MARKET MISCONDUCT TRIBUNAL

IN THE MATTER OF AN APPLICATION FOR STAY OF EXECUTION OF AN ORDER CONTAINED IN PART II OF THE REPORT OF THE MARKET MISCONDUCT TRIBUNAL RELATING TO DEALINGS IN THE SHARES OF QPL INTERNATIONAL HOLDINGS LIMITED

Applicant : Sun Hung Kai Investment Services Limited

Date of Hearing : 30 March 2009.

Date of Delivery of Reason for the Ruling and Orders : 2 April 2009.

Reasons for the Ruling refusing a stay of execution of an order and an order for costs and expenses in favour of the Government.

1. At an oral hearing on 30 March 2009, the Tribunal refused an application made on behalf of Sun Hung Kai Investment Services ("SHKIS"), made pursuant to section 265 of the Securities and Futures Ordinance (the Ordinance"), for a stay of part of the Order (that it "cease and desist") in respect of SHKIS made by the Tribunal on 25 February 2009, namely that pursuant to section 257(1)(c) of the Ordinance :

> "… it shall not again perpetrate any conduct which constitutes market misconduct;".

At the hearing we indicated that we would give our reasons for the refusal in due course. This we do now.

2. By letter of 18 March 2009, Messrs Haldanes, acting on behalf of Mr Chau Chin Hung, Edmund (1st Applicant), SHKIS (2nd Applicant) and Sun Hung Kai Strategic Capital Limited (3rd Applicant), informed the Tribunal that a Notice of Appeal had been lodged with the Court of Appeal pursuant to section 266 of the Ordinance in respect of various orders made by the Tribunal in both Part I of its Report, dated 22 January 2009, and Part II, dated 25 February 2009. Relevant to the application before the Tribunal were the following grounds of appeal, in which SHKIS was described as the 2nd Applicant :

> "4. The Tribunal erred in ordering that the … 2nd Applicant … shall not again perpetrate any conduct which constitutes market misconduct.
>
> 5. The Tribunal erred in failing to give proper consideration to the 2nd …Applicant(s) status as incorporated entities with perpetual duration when ordering that they shall not again perpetrate any conduct which constitutes market misconduct.
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> 7. Further or alternatively in relation to the 2nd Applicant, the Tribunal heard that other than a January 2009 disciplinary settlement made by the 2nd Applicant with the Securities and Futures Commission concerning the sale of Lehman Brothers Minibonds since 2002 the 2nd Applicant had otherwise enjoyed an unblemished record as a licensed entity since 1972. There being no finding or suggestion as to any likelihood of the … 2nd Applicant engaging in either false trading or price rigging in the future, the Tribunal erred in ordering that the 2nd Applicant shall not again perpetrate any conduct which constitutes market misconduct.
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> 9. Further or alternatively in relation to the … 2nd …Applicant(s), there having been no allegation, evidence or finding before or by the Tribunal as to forms of market misconduct other than false trading and price rigging, the Tribunal should have confined the orders made pursuant to section 257(1)(c)

> of the Ordinance to market misconduct in the form of false trading and price rigging.".

Stay of execution : the applicable principles.

3. The Presenting Officer, Mr Yeung, reminded the Tribunal of the provisions of section 268 of the Ordinance, namely :

> "Without prejudice to section 265, neither the lodging of an appeal nor the filing of an application for leave to appeal under section 266 by itself operates as a stay of execution of a finding or determination or an order (as the case may be) of the Tribunal unless the Court of Appeal otherwise orders, and any stay of execution may be subject to such conditions as to costs, payment of money into the Tribunal or otherwise as the Court of Appeal considers appropriate.".

4. The parties were agreed that the applicable principles are those identified in the judgments of Ma J (as he was then) in *Star Play Development Ltd v Bess Fashion Management Company Limited* (unreported, HCA 4726/2001) and *Wenden Engineering Service Company Limited v Lee Shing Yue Construction Company Ltd* (unreported HCCT 90/1999). Relevant to the application is Ma J's statement :

> "7. … unless a defendant can justify a stay of execution, one will not be ordered. The practice of the court is that a justification can be demonstrated only if good reasons exist.
>
> 8. Good reason can exist in a variety of forms. It will be wrong to set out an exhaustive definition of what would constitute good reasons, but, commonly, reference is made to factors such as whether the absence (or existence) of a stay would render an appeal nugatory (thus bringing into focus the relative prejudice that may be caused to the appellant and to the respondent by a stay of execution), and the merits of the appeal.".

In paragraph 9 of his judgment, Ma J went on to examine a more detail the various factors that he had identified.

The submissions made on behalf of SHKIS.

5. On behalf of SHKIS, Mr Brewer accepted that there was not "a strong likelihood of success" of the appeal, but contended that the appeal was "arguable" and submitted that unless a stay of execution of the "cease and desist" part of the Tribunal's order was made the appeal would be rendered "nugatory". In face of Mr Yeung' written submission, in which he drew the Tribunal's attention to section 257(5) of the Ordinance, namely :

> "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 market misconduct.".

Mr Brewer placed no reliance on the issue of "likelihood" articulated in paragraph 7 of the Notice of Appeal.

6. The burden of Mr Brewer's submission was that contained in paragraph 9 of the Notice of Appeal, namely that the Tribunal had erred in not confining its "cease and desist" order to the market misconduct of which it had determined as SHKIS was culpable, namely "false trading" and "price rigging". Furthermore, he contended that the terms of the Tribunal's order were themselves defective in that the order did not stipulate specifically all of the various forms of market misconduct embraced by the order.

7. Of the risk that SHKIS might face prosecution brought under section 257(10) of the Ordinance, namely for failing to comply with the "cease and desist order", Mr Brewer submitted in his written submission :

> "Applicant is a major financial services business with over 500 representatives. Breach of the order between now and disposal of the appeal by anyone of those representatives engaging in a form of market misconduct of an entirely different form to that in respect of which the Applicant was found to have engaged will be attributable to Applicant and result in criminal penalties… Such outcome cannot be cured by successful appeal and would render the outcome of such appeal nugatory to that extent. Neither could such outcome be compensated in damages or in any other manner."

The Reasons for the Tribunal's determination.

8. At the outset, the Tribunal reminded itself that the grounds of appeal articulated in the Notice of Appeal also contain a challenge to the finding by the Tribunal of culpability of market misconduct in the 2nd Applicant of "price rigging", contrary to section 275(1)(b) of the Ordinance. Of the issue taken with terms of the order in particular of the alleged failure to stipulate each and every form of market misconduct, the Tribunal notes that the term "market misconduct" is defined in section 245(1) of the Ordinance.

9. During the hearing Mr Brewer responded to the enquiry of the Chairman as to the likely date at which the appeal would be fixed by estimating that to lie six months in the future. It may be that estimate is optimistic and the Tribunal proceeded on the basis that it might be of greater duration. Mr Yeung informed the Tribunal that in his experience trials of prosecutions of market misconduct do not come before the courts in a period of less than 18 months after the commission of the events in question. It is the experience of the Tribunal, very unfortunately, that hearings of proceedings in the Market Misconduct Tribunal are held, typically, four to five years after the events in question. In consequence, Mr Brewer accepted that the risk of the appeal being rendered nugatory by an intervening

conviction or finding of culpability of SHKIS was remote. In any event, he accepted that if the remote possibility eventuated, application could be made for a stay of those proceedings pending resolution of the appeal.

10. In the result, the Tribunal was satisfied that in all the circumstances it was not appropriate to grant the application for a stay of execution of the "cease and desist" order made by the Tribunal in February 2009 pursuant to section 257(1)(c) of the Ordinance.

Costs.

11. At the conclusion of the proceedings, the Tribunal acceded to an application made by Mr Yeung for an order of costs and expenses in favour of the Government of $40,830.00. Mr Brewer indicated that he had no objection to the revised amount claimed on behalf of the Government. A Schedule setting out the basis upon which those monies were claimed is attached at Appendix I. The Chairman directed the Tribunal that the costs and expenses thereby incurred in respect of responding to the application for the grant of a stay of execution of the order lay within the provisions of section 257(1)(e) of the Ordinance, namely the power to make such an order in respect of :

> "costs and expenses reasonably incurred by the Government whether in relation or incidental to the proceedings…".

An application, pursuant to section 265 of the Ordinance, for a stay of execution of an order of the Tribunal is clearly incidental to the proceedings. Following the conclusion of the oral hearing the Tribunal invited the parties to make written submissions in respect of the issue of the appropriateness of making an order against the applicant in respect of the costs and expenses of the Tribunal itself. Both parties indicated by letter that they had no

submissions to make. In the result, the Tribunal determined that it was appropriate to encompass within the order made in favour of the Government the costs and expenses of the Tribunal. A Schedule setting out the basis upon which those costs and expenses, $31,835.00, was calculated is attached at Appendix II. Accordingly, the Tribunal orders the Applicant to pay the Government $72,665.00. Pursuant to section 264(1) of the Ordinance, notice is to be given to the Court of First Instance to register that order.

Miscellaneous.

12. The Tribunal wishes to thank counsel for their helpful and concise written submissions, which in no small measure reduced the time required for the oral hearing of the application. Those submissions are marked as exhibits in these proceedings.

The Hon Mr Justice Lunn
(Chairman)

Dr Cynthia K L Lam
(Member)

Mr Michael T P Sze
(Member)