Report of the
Market Misconduct Tribunal
of Hong Kong

on whether a breach of the disclosure requirements has taken place in relation to the listed securities of

Magic Holdings International Limited

and other related questions

Part II

INDEX

CHAPTER 9

CONSEQUENTIAL ORDERS

540. Following the delivery of the first part of our report to all the parties and its publication to the public on 19 March 2020, the Tribunal gave directions to the parties on the same date as to the provision of written submissions in respect of consequential orders that the Tribunal might make pursuant to section 307N and 307P of the Ordinance. Having received written submissions on behalf of all the parties, the Tribunal received oral submissions on 25 April 2020.

541. At that hearing, as foreshadowed in a letter from the Tribunal to the parties, dated 24 April 2020, that, subject to the submissions of the parties, it was minded to do so, the Tribunal requested the Presenting Officer, Mr. Scott SC, to present expert evidence relevant to the issue of "the notional losses suffered by the investors due to the delay in Magic's disclosure of inside information", a matter raised in the written submissions of the SFC, dated 2 April 2020,[1] with which issue was taken in their written submissions, dated 16 April 2020, by counsel on behalf of various Specified Persons.[2] In the result, the Tribunal adjourned the hearing in respect of the 1st to 6th Specified Persons to a date to be fixed, acceding to the request of counsel representing those Specified Persons that they be given until 8 May 2020 to consider and comment on the terms of reference Mr. Scott proposed be given to the expert witness. The chairman said that further directions would be given as and when required in due course. At the invitation of Mr. Scott and with the agreement of their counsel, the Tribunal proceeded to receive oral submissions in respect of the applications for orders for costs to be made in their favour by the 7th to 10th Specified Persons.

542. In the Summary of the Tribunal's determinations in respect of culpability, set out in Chapter 8, it was noted that:

(i) contrary to section 307B (1) of the Ordinance, Magic did not disclose to the public information, which constituted inside information, as soon as reasonably practicable after the inside information had come to its knowledge;[3]

[1] Submissions for the SFC, paragraph 42.
[2] Submissions for the 1st Specified Person, paragraph 9; Submissions for the 2nd to 5th Specified Persons, paragraph 38; and Submissions for the 6th Specified Person, paragraph 13.
[3] Report, paragraph 397.

(ii) contrary to section 307G (2) (a) of the Ordinance, the negligent conduct of Mr. Stephen Tang and Mr. Chris Cheng resulted in the breach by Magic of the disclosure requirement and each of them is in breach of the disclosure requirement;[4]

(iii) contrary to section 307G (2) (b) of the Ordinance, Mr. Sun Yan[5], Mr. Stephen Tang, Mr. Chris Cheng, Mr. She and Mr. Luo did not take all reasonable measures from time to time to ensure that proper safeguards existed to prevent Magic's breach of the disclosure requirement and are each in breach of the disclosure requirement.[6]

543. In addition, the Tribunal determined that it was not satisfied that either Mr. She or Mr. Luo was culpable of negligent conduct that resulted in the breach of Magic's disclosure requirement, contrary to section 307G (2) (a) of the Ordinance. The Tribunal said that it was satisfied that Mr. Dar Chen, Mr. Thomas Yan, Professor Yang Rude and Professor Dong had taken all reasonable measures to ensure that proper safeguards existed to prevent the breach of Magic's disclosure requirement.[7]

The powers of the Tribunal

(i) Orders of the Tribunal

544. Section 307N of the Ordinance provides that:

"(1) Subject to section 307K, at the conclusion of any disclosure proceedings the Tribunal may make one or more of the following orders in respect of a person identified under section 307J(1)(b) as being in breach of a disclosure requirement—

(a) an order that, for the period (not exceeding 5 years) specified in the order, the person must not, without the leave of the Court of First Instance—

(i) 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

(ii) in any way, whether directly or indirectly, be concerned or take part in the management of a listed corporation or any other specified corporation;

(b) an order that, for the period (not exceeding 5 years) specified in the order, the person must not, without the leave of the Court of First Instance, in Hong Kong,

[4] Report, paragraph 436.
[5] Report, paragraph 531.
[6] Report, paragraphs 534 and 537.
[7] Report, paragraphs 526-30.

directly or indirectly, in anyway acquire, dispose of or otherwise deal in any securities, futures contract or leveraged foreign exchange contract, or an interest in any securities, futures contract, leveraged foreign exchange contract or collective investment scheme;

(c) an order that the person must not again perpetrate any conduct that constitutes a breach of a disclosure requirement;

(d) if the person is a listed corporation or is in breach of the disclosure requirement as a director or chief executive of a listed corporation, an order that the person pay to the Government a regulatory fine not exceeding $8,000,000;

(e) without prejudice to any power of the Tribunal under section 307P, an order that the 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;

(f) without prejudice to any power of the Tribunal under section 307P, an 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;

(g) an order that anybody which may take disciplinary action against the person as one of its members be recommended to take disciplinary action against the person;

(h) if the person is a listed corporation, any order that the Tribunal considers necessary to ensure that a breach of a disclosure requirement does not again take place in respect of the corporation including, but not limited to, an order that the corporation appoint an independent professional adviser approved by the Commission to review the corporation's procedure for compliance with

this Part or to advise the corporation on matters relating to compliance with this Part;

(i) if the person is an officer of a listed corporation, any order that the Tribunal considers necessary to ensure that the officer does not again perpetrate any conduct that constitutes a breach of a disclosure requirement including, but not limited to, an order that the officer undergo a training program approved by the Commission on compliance with this Part, directors' duties and corporate governance."

545. In respect of a regulatory fine, section 307N (3) provides that:

"The Tribunal must not impose a regulatory fine on a person under subsection (1)(d) unless, in all the circumstances of the case, the fine is proportionate and reasonable in relation to the breach of the disclosure requirement. For that purpose, the Tribunal may take into account, in addition to any conduct referred to in subsection (2), any of the following matters—

(a) the seriousness of the conduct that resulted in the person being in breach of the disclosure requirement;

(b) whether or not that conduct was intentional, reckless or negligent;

(c) whether that conduct may have damaged the integrity of the securities and futures market;

(d) whether that conduct may have damaged the interest of the investing public;

(e) whether that conduct resulted in any benefit to the person or any other person, including any profit gained or loss avoided;

(f) the person's financial resources."

(ii) Costs

546. Section 307P of the Ordinance provides that:

"(1) Subject to subsection (4), at the conclusion of any disclosure proceedings, or as soon as reasonably practicable after the conclusion of the proceedings, the Tribunal may by order award to any of the following persons a sum it considers appropriate in respect of the costs reasonably incurred by the person in relation to the proceedings—

(a) a person whose attendance, whether as a witness or otherwise, has been necessary or required for the purposes of the proceedings;

(b) a person whose conduct is the subject, whether wholly or in part, of the proceedings.

(2) Any costs awarded under this section are a charge on the general revenue.

(3) Subject to any rules made by the Chief Justice under section 307X, Order 62 of the Rules of the High Court (Cap. 4 sub. leg. A) applies to the award of costs, and to the taxation of any costs awarded, by the Tribunal under this section.

(4) Subsection (1)(a) and (b) does not apply to—

(a) a person who has been identified under section 307J(1)(b) as being in breach of a disclosure requirement;

(b) a person whose conduct the Tribunal considers has caused, whether wholly or in part, the Tribunal to investigate or consider the person's conduct during the course of the disclosure proceedings; or

(c) a person whom the Tribunal considers has by the person's conduct caused, whether wholly or in part, the institution of the disclosure proceedings."

Notional loss

Written submissions for the SFC

547. In support of his submission that Magic's breach of the disclosure requirements "…had grave consequences for the investing public", Mr. Scott contended that:[8]

> "… investors who sold shares in Magic during the period between 29th April 2013 to 26th July 2013 were denied material information about Magic and sold shares at prices which were lower than they should have been. As the mere leakage of inside information had already caused a material rise in the price of Magic shares of 21.25%, the disclosure of the inside information would have caused at least the same (if not a higher than 21.25%) rise in the price of Magic shares. As the total turnover of Magic's shares from 29th April 2013 to 26th July 2013 amount to HK$$763,765,778.97 (see Appendix C to the Part I Report), the notional losses suffered by investors due to the delay in Magic's disclosure of inside information, using an increase of 21.25% in the price of the shares, amounted to an aggregate amount of HK$162,300,228."

[8] Submissions for the SFC, paragraph 42.

Written submissions for the 1st Specified Person

548. In his written submissions, on behalf of Magic, Mr. Li SC contended that there was "no evidence of any loss to investors" in consequence of Magic's breach of its disclosure requirement. The SFC's contention that, the leakage of the information having caused a 21.25% increase in Magic share price, disclosure of the information would have caused an equal rise in the share price was fallacious in fact and logic. In those circumstances, investors were already trading as though some disclosure had been made, so that disclosure was likely to have "little effect".[9]

Written submissions for the 2nd to 5th Specified Persons

549. Whilst it was accepted by Mr. Dawes SC in his written submissions, on behalf of the 2nd to 5th Specified Persons, that the investing public had suffered "some loss" due to Magic's delay in making disclosure and that was "a matter which should be taken into account", he invited the Tribunal to reject as "plainly unreliable" the contention advanced on behalf of the SFC that the notional loss was $162 million.[10] The computation was based on a number of unsustainable assumptions. First, that the volume of trading in Magic shares would have remained constant, even if the inside information had been disclosed. Secondly, that the difference between the price at which Magic shares traded and the notional price at which they would have traded if the inside information had been disclosed as soon as required remained a constant of 21.25%. That assumption was false.[11] If the SFC wished the Tribunal to rely on its computation, it ought to have sought to adduce expert evidence in support. It had not done so. In the result, there was no basis for the SFC's assertion that the delay in making disclosure had "grave consequences for the investing public."

550. Mr. Dawes suggested the actual loss suffered by investors was likely to be substantially smaller. The Tribunal had found that the inside information came into existence on Saturday, 27 April 2013. He submitted that the Specified Persons were entitled to take legal advice on the issue of whether the 'safe harbour' defence applied before complying with their obligation

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[9] Submissions for the 1st Specified Person, paragraphs 25-8.

[10] Submissions for the 2nd to 5th Specified Persons, paragraphs 38-43.

[11] Submissions for the 2nd to 5th Specified Persons, paragraph 40.

> "(a)… Magic's share price remained steady between HK $4.89 and HK $5.06 per share even after the Inside Information was announced on 2 August 2013.
> (b) for a substantial portion of the period between 29 April and 26 July 2013, the difference between (1) Magic's actual share price and (2) the price of HK $5.06 was only 5-10%. The difference between the two figures never reached 21.25%."

to make disclosure as soon as reasonably practicable. He suggested that they were entitled to take up and until Friday, 3 May 2013 to procure and understand such legal advice. Having closed at $4.10 on Friday, 26 April 2013, the closing price of Magic shares on 3 May 2013 was $4.34. On 8 May 2013, the closing price of Magic shares was $4.85. Thereafter, Magic shares traded in the range of a daily closing price of around $4.50 to $5.20.

551. In the result, Mr. Dawes submitted that Magic shares were not traded at an artificially low price for an extended period of time, in the absence of disclosure of the inside information. Rather, he submitted that Magic shares traded at "an artificially low level" for "around 4 business days."

Written submissions for the 6th Specified Person

552. In his written submissions, on behalf of the 6th Specified Person, Mr. Chan SC invited the Tribunal to reject the calculation of notional loss of around $162 million, being 21.25% of the total turnover of Magic shares from 29 April to 26 July 2013, set out in the SFC's written submissions.[12] It was not supported by any expert evidence, in particular expert evidence of the re-rated price of Magic shares, if the inside information had been made known to the public at the material time. It ignored the evidence of both experts, accepted by the Tribunal, that beginning at the closing of the market on 7 May 2013 the inside information was no longer materially price sensitive. Further, it did not take into account the individual prices at which shares were bought and sold. Rather, the calculation assumed that all buyers of the shares suffered the same notional loss.

Written submissions for the SFC in reply

553. In the SFC's written reply to the submissions made on behalf of the 1st Specified Person, that there was no evidence of any loss, Mr. Scott invited the Tribunal to note that, trading having been suspended in Magic shares on 26 July 2013 at a closing price of HK $4.60, the price at which shares traded rebounded to over HK $5.00 " in less than a few days following the interim announcement on 2nd August 2013 (which did not include a price)." Having regard to the total turnover in Magic shares traded in the period 29 April to 26 July 2013 of more than $763 million, Mr. Scott asserted "On any basis, the non-disclosure must have resulted in significant loss to investors."[13]

[12] Submissions for the 6th Specified Person, paragraphs 12-3.
[13] Submissions in Reply for the SFC, paragraph 9.

554. In reply to the submissions made on behalf of the 2nd to 5th Specified Persons, in the context of the total turnover in Magic shares of $763 million in the period, Mr. Scott contended "At any rate, the non-disclosure of *price-sensitive* inside information would have resulted in significant loss to investors. Even if one adopts a modest price differential of 5% or 10% (as alluded to at paragraph 40(b)), the loss would be in the region of HK $38-76 millions."[14] In that reply and in the reply to the submissions made on behalf of the 6th Specified Person it was contended:[15]

> "Whilst the notional loss is not addressed by expert evidence, the Tribunal (assisted by a member in the financial industry) has had the benefit of expert evidence and empirical data on changes in share price and trading volume throughout (including the period of 26th April to 26th July 2013)…The Tribunal cannot turn a blind eye to figures of such magnitude."

The hearing

555. At the hearing Mr. Scott said that the SFC agreed to present the expert evidence requested by the Tribunal and, having indicated that it was proposed to approach Mr. Karl Lung to provide that evidence, provided the Tribunal and the parties with skeleton proposed terms of reference.

556. For their part, Mr. Li, Mr. Dawes and Mr. Chan all opposed the Tribunal ordering that it be presented with such expert evidence. Mr. Li said that it was not necessary. Even if the evidence to be obtained had some relevance, inevitably it would cause delay and incur increased costs. He said that he wished to clarify the position of the 1st Specified Person, "It's not that there hasn't been any loss." He added, "I am not saying that… there could not be further effect on the market if there was full disclosure." Rather, he submitted that, "the exact magnitude of the notional loss would not, at the end of the day, be a major factor." In supporting those submissions, Mr. Dawes said that it would be necessary for the Specified Persons first, to consider any such report and secondly, the need for them to obtain their own expert evidence and, if necessary, to make application to adduce the evidence before the Tribunal. He said that those were matters that went to "time, cost and prejudice." If these matters were of importance, they ought to have been addressed in Mr. Karl Lung's first statement. For his part, Mr. Chan asserted that the prejudice to Mr. Sun Yan was that any order of disqualification made against him would begin later rather than sooner.

[14] Submissions in Reply for the SFC, paragraph 18 (3).
[15] Submissions in Reply for the SFC, paragraphs 18 (4) and 24 (2).

Discussion

557. In determining to request that the SFC obtain and present to the Tribunal the evidence of an expert witness in respect of the notional losses suffered by the investors due to the delay in Magic's disclosure of inside information, the Tribunal is acutely aware of the inevitable delay in the Tribunal making its final orders and of the increased costs and expenses that will result. Nevertheless, we are satisfied that it is appropriate that the evidence is presented to the Tribunal to enable it to discharge its duties properly. We are mindful, in particular, of the requirement of section 307N (3) of the Ordinance that the Tribunal must not impose a regulatory fine unless, in all the circumstances of the case, the fine is proportionate and reasonable in relation to the breach of the disclosure requirement and that, in considering those matters, the Tribunal may take into account the matters there listed, including "(d) whether that conduct may have damaged the interest of the investing public". Moreover, the economic consequences of the conduct may be relevant to other orders that the Tribunal might make.

Costs: section 307P

Written submissions for the 7th Specified Person

558. Having noted that in its report the Tribunal had dismissed the proceedings brought against Mr. Dar Chen, the 7th Specified Person, and had found that he had taken all reasonable measures to ensure proper safeguards existed to prevent Magic's breach of disclosure requirement, in his written submissions Mr. Wadham contended that, in accordance with the usual rule that costs should normally follow the event, the Tribunal ought to make an order in his favour in respect of costs reasonably incurred in relation to the proceedings, to be taxed if not agreed. There was no basis to displace the normal outcome.

559. Mr. Wadham submitted that Mr. Dar Chen's conduct did not cause the institution of the proceedings nor did it cause or prolong the investigation and consideration of his conduct by the Tribunal in the proceedings.

Written submissions for the 8th to 10th Specified Persons

560. Having noted that in its report the Tribunal had dismissed the proceedings brought against the 8th to 10th Specified Persons and had found that they had each taken all reasonable measures to ensure that proper safeguards existed to prevent Magic's breach of disclosure requirement, in his written submissions Mr. Chan invited the Tribunal to make an order of costs in their favour, pursuant to section 307P(1) of the Ordinance with a certificate for two counsel, to be taxed if not agreed.

561. Mr. Chan submitted that in such circumstances, subject to section 307P (4) (b) and (c)[16], that was the normal order that the Tribunal should make. He said that the question that arose was whether the Specified Person had brought suspicion upon himself. He invited the Tribunal to note that in its report in *Greencool Technology Holdings Limited*, the Tribunal, of which Mr. Michael Hartmann was chairman had said of a similarly worded provision in section 260 (4) of the Ordinance:[17]

> "Costs may not be granted to a person whose conduct, the Tribunal considers, has caused, whether wholly or in part, the investigation or whose conduct, the Tribunal considers, has caused, whether wholly (or) in part, the institution of the proceedings. In short, costs may not be awarded if the Tribunal is satisfied that, even though cleared of culpability, the specified person brought suspicion upon himself."

562. Of conduct relevant to a consideration of whether the person brought suspicion upon himself, the Tribunal determined[18] the appropriate approach was that taken in criminal proceedings as articulated in the judgment of Chan PJ, with whom all the other judges agreed, in the Court of Final Appeal in *Hui Yui Sang v HKSAR*:[19]

> "…the judge must consider the conduct of the appellant generally and that the most relevant conduct must be his conduct during the investigation and at the trial, including how he responded upon inquiry, the answers he gave when confronted with the accusations, the consistency of those answers with his subsequent defence, the strength of the case against him and the circumstances under which he came to be acquitted. See Litton PJ in *Tong Cun Lin v HKSAR* (1999) 2 HKCFAR 531 at p.535."

563. Mr. Chan submitted that there was no evidence that the 8th to 10th Specified Persons had brought suspicion on themselves.

Written submissions in reply for the SFC to the applications for costs: section 307P

The 7th and 8th Specified Persons

564. In their written submissions in reply Mr. Scott and Mr. Suen said that the SFC did not oppose the order sought on behalf of the 7th and 8th Specified Persons, Mr. Dar Chen and Mr. Thomas Yan, that the Tribunal make an order, pursuant to section 307P (1), in their favour in respect of the costs reasonably incurred by each of them in relation to the proceedings, to be

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[16] "(4) Subsection (1)(a) and (b) does not apply to—

(b) a person whose conduct the Tribunal considers has caused, whether wholly or in part, the Tribunal to investigate or consider the person's conduct during the course of the disclosure proceedings; or

(c) a person whom the Tribunal considers has by the person's conduct caused, whether wholly or in part, the institution of the disclosure proceedings."

[17] *Greencool Technology Holdings Limited* (24 January 2018), paragraph 445.

[18] *ibid*, paragraphs 446-7.

[19] *Hui Yui Sang v HKSAR* (2006) 9 HKCFAR, page 314, paragraph 13.

taxed if not agreed. In his oral submissions, Mr. Scott confirmed that to be the position of the SFC.

The 9th and 10th Specified Persons

565. On the other hand, Mr. Scott and Mr. Suen said that the SFC opposed the application made on behalf of the 9th and 10th Specified Persons for a similar order for costs. It was submitted that the exceptions to the making of such an order stipulated in section 307P (4) (b) and (c) were applicable.[20] That was the test. The test applicable in criminal proceedings, namely whether the defendant had brought suspicion upon himself, was not appropriate. Whilst that approach in criminal proceedings was appropriate having regard to the presumption of innocence, it was not applicable to civil proceedings.

566. In advance of the SFC instituting the disclosure proceedings by service of its Notice on the Tribunal, dated 29 March 2018, it was asserted that the overall upshot of the SFC's investigation was that Magic "did not have any written guidelines or written internal policies to comply with the disclosure of inside information." That much was made apparent from the reply of Linklaters, on behalf of Magic, to the SFC, dated 14 June 2016, in which material used in training seminars in March 2010 and June 2012 together with a memorandum from Messrs Chiu & Partners, dated July 2013, was identified as the only material that had been located that was responsive to the SFC's enquiry seeking the provision of such material.[21] Given that the *Guidelines* made it clear that, even as non-executive directors, Professor Yang Rude and Professor Dong had a role to play in ensuring that the board discharged its "responsibility for establishing and monitoring key internal control procedures"[22], the institution of proceedings against them was justified.

567. Mr. Scott said that the email, dated 21 December 2012, sent by Mr. Chris Cheng to all his fellow directors of Magic, attached to which was a copy of Part XIVA of the Ordinance and the *Guidelines*,[23] was only provided to the SFC after the commencement of these proceedings.[24] It is to be noted that copies of that material was attached to each of the witness

[20] Submissions for the SFC in Reply, paragraph 33.
[21] Exhibit Bundle, pages 1055-78.
[22] *Guidelines*, paragraph 59.
[23] Exhibit Bundle, pages 2962-3171.
[24] Submissions for the SFC in Reply, paragraph 33 (2).

statements of various Specified Persons, including the statements of Professor Rude and Professor Dong, dated 29 January 2019.

568. The Tribunal was invited to note that it had determined that Professor Yang Rude and Professor Dong were "passive" in their approach to discharging their duty to take all reasonable measures to ensure that proper safeguards existed to prevent a breach of a disclosure requirement by Magic.[25] The Tribunal had found that, although the circulation of the email, dated 21 December 2012, and its attachments by Mr. Chris Cheng begged the question of what measures Magic had taken/were to take, neither of them took any steps. Each of them merely asserted that they believed Magic had taken reasonable measures. Neither of them did anything. Professor Dong was unable to say if any measures had been taken.[26]

569. Given that evidence, Mr. Scott submitted that Professor Yang Rude and Professor Dong had been "let off the hook" by the Tribunal, "only because of their lack of business experience and reliance on others." In those circumstances, there should be no order as to costs in their favour. Alternatively, they should be awarded only a portion of the costs.

The hearing

570. At the hearing, Mr. Scott indicated that he had nothing to add to the SFC's written submissions in respect of the applications for costs by the 9th and 10th Specified Persons, other than suggesting that it could be said that they brought the proceedings on themselves, the Tribunal having found that they had done nothing at all to ensure compliance with Part XIVA.

571. For his part, Mr. Chan refuted the assertion made by Mr. Scott that the email sent by Mr. Chris Cheng to all his fellow directors, dated 21 December 2012, to which was attached Part XIVA of the Ordinance and the *Guidelines*, had only been provided to the SFC after the institution of proceedings against Professor Yang Rude and Professor Dong. He reminded the Tribunal that in the course of the evidence of Professor Yang Rude an issue had arisen of whether a copy of the email existed in the 'Unused material' disclosed by the SFC, which a little later resulted in Mr. Chan stating to the Tribunal "We have identified the same email from the unused material. That is the email box of Mr. Chris Cheng. We have managed to find the

[25] Report, paragraph 517.
[26] Report, paragraphs 521-3.

same email and it's in the exact same form as we have it in the bundles and in the attachment."[27] It is to be noted that Mr. Scott accepted that to be the case.[28]

Discussion

572. There is no dispute that the specific provisions set out in sub-sections 4 (b) and (c) of section 307P of the Ordinance describe the exceptions to the power of the Tribunal to make an order for costs in favour of a person alleged to be, but found not to be, culpable of a breach of disclosure requirement. For our part, we are satisfied that, having identified the gravamen of the provision, the appropriate approach was identified correctly and summarised succinctly in the report of this Tribunal in *Greencool Technology Holdings Limited* as being:[29]

> "In short, costs may not be awarded if the Tribunal is satisfied that, even though cleared of culpability, the specified person brought suspicion upon himself."

The email of 21 December 2012: in the possession of the SFC

573. The reliance by the SFC in its written submissions in reply, as part of the basis for asserting that the 9th and 10th Specified Persons ought to be denied their costs, namely that the SFC had not been provided with the email circulated by Mr. Chris Cheng to all his fellow directors, dated 21 December 2012, until the SFC had initiated these proceedings, is most surprising. It does not accord with the evidence adduced before the Tribunal.

574. In the course of his evidence, Professor Yang Rude said that he had located the email, dated 21 December 2012, from his own email records, which was then attached to his witness statement. Of the issue, which arose during his testimony, of whether that material was available from other sources, Mr. Scott told the Tribunal "During the course of the execution of the search warrant-the SFC did obtain Chris Cheng's computer, and we would expect to find that there."[30] As Mr. Chan pointed out in his oral address, as noted earlier, during the evidence of Professor Yang Rude Mr. Scott's expectation was vindicated. During Professor Yang Rude's evidence, a copy of the email was located in the unused material.

575. Earlier in the proceedings, having been told by Mr. Scott that the provenance of an email, dated 19 April 2013, from Mr. Leo Liu to Mr. Stephen Tang but copied to him, was material obtained as a result of the execution of a search warrant in December 2013, Mr. Chris

[27] Transcript; Day 14, pages 65-6.
[28] Transcript; Day 14, page 66.
[29] *Greencool Technology Holdings Limited*, paragraph 445.
[30] Transcript; Day 14, page 51.

Cheng agreed that was its provenance.[31] Later, he confirmed that the "SFC seized the emails".[32] For her part, in a witness statement, dated 29 March 2018, Ms. Wong Mei Mei said that the SFC had executed a search warrant on the officers of Magic on 18 December 2013 and seized material, including multiple emails to and from Mr. Chris Cheng.[33]

576. Clearly, the SFC had possession of the email, dated 21 December 2012, years before it initiated these proceedings in March 2018. Probably, the SFC came into possession of the email in December 2013. It appears that the fact of its possession was overlooked by the SFC.

577. Whilst the SFC may have been misled to some extent by the reply of Linklaters on behalf of Magic, dated 14 June 2016, in respect of the limited ambit of the material in the possession of Magic relevant to the question of the existence of written guidelines or policies in relation to inside information and its disclosure, which made no reference to the email dated 21 December 2012, that conduct is not attributable in any way to the 9th and 10th Specified Persons, who had ceased to be directors of Magic in 2014.

578. As it is apparent from our report, whilst we determined that the 9th and 10th Specified Persons were "passive" in their approach to taking all reasonable measures to ensure that proper safeguards existed to prevent a breach of disclosure requirement by Magic, in determining that they had done so the Tribunal had regard to all the circumstances, and in particular the general knowledge, skill and experience of each of them and those of their fellow directors,[34] together with the short period of time, namely four to five months, during which Part XIVA had been in operation at the material time.[35]

579. In the result, we are not satisfied that the conduct of either the 9th or 10th Specified Persons has caused, whether wholly or in part, the institution of these proceedings or caused, whether wholly or in part, this Tribunal to investigate or consider their conduct during these proceedings.

[31] Transcript; Day 11, page 18.
[32] Transcript; Day 11, page 51.
[33] Witness Evidence Bundle; pages 752-76, at pages 764-5.
[34] Report, paragraphs 528-9.
[35] Report, paragraph 530.

Conclusion

580. Accordingly, pursuant to section 307P (1) we order that the 7th to 10th Specified Persons have the costs reasonably incurred by each of them in relation to these proceedings, to be taxed if not agreed.

Mr. Michael Lunn, GBS

(Chairman)

Mr. Patrick Sun

(Member)

Ms. Cheung Man Kok, Christine

(Member)

Dated 5 May 2020.