Evidence

130. During the course of the enquiry, the Tribunal received certain expert opinion evidence. The Tribunal received that evidence, as to both the information given and the expressions of opinion, because it was likely to be outside the experience and knowledge of the Tribunal and/or would be of real assistance, in respect of the discharge of professional skills by any of the Specified Persons, in enabling the Tribunal to come to a true determination of relevant matters. The evidence of expert opinion, however, was received on the basis that the Tribunal was entitled to accept or reject all or part of that evidence in reaching its own conclusion based on its assessment of all the evidence.

131. Indeed, during the course of the hearing, counsel for Ms Margaret Man and Mr Henry Mok objected to the admission of certain expert evidence tendered by the SFC on the basis that it concerned a well understood area of corporate responsibility, namely, the duties of directors and other senior officers, an area that was not so specialised or esoteric in nature that it required the assistance of an expert to enable the Tribunal to come to a sound judgement on the matter. Details of that application and the Tribunal's ruling are given later in this chapter.

The duty of care owed by directors

132. Seven of the eight remaining Specified Persons were at all material times directors of Greencool. The remaining Specified Person, Mr Henry Mok, although not a director, was a senior officer of the company, it being asserted that he had group-wide responsibilities to ensure its financial integrity.

133. As such, in respect of the eight Specified Persons who were directors, the Tribunal is satisfied that their actions have to be considered within the context of the duty of care that each of them owed to Greencool as directors of the company. It was that duty of care which governed how they acted day by day in discharging their obligations to the company and it must be that duty of care therefore which acts as the yardstick in determining their regulatory culpability. As to the nature and extent of that duty of care, the Tribunal was referred by counsel to a number of authorities. From those authorities, a clear picture emerges.

134. The classic authority in company law as to the duty of care owed by directors is *Re City Equitable Fire Insurance Co Ltd*[17]. In his judgment, Romer J, having said that the care owed by a director to his company is such 'reasonable care' as an ordinary man might be expected to take in the circumstances on his own behalf, went on to make the following three observations.

> First –
>
> "A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience. A director of a life-insurance company, for

[17] [1925] 1 Ch 407 at 426 onwards.

instance, does not guarantee that he has the skill of an actuary or of a physician. In the words of Lindley MR: "If directors act within their powers, if they act with such care as is reasonably to be expected from them, having regard to their knowledge and experience, and if they act honestly for the benefit of the company they represent, they discharge both their equitable, as well as their legal duty to the company…"

Second –

"A director is not bound to give continuous attention to the affairs of his company. His duties are of an intermittent nature to be performed at periodical board meetings, and at meetings of any committee of the board upon which he happens to be placed. He is not, however, bound to attend all such meetings, though he ought to attend whenever, in the circumstances, he is reasonably able to do so."

Third –

"In respect of all duties that, having regard to the exigencies of business, and the articles of association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly.

135. Of particular relevance in this present enquiry, Romer J commented in respect of the third observation:

"In the judgment of the Court of Appeal in *In Re National Bank of Wales Ltd* the following passage occurs in relation to a director who had been deceived by the manager and managing director as to matters within their own particular sphere of activity: "Was it his duty to test the accuracy or completeness of what he was told by the general manager and the managing director? This is a question on which opinions may differ, but we are not prepared to say that he failed in his legal duty. Business cannot be carried on upon principles of distrust. Men in responsible positions must be trusted

> by those above them, as well as by those below them, until there is reason to distrust them. We agree that care and prudence do not involve distrust; but for a director acting honestly himself to be held legally liable for negligence, in trusting the officers under him not to conceal from him what they ought to report to him, appears to us to be laying too heavy a burden on honest business men."

136. If a director, in the absence of grounds for suspicion, is entitled to place trust in other directors and officials, what of outside agencies tasked to assist the company, particularly the auditors? In this regard, Mr Li, counsel for Ms Margaret Man, (who was a Non-Executive director of Greencool) looked to the authority of the Australian case of *AWA v Daniels*[18] in which the judge at first instance, Rogers J, observed that a non-executive director does not have to turn himself or herself into an auditor, managing director, chairman or other officer to find out whether management are deceiving him or her. In respect of auditors, the judge continued by saying:

> "… if directors appoint a person of good repute and competence to audit the accounts, absent real grounds for suspecting that the auditor is wrong, the directors will have discharged their duty to the corporation. The directors are not required to look at the entries in any of the corporation's books of record, or verify the calculations of the corporation's accountants in preparing the financial statements or of the auditor himself. Directors are entitled to rely on the judgment, information and advice of the auditor."[19]

137. As the Tribunal understands it, today the founding principles laid down in *Re City Equitable Fire Insurance Co Ltd* have been refined, incorporating both

[18] (1992) 7 ACSR 759

[19] As pointed out by Mr Li, the Court of Appeal affirmed these observations by the judge at first instance, the appellate judgment being found at (1996) 16 ACSR 607.

an objective and subjective test. What is to be considered, therefore, is the conduct of a reasonably diligent director having both –

(i) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as the director (the objective test); and

(ii) the general knowledge, skill and experience possessed by the director (the subjective test).

138. On this basis, while a reasonably diligent director, is entitled – absent reasonable grounds for suspicion - to rely on other directors, company officials and outside professionals such as auditors to perform their duties with integrity, skill and competence, it does not mean that he or she is thereby entitled to abandon responsibility for guiding and monitoring the affairs of the company. In this regard, Mr Duncan, the Presenting officer for the SFC, made reference to a further Australian authority, that of *ASIC v Healey & Others,*[20] a case in which the Australian Securities and Investments Commission brought proceedings against the CEO, the CFO and certain independent non-executive directors of a company, seeking declarations that they had breached their statutory duty of care and diligence in approving certain consolidated financial accounts for the group. The matter was determined within the context of the relevant statutory provisions. The Tribunal agrees, however, that certain observations by the judge at first instance, Middleton J, reflect the common law position. In this regard, he observed:

[20] [2011] 196 FCR 291

> "The case law indicates that there is a core, irreducible requirement of directors to be involved in the management of the company and to take all reasonable steps to be in a position to guide and monitor. There is a responsibility to read, understand and focus upon the contents of those reports which the law imposes a responsibility upon each director to approve or adopt."

139. Middleton J continued by stating that all directors must carefully read and understand financial statements, such a reading and understanding requiring directors to consider whether the financial statements are consistent with their own knowledge of the company's financial position. He continued:

> "This accumulated knowledge arises from a number of responsibilities a director has in carrying out the role and function of a director. These include the following: a director should acquire at least a rudimentary understanding of the business of the corporation and become familiar with the fundamentals of the business in which the corporation is engaged; a director should keep informed about the activities of the corporation; whilst not required to have a detailed awareness of day-to-day activities, a director should monitor the corporate affairs and policy; a director should maintain familiarity with the financial status of the corporation by a regular review and understanding of financial statements; a director, whilst not an auditor, should still have a questioning mind."

140. Middleton J qualified this by saying:

> "Nothing I decide in this case should indicate that directors are required to have infinite knowledge or ability. Directors are entitled to delegate to others the preparation of books and accounts and the carrying on of the day-to-day affairs of the company. What each director is expected to do is to take a diligent and intelligent interest in the information available to him or

her, to understand that information, and apply an enquiring mind to the responsibilities placed upon him or her. Such a responsibility arises in this proceeding in adopting and approving the financial statements. Because of their nature and importance, the directors must understand and focus upon the content of financial statements, and, if necessary, make further enquiries if matters revealed in those financial statements call for such enquiries.

No less is required by the objective duty of skill, competence and diligence in the understanding of the financial statements that are to be disclosed to the public as adopted and approved by the directors.

No-one suggests that a director should not personally read and consider the financial statements before that director approves or adopts such financial statements. A reading of the financial statements by the directors is not merely undertaken for the purposes of correcting typographical or grammatical errors or even immaterial errors of arithmetic. The reading of financial statements by a director is for a higher and more import purpose: to ensure, as far as possible and reasonable, that the information included therein is accurate. The scrutiny by the directors of the financial statements involves understanding their content. The director should then bring the information known or available to him or her in the normal discharge of the director's responsibilities to the task of focusing upon the financial statements. These are the minimal steps a person in the position of any director would and should take before participating in the approval or adoption of the financial statements and their own directors' reports."

141. As to the distinction, if any, in the eyes of the law between executive directors and independent non-executive directors[21], an authority binding on this

[21] A non-executive director is a director who has no executive or management responsibilities in the company. He is deemed to be independent under the Listing Rules if he is independent of management and does not receive any benefits from the company other than his director's fee.

Tribunal is that of *Re Boldwin Construction Co Ltd & Another*[22] in which Rogers VP made the following unequivocal statement:

> "Executive directors and non-executive directors have the same responsibility in law as to the management of the company's business. They have the same responsibility in law with regard to the finances of the company and as regards accounting to the shareholders for the company's finances. The law, and, in particular, the Companies Ordinance, does not have any regard to whether a director has an executive position within the company, or whether a director is paid a salary. The duties and responsibilities arising from a directorship are the same."

Ruling on the admission of certain expert evidence

142. During the course of the hearing, the Presenting Officer for the SFC sought to introduce certain expert evidence on the duties of care owed by the Specified Persons and whether there had been a failure to meet those duties. The admissibility of that evidence was challenged by counsel for both Ms Margaret Man and Mr Henry Mok. As to the nature of the expert evidence that was challenged, the following is a summary:

(i) Mr John Lees, a Fellow of the Hong Kong Institute of Certified Public Accountants and a practising member of the Academy of Experts, was asked to prepare two expert reports. The first and principal report ('the principal report') was dated 14 March 2014. The second and supplementary report ('the supplementary report') was dated 24 July 2015.

[22] [2001] 3 HKLRD 430

(ii) In respect of the principal report, the SFC asked Mr Lees to comment whether, over the relevant five-year period, the Specified Persons should have had grounds for concern, first, as to the unusually high cash balances held in the Group's various bank accounts and, second, as to the accuracy of the loan balances. If such grounds were demonstrated, Mr Lees was asked to give his opinion as to what actions the Specified Persons should have taken to fulfil their respective duties;

(iii) Mr Lees found that the Specified Persons all had valid reasons to question the accuracy of the unusually high amounts of cash held in the Group's bank accounts and to question the accuracy of the loan balances;

(iv) As to the actions that should have been taken, Mr Lees detailed what he considered to be the appropriate action that should have been taken by each of the Specified Persons according to the office each held in the Group. For example, in respect of the two Independent Non-Executive Directors – Ms Margaret Man being one of them – Mr Lees began his comments by saying:

> "(a) All directors, including the INEDs, should have received board papers prior to each board meeting which should contain various reports that inform board members of the company's financial position, progress of plans, and other important developments since the last board meeting. The INEDs should have spent sufficient time to review the board papers in detail. In the event that the board papers were not received by the INEDs, the INEDs should have insisted that the board papers be provided for their review;

(b) obtained explanations from the board as to the reasons for retaining such significant bank balances for each of the 2000 to 2004 years, which represented approximately 66% to 84% of the total net assets of the Group during the review period;

(c) obtained explanations from the board regarding the inconsistencies noted between the [Group's gross profit margins and the gross profit margins of comparable companies];

(d) be satisfied that the explanations… were reasonable and that they align[ed] with Greencool's investment policy… "

(v) Turning to the supplementary report, the focus of attention was on Mr Henry Mok, not in his capacity as the Company Secretary or as the Qualified Accountant under the GEM Listing Rules, but as the 'Financial Controller' of the Greencool Group. In this regard, the SFC instructions to Mr Lees were for him to comment on whether the fact that Mr Mok was a 'Financial Controller' put him in the same situation as the Executive Directors, Independent Non-Executive Directors and Audit Committee members and the extent of such duties; and

(vi) In respect of these supplementary instructions, Mr Lees concluded that, as Financial Controller, Mr Henry Mok was responsible for overseeing and supervising all financial information of the Group. In the result, he was responsible for reviewing the accounts and records of all the companies in the Group, including Greencool, the BVI subsidiaries and the PRC subsidiaries. Mr Lees was of the opinion that, if he was unable to fulfil these duties, Mr Henry Mok could have sought recourse by

appealing to the Board and/or to members of the Audit Committee, there being no record, however, that he had done so.

143. Returning to the basis of the challenge to the admissibility of both statements of expert opinion, Mr Li, counsel for Ms Margaret Man, referred the Tribunal to the test laid down in *R v Bonython*[23], which has been described as a three-part test in *Expert Evidence: Law and Practice*[24]*:*

> "whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge of human experience would be able to form a sound judgement on the matter without the assistance of witnesses possessing special knowledge or experience in the area (the first limb);
>
> whether the subject matter of the opinion forms part of a body of knowledge or experience, which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court (the second limb); and
>
> whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court (the third limb)."

144. Concerning Ms Margaret Man, one of two Independent Non-Executive Directors and a member of the Audit Committee, Mr Li submitted that the obligations owed by a director, including those of a director who is a member of an audit committee, were, as set out in this chapter, well understood. They were not duties requiring specialist expertise. Directors of companies did not require

[23] (1984) 38 S.A.S.R 45 at 46, South Australian Supreme Court

[24] 4th Edition, Litigation Library, page 11

the advanced specialist learning of doctors or engineers. There was therefore no necessity for a professional tribunal, in order to determine whether such obligations had been met according to the standards laid down by law, to seek expert opinion. Mr Li accepted that there may be occasions when expert evidence may be required, for example, in order to obtain an enhanced factual understanding of a complex business product or to understand why a director's conduct that may have one appearance or consequence in the general context has a very different appearance or consequence in the context of managing a specialised business[25]. But no such special circumstances existed in the present case, he said. It was simply a matter for the Tribunal to apply standards laid down by the courts with reference to the relevant facts.

145. Mr Ng, counsel for Mr Henry Mok, made submissions to like effect; namely, that, as with a director, the duties of a Company Secretary and of a Qualified Accountant pursuant to the GEM Listing Rules were well understood and that, in the circumstances, for an expert to testify as to the nature and extent of such duties was a "usurpation of the Tribunal's role".

146. In an oral ruling given on the 12th day of the hearing, the Tribunal said that it was satisfied that Ms Margaret Man had held two positions as a director that required the exercise of sound judgement and good common sense but did not require such an arcane body of knowledge and/or experience that the Tribunal required expert evidence to fully comprehend the nature and extent of her duties.

147. In the result, the Tribunal ruled that the two statements of expert opinion, in so far as they related to Ms Margaret Man, were inadmissible into evidence.

[25] In this regard, see *Secretary of State for Trade and Industry v Aaron* (Ch) D [2007] Bus LR Digest

148. In respect of Mr Henry Mok, however, the Tribunal came to a different decision. At the relevant time, Mr Henry Mok had been a Professional Accountant, qualified not only in Hong Kong but in at least one other jurisdiction. As a Qualified Accountant appointed pursuant to the GEM Listing Rules and, more importantly, if it was found that he had been the Group Financial Controller, he would therefore have been discharging professional duties that had a particular reach and level of professional expertise. As the Chairman observed, "whatever the true nature and extent of his offices, and that is a matter which the Tribunal understands will be the subject of dispute, the fact remains that he not only held the office of a Qualified Accountant under the GEM Listing Rules but was also described as being the Financial Controller of the Group, that is, not only of the holding company, but of its various subsidiaries".

149. Even though a professional tribunal, the Tribunal could only act on evidence placed before it for its consideration; it could not give evidence to itself. The Tribunal considered that Mr Lees would be able to assist it by giving expert evidence as to the role of a Group Financial Controller, it being the Tribunal's sole decision whether to accept that evidence or reject it either in part or in whole.

150. In this regard, the Chairman noted that section 253(1)(a) of the Ordinance provided that the Tribunal was empowered, on its own motion or on the application of any party before it, to receive and consider evidence even if it would not be admissible in civil or criminal proceedings in a court of law. As he further noted, while obviously this authority had to be employed in a principled manner, it did give a broader discretion to the Tribunal in seeking the assistance of evidence that it believed would enable it to come to a true determination.

151. For the reasons given, the Tribunal was inclined to receive into evidence just the supplementary expert opinion prepared by Mr Lees.

152. Mr Ng, however, submitted strongly that either both expert opinions were to be excluded from evidence or both were to be included. Recognising that it was for Mr Ng to determine how best to protect his client's best interests, the Tribunal ruled that accordingly both expert opinions would be received into evidence.

153. As to the manner in which the Tribunal's ruling was to be put into effect, recognising that it was a professional tribunal, the Chairman ruled that the Tribunal would have no difficulty in considering the evidence arising out of the two expert opinions in so far as that evidence applied to Mr Henry Mok but giving it no consideration whatsoever, that is, no weight whatsoever, in respect of Ms Margaret Man. In preparing this report, the Tribunal has proceeded on that basis.

CHAPTER 4

WAS THERE A DISSEMINATION OF FALSE OR MISLEADING INFORMATION LIKELY TO HAVE AN IMPACT ON THE MARKET?

154. As recorded earlier in this report, it is the SFC case that, in order to make the business operations of the Greencool Group appear more successful than in truth they were, within certain of the Greencool subsidiaries fictitious sales and commercial projects were created. In order to manage the fraud, false commercial papers, including contracts, invoices and bank documents, were created. In addition, in a number of subsidiaries, it was necessary to maintain separate books of account, the accounts giving a true record never being made available to external sources, certainly not to the Group auditors. In order to give effect to the fraud, that is, to ensure that false figures appeared in the Group accounts published under the GEM Listing Rules, individual officials in a number of banks which did business with the Group were prevailed upon to supply false bank records, principally as to the value of deposits held and/or the existence of loans advanced to companies within the Group.

155. In order to prove the matters asserted by the SFC, a voluminous amount of evidence was placed before the Tribunal. That evidence was unchallenged. First, none of the Specified Persons who had been Executive Directors chose to appear before the Tribunal to challenge it.[26] As the Tribunal has already determined, a number of them were given a reasonable opportunity to make such representations but chose not to take advantage of that opportunity. Second, as the Tribunal understood it, counsel representing both Ms Margaret Man and

[26] Mr Chen did not appear before the Tribunal although he made a number of written representations. In those representations, as the Tribunal has understood them, he did not seek to refute the existence of the fraud but rather sought to distance himself from any involvement and expressed his shock at the evidence of the ex-employees who spoke of the nature and extent of the fraud.

Mr Henry Mok at no time sought to challenge the evidence proving the fraud. The issue in respect of both of those Specified Persons was instead whether, being involved in the publication of the accounts, they had been reckless or negligent as to the fact that they were false or misleading as to matters sufficiently material to be likely to have an impact on the market.

156. The Tribunal accepts, of course, that, whether unchallenged or not, it was still for it, on a consideration of all the evidence, to determine whether the fraud had been proved to the required standard. This was done.

157. Having considered the evidence in its entirety, exercising due care when considering interview statements only, that is, statements not supported by way of oral evidence before the Tribunal and therefore statements that remained untested, the Tribunal was nevertheless left in no doubt that a fraud of the magnitude asserted by the SFC had been amply demonstrated.

158. It would be a most significant task to attempt to set out in detail the nature and extent of every part of the evidence presented to the Tribunal to prove what the Tribunal is satisfied constituted an extended fraud, both as to its nature and as to its length. The task of the Tribunal is to make findings in the light of the evidence presented and this it has done. That said, the Tribunal accepts that some indication of the evidence presented should be given in order to demonstrate the basis upon which it came to its findings and to demonstrate its reasoning.

An overview

159. As set out in paragraph 7 of the Synopsis, Greencool's Annual Accounts contained the following information about Greencool and its subsidiaries.

Financial year ended	Bank deposits (RMB)	Bank loans (RMB)	Net asset value (RMB)	Sales (Revenue /Turnover) (RMB)	Profit after tax (RMB)	Trade Receivables (RMB)
31.12.2000	850,695,000	20,000,000	1,140,010,000	363,897,000	269,124,000	86,207,000
31.12.2001	850,621,000	80,000,000	1,295,254,000	516,330,000	314,342,000	96,666,000
31.12.2002	1,031,033,000	68,000,000	1,325,115,000	321,420,000	82,688,000	52,700,000
31.12.2003	1,114,560,000	75,000,000	1,333,572,000	106,834,000	8,624,000	17,095,000
31.12.2004	977,729,000	24,000,000	1,350,193,000	184,845,000	16,621,000	30,439,000

160. The SFC asserted that this information – concerning bank deposits, bank loans, net asset values, sales profit after tax and trade receivables – were materially false and/or misleading.

Overstating of bank deposits

161. Evidence placed before the Tribunal[27] showed that there had been a marked inflation of funds held in six bank accounts opened by Greencool subsidiaries. For the year ended 31 December 2000 the bank deposit funds were overstated by amounts in excess of RMB 388 million; for the year ended 2001 by amounts in excess of RMB 500 million; for the year ended 2002 by amounts in excess of RMB 741 million; for the year ended 2003 by amounts in excess of RMB 877 million and for the year ended 2004 by amounts in excess of RMB 625 million.

[27] See paragraph 8.1 of the Synopsis.

162. The materiality of these fictitious figures can be illustrated easily enough when it is realized that the fictitious figure for the year ended 2000 was some 45% of the declared figure.

163. The fraud was discovered by means of obtaining original bank records and comparing them with false bank certifications that had been obtained between 2000 and 2004 for presentation to the Group auditors.

164. As an illustration, one subsidiary, Shenzhen Greencool[28] maintained an account with the Agricultural Bank of China, Luohu Sub-Branch ('the Agricultural Bank'). In respect of this account, it was shown that –

(i) As at 31 December 2000 Shenzhen Greencool held a sum of just RMB 1.402 million with the Agricultural Bank, this being verified by the head of accounting at the bank (Yu Yue Hua) who took the figures directly from the account records held in the bank. Figures for the amounts held in the accounts as at 31 December 2001, 2002, 2003 and 2004 were also verified;

(ii) However, in the course of its audit for the year ending 31 December 2000, the then auditors of the Greencool Group, Arthur Andersen, had been provided with a document headed (in translation) 'Bank Confirmation' bearing the official chop of the Agricultural Bank that showed that Shenzhen Greencool held a credit balance in its account in excess of RMB 168 million, this document falsely overstating the balance stated in the bank's records by an amount in excess of RMB 166 million;

[28] The full name of the company being Greencool Environmental Protection Engineering (Shenzhen) Co Ltd.

(iii) The evidence shows that Arthur Andersen relied on this false bank confirmation and that the false figure was a constituent part of the balance sheet for the year ended 31 December 2000 contained in Greencool's Annual Report, the balance sheet stating that the Greencool Group held 'cash and bank deposits' of RMB 850,695,000;

(iv) As to why this was necessary, in a statement dated 18 October 2010, Mr Chen Wei, the Finance Manager of Shenzhen Greencool at the relevant time said: "The bank balance of Shenzhen Greencool was generated mainly by fabricating the balance of the account at the Agricultural Bank. As the fictitious sales income had to be reflected in bank balances, the fictitious bank balance became larger and larger" ;

(v) Mr Chen admitted that much of the business generated by Greencool Shenzhen was fictitious. He said that he would report to Mr Zhang (the second Specified Person) as to the true amount of income and that Mr Zhang would then ask Mr Gu (the first Specified Person) for instructions as to how much fictitious income should be created. Once Mr Gu had made his decision, Mr Chen said that he would then be instructed and would set about creating the false documentation. He said that, to his memory, the company had an actual annual income of about RMB 5 million but the accounts were falsified to record an income of about RMB 25 million;

(vi) In respect of falsified sales, Mr Chen said that he would tell the auditors from Hong Kong that these were sales conducted with special clients and that no invoices had to be issued after the signing of contracts. In respect

of fictitious contracts, the name of the clients would be real, he said, but the contract amounts would not be real;

(vii) Mr Chen confirmed that when the auditors wished to review bank statements and obtain bank confirmations, Mr Zhang would "collude" with a manager of the front desk at the Agricultural Bank and the bank's seal would be put on fictitious bank confirmations;

(viii) Mr Chen said that, in order to manage the company's materially fictitious business, it was necessary to maintain three separate books of account. As the Tribunal understands it, the first book of accounts was true, the second was tailored to meet the requirements of a Hong Kong listed company and the third was for taxation purposes;

(ix) Mr Chen said that Mr Zhang confided in him that, as the fictitious bank balances became larger and larger, Mr Gu would think of ways to digest the increased amounts. In this regard, Mr Chen said:

> "This company did not operate like ordinary listed companies which would regularly convene board or management meetings to report what was happening in the company. In fact, all decisions of this company were made by Gu Chu Jun. Even a junior staff member like me knew the real situation of the company."

(x) In an interview dated 12 October 2010, Ms Mo Shu ('Ms Mo'), who joined Shenzhen Greencool in 1999 as a cashier, said that, working under the direct instructions of Mr Zhang, she was responsible for helping to manage the three separate account books, creating false business documentation, vouchers and the like. She said: "I believe it

was Gu Chu Jun who determined the total amount of income to be falsified for the whole Greencool Group. Then Zhang Xi Han would tell [two other Greencool employees] what were the false figures to be entered in the accounts of Shenzhen Greencool. They would discuss to which customer these figures were to be attributed";

(xi) In respect of the auditors, Ms Mo said that only one of the books would be made available to the auditors, the one containing the fictitious figures. When the auditors wanted to go in person to the Agricultural Bank to obtain data confirmation documents, she said, Mr Zhang would contact the front desk business manager in advance, that person being the one who worked with Mr Zhang and a limited number of others in Greencool to ensure that the falsification of accounts ran smoothly. In this regard, she said the following:

> "As mentioned, I would be responsible for making false deposit receipts and account statements. When the auditors wanted to go in person to the bank to obtain the confirmations, Zhang Xi Han would already have contacted the front desk business manager [name given] who would be responsible for affixing the chop on some falsified bank confirmations."[29]

(xii) As to why it was necessary to falsify the bank balances, Ms Mo commented:

[29] Ms Mo confirmed that to her knowledge Mr Zhang Xi Han had "some false bank chops" which would be used when necessary. She said that she filled out a lot of bank deposit slips, all under the instructions of Mr Zhang, but she would not be the one to go to the bank to carry out the transactions.

> "… it was mainly the amount in [the company's] account at the Agricultural Bank that was falsified. It was, because at the end of the day, the false sales incomes had to be reflected in the bank balance. The falsified bank balance, therefore, would keep going up and up."

(xiii) In her statement, Ms Mo confirmed that this practice of falsifying sales and incomes from commercial projects which inflated the company's bank balances existed throughout 2000, 2001, 2002, 2003 and 2004.[30]

165. In the judgment of the Tribunal, when considered in the round, this evidence was telling. It did not rely solely on the word of witnesses whose credibility may be in doubt but was supported by documentation which of itself, when considered in context, was damning. The evidence concerning other instances of inflated bank balances was equally telling.

166. Evidence as to two other subsidiaries broadens the evidence of fraud. In this regard the Tribunal can do no better than effectively set out the closing submissions of Mr Duncan on behalf of the SFC.

[30] As an indicator of the degree to which those who planned the creation of fictitious business and, flowing from that, the fictitious inflation of bank balances, sought to ensure that they would not be brought to account, in her record of interview dated 12 October 2010, Ms Mo Shu said that Mr Zhang had instructed an expert, a Dr Gao Jie, to work on the design of false documentation. In this regard, she said the following: "Zhang Xi Han at that time instructed Dr Gao Jie, who worked in the company, to design a set of form and font, which resembled that of the genuine bank account statements. As Gao Jie worked on the design using the computer of the finance department, I could see and was clearly aware of it. Later, Zhang Xi Han asked Gao to teach me how to do it. I began to prepare falsified bank deposit receipts and account statements around the end of the year 2000."

Beijing Greencool

(i) According to the Annual Report (which included the Annual Accounts) of Greencool for the year ended 31 December 2000, Greencool held RMB 850,695,000 as "Cash and bank deposits";

(ii) According to the records of the Agricultural Bank of China, Beijing Greencool held RMB 5,059,938.82 with the bank as at 31 December 2000. This was verified by banking staff;

(iii) In the course of its audit for the year ending 31 December 2000, Arthur Anderson, then auditors of Greencool, was provided with a bank confirmation purporting to show a balance with Agricultural Bank of China of RMB 86,658,032. Arthur Anderson relied on this false bank confirmation; and

(iv) Comparing the figure of RMB 5,059,938.82 with the balance of RMB 86,658,032 included for consolidation by Arthur Andersen, the deposit balance held by Beijing Greencool with the Agricultural Bank of China was overstated by RMB 81,598,093.18 as at 31 December 2000.

Hainan Greencool

(i) According to the Annual Report (which included the Annual Accounts) of Greencool for the year ended 31 December 2000, Greencool held RMB 850,695,000 as "Cash and bank deposits";

(ii) According to the records of Bank of Communication, Hainan Branch, Hainan Greencool held RMB 2,585,411.53 with the bank as at 31 December 2000. This was verified by banking staff;

(iii) In the course of its audit for the year ending 31 December 2000, Arthur Anderson, then auditors of Greencool, was provided with a bank confirmation purporting to show a balance with Bank of Communication, Hainan Branch of RMB 143,165,040. Arthur Anderson relied on this false bank confirmation; and

(iv) Comparing the figure of RMB 2,585,411.53 with the balance of RMB 143,165,040 included for consolidation by Arthur Andersen, the deposit balance held by Hainan Greencool with the Bank of Communication, Hainan Branch was overstated by RMB 140,579,628.47 as at 31 December 2000.

Non-disclosure of bank loans

167. Evidence placed before the Tribunal showed that in the financial years ending 31 December 2000, 2001, 2002, 2003 and 2004, there had been a failure to disclose 31 bank loans having a total value of RMB 953.2 million –

(i) For the year ended 31 December 2000, loans totaling RMB 98 million had not been disclosed, the loans being:

Lender	Borrower	Amount (RMB)
Bank of Communications	Shenzhen Greencool	29,000,000
China Minsheng Bank	Shenzhen Greencool	20,000,000
Shanghai Pudong Bank	Shenzhen Greencool	30,000,000
Agricultural Bank	Beijing Greencool	19,000,000

(ii) For the year ended 31 December 2001, loans totaling RMB 152 million had not been disclosed, the loans being:

Lender	Borrower	Amount (RMB)
China Minsheng Bank	Shenzhen Greencool	20,000,000
Shanghai Pudong Bank	Shenzhen Greencool	33,000,000
Agricultural Bank	Beijing Greencool	30,000,000
Agricultural Bank	Beijing Greencool	50,000,000
Agricultural Bank	Beijing Greencool	19,000,000

(iii) For the year ended 31 December 2002, loans totaling RMB 240.2 million had not been disclosed, the loans being:

Lender	Borrower	Amount (RMB)
China CITIC Bank	Shenzhen Greencool	20,000,000
China Minsheng Bank	Shenzhen Greencool	20,000,000
Shanghai Pudong Bank	Shenzhen Greencool	34,200,000
Shanghai Pudong Bank	Shenzhen Greencool	67,000,000
Agricultural Bank	Beijing Greencool	30,000,000
Agricultural Bank	Beijing Greencool	50,000,000

Agricultural Bank	Beijing Greencool	19,000,000

(iv) For the year ended 31 December 2003, loans totaling RMB 184 million had not been disclosed, the loans being:

Lender	**Borrower**	**Amount (RMB)**
Shanghai Pudong Bank	Shenzhen Greencool	50,000,000
Guangdong Development Bank	Jiangsu Greencool	15,000,000
Agricultural Bank	Beijing Greencool	30,000,000
Agricultural Bank	Beijing Greencool	50,000,000
Agricultural Bank	Beijing Greencool	19,000,000
Bank of Communications	Hubei Greencool	20,000,000

(v) For the year ended 31 December 2004, loans totaling RMB 279 million had not been disclosed, the loans being:

Lender	**Borrower**	**Amount (RMB)**
Shanghai Pudong Bank	Shenzhen Greencool	45,000,000
Guangdong Development Bank	Jiangsu Greencool	15,000,000
Agricultural Bank	Beijing Greencool	50,000,000
Agricultural Bank	Beijing Greencool	30,000,000
Agricultural Bank	Beijing Greencool	19,000,000
Bank of Communications	Hubei Greencool	30,000,000
Bank of Communications	Hubei Greencool	20,000,000
Hua Xia Bank	Hubei Greencool	20,000,000
Hua Xia Bank	Hubei Greencool	50,000,000

168. For the years ending 31 December 2000, 2001 and 2002 the undisclosed loans were to either Shenzhen Greencool or Beijing Greencool. For the years ending 31 December 2003 and 2004, the undisclosed loans were to Shenzhen Greencool (2); Beijing Greencool (6); Hubei Greencool (5) and Jiangsu Greencool (2).

169. Again, the fraud was discovered by means of discovering original loan documentation and obtaining original bank records. The SFC discovered 31 bank loans that were concealed.

170. Having considered the relevant evidence, the Tribunal is satisfied that this fraud has been proved. Again, the documentation, when considered in context, stands on its own. Again, however, there is witness evidence which, although untested, is direct and compelling.

171. Again, as an illustration, the financial statements of Beijing Greencool for the year ended 31 December 2000 provided to Arthur Andersen stated that there were no short term loans for this subsidiary –

(i) Confirmation of this was received from the Agricultural Bank of China, Beijing Chanping Sub-Branch, and acted upon by the auditors;

(ii) In fact, the undisclosed short-term borrowings of this subsidiary at the end of the 2000 financial year amounted to RMB 19 million. This was evidenced by a loan agreement for RMB 19 million (for the provision of 'short-term working capital') dated 30 June 2000;

(iii) It was further evidenced by a resolution of the board of directors of Greencool Refrigerant (China) Co Ltd dated 10 May 2000 agreeing to provide an irrevocable guarantee in respect of the loan advanced to Beijing Greencool; and

(iv) In her interview statement dated 13 October 2010, Ms Ke Zhao Xiang, who at the relevant time had been in charge of the accounts department at Beijing Greencool, said the following in respect of this loan:

> "These are the documents of Beijing Greencool. The signature on the cheque (stub) belongs to Chen Dong. He (was responsible for) running around getting loans and had to report to Gu Chu Jun. The signature on the 'Loan IOU' belongs to Gu Chu Jun. I knew that (the company) got this loan at the time, but did not record or disclose (it). I didn't know the actual amount of loan or the name of the bank because those people who ran around getting the loan did not give me the bank contracts or loan vouchers for recording 'the same' in the accounts."

172. In respect of Shenzhen Greencool, in her statement of 12 October 2010, Ms Mo said that the company to her knowledge concealed bank loans. She said:

> "All bank loans and fund transfers of the company were handled by Zhang Xi Han. After the company had received the bank loans, I would record them in the cash book… As to whether or not a loan facility was required to be disclosed or not, Zhang Xi Han would inform [Zhou Xiao] or Chen Wei directly and did not need to let me know about (it)."

173. Mr Wu Ben Ming testified before the Tribunal that he was initially employed by Hubei Greencool but shortly thereafter was transferred to Jiangsu Greencool as the person in charge of the finance and accounts department.

174. In respect of bank loans taken out by Jiangsu Greencool, he said that he would duly record all such loans but Mr Zhang Hong, his superior, would then remove certain loans so that they did not appear in the working papers of the Group auditors (at that time Deloitte).

175. Mr Wu further testified that the falsification of documents relating to sales took place on a continuing basis. He said that, during the course of his work, he spoke with Ms Zhou Xiao of Hubei Greencool and Mr Chen Wei of Shenzhen Greencool both of whom confided in him that there was extensive falsification of sales figures in their subsidiaries.

Figures relating to sales, profit after tax and trade receivables

176. As the Tribunal has noted and set out in some detail, in an attempt to make the Greencool Group appear considerably more profitable than in truth it was, the decision was made to create fictitious business. This, in turn, resulted in the creation of false sales figures, trade receivables and the like.

177. In this regard, Ms Ke Zhao Xing, who worked for Beijing Greencool and Beijing Greencool New Model, said the following in her statement of 13 October 2010:

> "Actually I know that these companies did not have (any) business after I had taken over (the accounting job). (They) only opened (some) bank accounts to deal with some payment transfers and fund transfers…

> (These) companies had one set of accounts only. This sets is false. (These) companies did not have any record which can show (the) companies' real operational and financial conditions. In fact, (the) companies did not do (any) business. When we needed to do the accounting, we took the amount that actually occurred as a basic figure and then added the false figures (to the basic figure.) (It) would then become the set of book that I mentioned. Firstly, Hu Xiao Hui (the third Specified Person) called (me) each quarter and told me how much the false income figure was. I met Hu Xiao Hui a few times only. He did not work in Beijing. I know that he was a director of Greencool Holdings[, the one that was listed in Hong Kong]…
>
> After Hu Xiao Hui had decided the false sales figure, Zhang Hong would provide the necessary income receipts, including sales invoices and project contracts. Although the sales are false, we still paid the tax."

178. Falsified sales figures, overheads and the like, of course, had to be woven into the fictitious tapestry of the Group's businesses. They could not be left unaccounted for: hanging in the air. In this regard, Mr Zhou Xiao, who was employed to work in the finance department of Hubei Greencool in March 2001 and was then transferred to Shenzhen Greencool explained the process as follows:

> "I added the falsified sales figures to the accounting items of sales, cost, inventories and customers receivables. As for relevant supporting documents and any missing information required for preparation of accounting vouchers, I would ask Zhang Xi Han directly and he would provide me with the documents required, such as original sales contract. I would, based on such contracts, "apportion" the falsified sales among the customers. Zhang Xi Han would also give me original copies of relevant bank deposit receipts."

179. Mr Zhou said that Mr Zhang was responsible for dealing with the Hong Kong auditors, especially in respect of requests for stocktaking at the end of the year. Mr Zhang, he said, would also provide the necessary bank confirmation letters and customers confirmation letters.

The distortion of net asset values

180. It was the SFC case[31] that as a result of the overstatement of bank deposits and the non-disclosure of bank loans, the net asset value of the Greencool Group was overstated by the following approximate figures: for the year ended 2000, RMB 486.79 million; for the year ended 2001, RMB 652.83 million; for the year ended 2002, RMB 981.84 million; for the year ended 2003, RMB 1,061.74 million; for the year ended 2004, RMB 904.37 million.

181. The materiality of these requires no explanation.

Dissemination of the false or misleading information

182. The fraud had only one purpose, that is, to make it appear to the public that Greencool generated far greater business and earned far greater profits than was in truth the case. The public came to know of that false or misleading information through the accounts of Greencool that were required to be published under the GEM Listing Rules.

183. In a statement dated 14 April 2014, Mr Wong Siu Wa, a Vice President of the Listing Division of the Stock Exchange of Hong Kong, confirmed that, according to the records of the exchange, between August 2000 and May 2005,

[31] See paragraph 8.3 of the Synopsis.

the directors of Greencool submitted announcements and financial reports for the quarterly, half-yearly and annual consolidated financial results to the Exchange for publication on the GEM website. All such relevant statements were included in the evidence presented to the Tribunal. No suggestion was made in the statement of Mr Wong that Greencool in any way had failed to live up to its responsibilities to publish results. In addition to its other responsibilities, Greencool was required to send audited accounts (or in appropriate cases, a summary financial report) to every member of Greencool and every holder of its listed securities: see rule 18.03. Again, nothing was placed before the Tribunal to suggest that during the material times, Greencool failed to meet its obligations in this regard.

184. On the evidence, it is therefore clear that, in respect of the financial years ended 31 December 2000 to 2004 (inclusive), Greencool published financial reports in strict accordance with the GEM Listing Rules.

185. As a matter of collateral relevance, in his statement Mr Wong confirmed that at all material times published announcements had to be accompanied by statements by the directors confirming that they had made all reasonable enquiries to ensure that the information contained in the accounts was accurate and complete and not misleading. The statements began:

> "This announcement, for which the directors of the issuer collectively and individually accept full responsibility, includes particulars given in compliance with the Rules Governing the Listing of Securities on the [GEM] for the purpose of giving information with regard to the issuer. The directors, having made all reasonable enquiries, confirm that to the best of their knowledge and belief: – (1) the information contained in this

> announcement is accurate and complete in all material respects and not misleading …"

Was the false or misleading information likely to impact on the market?

186. To assist the Tribunal, Ms Winnie Pao gave expert evidence as to whether the information contained in Greencool's consolidated accounts for the financial years ended 31 December 2000 to 2004 would have induced investors to buy Greencool shares and/or whether the same information would have been likely to maintain, increase or stabilise the price of Greencool shares. Her expertise was not challenged and the Tribunal was satisfied that her expert opinion, expressed in prudent and balanced terms, should be relied upon.

187. Although Ms Pao had taken into account certain negative press articles concerning Greencool and Mr Gu, she acknowledged that, with all relevant information being at least seven years old, it had been difficult to obtain exhaustive background material.

188. In respect of 'revenue' and 'turnover', Ms Pao said that 'revenue' is any form of income to a company; 'turnover' is the total sales figure of an organisation for a stated period, or, simply, the total revenue a company derived from the provision of goods and services. In the annual reports of Greencool, she said, these terms could be taken to mean the same thing.

189. Ms Pao said that the level and rate of growth of the revenue of any listed company are important pieces of information for investors, telling them how much business the company has done. The trend of such figures would also give a general indication of future prospects. In the result, she said, 'revenue' and

'turnover' in Greencool's consolidated accounts would have been a factor of considerable relevance for investors and potential investors. In this regard, she set out Greencool's annual revenue/turnover figures for the material period as follows:

Year ending	Revenue/Turnover (RMB '000)	% change
31 Dec 1999	92,827	
31 Dec 2000	363,897	+292.0%
31 Dec 2001	516,330	+41.9%
31 Dec 2002	321,420	-37.7%
31 Dec 2003	106.834	-66.8%
31 Dec 2004	184,845	+73.0%

190. In respect of these figures, Ms Pao noted that Greencool reported "stellar growth" in revenue in 2000 and 2001, followed by two consecutive years of severe revenue decline in 2002 and 2003. Despite a 73% increase in 2004, the level of revenue still fell far short of the level achieved in the year 2000.

191. Ms Pao was of the opinion that, based solely on the reported revenue/turnover figures, investors would have been induced to buy Greencool by the 2000 and 2001 figures, these figures also being likely to have increased the price of Greencool shares.

192. In respect of the 2002 figure, she said that, although disappointing, it was probably better than what was reflected in the share price and hence might have had a stabilising impact on the share price.

193. In respect of the share price, she noted that it was essentially in line with the excellent revenue results the 2000 and 2001 but that after the 2001 results were announced the stock fell by more than 70% and thereafter underperformed the relevant index. The share price staged a strong rebound from a very depressed level after the release of the 2002 results, outperforming the overall market. Ms Pao was of the view that this had probably been due to investors' expectations of worse results, an overall improvement in market sentiment at that time and also the fact that Greencool shares were very depressed. The decline in the share price, she said, resumed in the following year, increasing after the 2004 results. The stock substantially underperformed the GEM/GEI index before being suspended at the end of July 2005.

194. In respect of 'net profit figures', Ms Pao was of the opinion that the 2000 and 2001 net profit results would have induced investors to buy Greencool shares and might have caused the share price to rise. The 2002 net profit level, she said, showed that the stock was 'cheap' by way of a very low P/E ratio calculated for the stock. This, she said, might have caused the share price to rise in the midst of improved sentiment in the market overall.

195. As to Greencool's reserve figures, Ms Pao was of the view that, on their own, they would not go so far as to induce investors or potential investors to purchase Greencool shares. However, the relative stability of these reserves could have been information that shareholders took into consideration when assessing the sustainability of the firm after a string of poor earnings results. At best, therefore, she was of the view that the reserve figures could have been one of the factors that helped to maintain the share price.

196. In respect of the 'cash and bank deposit' figures, Ms Pao made reference to the following figures:

Year ending	Current assets (RMB '000)	Cash as % of current assets
31 Dec 2000	1,012, 417	84.0%
31 Dec 2001	1,229,630	69.1%
31 Dec 2002	1,276,719	80.8%
31 Dec 2003	1,335,268	83.5%
31 Dec 2004	1,173,658	83.3%

197. As Ms Pao noted, it would have been abundantly clear to investors that Greencool kept a substantial portion of its current assets in cash and bank deposits. In her opinion, such consistently high levels of cash were not typical of a company in a growth phase as Greencool ought to have been. As such, these high levels of cash may have been seen as being undesirable. On the other hand, given the adverse market environment in 2002 and 2003, some investors, she said, may have viewed these high levels of cash reserves in a positive fashion: "as saving ammunition for expansion in more favourable times".

198. The high cash reserves, said Ms Pao, translated into a high cash value per share which may also have induced some investors to buy the stock or to retain it. She gave three reasons for this:

(i) netting the cash component out from the share price would mean that the company's business can be bought cheaply; and/or

(ii) such cash might be distributed to shareholders as dividends if the company cannot find investment opportunities to deploy the cash; and/or

(iii) should the company go out of business, shareholders could expect to receive more in residual value from a cash-rich company as compared with an asset-rich company since assets might have to be liquidated at a discount to their book values.

199. In light of these considerations, Ms Pao was of the opinion that the reported high levels of cash assets, especially in respect of the years 2002, 2003 and 2004, would have induced some investors to hang onto their shares despite the dismal earnings situation. These figures, she said, might even have induced some potential investors to buy the shares of the company, judging from the high cash content that the stock was 'cheap'. It was therefore her opinion that in these three years, these figures would likely have served to stabilise the share price although these were periods of price weakness.

200. In respect of the levels of 'short-term borrowings' and 'current liabilities', Ms Pao said that investors commonly have regard to the current asset level of the company in order to assess its financial strength. The 'current ratio', she said, is a commonly used ratio in financial analysis to give an idea of a company's ability to pay back its short-term liabilities with its short-term assets. The current ratio is calculated by dividing the current asset level by the current liability level. In respect of the years 2000 to 2004, she said, the calculations bore the following results:

Year Ending	Current ratio
31 Dec 2000	15.2X
31 Dec 2001	9.1X
31 Dec 2002	8.2X
31 Dec 2003	7.5X
31 Dec 2004	5.8X

201. In respect of these figures, Mr Pao commented: "These current ratio levels are extraordinarily high. Indeed, these figures would paint a picture of a company in extremely strong financial positions and would not encounter any short-term liquidity problem any time soon. As such, the low levels of current liabilities and short-term borrowings of Greencool relative to its current assets would have provided comfort to investors, with respect to the survivability of the company despite adverse business conditions, and hence might have acted as a stabilising factor to its share price."

202. In respect of the 'net asset value' – 'book value' – figures, Ms Pao said that this represented the total value of the company's assets that, in theory, shareholders would receive if the company was liquidated. Accordingly, price-to-book value is a commonly used financial ratio to measure the fundamental value of a company. Ms Pao set out figures reflecting Greencool's net assets and corresponding 'book value per share'. It was her conclusion that "the low price-to-book values, particularly when Greencool's operating results were poor, might have induced investors to hold onto its shares, or even have induced some potential investors to buy Greencool shares. At the very least, they would have indicated that the stock was fundamentally cheap and might have helped to stabilise the price of the stock."

203. By way of summary, Ms Pao said that Greencool's revenue and earnings figures in 2000 and 2001, having told a solid growth story, with management painting a rosy picture of further prosperity, would no doubt have induced investors to buy the company shares. The other accounting figures, she said, were also important as together they presented a healthy financial picture.

204. By the time the 2002 results were announced, she said, Greencool's shares were trading at around $0.56, "less than 2 times 2002 earnings". In this regard, she commented: "Unless investors felt at that time that Greencool's profits could never recover to above the 2002 level, a P/E ratio of less than two times was very attractive and would have induced investors to purchase Greencool shares. Furthermore, the book value per share was $1.25 and cash per share stood at $0.97. These valuation metrics all pointed to Greencool shares being very cheap. Indeed, the share price recovered nicely in the following year."

205. The 2003 results, she said, were disastrous. The management blamed SARS, which had adversely impacted on the earnings of many listed companies, and Greencool's poor results appeared not to have surprised investors. The shares, she said performed more or less in line with the GEM, trading between a $0.73 and $1.10, at discounts to the 2003 per-share book value of $1.25 and per-share cash value of $1.04. "These metrics", she commented, "and the good current ratio of 7.5 times would have provided comfort to investors that Greencool could weather the bad operating environment for a while without liquidity problems. This was when the combination of accounting figures such as cash, current assets, current liabilities, short-term borrowings, net assets, and to a lesser extent, reserves, would have provided support to stabilise Greencool's share price".

206. However, when the continued bad 2004 results were released, she said, investors appear to have thrown in the towel. The share price began a downward spiral, dropping from $0.80 to just $0.38 before the stock was suspended.

207. In light of Ms Pao's opinion evidence, the Tribunal is satisfied that, for the years ending 2000 and 2001, the fraudulent figures put into Greencool's consolidated accounts materially assisted in driving up the share price and inducing investors to purchase. Even though, in respect of the years ending 2002, 2003 and 2004, Greencool came under increasing pressure, the Tribunal is satisfied that the continuance of the injection of fraudulent figures would, for the reasons set out in Ms Pao's opinion, have offered some comfort to investors and would thereby have assisted to maintain the share price, or at least to stem what would otherwise have been far greater damage.

CHAPTER 5

CULPABILITY: THE EXECUTIVE DIRECTORS

Mr Gu (the first Specified Person) and Mr Zhang (the second Specified Person)

208. Because so much of the evidence placed before the Tribunal spoke in tandem or in close sequence of these two Specified Persons, it is easier to consider their cases together although, of course, the Tribunal has directed itself that, as to culpability, the case against each of them must be independently assessed.

209. Mr Gu was interviewed by an officer of the SFC on 28 September 2007. During that interview, he was shown documentary evidence of the inflation of bank deposits and non-disclosure of bank loans in the accounts of subsidiaries which had carried through into the consolidated accounts of Greencool. Mr Gu had a simple answer: the CSRC, which held a grudge against him, had forged the evidence. In respect of the non-disclosure of bank loans, including the fact that his signature appeared on certain relevant documents, he said, simply:

> "All loans which were not announced in the annual reports were forged. All [my] signatures on these documents were not written by me. These loans did not exist."

210. If what Mr Gu asserted in his interview is to be given any weight, it would suggest a far reaching conspiracy on the part of the CSRC, a conspiracy involving the officers of a number of entirely independent banking institutions. There was no evidence whatsoever of any such conspiracy; to the contrary, the

Tribunal is satisfied that the documentation produced by the banks proving the existence of inflated deposits together with the documentation retrieved from banks and from the archives of the various Greencool subsidiaries proving the non-disclosure of loans is to be given full weight.

211. Mr Zhang was interviewed by an officer of the SFC on 27 September 2007. In respect of Shenzhen Greencool, he denied instructing subordinates to maintain three separate books of account and, while he admitted that Mr Chen Wei had informed him that the company had always maintained three separate books, at the time, he said, he had known nothing about them.

212. While there was no direct evidence of Mr Gu's involvement in the accounting fraud or his knowledge of it, Mr Zhang, when he was interviewed, accepted that Mr Gu had played an active role in overseeing the finances of the Group. It is also to be remembered that Mr Gu was the founder of the Greencool Group. He was the Chairman of the Group and from January 2000 to April 2002 – a period of some two years – he was the CEO[32]. He was also a director of a number of the subsidiaries including Shenzhen Greencool, Beijing Greencool and Beijing Greencool New Model, Hainan Greencool and Jiangsu Greencool.[33] Mr Zhang was just one of the persons who said that Mr Gu, far from being a nominal head of the Group, actively directed its finances and, in the opinion of the Tribunal, therefore, if he did not fashion the distortion, must (almost inevitably) have come to know of the fact that the Group's finances were constantly being distorted. By way of example, Mr Chen Wei, the Finance Manager of Shenzhen Greencool, who was directly involved in creating the

[32] A Chief Executive Officer is the highest-ranking executive in a company, his or her responsibility including the making of major corporate decisions, managing the overall operations and taking responsibility for managing the resources of the company.

[33] As to the details of his directorships within the Group, see paragraph 12.1 of the Synopsis.

company's materially fictitious business, made the comment – cited earlier – that Greencool did not operate like an ordinary listed company, regularly convening board meetings and management meetings. As he put it: "In fact, all decisions of this company were made by Gu Chu Jun. Even a junior staff member like me knew the real situation…"

213. It is also to be remembered that the evidence of creating fictitious and profitable business activity in order to inflate income while at the same time hiding the full extent of liabilities was not limited to a single subsidiary. If it had been, there may have been some concern that it was the work of a single rogue subsidiary of which Mr Gu may have known nothing. But it was not so limited. To a greater or lesser degree, some form of fraud (seeking to make it appear that the Group's profits were far greater than in truth they were) was spread across a number of subsidiaries.[34]

214. The evidence, therefore, was that, even though there may have been a shift in emphasis from one subsidiary to another over the material time, and even though the managers of the fraud may have been contained to a select, secretive group, the perpetuation of the fraud was intended to make the Group as a whole appear more profitable than in truth it was. What the evidence also revealed unsurprisingly was that, in perpetrating the fraud, the individual subsidiaries were not kept entirely 'air-tight'. Employees of one subsidiary tasked with advancing the fraud had to liaise with employees of other subsidiaries tasked with the same

[34] By way of illustration, just as there was evidence of the staff at Shenzhen Greencool having to maintain three separate books of account in order to manage the falsification of business activities (one book, it seems, being true, the second being tailored to meet the requirements of the Hong Kong listing authorities and the third being for taxation purposes), so there was evidence of Hainan Greencool maintaining the same set of three books of account. In this regard, Mr Xu Jian Dong (who was assigned to Hainan Greencool in July 2003) testified before the Tribunal that he was aware that three books were kept and that from time to time he would be instructed to give them to Ms Zhou Xiao and Mr Chen Wei of Shenzhen Greencool so that consolidated statements could be prepared. Here, therefore, was direct evidence of subsidiaries liaising in order to further the falsification of accounts.

responsibility and thereby came to know that the scope of the fraud extended (for all practical purposes) across the Group.

215. In such circumstances, it is difficult to believe that Mr Gu, even if (for the purposes of argument) it is assumed that he had no hand in guiding the fraudulent activity, would have remained ignorant of it over the five-year period.

216. In respect of Mr Zhang himself, he had been appointed an Executive Director of Greencool in June 2000. An indication of his importance within the Group is found in the fact that in 2002 he was made COO of the Group. The evidence shows that he and Mr Gu worked closely together. The evidence further indicates that he took a particular interest in financial matters, the accountants of the various subsidiaries reporting to him.

217. While there was no direct evidence of Mr Gu's involvement in fraudulently distorting the accounts of the subsidiaries, there was indirect evidence which, in the judgment of the Tribunal, when considered in the round, was compelling. There was, however, direct evidence against Mr Zhang.

218. By way of example, Mr Wu Ben Ming, who gave evidence by way of video link, testified that he had originally been employed by Hubei Greencool before being transferred to Jiangsu Greencool where he was in charge of the finance and accounts department. He was also employed in Shenzhen Greencool. As such, he said, he was answerable to Mr Zhang (that is, Mr Zhang Xi Han). In confirming earlier statements made by him, Mr Wu said:

"I know Zhang Xi Han had some false chops with him. When I was working in Shenzhen Greencool, I had filled in a lot of bank deposit receipts, all under the instructions of Zhang Xi Han, but I did not go to the relevant bank to carry out the transactions as recorded in these bank deposit receipts. Also, payments made out of these bank accounts actually did not have to be approved by the procedures prescribed by the company. I was the only person in Shenzhen Greencool who had authority to handle bank dealings. However, the amounts involved in the dealings as specified in the bank deposit slips which Zhang Xi Han requested me to fill in were actually not reflected in the bank monthly statements. I know that these false documents were prepared in relation to a savings account opened with the Agricultural Bank of China, Shenzhen Luohu Sub-Branch… "

219. Mr Wu continued by saying:

"Every time when I had filled in the requisite information in the bank deposit receipts as per Zhang Xi Han's instructions, I would hand them back to Zhang Xi Han. [He] would then affix the false bank chops to those deposit receipts and hand them back to me one day later. In order to make the credit/debit amount in the accounts and balance of the accounts tally with that appearing in the bank account statements, Zhang Xi Han at the time instructed Dr Gao Jie, who worked in the company, to design a set of form and font which resembled that of the genuine bank account statements."

220. As to broader tactical matters, Mr Wu said:

"I think it was Zhang Xi Han who told Zhao Xiao and Chen Wei how much business income was to be falsified. Zhang Xi Han would first ask Gu Chu Jun to determine the figures. I believe that it was Gu Chu Jun who determined the total amount of income to be falsified for the whole Greencool Group. Then Zheng Xi Han told Zhou Xiao or Chen Wei the

> false figures to be entered into the accounts of Shenzhen Greencool. He would discuss as to which customer these figures were to be distributed."

221. Mr Chen Wei himself said that, in the creation of Shenzhen Greencool's fictitious business, he would report directly to Mr Zhang, giving him the true picture of the company's financial position and it was his understanding that Mr Zhang would then ask Mr Gu for instructions as to how much fictitious income should be created. Mr Chen said that, having taken instructions, Mr Zhang would revert directly to him with instructions as to the level of falsification.

222. Mr Chen further said that, as the fictitious bank balances became larger and larger, Mr Zhang confided in him that Mr Gu was having to think of ways to digest the increased amounts.

223. Mr Chen's evidence was not the only evidence emanating from Shenzhen Greencool implicating both Mr Gu (indirectly) and Mr Zhang (directly). Ms Mo, a cashier who helped to manage the three separate books of account and was involved in creating false business documentation, said that she worked directly with Mr Zhang in furthering the fraud but it was always her understanding that it was Mr Gu who determined the broad tactical aspects of the fraud, that is, the total amount of income to be falsified for the Group.

224. There was evidence too of Mr Zhang possessing false bank chops and of him colluding directly with bank officials in order to provide the auditors with false bank confirmations.

225. Mr Ke Zhao Xiang, an accountant, who was responsible for the accounts of Beijing Greencool and also Beijing Greencool New Model, said that the books he managed were false. The companies, he said, earned very little and business therefore had to be invented. He said that he received instructions each quarter from Mr Hu (the third Specified Person) as to the size of the fictitious figures and, in integrating them into the accounts, it was Mr Zhang who calculated fictitious sales profits and the like.

226. Mr Ke said that he was also aware that there was a non-disclosure of loans that had been advanced to the two companies, a matter which he understood was under the ultimate control of Mr Gu. In this regard, he said, he knew of colleagues who had a responsibility to obtain loans and who had to report to Mr Gu in respect of them. When shown the records of one loan together with a 'loan IOU' form carrying the signature of Mr Gu, he said that this was one of the loans that had not been disclosed. This, he said, he knew because the staff responsible for obtaining the loan and reporting to Mr Gu had not given him the necessary contracts and vouchers for recording in the books of account.

227. When considering the culpability of Mr Gu, as earlier indicated, the Tribunal has taken into account that there was no direct evidence of his knowledge of the fraudulent activities. The evidence of witnesses was either hearsay[35] or what they understood to be the position. That said, provided it is approached with caution, such evidence may be taken into account and given due weight.

228. In the present case, when all the relevant evidence is taken into account, the Tribunal is not prepared to accept that Mr Gu, an active Chairman of the

[35] In the sense that it was what other people had reported to them had been said or done by Mr Gu.

Group, remained ignorant of the widespread fraudulent activities taking place in its various subsidiaries. To the contrary, the Tribunal is satisfied that the compelling inference to be drawn from that evidence is not simply that Mr Gu knew of the activities but that he must have played an active role in supervising them.

229. From this it follows that the Tribunal is satisfied that Mr Gu, knowing that the consolidated accounts for the years ending 31 December 2000 and 2001 were false and/or misleading as to material facts, misled the Group auditors when he (together with Mr Henry Mok) signed the letters of representation dated 27 March 2001 and 26 March 2002, confirming that the Company and Group accounts gave a true and fair view of their finances. The Tribunal is further satisfied that, when he gave his approval, he knew that the quarterly accounts, half-yearly accounts and annual audited accounts, together with their related announcements, were false and/or misleading as to material facts.

230. Much of the evidence against Mr Zhang, Mr Gu's close associate and from 2002 the COO of the Group, is direct[36] evidence and is evidence that the Tribunal finds compelling. The Tribunal has had no difficulty in coming to the conclusion that Mr Zhang not only knew of the activities but, as with Mr Gu, played an active role in supervising them.

231. It follows that the Tribunal is satisfied that Mr Zhang, knowing that the consolidated accounts for the years ending 31 December 2002 and 2004 were false and/or misleading as to material facts, misled the Group auditors when he signed the letters of representation dated 18 March 2003 and 25 March 2004 confirming that the Company and Group accounts gave a true and fair view of

[36] In the sense that it is evidence of conversations that witnesses had with him or what they saw him do.

their finances. The Tribunal is further satisfied that, when he gave his approval, he knew that the quarterly accounts, half-yearly accounts and annual audited accounts, together with their related announcements, were false and/or misleading as to material facts.

Mr Hu (the third Specified Person)

232. In the course of interviews with the SFC (12 February 2007) and the CSRC (10 March 2011), Mr Hu said that he had been invited by Mr Gu to leave Canada to join him in Greencool. Initially, he said, he had worked in Hong Kong until moving to the Shenzhen office in 2003. When operating from the Hong Kong office, he said, he was principally responsible for the management of that office, for meeting with investors and doing roadshows. He was not responsible for sales, he said, nor was he responsible for directing financial issues. In respect of the Shenzhen office, Mr Hu said that he had never participated in the work of Shenzhen Greencool nor did he have any recollection of holding the office of a director with that company (although the records indicated that he did hold a directorship). When shown certain signatures that appeared to be his, he denied that they were his signatures, the implication being that they had been forged by somebody. While he accepted that he made many visits to Shenzhen Greencool, Mr Hu said that, as they were always busy, he did not attempt to understand the full details of their operations. When it was suggested to him that he would have known that three separate sets of accounts were maintained by Shenzhen Greencool, he denied any such knowledge. He repeated that he had never participated in the daily management of the company or other mainland subsidiaries.

233. It is not possible, of course, to come to any findings related to credibility when looking only to the record of an interview, more especially a translation. In the view of the Tribunal, it is puzzling, however, why Mr Hu should have sought to distance himself from any involvement in the day-to-day management of Shenzhen Greencool.

234. What is apparent, on a consideration of all the evidence, is that Mr Hu was one of Mr Gu's inner circle and was trusted by him.

235. When he was interviewed by an officer of the SFC in Canada on 17 January 2012, Mr Chen (the sixth Specified Person), commented that Mr Hu had worked for some considerable time with Mr Gu and that Mr Gu referred to him as his "Chief of General Staff". Mr Chen said elsewhere in his record of interview that Mr Gu trusted most those who had worked with him the longest, his "veterans": these including Mr Zhang (the second Specified Person), Mr Xu (the fifth Specified Person) and Mr Hu.[37]

236. In the view of the Tribunal, this evidence is supported by the fact that Mr Hu was appointed Vice Chairman of the Greencool Group from 1 June 2000 and the CEO of the Group from April 2002 until the suspension of trading in Greencool shares in 2005. He was also an Executive Director and a member of the Audit Committee of Greencool's Board of Directors.

237. As to Mr Hu's knowledge of the fact that fictitious sales and the like were fed into the accounts of Greencool subsidiaries, Mr Ke, the person in charge of the accounts of Beijing Greencool and Beijing Greencool New Model, said that Mr Hu was one of the chief directors of that fraudulent scheme. He said that

[37] Mr Chen did not include himself as one of the "veterans" and therefore, as he put it in his record of interview, saw himself as more of an outsider.

every quarter he would receive instructions from Mr Hu as to the false income figure that was to be integrated into the accounts. In this regard, Mr Ke said the following:

> "In fact, the companies did not do any business. When we needed to do the accounting, we took the amount that actually occurred as a basic figure and then added the false figures to that basic figure. It would then become the set of accounts that I have mentioned. First, Hu Xiao Hui (Mr Hu) called me each quarter and told me how much the *false income figure* was. I met Hu Xiao Hui, a few times only. He did not work in Beijing. I know that he was a Director of Greencool Holdings [the one listed in Hong Kong]. Zhang Hong [as senior officer in the Beijing office] also told me that I had to follow Hu Xiao Hui's instructions. Therefore, when he called me, giving me instructions, I accepted them. After Hu Xiao Hui had decided on the false sales figures, Zhang Hong would provide the necessary income receipts, including sales invoices and project contracts." [emphasis added]

238. Mr Ke, therefore, gave direct evidence of receiving instructions on a regular basis from Mr Hu personally concerning the falsification of books of account; he gave direct evidence of acting on those instructions and doing so because a senior member of the office in Beijing had told him to do so.

239. As the Tribunal understands it, there is no other direct evidence implicating Mr Hu. However, when this single piece of direct evidence is considered in the light of all the circumstances that have been detailed, more especially the fact of the extended nature of the fraudulent activity within the group, both as to the number of subsidiaries involved and the length of time over which the fraud extended, and bearing in mind that Mr Hu was a trusted confidant of Mr Gu, appointed at the outset as Vice Chairman of the Group and thereafter

as the CEO, the Tribunal is satisfied that this single piece of direct evidence (which of itself has real substance) can be relied upon as reflecting the reality.

240. The Tribunal is therefore satisfied to the required standard, that is, on a balance of probabilities, that Mr Hu not only knew of the fraudulent activities within the Group, but – in respect at least of the two Beijing companies - played an active role in supervising that activity.

241. It follows that, in giving his approval to them, Mr Hu knew that the quarterly accounts, half-yearly accounts and the annual audited accounts, together with their related announcements, were false and/or misleading as to material facts.

Mr Xu (the fifth Specified Person)

242. In the course of an interview with the CSRC (at which SFC officers were present) given on 11 November 2010, Mr Xu accepted that he had been appointed a director of Hainan Greencool and had been the nominated responsible person for the company from 2000 to 2004. He further accepted that one of his responsibilities had been business development. However, when it was put to him that, as with Shenzhen Greencool, Hainan Greencool had created fictitious business resulting in false sales/business projects and, in order to account for the fictitious profits generated, to false cash balances being held in the company's bank accounts, Mr Xu said he did not know of such matters. He said that he had not been in charge of the accounts department and had taken no interest in the accounts and therefore never had reason to suspect that they were false. As to his approval of the accounts, he said that he had placed his signature on them simply because other directors had done so.

243. On its face, Mr Xu's assertion is fundamentally weak. He was effectively the principal director of Hainan Greencool – the responsible person – from 2000 to 2004, more than that, he was in charge of business development. On that basis it defies logic to think that he could not have come to appreciate that there was an alarming divergence between what he knew to be the true day to day business of the company and the results printed in the accounts. Overlooking that divergence for one year may be explicable but not for the entire period of his appointment.

244. Mr Xu Jian Dong, who was assigned to the finance department of Hainan Greencool in 2003 and who admitted being involved in the maintenance of three separate books of account, was certainly of the belief that Mr Xu's duties included overseeing the finances of the company. He was also of the belief that Mr Xu knew of the existence of the three separate books of account. When speaking of the perennial problem of managing the continuing fictitious enlargement of bank deposits, Mr Xu Jian Dong said that Mr Xu "*definitely* knew about this matter" [emphasis added]. Similarly, he said that Mr Xu would have reported to Mr Gu as to the amount of false sales being created. Mr Xu Jian Dong was not able to place these statements of knowledge into any specific factual context but that has not caused the Tribunal any particular difficulty. It is to be remembered that Mr Xu Jian Dong would have been working under Mr Xu on an almost daily basis; his statement of knowledge would therefore have been based on a continuing state of affairs, not on one or two isolated instances. What must also be taken into account is that the maintenance of the three books of account was an activity intended to 'benefit' the Group as a whole and accordingly, even if the activity took place behind closed doors at Hainan Greencool, the probabilities clearly indicate that Mr Gu would have placed

control of the activity in the hands of one of his Executive Directors, somebody he could trust, and that person, even if not on his own, had to be Mr Xu who, as the responsible person, had day to day control of the company's affairs. For Mr Gu (who the Tribunal is satisfied had the generalship of the fraud) to have excluded Mr Xu when Mr Xu had daily access to the Hainan Greencool offices and all its records would have been unrealistically foolhardy.

245. For the reasons given, when all the circumstances are taken into account, the Tribunal is satisfied that Mr Xu not only must have had knowledge of the fraud taking place in Hainan Greencool but must have played an active and extended role in managing that fraud.

Mr Chen (the sixth Specified Person)

246. Mr Chen was an Executive Director of Greencool from June 2000 until the suspension of trading in Greencool shares which took place in August 2005. More than that, he was a director of Shenzhen Greencool between 2000 and 2002, a subsidiary that maintained three separate books of account, and of Hainan Greencool over the same period. According to Mr Chen, however, his principal area of responsibility was managing the office of the listed company in Hong Kong. He said that, in the result, Hong Kong was his base. He did keep in contact with his colleagues on the Mainland and paid regular visits but, he said, at no time did he learn anything that gave him grounds to believe that an accounting fraud was taking place. When it came to putting his signature on the Group accounts, he said, even though he had no knowledge of accounts himself, he did so because he knew that the accounts had been monitored by the Chairman and Vice-Chairman of the Group, both men whom he trusted, that they had been audited by top-level auditors and had been scrutinized by the Audit Committee.

247. It does not appear that there was any direct evidence of Mr Chen's knowledge of the accounting fraud. Mr Duncan, the Presenting Officer for the SFC, spoke of matters to be found in the record of interview of Mr Liu (the fourth Specified person) who said that he believed that all the Executive Directors – including Mr Chen - knew that the various results announced by the Group were false or misleading because they must have known that the sales figures did not tally with the reality of the business being generated. In respect of this evidence, the Tribunal has observed as follows –

(i) In his record of interview, Mr Liu spoke of observations made by him when he was working (on a full time basis) at Shenzhen Greencool. He spoke of the fact that he saw many of the staff members responsible for obtaining business failing to secure orders. However, the annual business results remained "pretty good". In the result, said Mr Liu, he drew the conjecture – he put it no higher than that - that the financial statements of Greencool Holdings might probably be false. He emphasised that he could not be more certain, because Mr Gu had never allowed him to participate in financial matters.

(ii) As mentioned, Mr Liu said that he had been able to make his observations because he had worked full-time at Shenzhen Greencool and had seen the poor performance of the sales force. In respect of Mr Chen, however, there was no evidence that he worked full-time at any of the subsidiaries responsible for actively maintaining the fraud. Mr Chen laid stress on the fact that his responsibilities were limited to managing the affairs of the holding company in Hong Kong and in this

regard Mr Liu himself said in his record of interview that Mr Chen had been responsible for matters relating to "Hong Kong and Canada".

(iii) As to implicating Mr Chen, in his record of interview, in answer to a question whether the other Executive Directors "should all know" about the falsification of commercial records, Mr Liu said the following: "I think that other directors will also have knowledge of the falsifications because each of us, directors, clearly knew that the business of the Mainland subsidiaries was not so good and that there should be a vast difference from the business results publicly announced by Greencool Holdings. However, I did not ask other directors if they knew about the falsifications."

This assertion by Mr Liu is very general; Mr Chen is not here mentioned by name. If it is to carry weight, it must allow the Tribunal, on a consideration of the evidence as a whole, to be satisfied that Mr Chen knew and understood the reality of the business being generated by the subsidiaries and must therefore have known or been suspicious of the fact that the published accounts did not match that reality. Despite its suspicions, the Tribunal, has had difficulty in identifying substantive evidence of this kind. Yes, Mr Chen did travel from Hong Kong to the various subsidiaries but there is no evidence that he did so on such a frequent and regular basis that he must have understood the true nature and extent of the business, or lack of it, being generated in the various subsidiaries.

248. Mr Chen, although he did not appear at the hearing before the Tribunal, submitted a number of relatively lengthy statements. The core of his defence is perhaps contained in his statement of 3 July 2014 in which he said:

> "Of course, as a director of Greencool, not only should I be responsible for the Hong Kong company, I should also be responsible for the companies in the Mainland. [The] daily work of the Hong Kong company – being part of the listed company – and the work of the Mainland subsidiaries were highly interconnected. During my tenure as a director, apart from busily engaging myself in the heavy daily affairs of the Hong Kong company, I often liaised with the Mainland colleagues by telephone. I also often visited companies in the Mainland to attend company meetings or other activities. I always talked about matters relating to all aspects of the Company with the colleagues and staff members of the Company. I am not sure whether such problems mentioned in the proceeding materials are true or not. Indeed, I have never noticed or heard of problems such as overstatement of bank deposits and the non-disclosure of loans. Nor has anyone dropped me a hint of such problems. I know nothing at all. If I had known of such problems, I definitely would not have signed off the results before they were announced by the Company lest my conscience should smite me. I signed them off merely because the results of the Company had been audited by the Company's management officer and professional auditors and accountants, and based on my understanding of the company as well."

249. Mr Chen went on to say that he felt aggrieved as he had worked diligently during his tenure as director, even though the daily work of managing a listed company was bothersome and diverse. During the time when he was in charge of the Hong Kong company, he said, there were no problems at all.

250. Mr Chen supported his defence in a document dated 23 August 2014, when he said:

> "I really did not know anything about the problems or the misconducts listed in these SFC documents, like overstatement of bank deposits and non-disclosure bank loans, etc. If they were true, as I understand, all such

problems or misconducts took place in Mainland China. As a matter of fact, before and after Greencool went public in Hong Kong, I had been responsible full-time for the daily operation of the Hong Kong office."

251. Mr Chen continued by saying:

"I do not know accounting and cannot understand accounting terms. Therefore, I did nothing in relation to accounting while I was working for Greencool. However, I did sign the Final Results. I was authorised to sign simply because I was working in Hong Kong and it was unreasonable for the other directors to leave their work and come to Hong Kong only to sign when an authorised signature was acceptable. I signed because the results had been closely supervised and controlled by the management team of each subsidiary and, most importantly, by the Chairman and Vice Chairman and CFO and by the audit committee, and because the results had been strictly audited by professional accountants. I believed that the final results were true and accurate."

252. In his lengthy answers of 3 July 2014, Mr Chen explained his position as follows:

"… since I have no knowledge of finance, neither am I able to understand books of account, no one has ever shown me any books of account of any company [in the Group]. The accounting books are just like an iron barrel sealed by Gu Chu Jun who has never let me touch it. Simply because of my ignorance of finance, the Company has never asked me to audit the Company's results. It is clearly an irresponsible practice to allow a director who is ignorant of finance to audit the results. However, before the Company announced its results, other directors of the Company had authorised me to sign for them. I do not deny that those are my signatures. Neither would I deny that I attended the board meetings and approved the Company to announce its results. At that time, I signed my name because

> the Company's results had gone through various layers of audit, including the controls taken by the auditors, the accountants and the management of the company, *and also because of my understanding of every aspect of the company*. I firmly believed that there was no problem about the results before I signed my name." [emphasis added].

253. As to whether Mr Chen had actual knowledge of the fraud emanating in the subsidiaries, the Tribunal has taken note of the following:

(i) The evidence indicates that Mr Chen was given the responsibility of managing the Hong Kong office, that is, the affairs of the listed company itself, a holding company which did not manage operational matters. Operational matters were conducted by the Mainland subsidiaries;

(ii) It was Mr Chen's assertion, one not contradicted on the evidence, that he did not isolate himself from the affairs of the Mainland subsidiaries. In this regard, he said that he often visited the subsidiaries to attend meetings and that he would always discuss business matters with both colleagues (other directors) and staff members. It was Mr Chen's evidence that at no time, however, did anything come to his attention to the effect that there had been fraudulent overstating the bank deposits and non-disclosure of debt; and

(iii) Mr Chen knew, of course, that the Group results were excellent, certainly in the earlier years, but said that he had no reason to doubt the veracity of those results.

254. In light of these factors, and taking into account Mr Chen's assertion – not contradicted by other evidence – that he was not one of Mr Gu's 'veterans',

that is, one of the trusted 'insiders', the Tribunal accepts that there is some force in Mr Chen's numerous assertions that, as the director in charge of the Hong Kong office, a non-operational concern, and not as one of Mr Gu's trusted 'insiders', he was kept 'outside of the loop': put simply, that nobody was so open with him that he learnt the truth of what was happening on the Mainland or indeed that it gave him any cause for suspicion as to what in truth was happening on the Mainland.

255. Looking to the evidence as a whole, despite its suspicions, the Tribunal has been drawn to the conclusion that there is insufficient evidence to demonstrate on a balance of probabilities that Mr Chen knew of the accounting fraud and therefore knew that the Group accounts were false or misleading.

256. Equally, looking to the evidence as a whole, the Tribunal has been drawn to the conclusion that there is no evidential basis for demonstrating that Mr Chen was reckless as to whether the Group accounts were false or misleading.

257. That leaves the issue of negligence. But how is that founded? It appears to the Tribunal that the SFC case in this regard is founded essentially on the assertion that Mr Chen, in approving the Group accounts, was negligent in that he failed to act with that degree of care to be expected of a reasonably diligent director.

258. Mr Chen freely admitted that (at the relevant times) he knew little about accounting; that was why he was never given responsibility in overseeing the putting together of the Group accounts. Why then, if he knew so little, did he sign the Group accounts? Mr Chen gave three reasons:

(i) He said that he had reason to trust the senior management of the subsidiaries. He made regular visits to the Mainland, he spoke to colleagues there. In short, he attempted to have an understanding of the problems – and the opportunities – facing the subsidiaries. Hence, as he put it, he believed he had gained an 'understanding' of the companies making up the Group;

(ii) The Group accounts, to his knowledge, were approved by the Chairman and Vice Chairman of the Group, men more knowledgeable than he as to the affairs of the Group as a whole and men he trusted; And

(iii) The Group accounts were audited and considered by the Greencool Audit Committee; in short, they had been through a process of verification by people more skilled then himself.

259. In none of his statements, however, did Mr Chen say that he took it upon himself to read and understand the Group accounts which it was his responsibility, as an Executive Director, to approve.

260. As it was expressed by *Middleton J in ASIC v Healey & Others*[38], a director should maintain familiarity with the financial status of his company, he should review and understand the financial statements which are produced and, whilst not an auditor or forensic expert, should do so with a questioning mind. He should do this because of the importance of the financial statements and if, in seeking to understand them, concerns are raised then he should call for further enquiries.

[38] See paragraphs 123, 124 and 125 in this report.

261. Directors of course are entitled, unless they have reason for suspicion, to place trust in the integrity and competence of their co-directors and auditors. But, so it appears to have been argued on behalf of the SFC, that only takes matters so far and cannot excuse a failure to seek an understanding of matters in respect of which, as an Executive Director, Mr Chen took personal responsibility. Mr Chen must have understood that, as an Executive Director, in putting his signature to the accounts, he was accepting personal responsibility for their essential accuracy. Yet, on his own admission, he appears to have made no effort whatsoever to understand the nature and extent of those accounts. Put simply, on his own admission, he abandoned his responsibilities.

262. In the view of the Tribunal it is clear that Mr Chen failed to act as a reasonably diligent director would have acted and indeed failed to act as he himself, as an experienced business person, was quite capable of acting: the accounts after all were not so impenetrable, so dense and obscure as to defeat a person of his experience. The question is not therefore whether some negligence on the part of Mr Chen has been identified, the question is whether that negligence, in the context of the present case, constitutes a ground of culpability?

263. In this regard, in the judgment of the Tribunal, two questions present themselves. First, when he signed the accounts did Mr Chen have any reason to question the accuracy of the accounts? Second, if he did, was it nevertheless reasonable for him to sign them or, in doing so, did he fail to exercise that care which the circumstances demanded?

264. In the determination of the Tribunal, it has not been demonstrated that it was more probable than not that, when he signed the accounts, Mr Chen had any reason to question their accuracy. The circumstantial evidence that he must have

known of the on-going fraud within certain of the subsidiaries is just not cogent enough. In the result, in light of the fact that the accounts had been audited and approved by Greencool's Audit Committee, it cannot be said that Mr Chen failed to exercise that level of care which the circumstances of the present case demanded and which would make him liable under section 277(1) of the Ordinance.

CHAPTER 6

CULPABILITY: THE INDEPENDENT NON-EXECUTIVE DIRECTORS

265. Both Mr Fan and Ms Margaret Man were appointed Independent Non-Executive Directors of Greencool in June 2000 and both remained as such until February 2006. Mr Fan was the Chairman of the Audit Committee and Ms Margaret Man a member of that committee.

266. Both had considerable experience in matters of banking and/or finance. Ms Margaret Man had a Master's degree in banking and had completed a legal studies programme at Columbia Law School in the United States. In 1998, she joined the then CITIC Ka Wah Bank as a Senior Vice President with responsibility for strategic planning. She was invited to become an Independent Non-Executive Director of Greencool by Mr Fan who was then an Executive Director of the Hongkong Chinese Bank Limited.

267. At the date of the invitation, it appears that she did not know Mr Gu or any other member of his executive team. However, she discovered that Mr Gu had registered certain patents with the State Patents Committee, this being, in her eyes, official recognition that he was the creator of valid inventions. She did not hide the fact that during her time with Greencool she had considerable admiration for Mr Gu.

268. Ms Margaret Man said that she investigated Mr Gu's executive team and learnt that they had impressive credentials.

269. As to the commercial prospects of Greencool itself, Ms Margaret Man said in her first witness statement that Mainland China had joined the Montreal Protocol and was committed to phasing out its production of ozone-depleting substances by 2010. This presented Greencool – which sold and installed CFC-free refrigerants - with a great opportunity; in short, the potential for the business was exciting.

270. It is not suggested that either Mr Fan or Ms Margaret Man had actual knowledge of the accounting fraud that took place in certain of the Greencool subsidiaries, the results feeding through into the Group accounts. Nor is it suggested that their culpability lies in the failure to identify the actual fraud. It is instead the SFC case that both Mr Fan and Ms Margaret Man were made aware of a number of matters that should have alerted them to the real possibility of matters being materially amiss in respect of the finances. Despite being aware of these matters – for example, the extravagantly high bank balances maintained between 2000 and 2004 - and being given clear recommendations by the auditors (Arthur Anderson) to improve internal controls, there was a culpable failure to investigate the concerns and/or to implement the recommendations made by the auditors. In light of these failures, it was submitted, the members of the Audit Committee, including Mr Fan and Ms Margaret Man, were reckless or at least negligent as to whether the information contained in the published Greencool Group accounts was false or misleading.

271. At the commencement of the hearing the SFC put forward five matters that it said – taken individually and/or in the round - should have alerted both Mr Fan and Ms Margaret Man to the real possibility of matters being materially amiss in respect of Greencool's finances. At the conclusion of the enquiry, however, as the Tribunal understands it, these matters had, in light of the

evidence, taken on a revised format. That revised format, as the Tribunal understands it, can be divided into three sections.

Disturbing allegations, both anonymous and in the media:

(i) In June 2001, just short of a year after listing, an anonymous complaint was sent to the Stock Exchange alleging that the Greencool Group had inflated its sales and misused funds raised via the listing. Although dealt with in an exchange of correspondence with the Stock Exchange and not pursued further by the Stock Exchange, it nevertheless 'set the scene' for concern; and

(ii) At the end of 2001, shortly after Mr Gu had orchestrated the take-over of the state owned enterprise, Guangdong Kelon, an article published in the *Caijing Magazine* excited considerable media speculation as to the accuracy of Greencool's published figures and the viability of its business model. Greencool's share price fell substantially. This was a further matter 'setting the scene' for concern.

The recommendations of Arthur Anderson:

(i) In early 2002, Greencool's then auditors, Arthur Anderson, alerted the Audit Committee to deficiencies in the financial management of the Greencool Group and put forward major recommendations including matters pertaining to bank balances and bank loans and

(ii) These recommendations, however, were not followed in the sense that they did not prompt, as they should have done, a diligent investigation.

The maintenance of high bank balances by Greencool subsidiaries:

(i) Throughout the financial years ended 31 December 2000 – 2004 the Group accounts revealed that a number of the subsidiaries were maintaining extravagantly high bank balances. On the SFC case, these were balances that did not tally with "the overall performance, business nature and operations of the Group"[39]. As such, these balances should have alerted members of the Audit Committee, including Mr Fan and Ms Margaret Man, to question the accuracy of the balances. But no such action was taken; and

(ii) the high bank balances should have raised further concerns when contrasted with the fact that at the same time the Group was making substantial borrowings.

Viewing matters through a contemporaneous lense

272. Before turning to consider the issues just summarized, the Tribunal believes that recognition should be given of Mr Li's submission that those issues should be considered in the context of the circumstances as they were at the time and not as they may now appear through the lense of hindsight. In this regard, Mr Li emphasized the following –

(i) At the date of its listing, Greencool's prospectus contained Group accounts for the years ended 1998, 1999 and the first four months of 2000. These accounts had been audited by international auditors, Arthur

[39] Taken from Mr Duncan's closing submissions.

Anderson, as 'reporting accountants' without reservations. The listing itself had been sponsored by two international investment banks, one of the banks continuing to act as sponsor until the end of 2002, that sponsorship being without reservations. The Stock Exchange of Hong Kong had also vetted Greencool's prospectus;

(ii) In each of the relevant years, Greencool's auditors had signed so called 'clean' audit opinions. Both Arthur Anderson and Deloitte had been satisfied that the audited financial statements of the Group contained no material misstatements requiring any form of qualification;

(iii) Certainly, Greencool's first auditors, Arthur Anderson, had been aware of the anonymous complaint sent to the Stock Exchange and the later media comments that had had such an impact of Greencool's share price. They therefore would have carried out their professional duties with heightened concern. Nevertheless Arthur Anderson (and the following auditors, Deloitte) saw no reason to qualify the Group accounts;

(iv) Despite such scrutiny, the fraud taking place behind the closed doors of various subsidiaries remained undetected by Greencool's two firms of auditors (both being part of what was then called 'the Big 5') as well as the various Mainland auditors of the subsidiaries;

(v) Mr Fan and Ms Margaret Man were appointed Independent Non-Executive Directors of Greencool only and not of any of the subsidiaries. The accounting fraud, however, was perpetrated by select groups of persons operating behind closed doors in certain of the subsidiaries. As Mr Li expressed it, in the circumstances both Mr Fan and Ms Margaret

Man were "miles away" (both physically and figuratively) from the fraud; and

(vi) While, with the benefit of hindsight and considered by way of an overview, the core workings of the fraud perpetrated in the subsidiaries may appear simple enough, the disguising paperwork was obviously sufficiently sophisticated and coherent to conceal the fraud over an extended period of time. Even the SFC accepted that the investigation had been a lengthy and complex one, spanning "seven years' and 'several jurisdictions'.

273. In light of these matters, and on a consideration of all the evidence, the Tribunal accepts that at the relevant time nobody who was not part of the fraud itself had any reason to suspect that one was in progress. As Ms Margaret Man expressed it, it was simply not within anybody's contemplation.

The single issue in dispute under section 277(1)

274. Mr Li accepted that, pursuant to section 277(1) of the Ordinance, four elements fell to be proved by the SFC against his client. For the purposes of the enquiry, he said, the first three were not in dispute. In this regard, first, it was accepted that Ms Margaret Man and the other directors of Greencool authorized the publication (that is, dissemination) of each year's accounts; second, those accounts were likely to have an impact on the market (by inducing transactions and having an influence on the share price) and, third, those accounts were false as to material matters.

275. It was the final essential element, said Mr Li, that was very much disputed; namely, whether Ms Margaret Man had been reckless or negligent as whether those accounts had been false or misleading.

276. In the view of the Tribunal, therefore, the issues to be determined in respect of both Specified Persons may be defined in the following questions. At the time when Mr Fan and Ms Margaret Man authorized the publication of each year's accounts, what information did they have, or what information, with reasonable diligence, should they have had, and on that information was it reasonable of them, in their capacity as Independent Non-Executive Directors, to believe those accounts to be true?

Returning to the SFC's three sections

A. Disturbing allegations, both anonymous and in the media

277. In his closing submissions, when talking about the 'SFC's shrinking case', Mr Li emphasized the fact that the SFC had not pursued the first two matters set out in the Synopsis, namely, the matter of the anonymous letter sent to the Stock Exchange in June 2001 and the flurry of media articles published in late 2001 questioning the accuracy of certain aspects of Greencool's published accounts and the viability of the Group's business model. The Tribunal, however, has not viewed this as an abandonment of the issues but rather, as indicated earlier, the fashioning of both issues into background matters that should have alerted Mr Fan and Ms Margaret Man to investigate current issues - such as the maintenance of high bank balances - with added concern.

278. The first matter that potentially raised concern was an anonymous letter sent to the Stock Exchange in early June 2001 alleging that the Greencool Group had inflated its sales figures in the 1999 and 2000 accounts and had misused funds raised via the listing.

279. A consolidated response was made by three parties: first, the investment bank – ING – that remained Greencool's continuing sponsor; second, Arthur Anderson, the Group's auditors; and third, by Greencool itself, the solicitors representing Greencool acting as the author of the response. There was therefore a co-ordinated response. The allegations contained in the anonymous letter were refuted. Unsurprisingly, the Stock Exchange had some further enquiries. These were answered via Greencool's solicitors. According to Ms Margaret Man, the matter was taken no further. The Stock Exchange dropped its enquiries. It is understandable therefore that both Mr Fan and Ms Margaret Man would, at that time, have considered the anonymous letter to have had no substance, even to have been mischievous.

280. However, more substantial potential concerns were raised at the end of the year when the *Caijing Magazine* published its article, the matter being picked up the following day by an associated publication, the *Caijing Daily*, also called the *China Business Post*, and was then picked up by a number of media outlets in Hong Kong. The market reacted badly.

281. The articles were published shortly after Mr Gu had orchestrated the takeover of Guangdong Kelon, a major producer of domestic electrical appliances including air-conditioning and refrigerating equipment. As mentioned earlier, this was apparently the first time that a private entrepreneur on the Mainland had orchestrated the take-over of a state-owned enterprise.

282. The original article concentrated primarily on Mr Gu himself and the technology he had patented, the conclusion being that industry experts were sceptical as to whether it was quite the break through that it was promoted as being.

283. There was, however, a direct reference to the earnings of the Greencool Group as disclosed in its 2000 annual report, the disturbing allegation being made that, given the Group's existing business volume, these were unattainable[40]: in short that the profitable business model could not be sustained. Other disturbing allegations were made, for example, that certain cited clients of Greencool denied entering into any contract with the Group.

284. Ms Margaret Man said that the article and its off-shoot commentaries naturally aroused her concern. However, the matter was not ignored by the Audit Committee. Action was taken to investigate the position.

285. She said that she discussed the matter with Mr Fan, both agreeing – as banking professionals - that the media analysis was fundamentally flawed for a

[40] In translation, the relevant part of the article was as follows:

"Greencool's revenue mainly came from the refrigerant replacement business done by engineering firms and the distribution business completed by designated agents. Greencool Technology Holdings Limited's 2000 annual report disclosed that, of the company's RMB364 million revenue for 2000, RMB318 stemmed from 125 replacement projects done by four engineering firms in Beijing, Shenzhen, Hubei and Hainan, with the remaining RMB46 million from the distribution business. The reporter has done a simple calculation after consulting the experts and found that Greencool Technology Holdings Limited's revenue in 2000 is simply an unattainable figure, given the existing business volume. According to information provided by Greencool, its users are mostly office buildings and hotels. A refrigeration industry source told the reporter that the cooling power unit of an office building needs no more than 1,000 kilograms, i.e. one ton of refrigerants, and Greencool's R411 series of refrigerants were priced in a range of RMB86 to RMB111 per kilogram. Thus it could be calculated that the market price of one ton of Greencool refrigerants was RMB111,000 which, if multiplied by 125, would be equal to only RMB13.875 million. That was really too far away from the revenue of RMB318 million from the replacement business as announced by Greencool."

number of reasons and that no reliance could be placed upon it[41]. In the opinion of the Tribunal, Ms Margaret Man's stated reasons for coming to that conclusion, at face value at least, were logical.

286. She said she further discussed the matter with an analyst at UBS who had experience in covering Greencool. The analyst, Mr Joe Zhang, had already spoken to Mr Gu and had circulated his clients saying that UBS was not concerned by the media report (and the ensuing commentaries) and stood by its 'buy' recommendation. As it was, Mr Zhang was to qualify his initial opinion about a week later, putting out a circular to clients headed 'More questions than answers' and saying that it would seek further clarification from Greencool management and from industry officials before reviewing its rating. In the first circular, however, he had said the following:

> "Our view is that the stock will continue to be under some confusion (given the scientific nature of its products) but we think that Mr Gu's clarifications are convincing. We have seen some of its customers and we believe that it offers a credible product."

287. On behalf of the SFC, Mr Duncan queried why Ms Margaret Man would wish to consult with a market analyst in the first place and why her view would not (apparently) have been influenced by Mr Zhang's later reservations. In the view of the Tribunal, Ms Margaret Man's explanation was not convincing. The Tribunal, however, can see sense in Ms Margaret Man originally contacting Mr Zhang. Testing the views of a well respected analyst was one means – one among several - of assessing the depth of concern in the market place and through that the perceived strengths of the media criticisms.

[41] By way of illustration, the prices cited in the media article for refrigerants were the prices at which Greencool purchased them from Tianjin Greencool not the prices at which Greencool sold them to customers

288. In addition, Ms Margaret Man said that she conferred with Mr Wang Xiao Jun of ING, a director and one of the persons responsible for sponsoring Greencool's listing. She said that she was told by Mr Wang that the matters raised had been known to the sponsors during the listing process but the due diligence process had cleared any concerns. This no doubt would have been of comfort to her.

289. Ms Margaret Man said that she was unable to attend a press conference in Beijing given by senior management of Greencool. However, she said that she studied the results and learnt that five major Greencool clients[42] had attended the conference, all of them confirming that they had indeed entered into contracts with Greencool and were satisfied with products they had purchased.

290. In this regard, she said that she also took the opportunity to discuss Greencool with certain mutual clients, she still being a senior executive at CITIC Kaw Wah Bank . One of these mutual clients, she said, was Mission Hills (a golf course and real estate developer) which was a client of Greencool. The response, she said, was positive.

291. On a more formal basis, Ms Margaret Man said that the Audit Committee met on five occasions in the first five months of 2002, part of its work being related to the media reports.

292. As a result of meeting with Arthur Anderson, the auditors, said Ms Margaret Man, further steps were taken.

[42] The clients included the National Library, the Daxing County Xing Shang Materials Centre Refrigeration Plant and Shougang NEC Electronics Company Limited.

293. In particular, in light of comments made in the *Caijing Magazine* article to the effect that the market demand for Greencool's 'R22' refrigerant was limited, and that therefore Greencool's business model was fundamentally flawed, it was agreed that an independent valuation firm should be instructed to conduct an appraisal of the Mainland market. In this latter respect, a company called American Appraisal Hongkong Limited was appointed and later – in September of that year – submitted a full report. The report submitted by that company, although very technical, encompassed a survey of the various Mainland markets, and can be read as supporting Greencool's optimistic prognosis of its future business prospects. What was put before Greencool therefore was a report which, on analysis, supported the essential viability of its business model.

294. Ms Margaret Man said that she and Mr Fan also made what may be described as collateral enquiries. For example, Greencool provided a 'zero cost' model of financing to customers which meant that there would be no charge if electricity savings did not reach an agreed threshold: say 10%. To cover itself against loss, Greencool placed insurance with a number of companies including Ping An Insurance Company. Ping An Insurance informed Ms Margaret Man that Greencool had never made a claim under its insurance. As Ms Margaret Man understood it, this constituted an assurance that Greencool's installations were saving money, enabling it to collect from the customers rather than to claim on the insurance: another indication that its products were viable and profitable.

295. Ms Margaret Man said that she and Mr Fan, separately, also made surprise visits to Tianjin Greencool, Mr Gu's company, the company that made the Greencool refrigerants for sale to the Greencool Group. She said that, in the result, steps were taken to separate the storage facilities of Tianjin Greencool from those of the Greencool Group. Ms Margaret Man further testified that one

of the matters of concern at the time was the uncertainty created by the Group's connected transactions with Tianjin Greencool, a concern leading her to propose the creation of an investment committee, a proposal later adopted by the Greencool board.

296. Despite the Tribunal's concerns as to Ms Margaret Man's credibility, a matter which will be considered later, the matters set out above indicate that Ms Margaret Man did take a number of positive steps in the wake of the adverse media reports which, on balance, do support her assertion that she was not merely passive but, as her counsel put it, acted 'conscientiously and reasonably' to protect the interests of the Greencool Group.

B. Failing to follow the recommendations of Arthur Anderson

297. On behalf of the SFC, considerable stress was placed on the assertion that, despite the disturbing reports in the media, neither Mr Fan nor Ms Margaret Man, as members of the Greencool Audit Committee, followed up on proposals made to that committee by the Group auditors, Arthur Andersen.

298. In response, on behalf of Ms Margaret Man, it was said that this emphasis, when considered in a contemporaneous context and not through the prism of hindsight, was misplaced. While there were certainly limited proposals made by the auditors concerning the allegations made in the media, proposals that were given due consideration, in the main the proposals were not related to any concern as to any form of wrongdoing within the Group but were entirely standard proposals made by the auditors (by way of a 'value added' service) seeking to enhance internal management procedures.

299. As to the nature of the proposals, Mr Bur Chan Kwong Tak ('Mr Bur Chan') of Arthur Anderson said that it was standard procedure for his team to prepare PowerPoint presentations for Audit Committee meetings, circulating hard copies to the members. The PowerPoint presentations, he said, provided a clear and comprehensive record of matters falling for discussion.

300. By way of illustration, referring to the issue of Greencool's high bank balances, he pointed to the PowerPoint presentation made on 19 March 2001, in which an abstract of the consolidated balance sheet revealed that Greencool was holding RMB850,695,000 in cash and bank deposits and in which, in a later section of the presentation headed 'business opportunity' the recommendation was made to fully utilise those idle funds.

301. The PowerPoint presentation given at the meeting of the Audit Committee on 21 January 2002 was, of course, within weeks of the adverse publicity that Greencool attracted at the end of 2001.

302. In that PowerPoint presentation, an abstract of the consolidated balance sheet revealed that cash and bank deposits had increased from an audited figure of RMB850,695,000 for the year ending 31 December 2000 to an unaudited figure of RMB1,140,315,000 for the period ending 30 September 2001.

303. Within the presentation, a number of matters were raised under the heading of 'Communications between the Audit Committee and the Auditors' including, for example, the 'responsibilities of the auditors' and 'differences of opinion with management'. It is important to note, however, that Mr Bur Chan testified that these issues had not been raised in order to deal with any form of crisis following the adverse media coverage but were entirely standard topics that

were required to be brought to the attention of the Audit Committee pursuant to the auditing standards.

304. However, in the same presentation under the heading of 'Concerns'[43], the following was presented to the Audit Committee:

> *Recent negative news[44] regarding the company*
>
> - anonymous complaint letter received by the Stock Exchange of Hong Kong on 4 June 2001;
> - disputed articles published in the domestic magazine 'Finance Weekly' [*sic*] on 5 December 2001 and subsequent follow-up reports and the company's response;
> - effect on the audit of the year 2001; and
> - our suggestions.

305. Concerning the third bullet point, it was suggested that certain new audit procedures be implemented. In respect of 'sales and accounts receivable', among other matters, it was suggested that there be a background check on 10 of the largest customers and that, in addition, 60 other customers should be randomly selected and made the subject of audit procedures, including on-site visits or enquiries over the telephone, confirmation of year-end balances and mid-year

[43] There was some debate as to the manner in which the heading "Concerns' should be understood, whether as 'matters to be raised' or 'things for attention'. In the opinion of the Tribunal, nothing really turns on this, more especially as Ms Margaret Man accepted in the course of her testimony that suggestions made by the auditors were to be taken seriously.

[44] The 'recent negative news' was spelt out in the PowerPoint presentation as consisting of: certain products of Greencool not being validly approved; the energy-saving effect of products being exaggerated; Mr Gu being questioned; the identity of certain of Greencool's customers not being known; sales for the years 1999 and 2000 being exaggerated; and finally, listing funds being used improperly.

sales and a review of all executed contracts. In respect of bank deposits, it was suggested that the auditors should make more detailed enquiries.

306. In respect of these new audit procedures, the evidence indicates that they were considered by the Audit Committee and agreed in principle.

307. As to the details of the auditors' 'suggestions' these were set out in the PowerPoint presentation in the following terms:

- form an independent investigation team to verify the related negative news and issue an independent investigation report;
- increase management's transparency to appropriately maintain good communications with the media on a regular basis;
- appoint non-executive directors; and
- engage auditors to audit the results of each quarter and issue the auditor's report.

308. A few weeks after this, in March 2002, Arthur Andersen submitted a 'Management Proposal' document which represented Arthur Anderson's professional suggestions made on the basis of its auditing experience, the proposals being intended for the improvement of Greencool's internal management systems. In this regard, the following was said:

> "We understand that your Group is actively perfecting internal management systems for the purpose of overcoming current challenges and based on the long-term development. At this important moment in your development, we hope to provide valuable recommendations…"

309. The document emphasised, however, that the matters raised would not cause the auditors to express any "independent" opinion on the efficiency of internal controls.

310. The great majority of recommendations made were standard in the sense that they looked to the more efficient implementation of systems within the Group. [45] There was, however, one area in which, in putting forward recommendations, a direct criticism was levied. Under the heading of 'Financial Information Management', Arthur Andersen, having recognised that the main function of the Hong Kong office related to the Group accounts and liaising with the Stock Exchange, went on to say the following of the financial department in the Hong Kong office, namely, that it:

> "… knew little about the financial position and business operations of the subsidiaries in Mainland China, thus they could not really play the role of financial supervision and control over the subsidiaries in mainland China."

311. In light of this, Arthur Andersen recommended that the Hong Kong financial department should strengthen its functions of financial supervision and control over the subsidiaries.

312. As already recorded, considerable emphasis was placed by the SFC on these various communications between Arthur Andersen and the Greencool Audit Committee.

[45] For example, in respect of cash disbursement management, it was suggested, among other matters, that disbursement of large amounts of cash should be subject to the approval of the Board of Directors and that the Audit Committee should be notified of disbursements of large sums of cash.

313. In answer, it was submitted by Mr Li, on behalf of Ms Margaret Man, that it was not possible to read any of the suggestions made by the auditors at this time as indicating the possibility of any form of fraud or lesser form of wrongful accounting within the Group. Leaving aside for the moment the constitution of an independent investigation team which would look at the recent adverse media publication, the proposals were not in any way made to try and avert some sort of crisis, they were entirely standard suggestions made to seek to improve internal management systems. This was made abundantly clear, for example, in the covering note to the March 2002 'Management Proposal'. If Arthur Andersen had been concerned of the possibility of fraud or some other similar malfeasance, it would surely have spelt out matters in far more certain terms.

314. As the Tribunal has understood it, however, it is not the SFC case that the management proposals put forward by Arthur Andersen did in any way, direct or indirect, raise the spectre of fraud or indeed any form of falsification of Greencool's accounts. The SFC case is instead focused on the assertion that, despite the suggestions or proposals put forward by Arthur Andersen, the Audit Committee did nothing, certainly nothing of any real value, to follow up on those suggestions or proposals and in the result, by reason of its inertia, the opportunity was lost to unearth information which may have revealed that the accounts authorised for publication were in some material manner false or misleading.

315. Central to Mr Li's argument was the submission that the SFC had attempted to give an importance to the communications detailed above that they simply did not have at the time.

316. In advancing his argument, Mr Li said that, in respect of the January 2002 PowerPoint presentation - a document of central importance to the SFC -

Mr Bur Chan accepted that, when he and his team went to the Audit Committee with that presentation, subject to certain formalities being met, he fully expected to be able to give a 'clean' opinion and that, in turn, the Audit Committee would recommend to the Greencool board that the accounts be adopted. In the result, whatever recommendations or proposals were put forward in that presentation, they were essentially for future reference; it was not suspected that they would impact on the current audit. It was not, therefore, something that was expected to put the current audit into a state of suspension while further and deeper investigations were made by the Greencool management.

317. On the evidence, that is clearly the case. The suggestions were essentially just that: 'suggestions'. They were not instructions. They represented issues for discussion, as Mr Li put it, not problems that demanded fixing. The evidence revealed that the practice of making such suggestions was relatively standard, a form of 'value-added' service, and in this instance did not point to any concern that there were at that time serious internal control weaknesses that demanded immediate investigation. Indeed, in this regard, Mr Bur Chan confirmed that in the 'sign-off' meeting notes of the audit team for the year ended 31 December 2000, it was recorded: "no significant control weaknesses noted".

318. In any event, as matters for future reference and perhaps for ongoing discussion, Mr Bur Chan accepted that the auditors did not expect there to be an immediate formal response to the proposals. It was more a matter for digestion by the management, a process of considering current internal management processes and determining whether or not they would be enhanced if the suggestions or proposals made by Arthur Andersen were taken on board. In short, quite legitimately, after due consideration, the suggestions or proposals could be accepted in part or whole or rejected.

319. As it was, there was a response of a kind to the auditor's suggestions, consisting essentially of handwritten notations, agreeing with some of the suggestions and explaining why others were not necessary to follow up. In this particular regard, Mr Terence Cheung Kwong Tat ('Mr Terence Cheung'), the partner at Deloitte who took over the auditing responsibilities from Mr Bur Chan, testified that the answers had been scrutinised and that he and his team at the time were satisfied with those responses.[46]

320. Considered in its contemporaneous context, the Tribunal is satisfied that Mr Li's submissions must be correct. When viewed as a whole, the proposals put forward by Arthur Anderson at about that time were not seeking in any way to raise an alarm but were, in the main, standard proposals for the enhancement of internal management put forward for consideration by the Audit Committee and/or Greencool's senior management. As such, an immediate response was not required; indeed, no response at all was necessarily required, it being very much a matter for internal determination.[47]

321. But what of the proposal for the forming of an investigation team, a team that would investigate the media criticisms, criticisms related to the inflation of sales figures and the like? In respect of this matter, the evidence indicates that, in light of certain enhanced audit procedures carried out by Arthur Andersen, a decision was later made that the need for such a team was no longer necessary.

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[46] Indeed, various ticks placed next to Greencool's answers had been placed there by himself, said Mr Terence Cheung.

[47] By way of illustration, Arthur Anderson recommended that steps should be taken to ensure better media communications but, according to Ms Margaret Man (whose evidence was a little ambiguous), Greencool either already retained a public relations firm or followed the recommendations and hired one: the end result, of course, being the same.

Mr Bur Chan himself confirmed this to be the position in a statement made to the SFC in November 2013.[48]

322. In her evidence, Ms Margaret Man said that both she and Mr Fan thought that this recommendation was worth pursuing. In the result, there were initial discussions with a financial advisory company, Access Capital, Ms Margaret Man believing that it may be appointed to head the investigation. However, she said, as matters developed, the decision was made that such an investigation team was not necessary. She gave her reasons for this in her second witness statement of 26 October 2015:

> "In light of our discussions with Access Capital and procuring a report from American Appraisal, and considering that Greencool had already given a lot of clarifications publicly as well as to the Stock Exchange, and given that Arthur Anderson had carried out extensive audit procedures specifically in response to points made in the negative news, the yet-another step of setting up a formal independent investigation would be unlikely to add anything further. Mr Fan and I discussed [the matter] and agreed so. However, we planned to carry out some follow-up checking of our own."

323. In the view of the Tribunal, the abandonment of the proposal to set up an independent investigation team, while perhaps – with the benefit of hindsight – the loss of a real opportunity, was clearly a decision arrived at on a rational basis and, of itself, cannot be taken as pointing to a lack of diligence on the part of either Mr Fan or Ms Margaret Man.

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[48] In this regard, the following extract from the interview reads:
"Question: So this is more clear now. That is, actually, you only proposed this investigation team to it [Greencool's Audit Committee] on 21 January before you carried out the additional audit procedures, but after completing the audit and making proposals on strengthening [internal] controls, this recommendation no longer existed, right? That is, there was no longer the idea of an investigation team?
Answer: That's right, that's right."

C. The maintenance of high bank balances by Greencool subsidiaries

324. As stated earlier in this report, the evidence has shown that in the tax years ended 31 December 2000 – 2004 inclusive there was a marked inflation of funds held in six bank accounts opened by Greencool subsidiaries. The inflated figures were not small.[49] While at that time it was assumed by everybody (other than those in the systemic fraud) that the funds were genuine, they nevertheless were for practical purposes, 'idle funds'.

325. Mr Bur Chan Kwong Tak, the audit partner at Arthur Anderson, testified that he was informed that Greencool intended to expand its business interests by way of acquisitions and required funds for that purpose. He further testified that, while there was a very large amount of surplus cash being held, at the same time subsidiaries in the Group had entered into loan agreements, those agreements attracting interest. It was for that reason, he said, that suggestions were made on strengthening cash management.

326. Mr Terence Cheung, the audit partner of Deloitte, testified that he noticed in particular the large amount of inventory being held and also the surplus cash. With most GEM listed companies, he said, funds raised in the listing would be utilised within a short space of time to develop the business. In the result, in Deloitte's report issued to the Greencool Audit Committee for the year ended 2003 the issue of making use of 'significant idle funds' was raised.

[49] By way of illustration, for the year ended 31 December 2000 the overstated bank deposits exceeded RMB 388 million; for the year ended 31 December 2002 they exceeded RMB 741 million and for the year ended 31 December 2003 they exceeded RMB 877 million.

327. That said, as already stated, there was no suggestion at the time that the surplus funds were anything other than genuine. The amount of the deposits were verified each year by banks holding the funds and reported by the auditors.[50]

328. As Ms Margaret Man, a person with experience in Mainland banking practice, put it, banks were unlikely to participate in making false confirmations; they received many confirmation requests and had tested systems in place. It is understandable therefore that she should have had no concern as to whether the reported cash balances reflected the true situation.

329. The issue for her, therefore, was whether prudence dictated a better use for the funds, hardly a matter that would point to the funds themselves being misreported as to their true value. The Tribunal has had no difficulty accepting therefore that the fact that there were large surplus funds being held in a number of Mainland banks was not (at the time) in any way suspicious. Not only had Greencool raised substantial funds in its listing but it continued – on the audited accounts – to be profitable.

330. As to why such surplus funds should be held, Ms Margaret Man's explanation was a rational one. As she put it in her second statement, Mr Gu had always talked of his ambition to build a business empire and become a leader in the field of both domestic and industrial cooling and refrigeration. His strategy was to acquire companies that would use Greencool refrigerants thereby building up both integrated businesses and the Greencool refrigerant brand. The surplus

[50] As Mr Li, for Ms Margaret Man, pointed out in his final submissions, the evidence revealed that the auditors did more than simply checking with banks. They "tallied the figures and the transactions which had led to the figures, they [went] to monthly statements, to sales documentation (contracts, orders, dispatch notes, invoices, engineering reports, receipts, deposit vouchers etc), to confirmation from customers (another independent source of verification), to internal ledgers, even to tax payments".

funds, therefore, were being kept, as she understood it, for future mergers and acquisitions.

331. In the view of the Tribunal, in such circumstances, it is understandable that Ms Margaret Man (and other members of the Audit Committee) would not have thought it necessary to question the maintenance of what during the hearing was sometimes referred to as a 'war chest'.[51] Nor, in the view of the Tribunal, would the fact that the 'war chest' was maintained over a period of several years have been grounds for concern; as always, the identification of 'target' companies and their acquisition can be a protracted business.[52]

332. Of interest, is the comment made by the SFC's own expert witness on market analysis, Ms Winnie Pao, that some investors may have regarded this strategy of building up a 'war chest' positively: "saving up ammunition for expansion in more favourable times."

333. In the result, the Tribunal is unable to accept the submissions advanced on behalf of the SFC by Mr Duncan that the fact *simpliciter* of large cash surpluses should have placed Mr Fan and Ms Margaret Man, and all the other members of the Audit Committee, on their guard and have caused them to further enquire into the issue.

334. A more difficult question arises in respect of the fact that, despite holding such large cash surpluses, various subsidiaries in the Group still borrowed significant sums of money from banks. Why would this have been

[51] It was apparent on the evidence that the auditors also accepted the rationale for maintaining a hefty 'war chest'.

[52] Evidence was put before the Tribunal of the identification of a potential acquisition in mid-2004, that is, of a company called Shangqui Ice Bear Refrigerating Facilities Company Limited.

done; why would interest be paid on loans when the Group held such large surplus deposits that were (for all practical purposes) lying idle?

335. With the benefit of hindsight, of course, it can be seen that there would have been a very real need to borrow because the surplus deposits were fictitious; in short, there was little, if any, available funds. But that was not known, or even suspected, at the time.

336. The issue of the need to borrow from banks when such large surplus funds were available in the Group's own bank accounts was raised by both Arthur Anderson and Deloitte. In answer, Greencool's management said that funds had been borrowed for two principal reasons: first, to build closer relationships with the banks; and second, to avoid what was described as 'cross-subsidy' problems.[53]

337. When asked about their reactions to these explanations, both Mr Bur Chan and Mr Terence Cheung said that the explanations at the time appeared to be reasonable. As Mr Bur Chan expressed it in answer to a question from Mr Li: "It actually made quite a bit of sense".

338. In answer to a question from the Chairman of the Tribunal, Mr Bur Chan agreed that, if Greencool was set on a programme of expansion, it may have made sense also to borrow for everyday purposes while maintaining the 'war chest' undiminished.

[53] As the Tribunal understands it, inter-company borrowings were at the time regulated in the Mainland and so it was financially advantageous for individual companies to have their own sources of funding.

339. On behalf of the SFC, Mr Duncan argued that, while, from an auditing point of view, the auditors may have accepted these explanations from Greencool's management, Mr Fan and Ms Margaret Man were Independent Non-Executive Directors and were not able to discharge their duties to the company by simply taking the lead from the auditors. The amount of loans borrowed ought to have appeared disproportionately large [54] for the purposes put forward by Greencool's management and should therefore have prompted enquiries on their part.

340. As to knowledge of the extent of loans, Mr Duncan cited the evidence of Mr Terence Cheung, the Deloitte audit partner, who said that, if loans raised by subsidiaries in the Greencool Group had been large enough, that is, 'material', good corporate governance would have dictated that the holding company would be made aware of them and would be required to give approval. As, during his period as auditor, the profits of Greencool were not that big, he said, and were reducing, the number of loans treated as 'material' would have been that much greater. All of this, said Mr Duncan, had to be considered against the background of the earlier disturbing allegations made in the anonymous letter and in the media.

341. There is a good argument to be made that, not being auditors, Mr Fan and Ms Margaret Man should have viewed the 'loans' issue as Independent Non-Executive Directors, both with a banking background, and should more diligently have questioned the need for such loans. The Tribunal itself questions why a company with an embarrassment of liquid assets should wish to borrow.

[54] In cross-examination, Mr Duncan suggested to Ms Margaret Man that the known borrowings in 2000 had been RMB 20 million; in 2001, RMB 80 million; in 2002, RMB 68 million; in 2003, RMB 75 million. In her answer, Ms Margaret Man indicated that, to her memory, she did not consider these to be disproportionate, not when compared with Greencool's total assets.

342. But that said, the Tribunal must make allowances for two factors. First, that, if commercial reasoning is found to be acceptable to auditors of repute, it may well be found to be acceptable to the Independent Non-Executive Directors too. Second, whether the reasoning is sound or questionable, it is far from unheard of for large companies with cash to nonetheless take out loans and to do so for many different, entirely legitimate reasons.

343. In the circumstances, the Tribunal is unable to find that Mr Fan or Ms Margaret Man can be held to be reckless or negligent for failing to look more deeply into the 'loans' issue at the time.

Ms Margaret Man's credibility

344. In the judgment of the Tribunal, there is no doubt that Ms Margaret Man attempted assiduously to distance herself from any accusation of recklessness or negligence in the discharge of her duties as a director. In doing so, rather than being frank and forthright with the Tribunal, she did herself a disservice. This lack of credibility, said Mr Duncan on behalf of the SFC, was compounded by the fact that many of her assertions were not supported by any form of contemporaneous written evidence.

345. That said, the Tribunal has had to warn itself of the dangers of making substantive determinations of culpability on the basis only of a person's lack of credibility. In this regard, it must be remembered that Ms Margaret Man was being asked to remember matters that had taken place well over a decade earlier: in such circumstances, it is understandable that there would be degrees of uncertainty, even an amount of vacillation, on her part, as to conversations with Mr Gu and the like.

346. For example, she testified that she remembered speaking to Mr Gu concerning the fact that subsidiaries were taking out loans when they held credit balances in their banks but could not remember the gist or outcome of those discussions. It was pointed out by Mr Duncan that none of the minutes of Greencool board meetings made any reference to the issue, a point of significance, yes, but it may also be that it was simply not recorded.

Conclusion

347. In coming to its determination in respect of the two Independent Non-Executive Directors, the Tribunal has taken into account, among other matters generally, the following –

(i) That at all relevant times both Arthur Andersen and Deloitte, the Greencool auditors, both firms of international repute, accepted the explanations given to them by the management of Greencool and issued a clean bill of health in respect of the Group's financial affairs. This was despite the fact that certain concerns had been raised in the media;

(ii) That neither Mr Fan or Ms Margaret Man was a paid, full-time executive, Greencool had appointed auditors of repute and competence and they were entitled to rely on their advice subject of course to employing their own wisdom and experience in order to weigh that advice. In addition, absent grounds for suspicion, they were entitled to trust the management of Greencool to do their work competently and honestly. The adverse matters raised in the media would of course have been matters of concern for both Mr Fan and Ms Margaret Man: Ms Margaret Man fully

admitted this. On the evidence, however, as she said, she worked with the auditors, Audit Committee and management to investigate the concerns. Might she and Mr Fan have more vigourously and incisively discharged their obligations? No doubt, looking back over the years and knowing what is now known, criticisms can be levelled. But that is not the test; and

(iii) That, in looking to culpability, it must be remembered that neither Mr Fan nor Ms Margaret Man was under an obligation to turn themselves into auditors or executives to try and ferret out deceit. Nor were they required to give continuous attention to the affairs of Greencool.

348. In the judgment of the Tribunal, therefore, while there were media concerns, it is apparent on the evidence that these concerns did put both Mr Fan and Ms Margaret Man on alert. The evidence further indicates that both of them did not simply abandon their responsibilities to the auditors, instead they worked with the auditors, considering their suggestions, and taking a number of positive and rational steps to investigate matters. In the result, it has not been demonstrated to the Tribunal that, with reasonable diligence, either of them should at the time have been able to unearth information undermining the integrity of the Group accounts.

349. On the information available to them at the relevant times, when that information is considered in the round, the Tribunal is satisfied that, when each of them, as members of the Audit Committee, authorised the publication of Group

accounts, it was reasonable for them at the time to believe that the accounts were true. In the result, neither has been found culpable.

CHAPTER 7

CULPABILITY: THE QUALIFIED ACCOUNTANT AND COMPANY SECRETARY OF THE GROUP

350. Earlier in this report, reference has been made to a set of management proposals submitted by Arthur Andersen to the Greencool Audit Committee in March 2002, relatively soon after adverse media publicity concerning Greencool. In particular, reference has been made to what the Tribunal has described as a 'direct criticism' contained in those proposals. Under the heading of 'Financial Information Management', having recognised that one of the main functions of Greencool's "head office" of the Group was concerned with the Group accounts, Arthur Andersen said that the financial department -

> "… knew little about the financial position and business operations of the subsidiaries in Mainland China, thus they could not really play the role of financial supervision and control over the subsidiaries in Mainland China."

351. During the course of his testimony, Mr Henry Mok equivocated as to whether this criticism was directed at his department in Hong Kong. He put forward the suggestion, one which the Tribunal has had no difficulty in rejecting, that the reference was directed at the financial department of the Shenzhen office.

352. On an understanding of all relevant evidence, the fact is that – clearly – the criticism was directed at the financial department in Hong Kong, the department headed by Mr Henry Mok. As such, the criticism was aimed directly at him. When analysed, taken on its face, the criticism is damning. In blunt terms, it was saying that Mr Henry Mok was not doing his job. It stated that the

department, and therefore Mr Henry Mok himself, was at that time unable to exercise effective supervision and control over the Mainland subsidiaries, those subsidiaries constituting the operational arm of the Group. The reason for this state of affairs, it was said, was because the department, and therefore, Mr Henry Mok himself, knew little about the business operations of the subsidiaries on the Mainland and of their respective financial positions.

353. The criticism was followed by a number of recommendations, the principal one being that "the financial department at the head office of your Group should strengthen the function of financial supervision and control over the subsidiaries".

354. A further recommendation proved, albeit with the benefit of hindsight, to be prophetic, stating that the financial department should ensure an understanding of the internal financial management systems of the subsidiaries in Mainland China and should, to achieve that end, carry out a continuous review of such systems.

355. While acknowledging, as stated earlier in this report, that these proposals were not instructions but more properly were suggestions made by the auditors for consideration by Greencool, in the view of the Tribunal the fact remains that Mr Henry Mok must have appreciated that the criticism was of him and that the recommendations were, in the first instance at least, recommendations for remedial action by himself and his department members.

356. On the evidence, it does not appear, however, that Mr Henry Mok attempted to follow the recommendations. Why was this? Was it passivity on his part, evidence of a continuing negligence in the discharge of his responsibilities?

Expressed broadly, and based on a greater range of assertions, that was the SFC contention. Or was it, as Mr Henry Mok himself asserted, that even if the criticism was aimed at the Hong Kong financial Department, it was misplaced; it was simply not his function, and therefore not within his power, to exercise the level of supervision and control over the Mainland subsidiaries?[55]

357. During the hearing there was considerable debate as to this issue. Indeed, it may be said that it is the primary issue to be determined when considering whether, pursuant to section 277(1), Mr Henry Mok is to be found culpable.

358. In the view of the Tribunal, the issue raises a principal question and, if necessary, a subsidiary question. The principal question looks to the true nature and extent of Mr Henry Mok's duties. The subsidiary question, if required to be answered, looks to whether there was some legitimate and rational division of responsibility which excused him from exercising the level of supervision and control over the Mainland subsidiaries outlined by Arthur Anderson.[56]

359. Before turning to the principal question, however, something should be said of Mr Henry Mok's professional background.

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[55] In the course of his evidence, Mr Henry Mok was asked by one of the members what action personally had he taken? He replied: "At the relevant time, there was some recommendations made and then we submitted these recommendations to the directors, including Mr Zhang Xi Han and Mr Gu Chu Jun because they were the ones who directly managed the subsidiaries and also the head office." As to why he had taken no further action himself, he answered: "Because… I cannot do anything about this. I was not involved in the daily management of the subsidiaries." The exchange continued:
"Q: So, even though you were the qualified accountant, you could do nothing about them?
A: Correct."

[56] In his final submissions, Mr Felix Ng, counsel for Mr Henry Mok, submitted that the relevant questions should be, first, what did the contractual documents/statutory instruments actually say were the duties of Mr Henry Mok and, second, what was the actual division of labour for financial reporting within the Greencool Group at the time?

360. Mr Henry Mok began his accounting career in 1985 when he joined Price Waterhouse as an auditor. Prior to joining Greencool in April 2000, he had for a time practised as a certified public accountant under the name of Henry Mok & Company and had been employed by a number of companies as a financial controller and/or company secretary. At the time of joining Greencool he therefore had some 15 years experience in the profession. Mr Henry Mok remained with Greencool until his resignation in 2006.

361. When he took up his employment, Mr Henry Mok entered into a service agreement with Greencool Technology Holdings Limited – the listed company – it's principal place of business being given as Hong Kong.

362. In terms of the agreement, he was employed as "the financial controller and company secretary". As to the extent of his duties, in terms of Clause 3 he undertook to "use his best endeavours to carry out his duties… and to protect, promote and act in the best interests of the Group". Clause 3 further provided that he would perform such services for "the Group" and accept such offices in "the Group" as the Company may from time to time require.

363. As to the meaning of "the Group", the agreement, in its definition section, said that it means "the Company and *its subsidiaries* and, unless the context requires otherwise, includes associated companies from time to time". The agreement further contemplated travelling into the Mainland, stating that he would mainly work in Hong Kong but would travel to the Mainland at the Company's request.

364. Shortly after Mr Henry Mok's employment, Greencool was listed on the GEM Board and, as stated earlier in this report, he was described in the

prospectus as the Qualified Accountant and Company Secretary of "the Group". Mr Henry Mok accepted that he took on the position of 'qualified accountant' although no further formal agreement was entered into in this regard.

365. Pursuant to Rule 5.11 of the GEM Listing Rules, a 'qualified accountant's' responsibilities must include, as a minimum –

(1) advising on and assisting the board of directors of the issuer in developing and implementing financial reporting, internal control and other procedures to provide the board with a reasonable basis for making proper judgements as to the financial position and prospects of the group; and\

(2) unless he is otherwise a member of the audit committee of the issuer, liaising with the audit committee to assist it in monitoring the development and implementation of such procedures.

366. The Tribunal is satisfied that this description of the responsibilities of a qualified accountant is broad in nature, setting out *the minimum* responsibilities; it does not attempt to set out in any detail the full range of the responsibilities. The Tribunal is further satisfied that this description does not limit the role of a qualified accountant to that of an adviser; a qualified accountant is to advise and *assist* the board of directors, that is, to take such steps as may be necessary to implement internal controls and other procedures that are necessary to provide the board with a reasonable basis for making sound commercial judgements.

367. The Tribunal is also satisfied that, in accordance with this description of the duties of a qualified accountant, such duties are not limited to that of a

holding company but extend to taking such steps as may be necessary to implement internal controls and other procedures in all the companies making up 'the Group'.

368. Mr Frank Yuen, who gave expert testimony on behalf of Mr Henry Mok, agreed that, in terms of Rule 5.11, the duties of a qualified accountant must extend to all the companies in the group. He further agreed that, as a substantial part of the business of Greencool was executed by its Mainland subsidiaries, for Mr Henry Mok to discharge his responsibilities as a qualified accountant, he would have to have the necessary degree of knowledge as to what was going on within the subsidiaries.

369. The Tribunal has also taken note of the fact that Mr Henry Mok, together with Mr Gu, signed a letter of representation in respect of the financial statements of Greencool as at 31 December 2000, stating in that letter –

> "… we acknowledge and confirm, to the best of our knowledge and belief, having made appropriate enquiries of other directors and officials of the Company and *the Group*, as at the date of this letter, the following representations [that were] made to you during your audit…" [emphasis added]

370. When he gave evidence, Mr Terence Cheung, the partner of Deloitte responsible for the Greencool audit, said that he took it for granted that Mr Henry Mok, being financial controller of the listed company, was the financial controller of the Group. He was never told anything to the contrary and he said that, whenever he wished to make direct contact with any of the mainland subsidiaries. Mr Henry Mok would be of assistance to him. In his role as the auditor, he said

that it was common sense that the holding company would be responsible for the accounts of the subsidiaries and would be responsible for preparing consolidated financial statements. As such, the financial controller should have at least some responsibility to account for "subsidiary level matters".

371. Mr Henry Mok himself accepted when cross-examined that, as the qualified accountant for the listed company, he had responsibilities which extended beyond the listed company into the group of companies making up the Greencool Group. As to the nature of those responsibilities, however, it was the overall thrust of his evidence that they were very limited.

372. Mr Henry Mok's evidence, although ambiguous in many parts, was clearly aimed at attempting to limit his responsibility in respect of the Mainland subsidiaries. In his witness statement of 18 June 2015, he said that, as the financial controller, his main duties were monitoring the accounting team keeping the books of Greencool Holdings and its particular subsidiaries established in the British Virgin Islands, these subsidiaries including companies named Greencool Pacific Holdings Limited, Greencool Concord Holdings Limited and Greencool Technology Inc. but not including any of the Mainland subsidiaries that made up the operating arm of the Greencool Group.

373. In his witness statement, he further sought to reduce his general level of importance:

> "I was not an authorised signatory for any of the bank accounts of either Greencool Holdings or any of its subsidiaries, be they British Virgin Islands subsidiaries or other subsidiaries established in the Mainland. I had no authority to access the financial records of any of the subsidiaries. If I have to access the financial records of any of the subsidiaries, I have to obtain

> them from the executive directors such as Mr Gu (the Chairman) or Mr Zhang (the Chief Operating Officer). However, I did not and had no authority to sign or issue cheques on behalf of Greencool Holdings or any of the subsidiaries. Neither did I have any authority to execute bank transfers for any of the accounts within the Group."

374. That may be the case, the matter does not appear to have been disputed. In the opinion of the Tribunal, however, it has little relevance to the professional execution of Mr Henry Mok's duties as the qualified accountant.

375. Mr Henry Mok was also at pains to emphasise that he did not consider himself to be the chief financial officer of the Geencool Group. As he understood it at the time, he said, the most senior financial officer in the Group was Mr Zhang (Zhang Xi Han), even though he did not know if he possessed any accounting qualifications or similar.[57]

376. Mr Henry Mok's evidence was also ambiguous as to what he considered to be the head office of the Greencool Group, his evidence tending to suggest that, for all practical purposes, he considered it to be the offices of Shenzhen Greencool.

377. It was plain to the Tribunal that Mr Henry Mok's evidence was purposefully tailored to try and remove himself as far as possible from any responsibility for what happened on the Mainland. In the judgment of the Tribunal, his evidence was untenable. Quite clearly, his duties as Group Financial Controller and/or Group Qualified Accountant extended to each of the subsidiaries within the Group.

[57] There was no evidence that Mr Zhang possessed any professional qualification as an accountant.

378. Notwithstanding that Mr Henry Mok was based in Hong Kong, he had responsibilities not only to the listed company but to all the subsidiaries within the Group. As such, his supervisory responsibilities extended to each of the Mainland subsidiaries.

379. What then, as the Financial Controller of the Greencool Group and/or the Qualified Accountant of the Greencool Group, was the nature and extent of his duties?

380. Mr John Lees, who was called by the SFC to give expert testimony, adopted what he had written in his supplementary expert report of 24 July 2015 as to the duties and responsibilities of a financial controller and qualified accountant of a GEM listed company. In this regard, he included the following duties –

(a) Accounting

(i) overseeing the accounting and finance functions; and

(ii) supervising the preparation and management reports, budgets, financial reports and statutory accounts (according to the prevailing accounting standards and regulatory requirements).

(b) Internal controls

(i) ensuring and implementing appropriate internal control systems;

(ii) establishing and monitoring of internal control systems; and

(iii) ensuring proper corporate governance.

381. These (and the other duties that he set out) he said, would necessarily require detailed knowledge of the accounts of the constituent companies, that is, in the present case, the Mainland subsidiaries.

382. In the judgment of the Tribunal, leaving aside other matters, it is satisfied that Mr Lees must have been correct in respect of the matters set out above.

383. Mr Henry Mok did not accept all of the proposed duties suggested by Mr Lees. When he testified in respect of the matter, frankly, it was difficult to obtain any form of succinct answer from him. However, he was firm in his evidence in limiting the reach of his responsibilities. The following short exchange illustrates the point (in respect of, for example, the suggested duty of ensuring and implementing appropriate internal control systems):

> Chairman: "… let me put this to you because we are obviously missing each other in the night. If you heard, when you held this position as financial controller, that certain internal procedures that ensured proper accounting were not being complied with within any one subsidiary, would you feel you had any responsibility?
> A: I would be unable to monitor such an occurrence."

384. This was a surprising answer. For all practical purposes, Mr Henry Mok was saying that, even though he held the position of the group financial controller and/or qualified accountant, he had no authority in the exercise of his responsibilities to ensure that the Mainland subsidiaries adopted appropriate financial standards. His evidence could only be read as implying that, while he had the ability to speak to the directors of subsidiaries to ask that they deal with such matters, he had no ability to monitor (and thereby ensure) due compliance.

385. As to why this was the case, Mr Henry Mok said that it was the dynamics of the internal control system that was in force that all such matters would have to be dealt with by the directors of the subsidiaries and they would have the responsibility of informing the parent company. He went on to say that during his term of employment, he believed that his role of financial controller was "limited to the financial reporting at the group level". Put another way, that his responsibilities as financial controller did not extend to ensuring the integrity of the accounting systems within each of the mainland subsidiaries; he looked at matters at the group level only. This testimony accords with Mr Henry Mok's assertions that he had no access to the financial records of the Mainland subsidiaries and that it was the responsibility of Mr Zhang to collect and collate all material from those subsidiaries which would be passed on to himself and/or the auditors for consolidation.

386. During his cross-examination, Mr Henry Mok was asked several times what steps he took as group financial controller/qualified accountant to develop financial reporting and internal control procedures within the Mainland subsidiaries. He was also asked on several occasions what steps he took on an on-going basis to monitor the financial reporting and internal control procedures within these subsidiaries. His answers may best be described as evasive.

387. Having determined the principal question, namely, the true nature and extent of Mr Henry Mok's duties, the subsidiary question arises for answer: was there some legitimate and rational division of responsibility which excused him from exercising his duties as financial controller and/or qualified accountant in respect of the Mainland subsidiaries.

388. When looking at the evidence as a whole, and doing so with the benefit of hindsight, it is apparent that a number of the Executive Directors of Greencool, certainly Mr Gu and Mr Zhang, and no doubt others who knew of and were complicit in engineering the 'accounting fraud' within the subsidiaries, wished so far as possible to limit Mr Henry Mok's access to the subsidiaries. To enable Mr Henry Mok to actively monitor internal control systems within the subsidiaries, and more so to implement appropriate enhancements, ran the very real risk of exposing the fraud. It is understandable, therefore, that they should set up the division of responsibilities outlined by Mr Henry Mok, a division that kept Mr Henry Mok at arms' length from what was happening in the subsidiaries, reducing his supervisory duties to matters at group level. The issue, however, is whether what was (no doubt) engineered by them constituted a legitimate and rational division of responsibilities.

389. Patently, it did not. A limited delegation of responsibilities is of course acceptable; indeed, it is often necessary. In the present instance, however, Mr Henry Mok was accepting a material reduction in the nature and extent of his powers, and thereby his responsibilities, as the financial controller and/or qualified accountant of the Greencool Group and doing so essentially on an informal basis. Putting it bluntly, but, as he himself admitted in the course of his testimony, in terms of the arrangement reached, even though he was the most senior financial officer in the Group, the internal financial affairs of each subsidiary became for him a 'no go' area. For that to happen without any formal public notice, even it not intended, was a deceit on the Stock Market authorities and on the market.

390. This is not to suggest that Mr Henry Mok knew of any fraudulent activities within any of the subsidiaries. This has never been part of the SFC case.

But it does mean that he was prepared to enter into an arrangement of compromise, one that, on any objective assessment, not only reduced his ability to fulfil his own duties but potentially compromised the financial integrity of the Group.

391. This, in the opinion of the Tribunal, brings the focus back to the management proposals submitted by Arthur Andersen in March 2000 and the concern expressed in those proposals that the Hong Kong financial department - effectively, therefore, Mr Henry Mok himself - knew little about the financial position and business operations of the subsidiaries on the Mainland, the result being that the department had lost the ability to play the (essential) role of financial supervision and control over the subsidiaries. What was recommended at that time, albeit it was more in the form of a suggestion to Greencool than a command, was that there should be a strengthening of the function of financial supervision and control over the subsidiaries. For the reasons already set out, the Tribunal is satisfied that Mr Henry Mok at that time must have appreciated that essentially the criticism was aimed at him. He was a professional accountant, a man with considerable experience in the commercial world. Regrettably, however, it is apparent that he took no steps to abide by the recommendations. Having abandoned an essential part of his responsibilities, he was prepared to abide by that abandonment. In doing so, he failed in his duty of care to Greencool and to the market.

392. The Tribunal is satisfied that this failure of his duty of care, this continuing negligence on his part, was not to be seen simply as a failure in isolation, having no consequential effect. To the contrary, it meant that over an extended period of time, working under the management of directors who were

complicit in the accounting fraud, the various subsidiaries of the Group were able to act unimpeded; to employ colloquial language, they were given free rein.

393. In this regard, what must be remembered is that, on the evidence presented to the Tribunal, there were a number of employees working in the subsidiaries who either played a role in the accounting fraud or were aware of it. While, of course, it cannot be said that Mr Henry Mok would have uncovered any fraud, nevertheless, if he had visited the subsidiaries more frequently, if he had exercised his supervisory role with some energy and insight (as expected of a senior executive), he may well have picked up indications that all was not as it seemed to be. Frequent interaction with the employees may have resulted in one or more of them willingly, or accidentally, passing on critical information to him.

394. Mr Henry Mok, in the course of his testimony, emphasised that the board of Greencool had never criticised him. This, in his opinion, was evidence that he had fulfilled his duties to the letter. Of course, the board did not criticise him. He had been persuaded to emasculate his own powers by those members of the board who dominated it so they could continue to undermine the financial integrity of the Group.

395. It has not been disputed that Mr Henry Mok played a central role in the publication of the audited accounts and the combined final results of Greencool and its subsidiaries. For the reasons given, the Tribunal is satisfied that, in playing his role in the dissemination of this material, he was negligent as to whether it was false or misleading.

396. In the course of the hearing, other assertions were made to the effect that Mr Henry Mok, in disseminating the accounts, had been negligent as to whether

they were false or misleading, a principal example being his handling of Greencool's (supposed) accumulation of significant idle funds and the need to take out large loans despite the existence of those funds.

397. In this regard, it is to be emphasised that at all material times, Mr Henry Mok was a paid, full-time senior executive of Greencool. As such, in the judgment of the Tribunal - being (both formally and for all practical purposes) the senior financial officer of Greencool and holding the position demanded by the GEM board of qualified accountant – he carried a higher duty of care than, for example, the Independent Non-Executive Directors, to investigate, consider and advise the board concerning the accumulation of significant credit balances and the need to take out loans despite the existence of those balances.

398. Mr Frank Yuen, Mr Henry Mok's expert witness, agreed under cross-examination that the Greencool board should have been appraised of the reasons for the need to take out loans, more particularly, in light of the fact that the loans were well above 5% of Greencool's annual profits after tax. Yet no evidence was placed before the Tribunal to show that this issue was ever discussed by the board and recorded in its minutes. Mr Yuen was asked whether he would have expected the board to have been appraised of the reasons for those loans and also given details of their terms and conditions, including any security put forward. He agreed that it should have been done.

399. Mr Henry Mok's evidence as to the matter was defensive and equivocal, in many respects playing down the importance of the loans.

400. While it cannot be said that, if Mr Henry Mok had fulfilled his duties with greater professionalism in respect of this matter, any evidence of

malfeasance would have been revealed, this evidence of passivity on his part, his acceptance of a material diminution of his responsibilities, is, in the opinion of the Tribunal, supporting evidence of the fact that he knew he had been allocated a limited role by the Executive Directors, one that undermined the proper exercise of his duties, and evidence of the fact that he was prepared to accept this diminution.

CHAPTER 8

SUMMARY OF THE TRIBUNAL'S FINDINGS

401. In the Notice of the Financial Secretary, this Tribunal was required to determine whether the nine Specified Persons whose names are set out hereunder may have contravened section 277(1) of the Securities and Futures Ordinance, chapter 571 ('the Ordinance'), thereby being culpable of market misconduct.

402. For the reasons given in the body of this report, the Tribunal has come to the following determinations in respect of each of the nine specified persons.

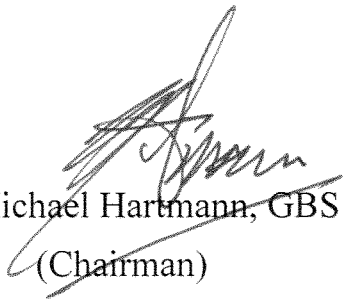
(i) Concerning Mr Gu Chu Jun (the first specified person), Mr Zhang Xi Han (the second specified person), Mr Hu Xiao Hui (the third specified person) and Mr Xu Wan Ping (the fifth specified person), the Tribunal has determined that each of them knew that the audited accounts together with the combined final results of Greencool and its subsidiaries for the financial years ended 31 December 2000, 2001, 2002, 2003 and 2004 were false or misleading as to material facts or through the omission of material facts and are thereby culpable of market misconduct pursuant to section 277(1).

(ii) Concerning Mr Mok Henry Wing Kai, (the ninth specified person), the Tribunal has determined that he was negligent as to whether audited accounts together with the combined final results of Greencool and its subsidiaries for the financial years ended 31 December 2000, 2001, 2002, 2003 and 2004 were false or misleading as to material facts or through

the omission of material facts and is therefore culpable of market misconduct pursuant to section 277(1).

(iii) Concerning Mr Liu Cong Meng (the fourth specified person), the Tribunal has determined that he was not given a reasonable opportunity to be heard and in the result is not to be identified as a person having engaged in market misconduct.

(iv) Concerning Mr Chen Chang Bei (the sixth specified person), Mr Fan Jia Yan (the seven specified person) and Ms Margaret Man (the eighth specified person,) the Tribunal has determined that they are not culpable of market misconduct.



Mr. Michael Hartmann, GBS
(Chairman)

Dr. Ngai Wai Yiu, Norman
(Member)

Mr. Hui Sik Wing, Joseph
(Member)

Dated 29 December 2016

CHAPTER 9

ORDERS

403. On 29 December 2016, the Tribunal published Part One of its Report. On 2 February 2017, the Tribunal issued a direction that all consequential matters arising out of its findings should be determined at a hearing to be held on 29 April 2017.

Service of the Direction

404. Ms Margaret Man (the eighth Specified Person) and Mr Henry Mok (the ninth Specified Person), both of whom reside in Hong Kong, were served with the Tribunal's direction and were represented and/or appeared at the hearing on 29 April 2017.

405. Mr Gu (the first Specified Person) was not represented at the hearing but clearly had notice of it. In a letter dated 18 April 2017, he requested the Tribunal to adjourn the hearing on an indefinite basis. His written application was based on the contention that a false case had been manufactured against him by certain persons of influence in the Mainland. He believed these persons would shortly be brought to justice and thereafter, he suggested, evidence exonerating him would emerge. The Tribunal was not prepared to adjourn the hearing. There was no evidence other than Mr Gu's bare assertion (which had been made much earlier in the proceedings) that a false case had been manufactured against him. There was no basis to doubt the integrity of the findings made in Part One of the report.

406. Concerning Mr Zhang (the second Specified Person) and Mr Hu (the third Specified Person), both of whom had been found culpable of market misconduct, notice was served upon them by way of email (to two addresses) and by ordinary post at their last known place of business, a company in Beijing called Super Genius where documents had previously been accepted on their behalf. No evidence emerged that the email addresses were no longer in existence. Nor were the letters sent by ordinary post returned undelivered.

407. Concerning Mr Xu (the fifth Specified Person), who had also been found culpable of market misconduct, notice was served by ordinary post at his three last known addresses in the Mainland. None of these letters were returned undelivered.

408. Concerning Mr Chen (the sixth Specified Person), who had not been found culpable of market misconduct, he was served by ordinary post and acknowledged service by means of an email dated 11 April 2017.

409. Concerning Mr Fan (the seventh Specified Person), who had not been found culpable, he was served by ordinary post at his last known address in the Mainland. The letter was not returned.

410. Concerning Mr Liu (the fourth Specified Person), the tribunal had determined that he had not been given a reasonable opportunity to be heard, there being no proof of service of documents upon him, and he was not, therefore, identified as a person having engaged in market misconduct. In order to seek to bring this to his attention, notice was served in two newspapers circulating in the Mainland, the Securities Times and Ta Kung Pao. The notices were published on 9 February and 16 February 2017.

411. It should be said that the same published notices were addressed also to the first, second, third, fifth, sixth and seventh Specified Persons.

412. In light of the evidence, the Tribunal is satisfied that all of the Specified Persons, whether found culpable of market misconduct or not, were given a reasonable opportunity of being heard in respect of the Part Two hearing which took place on 29 April 2017.

Application for a Disgorgement Order

413. Section 257(1)(d) of the Ordinance empowers the Tribunal to order that a person found culpable of market misconduct must pay to the Government an amount not exceeding the amount of any profit gained or loss avoided by that person. Such an order was sought against Mr Gu only.

414. As to the amount of any profit gained or loss avoided, the SFC relied on the expert report of Mr John Lees dated 27 March 2017. Mr Lees calculated that disposals made by Mr Gu in 2001 (in the placement of 80 million Greencool shares and the subsequent disposal of 15 million of those shares) gave to Mr Gu a profit of HK$208,905,000. With accrued interest (calculated at the judgment rate) of HK$273,064,785, this made for a total profit of HK$481,969,785. The SFC sought a disgorgement order against Mr Gu in this sum. On a consideration of all the evidence, the Tribunal is satisfied that it would be proper to make such an order and that order is made.

Application for Disqualification Orders

415. Section 257(1)(a) of the Ordinance empowers the Tribunal to order that a person found culpable of market misconduct shall not, without the leave of the Court of First Instance, be or continue to be a director of a listed corporation or in any way, whether directly or indirectly, be concerned or take part in the management of a listed corporation for a period not exceeding five years.

416. The SFC sought orders of disqualification against Mr Gu (the first Specified Person), Mr Zhang (the second Specified Person), Mr Hu (the third Specified Person) and Mr Xu (the fifth Specified Person) on the basis that each of them - each being executive directors of Greencool - had been found not only to have known of the fraudulent activities taking place within the Greencool Group but played an active role in furthering those activities.

417. As Part One of the Report makes clear, over a period of several years a carefully calculated fraud was perpetrated in the Greencool Group; it was a fraud spread across a number of subsidiaries of the Group, a fraud which required dedicated teams for its continued manufacture of false documentation and which required the corruption of senior bank officials in the Mainland. In the opinion of the Tribunal, it would not be an exaggeration to say that it was a fraud of such magnitude that it effectively maintained the charade that Greencool was a vibrant, profitable commercial concern over several years.

418. In the result, in seeking to protect the integrity of the market, the Tribunal has had no difficulty in coming to the conclusion that each of those specified persons - the first, second, third and fifth Specified Persons - should each be prohibited from acting as a director or taking part in the management,

directly or indirectly, of any listed corporation (or subsidiary) for the maximum period of five years.

419. It should be said that an order of disqualification was also sought in respect of Mr Henry Mok. Mr Mok appeared at the hearing on 29 April 2017, acting in person and made representations in respect of a number of matters. All of those matters, including the application for a disqualification order, are dealt with below.

Application for a 'Cold Shoulder' Order

420. Section 257(1)(b) of the Ordinance empowers the Tribunal to make an order that a person found culpable of market misconduct shall not, without the leave of the Court of First Instance, in Hong Kong, directly or indirectly, in any way, deal in any securities, futures contracts or similar for a period not exceeding five years.

421. A 'cold shoulder' order, as it is called, is also protective in nature. It is not to be imposed simply as a form of penalty. It is to be imposed when the Tribunal is satisfied that the person made the subject of the order poses a threat to the integrity of Hong Kong's financial markets.

422. In the present case, the SFC seeks such an order in respect of Mr Gu only. The Tribunal is satisfied that Mr Gu, as Chairman of Greencool, must have been the major, or at least one of the major, driving forces behind the fraud. The purpose of that fraud was to artificially and dishonestly maintain the price of Greencool shares. In his placement and disposal of shares, Mr Gu was prepared to undermine the integrity of the market. As such, he constituted a very real

threat to the integrity of the market and, in the opinion of the Tribunal, there must be a real risk that he still constitutes such a threat. Having regard to the nature of his involvement in the fraud and the level of threat that it presented, the Tribunal is of the view that it is entirely appropriate that a 'cold shoulder' order be imposed on Mr Gu for the maximum period of five years.

Application for 'Cease and Desist' Orders

423. Section 257(1)(c) of the Ordinance empowers the Tribunal to order that a person found culpable of market misconduct shall not again perpetrate any conduct which constitutes market misconduct. 'Cease and desist' orders, as they are commonly called, do not shut out the person who is the subject of the order from the Hong Kong financial markets. Instead, on pain of criminal punishment, they seek to ensure that all future dealings by that person avoid the market misconduct detailed in the order. 'Cease and desist" orders may be made without a time limit.

424. In the present case, the SFC seeks such orders against Mr Gu (the first Specified Person), Mr Zhang (the second Specified Person), Mr Hu (the third Specified Person) and Mr Xu (the fifth Specified Person). For the reasons set out fully in Part One of the Report, the Tribunal is satisfied that each of these persons played an active role in the fraud and, having regard to the calculated dishonesty of their actions, must continue to pose a threat to the market. In the result, the Tribunal is satisfied that 'cease and desist' orders should be made against those four persons.

425. As to the scope of the orders, the Tribunal is of the view that the misconduct of the specified persons was so egregious, so calculated and all-

encompassing that in this particular case, the scope should be broad. Accordingly, the Tribunal will order that they shall not again perpetrate any conduct which constitutes market misconduct under section 270 of the Ordinance (insider dealing), section 274 (false trading), section 275 (price rigging), section 276 (disclosure of information about prohibited transactions), section 277 (disclosure of false or misleading information inducing transactions) and section 278 (stock market manipulation).

The Application for Various Orders against Mr Henry Mok

426. The SFC sought two protective orders pursuant to the provisions of section 257(1) of the Ordinance against Mr Henry Mok. They consisted, first, of a disqualification order under section 257(1)(a) of the Ordinance and, second, under section 257(1)(g) of the Ordinance, an order to refer the findings of the Tribunal in respect of Mr Henry Mok to the Hong Kong Institute of Certified Public Accountants with a recommendation that it take disciplinary action against him. The SFC also sought costs orders against him.

427. In respect of the application for a disqualification order, Mr Henry Mok submitted that such orders are normally imposed on persons who have acted in a calculated and knowing manner. In his case, he said, he was found not to be an active and calculating participant in the fraud in any way; to the contrary, in certain respects he too was a victim of the fraud perpetrated by "his superiors" in the Group. The culpability that had been found against him was that of negligence, of a failure to act when the circumstances required that he should do so.

428. While the Tribunal accepts that Mr Henry Mok played no knowing role in the fraud, nevertheless, he held a position of high seniority as the financial controller and company secretary, it being his obligation to protect, promote and act in the best interests of the Greencool Group as a whole. He failed to do so. He was prepared to take a very diminished role, one that effectively kept him away from any real possibility of discovering the fraud. By his passivity, he was prepared to undermine his professional obligations. As the Tribunal noted in Part One of the Report (paragraph 390):

> "This is not to suggest that Mr Henry Mok knew of any fraudulent activities within any of the subsidiaries. This has never been part of the SFC case. But it does mean that he was prepared to enter into an arrangement of compromise, one that, on any objective assessment, not only reduced his ability to fulfil his own duties but potentially compromised the financial integrity of the Group."

429. This was the basis of his culpability but, having regard to his professional status and the duties that flowed from it, it was a culpability of very real significance. It also called into question his fitness – even though he was not a director of Greencool - to take on the decision-making role of a director of a listed company.

430. The Tribunal is aware that Mr Henry Mok has worked in listed companies for much of his career, that is where his expertise lies. It does not wish to prevent him from earning his living by disqualifying him from playing any role in the management of a listed company. It is firmly of the view, however, that an order disqualifying him from taking on the role of a director of a listed company must be imposed. His past conduct has shown that, until he has a full understanding of his own professional obligations, he simply lacks the

strength of character and/or understanding of a director's duties to take on the more onerous duties of a director. Accordingly, the Tribunal is satisfied that he should be disqualified pursuant to section 257(1)(a) of the Ordinance from being or becoming a director of a listed company for a period of three years.

431. The second order sought by the SFC was one in terms of which the Tribunal's findings in respect of Mr Henry Mok be referred to the Hong Kong Institute of Certified Public Accountants with a recommendation that it take disciplinary action against him. During the course of the hearing, Mr Henry Mok said that he had no objection to this order being made. In this regard, he said the following:

> "Actually, I think the HKICPA has the professional knowledge about what a financial controller should do in a listed company, so I think there will be justice and I believe in justice in the Hong Kong legal system. So I have no objection."

432. The Tribunal is satisfied that an order should be made referring its findings in respect of Mr Henry Mok. Increasingly in this globalised, cross-border world, there must be cases in which a hostile body of directors seeks to diminish the professional responsibilities of a senior financial officer, the implied threat being 'look only where we tell you to look if you wish to keep your position'. Whether compliance with such a threat amounts to unprofessional conduct is not a matter for the Tribunal but, in the opinion of the Tribunal, it is a matter that, potentially at least, could undermine the integrity of the profession and should be considered by the appropriate body.

Application for Costs Orders

433. Section 257(1) of the Ordinance gives the discretionary power to the Tribunal to make orders as to costs in respect of persons identified as having engaged in market misconduct. In terms of the section, costs orders falling into three categories have been sought:

(i) Pursuant to subsection (e), an identified person may be ordered to pay to the Government such sum as the Tribunal considers appropriate for the costs and expenses reasonably incurred by the Government in relation to, or incidental to, the proceedings. These, it appears, are essentially the Tribunal's own costs. In this regard, having considered the detailed schedule drawn up by its staff, the Tribunal is satisfied that a sum of HK$2 million is appropriate to reflect the overall costs and expenses reasonably incurred.

(ii) Pursuant to subsection (f)(i), an identified person may be ordered to pay to the SFC such sum as the Tribunal considers appropriate for the costs and expenses reasonably incurred by the SFC in relation to, or incidental to, the proceedings. In this regard, having considered the detailed schedule presented by the SFC, the Tribunal is satisfied that a sum of HK$10,700,000 is appropriate to reflect the overall costs and expenses reasonably incurred.

(iii) Pursuant to subsection (f)(ii), an identified person may be ordered to pay to the SFC, such sum as the Tribunal considers appropriate for the costs and expenses reasonably incurred by the SFC arising out of the investigation into the person's conduct prior to the institution of

proceedings. In this regard, having considered the detailed schedule presented by the SFC, the Tribunal is satisfied that a sum of HK$8,900,000 is appropriate to reflect the overall costs and expenses reasonably incurred.

434. The full costs that are sought amount to a figure of HK$21,600,000, a figure that reflects the length and complexity of the SFC investigation, that investigation leading to lengthy and complex proceedings before the Tribunal itself. On behalf of the SFC, it was submitted that, in respect of each of the three categories of costs, Mr Gu (the first Specified Person), Mr Zhang (the second Specified Person), Mr Hu (the third Specified Person), Mr Xu (the fifth Specified Person) and Mr Henry Mok (the ninth Specified Person) should each be ordered to pay 20% of those costs.

435. While the Tribunal is satisfied that costs orders should be made against each of the five Specified Persons, it is firmly of the view that to order Mr Henry Mok to pay 20% of all the costs, a sum of HK$4,320,000, would visit an injustice upon him. In this regard, the Tribunal has taken into account the following matters.

436. As with courts of the classic kind, in determining orders for costs the Tribunal is vested with a wide discretion, not only as to whether an order for costs should be made but, when several persons are found to be liable, as to the apportionment of costs between those persons. Although the discretion in both respects is wide, it is well settled that it is a judicial discretion and must be exercised according to fixed principles; primarily, according to rules of reason and justice and not according to private opinion. It is not a discretion to be exercised on the basis of simple benevolence.

437. In the present case, the Tribunal found that Mr Gu, Mr Zhang, Mr Hu and Mr Xu, all executive directors, not only knew of the fraud taking place within the Group, but each in their own way, played an important role in managing the successful continuance of that fraud. For the SFC to unravel the edifice of dishonesty built by them required extensive and prolonged cross-border investigations, investigations that they called upon their own heads. Whatever the hierarchy of seniority within that small group, in the opinion of the Tribunal, bearing in mind the extent of the fraud and its prolonged nature, it cannot change the fact that their culpability was an equally shared culpability.

438. By contrast, Mr Henry Mok was not a director. He was in no way part of that small group; indeed, he was purposefully excluded. It was never part of the SFC case that Mr Henry Mok knew of any fraudulent activities within any of the subsidiaries of the Group. His culpability was of a different order entirely. It was a culpability based on his preparedness to enter into an arrangement of compromise that, as it turned out, reduced his ability to fulfil his professional duties and thereby, when viewed objectively, potentially compromised the financial integrity of the Group.

439. In such circumstances, the Tribunal is satisfied that, while Mr Henry Mok should not escape responsibility for payment of a proportion of the costs, it should be a far smaller proportion than that of the four executive directors who were at the heart of the fraud.

440. While awards of costs in these matters are not to be seen as a punishment, when viewing the overall severity of the consequential orders affecting Mr Henry Mok, the hurt that a costs order may cause cannot be entirely ignored.

441. It was not an easy task for the Tribunal deciding upon the proportion of costs that should be met by Mr Henry Mok. In the final analysis, however, looking to all matters including the size of the costs, it was determined that Mr Henry Mok should be ordered to pay 5% of each category of costs.

442. It was further determined that Mr Gu, Mr Zhang, Mr Hu and Mr Xu should each be ordered to pay 23.75% of each category of costs.

Ms Margaret Man's Application for Costs

443. Ms Margaret Man (the eighth Specified Person) was found not culpable of market misconduct. Pursuant to the provisions of section 260(1)(b) of the Ordinance, she sought an order for her costs.

444. The SFC objected. It did so on two bases, first, on the basis that the provisions of section 260(4) of the Ordinance applied in the present case, barring her from being awarded her costs and, second, that in any event the Tribunal should, in the light of all relevant matters, exercise its discretion against an award of costs.

445. Looking first to the provisions of section 260(4) of the Ordinance, they contain certain exceptions to the Tribunal's power to award costs to a specified person who has been found not culpable of market misconduct. Costs may not be granted to a person whose conduct, the Tribunal considers, has caused, whether wholly or in part, the investigation or whose conduct, the Tribunal considers, has caused, whether wholly in part, the institution of the proceedings. In short, costs may not be awarded if the Tribunal is satisfied that, even though cleared of

culpability, the specified person brought suspicion upon himself. What must be considered, therefore, is the conduct of the person seeking an order for costs.

446. Similar provisions exist in Hong Kong criminal law. In Hui Yui Sang v HKSAR (2006) 9 HKCFAR 308, Chan PJ, in giving the judgment of the Court of Final Appeal, said that in criminal matters, as a general rule, the court should normally award costs to an acquitted defendant unless there are positive reasons to deprive him of such costs. One of the positive reasons would be that the defendant has brought suspicion upon himself. In determining that issue, Chan PJ commented:

> "It is not disputed that in exercising his discretion, the judge must consider the conduct of the appellant generally and that the most relevant conduct must be his conduct during the investigation and at the trial, including how he responded upon enquiry, the answers he gave when confronted with the accusations, the consistency of those answers with his subsequent defence, the strength of the case against him and the circumstances under which he came to be acquitted."

447. Although matters before the Tribunal are civil in nature, it is satisfied that the approach laid down in Hui Yui Sang is the proper approach to be adopted when considering objections to the award of costs under section 260(4)(b) and (c) of the Ordinance.

448. On behalf of the SFC, Mr Duncan SC said that, although Ms Margaret Man had been interviewed on more than one occasion by the SFC in the early stages of its investigation, a good many matters relevant to the issue of whether she had been reckless or negligent in her capacity as an Independent Non-

Executive Director only emerged after the commencement of the Tribunal's enquiry.

449. By way of example, Mr Duncan said that, in respect of negative media reports concerning Greencool that arose when Ms Margaret Man was a Non-Executive Director - reports that would have caused some considerable alarm - she only informed the SFC in her interviews of the fact that she discussed the matter with the Chairman of the Greencool Audit Committee, Mr Fan, and with the Chairman of the Group itself, Mr Gu. She recalled that she had also requested an independent enquiry into the effectiveness of the refrigerants marketed by Greencool, that issue being at the core of the negative media reports. It was only after the commencement of the Tribunal's enquiry, said Mr Duncan, that Ms Margaret Man recalled that she had additionally taken a number of other important steps. Had she informed the SFC of these alleged additional steps when she had been interviewed (or indeed thereafter by way of assisting the SFC), said Mr Duncan, the SFC would have had the opportunity at least of assessing the case against her in full context.[1] It was, however, denied that opportunity.

450. Mr Duncan expanded on his submissions by saying that the fact that Ms Margaret Man had not been named as a person under investigation during the course of the SFC investigation was neither here nor there. Persons required by the SFC to produce records or documents which are likely to contain information

[1] Matters which Ms Margaret Man did not mention when interviewed by the SFC but which arose during the course of the enquiry before the Tribunal included the following: that she had discussed the negative media reports and the impact of those reports on Greencool with a leading analyst and with a financier; second, that she had discussed the matter with certain clients of Greencool (e.g Mission Hills) and received positive responses; third, that she discovered that five major clients of Greencool had participated in a press conference in Beijing in which they had confirmed that they were satisfied with the products that they had purchased from the Group; fourth, that she had made enquiries with Ping An Insurance regarding the insurance placed by Greencool with Ping An to cover customer claims and had been told that no claims had been received, that itself being a firm indication that customers were generally satisfied with the quality of product they had purchased from Greencool.

relevant to its investigations may subsequently be suspected of being complicit in the misconduct under investigation. In the present case, said Mr Duncan, it was the nature of Ms Margaret Man's answers to the SFC that prompted the institution of proceedings against her.

451. In response to these submissions, Mr Laurence Li, on behalf of Ms Margaret Man, placed considerable reliance on the accepted fact that, when the SFC originally interviewed Ms Margaret Man, doing so on two occasions, she was not at that time under any suspicion. She was there to assist the SFC as to the investigation generally and not, for example, in respect only of what steps were taken by her in reaction to the negative media reports. She was not, therefore, being examined as to the nature and extent of steps taken by her in particular in her capacity as a Non-Executive Director.

452. Putting matters into context, Mr Li said that the SFC investigation had commenced in 2006, taking seven years to complete. The SFC spoke with Ms Margaret Man in a telephone interview in October 2006, the record of that interview being only some nine pages in length. It was only five years later, in February 2012 that the SFC interviewed her again. This interview was longer but still took less than three hours. On neither occasion did the SFC investigator treat Ms Margaret Man as a person under investigation. No allegations were made against her. Nor was any sort of case put to her. As to the negative media reports, Mr Li emphasised that, while the SFC placed considerable emphasis on these reports in the course of the enquiry, neither of those media reports had been shown to Ms Margaret Man during her two interviews.

453. In such circumstances, it was argued, it was entirely unsurprising that Ms Margaret Man - in two interviews separated by several years - did not think it

necessary to concentrate solely on protecting her own interests by seeking to recall from her memory specific details of her own actions and how those actions were evidence of her own professional conduct: conduct that, at that stage, appears not to have been in question. At that stage, Ms Margaret Man was seeking to assist the SFC investigations generally and, understandably, would not have been seeking simply to protect her own reputation.

454. In order to assist the Tribunal in determining whether Ms Margaret Man did bring suspicion upon herself, Mr Duncan set out a detailed table comparing what Ms Margaret Man had said to the SFC during the investigation and what she put before the Tribunal during the subsequent enquiry. It was of considerable assistance to the Tribunal.

455. While the comparison table revealed perhaps some questionable shifts in emphasis and while undoubtably matters were raised during the course of the enquiry before the Tribunal which had not been raised earlier in the course of the SFC investigation, when these matters are considered in context, the Tribunal is satisfied that they do not demonstrate that in some culpable manner Ms Margaret Man had brought suspicion upon herself in the manner alleged. In this regard, the following background matters must be taken into consideration. First, in respect of the negative media articles, these came into being in late 2001, some five years before Ms Margaret Man's first SFC interview and a decade or so before her second interview. Second, Ms Margaret Man had not been informed during either interview that she was a person under investigation. Nor, in the opinion of the Tribunal, had the questioning manifestly taken on a form which suggested that her own conduct was under critical review. In such circumstances, in the judgment of the Tribunal, it is understandable that she should not at the time of her two interviews have dredged her memory to try and recall every event from

several years earlier which demonstrated her own particular professionalism, - to repeat, a professionalism which did not appear at that time to be in any serious doubt. As Mr Li said that during the course of his submissions, at no time during the interviews did the SFC question the extent of the actions taken by Ms Margaret Man, there was no suggestion that perhaps she had not done sufficient thereby inviting Ms Margaret Man to consider in detail what actions she had in fact taken. To employ the words used by Mr Li: when she gave her two interviews (separated by several years) Ms Margaret Man had no duty to anticipate all possible cases against her.[2]

456. In such circumstances, in the opinion of the Tribunal, it was entirely understandable that, when her own culpability was put in issue, and when she testified as to that culpability, the matters that Ms Margaret Man raised, when compared with the matters raised in the course of her interviews, showed a good number of additions and differences of emphasis. The Tribunal also took into account as an important factor that Ms Margaret Man was being asked to remember matters that had taken place more than a decade earlier. In such circumstances, there were bound to be gaps in the memory, vacillation as to the true nature of otherwise long-forgotten conversations and the like.

457. The Tribunal should also make clear that, whatever its comments concerning Ms Margaret Man's credibility - a matter to which the Tribunal will turn in a moment - it did not come to the determination that she was not culpable of market misconduct on some 'technical' basis. As Part One of the Report

[2] It should also be borne in mind that the SFC, when it presented its opening submissions in the enquiry, placed reliance on an expert report that set out what she should have done at the relevant time. That report, however, was dated March 2014, a long-time after the two SFC interviews. Ms Margaret Man was never asked to answer the assertions set out in the expert report in any later interview during the SFC investigation: there was no later interview. In this regard, it should also be borne in mind that the expert report itself was ruled inadmissible by the Tribunal.

makes clear, the Tribunal came to its determination on a consideration of substantive issues of fact.

458. In its findings, the Tribunal commented that Ms Margaret Man had attempted assiduously to distance herself from any accusation of recklessness or negligence in the discharge of her duties. Clearly, she was seeking over eagerly to defend her reputation and that raised question marks as to her own sense of objectivity. It does not follow, however, that the Tribunal disbelieved the substance of her evidence. To the contrary, it found the substance of her evidence to be persuasive.

459. On a consideration of all relevant matters that were debated before the Tribunal during the costs hearing, it is satisfied that there is no basis for denying Ms Margaret Man her entitlement to costs.

Application for the Registration of the Tribunal's Orders Pursuant to Section 264(1)

460. The Tribunal is satisfied that its orders should be registered by the Court of First Instance so that they become for all purposes orders of that court.

Summary of the Orders Made

461. In respect of Mr Gu (the first Specified Person):

(i) pursuant to section 257(1)(a) of the Ordinance, he shall not, without the leave of the Court of First Instance, be or continue to be a director, or take part, directly or indirectly, in the management of a listed company

or any company in which a listed company, directly or indirectly, has a shareholding, for a period of five years calculated from 1 October 2017;

(ii) pursuant to section 257(1)(d) of the Ordinance, he shall pay to the Government the amount of HK$481,969,785, this being the profit gained by him, together with interest thereon;

(iii) pursuant to section 257(1)(b) of the Ordinance, he shall not, without the leave of the Court of First Instance, in Hong Kong, directly or indirectly, in any way deal in any securities, futures contract or leveraged foreign exchange contract, or any interest therein, for a period of five years calculated from 1 October 2017; and

(iv) pursuant to section 257(1)(c) of the Ordinance, he shall not again perpetrate any conduct which constitutes misconduct under section 270 of the Ordinance (insider dealing), section 274 (false trading), section 275 (price rigging), section 276 (disclosure of information about prohibited transactions), section 277 (disclosure of false or misleading information inducing transactions), and section 278 (stock market manipulation) of the Ordinance.

(v) pursuant to section 257(1)(e), section 257(1)(f)(i) and section 257(1)(f)(ii) he shall pay 23.75% of each category of costs, this being assessed at an overall figure of $5,130,000.

462. In respect of Mr Zhang (the Second Specified Person):

(i) pursuant to section 257(1)(a) of the Ordinance, he shall not, without the leave of the Court of First Instance, be or continue to be a director, or take part, directly or indirectly, in the management of a listed company, or any company in which a listed company, directly or indirectly, has a shareholding, for a period of five years calculated from 1 October 2017;

(ii) pursuant to section 257(1)(c) of the Ordinance, he shall not again perpetrate any conduct which constitute misconduct under section 270 of the Ordinance (insider dealing), section 274 (false trading), section 275 (price rigging), section 276 (disclosure of information about prohibited transactions), section 277 (disclosure of false or misleading information in juicing transactions, and section 278 (stock market manipulation); and

(iii) pursuant to section 257(1)(e), section 257(1)(f)(i) and section 257(1)(f)(ii) he shall pay 23.75% of each category of costs, this being assessed at $5,130,000.

463. In respect of Mr Hu (the third Specified Person):

(i) pursuant to section 257(1)(a) of the Ordinance, he shall not, without the leave of the Court of First Instance, be or continue to be a director, or take part, directly or indirectly, in the management of a listed company, or any company in which a listed company, directly or indirectly, has a shareholding, for a period of five years calculated from 1 October 2017;

(ii) pursuant to section 257(1)(c) of the Ordinance, he shall not again perpetrate any conduct which constitute misconduct under section 270 of the Ordinance (insider dealing), section 274 (false trading), section 275

(price rigging), section 276 (disclosure of information about prohibited transactions), section 277 (disclosure of false or misleading information in juicing transactions, and section 278 (stock market manipulation); and

(iii) pursuant to section 257(1)(e), section 257(1)(f)(i) and section 257(1)(f)(ii) he shall pay 23.75% of each category of costs, this being assessed at $5,130,000.

464. In respect of Mr Xu (the fourth Specified Person):

(i) pursuant to section 257(1)(a) of the Ordinance, he shall not, without the leave of the Court of First Instance, be or continue to be a director, or take part, directly or indirectly, in the management of a listed company, or any company in which a listed company, directly or indirectly, has a shareholding, for a period of five years calculated from 1 October 2017;

(ii) pursuant to section 257(1)(c) of the Ordinance, he shall not again perpetrate any conduct which constitute misconduct under section 270 of the Ordinance (insider dealing), section 274 (false trading), section 275 (price rigging), section 276 (disclosure of information about prohibited transactions), section 277 (disclosure of false or misleading information in juicing transactions, and section 278 (stock market manipulation); and

(iii) pursuant to section 257(1)(e), section 257(1)(f)(i) and section 257(1)(f)(ii) he shall pay 23.75% of each category of costs, this being assessed at $5,130,000.

465. In respect of Mr Henry Mok (the ninth Specified Person):

(i) pursuant to section 257(1)(a) of the Ordinance, he shall not, without the leave of the Court of First Instance, be or continue to be a director in the management of a listed company, or any company in which a listed company, directly or indirectly, has a shareholding, for a period of three years calculated from 1 October 2017;

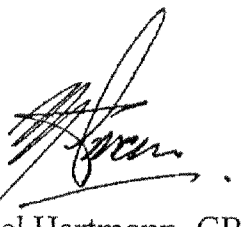
(ii) pursuant to 257(1)(g) of the Ordinance, that the Hong Kong Institute of Certified Public Accountants be informed of the findings of the Tribunal. Concerning Mr Henry Mok and be recommended to take disciplinary action against him; and

(iii) pursuant to section 257(1)(e), section 257(1)(f)(i) and section 257(1)(f)(ii) he shall pay 5% of each category of costs, this being assessed at $1,080,000.

466. In respect of Ms Margaret Man (the eighth Specified Person):

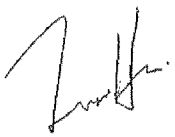
(i) pursuant to section 260(1)(b), Ms Margaret Man be awarded her costs; if not agreed, such costs to be taxed; and

(ii) pursuant to section 264(1) of the Ordinance, the Tribunal directs that notice be given to the Court of First Instance to register its orders.



Mr. Michael Hartmann, GBS
(Chairman)

Dr. Ngai Wai Yiu, Norman
(Member)



Mr. Hui Sik Wing, Joseph
(Member)

Dated 23 June 2017

IN THE MARKET MISCONDUCT TRIBUNAL

GREENCOOL TECHNOLOGY HOLDINGS LIMITED

AND ITS LISTED SECURITIES

(STOCK CODE 8056)

RULING ON THE SFC'S APPLICATION FOR A

VARIATION OF S257(1)(F)(I) COST ORDER

RULING

467. In Part II of this Report dated 23 June 2017, the Tribunal ordered the Specified Persons who had been found culpable of market misconduct to pay the costs and expenses reasonably incurred by the SFC pursuant to section 257(1)(f)(i) of the Ordinance. The amount of those costs and expenses reasonably incurred by the SFC was assessed by the Tribunal to be HK$10,700,000.

468. This figure of HK$10,700,000 was derived from the statement of costs and expenses provided by the SFC to the Tribunal on 7 April 2017 supported by written submissions.

469. In a letter addressed to the Tribunal dated 30 June 2017, the SFC sought a further supplemental order for costs in a total sum of HK$429,933.

470. That a supplemental order would be sought by the SFC at a later stage had been indicated by the SFC in its submissions of 7 April 2017. In its letter of 30 June 2017 seeking the further supplemental order, the SFC said the following:

> "As indicated in item D5 of [the initial submissions], the actual time costs incurred by the Commission's legal staff, in their capacity as Assistant Presenting Officers, for the "Hearing on Sanction" needed to be inserted on a later date as we did not know how much time would be incurred between the filing of the Part II Submissions and the hearing on 29 April 2017. The cost estimate of 180 minutes of HK$12,000 included in item D5 was an estimate based on the time fixed for the hearing on 29 April 2017, which was 3 hours.
>
> We have now updated item D5 to reflect the actual time costs incurred on 7 April 2017 and up to and including the hearing on 29 April 2017. Please find enclosed the Updated Statement of Costs for Summary Assessment, which includes a detailed

> breakdown of the work undertaken. The actual time costs incurred by the Commission's legal staff, in their capacity as Assistant Presenting Officers, for item D5 is HK$57,933.
>
> In item E4 of the Summary of Costs, it was stated that the costs to be incurred by Mr Duncan SC and Ms Law for all the preparation work for and attendance at the Part II hearing on 29 April 2017 needed "to be inserted" as the fee notes from Mr Duncan SC and Ms Law were not available as at the Part II Submissions filing date.
>
> The Commission therefore respectfully requests the Tribunal to vary order for the amount of costs payable by the culpable specified persons under section 257(1)(f)(i) to include (i) the costs incurred by the Commission's Assistant Presenting Officers on and after the filing date of the Part II Submissions (inclusive of the attendance at the 29 April 2017 hearing) and (ii) Mr Duncan SC and Ms Law's fees incurred for all the preparation work done for and attendance at the hearing of 29 April 2017 in the total sum of HK$429,933."

471. While the Tribunal is satisfied that these supplementary costs and expenses had been reasonably incurred, it was concerned as to whether it now had the power, subsequent to its primary order as to costs and expenses, to order payment of further costs and expenses.

472. In answer, in written submissions dated 5 July 2017, the SFC submitted that this Tribunal did possess the necessary power. In this regard, the following were put before the Tribunal:

> "The Commission respectfully submits that it is not too late for the Tribunal to consider the Application and make the variation order sought as the Tribunal will only become *functus officio* when the orders set out in its report of 23 June 2017 have been drawn up, entered or otherwise perfected. This is the common law principle laid down in ***Millensted v Grosvenor House (Park Lane) Ltd.*** [1937] 1KB 717 at p. 722, which was cited with approval by the English Court of Appeal in ***Pittalis v Sherefettin*** [1986] 1 QB 868 and applied by the Hong Kong Court of Appeal in ***Lilik Andayani v Chan Oi Ling*** [2000] 4 HKC 233 at paragraph 7:

> "It was not sought to be disputed… ***that it is within the power of a judge at any time before judgement is entered and perfected to alter its terms***… ".**"**

473. It was further submitted that –

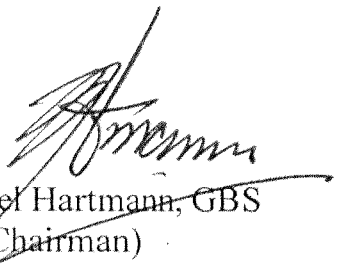
> "In the present case, as submitted in our 30 June 2017 letter, the Commission had expressly indicated in its Statement of Costs that the additional costs to be incurred by the Commission's legal staff and two counsel appearing for the Commission will need to be inserted. In the circumstances, the Tribunal had yet to make a determination on the costs and expenses incurred by the Commission on and after the filing of the Part II Submissions when it handed down its written report on 26 June 2017. "

474. The Tribunal acknowledges that, when it came to make its order set out in Part II of this Report, it did have before it a specific reservation made by the SFC that it had not yet been able, through no fault of its own, to calculate certain further costs and expenses already incurred and that in due course those costs and expenses would be claimed. No objection was taken to that reservation at the time. Nor has the Tribunal in Part II of this Report said anything to the effect that no such application would be permitted.

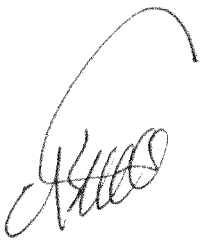
475. It must follow that the original orders for costs and expenses reasonably incurred pursuant to section 257(1)(f)(i) were subject to a further supplemental application for costs and in this respect were not final orders and that this Tribunal is not therefore *functus*.

476. As indicated earlier, the Tribunal accepts that such additional costs and expenses were reasonably incurred. Nor, in the view of the Tribunal, is there any further ground in equity for refusing the application.

477. In the circumstances, there will be a further order made under section 257(1)(f)(i) that the Specified Persons found to be culpable of market misconduct shall pay the additional sum of HK$429,933 so that the 1st, 2nd, 3rd and 5th Specified Persons shall each pay an additional sum of HK$102,109 while the 9th Specified Person shall pay an additional HK$21,497.



Mr Michael Hartmann, GBS
(Chairman)



Dr. Ngai Wai Yiu, Norman
(Member)

Mr. Hui Sik Wing, Joseph
(Member)

Dated 24 January 2018