

The Market Misconduct Tribunal
In the Matter of the Listed Securities of
China Forestry Holdings Company Limited
(now delisted; former stock code: 930)

Li Kwok Cheong	1 st Specified Person
Li Han Chun	2 nd Specified Person
Top Wisdom Overseas Holdings Limited	3 rd Specified Person

Date of Hearing: 24 October 2022

Date of Delivery of the Ruling: 25 October 2022

RULING

1. Li Han Chun, the 2nd Specified Person, and Top Wisdom Overseas Holdings Limited (“Top Wisdom”), the 3rd Specified Person, have applied for a permanent stay of the proceedings against the Specified Persons in the Market Misconduct Tribunal (the “Tribunal”) pursuant to section 253(1)(i) of the Securities and Futures Ordinance, Cap. 571 (the “Ordinance”).

Background

The proceedings

(I) The Notice

2. The proceedings were initiated by the Securities and Futures Commission (the “Commission”) by service on the Tribunal of a Notice, pursuant to section 252(2) of and Schedule 9 to the Ordinance, Cap. 571, dated 3 May 2018.
3. The Notice required the Tribunal to conduct proceedings and determine whether market misconduct within the meaning of section 277 and 270 of Part XIII of the Ordinance had taken place in relation to the securities of China Forestry Holdings Company Limited (“China Forestry”), formally listed on the Main Board of the Stock Exchange of Hong Kong (the “SEHK”), in the nature of false or misleading information inducing transactions, insider dealing or otherwise; to identify any such person who had perpetrated such market misconduct; and to determine any profit gained or loss avoided as a result of that misconduct. Each of the Specified Persons was identified as a person suspected to have perpetrated market misconduct.

China Forestry

4. Having been incorporated in the Cayman Islands on 21 December 2007, China Forestry’s shares were listed on the Main Board of the SEHK on 3 December 2009 by way of a global offering. A total of 810,452,000 China Forestry’s shares were allotted, of which 375 million shares were

allotted to the members of the Hong Kong public and a total of \$1,677.6 million raised.

5. Li Kwok Cheong, the 1st Specified Person, was an executive director and chairman of China Forestry, whereas the 2nd Specified Person was also an executive director and the chief executive officer of the company at all material times. Each of them was a substantial shareholder of China Forestry, holding those shares through their respective wholly-owned companies, Kingfly Capital Limited and Top Wisdom.
6. On 26 January 2011, on the application of China Forestry, trading in its' shares on the SEHK was suspended. Trading in China forestry's shares never resumed. In an announcement, dated 31 January 2011 the board of directors explained the earlier application to suspend its shares by stating "...possible irregularities have been identified by KPMG, the auditors of the Company" and said that an independent board committee had been established to conduct an enquiry into the matters concerned. By a letter to the board of directors, dated 27 January 2011, KPMG had informed the board that, "It appears clear that serious irregularities have taken place within the Group which have a material impact on the financial information recorded in the Group's accounting records that have previously been presented to us by the Company." The board resolved to dismiss the 2nd Specified Person from his position as chief executive officer with effect from 14 February 2011. However, he remained an executive director. On 18 June 2015, China Forestry was wound up on an order of the Grand Court of the Cayman Islands and joint official liquidators were appointed. On 24 February 2017, China Forestry's shares were delisted.

(i) False or misleading information inducing transactions

7. The Commission alleged that the 1st and 2nd Specified Persons were knowing participants in an alleged fraudulent scheme, which involved the disclosure, circulation or dissemination to the public of false or misleading information in respect of China Forestry in the Listing Prospectus, the 2009 Annual Results and 2010 Interim Results namely in respect of China Forestry's: revenue, profit and turnover generating activities; the value, existence and nature of its assets; and its suitability to be listed and the quality of its management. Alternatively, it was alleged that the 1st and 2nd Specified Persons were reckless or negligent as to whether such information was false or misleading as to a material fact or misleading through the omission of a material fact.
8. It was alleged that the false or misleading information contained in the Prospectus was likely to induce another person to subscribe for the shares, whereas the false or misleading information contained in the 2009 Annual Results and the 2010 Interim results was likely to induce the sale or purchase of shares by another person.

(ii) Insider dealing

9. Further, the Commission alleged that, knowing that China Forestry's then auditors, KPMG, had identified audit issues which could or would in due course reveal other false and misleading disclosures made by China Forestry, the 2nd and 3rd Specified Persons engaged in insider dealing in that the 2nd Specified Person procured the 3rd Specified Person to enter into and execute a placing agreement in respect of 119 million China Forestry shares for a total of around \$398 million on 12 and 13 January 2011 respectively.

Collateral proceedings

10. In February 2011, the Commission commenced proceedings against the 2nd and 3rd Specified Persons seeking an order that they take steps to restore or compensate the counterparties to the Placing.¹ On 2 February 2011, the Commission obtained an injunction from the Court of First Instance prohibiting the 2nd and 3rd Specified Persons from removing from Hong Kong or disposing of or dealing in assets to a value of about \$398 million, in particular the balance at that date of about \$394 million held in the account of Top Wisdom with UBS AG Hong Kong. In other proceedings, the Commission seeks an order against the 1st and 2nd Specified Persons that they take steps to restore or compensate the independent minority shareholders of China Forestry who entered into any transaction as a result of their alleged market misconduct and held shares as at 31 January 2011.²

(II) The course of the proceedings

The substantive hearing

11. The substantive hearing was conducted before Mr Kenneth Kwok SC, the chairman, and two ordinary members of the Tribunal on 19 days on various dates on and between 25 November 2019 and 23 January 2020. Although the 1st Specified Person filed a lengthy witness statement (104 pages) with the Tribunal, dated 29 March 2019, by the time of the substantive hearings he was no longer legally represented and did not attend or participate in those proceedings. The 2nd Specified Person filed

¹ HCMP 176/2011.

² HCA 117/2017.

a witness statement with the Tribunal, dated 9 April 2019, and gave oral evidence over several hearing days.

12. Lengthy written closing submissions were provided by the Commission and those representing the 2nd and 3rd Specified Persons on 2 and 16 March 2020. In consequence of the advent of the Covid-19 pandemic, on the application of the Commission, by a letter, dated 26 March 2020, the chairman vacated the dates fixed for receiving oral submissions, namely 30 and 31 March 2020. Thereafter, the Tribunal made no further directions nor did it make any determination.

The incapacity of the chairman

13. By a letter, dated 11 January 2022, in my capacity as a chairman of the Tribunal I advised the parties that the Tribunal had been informed on 10 January 2022 by his son that Mr Kenneth Kwok had suffered a serious medical setback such that "...he is and will be unable to discharge his duty as chairman, in particular to play any further role in the completion of this Inquiry." In those circumstances, the parties were invited to make such submissions as they might wish to make as to the way forward.

The way forward: the submissions of the parties

The Commission

14. In its written submissions to the Tribunal, dated 18 March 2022, the Commission submitted that the Tribunal be re-constituted with a new chairman and two new ordinary members "...to conduct a *de novo* retrial of the MMT Proceedings with the witnesses giving oral evidence afresh but with the existing documentary evidence." Further, the Commission

asserted that it was “...not in the interest of justice to dismiss or stay the MMT proceedings without a decision or a retrial.”

The 2nd and 3rd Specified Persons

15. In the written submissions to the Tribunal, dated 4 April 2022, made by Messrs King & Wood Mallesons on behalf of the 2nd and 3rd Specified Persons, issue was taken with the Commission’s submission that the Tribunal be reconstituted and that there be a trial *de novo*. It was contended that “...the proceedings are still extant and on-going, pending the determination of the Tribunal.” It was noted that the Chief Executive had not exercised her power either to remove or replace the Chairman.
16. Further, it was submitted that the “...fair and appropriate way to dispose of these proceedings” was that they be discontinued or permanently stayed. It was asserted that, if a full rehearing was undertaken, the 2nd and 3rd Specified Persons would be “subject to irreparable prejudice”, in particular that:
 - it would be oppressive, having regard to the time and expense they had incurred in the earlier hearing;
 - the “distinct possibility” was that they would be unrepresented, given that, other than the monies in a bank account of the 3rd Specified Person, which were the subject of an injunction brought at the behest of the Commission, they did not have other means to conduct their defence; it was likely that the liquidators of China Forestry would strenuously oppose the application to release further monies to the 2nd and 3rd Specified Persons for their legal representation;

- there would be a significant further lapse of time, in addition to the more than two years in which the Tribunal's determination had been pending, until the proposed re-hearing, in particular having regard to the detrimental effect on the memory of the witnesses, including the 2nd Specified Person, giving evidence about events as long ago as 2006 and 2007; and
- there would be further delay in the 2nd and 3rd Specified Persons having access to the monies in the bank account of the 3rd Specified Person, the subject of the injunction obtained by the Commission, which monies were their main assets.

17. In those circumstances, it was submitted that, if there is to be a properly constituted Tribunal, "...the only fair and appropriate way of disposing of the existing proceedings is for them to be permanently stayed pursuant to section 253(1)(i) of the Ordinance."

The 1st Specified Person

18. Having been informed by the Secretary to the Tribunal of the specific submission made to the Tribunal by the Commission, dated 18 March 2022, namely that the Tribunal be reconstituted and the proceedings be conducted *de novo*, and having been invited to make any submission that he wished to make, in an email, dated 22 March 2022, the 1st Specified Person informed the Secretary to the Tribunal that he agreed to the Tribunal being reconstituted by a new chairman and two new ordinary members to conduct a retrial with the use of the existing documentary evidence.

Directions Hearings

19. Following a Directions hearing, conducted on 21 April 2022, a further Directions hearing, was conducted by Mr Michael Hartmann, GBS on 13 July 2022. The Commission and the 2nd and 3rd Specified Persons were represented on each of those occasions, although the 1st Specified Person was neither represented nor did he attend. On the latter occasion, Mr Ambrose Ho SC made an application on behalf of the 2nd and 3rd Specified Persons for a permanent stay of these proceedings, the hearing of which was fixed for 24 October 2022.

The appointment by the Chief Executive of the chairman and approval of the appointment of two ordinary members

20. In letters from Secretary for Financial Services and the Treasury, dated 8 June 2022 and 18 October 2022, the Tribunal was informed of the approval of the appointment of two ordinary members and of the appointment of the chairman for the proceedings specified in the Commission's Notice, dated 3 May 2018. The former letter stated that, pursuant to sections 4 and 5 of Schedule 9 to the Ordinance, the former Chief Executive had approved the appointment of two ordinary members of the Tribunal. The latter stated that, pursuant to section 42(b) of the Interpretation and General Clauses Ordinance, Cap.1, read together with section 2 of Schedule 9 to the Securities and Futures Ordinance, Cap. 571, on the recommendation of the Chief Justice, the Chief Executive approved my appointment as chairman of the reconstituted Tribunal.

The application for a permanent stay of the proceedings

The 1st Specified Person

21. The Tribunal has received no notice of an application for the stay of proceedings from the 1st Specified Person.
22. By letter dated 21 July 2022, delivered by courier and by email, the Commission had informed the 1st Specified Person of the Directions approved by the Tribunal on that date and specifically drew his attention to his right to make such an application if he so wished.

The submissions of the 2nd and 3rd Specified Persons

(i) *The right to finality*

23. In their written submissions, Mr Ambrose Ho SC, leading Mr Francis Chung, invited the Tribunal to note that the proceedings had reached a stage at which all the evidence had been given and submissions made. All that remained was for the Tribunal to make its determination. That the Tribunal did not do so was not in any way the fault of the Specified Persons. He asserted that the Specified Persons were entitled to a determination from the Tribunal and had a “right” to finality in the proceedings. That right must prevail, “absent strong justification with cogent reasons.” There were none. In those circumstances the Commission’s application to re-open the proceedings was itself “...tantamount to an abuse of the process”.

(ii) *Representation of the 2nd and 3rd Specified Persons*

24. Mr Ambrose Ho reiterated the contention articulated in the letter to the Tribunal of King & Wood Mallesons, dated 4 April 2022, that there was a “distinct possibility” that the 2nd and 3rd Specified Persons would be unrepresented at any resumed hearing. He asserted that, other than the injunctioned monies in the bank account of the 3rd Specified Person, they “...do not have alternative means for legal costs for the purpose of the Resumed Hearing.” There was “no certainty” that the Commission and the liquidators of China Forestry would agree to the release of monies to them for that purpose. Rather, he contended that it was “likely” that any further application for the release of monies would be met with “strenuous opposition”. In that event, they would have “...no choice but to be left unrepresented” in any resumed proceedings. Further, the 2nd and 3rd Specified Persons having expended substantial time and costs in the earlier proceedings, it would be unfair and oppressive to require them to do so again.

(iii) *The 1st Specified Person’s participation in the resumed hearing*

25. Mr Ho submitted that the 1st Specified Person’s participation in the resumed hearing would “...seriously and unfairly prejudice” the 2nd and 3rd Specified Persons. It was to be inferred from the fact that the 1st Specified Person had informed the Secretary to the Tribunal that he agreed to a hearing *de novo* before a newly constituted Tribunal, together with the fact that he had not himself made any application for stay, that he intended to participate in any resumed hearing.
26. At the hearing, Mr Ho asserted the case of the 2nd and 3rd Specified Persons had been articulated in very extensive cross-examination of witnesses on

their behalf and set out fully in the evidence of the 2nd Specified Person. By contrast, the 1st Specified Person had not conducted cross-examination of witnesses nor had he given oral testimony. That was material. As a result, the 1st Specified Person was unjustifiably placed in the advantageous position of knowing the full extent of their case. In those circumstances, he would be able “to tailor his case to shift all the blame to SP2”. He could do so by being able to: tailor the lines of cross-examination of witnesses; rehearse and strengthen his own evidence; attack the weakness of the 2nd and 3rd Specified Persons’ case and/or strengthen the veracity of his own case.

27. Further, Mr Ho contended that it would be “wholly unfair” to the 2nd and 3rd Specified Persons if, at the resumed proceedings *de novo*, the 1st Specified Person was “...given a second chance to adduce supplemental evidence, in addition to his witness statement”, in order to strengthen his case “...after considering the areas of weakness or loopholes in his existing evidence.” Affording the 2nd and 3rd Specified Persons the opportunity to file new evidence would not mitigate such unfairness, given that the 2nd Specified Person had left China Forestry in around February 2011 and was no longer able to access that company’s documents. The material available to them was limited to the existing documentary evidence and the Commission’s ‘Unused’ material.
28. If the 1st Specified Person was permitted to adduce such supplemental evidence, it might be necessary for the 2nd and 3rd Specified Persons to “...adjust their case or explanations that have been put forward” in the earlier proceedings. If that gave rise to inconsistencies, that might be used to undermine the credibility of the 2nd Specified Person. There being no

“practical alternatives” to remedy the prejudice to the 2nd and 3rd Specified Persons, it would be “impossible to ensure (them) a fair trial.”

(iv) *The lapse of time: impaired memory of witnesses*

29. Mr Ho submitted that the significant lapse of time from the events the subject of the allegations, namely the period commencing in 2006 before and during the period when China Forestry was listed, presented a substantial forensic challenge to witnesses giving oral evidence of those matters. That was prejudicial to the case of the 2nd and 3rd Specified Persons, given that their case was highly dependent on the credibility of the 2nd Specified Person. The prejudice was exacerbated by the real uncertainty as to when the resumed hearing might take place, given the need to accommodate the diaries of counsel in fixing such dates. Further, through no fault of his own, the 2nd Specified Person would also be prejudiced by having to endure the stress and anxiety of an otherwise unnecessary further cross-examination.

The Law

(i) *Permanent stay*

30. Mr Ho submitted that the Tribunal’s power to stay proceedings can be invoked in two categories of cases:³
- notwithstanding the range of remedial measures available, a fair trial is found to be impossible and continuing the hearing would amount to an abuse of process; and

³ *HKSAR v Lee Ming Tee* (2001) 4 HKCFAR 133 at pages 148 I-149 A and 150 A-B. *Market Misconduct Tribunal's Ruling in QPL International Holdings Limited* (27 December 2007) at paragraphs 56-71.

- in rare cases where, even though the fairness of the proceedings was not in question, a stay is granted because the circumstances involved an abuse of power which so offended the Court's sense of justice and propriety that the entire proceedings would be an abuse of process.
31. Mr Ho acknowledged that it was only in highly exceptional circumstances that the Tribunal could properly be satisfied that a fair trial is impossible and that it was for the Specified Person to demonstrate on the balance of probabilities that he will suffer serious prejudice to the extent that no fair trial can be held. Further, he accepted that whilst no prejudice is to be presumed from delay, the Tribunal was entitled to infer that any substantial delay at whatever period leads to further loss of recollection of any witness.⁴

The submissions of the Commission

32. In their written submissions Mr Jat Sew Tong SC with Mr Derek Chan SC, leading Mr Julian Lam opposed the application for permanent stay, inviting the Tribunal to dismiss it and to make an order of costs in favour of the Commission.

The Law

(i) The nature and purpose of MMT proceedings

33. Mr Jat invited the Tribunal to note that MMT proceedings are in the nature of an inquiry, which is civil and inquisitorial. The MMT does not have parties before it in the sense of a prosecution and an accused or a plaintiff

⁴ *Market Misconduct Tribunal's Ruling in QPL International Holdings Limited*, at paragraphs 62-66.

and a defendant. Its function is not to adjudicate between rival claims or positions.⁵

34. The purpose of the Tribunal's proceedings was "...to protect and maintain the integrity of the financial markets in Hong Kong, thereby enhancing and preserving Hong Kong's reputation as an international financial centre. It is regulatory in nature. The investing public, and therefore public interest at large, is protected in the sense that the regime ensures the integrity of the financial markets in which the investing public carry on their investment or trading activities."⁶ Further, "...the Tribunal is there to regulate the conduct of those involved in the financial markets in Hong Kong. The investing public and the reputation of Hong Kong as a serious financial centre all have a stake in it."⁷

(ii) *Permanent stay*

35. Mr Jat accepted that the principles applicable to a permanent stay were those described in Mr Ho's submissions. In doing so, he invited the Tribunal to note the statement of Ribeiro PJ in his judgment in the Court of Final Appeal in *HKSAR v Lee Ming Tee* that:⁸

"There are cogent reasons why in principle and in practice such stays are highly exceptional.

In the first place, it is only in very unusual circumstances that a court can properly be satisfied that a fair trial is 'impossible'. The 'fairness' achievable is judged in practical and not absolute terms....More importantly, the court's primary endeavour is to ensure that a fair trial takes place, employing the law's

⁵ *Securities and Futures Commission v Cheng Chak Ngok* [2018] 4 HKLRD 612. Cheung JA at pages 626-67, paragraph 7.1.

⁶ *Luk Ka Cheung v Market Misconduct Tribunal* [2009] 1 HKLRD 114 at page 139, paragraph 52.

⁷ *ibid* at page 140, paragraph 54.

⁸ *HKSAR v Lee Ming Tee* at pages 150 C-151 G.

available resources, and not to abort it on the ground that fairness cannot be attained, save as a last resort.”

36. Ribeiro PJ⁹ went on to cite with approval the judgment of Brennan J in the High Court of Australia in *Jago v District Court of New South Wales* (1989) 168 CLR 23 at p. 46:

“Obstacles in the way of a fair trial are often encountered in administering criminal justice....Unfairness occasioned by circumstances outside the courts control does not make the trial a source of unfairness. When an obstacle to a fair trial is encountered, the responsibility cast on a trial judge to avoid unfairness to either party but particularly to the accused is burdensome, but the responsibility is not discharged by refusing to exercise jurisdiction to hear and determine the issues. The responsibility is discharged by controlling the procedures of the trial by adjournments or other interlocutory orders, by rulings on evidence and, especially, by directions to the jury designed to counteract any prejudice which the accused might otherwise suffer.”

37. In his oral submissions, Mr Jat emphasised that it was for the Specified Persons to show on the balance of probabilities that no fair trial can be held.

The Commission’s response to the 2nd and 3rd Specified Persons’ grounds

(i) *The right to finality*

38. Mr Jat submitted that the arguments advanced on behalf of the 2nd and 3rd Specified Persons as to the right to finality of proceedings suggested that it was contended that the right encompassed the right to undergo the trial process once only, after which there was a right to receive a determination.

⁹ *HKSAR v Lee Ming Tee* at pages 150 J-151 C.

Further, that an order that there be a rehearing was contrary to their rights. There was no such right or legitimate expectation.

39. In *Boodhoo v Attorney General of Trinidad and Tobago*¹⁰ the Privy Council determined that the failure of the Court of Appeal to deliver its judgment, following the death of one of the three presiding judges fourteen months after the hearing of an appeal, did not infringe the appellant's constitutional rights of "protection of the law", provided for by section 4(b) of the Constitution or any of the other rights. That "...a judge may die or take ill before concluding the hearing the case or before judgment is given" was one of the "possible hazards" faced by those engaged in litigation.¹¹
40. Having reminded the Tribunal that sections 7 and 8 of Schedule 9 to the Ordinance empowered the Chief Executive to remove from office the Chairman and an ordinary member of the Tribunal, Mr Jat submitted that it was inconceivable that the consequence of the exercise of that power would be that any incomplete proceedings would thereby be automatically stayed.
41. Of Mr Ho's submission that "strong justification with cogent reasons" for a rehearing of proceedings were required to override the alleged rights of finality, Mr Jat said that they did exist. First, the alleged market misconduct was extremely serious. The 1st and 2nd Specified Persons had knowingly participated in a massive fraud which had caused substantial harm to the investing public, in addition to which the 2nd and 3rd Specified Persons had made substantial profits of around \$398 million by engaging in insider dealing. Secondly, there was a significant public interest in the

¹⁰ *Boodhoo v Attorney General of Trinidad and Tobago* [2004] 1 WLR 1689.

¹¹ *Ibid* ; Lord Carswell at paragraph 14.

final resolution of the proceedings on the merits. An adverse determination against the Specified Persons rendered them liable to appropriate sanctions under sections 257 and 258 of the Ordinance and would facilitate the prompt determination of the related proceedings brought by the Commission against the 2nd and 3rd Specified Persons¹² and the 1st and 2nd Specified Persons.¹³ In turn, that would facilitate the payment of compensation to the counterparties to the placing and the innocent shareholders under section 213 of the Ordinance. Thirdly, there was strong evidence of market misconduct against the 2nd and 3rd Specified Persons. There was no serious dispute that false information and documents regarding China Forestry's assets and business activities was submitted in support of the listing application to the joint sponsors and auditors. The real issue was the knowledge and participation of the 2nd Specified Person in the fraudulent scheme. Relevant to that issue was the considerable volume of evidence of his knowledge and involvement in the management of China Forestry's operations.

Representation of the 2nd and 3rd Specified Persons

42. Mr Jat submitted that the contention that there was a “distinct possibility” that the 2nd and 3rd Specified Persons lacked access to funds and might find themselves unrepresented at the re-hearing proceedings was unsupported by evidence, exaggerated and premature. From time to time the 2nd and 3rd Specified Persons had succeeded in obtaining monies for their litigation costs from the monies the subject of the injunction in the bank account of Top Wisdom. On each occasion a consent order had been made. To date, China Forestry had agreed to those orders. For its part, the

¹² HCMP 176/2011.

¹³ HCA 117/2017.

Commission was prepared to agree to a further variation in respect of legitimate and reasonable costs of the 2nd and 3rd Specified Persons. There was no actual rather than theoretical difficulty. It was premature to advance this ground. If necessary, it could be advanced if the difficulty materialised and the Tribunal could be informed of all the relevant circumstances.

43. The fact that the re-hearing proceedings might require the 2nd and 3rd Specified Persons to expend further time and monies was simply one of the hazards of the litigation process.¹⁴

The 1st Specified Person's participation in the rehearing

44. Of the complaint that in the rehearing the 1st Specified Person could take unfair advantage of his knowledge of how the 2nd and 3rd Specified Persons had advanced their case in the earlier proceedings by “tailoring” his own case, Mr Jat suggested that the complaint was general and unparticularised and did not differentiate from what was commonplace in retrials in civil and criminal trials. Such retrials were not thereby rendered unfair. The potential advantage of having heard the evidence of another party before giving evidence oneself was something that existed in many trials, let alone retrials. That arose simply from the sequence in which procedure required the parties or defendants to give evidence.
45. The complaint that the 1st Specified Person might seek to adduce new evidence was not relevant to the grant of a permanent stay. Such an application could be dealt with by the Tribunal if and when it arose.

¹⁴ *Boodhoo v Attorney General of Trinidad and Tobago*.

46. Of the complaint that the 2nd and 3rd Specified Persons were at a disadvantage in accessing underlying documents, Mr Jat submitted that the complaint was unsupported by evidence and speculative. Once they knew of the allegations made against them, common sense required the 2nd and 3rd Specified Persons to take steps to secure such documentation.¹⁵ That was a requirement for the earlier proceedings.

The lapse of time: impaired memories of witnesses

47. Mr Jat invited the Tribunal to note that in making and filing with the Tribunal his witness statement, dated 9 April 2019, the 2nd Specified Person made no complaint about his ability to recount events that had occurred many years earlier. No evidence had been adduced to establish that the 2nd Specified Person suffered from any condition which had caused any abnormal deterioration of memory. No alleged specific prejudice caused by the additional time needed to conduct the rehearing had been identified. The dimming of memories by the passage of time “...does not necessarily mean that a fair trial cannot be conducted.”¹⁶ The circumstances of each individual case must be examined with care.¹⁷
48. The nature of the 2nd and 3rd Specified Persons’ case, as articulated by the former in the earlier proceedings, was not dependent on establishing voluminous factual detail. Rather, he asserted simply that he had no knowledge of the irregularities that had been uncovered subsequently and said that at the time the information was passed to others he believed it to be true.

¹⁵ *Hymer v Mass Transit Railway Corp & Others* [2000] 2HKLRD 589. Ribeiro JA at page 610 E-F.

¹⁶ *Ibid* page 609 I.

¹⁷ *A & M Manufacturing and Marketing Limited v Iu Po Shing* (CACV 15/2011; unreported, Fok JA (as Fok PJ was then) at paragraph 48.)

DISCUSSION

The Law

49. Section 253(1)(i) of the Ordinance provides that the Tribunal:

“...may, on its own motion or on the application of any party before it, stay any of the proceedings on such grounds and on such terms and conditions as it considers appropriate having regard to the interests of justice.”

50. There is no dispute as to the principles applicable to the exercise of that power. A stay is to be ordered if, notwithstanding the range of remedial measures available at the trial, a fair trial is found to be impossible and continuing the proceedings would amount to an abuse of process and, in rare cases, even though a fair trial undoubtedly remains possible, the circumstances involved an abuse of power which so offended the Tribunal’s sense of justice and propriety that the entire proceedings were tainted as an abuse of process.

51. It is for a Specified Person to demonstrate on the balance of probabilities that he will suffer serious prejudice to the extent that no fair trial can be held.

The earlier proceedings

52. There is no dispute that the Specified Persons and the Commission are not at fault in any way for the fact that the earlier proceedings miscarried in that, notwithstanding the voluminous material and lengthy oral evidence adduced at those proceedings, the Tribunal did not make any determinations¹⁸ or prepare and issue a written report containing such

¹⁸ Section 252 of the Ordinance.

determinations and any orders.¹⁹ Those proceedings miscarried simply because of the incapacity of the Chairman, brought about by his unfortunate ill-health, which rendered him unable to discharge his duties. Absent the chairman the Tribunal was unable to function.

The right to finality

53. No doubt, all parties in civil and criminal trial proceedings anticipate and expect a judgment or a verdict to be delivered after all the evidence has been adduced and closing submissions made. Similarly, that anticipation and expectation is shared by the parties to the proceedings in this Tribunal. Experience of the vagaries of life teaches that those sentiments may be thwarted by a range of events through no fault of the parties. As Lord Carswell observed in his judgment in *Boodhoo*:²⁰

“Citizens who are engaged in litigation have to face a number of possible hazards...A jury may have to be discharged or a judge to recuse himself at an advanced stage of a trial, without anyone having been at fault. A judge may die or take ill before concluding the hearing of a case or before judgment is given. These constitute the ordinary risks inseparable from litigation, which cannot be laid to the door of the state or be regarded as breaches of constitutional rights.”

54. It may be necessary to discharge the jury in a range of circumstances: a juror may fall ill or die or so may a close family member; inadmissible evidence prejudicial to a defendant on trial may have been adduced inadvertently. In those circumstances, the usual practice is to empanel another jury and to conduct the trial afresh. That is the case

¹⁹ Section 262(1) and (2) .

²⁰ Lord Carswell at paragraph 14.

notwithstanding the fact that it necessitates the defendant expending the time and expense of a rehearing.

55. Similarly, it is common practice that, having allowed an appellant's appeal against his conviction for judicial error such as a misdirection to the jury on law, the Court of Appeal orders a retrial. Again, that necessitates the defendant expending the time and expense of a rehearing. In those circumstances, no fault lies with the parties.
56. With respect, Mr Ho advanced a very bold submission as to the alleged 'right to finality' of the 2nd and 3rd Specified Persons, namely that having faced the trial process they were "...entitled to a Determination". He contended that the alleged right had been infringed by the simple fact, without more, of the failure of the Tribunal to deliver any determination. He cited no authority for the proposition. He did not suggest that any fault lies with the Commission nor for that matter, not surprisingly, did he suggest that the chairman's illness rendering him incapable of discharging his duties gave rise to any fault in the Tribunal. Nevertheless, he submitted, albeit with a caveat, that "...any Resumed Hearing would be tantamount to an abuse of the process." In doing so, he asserted that the alleged rights must prevail, although by the caveat he conceded that the position was otherwise, if there was "...strong justification with cogent reasons."
57. In my judgement, there is force in Mr Jat's submission that, on its face, the existence of such an alleged right is at odds with the provisions in the Ordinance that the Chief Executive may remove the chairman and ordinary members of the Tribunal. Obviously, that power might be exercised in a range of circumstances, including bias or misconduct. It would be very strange indeed, if one consequence of the exercise of the

power was that any incomplete proceedings would be automatically stayed because the Tribunal had not delivered a determination.

58. With the greatest of respect, I do not accept Mr Ho’s submissions. In my judgement, regard is to be had to all the circumstances in determining where the interests of justice lie. The earlier proceedings miscarried without any fault at all by the parties. The alleged misconduct is clearly extremely serious and appears to have led to substantial financial loss to the investing public, in particular to those who subscribed for or acquired shares in China Forestry. Clearly, there is a significant public interest in the final resolution of the proceedings on the merits. As Cheung JA, as Cheung CJ was then, noted in his judgment in *Luk Ka Cheung*:

“The Tribunal is there to regulate the conduct of those involved in the financial markets in Hong Kong. The investing public and the reputation of Hong Kong as a serious financial centre all have a stake in it.”

(i) *Representation of the 2nd and 3rd Specified Persons*

59. Given that the highest that Mr Ho was able to pitch his argument as to the representation of the 2nd and 3rd Specified Persons at any resumed proceedings was that there was a “distinct possibility” that they would be unrepresented, it is clear that resolution of the issue lies in the future. As Mr Ho acknowledged, unless and until an order is made by the Tribunal that there be resumed proceedings, no application can be made to the court for the release of injunctioned monies in the bank account of Top Wisdom to enable them to be represented. Whilst it is not disputed that all the previous release of monies for that purpose was on the basis of consent orders, it is not known with certainty what position would be taken by the liquidators of China Forestry.

60. No evidence whatsoever has been adduced before the Tribunal as to the financial position of the 2nd and 3rd Specified Persons. It has merely been asserted by counsel that, absent the provision of monies from the enjoined bank account of Top Wisdom, they “...do not have alternative means for legal costs for the purpose of the Resumed Hearing.”

61. In all the circumstances, I am satisfied that there is merit in Mr Jat’s submission that it is premature to advance this ground in support of an application for stay.

(ii) *The 1st Specified Person’s participation in the rehearing*

62. The core of the complaint made on behalf of the 2nd and 3rd Specified Persons is that the anticipated participation of the 1st Specified Person in the resumed proceedings would be wholly unfair to them because he was now in a position to know their case. It had been articulated in the witness statement of the 2nd Specified Person, in cross-examination of witnesses at the earlier proceedings and in the oral testimony of the 2nd specified Person. The 1st Specified Person would now be in a position to “tailor” his case in various ways, to the prejudice of the 2nd and 3rd Specified Persons.

63. As Mr Jat pointed out, those are the circumstances, namely knowledge of how the other defendant puts its case, that often obtain when a retrial is ordered in other proceedings. That is the case even in a “cut throat” defence, perhaps in which the commission of the crime is not disputed, but the real issue is which of the defendants was culpable. If the retrial was ordered after each of them had given evidence in the earlier proceedings, then the nature of their defence case was known to the other. But, that is not a barrier to the court ordering a retrial. It is one of the hazards of litigation.

64. It is to be remembered that each of the 1st and 2nd Specified Persons had filed lengthy witness statements with the Tribunal in advance of the earlier proceedings. In effect, each asserted that not only did they not participate in the making of false statements but also they were unaware that such irregularities had occurred. In effect, each pointed the finger of culpability at the other. Obviously, each was aware broadly of the others' case.
65. In any event, it is to be noted that, given the practice of the Tribunal is for the Specified Persons to give evidence in the sequence in which they are stipulated in the Notice filed with the Tribunal by the Commission, it is a question of happenstance as to which of them gives evidence first. The same practice is followed in the criminal courts on the basis of the sequence in which a defendant is named in an indictment.
66. Given that the Tribunal is yet to hold a Directions hearing, let alone has it give Directions, as to the receipt of evidence at any resumed proceedings the complaint made on behalf of the 2nd and 3rd Specified Persons that it would be wholly unfair if the 1st Specified Person was permitted to adduce supplemental evidence is premature and speculative. These are matters that can be canvassed in submissions at the Directions stage. It is to be noted that in written submissions made in advance of the Directions hearing held by Mr Hartmann on 13 July 2022, Mr Ho submitted that it was desirable that any directions in respect of a rehearing be determined after the disposal of the application for permanent stay.

(iii) *The lapse of time: impaired memories of witnesses*

67. There is no dispute but that significant time has elapsed since the period in which events relevant to the allegations of misconduct occurred in the period 2006 to January 2011. A substantial period of time had elapsed already from those events before the substantive hearing was held in the earlier proceedings, namely November 2019 to January 2020. It is inevitable that memories of witnesses will have been dimmed to some extent by the passage of time.
68. On the other hand, it is clear that the 2nd Specified Person was alerted to the alleged irregularities by the Announcement, dated 26 January 2011, of the suspension of trading in the shares of China Forestry, KPMG's letter of the following day to the board of directors of China Forestry identifying the discovery of irregularities in the accounts and the following Announcements and steps taken in consequence, in particular the board's resolution to dismiss the 2nd Specified Person as the chief executive officer. From that period, the 2nd Specified Person was put on notice that it was necessary to secure documentation and preserve memories that were relevant to the issues being raised.
69. As Mr Jat pointed out, no complaint was made in the witness statement of the 2nd Specified Person, dated 9 April 2019, about his ability to recall the relevant events that had occurred many years earlier. Perhaps, as Mr Jat suggested, that was because of the broad nature of the 2nd Specified Person's case, namely that he was unaware of any irregularities that have been discovered subsequently and at the time that the information was passed to others believed it to be true.

70. There is no dispute that further time has elapsed, about three years, since the 2nd Specified Person gave oral evidence in the earlier proceedings. Equally, yet more time will have elapsed before any resumed proceedings could be held. Obviously, priority would have to be given by the Tribunal and the parties to holding any resumed proceedings as soon as possible and counsel required to give such proceedings priority over other diary commitments.
71. These are all matters which the Tribunal would have to take into account when having regard to the effect of dimming memory on oral evidence at any resumed proceedings. But, that is a commonplace requirement in litigation and is taken into account by various tribunals of fact without any difficulty. It is certainly not a bar to the holding of resumed proceedings in this case.

Conclusion

72. In the result, having regard to all the circumstances, and, in particular the interests of justice, I have no hesitation at all in determining that the 2nd and 3rd Specified Persons have failed to show on the balance of probabilities that a fair trial cannot take place at resumed proceedings. Further, I am satisfied there are no circumstances involving an abuse of power such as to offend the Tribunal's sense of justice and propriety and to taint resumed proceedings as an abuse of process. I dismiss the application of the 2nd and 3rd Specified Persons for a permanent stay of the proceedings.
73. The mode of the resumed proceedings is a matter on which the Tribunal will receive the submissions of the parties and give directions in due course.

Costs

74. Sensibly, Mr Ho did not oppose Mr Jat's submission that, if the application was dismissed, the Tribunal should make an order of costs in favour of the Commission with a certificate for two counsel. I make that order.

A handwritten signature in dark ink, appearing to read 'Michael Lunn', with a stylized, flowing script.

Michael Lunn, GBS

(Chairman)

Dated: 25 October 2022.

Mr Jat Sew Tong, SC and Mr Julian Lam for the Securities and Futures Commission.

Mr Ambrose Ho, SC and Mr Francis Chung, instructed by King & Wood Mallesons for the 2nd and 3rd Specified Persons.

1st Specified Person-absent and unrepresented.