

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
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Li Han Chun	2 nd Specified Person
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Top Wisdom Overseas Holdings Limited	3 rd Specified Person
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Before: Mr. Michael Lunn, GBS

Date of Hearing: 10 January 2023

Date of Delivery of the Reasons for the Ruling: 12 January 2023

REASONS FOR THE RULING

The application for an adjournment

1. By a letter to the Tribunal, dated 4 January 2023, King & Wood Mallesons, solicitors acting for the 2nd and 3rd Specified Persons, applied for the adjournment of the hearing fixed to commence on 1 February 2023, with 2, 3, 6-10 February 2023 reserved, to commence instead on 12 April 2023, together with the other dates reserved up and until 25 April 2023. In his written

submissions, dated 6 January 2023, Mr. Isaac Chan, for the 2nd and 3rd Specified Persons asked that the Tribunal fix additional dates, to replace those lost in February 2023 and to do so in consultation with counsel's diary.

The response of the Securities and Futures Commission

2. In its written submissions the Securities and Futures Commission (the "Commission") opposed the application.

Ruling

3. Having heard counsel, Mr. Issac Chan for the 2nd and 3rd Specified Persons and Mr. Jat Sew Tong SC for the Commission, at the hearing on 10 January 2023, I refused the application and said that I would give my reasons for so ruling in due course. That, I do now.

Inability to instruct legal representatives

4. In support of the application, the Tribunal was informed that it was made because the 2nd and 3rd Specified Persons were "...now unable to instruct their legal representatives to commence preparation for the rehearing" fixed to commence on 1 February 2023. It was contended that the application was necessitated pending the resolution of an application, dated 28 November 2022, made by King & Wood Mallesons to the Court of First Instance for the release of \$36.3 million, some of the monies the subject of a *Mareva* injunction in proceedings in HCMP 176/2011.¹

The application to the Court of First Instance for the release of funds; HCMP 176/2011

5. The application of the 2nd and 3rd Specified Persons to the Court of First Instance was for the release of \$36.3 million of the monies held in a bank account

¹ Securities and Futures Commission v Li Han Chun (1st Defendant) and Top Wisdom Overseas Holdings Limited (2nd Defendant) and China Forestry Holdings Co Limited (In Official Liquidation (Intervener)).

in the name of Top Wisdom Overseas Holdings Limited with UBS AG Hong Kong, which monies were the subject of an injunction preventing the 2nd and 3rd Specified Persons from dealing with their assets up to \$398,219,458. The sum of \$36.3 million was stipulated to cover the legal costs:

- (i) incurred after the hearing in the Tribunal of an application for stay of proceedings;
- (ii) the estimated costs of the rehearing in the Tribunal; and
- (iii) the costs of making the application to the Court of First Instance to withdraw the monies.

The hearing of the application has been fixed before Deputy Judge Le Pichon on 30 January 2023.

6. By an affirmation, filed in the Court of First Instance on 16 December 2022, the Securities and Futures Commission (“the Commission”) stated that it agreed to the release of \$18.7 million, as being a reasonable quantum of costs, but opposed the release of the total amount sought as being “excessive”. By an affirmation filed on the same date, the Liquidators of China Forestry Holdings Co Ltd (“China Forestry”) opposed the application for the release of any of the monies, contending that it had a proprietary claim over the monies the subject of the injunction.

Directions: hearing dates

7. Following a Preliminary Conference, held on 18 November 2022, in Directions, dated 29 November 2022 the Inquiry was set down for hearing at 9:30 a.m. to 1:00 p.m.; and 2:30 p.m. to 5:00 p.m. on 1-3 and 6-10 February 2023; and 12, 14, 17-21, 24 (afternoon only) and 25 April 2023.

Background Chronology

3 May 2018

8. By a Notice, dated 3 May 2018, the Commission initiated proceedings in this Tribunal in which the three Specified Persons were identified as each being a person suspected to have perpetrated market misconduct.

The substantive hearing

9. Hearings were conducted before the Tribunal, constituted by Mr. Kenneth Kwok SC (Chairman) and two ordinary members, on various dates commencing on 25 November 2019 and concluding on 23 January 2020. Thereafter, proceedings were adjourned for the filing of written closing submissions by the parties on 2 and 16 March 2020. The hearing fixed for 30 and 31 March 2020 for the delivery of oral submissions was vacated by the direction of Mr. Kenneth Kwok, dated 26 March 2020, in light of the advent of the Covid-19 pandemic. Thereafter, the Tribunal made no further directions nor did it make any determination.

10 January 2022

10. On 10 January 2022, the Tribunal was informed 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.

11 January 2022

11. In a letter, dated 11 January 2022, in my capacity as a chairman of the Tribunal, I advised the parties of the information received by the Tribunal as to Mr. Kenneth Kwok's medical condition and invited the parties to make "...such submissions to the Tribunal as they might wish to make as to the way forward."

18 March 2022

12. In written submissions, dated 18 March 2022, the Commission submitted that the Tribunal be reconstituted 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”. In addition, the Commission asserted that it was “...not in the interest(s) of justice to dismiss or stay the MMT proceedings without a decision or a retrial.”

4 April 2022

13. In written submissions on behalf of the 2nd and 3rd Specified Persons, dated 4 April 2022, issue was taken by King & Wood Mallesons with the Commission’s submission that the Tribunal be reconstituted and that there be a trial *de novo*. It was submitted that the “...proceedings are still extant and on-going, pending the determination of the Tribunal.” It was noted that the then Chief Executive had not “...exercised her power either to remove or replace the Chairman.” In addition, it was submitted that the “...fair and appropriate way to dispose of these proceedings”, was that they be discontinued or permanently stayed.

14. In contending that, if there was a full rehearing, the 2nd and 3rd Specified Persons would be “...subject to irreparable prejudice”, it was submitted that, amongst other things, there was “...a distinct possibility” that they would be unrepresented. In particular, it was asserted that:²

“While the Commission’s position all along has been prepared to consent to withdrawal of funds for our clients’ reasonable legal expenses, the Liquidators’ stance is much more uncompromising. In the last application for release of funds for the MMT Proceedings, the Liquidators originally resisted any or any substantial release as they maintained they had a *proprietary claim* over the Injuncted Funds. It is likely

² King & Wood Mallesons letter, dated 4 April 2022, at paragraph 4.3

that any further application for release will be met with strenuous opposition, creating much uncertainty and hardship for our clients.”

21 April 2022 and 14 June 2022

15. Following a Directions hearing held on 21 April 2022, of which I was the Chairman, the parties were informed by the Tribunal by a letter, dated 14 June 2022, the Chief Executive had approved the appointment of two ordinary members of the Tribunal for the proceedings specified in the Notice, dated 3 May 2018. The fact of that approval of the Chief Executive had been communicated to the Tribunal in a letter, dated 8 June 2022, from the Secretary for Financial Services and the Treasury.

13 July 2022

16. At a Directions hearing held on 13 July 2022, of which Mr. Michael Hartmann was the Chairman, Mr. Ambrose Ho SC, on behalf of the 2nd and 3rd Specified Persons, applied for a permanent stay of the proceedings, in consequence of which a hearing was fixed for that application on 24 October 2022. At the specific request of Mr. Ho in his written submissions³, contrary to the Commission’s written submissions, no dates were fixed for a possible future rehearing.⁴

18 October 2022

17. On 18 October 2022 the Tribunal was informed by the Secretary for Financial Services and the Treasury that the Chief Executive had appointed Mr. Michael Lunn as chairman of the proceedings specified in the Commission’s Notice, dated 3 May 2018. By letter of the same date the parties were informed of that appointment.

³ Submissions by Li Han Chun (‘SP2’) and Top Wisdom Overseas Holdings Limited (‘SP3’), dated 13 July 2022, at paragraphs 2 and 6.

⁴ Skeleton Submissions of the Securities and Futures Commission, dated 11 July 2022, at paragraph 11.

25 October 2022

18. Following a hearing, on 24 October 2022, of the application for stay of the proceedings on behalf of the 2nd and 3rd Specified Persons, in a written Ruling handed down on 25 October 2022, I refused the application for stay. In doing so, it was noted that Mr. Ho had contended that it was not until the resolution of the question of whether there was to be a rehearing that an application could be made to the court for the release of monies, so that the 2nd and 3rd Specified Persons might be represented at such future rehearing.⁵ Also, it was observed in the Ruling that no evidence at all had been adduced before the Tribunal of the financial position of the 2nd and 3rd Specified Persons. It had merely been asserted that, absent the provision of monies from the injunctioned bank account of Top Wisdom, they “... do not have alternative means for legal costs for the purpose of the Resumed Hearing.”⁶

19. By a letter, dated 25 October 2022, the Tribunal fixed the hearing of a Preliminary Conference on 18 November 2022 to enable the Tribunal to give directions to secure the expeditious and economical conduct of the proceedings. Also, the Tribunal provided a timetable for the submissions of the parties to be filed with the Tribunal.

16 and 17 November 2022

20. By a letter, dated 16 November 2022, the Commission informed the Tribunal that counsel for the Commission and the 2nd and 3rd Specified Persons were mutually available to conduct the rehearing on various dates, to a total of twenty days, in August and November 2023. By a letter, dated 17 November 2022, I informed the parties that the Tribunal was concerned that the proposed dates of the resumed hearing “...do not reflect adequately or properly the

⁵ Ruling, dated 25 October 2022, at paragraph 59.

⁶ Ruling, dated 25 October 2022, at paragraph 60.

important requirement that resumed hearings of this Inquiry be held expeditiously.” The parties were invited, “...to identify and propose much earlier alternative dates for the hearings to be held”.

18 November 2022

21. At the Directions hearing held on 18 November 2022, it emerged that no application had been made on behalf of the 2nd and 3rd Specified Persons to the Court for the release of the funds to provide for their legal representation at the rehearing. That was a matter of surprise, since a ruling had been made on 25 October 2022 that a rehearing was to take place. In response, Mr. Ho indicated that an application would now be made.

22. Although, as noted earlier, the parties had suggested that dates be fixed for the rehearing in August 2023, it became apparent during the course of the hearing that the diaries of counsel were in fact free for hearings to be fixed in two tranches, first in February 2023 and, secondly in April 2023. On that basis, the parties were asked to provide the Tribunal with dates in those two months for hearing dates to be fixed.

29 November 2022

23. In the event, in their correspondence with the Tribunal, dated 24 and 25 November 2022, the parties were unable to provide the Tribunal with the twenty hearing dates, sought by the parties, in those two months on which they were all available.

24. In the result, by its Directions, dated 29 November 2022, the Tribunal fixed hearings on such dates as counsel were prepared to make themselves available. In order to provide for as much hearing time as possible, the Tribunal stipulated longer than the usual daily hearing times, namely from 9:30 a.m. to 1:00 p.m. and 2:30 p.m. to 5:00 p.m. on each of the available dates.

The submissions of the 2nd and 3rd Specified Persons

25. In support of the application that the proceedings, fixed to commence on 1 February 2023, be adjourned to commence instead on 12 April 2023 Mr. Isaac Chan submitted that was the only fair and practicable way to resolve the “serious predicament” in which the 2nd and 3rd Specified Persons found themselves.

(i) HCMP 176/2011: the application of the 2nd and 3rd Specified Persons

26. Of the steps taken to secure monies to fund the legal representation of the 2nd and 3rd Specified Persons, Mr. Chan said that on 28 November 2022, Messrs King & Wood Mallesons had taken out an application in HCMP 176/2011 to withdraw \$36.3 million from the injunctioned funds to cover various legal costs, including those anticipated for the rehearing. Those documents had been served on the Commission and the Liquidators on 29 November 2022. On 1 December 2022, having received the comments of the Commission and the Liquidators a consent summons was filed with the Court. The hearing date of 30 January 2023, fixed by the Court on 8 December 2022, was the earliest date available for the Court.

27. At the hearing, without objection from Mr. Jat, the Tribunal received from Mr. Chan a ‘Chronology’, setting out in tabular form the date of the occurrence of various events under the title ‘Event/Document’.

(ii) The response of the Commission and the Liquidators

28. On 16 December 2022 the Commission and the Liquidators had filed affirmations with the Court in response to the application of the 2nd and 3rd Specified Persons.

(a) The Commission

29. Whilst the Commission took issue with the total quantum of costs sought by the 2nd and 3rd Specified Persons, the Commission indicated that it did not

object to the interim release of \$18.7 million, of which \$18,213,700 was for costs in the rehearing in the Tribunal proceedings, plus such amount of money in excess that the judge determined to be appropriate at the hearing.

(b) The Liquidators

30. By contrast, the Liquidators objected fundamentally to the release of monies to fund legal costs of the 2nd and 3rd Specified Persons, maintaining their earlier contention that they had a proprietary claim over the monies, so that a more stringent test applied to the release of any such monies. As a first step in that test, it was required that the 2nd and 3rd Specified Persons demonstrate by full and frank evidence that there were no alternative funds or assets available to them. It was contended that the 2nd Specified Person had not given full or satisfactory disclosure to show that he and the 3rd Specified Person did not have other sources of funding for the MMT proceedings.

(iii) *Without prejudice negotiations*

31. Without prejudice negotiations had been commenced by the 2nd and 3rd Specified Persons with the Commission and the Liquidators on 28 December 2022. In doing so, the 2nd and 3rd Specified Persons sent a 20-page letter to them providing “substantive responses” to their objections. However, in light of the stance taken by the Liquidators, Mr. Chan said that it was “unlikely that the parties can reach an agreement for a release of funds in sufficient time before the Rehearing”, so that it was “very likely that the funding question will only be resolved by a determination of the Court on 30 January 2023.”

The submissions of the Commission

32. In opposing the application, in written submissions, dated 9 January 2023, Mr. Jat Sew Tong noted that the sole grounds relied upon in seeking the adjournment was the inability of the 2nd and 3rd Specified Persons to secure funding to instruct legal representatives to commence preparation for the

rehearing. Of the Commission's grounds of objection to the application for an adjournment he said that first, the 2nd and 3rd Specified Persons had filed no evidence with the Tribunal to support their alleged lack of funds to instruct legal representatives. Secondly, their inability to secure funds was "...a predicament of their own making."

33. As to the first matter, Mr. Jat submitted that to make good the contention that they lacked funds it was incumbent upon the 2nd and 3rd Specified Persons to make full disclosure of information and documents relating to their assets and finances, including those controlled directly or indirectly. Full particulars were required of their sources of income. In addition, given that they had a year's notice that a rehearing was a possibility, the burden was on the 2nd and 3rd Specified Persons to satisfy the Tribunal that they had made reasonable and *bona fide* attempts to secure funding for legal representation. A bare assertion that they lacked funds was insufficient. In addition, in the Ruling in respect of the application for a stay of the proceedings, the Tribunal had observed specifically that no evidence had been adduced before the Tribunal to support the bare contention that the 2nd and 3rd Specified Persons lacked funding to secure legal representation.⁷

34. As to the second matter, Mr. Jat submitted that the 2nd and 3rd Specified Persons had failed to act expeditiously in making their application for the release of funds. They were unable to explain why, given that the Ruling rejecting the application for stay of proceedings had been made on 25 October 2022, no application was begun for the release of funds until 28 November 2022. Clearly, the 2nd and 3rd Specified Persons had correctly anticipated the stance to be taken by the Liquidators in respect of their application for release of monies. Further, no explanation was offered as to why there had been a further delay until 28

⁷ Ruling, dated 25 October 2022, at paragraph 60.

December 2022 before attempts were made to obtain the consent of the Commission and the Liquidator for the interim release of funds. Finally, there was no explanation for the delay until 4 January 2023 before an application was made to the Tribunal to adjourn the commencement of proceedings to 12 April 2023.

35. In addition, Mr. Jat invited the Tribunal to have regard to the fact that an adjournment would necessarily result in delay in the proceedings, whilst future hearing dates were identified as being available. That was inimical to the public interest that there be just, expeditious and economic conduct of the proceedings.

36. Mr. Jat informed the Tribunal that the Commission had identified witnesses available to give evidence on the dates fixed for the hearings, including those in February 2023. They were set out in Appendix 2 to their written submissions. In addition to delivery of the Commission's Opening Submissions, it was proposed that four witnesses of fact and two expert witnesses give evidence on the hearing dates fixed for February 2023.

A consideration of the submissions

37. In the course of the oral hearing, Mr. Chan invited the Tribunal to have regard to an unaffirmed affirmation in Chinese of the 2nd Specified Person, with a translation into English. In part, it addressed the objections taken by the Commission and the Liquidator in their respective affirmations filed on 16 December 2022 in proceedings in HCMP 176/2011. It had not been affirmed because Mr. Li Han Chun was not in Hong Kong. It was intended that it be affirmed when he was in a position to do so and to have it notarised. Mr. Jat objected to the Tribunal receiving the documents. He had not been given the opportunity to check the accuracy of the English translation.

38. Having regard to all the circumstances, I declined to receive the unaffirmed Chinese original and its translation. In doing so, I had regard to the fact

that in the Ruling in respect of the application for a stay of proceedings the Tribunal had drawn attention to the fact that it had received no evidence as to the availability or otherwise of monies to the 2nd and 3rd Specified Persons to fund legal representation, and that the time at which the application for an adjournment was made to the Tribunal was entirely a matter of the choice of the 2nd and 3rd Specified Persons. They were on long-standing notice of what was required, but they had failed to get their tackle in order timeously.

39. I am satisfied that there is force in Mr. Jat’s submission that no satisfactory explanation has been given by the 2nd and 3rd Specified Persons for the delay in making the application to the Court for the release of funds in HCMP 176/2011 to provide monies for their legal representation in the rehearing. In the Ruling in respect of the application for stay of proceedings, the Tribunal addressed the concerns raised on behalf of the 2nd and 3rd Specified Persons of prejudice arising from fading memories of witnesses, including the 2nd Specified Person, of events that had taken place well over a decade earlier and the additional complaint that “...yet more time will have elapsed before any resumed proceedings could be held” and said:⁸

“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.”

40. It is to be noted that the Tribunal sent the parties a letter on the same date as the Ruling directing that a Preliminary Conference be held on 18 November 2022, “...to give such directions as are necessary to secure the just, expeditious and economical conduct of the proceedings”, and providing a timetable for the filing of submissions prior to that hearing.

⁸ Ruling, dated 25 October 2022, at paragraph 70.

41. The parties were under clear notice that the Tribunal intended to commence the resumed proceedings “...as soon as possible”, not least because the Tribunal said so. Given that the 2nd and 3rd Specified Persons said that they anticipated, correctly as events have shown, that the Liquidators would strenuously object to the release of monies from those the subject of the injunction to fund their legal representation in the proceedings in this Tribunal, it was obvious that it was imperative to make any such application immediately. They failed to do so. Had they done so, other things being equal, it seems likely that the Court of First Instance would have been able to accommodate the hearing of the application about 4 weeks or so earlier than 30 January 2023. In that respect, I accept that there is force in Mr. Jat’s description of the circumstances in which the 2nd and 3rd Specified Persons state that they find themselves as being “a predicament of their own making”.

Evidence of the unavailability of monies to the 2nd and 3rd Specified Persons to fund their legal representation

42. No explanation has been provided by the 2nd and 3rd Specified Persons as to why they have not filed any evidence to support their bare assertion that they have available to them no other sources of monies, other than those the subject of an injunction in HCMP176/2011 to fund their legal representation in the forthcoming rehearing. As noted earlier, in the Ruling in respect of the application for stay of proceedings, the Tribunal noted the absence of any such evidence.

43. There are many components that are required to be brought together to enable a hearing to be conducted in an Inquiry. They include ensuring that witnesses and the ordinary members of the Tribunal are available for the hearing dates which had been fixed. The services of interpreters and those who provide a video link for witnesses not present in Hong Kong have to be secured. The parties work to a timetable to bring the presentation of documentation to

readiness and they prepare and serve written submissions. Whilst the fixed dates for the hearing are not sacred, they are important. Disrupting those dates often has significant consequences, and requires cogent justification. The 2nd and 3rd Specified Persons had not advanced any such justification.

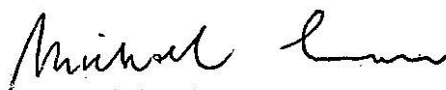
Conclusion

44. For the reasons that I have set out, I was satisfied that the application by the 2nd and 3rd Specified Persons for an adjournment of the proceedings to 12 April 2023 was not justified.

Costs

45. Mr. Jat submitted that, if the application for an adjournment was refused, the Tribunal should make an order of costs in favour of the Commission with a certificate for two counsel. For his part, Mr. Chan submitted that in those circumstances, the Tribunal ought to order that cost be in the cause. He opposed the grant of a certificate for two counsel, submitting that the issues were not very difficult and did not require very senior counsel.

46. I reserved my decision on the issue of costs, which I address now. Having regard to all the circumstances, I make an order of costs of the application in favour of the Commission with a certificate for two counsel.



Michael Lunn, GBS

(Chairman)

Dated: 12 January 2023.

Mr. Jat Sew Tong, SC and Mr. Joshua Chan for the Securities and Futures Commission.

Mr. Issac Chan, instructed by King & Wood Mallesons for the 2nd and 3rd Specified Persons.

1st Specified Person-absent and unrepresented.