

MARKET MISCONDUCT TRIBUNAL

IN THE MATTER OF DEALING IN THE LISTED SECURITIES OF  
QPL INTERNATIONAL HOLDINGS LIMITED

SPECIFIED PERSONS :

Sun Hung Kai Investment Services Limited

Cheeroll Limited

Mr Chau Chin Hung, Edmund

Ms Cheung Sau Lin, Connie

Date of Delivery of Ruling : 27 December 2007.

RULING

The Standard of Proof

1. There is no dispute that the requisite standard of proof to determine any question or issue before the Tribunal is that provided for by section 252(7) of the Securities and Futures Ordinance, Cap. 571 (“the Ordinance”), namely :

“... the standard of proof applicable to civil proceedings in a court of law.”.

At issue is the question of how that standard of proof is to be applied in practice.

## THE SUBMISSIONS OF COUNSEL FOR THE SPECIFIED PERSONS

2. Mr Brewer, supported by Mr Bell and Mr Patterson, made the following submission in paragraph 24 of his written submission dated 27 September 2007 :

“that (a) the inherent seriousness of these allegations, (b) the seriousness of the consequences which would follow if they are substantiated, and (c) the fact that the lack of particularity in the Statement renders the Tribunal’s task primarily an exercise in judgment and evaluation (rather than subjecting particularised allegations to a standard of proof) combined together to require the Tribunal either to be “ sure” of its determination(s), or otherwise to adopt a civil standard of proof which is to all intents and purposes equivalent to the criminal standard.”

3. Mr Brewer acknowledged that the judgment of Sir Anthony Mason NPJ, with whose judgment all the other judges agreed, in *HKSAR v Lee Ming Tee and the Securities and Futures Commission (Intervener)* [2003] 6 HKCFAR 336 articulated the appropriate approach to the application of the civil standard of proof to the particular factual situation being considered by a court or tribunal. In that case, the Court of Final Appeal was seized of an appeal from the decision of a judge in the court of First Instance to permanently stay proceedings in a criminal trial. In examining the judges’ findings of fact Sir Anthony Mason NPJ addressed the issue of the applicable standard of proof (paragraphs 70 and 71, pages 361H-362E) :

“70. It is not in dispute that the civil standard was applicable and that the civil standard of proof on the balance of probabilities calls for a degree of satisfaction which varies according to the gravity of the fact to be established. The principle is that in a civil case, even a civil case involving allegations of the commission of a criminal offence, the tribunal of fact must be reasonably satisfied of the fact sought to be established, having regard to the gravity of what is sought to be established, though not with the degree of certainty which is indispensable in criminal proceedings (*Briginshaw v. Briginshaw* (1938) 60 CLR 336 at 360-368, per Dixon J; *Helton v. Allen* (1940) 63 CLR 691 at 712-713, per Dixon, Evatt and McTiernan JJ; *Rejfeek v. McElroy* (1965) 112 CLR 517 at 520-522).

71. Statements may be found in Privy Council and English decisions which equate the burden of proof in civil cases of acts which are tantamount to a criminal offence to the criminal standard of proof. (See, for example, *Lanford v. GMC* [1990] 1 AC 13 at 19-20, per Lord Lowry; *In re A Solicitor* [1992] 2 WLR 552 at 562, per Lord Lane CJ.) It is now accepted, however, that the correct approach was that stated by Morris LJ in *Hornal v. Neuberger Products Ltd* [1957] 1 QB 247 at 266. This approach was approved in *In re H (Minors)* [1996] AC 563 where Lord Nicholls of Birkenhead (with whom Lord Goff of Chieveley and Lord Mustill concurred) said (at 586E) :

‘When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.’

Lord Nicholls’s remarks accord with the law as it has been stated and applied in Hong Kong (see *Attorney-General v. Tsui Kwok-leung* [1991] 1 HKLR 40).”.

4. Mr Brewer reminded the Tribunal that the impugned conduct identified in the Financial Secretary’s notice of 6 June 2007, namely :

“... market misconduct within the meaning of section 274 (“False Trading) and/or section 275 (“Price Rigging”) and/or section 278 (“Stock Market Manipulation”) of Part XIII of the Ordinance”

is conduct which may be the subject of criminal offences as provided for by identically worded provisions in sections 295, 296 and 299 respectively. Further, that pursuant to section 303 of the Ordinance on conviction on indictment there is available to the court a power to impose a fine of \$10 million and imprisonment for 10 years.

#### THE SUBMISSIONS OF THE PRESENTING OFFICER

5. For his part Mr Yeung emphasised the particular relevance of the following passage in the judgment of Sir Anthony Mason NPJ cited earlier :

“The principle is that in a civil case, even a civil case involving allegations of the commission of a criminal offence, the tribunal of fact must be reasonably satisfied of the fact sought to be established,

having regard to the gravity of what is thought to be established, **though not with the degree of certainty which is indispensable in criminal proceedings...** [Emphasis added].

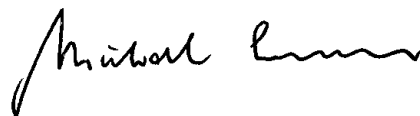
## A CONSIDERATION OF THE SUBMISSIONS

6. In the paragraph that followed the two paragraphs of Sir Anthony Mason's judgment, cited earlier, Sir Anthony addressed the application of the principles of law there identified to the facts of the case, in particular to the allegation in that case that the Securities and Futures Commission ("SFC") had improperly terminated an investigation in order to avoid making disclosure that might compromise the status of an expert witness :

"72. ...It is not possible to state in definitive terms the nature of the evidence which the court will require in order to be satisfied, in a civil proceeding, that a serious allegation of this kind, is made out. It would not be right to say that the requisite standard prescribes that the inference of wrongdoing is the only inference that can be drawn (cf. *Sweeney v. Coote* [1907] AC 221 at 222, per Lord Loreburn) for that is the standard which applies according to the criminal standard of proof. In the particular circumstances, it was for the respondent to establish as a compelling inference that very senior officers of the SFC had deliberately and improperly terminated the investigation into Meocre Li's conduct for the ulterior purpose alleged, sufficient to overcome the inherent improbability that they would have done so (see *ADS v. Brothers* (2000) 3 HKCFAR 70 at 91H, 96G-I, per Lord Hoffmann).".

## Conclusion

7. The Chairman has directed the Tribunal in respect of the application of the civil standard of proof in the determination of any question or issue before the Tribunal in the terms of paragraphs 70 and 71 of the judgment of Sir Anthony Mason cited earlier.



The Hon Mr Justice Lunn  
(Chairman)