REPORT OF THE
MARKET MISCONDUCT TRIBUNAL
OF HONG KONG

on whether any market misconduct has taken place

in relation to the listed securities of

China Vanguard Group Limited
(now known as Sinopharm Tech Holdings Limited (Stock Code 8156))
and
Yunbo Digital Synergy Group Limited
(now known as Quantum Thinking Limited (Stock Code 8050))

on and between 1 August 2014 and 30 September 2014

and other related questions

The Report of the Market Misconduct Tribunal into dealings
in the shares of China Vanguard Group Limited
(now known as Sinopharm Tech Holdings Limited) and
Yunbo Digital Synergy Group Limited (now known as Quantum Thinking Limited)
on and between 1 August 2014 and 30 September 2014

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

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Chapter 1

The Institution of Proceedings before the Market Misconduct Tribunal

The Notice Filed by the SFC

Pursuant to section 252(2) of, and Schedule 9 to, the Securities and Futures Ordinance, Cap 571 ("**the SFO**"), the Securities and Futures Commission ("**the SFC**") on 5 August 2022 filed with the Market Misconduct Tribunal ("**the Tribunal**") a Notice in which it stated that it appears to the SFC that:

> "market misconduct in the nature of false trading within the meaning of section 274 of the Securities and Futures Ordinance (Cap. 571) (the "**SFO**") has or may have taken place in relation to the shares in China Vanguard Group Limited, now known as Sinopharm Tech Holdings Limited (stock code 8156) ("**CVG**") and in relation to the shares in Yunbo Digital Synergy Group Limited, now known as Quantum Thinking Limited (stock code 8050) ("**YBD**"), both listed on the Growth Enterprise Market of The Stock Exchange of Hong Kong Limited ("**SEHK**")…"

2. The Notice then stated that the SFC was instituting proceedings before the Market Misconduct Tribunal for it to determine:

> "(1) Whether any market misconduct within the meaning of section 274 of the SFO has taken place;
>
> (2) The identity of any person who has engaged in the market misconduct found

to have been perpetrated; and

(3) The amounts of any profit gained and/or loss avoided, if any, as a result of the market misconduct found to have been perpetrated."

These three determinations simply repeat what is contained in section 252(3) of the SFO.

3. The Notice specifies the person suspected to have engaged in Market Misconduct as Jonathan Dominic Wai Chung Iu, although this was later amended by direction of the Tribunal to Jonathan Dominic Wai Ching Iu ("**Mr Iu**" or "**the Specified Person**").[1]

4. Section 252(2) of the SFO requires the Notice to contain "a statement specifying the matters prescribed in Schedule 9". Section 13 of Schedule 9 sets out what the section 252(2) statement must specify and that is as follows:

"(a) the provision or provisions of Part XIII of this Ordinance by reference to which any person appears to have perpetrated any conduct which constitutes market misconduct; and

(b) the identity of the person, and such brief particulars as are sufficient to disclose reasonable information concerning the nature and essential

[1] The person suspected by the SFC of having engaged in market misconduct is commonly referred to as the Specified Person as the SFC specifies his identity in accordance with its statutory duty under the SFO. If this person is determined by the Tribunal to have engaged in market misconduct then he, arguably, becomes the "identified person" because, in accordance with its duty under section 252(3)(b) of the SFO, the Tribunal has determined the identity of the person who has engaged in market misconduct and any orders that the Tribunal makes under section 257(1) of the SFO can only be made against this identified person. However, for the sake of consistency and to avoid any confusion, the term "Specified Person" is used throughout this Report.

elements of the market misconduct."

5. In compliance with section 13 of Schedule 9, the statement specifies section 274 of the SFO as the provision of Part XIII of the ordinance by reference to which Mr Iu appears to have perpetrated any conduct which constitutes market misconduct and also provides "brief particulars as are sufficient to disclose reasonable information concerning the nature and essential elements of the market misconduct.". The SFC's Notice containing this statement is at **Annexure A** to this Report.

6. The section 13 brief particulars assert that Mr Iu was, at the material time, namely between 1 August 2014 and 30 September 2014, a director and the chief investment officer of Tarascon Capital Management (Hong Kong) Limited ("**Tarascon**"). This company was incorporated in Hong Kong and is engaged in the business of providing investment and portfolio management services. Mr Iu held 80% of the shares in Tarascon.

7. Tarascon managed a hedge fund called Tarascon Asia Absolute Fund (Cayman) Limited ("**the Fund**"). The Fund is a company incorporated in the Cayman Islands as an exempted open-ended investment company. Mr Iu was responsible for managing and making investment decisions for the Fund and was the only person authorised by Tarascon to place orders to trade securities for it.

8. The Fund maintained a number of securities accounts, three of which were Guosen Securities (HK) Brokerage Company Limited, UBS Securities Asia

Limited, and Morgan Stanley Hong Kong Securities Limited (the "**Fund's Accounts**").

9. Mr Iu's mother, Victoria Iu ("**Ms Iu**"), maintained a securities account at Hang Seng Securities Limited ("**Ms Iu's Account**"). Mr Iu had access to and was authorised by Ms Iu to operate this account.

10. The shares of both CVG and YBD were listed on the Growth Enterprise Market of the SEHK and between 1 August 2014 and 30 September 2014, Mr Iu made or proposed to make, offers to purchase and to sell shares in both of these companies. The accounts through which he made these trades were the Fund's Accounts and Ms Iu's Account.

11. The statement goes on to assert:

> "7. Pursuant to the offers:
>
> 7.1. 23,465,000 CVG shares were purchased for the Fund's Accounts at an average price of HK$3.657 per share. 35,210,000 CVG shares were sold at an average price of HK$3.412 per share. The Fund's Accounts made a loss (based on the average purchase and sale prices, same for all figures of gains and losses below) of approximately HK$2.68 million.
>
> 7.2 16,740,000 CVG shares were purchased for Ms Iu's Account at an average price of HK$3.409 per share. 17,895,000 CVG shares were sold at an average price of HK$3.702 per share. Ms Iu's Account made a gain of approximately HK$5.54 million.

7.3 1,600,000 YBD shares were purchased for the Fund's Accounts at an average price of HK$6.932 per share. 756,000 YBD shares were sold at an average price of HK$6.68 per share. The Fund's Accounts made a loss of approximately HK$2.67 million.

7.4 556,000 YBD shares were purchased for Ms Iu's Account at an average price of HK$6.901 per share. 556,000 YBD shares were sold at an average price of HK$7.038 per share. Ms Iu's Account made a gain of approximately HK$76,040.

8. The offers to purchase or to sell shares for the Fund's Accounts or Ms Iu's Account (as the case may be) were frequently matched and executed against opposite offers also made by Mr Iu to sell or to purchase for Ms Iu's Account or the Fund's Accounts (as the case may be):

8.1. 15,805,000 CVG shares were purchased by the Fund's Accounts from Ms Iu's Account. 14,420,000 CVG shares were sold from the Fund's Accounts to Ms Iu's Account.

8.2. 440,000 YBD shares were purchased by the Fund's Accounts from Ms Iu's Account. 100,000 YBD shares were sold from the Fund's Accounts to Ms Iu's Account.''

12. These facts, the SFC alleges, reveal Mr Iu committing market misconduct in the form of false trading contrary to section 274 of the SFO. In support of this allegation the SFC, in the statement attached to its Notice, reasons as follows:

"9. By the offers:

9.1. Mr Iu offered to purchase and sell shares in CVG at prices that were substantially the same as prices at which he had made or proposed to make, or knew that an associate of his (viz., the Fund or Ms Iu, as the case may be) had made or proposed to make, offers to sell or purchase the same or substantially the same number of them, within the meaning of section 274(5)(b) and (c) of the SFO.

9.2. Mr Iu offered to purchase and sell shares in YBD at prices that were substantially the same as prices at which he had made or proposed to make, or knew that an associate of his (viz., the Fund or Ms Iu, as the case may be) had made or proposed to make, offers to sell or purchase the same or substantially the same number of them, within the meaning of section 274(5)(b) and (c) of the SFO.

10. Moreover, amongst the offers:

10.1. Mr Iu often made offers to sell shares in CVG and YBD for Ms Iu's Account at minimum prices higher than the nominal prices of such shares in the market, and made offers to purchase shares at maximum prices lower than the nominal prices of such shares in the market.

10.2. In anticipation of or following such offers to sell shares for Ms Iu's Account, Mr Iu made offers to purchase shares for the Fund's Accounts which would be executed against other offers in the market with priority over the offers to sell shares for Ms Iu's Account. The nominal prices of the shares would be increased.

10.3. In anticipation of or following such offers to purchase shares for

Ms Iu's Account, Mr Iu made offers to sell shares for the Fund's Accounts which would be executed against other offers in the market with priority over the offers to purchase shares for Ms Iu's Account. The nominal prices of the shares would be decreased.

10.4. As a result, the offers made or to be made to sell or purchase CVG or YBD shares for Ms Iu's Account could be and were executed at higher prices for selling and lower prices for purchasing."

13. The SFC then concludes:

"11. By the offers and by reason of the matters aforesaid:

11.1. Mr Iu offered to and/or did purchase and sell shares in CVG for the Fund's Accounts and Ms Iu's Account with the intention that, or being reckless as to whether, the offers and/or purchases and sales had or were likely to have, the effect of:

(a) Creating a false or misleading appearance of active trading in CVG shares, within the meaning of section 274(1)(a) of the SFO;

(b) Creating a false or misleading appearance with respect to the market for, or the price for dealings in, CVG shares, within the meaning of section 274(1)(b) of the SFO; and/or

(c) Creating an artificial price for dealings in CVG shares, within the meaning of section 274(3) of the SFO.

11.2. Mr Iu offered to and/or did purchase and sell shares in YBD for the

Fund's Accounts and Ms Iu's Account with the intention that, or being reckless as to whether, the offers and/or purchases and sales had or were likely to have, the effect of:

(a) Creating a false or misleading appearance of active trading in YBD shares, within the meaning of section 274(1)(a) of the SFO;

(b) Creating a false or misleading appearance with respect to the market for, or the price for dealings in, YBD shares, within the meaning of section 274(1)(b) of the SFO; and/or

(c) Creating an artificial price for dealings in YBD shares, within the meaning of section 274(3) of the SFO.

12. In the premises, Mr Iu engaged in market misconduct, namely false trading within the meaning of section 274 of the SFO."

14. In terms of the determinations that the Tribunal is required to make, the statement seeks to outline the factual basis of the SFC's allegations that:

(1) market misconduct in the form of false trading contrary to section 274 of the SFO took place between 1 August 2014 and 30 September 2014;

(2) the person who engaged in this market misconduct was Mr Iu; and

(3) as a result of this market misconduct a profit was gained of approximately HK$5.54 million from trades in respect of CVG

shares and HK$76,040 in respect of YBD shares. These gains were all made to Ms Iu's account and at the expense of the Fund's accounts. The Fund's Accounts incurred losses of approximately HK$2.68 million in respect of the trades in CVG shares and HK$2.67 million in respect of the trades in YBD shares.

Chapter 2

False Trading

15. The provisions of the SFO dealing with market misconduct can be found in Part 13 of the ordinance. Division 2 of this Part establishes the Market Misconduct Tribunal; Division 3 provides a right of appeal to the Court of Appeal from findings or determinations of the MMT; and Division 4 contains provisions relating to insider dealing. Division 5 is entitled "Other market misconduct" and it is within this Division, at section 274, that false trading can be found. The whole of section 274 is at **Annexure B** to this Report but not all of it requires our consideration. For our purposes, the relevant parts of section 274 are as follows:

> "**274. False trading**
>
> (1) False trading takes place when, in Hong Kong or elsewhere, a person does anything or causes anything to be done, with the intention that, or being reckless as to whether, it has, or is likely to have, the effect of creating a false or misleading appearance—
>
> (a) of active trading in securities or futures contracts traded on a relevant recognized market or by means of authorized automated trading services; or
>
> (b) with respect to the market for, or the price for dealings in, securities or futures contracts traded on a relevant recognized market or by means of authorized automated trading services.

…

(3) False trading takes place when, in Hong Kong or elsewhere, a person takes part in, is concerned in, or carries out, directly or indirectly, one or more transactions (whether or not any of them is a dealing in securities or futures contracts), with the intention that, or being reckless as to whether, it or they has or have, or is or are likely to have, the effect of creating an artificial price, or maintaining at a level that is artificial (whether or not it was previously artificial) a price, for dealings in securities or futures contracts traded on a relevant recognized market or by means of authorized automated trading services.

…

(5) Without limiting the general nature of the conduct which constitutes false trading under subsection (1) or (2), where a person—

…

(b) offers to sell securities at a price that is substantially the same as the price at which he has made or proposes to make, or knows that an associate of his has made or proposes to make, an offer to purchase the same or substantially the same number of them; or

(c) offers to purchase securities at a price that is substantially the same as the price at which he has made or proposes to make, or knows that an associate of his has made or proposes to make, an offer to sell the same or substantially the same number of them,

then, unless the transaction in question is an off-market transaction, the

person shall, for the purposes of subsections (1) and (2), be regarded as doing something or causing something to be done, with the intention that, or being reckless as to whether, it has, or is likely to have, the effect of creating a false or misleading appearance—

(i) where the securities are traded on a relevant recognized market or by means of authorized automated trading services, of active trading in securities so traded or with respect to the market for, or the price for dealings in, securities so traded; or

(ii) where the securities are traded on a relevant overseas market, of active trading in securities so traded or with respect to the market for, or the price for dealings in, securities so traded."

16. The elements of the forms of market misconduct described in section 274(1) are:

(i) a person does anything or causes anything to be done;

(ii) (a) with the intention that what he does, or causes to be done, has or is likely to have, the effect of creating a false or misleading appearance; or

(b) is reckless as to whether what he does, or causes to be done, has or is likely to have, the effect of creating a false or misleading appearance;

(iii) the false or misleading appearance must be:

(a) of active trading in securities or futures contracts traded on a relevant recognised market or by means of authorised automated trading services (section 274(1)(a)); or

(b) with respect to the market for, or the price for dealings in, securities or futures contracts traded on a relevant recognised market or by means of authorised automated trading services (section 274(1)(b)).

17. The elements of the forms of market misconduct described in section 274(3) are:

(i) a person takes part in or is concerned in or carries out, directly or indirectly one or more transactions;

(ii) with the intention that, or being reckless as to whether, the transaction(s) has or is likely to have the effect of:

(a) creating an artificial price; or

(b) maintaining at a level a price that is artificial;

for dealings in securities or futures contracts traded on a relevant recognised market or by means of authorised automated trading services.

18. Subsection 3 is concerned with conduct that seeks to set or maintain a market price for a share at a particular level. This conduct results in what the

section calls an artificial price. It is a price that is created by a market support operation of which the market is unaware and, in its ignorance, will wrongly attribute to the forces of genuine supply and demand.

19. Market manipulation, whether it be in the form of false trading under section 274(1) or under section 274(3), involves an interference with the forces of supply and demand which enables the manipulator to influence the decisions of investors who, unaware of his interference, believe that whatever is happening to a particular share is due solely to the forces of genuine supply and demand. The purpose of prohibiting this conduct is to preserve the integrity of the market and protect the interests of all investors. The following observations of Sir Anthony Mason in the Australian High Court judgment of *North v Marra Developments Limited*[2] have been held by our Court of Appeal[3] to be equally applicable to section 274:

> "It seems to me that the object of the section is to protect the market for securities against activities which will result in artificial or managed manipulation. The section seeks to ensure that the market reflects the forces of genuine supply and demand. …It is in the interests of the community that the market for securities should be real and genuine, free from manipulation. The section is a legislative measure designed to ensure such a market and it should be interpreted accordingly."

20. The observations of Sir Anthony Mason came under detailed discussion

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2 (1981) 148 CLR 42, at 59.

3 See *HKSAR v Fu Kor Kuen Patrick* [2011] 1 HKLRD 655 at 665, [25].

in the later High Court of Australia decision of *DPP(Cth) v J M*[4]. Here the High Court was dealing with a very similar provision to our section 274(3). It discussed Mason J's judgment in *North v Marra Developments Limited*[5] and said of it that the proposition which underpinned that decision was that "market manipulation is centrally concerned with conduct, intentionally engaged in, which has resulted in a price which does not reflect the forces of supply and demand".[6]

21. The importance of genuine supply and demand to the integrity of the market's operation was further expanded upon by the High Court. It said:

> " *'Genuine supply and demand'*
>
> 71. The forces of "genuine supply and demand" are those forces which are created in a market by buyers whose purpose is to acquire at the lowest available price and sellers whose purpose is to sell at the highest realisable price…
>
> …
>
> 74. … Participants in the market can be (and are) informed of the transactions which occur. Participants in the market are entitled to assume that the transactions which are made are made between genuine buyers and sellers and are *not* made for the purpose of setting or maintaining a particular price. Hence, as Mason J explained in *North v Marra* (109), "in the absence of revelation of their true character [as transactions to set or maintain a particular price] they are seen as transactions reflecting genuine supply and

4 (2013) 250 CLR 135.
5 (1981) 148 CLR 42.
6 (2013) 250 CLR 135 at 165, [70].

> demand and having as such an impact on the market". They have, or at least are likely to have, the effect of setting or maintaining an artificial price for the shares in question."

22. Thus, the forms of market misconduct in section 274(1) and (3) are all about a person's state of mind when he does something or causes something to be done, which has, or is likely to have, the effect of creating the proscribed false or misleading appearance. It is not enough that the acts of the person do in fact have, or are likely to have, the effect of creating the requisite false or misleading appearance; the required state of mind is that the person must intend his acts to have the effect of creating this false or misleading appearance or be reckless as to his actions having the effect of creating such an appearance.

23. In *HKSAR v FU Kor Kuen Patrick*[7] the Court of Appeal held that it was correct to say that a result was intended when:

(i) it was the actor's purpose to cause it; or

(ii) if not the actor's purpose, the result is a virtually certain consequence of the act and the actor knows that it is a virtually certain consequence.

24. The law relating to recklessness as a state of mind is as set out in the Court of Final Appeal judgement of Sir Anthony Mason NPJ in *Sin Kam Wah &*

[7] [2011] 1 HKLRD 655 at 665 – 666, [27] – [31], following *Securities and Futures Commission v Zou Yishang* [2007] 3 HKC 409.

Another v HKSAR.[8] In giving a judgement with which the other members of the Court agreed, Sir Anthony said:

> "… juries should be instructed that … it has to be shown that the defendant's state of mind was culpable in that he acted recklessly in respect of a circumstance if he was aware of a risk which did or would exist, or in respect of a result if he was aware of a risk that it would occur, and it was, in the circumstances known to him, unreasonable to take the risk."

25. Unless the person doing the acts, or causing them to be done, makes admissions as to his intent, then proof of his intent will be by drawing an inference from the circumstantial evidence.

26. However, section 274 provides an aid to proving intent in the form of subsection 5 which is a deeming provision. This means that, in the particular situations described in the subsection, certain acts are deemed to have been done, or caused to be done, with the specified intent. Subsection 5 identifies three types of conduct which are described in paragraphs (a) to (c) of the subsection. Subsection 5(a) describes a kind of conduct commonly referred to as "wash sales" and subsection 5(b) and (c) describes a kind of conduct commonly referred to as "matched orders".

27. In the case of Mr Iu, the SFC asserts in paragraphs 9.1 and 9.2 of its Notice[9] that Mr Iu's conduct in his offers to purchase and sell both CVG and YBD

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[8] (2005) 8 HKCFAR 192 at 210, [44].

[9] See [12], page 5 of this Report where 9.1 and 9.2 of the Notice are quoted.

shares is the kind of conduct described in section 274(5)(b) and (c) of the SFO. That being so, the SFC argues, the deeming provision in subsection 5 is triggered and, thereby, Mr Iu's intent to commit false trading is proven.

28. However, as we shall see, in the present case Mr Iu admits he engaged in false trading and there is no dispute that the Tribunal should so determine under section 252(3)(b) of the SFO.

29. If at the end of the proceedings the Tribunal identifies a person as having engaged in market misconduct then the Tribunal may make one or more of the orders set out in section 257 of the SFO. The whole of section 257 is at **Annexure C**.

Chapter 3

The History of the Proceedings

30. After the institution of these Proceedings by the SFC filing its Notice, the first formal hearing by the Tribunal took place. This was a preliminary conference that was held on 28 October 2022. At this hearing, presided over by Mr McWalters GBS as Chairman of the Tribunal, Mr Iu was represented by solicitors from Messrs Hauzen LLP. The Presenting Officer for the SFC was Mr Laurence Li SC. At this hearing the Chairman gave directions for the further progress of the proceedings. The Chairman also appointed 24 March 2023 for a further preliminary conference, to be presided over by the Chairman alone in accordance with section 30 of Schedule 9 of the SFO.

31. On 13 January 2023 Mr Anthony Jen Haw Chan and Mr Tan Yat Quan were appointed as Ordinary Members of the Tribunal.

32. On 2 February 2023 the Tribunal received an email from Messrs Hauzen LLP informing it that the firm had no further instructions from Mr Iu "to act with respect to this matter". On 15 February 2023 the Tribunal received a letter from Messrs Jack Fong & Co informing the Tribunal that it had been instructed by Mr Iu to act for him in those proceedings in place of Messrs Hauzen LLP.

33. On 1 March 2023 Messrs Jack Fong & Co wrote to the Tribunal informing it as follows:

> "Due to recent developments, Mr Iu is not minded to file any evidence to contest liability.
>
> Senior Counsel has been recently instructed and initiatives have been taken to liaise with the SFC to reach an amicable solution with a view to deal with the matter expediently."

34. At the second preliminary conference held on 24 March 2023 Mr Edwin Choy SC appeared for Mr Iu. At this hearing Mr Choy indicated that his client would not be contesting liability and that it was anticipated that a set of agreed and admitted facts relating to liability would be filed with the Tribunal. It was made clear that the parties' submissions would primarily concern the orders the Tribunal should make upon determining that Mr Iu had engaged in market misconduct. At the conclusion of this hearing the Chairman gave directions for the filing by the parties of their written submissions and appointed 10 May 2023 for the substantive hearing.

35. On 26 April 2023, in compliance with the directions given by the Tribunal, the SFC filed its written submissions in a bundle that also contained a Statement of Agreed and Admitted Facts, and Annexures, dated 26 April 2023 that was signed by both the SFC and Mr Iu's solicitors. The Statement of Agreed and Admitted Facts ("SoAAF"), and the Annexures to it, are **Annexure D** to this Report.

36. A detailed summary of the SoAAF is contained in Chapter 4 of this Report. For present purposes it is sufficient to note that nowhere in the SoAAF is any mention made of what happened to the monies in Ms Iu's account that were the profits gained from the false trading. Nor was anything said about Mr Iu's motivation for the false trading.

37. Also in the SFC's bundle was a document entitled "Orders Jointly Proposed by the SFC and the Specified Person". This document, which contains the parties' proposed orders, is **Annexure E** to this Report. In respect of this document it became of concern to the Tribunal that no order was being sought under section 257(1)(d) of the SFO in respect of the profit that was gained from the market misconduct.

Section 257(1)(d) of the SFO

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

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

> **"257. Orders, etc. of Tribunal**

(1) Subject to subsection (3), the Tribunal may at the conclusion of any proceedings instituted under section 252 make one or more of the following orders in respect of a person identified as having engaged in market misconduct pursuant to section 252(3)(b)–

…

(d) an order that the person pay to the Government an amount not exceeding the amount of any profit gained or loss avoided by the person as a result of the market misconduct in question;"

40. In his written submission to the Tribunal dated 4 May 2023 Mr Li, counsel on behalf of the SFC, said of Mr Iu's motive:

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

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

by Ms Iu simply because of their family relationship".

42. Mr Li then expressed the SFC's position as being:

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

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

43. In its letter of 4 May 2023 the solicitors for Mr Iu agreed with the SFC's response to the Tribunal's questions and asserted that "the motive of the Specified Person is not an essential element of the market misconduct as alleged" and "there is insufficient basis in law for an order of disgorgement".

44. On 4 May 2023, in response to these submissions, the Chairman again wrote to the parties noting the interpretation of section 257(1)(d) of the SFO that underlay their position and directing that more detailed written submissions in respect of the interpretation of section 257(1)(d) be filed with the Tribunal by 8 May 2023 for a hearing on 10 May 2023.

45. At the hearing on 10 May 2023, the Tribunal made clear to the parties that it would require detailed submissions on the interpretation of section 257(1)(d) and would also wish to be addressed by the parties on what inferences the Tribunal

could draw, on the balance of probabilities[10], from the evidence presented to it, in respect of Mr Iu's control over the profit gained from his market misconduct and the ultimate disbursement of it.

46. After the hearing of 10 May 2023 the Tribunal received a letter from Jack Fong & Co informing the Tribunal that:

> "We are instructed that the specified person does not intend to make any further admissions except those already agreed to and admitted in the SoAAF."

47. This was followed by a further letter from Jack Fong & Co dated 15 May 2023. In this letter the solicitors stated that Mr Iu had terminated their retainer and the retainer of the two counsel and that, accordingly, they had "no authority and instructions to act for the abovenamed Specified Person in the above proceedings any further".

48. In a letter to the Tribunal dated 17 May 2023 the SFC said that it would identify the evidence relevant to the issue of Mr Iu's control over Ms Iu's account. On 25 May 2023 the Chairman proposed certain directions relating to the further investigation by the SFC into the access to, and use by, Mr Iu of Ms Iu's securities account and the disbursement of the profits of the false trading from that account. However, in subsequent correspondence the Chairman agreed with the SFC that no directions were necessary as the SFC would carry out the further investigation requested by the Tribunal and in due course update the Tribunal on the results of

[10] Section 252(7) of the SFO provides that "the standard of proof required to determine any question or issue before the Tribunal shall be the standard of proof applicable to civil proceedings in a court of law."

its efforts. In its letter of 12 June 2023 the Tribunal required the SFC to provide it with a progress report by letter no later than 15 September 2023.

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

50. The second issue is the factual one of whether, on the evidence before it, and applying the legal directions of the Chairman on the interpretation of section 257(1)(d), an order can be made under the subsection by the Tribunal and, if so, whether such an order should, in the exercise by the Tribunal of its discretion, be made and, if so, the terms of that order.

51. In order not to unnecessarily delay this enquiry, the Chairman directed that a hearing take place before him alone to address the legal issue of the interpretation of section 257(1)(d) of the SFO. This hearing took place on 17 November 2023 but Mr Iu, who is now resident in the United Kingdom, wrote to the Tribunal and informed it that he would not participate in this hearing and would rely on the submissions filed by his former legal representatives with the Tribunal. The hearing took place and the Ruling by the Chairman was handed down on 11 January 2024. This Ruling is at **Annexure F** to this Report.

52. The Chairman subsequently directed that a further oral hearing take place on 12 April 2024 so that the parties could make further submissions on the

orders the Tribunal should make and specifically whether it should make an order under section 257(1)(d) and, if so, the terms of that order. The Chairman also wrote to Mr Iu inviting him to provide an update, if he so wished, on his medical condition and informing him that if he wished to argue that he was impecunious and that this fact should influence the Tribunal in whether to make financial orders against him, then he would have to substantiate his claim of impecuniosity. This correspondence and Mr Iu's submissions to the Tribunal as set out in his letter are detailed in Chapter 6 of this Report.

53. In preparation for the hearing on 12 April 2024 the SFC filed a written submissions in which it invited the Tribunal to make all the orders previously agreed on by the parties and, additionally, an order under section 257(1)(d) that Mr Iu pay to the government the profit that he gained from his market misconduct. The SFC argued that:

> "… the relevant questions are whether Mr Iu had set out to make and succeeded in making a financial gain in Ms Iu's Account through false trading, and how much profit was gained."

All these questions, the SFC submitted, were answered affirmatively by the admissions Mr Iu had made in the SoAAF and the amount of the profit gained from the false trading was similarly established.

54. The SoAAF only contained an approximate amount of the profit gained by Mr Iu from his trades in CVG shares. The precise amount, however, can be obtained from the expert report prepared for the SFC by Mr T.B. Hekster, the

contents of which were admitted by Mr Iu. According to Mr Hekster the precise amount of profit from the CVG trades was HK$5,541,500. With the profit of HK$76,040 that Mr Iu gained from the trades in YBD shares, the total profit gained was HK$5,617,540 and this is the amount, the SFC submits, for which the section 257(1)(d) order should be made.

55. The SFC also filed a further report on the results of its additional investigations carried out at the request of the Tribunal. The contents of this report are discussed in Chapter 6 of this Report.

56. On 9 April 2024 Mr Iu informed the Tribunal that he would not be able to attend the hearing on 12 April as he is currently receiving treatment for his clinical depression and because his financial situation is such that he had no ability to return to Hong Kong. He asks the Tribunal to "take into consideration my current health condition, financial situation lack of employment prospects and investor mitigation letters" when deciding on the orders it will make.

Chapter 4

The Market Misconduct of the Specified Person

The Evidence of the SFC

57. The factual background to Mr Iu's market misconduct is set out in detail in the SoAAF at **Annexure D**.

58. The SFC and Mr Iu agree and accept the facts and matters set out in this document and invite the Tribunal "to make a determination under section 252(3) of the [SFO] on the basis of the facts and matters set out herein". Below is a summary of the contents of the SoAAF.

(i) Mr Iu's professional position

59. The document first sets out Mr Iu's position as director, chief investment officer and owner of 80% of the shares of Tarascon. It then refers to Tarascon's management of the Fund, of which Mr Iu was one of five unit holders. Importantly, it is admitted that Mr Iu was:

> "… responsible for managing and making investment decisions for the Fund and the only person authorised by Tarascon to place orders to trade securities for the Fund."

(ii) The accounts to which Mr Iu had access

60. The SoAAF then refers to three of the Fund's securities accounts, namely the Guosen Account, the UBS Account and the Morgan Stanley Account which it collectively refers to as the "**Fund's Accounts**". In respect of these accounts it is admitted and agreed that Mr Iu was "the only person authorised by Tarascon to operate and to trade securities through the Fund's Accounts".

61. The next set of admissions concern Mr Iu's mother who had a securities account at Hang Seng Securities Limited. It is admitted that at the material times Mr Iu was "authorised by Ms Iu to operate and to trade securities through Ms Iu's Account", and that "Ms Iu was an associate of Mr Iu within the meaning of section 274(5) of the SFO".

(iii) Mr Iu's trading in CVG and YBD shares

62. The next section in the SoAAF concerns Mr Iu's operations of the Fund's Accounts and Ms Iu's account in respect of share trades of CVG and YBD which were listed on the Growth Enterprise Market of the Stock Exchange of Hong Kong Limited.

63. The SoAAF summarises the trades that Mr Iu conducted in CVG and YBD shares but greater detail of these trades are contained in Enclosures (in the form of CD-ROMs) and Annexures to the SoAAF. The SFC retained an expert in securities trading, Mr T.B. Hekster, to analyse the orders and trades in these

two shares. Mr Hekster produced a report and in the SoAAF it is stated in respect of this report:

> "Mr Iu agrees to and accepts the contents of the Expert Report."

64. In respect of CVG shares traded through the Fund's Accounts it is admitted:

(i) as of 31 July 2014 the Fund's Accounts held 76,450,000 CVG shares;

(ii) during the period 1 August 2014 to 30 September 2014 Mr Iu purchased a total of 23,465,000 shares at an average price of HK$3.657 per share and sold 35,210,000 shares at an average price of HK$3.412 per share;

(iii) these transactions constituted 42.71% of the total trading volume of CVG shares in the market on those days on which Mr Iu traded; and

(iv) these transactions resulted in a loss of approximately HK$2.68 million to the Fund's Accounts.

65. In respect of CVG shares traded through Ms Iu's account it is admitted:

(i) as of 31 July 2014 Ms Iu's account had 2,190,000 CVG shares;

(ii) during the period 1 August 2014 to 30 September 2014 Mr Iu purchased a total of 16,740,000 shares at an average price of

HK$3.409 per share and sold 17,895,000 shares at an average price of HK$3.702 per share;

(iii) these transactions constituted 28.29% of the total trading volume of CVG shares in the market on those days on which Mr Iu traded; and

(iv) these transactions resulted in a gain of approximately HK$5.54 million to Ms Iu's account.

66. In respect of Mr Iu's trading in YBD shares through the Fund's Accounts, the SoAAF reveals:

(i) as of 31 July 2014 the Fund's Accounts did not hold any YBD shares;

(ii) in the period 1 August 2014 to 30 September 2014, Mr Iu purchased for the Fund's Accounts a total of 1,600,000 YBD shares at an average price of HK$6.932 per share and sold for the Fund's Accounts 756,000 shares at an average price of HK$6.680 per share;

(iii) these transactions constituted 20.20% of the total trading volume of YBD shares in the market on those days on which Mr Iu traded; and

(iv) the transactions resulted in a loss of approximately HK$2.67 million to the Fund's Accounts.

67. For the YBD trades conducted through Ms Iu's account, the SoAAF reveals:

(i) as of 31 July 2014 Ms Iu's account did not hold any YBD shares;

(ii) from 1 August 2014 to 30 September 2014 Mr Iu purchased 556,000 YBD shares at an average price of HK$6.901 per share and sold 556,000 shares at an average price of HK$7.038 per share;

(iii) these transactions constituted 8.02% of the total trading volume of YBD shares in the market on those days on which Mr Iu traded; and

(iv) these transactions resulted in a gain of HK$76,040 to Ms Iu's account.

(iv) Mr Iu's false trading

68. Many of the CVG transactions involved matching offers and executions between the Fund's Accounts and Ms Iu's Account and this is proven by the following admissions in the SoAAF:

> "27. On 22 of the trading days mentioned above, Mr Iu operated both the Fund's Accounts and Ms Iu's Account. He contemporaneously placed orders to purchase or to sell CVG shares for the Fund's Accounts on the one hand, and orders to sell or to purchase CVG shares for Ms Iu's Account on the other.

28. The offers to purchase or to sell shares for the Fund's Accounts or Ms Iu's Account (as the case may be) were frequently matched and executed against offers also placed by Mr Iu to sell or to purchase for Ms lu's Account or the Fund's Accounts (as the case may be). The opposite orders resulted in 128 executed transactions between the Fund's Accounts and Ms Iu's Account.

29. As a result, the Fund's Accounts purchased 15,805,000 CVG shares from Ms Iu's Account and sold 14,420,000 CVG shares to Ms Iu's Account."

69. As with the CVG trades, many of the YBD transactions involved matching offers and executions between the Fund's Accounts and Ms Iu's Account and this is proven by the following admissions in the SoAAF:

"42. On 3 of the trading days mentioned above, Mr lu operated both the Fund's Accounts and Ms Iu's Account. He contemporaneously placed orders to purchase or to sell YBD shares for the Fund's Accounts on the one hand, and orders to sell or to purchase YBD shares for Ms Iu's Account on the other.

43. The offers to purchase or to sell shares for the Fund's Accounts or Ms Iu's Account (as the case may be) were frequently matched and executed against offers also placed by Mr Iu to sell or to purchase for Ms Iu's Account or the Fund's Accounts (as the case may be). The opposite orders resulted in 11 executed transactions between the Fund's Accounts and Ms lu's Account.

44. As a result, the Fund's Accounts purchased 440,000 YBD shares from Ms Iu's Account, and sold 100,000 YBD shares to Ms Iu's Account."

70. By reason of the trades carried out by Mr Iu, and of their matching characteristics, the following admissions were made as to Mr Iu's complicity in false trading:

"F. False Trading by Matching Orders

46. By reason of the matters aforesaid:

46.1 On at least 128 occasions, Mr Iu offered to purchase and sell shares in CVG at prices that were substantially the same as prices at which he had made or proposed to make, or knew that an associate of his (viz., the Fund or Ms Iu, as the case may be) had made or proposed to make, offers to sell or purchase the same or substantially the same number of them, within the meaning of section 274(5)(b) and (c) of the SFO.

46.2 On at least 11 occasions, Mr Iu offered to purchase and sell shares in YBD at prices that were substantially the same as prices at which he had made or proposed to make, or knew that an associate of his (viz., the Fund or Ms Iu, the case may be) had made or proposed to make, offers to sell or purchase the same or substantially the same number of them, within the meaning of section 274(5)(b) and (c) of the SFO."

71. It was also admitted by Mr Iu that by the way he conducted his trading "the orders placed or to be placed to sell or purchase CVG or YBD shares for

Ms Iu's Account could be and were executed at higher prices for selling and lower prices for purchasing".

(v) Mr Iu's intention

72. The intention of Mr Iu in conducting the trades in the way he did is established by the following admission:

> "51. Mr Iu placed the orders with the intention that the orders or their resulting transactions would:
>
> 51.1 Cause more than ordinary changes in the trading volumes or prices in the CVG or YBD shares;
>
> 51.2 Not reflect the genuine market supply and demand for the CVG or YBD shares; and
>
> 51.3 Set or maintain the price of the CVG or YBD shares at a level which did not reflect genuine market supply and demand."

73. However, what causes his trading conduct to amount to false trading is his intention that his trading will have the effect of creating a false or misleading appearance of a specified kind or being reckless as to his actions having the effect of creating the false or misleading appearance of this specified kind. Mr Iu's next set of admissions prove that intent:

> **"H. False Trading by Creating False Appearance**
>
> 52. By reason of the matters aforesaid, including in sections D, E, and G above:

52.1 Mr Iu offered to and/or did purchase and sell shares in CVG for the Fund's Accounts and Ms Iu's Account with the intention that the offers and/or purchases and sales had or were likely to have, the effect of:

(a) Creating a false or misleading appearance of active trading in CVG shares, within the meaning of section 274(l)(a) of the SFO; and/or

(b) Creating a false or misleading appearance with respect to the market for, or the price for dealings in, CVG shares, within the meaning of section 274(l)(b) of the SFO.

52.2 Mr Iu offered to and/or did purchase and sell shares in YBD for the Fund's Accounts and Ms Iu's Account with the intention that the offers and/or purchases and sales had or were likely to have, the effect of:

(a) Creating a false or misleading appearance of active trading in YBD shares, within the meaning of section 274(l)(a) of the SFO; and/or

(b) Creating a false or misleading appearance with respect to the market for, or the price for dealings in, YBD shares, within the meaning of section 274(l)(b) of the SFO."

(vi) Mr Iu's liability for market misconduct

74. This leads to Mr Iu's final admission which is conclusive of his having

engaged in false trading contrary to section 274 of the SFO:

> **"I. Contravention of the SFO**
>
> 53. In the premises, Mr Iu admits, agrees, and accepts that he engaged in market misconduct, namely false trading contrary to section 274 of the SFO."

Determination of the Tribunal under Section 252(3) of the SFO

75. Based upon the contents of the SoAAF, with special reliance on the admissions made in that document by Mr Iu, and upon other material placed before the Tribunal, we determine in accordance with section 252(3) of the SFO as follows:

(i) market misconduct in the form of false trading within the meaning of section 274 of the SFO took place in Hong Kong between 1 August 2014 and 30 September 2014 in respect of the shares of CVG and YBD;

(ii) the person who engaged in this market misconduct was the Specified Person, namely Mr Jonathan Dominic Wai Ching Iu; and

(iii) the amount of $5,617,540 was profit gained as a result of the market misconduct.

Chapter 5

The Orders Proposed by the Parties

76. The proposed orders are based on the Tribunal having come to a finding "that the Specified Person engaged in Market Misconduct, namely false trading contrary to section 274 of the SFO". This we have done, as set out in the preceding chapter, on the basis of the contents of the SoAAF.

77. The proposed orders are:

"IT IS ORDERED that:

1. Pursuant to section 257(1)(a) of the SFO, for a period of 48 months, the Specified Person shall not, without the leave of the Court of First Instance:

   (a) Be or continue to be a director, liquidator, or receiver or manager of the property or business, of any listed or unlisted corporation in Hong Kong including Tarascon Capital Management (Hong Kong) Limited or any of its subsidiaries and affiliates; or

   (b) In any way, whether directly or indirectly, be concerned or take part in the management of any listed or unlisted corporation in Hong Kong including Tarascon Capital Management (Hong Kong) Limited or any of its subsidiaries and affiliates.

2. Pursuant to section 257(1)(b) of the SFO, the Specified Person 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, futures contract or leverage foreign exchange contract, or an interest in any securities, futures contract, leveraged foreign exchange contract or collective investment scheme for a period of 48 months.

3. Pursuant to section 257(l)(c) of the SFO, the Specified Person shall not again perpetrate any conduct which constitutes the market misconduct of:

(a) Insider dealing under section 270 of the SFO;

(b) False trading under section 274 of the SFO;

(c) Price rigging under section 275 of the SFO;

(d) Disclosure of information about prohibited transactions under section 276 of the SFO;

(e) Disclosure of false or misleading information inducing transactions under section 277 of the SFO; and

(f) Stock market manipulation under section 278 of the SFO.

4. Pursuant to section 257(l)(e) of the SFO, the Specified Person shall pay to the Government costs and expenses reasonably incurred by the Government in relation or incidental to these proceedings, to be taxed if not agreed.

5. Pursuant to section 257(l)(f)(i) of the SFO, the Specified Person shall pay to the SFC costs and expenses reasonably incurred by the SFC in relation or incidental to these proceedings, to be taxed if not agreed, with a certificate

for two counsel.

6. Pursuant to section 257(l)(f)(ii) of the SFO, the Specified Person shall pay SFC costs and expenses reasonably incurred in relation or incidental to the investigation carried out before these proceedings were instituted, in the agreed sum of HK$830,898.

7. Pursuant to section 257(1)(f)(iii) of the SFO, the Specified Person shall pay to the SFC costs and expenses reasonably incurred in relation or incidental to the investigation carried out for the purposes of these proceedings, in the agreed sum of HK$3,100.

8. Pursuant to section 264(1) of the SFO, notice be given to the Registrar of the High Court for this Order to be registered in the Court of First Instance.

9. Pursuant to section 264(2) of the SFO, this Order be filed with the Registrar of the Companies as soon as reasonably practicable."

These proposed orders predate the Chairman's Ruling on the Interpretation of Section 257(1)(d) of the SFO. After that Ruling was published the SFC filed a submission in which it sought an additional order, namely one under section 257(1)(d) for the amount of HK$5,617,540. Mr Iu does not consent to such an order being made and asks the Tribunal to have regard to his impecunious financial situation.

78. The orders, and their statutory basis under the SFO, can be summarised as being:

(i) a disqualification order under section 257(1)(a);

(ii) a cold shoulder order under section 257(1)(b);

(iii) a cease and desist order under section 257(1)(c);

(iv) an order to pay to the Government the amount of the profit gained from the market misconduct under section 257(1)(d); and

(v) a costs order under section 257(1)(e) and (f).

79. The fact that the parties agreed to the Tribunal making certain orders and agreed to the terms of these orders in no way binds the Tribunal, and this is acknowledged by both the SFC and the former legal representatives for Mr Iu. Nevertheless, the Tribunal recognises that the SFC, as regulator, possesses a knowledge and experience of the operation of the SFO within the marketplace that the Tribunal does not possess. That knowledge and experience merits the respect of the Tribunal and so it is only natural that the Tribunal will be "guided by the agreement that the regulator, the SFC, has reached concerning the sanction to be imposed".[11]

The Legal Principles Relating to the Orders in Section 257 of the SFO

80. We set out below the legal principles relating to the orders the Tribunal can make under section 257 of the SFO.

[11] Per Harris J in *SFC v Yeung Kui Wong and others*, HCMP 1742/2009, unreported, 9 April 2010, at [5]. This statement of principle was followed by Barma J in *SFC v Li Wo Hing and others*, HCMP 1023/2011, unreported, 26 September 2012, at [5].

General Principles

(i) The twin objectives of the orders under section 257(1)(a) – (c)

81. It must be emphasised that orders under section 257(1)(a) – (c) are not imposed as a punishment but only after the Tribunal has satisfied itself that there is a need for the orders. Whether there is such a need must be addressed by having regard to the objectives or purposes that these orders serve. The primary objective of these orders is to protect shareholders, investors and the public with a secondary objective of deterring the Specified Person and others from engaging in this form of misconduct. The orders should only be made once it is shown that they are needed to achieve these objectives.

82. In his judgment in *Koon Wing Yee v Insider Dealing Tribunal*[12], Sir Anthony Mason described the nature of the disqualification order under the Securities (Insider Dealing) Ordinance (repealed) ("**SIDO**") as protective rather than as punitive. Responding to an argument that the deterrent effect of such an order was punitive, and whilst not denying it had such an effect, he said "that effect is incidental and subservient to the purpose of protecting shareholders, investors and the public from corporate officers who are unfit to hold office". The point that Sir Anthony Mason was making is that even though the effect of deterrence is felt by the Specified Person, its primary purpose is not to punish.

83. Sir Anthony was certainly not saying that deterrence is not a legitimate

[12] (2008) 11 HKCFAR 170.

consideration when determining whether one or more of these sanctions is needed. After all, the purpose of deterrence, which is manifest in any court imposed punishment or tribunal imposed disciplinary measure, is always to protect and advance societal goals and interests. Within the SFO it is a valuable tool in protecting the range of public interests that can be impacted by market misconduct in its different forms or by any other breach of the provisions of the SFO. These public interests are protected when the Specified Person is deterred from re-offending and they are especially protected when others are deterred from also engaging in market misconduct.

84. But, and this is perhaps stating the obvious, an order cannot have any chance of deterring unless its effect is felt by the individual on whom the punishment or disciplinary measure is imposed. It is the sting in the order which gives it a punitive impact and it is only by everyone realising that there will be unpleasant consequences for conduct in breach of the SFO that the order is able to have the desired deterrent effect.

85. We note that within the SFO there is another director disqualification power. It is contained in section 214(2)(d) and it enables the Court of First Instance to disqualify a director for up to 15 years when it is of the opinion that the business or affairs of a corporation have been conducted in any of the improper ways referred to in section 214(1). In *Securities and Futures Commission v Fung Chiu*[13] Susan Kwan J commented on section 214(2)(d) of the SFO as follows:

> "I bear in mind two important objectives in the exercise of this jurisdiction to make

[13] [2009] 2 HKC 19 at 23A–C.

> disqualification orders: firstly, protection of the public against the future conduct of persons whose past records as directors of listed companies have shown them to be a danger to those who have dealt with the companies, including creditors, shareholders, investors and consumers; and secondly, general deterrence in that the sentence must reflect the gravity of the conduct complained of so that members of the business community are given a clear message that if they break the trust reposed in them they will receive proper punishment. ”

Although Kwan J was commenting on a different section of the SFO her observations are a very succinct summary of the objectives underlying the exercise of the section 257(1)(a) power.

(ii) There must be a need for orders under section 257(1)(a) – (c)

86. The importance of not making any of the orders under section 257(1)(a) – (c) of the SFO unless there is a need for them was emphasised by the Tribunal in its Report on Bank of China Limited where it said:

> “68. Unless the leave of the Court of First Instance is first obtained, a cold shoulder order has the effect of prohibiting a person who is the subject of the order from any dealings, direct or indirect, in the Hong Kong financial market for the life of the order. Put succinctly, the person is shut out entirely from the market for the life of the order. For a person whose profession is based on the ability to have access to the market it is potentially a Draconian prohibition. It is not therefore an order to be imposed as a matter of course.
>
> …

80. Finally, for the avoidance of ambiguity, it needs to be clearly stated that cold shoulder orders and cease and desist orders, being imposed in order to protect the integrity of the market and not by way of a penalty, are only to be imposed when, in the view of the Tribunal, there is a requirement for protection."

(iii) Assessing the need for section 257(1)(a) – (c) orders: the context

87. This assessment of the need for section 257(1)(a) – (c) orders must be conducted against the backdrop of the importance of what it is that is sought to be protected, namely, the investing public, Hong Kong's financial markets and Hong Kong's status as an international financial centre. These are all very strong public interests which go to the core of Hong Kong's prosperity. In the Market Misconduct Tribunal's Report on Bank of China Limited, it was said:

"79. When looking to the purpose of protective orders such as cold shoulder and cease and desist orders it is important, we think, to take into the account the importance of what is sought to be protected. What is sought to be protected is the integrity of Hong Kong's financial markets. Our courts (in both the criminal and regulatory jurisdictions) have pointed out on numerous occasions the degree to which the prosperity of Hong Kong relies on its financial industry and the degree to which the strength of that industry in its turn is reliant on the perception of all market participants, both local and international, that it is an orderly-run, transparent market."

88. In *Luk Ka Cheung v The Market Misconduct Tribunal*[14] A Cheung J, with whom Hartman JA agreed, echoed the comments made by the Court of Final Appeal in *Koon Wing Yee* and by Hartmann and Lam JJ in *Chau Chin Hung v Market Misconduct Tribunal*[15] on the protective nature of the sanctions available to the Tribunal. A Cheung J said:

> "52. In my view, quite plainly, looking at the dual regimes under the Ordinance, and particularly the Part XIII scheme, the purpose is 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. …"[16]

(iv) Assessing the need for section 257(1)(a) – (c) orders: matters to be considered

89. In order to determine whether there is a need to protect the public and to deter the Specified Person and others, the Tribunal must conduct assessments of the gravity of the misconduct, the character of the Specified Person and the risk of others engaging in similar misconduct. The gravity of the Specified Person's misconduct speaks to his character. The Tribunal's assessments of the gravity of the conduct and of the character of the Specified Person, including the

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[14] [2009] 1 HKC 1.

[15] HCAL 123/2007, unreported, 22 September 2008.

[16] In their joint judgment in *Chau Chin Hung*, Hartmann and Lam JJ applied the comments of Sir Anthony Mason in *Koon Wing Yee*, in respect of SIDO disqualification orders, to the power in section 257(1)(a) of the SFO to make a disqualification order.

motivation for his misconduct, will assist the Tribunal in its assessment of the risk of the Specified Person reoffending.

90. In conducting the assessments, and bearing in mind the importance of the public interests to be protected, the Tribunal will have regard to a broad range of matters amongst which will be the following:

(i) the nature, duration and purpose of the breach of, or non-compliance with, the regulatory provision and any benefit the Specified Person obtained from the breach or non-compliance, whether in profit gained or loss avoided;

(ii) the impact of the breach or non-compliance on others or on the market;

These matters, together with (iii) below, go to the gravity or seriousness of the Specified Person's breach of, or non-compliance with, the regulatory provision.

(iii) the importance to the integrity of Hong Kong's markets of compliance with the regulatory provision and the potential for a breach of, or non-compliance with, that provision to cause harm to Hong Kong's reputation as an international financial centre;

(iv) the frequency that the regulator encounters such conduct in the market;

These matters, together with those in (i) – (ii) above, are relevant to the question of whether there is a need for the Tribunal's order to contain an element of general deterrence so as to protect Hong Kong from future breaches of, or non-compliance

with, regulatory provisions.

(v) the character of the Specified Person, including any remorse exhibited;

(vi) whether the Specified Person has cooperated with the regulator and assisted the regulator in its investigation;

(vii) the criminal and regulatory history of the Specified Person[17] including in the period from the time the market misconduct was committed to the hearing by the Tribunal;

(viii) the likelihood of the Specified Person re-offending and how great a need there is for the Tribunal's order to contain an element of personal deterrence;

(ix) the likely impact of the order on the Specified Person; and

(x) the likely adverse impact of the order on any innocent third party, including any corporation with which the Specified Person has been associated.

These remaining matters deal with the Specified Person's character and, together with (i) and (ii) above, are relevant to the risk of his reoffending. They are also relevant as either mitigating the Specified Person's misconduct or, where he has a history of prior offending or shows no remorse or has sought to frustrate the regulators' investigation or, for whatever reason, presents as a high risk of reoffending, as aggravating the Specified Person's misconduct.

[17] See section 257(2) of the SFO.

Although addressing these matters will assist the Tribunal in making its assessments, the relevance and importance of each of these matters to the assessments will necessarily vary from case to case.

91. After these assessments have been completed it should be clear to the Tribunal whether there is a need for shareholders, investors or the public to be protected from the Specified Person and whether his misconduct is so grave that the civil sanctions imposed on him should contain an element of deterrence against future offending by him and by others. The Tribunal will then decide whether it should make an order and, if so, what order it should make.

Legal Principles Relating to Each Order

(i) Disqualification Order: Section 257(1)(a) of the SFO

92. A disqualification order is an order that the Specified Person "shall not, without the leave of the Court of First Instance, be or continue to be a director, liquidator or receiver or manager of the property or business, of a listed corporation or any other specified corporation or in any way, whether directly or indirectly, be concerned or take part in the management of a listed corporation or any other specified corporation for the period (not exceeding 5 years) specified in the order".

93. Earlier in this chapter we referred to the director disqualification power

that is contained in section 214(2)(d) of the SFO[18] which has a maximum disqualification period of 15 years. In respect of section 214(2)(d)'s 15 year period we note that the Court of First Instance has employed an approach adopted in the United Kingdom in respect of its director disqualification regime which is set out in section 6 of the Company Directors Disqualification Act, 1986. That Act contained maximum and minimum periods of disqualification of 15 years and 2 years respectively.[19] In *Re Sevenoaks Stationers (Retail) Limited* the Court of Appeal of England and Wales endorsed a division of the 15 years into three tiers of seriousness as set out in the following passage from the judgment of Dillon LJ at page 174 of the report:

> "I would for my part endorse the division of the potential 15-year disqualification period into three brackets, … viz.: (i) the top bracket of disqualification for periods over 10 years should be reserved for particularly serious cases. These may include cases where a director who has already had one period of disqualification imposed on him falls to be disqualified yet again. (ii) The minimum bracket of two to five years' disqualification should be applied where, though disqualification is mandatory, the case is, relatively, not very serious. (iii) The middle bracket of disqualification for from six to 10 years should apply for serious cases which do not merit the top bracket."[20].

94. The maximum disqualification period of 15 years in the United Kingdom legislation and section 214(2)(d) of the SFO lends itself to this neat

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[18] See [85] of this chapter.

[19] However, unlike the United Kingdom provision, section 214(2)(d) has no minimum disqualification period.

[20] See *Securities and Futures Commission v Cheung Keng Ching* [2011] 4 HKC 453; *Re Styland Holdings Limited* [2011] 1 HKLRD 96; *Re First China Financial Network Holdings Limited* [2015] 5 HKLRD 530.

division of the period into a three tier classification with each tier consisting of a 5 year range. The maximum disqualification period of 5 years that is contained in section 307N(1)(a) results in a much smaller range of 20 months for each tier but we are of the view that is still broad enough to accommodate the range of culpability the Market Misconduct Tribunal is likely to encounter. We note that other Market Misconduct Tribunals have employed an adapted three tier *Sevenoaks* approach to the lesser five year disqualification period[21]. We are satisfied that this method of classifying levels of seriousness remains useful and are content to employ it in the present case.

95. This brings us to the question of how to apply this regime to determine the period of disqualification that is appropriate for a particular Specified Person. In *SFC v Yeung Kui Wong and others*[22] Harris J was dealing with this question in respect of a disqualification order being made under section 214(2)(d) of the SFO. He referred with approval to comments made by the English Court of Appeal. He said:

> "9. In *Re Westmid Packing Services Ltd.* [1998] 2 BCLC 646, the Court of Appeal in England gave useful guidance as to the relevant factors for determining the length of the disqualification period under the Companies Directors Disqualification Act 1986:-

[21] See The Report of the Market Misconduct Tribunal in relation to the securities of Yorkey Optical International (Cayman) Limited at [56] – [57], chaired by Mr K Kwok SC and dated 27 February 2017 and The Report of the Market Misconduct Tribunal in relation to the securities of Magic Holdings International Limited at [670] – [671], chaired by Mr M Lunn GBS and dated 10 March 2021.

[22] Unreported HCMP 1742/2009, 9 April 2010.

"(1) It is of the greatest importance that any individual who undertakes the statutory and fiduciary obligations of being a company director should realise that these are personal responsibilities.

(2) The primary purpose of disqualification is to protect the public against the future conduct of companies by persons whose past records as directors of insolvent companies showed them to be a danger to creditors and others. Other factors also come into play in the wider interests of protecting the public, i.e. a deterrent element in relation to the director himself and a deterrent element as far as other directors are concerned.

(3) The period of disqualification must reflect the gravity of the offence.

(4) The period of disqualification may be fixed by starting with an assessment of the correct period to fit the gravity of the conduct, and a discount is then given for mitigating factors.

(5) A wide variety of factors, including the former director's age and state of health, the length of time he has been in jeopardy, whether he has admitted the offence, his general conduct before and after the offence, and the periods of disqualification of his co-directors that may have been ordered by other courts, may be relevant and admissible in determining the appropriate period of disqualification." "

96. We, also, have found these comments helpful in exercising our section 257(1)(a) power. They set out a process for determining the duration of a

disqualification order that essentially involves the following three steps:

(i) assess the gravity of the conduct;

(ii) determine, as a starting point, a period of disqualification to fit that level of gravity; and

(iii) discount this starting point to allow for any mitigating factors.

97. In *Re Styland Holdings Limited*[23] Thomas Au J also addressed the question of the matters to which regard should be had when exercising the section 214(2)(d) disqualification power. He said:

> "In considering what is an appropriate period of disqualification, the court takes into account a broad spectrum of considerations with the dual objective of protecting the public and deterrence."

98. After quoting Lord Woolf MR in *Re Westmid Packing Services Ltd*, the English Court of Appeal judgment which Harris J quoted with approval in *Yeung Kui Wong*, Thomas Au J continued:

> "8. There are also eight criteria which govern the court's exercise of the power of disqualification, namely:
>
> (1) Character of the offenders;
>
> (2) Nature of breaches;

[23] [2011] 1 HKLRD 96 at [6].

(3) Structure of the companies and the nature of their business;

(4) Interests of shareholders, creditors and employees;

(5) Risks to others from the continuation of offenders as company directors;

(6) Honesty and competence of offenders;

(7) Hardship to offenders and their personal and commercial interests;

(8) Offenders' appreciation that future breaches could result in future proceedings."

99. In essence, Thomas Au J's "broad spectrum of considerations" is encompassed in all those matters we have mentioned in [90] of this Report. The matters that go to the gravity of the Specified Person's misconduct will determine into which tier of seriousness the Specified Person falls. The matters that deal with the Specified Person's character and risk of reoffending will guide the Tribunal to where within each tier the Tribunal should make its order. They may, exceptionally, cause the Tribunal to place the Specified Person into a higher or lower tier.

(ii) Cold Shoulder Order: Section 257(1)(b) of the SFO

100. This order prohibits a person, without the leave of the Court of First Instance, directly or indirectly, from acquiring, disposing or otherwise dealing with securities, futures contracts or leveraged foreign exchange contracts or an interest in them, for up to a maximum period of 5 years. As we have said, this

type of order, like a disqualification order, is not imposed as a penalty but as a measure to protect the market. It should only be imposed when the Tribunal is of the view that the Specified Person poses a threat to the integrity of the financial markets. In *Chau Chin Hung*, Hartmann and Lam JJ said:

> "34. In our judgement, a 'cold shoulder' order serves the same essential purpose as a disqualification order. It is not penal in character. It is protective. The integrity of the financial markets must be safeguarded and if it has been demonstrated that a person cannot be trusted to operate in the markets in accordance with the requirements of the Ordinance, then he can be prevented from doing so for such period of time as the Tribunal considers appropriate. A cold shoulder order serves to protect financial institutions as well as the investing public.
>
> 35. Yes, of course, the consequence of a cold shoulder order may be damaging to the identified person but that does not detract from the primary purpose and essential character of the order. …"[24]

101. As to the duration of such an order the Bank of China Tribunal said in its Report:

> "73. A cold shoulder order may be imposed for a maximum of five years. What is the appropriate length of an order lies within the discretion of the Tribunal, that discretion being exercised in the light of all relevant circumstances. Clearly, one of the relevant circumstances in determining the length of an order will relate to the nature of the market misconduct that has been proved. The more systematic that conduct, the clearer the intent to disregard the statutory provisions, regulations and

[24] *Chau Chin Hung v Market Misconduct Tribunal*, HCAL 123/2007, unreported, 22 September 2008.

codes of conduct governing the principled participation in the market, the greater the damage actually occasioned or intended, then, absent other compelling factors, the longer the life of the order is likely to be. This is not because the order is imposed as a punishment. It is because the greater the threat to the integrity of the market exhibited by proven conduct the more extensive the need for protective measures."

102. Unless there is some special consideration or indication to suggest otherwise, the duration of the cold shoulder order is likely to be at least as long, if not longer than, the disqualification order. Although the two orders cover different aspects of the Specified Person's life, if the Specified Person cannot be trusted to be a director then it is likely that he cannot be trusted to deal in securities.

(iii) Cease and Desist Order: Section 257(1)(c) of the SFO

103. This order was described by Hartmann and Lam JJ in *Chau Chin Hung* as follows:

"36. S.257(1)(c) of the Ordinance gives the Tribunal the power to issue what are often described as 'cease and desist' orders. These are orders in terms of which a person who has been identified as a perpetrator of some form, or forms, of market misconduct is made the subject of a warning–

> "… that the person shall not again perpetrate any conduct which constitutes such market misconduct as is specified in the order (whether the same as the market misconduct in question or not)."

> 37. In plain language, as we see it, the Tribunal is given the power to demand that an identified person shall in future act professionally, avoiding what has been identified by the Tribunal – even if the person should contest it – to be a form, or forms, of market misconduct.
>
> 38. In our view, such demands, or warnings, are intended to do no more than look to the future protection of the financial markets. To that extent, such orders are preventative and not penal."

104. Although preventative and intended to look to the future protection of the public and the markets, there is no requirement that the Tribunal determine that the Specified Person is likely to reoffend. Nor must the order be limited to the type of misconduct in which the Specified Person has been found to have committed. This is because section 257(5) provides:

> "The Tribunal may, in relation to any person, specify any market misconduct in an order under subsection (1)(c), whether or not there is, at the time when the order is made, likelihood that the person would perpetrate any conduct which constitutes the market misconduct."

105. Section 257(1)(c) and (5) were discussed by the Court of Appeal in *Chau Chin Hung and Others v Market Misconduct Tribunal and Others*[25] where it was held that a cease and desist order may be made in respect of all market misconduct notwithstanding that not all the different forms of market misconduct were raised in the SFC's section 252(2) notice or were the subject of a finding by

[25] CACV 62/2009, unreported, 22 December 2009.

the Tribunal. In this case an attack was mounted by the applicants on the Tribunal making the cease and desist order in perpetuity. The Court of Appeal held that the making of such an order was an exercise of discretion and the legislation contemplated and permitted the making of in perpetuity orders.

106. Given the nature of this type of order, which has been described as "a form of permanent injunction",[26] it is not surprising that there is no limit in respect of its duration.

107. This order is not a meaningless statement by the Tribunal in which it merely encourages the Specified Person to behave in the future. Section 257(10) makes it an offence for a person to fail to comply with an order made under subsection (1)(a), (b) or (c). The maximum sentence for this offence, when it is tried on indictment is a fine of HK$1,000,000 and imprisonment for 2 years. Thus, there are quite severe consequences for non-compliance with the order.

(iv) Payment of Profit Order: Section 257(1)(d) of the SFO

108. This order has been discussed in detail in the Chairman's Ruling on the Interpretation of Section 257(1)(d) of the SFO which is at **Annexure F** of this Report.

109. In accordance with that Ruling, the Tribunal is directed that in determining whether it should make an order under section 257(1)(d) of the SFO

[26] Report of Market Misconduct Tribunal on Bank of China at [75].

the Tribunal does not have to be satisfied that the identified person received or enjoyed the benefit of the illicit profit or was in a position to exercise control over it. All that needs to be shown are that the identified person committed market misconduct, as a result of which a profit was gained or a loss was avoided. Once that is proven, the Market Misconduct Tribunal is empowered to make a section 257(1)(d) order against the Specified Person.

110. But, having the power does not mean it has to be exercised and exercised to its full extent. It will always be for the Tribunal, in the exercise of its discretion, to determine whether, in the particular circumstances of the case before it, an order is warranted and, if so, the terms of that order.

111. In exercising its discretion the Tribunal must bear in mind the purpose of section 257(1)(d) which is to ensure that the Specified Person is not successful in gaining a profit, or avoiding a loss, from his market misconduct and "to restore the *status quo ante*" as Hartmann and Lam JJ said in *Chau Chin Hung and another v Market Misconduct Tribunal and another*.[27]

112. Given the legal directions to the Tribunal on how section 257(1)(d) is to be interpreted and given the admissions made by the Specified Person, the evidential, issue of whether an order *can* be made, as opposed to whether it *should* be made, does not arise. But, all the factual background is still relevant to the issues of whether, in the exercise of its discretion, the Tribunal should make an order and, if so, the terms of that order. That being so, we make the following

[27] HCAL 123/2007, 124/2007, 22/2008 at [42].

observations on the drawing of inferences that are relevant to the exercise of that discretion.

113. How the Tribunal exercises its discretion will very much depend on what inferences are available to be drawn by the Tribunal from the evidence. In this regard we note that inferences are not drawn in a vacuum but rather against the backdrop of the real world in which we live. The inferences must reflect the reality of our world and must be drawn by the Tribunal using its common sense, knowledge of everyday life and experience of human nature.

114. Bearing this in mind, we do not agree with the SFC that the fact that the identified person used his mother's account to conduct the profitable trades, with the consequence that the profits gained were deposited into that account, on its own, allows of only one inference, namely that the profits were for the benefit of the mother and were not, therefore, profits gained by the identified person.

115. Any kind of white collar crime or money laundering or merely improper conduct under the SFO may involve the use of third party identities and their bank accounts or other forms of accounts. This is usually done, and we are perhaps stating the obvious, not to confer a benefit on the third party but rather to conceal the involvement of the offender and to distance him from his offending. This, it seems to us may, in many cases, be the natural and realistic inference to be drawn. Even when the account belongs to a close relative, the inference that the offender's use of this account was for the purpose of concealing his involvement in the offending, rather than for the purpose of conferring a benefit on the close relative,

would, in the absence of evidence that would suggest otherwise, still be one that the Tribunal would have to consider. It is greed, and not altruism, that is the usual motivator of dishonest conduct that is perpetrated in order to generate an illicit monetary gain.

116. Nor would we readily draw an inference that just because the identified person has no legal right to transfer monies from this account he must have intended the third party account holder to keep the profit for himself or herself or that he had no ability to access, or influence what happened to, those monies. If the identified person made use of the third party's account in order to conceal his offending, then it may be that he did so knowing that he would be able to access the profits from his offending with the assistance of the account holder, who may or may not be complicit in the offending.

(v) Costs Orders

117. Costs orders perform a different role from the orders under section 257(1)(a) – (d). The orders under section 257(1)(a) – (c) are, as we have said, protective in purpose and nature and the purpose of the section 257(1)(d) order is to deny the Specified Person the profit gained or loss avoided from his market misconduct. Costs orders, however, are compensatory in nature and are intended to ensure that neither the SFC nor the Government are out of pocket as a consequence of the Specified Person's market misconduct. There is no reason why the Hong Kong public should have to pay to correct a wrong committed upon it by the Specified Person.

(a) Costs of the Proceedings Order: Section 257(1)(e) of the SFO

118. Under section 257(1)(e) the Tribunal may order that the Specified Person "pay to the Government the sum the Tribunal considers appropriate for the costs and expenses reasonably incurred by the Government in relation or incidental to the proceedings".

119. The proceedings are the proceedings of the Tribunal instituted under section 252 of the SFO. Given the existence of the power under section 257(1)(f) care must be taken to distinguish the Government's costs from the SFC's costs. The Government's costs are essentially those expenses it incurred in carrying out the Market Misconduct Tribunal hearing.

(b) Costs of the SFC: Section 257(1)(f) of the SFO

120. Under section 257(1)(f) the Tribunal may order that the person pay to the Commission the sum the Tribunal considers appropriate for the costs and expenses reasonably incurred by the Commission, whether in relation or incidental to–

> "(i) the proceedings;
>
> (ii) any investigation of the person's conduct or affairs carried out before the proceedings were instituted; or
>
> (iii) any investigation of the person's conduct or affairs carried out for the purposes of the proceedings."

121. This power covers every aspect of the SFC's involvement in the Specified Person's misconduct including its expenses incurred prior to, for the purpose of, and during the proceedings before the Tribunal. The SFC's costs and expenses reasonably incurred in relation or incidental to these proceedings have not yet been identified and if not agreed will have to be taxed. The SFC's costs in relation to the pre-hearing investigation have been agreed at $830,898. The SFC's costs of investigation carried out for the purposes of the Tribunal's proceedings are agreed at $3,100.

122. The Specified Person has not sought to resile from the agreements he has reached in respect of any of the costs orders but he has asked the Tribunal to have regard to his current financial situation.

Chapter 6

An Assessment of the Specified Person's Culpability

The Matters to be Considered

123. The orders that the Tribunal should make will, of course, depend upon its assessment of the culpability of the Specified Person. Relevant to that assessment will be:

(i) the nature of the false trading;

(ii) the extent and duration of the false trading;

(iii) the impact upon the market of the false trading;

(iv) what the Specified Person was seeking to achieve by the false trading;

(v) the outcome of the false trading in terms of how successful the Specified Person was in achieving his goal; and

(vi) the harm caused, or the potential for harm to be caused to Hong Kong's reputation as an international financial centre.

124. It is important to note that culpability is not determined by a mathematical measure of how much profit was gained or the size of any loss avoided by the false trading, although these aspects of it will, of course, be highly relevant to the Tribunal's assessment of culpability. In *SFC v Lee Sing Wai*

McMahon J said in respect of the offence of false trading when[28] responding to a submission that a sentence of 7 months' imprisonment was for this offence too severe:

> "8. I disagree. Firstly, this was a sophisticated and relatively large scale operation. It was also extremely cynical as all such operations are. That is because, to make a profit, the members of the group had to sell their share holding in Essex at an artificially inflated price. That meant the persons they sold those shares to would foreseeably eventually lose a substantial portion of the moneys they paid for the shares when ordinary market forces returned the shares to their economic price.
>
> 9. Other innocent members of the investing public would be misled by the false price and turnover created in respect of the shares and purchase them without being aware that there was a premium attached to the price they paid attributable to the groups dishonesty. This was, in other words, a selfish and blatant offence designed not only to bring profit to members of the group but to likely cause loss to members of the investing public. In those circumstances, a sentence of immediate imprisonment was justified. Offences such as the present are not merely regulatory or technical offences, they amount to frauds on the investing public.
>
> 10. It was suggested by the appellant during the appeal that in virtually all previous such prosecutions sentences of suspended imprisonment were handed down. I am surprised by that. These offences are serious and cause real and substantial losses to investors and bring an important part of Hong Kong's economy

[28] HCMA 132/2006, unreported 29 March 2006.

into disrepute. Sentences of imprisonment, in my view, cannot be complained of even for first offenders.

11. The level of sentence will obviously depend on the circumstances of the case of which the most important will usually be the scale of the operation underlying the offence."

125. The comments of McMahon J resonate with what took place in the present case, even allowing for the fact that they were made in the context of a prosecution for the offence form of false trading. Even though the Tribunal is only dealing with false trading in its market misconduct form, the actions of the Specified Person nevertheless reveal that his conduct was deliberate and that its purpose was to undermine the integrity of our market and to distort its operations so that a profit would be gained at the expenses of others. These matters elevate the misconduct to a very serious level.[29]

126. But, only examining the market misconduct and its impact on others and on Hong Kong does not enable us to make a complete assessment of the Specified Person's culpability. We must also have regard to what is known of the character of the Specified Person and this is done by addressing all the matters set out in [90 (v) – (ix)] of this Report.

[29] See the observations of Hartmann and Lam JJ in *Chau Chin Hung & Another v Market Misconduct Tribunal and Another* HCAL 123/2007, unreported, 22 September 2008 at [23].

(i) The nature, extent and duration of the false trading

127. The false trading of shares involved only two listed companies and, on the evidence that the SFC was able to obtain, the Tribunal must find that it lasted a period of only two months, namely from 1 August 2014 to 30 September 2014. It was executed in a way which would cause losses to the Fund and enable Mr Iu's mother's trading account to gain a profit. Being limited to the shares of only two listed companies and being for only a very specific and relatively limited period of time the false trading did not generate huge profits, relative to the kind of profits that can be generated from a large scale false trading operation.

(ii) The impact upon the market of the false trading

128. What impact Mr Iu's conduct had on the market generally is not fully known, but what is known is that not all the trades were between only Ms Iu and the Fund and so it is reasonable to infer that some members of the public must have been affected by Mr Iu's misconduct.

129. Furthermore, the profit that Mr Iu achieved was at the expense of the Fund which had four other unit holders. Consequently, Mr Iu acted in breach of the trust that these other unit holders had placed in him. Instead of acting in the best interests of the Fund he acted adversely to their interests in order to generate the profit that he gained from his false trading. In the absence of any evidence that the other unit holders had any knowledge of what Mr Iu was doing, the only possible conclusion is that they are victims of his market misconduct. We have

not been informed whether Mr Iu has compensated the Fund, or the unit holders, for the losses incurred by the Fund or what action, if any, they may be taking to recoup their losses. However, from the character reference letters provided by them we do know what their current attitude is, as victims, to the Specified Person. Their letters are totally devoid of ill-will and any injury they may have suffered appears to have been forgiven.

(iii) Mr Iu's goal and the outcome of his false trading

130. The purpose of any false trading will usually be to manipulate the market for personal gain. Mr Iu has chosen not to disclose what motivated his misconduct and the only inference we can draw from his admitted intentional false trading was, likewise, to manipulate the market for unlawful gain. The pattern of the false trading reveals a clear intention to generate a profit for the mother's account at the expense of the Fund.

131. However, the obvious questions of why Mr Iu did what he did and what happened to the profits gained remain unanswered. The protestations by both Mr Iu's mother of poor recollection and fading memory do not impress and Mr Iu's claimed ignorance of what happened to the profits also strains credulity. Mr Iu's less than full and frank cooperation with the SFC in answering these questions is not consistent with his claim of being truly remorseful for his actions.

132. The SFC has done all that can be done to determine the answers to these questions but there is no direct evidence in respect of them and, unfortunately, the

circumstantial evidence does not allow inferences to be drawn that would enable answers to be made to them.

133. This much we know from the SFC's further investigations:

(i) Mr Iu traded in CVG and YBD shares using his mother's account and accounts that he had access to when trading for the Fund;

(ii) the mother's trading account was linked to her bank account and the monies to fund her trades, and the profits from her trades, came from and were deposited into her bank account;

(iii) although Mr Iu had authorised access to his mother's trading account, he had no access to her bank account and nor did anyone else;

(iv) other than knowing that the monies to fund Ms Iu's trades came from her bank account, it is not possible to identify the source of the funds used by Mr Iu to trade using his mother's account and whether they were, in fact, the mother's. The SFC concluded:

> "The Commission is unable to conclude whether Mr Iu could have funded the securities trading in Ms Iu's account.";

(v) during 2014 there were transfers of funds between the bank accounts of Mr Iu and his mother and also from June 2016 to June 2023 when, in this latter period, Ms Iu traded in CVG shares. However, these do not match with the profits gained from trading CVG and YBD shares in the mother's account. The SFC

concluded:

> "The Commission is unable to establish a correlation between Mr Iu's trading and the funds transferred from Ms Iu to Mr Iu (or the other way round).";

(vi) there is no evidence of further false trading between 2018 and 2023.

134. The SFC's further investigations do not allow an inference to be drawn other than that:

(i) there is nothing to suggest that Ms Iu did not own the monies that were used by Mr Iu to conduct trades on her account;

(ii) the profits from Mr Iu's trades on his mother's account were deposited into her bank account;

(iii) no-one, other than Ms Iu, had access to or control over the funds in her bank account; and

(iv) the funds transfers between Mr Iu's and Ms Iu's bank accounts cannot be linked to the profits gained from Mr Iu's trading using his mother's account.

Given that it is a reasonable inference that a son, with the opportunity and ability to gain an illicit profit, might wish to do so in order to benefit his mother, the only inference the Tribunal can draw is that Mr Iu's false trading was conducted in order to benefit the mother. The Tribunal accepts that, on the facts available to

it, the mother cannot be shown to have been a knowing participant in Mr Iu's market misconduct although it does not accept her claim of fading memory and poor recollection. The Tribunal accepts that because it is unable to determine what happened to the profits gained once they were deposited into Ms Iu's bank account, it cannot be shown that Mr Iu personally enjoyed any part of the profits gained. Nor is the circumstantial evidence sufficient to draw an inference to this effect.

135. In view of the Chairman's ruling on section 257(1)(1)(d) it matters not who the ultimate beneficiary was of that gain, whether the Specified Person himself or his mother or, if both he and his mother, how much of the profit gained each received. All that matters is that the Specified Person deliberately manipulated the market in order to generate an illicit profit and succeeded in doing so to the extent of $5,617,540.

Mitigating Matters

136. When Mr Iu had legal representation written submissions were filed on his behalf. In those submissions the following matters in mitigation were advanced:

(i) Mr Iu's full and frank admissions showed "his remorse and his willingness to face up to the consequence of his action";

(ii) Mr Iu's willingness to cooperate and admit his misconduct "substantially saved the time and costs of all parties and the

Tribunal";

(iii) Mr Iu's admissions "should attract a significant reduction in the period of disqualification and cold shoulder order **Ngai Hing Hong Company Limited Report**, 23 July 1998, p. 54";

(iv) Mr Iu is expected to pay HK$2.5 million in costs. "This is on top of the immeasurable damage to his reputation as hedge fund manager, which in turn will inevitably adversely affect his future earning capacity";

(v) Mr Iu's conduct was not a sophisticated scheme and this is "an important factor to be considered and should place Mr Iu's culpability towards the lighter end of the scale";

(vi) Prior to the present case Mr Iu had "almost 13 years of experience in the financial market working for various reputable securities companies". He had "an unblemished record in the financial industry";

(vii) The set-up capital for the Fund "mainly consists of Mr Iu's own capital and capital investment by his friends and/or ex-colleagues. The Fund currently consists of only persons known personally to Mr Iu with no independent third party or institutional investors"; and

(viii) "An investor of the Fund, now having been made fully aware of the current proceedings, nevertheless speaks highly of Mr Iu". In support of this claim a reference letter from Mr Paul Snelgrove

was produced.

137. When Mr Iu was no longer legally represented he wrote a letter to the Chairman dated 22 September 2023 in which he informed the Tribunal of the following matters:

(i) he is currently residing in the United Kingdom with no fixed abode;

(ii) he is suffering from a major depressive disorder for which he is currently undergoing treatment and as a consequence of which he is not fit to participate in the Tribunal's enquiry;

(iii) he lacks the financial resources to pay for legal representation. Having previously borrowed money to handle his earlier involvement with the SFC and the Tribunal, he is now heavily in debt;

(iv) he did not profit from the market misconduct, directly or indirectly, and his position on this issue is as set out in his SFC interviews as well as in subsequent correspondence between the SFC and his former legal representatives;

(v) the SFC investigated and could not prove that he personally benefited from the false trading, consequently any order to pay back the alleged profit "would be extremely unjust and unfair to me";

(vi) this matter has taken around 10 years to conclude "and the undue

delay, itself, in my view, already represents a very heavy penalty imposed on me";

(vii) he will have to pay the SFC's investigation costs, amounting to more than HK$2 million, "and this alone would no doubt force me into bankruptcy;

(viii) "the proceedings and the negative publicity surrounding it has had a catastrophic effect on my professional career. It has also ruined any prospects of my securing employment not only in financial services but also in any professional capacity in future";

(ix) there are 5 investors in the fund. He is one and another is deceased. The other three "are aware of the Tribunal's proceedings and have vouched for my character and integrity" (Character letters from Mr Thomas Ng and Mr Kes Visuvalingam were attached to Mr Iu's letter);

(x) he was the third largest shareholder in the fund in 2015 and CVG had been "a core holding in the Fund since 2008 of which a total profit was made by the Fund and was a source of outsized returns for investors";

(xi) he is "incentivized by the performance fee to generate positive returns for the Fund, and my priority has always been to maximize the performance for the Fund";

(xii) he has managed the fund to the best of his abilities. It "generated positive returns in 2008, despite the financial crisis

and it received many industry awards in 2015";

(xiii) he has never made any redemptions from the Fund and as at February 2023 was the joint largest shareholder of it;

(xiv) due to the current state of his mental health he is no longer able to manage the Fund and the SFC has been notified that the Fund will cease business on 30 September 2023; and

(xv) considering the state of his health and his financial position he asks the Tribunal "to consider my current circumstances with compassion when coming to their ruling".

138. Subsequently, on 3 October 2023, Mr Iu forwarded to the Tribunal medical reports in support of the claims he made in this letter in respect of his mental health. These reports confirmed that he has been diagnosed as suffering from low mood and anxiety which is being treated with medication. The reports disclosed that over the course of this year Mr Iu suffered from depression and panic attacks and had at times experienced suicidal thoughts.

139. Since receipt of this letter the Tribunal has provided Mr Iu with a copy of the transcript of the proceedings dealing with the interpretation of section 257(1)(d) and a copy of the Chairman's Ruling on this legal issue.

140. In preparation for the hearing by the Tribunal on 12 April 2024 the Chairman wrote to Mr Iu on 19 and 29 January 2024 informing him of his right to place before the Tribunal any submissions he might like to make in respect of

the orders the Tribunal might make. Such submissions could include, but were not limited to, his current medical position and his ability to pay any financial orders it was open to the Tribunal to make and specifically on whether it should make a section 257(1)(d) order and, if so, on what terms. The Chairman also informed Mr Iu that if he wished to assert that he lacked the financial means to pay any of the financial orders that the Tribunal might be minded to make it would be incumbent on him to substantiate such a claim.

141. In response to the Chairman's letters the Tribunal received a further letter from Mr Iu dated 12 February 2024. In this letter Mr Iu maintained his assertion that he is impecunious. He said he "would have extreme difficulty in coming up with the proposed reduced negotiated payment, let alone any financial aspects pertaining to a disgorgement order". He explained that all his net worth was tied to the Fund and not all the accrued performance fee was paid to him. Because he did not take a salary in the 17 years of the Fund's operation it was the performance fee on which he relied to pay for his living expenses. He also used his personal finances "to support the running costs of the Fund from 2020 as the assets under management were insufficient to do so". Ultimately, "… a total of USD1,658,868,43 has been written off or adjusted to keep the Fund solvent. The Fund was liquidated as of December 2023 with a net asset value of zero (TAAFFINALSTATEMENT.png) and thus I lost all my investment in the Fund".

142. Mr Iu said that he invested considerable sums of his own in the Fund but never made any redemptions from it. As of 2023 he was "the top shareholder in the Fund". Furthermore, he was owed HK$4,712,661.33 by an individual

who was subsequently declared bankrupt. He has spent HK$950,292 on legal fees and HK$719,000 for the MMT proceedings. He currently has a Citibank Credit Card loan of HK$950,514.36 and has only HK$768.29 in his HSBC bank account.

143. Finally, he stated that he has no fixed abode and is temporarily staying with relatives and friends and is dependent on their charity. His Type 9 Responsible Officer licence has been revoked and the MMT proceedings "has made it impossible for me to gain employment not only in financial services but also in any professional capacity, which makes it extremely challenging for me to have any chance in paying for the SFC's costs and disgorgement penalties". Mr Iu then referred to his deteriorating mental health as a consequence of "the closure of the Fund and the complete wipe out of my net worth.".

144. He concluded by saying that all his claims in respect of his financial situation can be substantiated by contacting the relevant institutions.

Conclusion

145. We accept what is contained in Mr Iu's medical reports and we accept that the onset of Mr Iu's mental health problems was caused by the SFC investigation into his misconduct, the duration of that investigation and the anxiety Mr Iu endured over the outcome of it. Of course, as sympathetic as we

may be to Mr Iu's current situation, we cannot ignore the fact that he brought it upon himself.

146. That being said, it is only fair to note that the investigation has taken longer than it should have. The Tribunal has been informed that the SFC commenced its investigation into Mr Iu's false trading in November 2014. Thus, almost ten years has elapsed since the commission of the market misconduct. Since that time Mr Iu has had that investigation, and the potential consequences of it, hanging over his head. This has not only caused unnecessary additional anxiety for Mr Iu, but it has meant that records that might have assisted the Tribunal in answering some of the questions that have arisen in this case are no longer available. To that extent the work of the Tribunal in performing its statutory duty has been impeded by the SFC's delay. We shall speak more on this at the end of this report.

147. We also accept that a determination by this Tribunal that Mr Iu has engaged in false trading, together with such consequential orders we may make, will inevitably impact adversely upon Mr Iu's future career prospects in the securities industry. In the long term, the price exacted on him for his false trading by those in his industry may be greater than the adverse impact of this Tribunal's orders.

148. Finally, we accept that Mr Iu has cooperated with the SFC and this Tribunal in ensuring that these proceedings are brought to a speedy conclusion. There is no doubt that a full and frank admission made at the earliest opportunity

is very significant mitigation. It reduces delay in both the institution, and the hearing, of the Tribunal's enquiry and shortens the length of that enquiry. It makes the task of the Tribunal simpler and easier and it brings the resolution of the allegation to a speedier end. All of these matters are considerable benefits to the public interest and result in the saving of public monies. Credit must be given to Mr Iu for his assistance in expediting the hearing before the Tribunal. Together with evidence of other mitigating conduct it may support a submission that the identified person is truly remorseful for his misconduct.

149. However, for the reasons we have earlier set out, we are not persuaded that his cooperation evidences genuine remorse. We say that because whilst Mr Iu admits to gaining a profit of many millions of dollars he has provided the Tribunal with no explanation for his conduct other than his admissions that it was intentional and purposeful misconduct. Even though the inference that the Tribunal draws is that Mr Iu was motivated by desire to confer an illicit windfall on his mother, such a motivation in no way lessens his culpability. Furthermore Mr Iu has left the Tribunal in ignorance of the whereabouts of these illicit profits and has made no effort to repay them. Indeed, to the contrary; he has sought to take advantage of a potential lacuna in the law which he argues prevents this Tribunal from making a section 257(1)(d) order against him. If the Tribunal had accepted his interpretation of the law it would have meant that the Tribunal would have been prevented from denying him the benefit of the profit that he gained from his market misconduct.

150. However, what makes Mr Iu's conduct particularly concerning is that it

was, as we have said, in breach of the trust that other unit holders of the Fund had placed in him. This shows a high level of dishonesty and a total indifference to the impact his conduct would have on others. He was willing to betray friends and colleagues to advance his own interests. His colleagues' apparent forgiveness of him does not excuse, or lessen, the seriousness of his misconduct, although their unanimous view that it was completely out of character does impact favourably upon the assessment of his culpability.

151. We also note that Mr Iu is a first offender. The fact that he has no adverse history with the regulator weighs strongly in his favour.

Chapter 7

The Orders of the Tribunal

152. There are a number of matters that impact upon the orders available to the Tribunal under section 257(1) and these must be addressed before the Tribunal can decide what orders it should make.

(i) The relevance of the Specified Person's claim of impecuniosity

153. This claim is only relevant to the financial orders and the question we must address is whether, if the Tribunal accepted the Specified Person's claim, it is an impediment to the Tribunal making a costs order or an order under section 257(1)(d) of the SFO.

154. The SFC submits it is not an impediment and argues that these are civil proceedings and any claim of impecuniosity does not go to the liability of the Specified Person to have costs awarded against him or to the public interest in having him stripped of his illicitly gained profit. Rather, it has relevance only to the enforcement of the Tribunal's orders. Mr Li referred us to the judgment of Fok JA (as he then was) in *Sun Focus Investment Limited v Tang Shing Bor and another*[30] where, at [13], Fok JA addressed an argument that awarding costs of an appeal on an interlocutory matter should not be ordered to be paid forthwith as it could stifle the plaintiffs untried suit. In rejecting this argument Fok JA

[30] CACV 82/2011 unreported, 18 January 2012.

commented:

> "If the plaintiff's argument were correct, so that these costs should not be payable forthwith, it would mean that impecunious litigants (assuming, for present purposes, that the plaintiff is such a litigant) would be placed in an advantageous position in respect of adverse interlocutory costs orders."

155. We agree that the mere fact that a Specified Person is impecunious cannot absolve him of liability to have an award of costs made against him. Whether the party in whose favour the award of costs is made ultimately receives it is an incident of the enforcement process and has nothing to do with the liability to pay costs.

156. As to the order under section 257(1)(d), it would totally defeat the purpose of the order if the Tribunal were not to make it or to make it for a lesser amount. The Specified Person's ability to pay the order becomes, as with the costs order, merely an incident of the enforcement process.

157. There are certain other matters which need to be considered before the Tribunal can determine what orders it should make in respect of Mr Iu. These matters need to be considered bearing in mind the maximum period for which the Tribunal can make these orders. As set out in Chapter 5 of this Report, the Tribunal can make disqualification and cold shoulder orders for a maximum period of 5 years and a cease and desist order for any period up to an in perpetuity order.

(ii) The need to protect Hong Kong

158. The integrity of Hong Kong's markets are crucial to its economic success. Anything that undermines that integrity or throws doubts on it, affects the favourable reputation that Hong Kong enjoys as an international financial centre. False trading is clearly conduct that, unless condemned and deterred, could have a seriously detrimental impact upon the perception of Hong Kong as a properly regulated market place and a safe place for investors to place their funds. The Specified Person's conduct clearly gives rise to a need to protect Hong Kong and this must be reflected in the orders the Tribunal makes.

159. The disqualification order agreed by the parties applies to both listed and unlisted companies. Mr Iu's false trading took place whilst he was operating and managing the private company Tarascon. Through his indifference to and disregard of the laws of Hong Kong he has clearly demonstrated both that he is unfit to be involved in the important duties of a director or manager of a company and that there is a need to protect Hong Kong from him in such roles.

(iii) The need to deter the Specified Person

160. The primary objective of the false trading provisions is to protect the market from manipulation and Mr Iu's misconduct, in its intentional circumvention of these provisions, was clearly a very deliberate abuse of the market. In view of what we have said in Chapter 6, there is clearly a need to deter Mr Iu from re-offending.

(iv) The need for general deterrence

161. The need for general deterrence exists simply as a consequence of the need to protect Hong Kong. Any incident of false trading can have a significant impact on Hong Kong's reputation as a financial marketplace and there is a very important public interest in protecting and enhancing that reputation. All this Tribunal can do in this regard is to demonstrate that this kind of market misconduct will be condemned in the strongest terms as reflected in the orders the Tribunal makes. The strength of its orders should be such as to deter others from contemplating engaging in false trading and in this way the orders of the Tribunal will protect Hong Kong.

162. An important element in providing an effective deterrence to those who may be tempted into thinking that market misconduct can be profitable is to make an order which neutralises any profit made and in the present case that can be achieved by a section 257(1)(d) order against the Specified Person even though it cannot be proven that he personally benefited from the profit gained from his false trading.

(v) The duration of the orders

163. In view of the seriousness of the misconduct and all the other matters to which we have referred in this and the previous Chapter we are satisfied that a period of 4 years is the appropriate period for the disqualification and cold

shoulder order and that the cease and desist order should be made of indefinite duration.

The Orders of the Tribunal

164. The Tribunal having determined that:

(i) there is a need to protect Hong Kong; and

(ii) there is a need to deter the Specified Person and others from engaging in any form of market misconduct;

makes the following orders under section 257(1) of the SFO:

1. Pursuant to section 257(1)(a) of the SFO, for a period of 48 months, the Specified Person shall not, without the leave of the Court of First Instance:

(a) Be or continue to be a director, liquidator, or receiver or manager of the property or business, of any listed or unlisted corporation in Hong Kong including Tarascon Capital Management (Hong Kong) Limited or any of its subsidiaries and affiliates; or

(b) In any way, whether directly or indirectly, be concerned or take part in the management of any listed or unlisted corporation in Hong Kong including Tarascon Capital Management (Hong Kong) Limited or any of its subsidiaries and affiliates.

2. Pursuant to section 257(1)(b) of the SFO, the Specified Person 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, futures contract or leverage foreign exchange contract, or an interest in any securities, futures contract, leveraged foreign exchange contract or collective investment scheme for a period of 48 months.

3. Pursuant to section 257(l)(c) of the SFO, the Specified Person shall not again perpetrate any conduct which constitutes the market misconduct of:

   (a) Insider dealing under section 270 of the SFO;

   (b) False trading under section 274 of the SFO;

   (c) Price rigging under section 275 of the SFO;

   (d) Disclosure of information about prohibited transactions under section 276 of the SFO;

   (e) Disclosure of false or misleading information inducing transactions under section 277 of the SFO; and

   (f) Stock market manipulation under section 278 of the SFO.

4. Pursuant to section 257(1)(d) of the SFO, the Specified Person shall pay to the Government the amount of HK$5,617,540 being

the profit gained from his market misconduct.

5. Pursuant to section 257(l)(e) of the SFO, the Specified Person shall pay to the Government costs and expenses reasonably incurred by the Government in relation or incidental to these proceedings, to be taxed if not agreed.

6. Pursuant to section 257(l)(f)(i) of the SFO, the Specified Person shall pay to the SFC costs and expenses reasonably incurred by the SFC in relation or incidental to these proceedings, to be taxed if not agreed, with a certificate for two counsel.

7. Pursuant to section 257(l)(f)(ii) of the SFO, the Specified Person shall pay to the SFC costs and expenses reasonably incurred in relation or incidental to the investigation carried out before these proceedings were instituted, in the agreed sum of HK$830,898.

8. Pursuant to section 257(1)(f)(iii) of the SFO, the Specified Person shall pay to the SFC costs and expenses reasonably incurred in relation or incidental to the investigation carried out for the purposes of these proceedings, in the agreed sum of HK$3,100.

9. Pursuant to section 264(1) of the SFO, notice be given to the Registrar of the High Court for this Order to be registered in the Court of First Instance.

10. Pursuant to section 264(2) of the SFO, this Order be filed with the Registrar of Companies as soon as reasonably practicable.

Delay in Commencing MMT Proceedings

165. Earlier in this Report we referred to the delay in commencing proceedings before the Market Misconduct Tribunal and how it impacted upon the Specified Person, the work of the Tribunal and the public interest. Of course, the public interest lies not just in seeing that the Tribunal is effective in carrying out the enquiry required of it by the SFO, but also in expeditiously bringing to a conclusion the investigation initiated by the SFC. Where market misconduct is proven to have occurred there is a very strong public interest in seeing that misconduct revealed, explained and punished by the Tribunal as soon as possible. Delay only puts at risk the effectiveness of the Tribunal's work and lessens the deterrence value of that work. It is the enemy of good and effective regulation of the markets.

166. For some time now different Chairmen of this Tribunal have been commenting on the systemic delay in bringing cases of market misconduct before this Tribunal. Despite those comments there has been no improvement. Something must now be done to address this state of affairs. That requires an examination of the process that takes place prior to the filing of the Notice with the Tribunal. As explained to us by Mr Li, and by the SFC in a written submission subsequently filed with the Tribunal, that process involves the following steps:

1. Conducting the investigation which is done by the SFC's Enforcement Division. This may involve conducting interviews and accessing records using the SFC's statutory powers.

2. Seeking internal legal advice. The Enforcement Division seeks legal advice from the SFC's Legal Services Division on whether there is sufficient evidence for a criminal prosecution. The advice that is given will be based upon The Prosecution Code published by the Department of Justice. Before a final advice is given there may be interim advices recommending further steps be taken by the Enforcement Division with a view to improving the state of the evidence. Consequently, some time may elapse before a final advice is given. In this period the Legal Services Division will also consider whether there is a need for any urgent interim civil orders.

3. Seeking external legal advice. This is an optional course that may be in addition to, or instead of, internal legal advice provided by the Legal Services Division. As when internal legal advice is given, the advice of the external counsel may involve the Enforcement Division conducting further investigations to address any matters raised in the legal advice.

4. Preparing the SFC file for submission to the Director of Public Prosecutions (DPP) of the Department of Justice (DOJ) for advice on whether a criminal prosecution is warranted. One of many requirements of the DOJ is that all witness statements are signed and this may account for some delay in the preparation of the file. We presume that this, and the other matters required by the DOJ, are not matters that the Legal Services Division requires

before providing its advice.

5. As with other legal advices, the DOJ may render interim legal advices in which further investigative work is requested. This may lead to delay in the final legal advice being provided to the SFC. The DOJ's legal advice will be confined to assessing the sufficiency of evidence for a criminal prosecution and will not address the question of whether there is sufficient evidence to commence proceedings before the MMT.

6. If the DOJ advises that there is insufficient evidence for a criminal prosecution, but the SFC has legal advice, either from its own internal counsel or from external counsel, that there is sufficient evidence to institute MMT proceedings, then the SFC will seek its Board's approval to commence proceedings before the Tribunal.

7. Simultaneously with the process of seeking its Board's approval, or as soon as that approval has been obtained, the SFC's Legal Services Division will begin preparation of the Notice and Synopsis that are the initiating documents for the MMT proceedings. These two documents may be drafted by external counsel.

8. After the SFC Board has given its approval to the institution of MMT proceedings and after the Notice has been drafted, the SFC will seek the Secretary for Justice's consent to proceed. The consent appears not to have been delegated but is signed

personally by the Secretary for Justice. It has not been made clear to us how the SFC's request for consent is processed within the DOJ.

The seeking of external advice may or may not take place depending upon the need as assessed by the SFC but generally there will be at least one occasion that the SFC seeks external legal advice before filing its Notice with the Tribunal.

167. In the present case there was the following timeline:

1. 1 August – 30 September 2014: Commission of the Market Misconduct

2. 4 November 2014: Institution of the SFC's investigation

3. 4 November 2014 – November 2017: The SFC conducted its investigation and interviewed the Specified Person, his mother and his wife, and provided instructions to a market expert.

4. 21 December 2017: The Enforcement Division of the SFC referred its investigation to the Legal Services Division of the SFC for Legal advice.

5. 28 September 2018: The Legal Services Division rendered its first legal advice identifying a number of matters for further investigation.

6. October – December 2018: The Enforcement Division carried out the further investigation recommended by the Legal Services Division.

7. 14 January 2019: The Enforcement Division referred the case to the Legal Services Division for further legal advice.

8. 28 March 2019: The Legal Services Division provided a further advice recommending additional information be provided to the market expert so that he could re-evaluate his opinion and update his report.

9. April – July 2019: Awaiting the updated report from the market expert.

10. 8 August 2019: The market expert's report is referred to the Legal Services Division for further legal advice.

12. 30 September 2019: The Legal Services Division issued its final legal advice.

13. 30 September 2019 – 29 July 2020: The Enforcement Division obtained signed witness statements and section 22A Evidence Ordinance certificates verifying computer produced documents.

14. 24 June 2020: The Enforcement Division referred the file to the DPP for legal advice on a criminal prosecution.

15. 11 November 2020: The SFC received the DPP's advice regarding a criminal prosecution.

16. 16 April 2021: The SFC briefed external counsel.

17. 7 July 2021: Final advice from external counsel was received.

18. 14 July 2021: The Enforcement Division seeks SFC Board

approval to commence MMT proceedings.

19. July 2021 – May 2022: The Enforcement Division obtains additional evidence pursuant to external counsel's advice.

20. 17 June 2022: The SFC seeks consent from the Secretary for Justice to institute proceedings before the Market Misconduct Tribunal.

21. 8 July 2022: The SFC received the Secretary for Justice's consent to institute MMT proceedings.

22. 5 August 2022: The SFC filed a Notice with the Market Misconduct Tribunal.

168. We should emphasise that we are not trying to find fault with anyone or to blame anyone for the delay in this case. We are setting out the process in an effort to enable us to better understand it and hopefully for others to dispassionately and objectively consider it with a view to identifying areas where delay might be reduced.

169. However, in the course of so doing it is necessary to bear in mind, in respect of the present case, an important part of the context; namely, that from January 2020 to May 2022 Hong Kong, along with the rest of the world, suffered from the Covid-19 epidemic. In response to the epidemic the SFC implemented special working arrangements which had as their side effect a slowing down of the normal pace at which employees could perform their duties. In a nutshell, it

took longer to get things done. This is quite understandable and was certainly not unique to the SFC.

170. We well understand that white collar crime investigations are time consuming and resource intensive. There is nothing unusual in them taking years to complete. Nevertheless, what does stand out is that a period of over 4 ½ years elapsed from when the Enforcement Division first sent its file for legal advice on 21 December 2017 to when it filed a Notice with the MMT on 5 August 2022. Even allowing for the difficulties posed by the Covid-19 working arrangements, this period seems far too long. This is the period, we would suggest, that warrants closer scrutiny.

171. In conducting a closer scrutiny of this period, focus should be placed on the number of occasions on which legal advice was needed and the time taken to complete the provision of the legal advices. On the face of it, the number of occasions, four in total, and the time taken to provide it, some 15 ½ months, seem both to be more than should have been needed. We qualify ourselves by saying "on the face of it" because, for reasons of legal professional privilege, we cannot know what legal advice was requested or provided. Nevertheless, we can't help but wonder whether this is an area where some of the delay may have crept in as the seeking and providing of legal advice gradually lengthened the period between the end of the investigation and the seeking of approval from the Department of Justice, and between the obtaining of that approval and the filing of the Notice with the Market Misconduct Tribunal.

172. We also note that at item 13 of the timeline it took the Enforcement Division 10 months to prepare a file to be sent to the DPP for legal advice. Why this file was not already in a state to be sent to the DPP is not clear. Also, it is apparent that there was a delay of 11 months from when Board approval for MMT proceedings was obtained to when the consent of the Secretary for Justice was sought. Whether this is fully accounted for by external counsel's need for additional evidence is not clear.

173. As we have sought to emphasise, what is of greatest concern to us is the impact that delay may have on the MMT's ability to properly discharge its statutory function, namely, to conduct an enquiry and make findings in accordance with the provisions of the SFO. In order for the Tribunal to conduct an enquiry it is given a range of powers. However, those powers may be of no value if records no longer exist and witnesses and Specified Persons have disbursed beyond Hong Kong. Of course, if the Specified Person has left Hong Kong and no longer has any assets here, then any financial orders of the Tribunal will be unenforceable.

174. We can do no more than lay out the situation as it has been described to us and to invite the SFC and the Department of Justice to consider in partnership what could be done to reduce the delay in bringing matters to the Tribunal. We hope our comments on this matter may be a motivation for change.

Mr Ian McWalters, GBS

(Chairman)

Mr CHAN Anthony Jen-haw

(Member)

Mr TAN Yat Quan

(Member)

Dated 28 June 2024