The report of the Market Misconduct Tribunal into dealings
in the shares of China Huiyuan Juice Group Limited
on and between 30 July 2008 to 4 September 2008

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

INDEX

		Paragraphs
Chapter 8	Orders	271-306
	Attestation to Part II of the Report	
	Corrigenda	

INDEX – APPENDICES

Annexure 6	Report of Mr. Cheng Kai Sum dated 26 March 2013 in the calculation of profit made by Sun Min in the shares of China Huiyuan Juice on 7, 8, 12 and 29 August 2008	A37-A45
Annexure 7	Costs of SFC	A46
Annexure 8	Costs of Government	A47

CHAPTER 8

ORDERS

Orders

271. On 1 March 2013, the Tribunal delivered Part I of its Report to the Financial Secretary. On 4 March 2013, the Report was handed to the parties. As to the orders to be made pursuant to Part I of the Report, the parties were invited to file written submissions prior to a hearing set for 29 April 2013 and, if they chose, to support those submissions with oral argument at the hearing.

272. The Tribunal received written submissions from the Presenting Officer, Mr. Grossman SC, and from Mr. Duncan SC, leading counsel for Sun Min. Both counsel supported their written submissions with oral argument.

273. Section 257 of the Ordinance gives the power to the Tribunal to make a range of orders in respect of a person who has been identified as having engaged in market misconduct; in the present case that person being Sun Min who has been found culpable of insider dealing on the following dates, that is, 7, 8, 12 and 29 August 2008, the total number of shares purchased by her on those dates being 3,131,500.

Section 257(1)(d): disgorgement of profit

274. Section 257(1)(d) empowers the Tribunal to order that a person found culpable of market misconduct pay to the Government "an amount not

exceeding the amount of any profit gained… as a result of the market misconduct in question."

275. Mr. Cheng Kai Sum, who gave evidence as an expert in the course of the substantive enquiry, submitted a written statement in which, based on the methodology set out in the Court of Final Appeal's judgment in *Insider Dealing Tribunal v Shek Mei Ling* (1999) 2 HKCFAR 205, he calculated that the profit made by Sun Min in the sale of the 3,131,500 shares amounted to $21,151,712.65. A copy of the report is attached as Annexure 6.

276. The correctness of the methodology employed by Mr. Cheng was not in any way disputed nor the correctness of his mathematical calculations. Nevertheless, Mr. Duncan submitted that Sun Min should not be ordered to pay the full sum calculated by way of an order for disgorgement.

277. Mr. Duncan's submission was based on observations made by the Tribunal which contrasted the information contained in Tera Cheung's second diary entry, that information being found to constitute inside information, and the information that was made public after the suspension in the trading of Huiyuan shares. In particular, as Mr. Duncan emphasised, the information contained in the second diary entry did not identify the name of the corporation seeking the takeover although the fact that it was a substantial player in the market could be deduced. By contrast, the information that was made public identified the corporation as the Coca-Cola Company, a global brand with an impressive record of success in the field of soft drinks. The information

contained in the second diary entry did not identify the price per share. The information that was made public stated the price to be $12.20 per share. The information contained in the second diary entry related to negotiations that were still in the course of negotiation and may therefore in the final analysis have amounted to nothing. The information that was made public spoke of a settled agreement, giving details of the agreement. Mr. Duncan placed special emphasis on the finding of the Tribunal that the information contained in the second diary entry would in all likelihood have "stirred the market", having a materially positive impact on the long-term depressed share price. However, it was accepted that the information contained in the second diary entry, if made public at the time of the entry itself, would not have had the same potent impact as the information that was made public after the suspension of trading. By way of summary, as Mr. Duncan put it, the information contained in the second diary entry was essentially of a different nature to the information that was made public after the suspension of trading.

278. It was Mr. Duncan's submission that the methodology in *Shek Mei Ling* assumed that the information improperly obtained by an insider dealer would be, in substance at least, of the same nature and potency as the information thereafter made public. This assumption allowed for an accurate assessment of profit gained "as a result of the insider dealing". However, recognising that the methodology might not suit every occasion, the Court of Final Appeal held that there may be exceptional circumstances meriting some allowance. The present case, said Mr. Duncan, was an appropriate case in which an allowance should be made. In the present case, the information made

known to the public was very significantly more positive than the information which the Tribunal found had been obtained improperly by Sun Min. In other words, as Mr. Duncan expressed it, the eventual scale of the price increase was due to material information *not* in the possession of Sun Min at the time when she was found to have been culpable of insider dealing. It was submitted that in such circumstances the Tribunal should allow for a significant reduction in the disgorgement order.

279. Mr. Duncan accepted that it would be difficult to quantify with any accuracy the positive price effect of the information contained in the second diary entry if it had been known to the public at the time when the entry was made. A broad brush approach would therefore have to be adopted. He submitted, however, that the Tribunal should consider exercising its discretion by allowing for a 50% reduction: down to a figure, therefore, of about $10,575,000.00.

280. The Tribunal is unable to accept these submissions. The submissions may perhaps have been more persuasive if the Tribunal was considering the levy of a fine, a form of punitive sanction. But the Tribunal has no such power. It has power only to order that profits be surrendered, the clear purpose being to ensure that a person found guilty of market misconduct is not able to profit financially from that misconduct. Mr. Duncan's submission, when stripped to the bone, amounts to a submission that Sun Min should be entitled to retain 50% of the profits made by her as a result of her culpable conduct on the basis only that the profit made was far greater than she could have anticipated.

281. In its report, the Tribunal came to the view, already well accepted by legal commentators, that the fact that a transaction is merely contemplated or at a preliminary stage of negotiation does not mean that information concerning those negotiations cannot be specific. In this regard, the Tribunal cited the observations of Mr. Justice McMahon in the *Firstone International Holdings* inquiry to the effect that in many instances the very point of insider dealing is to deal while a transaction is only contemplated because once it has actually occurred the market is likely to be aware of it and will move to reflect that fact in the price: see paragraph 79 of Part I of this Report.

282. A person who deals on inside information before a transaction is concluded and all details of it are known must, by definition, deal at a time when certain matters are uncertain. That uncertainty may, when all details are finally made public, play to the advantage or disadvantage of the insider dealer. It is a risk inherent in the culpable conduct. What must be remembered, however, is that it is conduct aimed at exploiting inside information in order to "steal a march" on the market and thereby to make an improper profit, even if the exact amount of that profit cannot at the time of the insider dealing be assessed with any certainty. That being the case, it is frankly difficult to see the force in an argument that the insider dealer made a larger profit than he or she could have anticipated and should therefore be entitled to retain the unanticipated portion.

283. The same or a similar argument appears to have been placed before the Court of Final Appeal in *Shek Mei Ling* and was rejected. In this regard, Lord Nicholls described the suggested approach as follows (at page 210 F):

> "Markets do not operate in a sterile vacuum. The difference between the purchase and sale prices is likely to be affected, for better or worse, by many factors beside the disclosure of this [inside] information. The longer the period of time that elapses between the purchase and the sale, the more likely it is that there will be fluctuations in the market price for other reasons. The factors involved may be general, affecting share prices of most companies or most companies in the relevant sector of the market, or they may be peculiar to the particular company but unrelated to the price sensitive information. In one sense, any increase in the insider dealer's profit due to favourable extrinsic factors such as these might be said not to form part of the insider dealer's profit gained "as a result of" the insider dealing. On this approach, when calculating the insider dealer's profit … the profit made on the sale should be adjusted, downwards or upwards, to reflect the extent to which the sale price was increased or diminished by favourable or unfavourable extraneous factors."

284. In respect of this suggested approach, Lord Nicholls said (page 210 H):

> "This is not the approach adopted in practice by the Tribunal, nor do I think it would be correct. I do not believe the Ordinance envisages that any such problematical exercise is to be undertaken for the purpose of s.23. The context of s.23 is the dealings with listed securities. References to profit gained are to be read, naturally and consistently with the purpose of financial orders, as references to profits arising from buying and selling in the markets, without any allowance for the ordinary incidents affecting market prices. When the insider dealing consists of an improper purchase, the profit gained comprises the difference between the cost of purchase and the net sale price. That is the general rule …"

285. Lord Nicholls was here speaking of the provisions of the old Ordinance but the Tribunal does not see that the provisions of the current Ordinance require a modified approach. That being so, it is the opinion of the Tribunal that Lord Nicholls' observations apply with equal force to Mr. Duncan's submission, a submission which also involves the problematic exercise of attempting to calculate the value of an extraneous matter, namely, "unanticipated profits" arising out of further positive information.

286. Lord Nicholls, of course, did not seek to lay down an absolute rule. He spoke of it being the "general rule", saying:

> "That is the general rule, although I would not exclude altogether the possibility there might be exceptional circumstances when some allowance would be called for."

287. In the present case, the Tribunal is unable to identify any form of "exceptional circumstances". Sun Min chose to deal at a time when clearly the parties were negotiating with a realistic view to achieving an identifiable goal but before the agreement was finally settled. Clearly, she chose to deal in anticipation of a profit, inevitably hoping that, if the negotiations were successfully concluded, the profit would be sizeable. She did not have to deal; there were no external factors putting her in any form of invidious situation. Equally, there was no dramatic turn of events concerning the takeover itself which the Tribunal cannot ignore. Negotiations took place and were successful. Sun Min would not have purchased if she had not realistically foreseen that probability. The fact that, as matters transpired, the profit turned out to be

greater than - *perhaps* - she had anticipated can in no way constitute any form of exceptional circumstance.

288. Accordingly, the Tribunal will order that there be a disgorgement of the full profit of $21,151,712.65.

The issue of delay

289. On behalf of Sun Min, considerable dissatisfaction was expressed at the significant delay in bringing this matter before the Tribunal, a delay, it was said, together with its accompanying uncertainty, that placed a significant emotional burden on Sun Min.

290. According to the chronology placed before the Tribunal, one to which the Presenting Officer took no objection, the SFC commenced its investigations in early December 2008. Within a year, that is, by about December 2009, all the witnesses had been interviewed. However, it was not until March 2012 that the Financial Secretary's Notice was issued, a lapse of some two years and three months. It was submitted by Mr. Duncan that there was nothing of any particular complexity, factual or legal, that would account for this delay in the investigation process. The investigation process may have had a cross-border element but that factor - of itself and unexplained - could not account for the inordinate delay.

291. In response, Mr. Grossman said that those responsible for the investigation faced particular difficulties occasioned by the fact that Huiyuan

was a Mainland company and that many of those involved in the confidential takeover negotiations lived and worked in the Mainland. Investigators could not therefore act with the same robustness and speed that would perhaps be expected if all relevant parties were living and working in Hong Kong. The cross-border factor created difficulties of particular sensitivity, that sensitivity inevitably resulting in delays. In any event, said Mr. Grossman, the delay was not so egregious as to demand action on the part of this Tribunal. As he put it, no grounds had been made out to suggest that the delay constituted an abuse of process.

292. Historically, the law's delay has been the source of much frustration and disappointment on the part of those who are prejudiced by that delay. It is a fundamental rule that justice demands that legal proceedings be brought to finality with reasonable expedition. While proceedings before this Tribunal are not criminal in nature, it is to be emphasised that they do put in issue the integrity of individuals and that an adverse finding by this Tribunal may have the effect of ruining a career. The tribunal accepts therefore that any delay in bringing proceedings will create an atmosphere of uncertainty which will inevitably add to the emotional burden placed on persons who know that they are the subject of investigation.

293. By way of general principle, albeit in respect of criminal proceedings, if undue delay is found to constitute an abuse of the process of the court, rendering a prosecution oppressive and vexatious, then a judge has the power to intervene. Invariably, however, if an allegation of abuse of process is based on

undue delay, something more than the fact of the delay itself must be exhibited. What must be shown is that, as a result of the undue delay, a defendant has suffered serious prejudice to the extent that it is no longer possible to hold a fair trial.

294. In the present case, Mr. Duncan did not suggest that the delays had resulted in serious prejudice to Sun Min, depriving her of the ability to have a fair hearing before this Tribunal. As Part I of this Report makes clear, the evidence presented during the course of the inquiry was essentially limited in its extent, being focused on written entries in the diary of Tera Cheung.

295. The Tribunal, however, is of the view that it should take into account such delay as there has been on one limited basis. In this regard, the Tribunal is able to take into account that since August 2008, a period now nearly 5 years, Sun Min has not been found culpable of any other form of market misconduct pursuant to the provisions of the Ordinance nor has any information been placed before the Tribunal to the effect that, in that period of time, she has been subject to any form of disciplinary proceedings concerning her conduct in Hong Kong's financial or commercial markets. In short, in that extended period of time nothing has been brought to the attention of the Tribunal to suggest that she continues to present a threat to the integrity of Hong Kong's financial markets. In considering its other consequential orders, this is a factor which the Tribunal has taken into account: the principal objective of such orders being the protection of the integrity of Hong Kong's financial markets.

Section 257(1)(a): an order that a person shall not act as a director or take part in the management of a listed corporation or any other specified corporation

296. While there is no evidence that Sun Min has ever sat on the board of a listed corporation, during the course of the inquiry it emerged that she has acquired significant connections in the field of finance and shipping in Hong Kong. Together, she and her husband have built a very successful business. It would not be an exaggeration to say that today Sun Min is (in Hong Kong) a woman of considerable wealth and influence. Such a person may well be invited to join the board of a listed corporation or to play some significant role in its operations. In the opinion of the Tribunal, in such circumstances, it would be proper to make an order pursuant to section 257(1)(a) that, without the leave of the Court of First Instance, Sun Min should be prohibited from being a director of any listed corporation for a period of nine months with effect from 14 May 2013.

297. Sun Min and her husband originally set up a shipping business in Hong Kong, Transfield Resources Limited, and thereafter set up an investment division, Transfield Asset Management Limited. Sun Min is a director of both corporations. While, on the evidence, her husband is principally responsible for the shipping business, Sun Min plays an active role in the management of the investment arm of their business interests, Transfield Asset Management. The latter corporation, however, deals not only in equities, bonds and other financial instruments but has holdings of various kinds including real estate holdings.

298. In the opinion of the Tribunal, as neither corporation is listed and, on the evidence, both are controlled by Sun Min and her husband for their own benefit, the public interest in this particular instance will not be served by prohibiting Sun Min from being a director of either company or of playing any role in their management. In coming to this decision, the Tribunal recognises that Transfield Asset Management has traditionally traded in shares, bonds and similar financial instruments and that it was while acting as a director of this corporation that Sun Min committed her acts of insider dealing. There are, however, other aspects of the corporation's business that require Sun Min's management skills; for example, the management of the real estate assets and the Tribunal does not see that any public interest is served in hobbling the success of this corporation. The public interest is better protected in terms of the orders that follow.

Section 257(1)(b): an order that a person shall not deal in any securities

299. It is the view of the Tribunal that the public interest will be better protected if, for a limited period of time, Sun Min is prohibited from dealing in any securities or other financial instruments detailed in this section. Having regard to the fact that Sun Min's acts of insider dealing took place in August 2008 and that she has not since that time been found culpable of any other form of market misconduct, the Tribunal is of the view that the period of prohibition should be limited to a period of nine months only, calculated from 14 May 2013.

Section 257(1)(c): an order that a person shall not again perpetrate any specified market misconduct

300. It may be said that, if Sun Min is allowed to remain a director of Transfield Asset Management, a company effectively run by just herself and her husband, an order prohibiting her from dealing in securities will, for all practical purposes, be of no force and effect.

301. Even though the order pursuant to section 257(1)(b) is of general effect and not limited to when Sun Min acts in her capacity as a director of Transfield Asset Management, the Tribunal accepts that there is some force in this observation. It is of the view, however, that an order made pursuant to section 257(1)(c) will serve to dissuade her from any temptation to commit further acts of insider dealing. Orders made pursuant to section 257(1)(c) direct that the person who is the subject of the order shall not again perpetrate any conduct constituting market misconduct. What gives such an order "teeth" is section 257(10) which provides that, if a person fails to comply with an order made pursuant to section 257(1)(c), he or she shall be liable on conviction to a fine and to imprisonment. There will therefore be an order that Sun Min shall not again perpetrate any conduct constituting market misconduct by way of insider dealing.

Section 257(1)(e) and (f): an order in respect of the costs and expenses of the Government and the SFC

302. Section 257(1)(e) and (f) provides that the Tribunal may make an order in respect of the costs and expenses reasonably incurred by the Government and the SFC respectively in relation to, or incidental to, the investigation of the

conduct of a person determined to be culpable of market misconduct and in respect of the proceedings before the Tribunal itself.

303. On behalf of Sun Min, no challenge has been made to the accuracy of the calculation of costs nor their inherent reasonableness. Costs of course are always a matter of discretion. In the present case, the Tribunal finds no reason why costs should not follow the event. Sun Min will therefore pay the costs of the Government and the costs of the SFC. Details of these costs are set out in Annexures 7 and 8.

Orders Made

304. Pursuant to section 257 of the Ordinance, the Tribunal makes the following orders in respect of Sun Min:

(i) Pursuant to section 257(1)(a), that she shall not, without the leave of the Court of First Instance, be a director of a listed corporation in Hong Kong for a period of nine months calculated from 14 May 2013;

(ii) Pursuant to section 257(1)(b), that she shall not, without the leave of the Court of First Instance, in Hong Kong, directly or indirectly, in any way acquire, dispose of or otherwise deal in any securities or futures contract, or any interest in such instruments, for a period of nine months calculated from 14 May 2013;

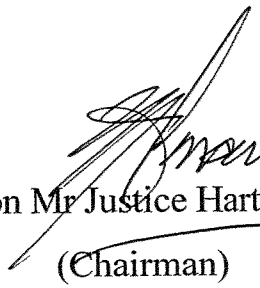
(iii) Pursuant to section 257(1)(c), that she shall not again perpetrate any conduct which constitutes insider dealing as that form of market misconduct is defined in the Securities and Futures Ordinance, Cap.

571; and

(iv) Pursuant to section 257(1)(d), that she shall pay to the Government the sum of $21,151,712.65.

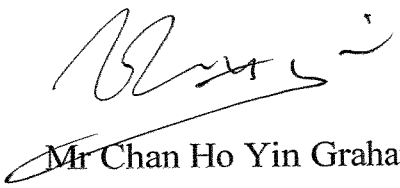
305. In respect of costs, pursuant to section 257(1)(e), that she shall pay to the Government the sum of $2,734,235.38, and pursuant to section 257(1)(f) that she shall pay to the Securities and Futures Commission the sum of $788,833.00.

306. Further, pursuant to section 264(1) of the Ordinance, the Tribunal directs that written notice be given in order to register this order in the Court of First Instance.



The Hon Mr Justice Hartmann JA
(Chairman)

Mr Chan Chi Hung
(Member)



Mr Chan Ho Yin Graham
(Member)

Dated 10 May 2013

CORRIGENDA

The following are typos (underlined) and their corrections in Part I of our Report :

1. Paragraph 37

"…12/8/2008 : 195,000 shares purchased (through one of the broking house),…"

195,000 is a typo. The correct figure is 195,500.

2. Paragraph 132

"…These details show that, having purchased a total of 5,482,000 shares on 30 and 31 July 2008, there were then just three days between 1 and 28 August 2008 when further shares were purchased : 467,000 shares on 7 August, 377,000 on 8 August and 195,000 on 12 August. …"

195,000 is a typo. The correct figure is 195,500.

3. Paragraph 269

"This culpability relates to her purchase of Huiyuan shares on 7, 8, 12 and 29 August 2008, the total number of shares being 3,131,000."

3,131,000 is a typo. The correct figure is 3,131,500.