The report of the Market Misconduct Tribunal into dealings in the shares of QPL International Holdings Limited between 6 May 2003 and 10 June 2003 (inclusive)

Part I & II : A report pursuant to section 252(3)(a), (b) and (c) of the Securities and Futures Ordinance, Cap 571.

CHAPTER 1

THE FINANCIAL SECRETARY'S NOTICE

1. The Tribunal was constituted by the Notice of the Financial Secretary ("FS") dated 6 June 2007, which is set out below :

"**IN THE MATTER OF THE LISTED SECURITIES OF QPL INTERNATIONAL HOLDINGS LIMITED (Stock Code 243)**

NOTICE TO THE MARKET MISCONDUCT TRIBUNAL PURSUANT TO SECTION 252(2) AND SCHEDULE 9 OF THE SECURITIES AND FUTURES ORDINANCE, CAP 571 ('THE ORDINANCE')

WHEREAS it appears to me that market misconduct, within the meaning (sic) section 274 ('*False Trading*') and/or section 275 ('*Price Rigging*') and/or section 278 ('*Stock Market Manipulation*') of Part XIII of the Ordinance, has or may have taken place arising out of dealings in the securities of QPL International Holdings Limited (Stock Code 243) ('the Company'), the Market Misconduct Tribunal is hereby required to conduct proceedings and determine –

(a) whether any market misconduct has taken place;
(b) the identity of every person who has engaged in market misconduct; and
(c) the amount of any profit gained or loss avoided, if any, as a result of the market misconduct.

Persons and/or Corporate Bodies Specified

Mr. CHAU Chin Hung, Ms. Connie CHEUNG Sau Lin, Cheeroll Limited and Sun Hung Kai Investment Services Limited

Statement for institution of proceedings

1. During the period between 6 May 2003 and 10 June 2003 (both days inclusive), CHAU Chin Hung (acting as a director and responsible officer of Sun Hung Kai Investment Services Limited) placed a significant number of bid orders with the authority and on behalf of Cheeroll Limited (an associated company of Sun Hung Kai Investment Services Limited) for the purchase of shares of the Company. The said orders were generally immediately cancelled, reduced in size, cancelled later on the same day or cancelled and re-issued at the same price shortly thereafter. Not one of Cheeroll Limited's bid orders was executed

during the said period. The placing of the orders followed by the revisions mentioned above created a false appearance of strong market demand of the Company's shares resulting in artificial support for and/or an increase in the price of the Company's shares in order to facilitate the share sales mentioned in paragraph 2 (*post*).

2. During the same period, Connie CHEUNG Sau Lin (acting as an employee or agent of Sun Hung Kai Investment Services Limited) sold through Sun Hung Kai Investment Services Limited substantial quantities of the Company's shares on behalf of Chinacal Limited and Honest Opportunity Limited respectively, the said sales were facilitated, as Connie CHEUNG Sau Lin was aware, by the false appearance of strong market demand for the Company's shares resulting from the artificial support and/or increase in the price of the Company's shares created pursuant to the conduct of CHAU Chin Hung, Cheeroll Limited and Sun Hung Kai Investment Services Limited mentioned in paragraph 1 (*ante*).

3. Accordingly, CHAU Chin Hung, Cheeroll Limited, Sun Hung Kai Investment Services Limited and Connie CHEUNG Sau Lin engaged or may have engaged jointly or severally in market misconduct contrary to Sections 274, 275 and 278 of the Ordinance.

Dated this 6th day of June 2007

(Signed)
(Henry Tang)
Financial Secretary".

CHAPTER 2

THE COURSE OF THE PROCEEDINGS

2. A chronology of significant steps in these proceedings is set out below :

Chronology.

6 May to 10 June 2003 - the events giving rise to the allegations of market misconduct;

6 June 2003 - the Securities and Futures Commission ("SFC") first letter to Sun Hung Kai Investment Services Limited ("SHKIS") seeking information of the impugned trading;

10 September 2003 - the first record of interview of Mr Edmund Chau Chin Hung ("Mr Edmund Chau");

3 October 2003 - the first record of interview of Ms Connie Cheung Sau Lin ("Ms Connie Cheung");

27 January 2005 - the last interview conducted of a witness called before the Tribunal;

6 June 2007 - the FS's Notice constituting the Tribunal;

27 August 2007 - appointment of the Ordinary Members of the Tribunal by the Chief Executive and of the Presenting Officer by the Secretary for Justice;

3 September 2007 - the first hearing of the Tribunal;

24 September, 5 and 12 October 2007 - submissions made on behalf of the Specified Persons :

(i) that the Tribunal lacked jurisdiction to proceed because of failure to comply with the requirements of the ordinance in respect of the FS's notice;

(ii) that the proceedings before the Tribunal were of a criminal nature;

(iii) that the statutory provisions providing for the use of testimony of the Specified Persons compelled outwith the Tribunal and the compellability as witnesses of the Specified Persons in these proceedings were invalid and as to the ambit and nature of the standard of proof;

(iv) that the proceedings ought to be "stayed" for delay;

12 October 2007 - the Chairman's ruling as to (i) and (ii);

27 October 2007 - Hartmann J ordered these proceedings stayed in HCAL 123/2007 and 124/2007, having granted leave to apply to judicial review of the Chairman's rulings of 12 October 2007 to Mr Edmund Chau and Ms Connie Cheung on the one hand and on the other hand Cheeroll Limited ("Cheeroll"), SHKIS, respectively;

9 November 2007 - Hartmann J lifted the stay of these proceedings to permit the Tribunal to address (iii) and (iv);

14 and 15 November 2007 - submissions in respect of (iii) and (iv);

27 December 2007 - the Chairman's rulings as to (iii) and the Tribunal's ruling as to (iv) [**Annexure I -** Ruling in respect of the application for a "Stay" of proceedings];

18 March 2008 - leave granted by Hartmann J to Mr Edmund Chau and Ms Connie Cheung to apply for judicial review in HCAL 22/2008 in respect of the Chairman's ruling as to compellability in (iii);

17 and 18 June 2008 - hearing of HCAL 123/2007, 124/2007 and 22/2008;

22 September 2008 - judgment of Hartmann and Lam, JJ in HACL 123/2007, 124/2007 and 22/2008 refusing to grant any of the relief sought [**Annexure II**];

23 September 2008 - the Tribunal ordered the substantive hearing to commence on 10 November 2008;

10, 13, 14 and 17 November 2008 - the Tribunal received material, including oral evidence from 4 witnesses of fact :

- Mr Ma Yu Lung ("Mr Ma") (an employee of SHKIS);
- Mr David Hui Yip Wing ("Mr David Hui") (a director of Sun Hung Kai & Co Limited ("SHK&Co") and Cheeroll);
- Mr Lin Xu Ming ("Mr Lin") (a director and beneficial owner of Chinacal Limited ("Chinacal"));
- Mr Chiu Sau Leung ("Mr Chiu") (a person authorised to trade in the account of Honest Opportunity Limited ("Honest Opportunity")); and
- the evidence of Mr Shek Kam Por ("Mr Shek"), as an expert witness in market misconduct;

17 November 2008 - all the parties to the proceedings made an application to the Tribunal for an order under section 33 of Schedule 9 of the Ordinance, addressing the issues of whether or not market misconduct had occurred and the identity of the miscreants, they all requesting, agreeing to and consenting to the making of that order [**Annexure III,** being the application and draft order];

18 November 2008 - Tribunal's ruling, declining to exercise its discretion to make the order requested [**Annexure III**];

18 to 21 November 2008 - the Tribunal received the evidence of the Specified Persons, Mr Edmund Chau and Ms Connie Cheung, but not the corporate Specified Persons, who did not avail themselves of the invitation to place material before the Tribunal, and the evidence on recall of Mr Lin and Mr Chiu;

26 November 2008 - the Tribunal received the closing submissions of the Presenting Officer and counsel on behalf of the Specified Persons;

29 November 2008, 7 and 9 January 2009 - the Tribunal received further written submissions from Mr Brewer.

Representation.

3. The Presenting Officer was Mr Keith Yeung of counsel and the Assistant Presenting Officer Ms Winnie Ho of the Department of Justice.

4. Messrs Haldanes were the instructing solicitors of counsel appearing for all the Specified Persons :

(i) Mr Adrian Bell of counsel appeared for Mr Edmund Chau Chin Hung;

(ii) Mr Kevin Patterson of counsel appeared for Ms Connie Cheung Sau Lin until 3 December 2007, thereafter she was represented by Mr Bernard Mak of counsel;

(iii) Mr John Brewer of counsel appeared for Cheeroll Limited and Sun Hung Kai Investment Services Limited.

CHAPTER 3

THE LAW

5. The Chairman gave the Tribunal the following directions in law :

Section 245(1) of Securities and Futures Ordinance Cap 571 ("the Ordinance") provides that :

" '**market misconduct**' means –

(a) insider dealing;
(b) false trading within the meaning of section 274;
(c) price rigging within the meaning of section 275;
(d) disclosure of information about prohibited transactions within the meaning of section 276;
(e) disclosure of false or misleading information inducing transactions within the meaning of section 277; or
(f) stock market manipulation within the meaning of section 278,

and includes attempting to engage in, or assisting, counselling or procuring another person to engage in, any of the conduct referred to in paragraphs (a) to (f);

'securities' means -

(a) shares, stocks…issued by, a body whether incorporated or unincorporated…;

'**relevant recognized market**' means -

(a) in relation to securities, means a recognized stock market;…".

6. Schedule 1 of the Ordinance provides that :

" '**recognized stock market**' means a stock market operated by a recognized stock exchange company.".

7. By operation of schedule 1 and schedule 5 Part 2 :

" '**automated trading services**' means services provided by means of electronic facilities, not being facilities provided by a recognized exchange company or a recognized clearing house whereby -

(a) offers to sell or purchase securities or futures contracts are regularly made or accepted in a way that forms or results in a binding transaction in accordance with established methods, including any method commonly used by a stock market or futures market;".

8. Section 19 of the Ordinance provides for recognition of the Stock Exchange of Hong Kong Limited ("SEHK") as a stock market in that it states :

> "(1) No person shall -
>
> (a) operate a stock exchange unless the person is -
>
> (i) the Stock Exchange Company; ….".

9. Section 252 of the Ordinance provides that -

> "(4) Subject to subsections (5) and (6), the Tribunal may identify a person as having engaged in market misconduct pursuant to subsection 3(b) if -
>
> (a) he has perpetrated any conduct which constitutes the market misconduct;
>
> (b) ….
>
> (c) notwithstanding that he has not perpetrated any conduct which constitutes the market misconduct -
>
> (i) the Tribunal identifies any other person as having engaged in market misconduct pursuant to subsection (3)(b); and
>
> (ii) he assisted or connived with that the person in the perpetration of any conduct which constitutes the market misconduct, with the knowledge that such conduct constitutes or might constitute market misconduct.".

10. In light of submissions made on behalf of the Specified Persons the Chairman directed the Tribunal, contrary to those submissions, that the phrase "connived with" does not require proof of the person so conducting himself that he had a duty and/or power to control the conduct of the person whose conduct constitutes the market misconduct.

<u>False trading.</u>

11. Section 274(1) of the Ordinance provides that :

> "(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 that dealings in, securities or futures contracts traded on a relevant recognized market or by means of authorized automated trading services.".

12. It is not necessary that the false or misleading appearance, as particularised in section 274(1)(a) or (b), is created. Breach of the section occurs when 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 that result. [See paragraph 42 of the judgment of Mason J in the High Court of Australia in *North v Marra Development Ltd* 4 ACLR 585 in construing section 70 of the Securities Industry Act 1970 (NSW) :

> "A person shall not create or cause to be created or do anything which is calculated to create, a false and misleading appearance of active trading in any securities on any stock market in the State, or a false or misleading appearance with respect to the market for, or the price of, any securities.".

13. The phrase "...does <u>anything</u> or causes <u>anything</u> to be done…", with the requisite intention in respect of the effect of "…creating a false or misleading appearance of :

(a) active trading in securities…"

is not limited to executed trades, namely sales or purchases, on the stock market. [underlining added]

<u>Price rigging.</u>

14. Section 275 of the Ordinance provides that :

> "(1) Price rigging takes place when, in Hong Kong or elsewhere, a person -
>
> ...
>
> (b) enters into or carries out, directly or indirectly any fictitious or artificial transaction or device, with the intention that, or being reckless as to whether, it has the effect of maintaining, increasing, reducing, stabilizing or causing fluctuations in the price of securities, or the price for dealings in futures contracts, that are traded on a relevant recognized market world by means of authorized automated trading services.
>
> …
>
> (3) For the purposes of subsections (1)(b) and (2)(b), the fact that a transaction is, or at any time was, intended to have effect according to its terms is not conclusive in determining whether that the transaction is, or was, not fictitious or artificial.".

Stock market manipulation.

15. Section 278 of the Ordinance provides that :

> "(1) Stock market manipulation takes place when, in Hong Kong or elsewhere -
>
> (a) a person enters into or carries out, directly or indirectly, 2 or more transactions in securities of a corporation that by themselves or in conjunction with any other transaction increase, or are likely to increase, the price of any securities traded on a relevant recognized market or by means of authorized automated trading services, with the intention of inducing another person to purchase or subscribe for, or to refrain from selling, securities of the corporation or of a related corporation or of the corporation;
>
> ……
>
> (3) In this section -
>
> (a) a reference to a transaction includes an offer and an invitation (however expressed); and
>
> (b) a reference to entering into or carrying out a transaction shall, in the case of an offer or an invitation referred to in paragraph (a), be construed as a reference to making the offer or the invitation (as the case may be).".

16. The word "likely" means that it is more probable than not. [See the judgment of Sackville J in the Federal Court of Australia in 1998 in *ASC v Nomura International* 29 ACSR 473 at 561]. In that case, the court was concerned with the construction of the provisions of section 998(1) of the Corporations Law, the then current counterpart of section 70 of the Securities Industry Act 1970, which provided that a person shall not :

> " (i) create; or
> (ii) do anything that is intended to create; or
> (iii) do anything that is likely to create
> a false or misleading appearance
> (iv) of active trading in any securities on a stock market;
> (v) with respect to the market for any securities; or
> (iv) with respect to the price of any securities.".

17. In giving the directions in paras 18 - 30 the Chairman acknowledges that close regard was paid to the directions given by the Chairman in MMT proceedings in respect of Sunny Global.

"Reckless".

18. The Chairman has directed the Tribunal in respect of the ingredient of recklessness in accordance with the judgment of Sir Anthony Mason NPJ, with whose judgment all the other judges agreed, in the Court of Final Appeal in *Sin Kam Wah v HKSAR* [2005] HKCFAR 192 at paragraph 44, page 210 D-G. A person acts recklessly in respect of a circumstance if he/she 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. If, due to his/her age or personal characteristics, he genuinely did not appreciate or foresee the risks involved in his actions he/she is not reckless.

The Standard of Proof.

19. Section 252(7) of Ordinance 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.".

20. That standard is the "balance of probabilities". In *Solicitor (24/7) v The Law Society of Hong Kong* [2008] 2 HKLRD 576 the Court of Final Appeal accepted, the correctness of the approach to the civil standard of proof expressed by Lord Nicholls of Birkenhead in *Re H & Others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 at p 586 D-G :

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. 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.".

21. In his judgment in the Court of Final Appeal in *Koon Wing Yee and Insider Dealing Tribunal* (unreported) FACV No. 19 of 2007 Sir Anthony

Mason NPJ cited that acceptance with approval (see paragraph 89). That is the approach to the standard of proof that has been adopted by this Tribunal.

Circumstantial evidence and inferences.

22. In his judgment in the Court of Final Appeal, with which all the other judges agreed, in *HKSAR v Lee Ming Tee* (2003) 6 HKCFAR 336 Sir Anthony Mason NPJ, having cited with approval the passage from the speech of Lord Nicholls quoted above, went on to address the proper approach to the drawing of inferences in circumstances of allegations of gross misconduct by senior officers of the SFC. Sir Anthony said :

> "…that conclusion was not to be reached by conjecture nor, as the respondent submitted, on a mere balance of probabilities. It was to be plainly established as a matter of inference from proved facts. 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 *Aktieselskabet Dansk Skibsfinansiering v Brothers & Others* (2000) 3 HKCFAR 70 at pp. 91H, 96 G-I, per Lord Hoffmann).".

23. Excerpts from the passage quoted above in the judgment of Sir Anthony Mason NPJ were cited with approval in the judgment of Mr Justice Ribeiro PJ (see paragraph 187) in the Court of Final Appeal in *Nina Kung alias Nina TH Wang and Wang Din Shin* (2005) 8 HKCFAR 387. In his judgment, Lord Scott of Foscote NPJ observed, in the context of allegations that Mrs Wang had procured the forgery and in a conspiracy with another was attempting to obtain probate as the will of a document she knew to have been forged, at paragraph 626 :

> "The probability of these allegations being true must be judged on the evidence adduced in the case. But it must also take account of propensity. If such an allegation is made against a person with a record of involvement in forgery or fraud, the strength of the other evidence necessary to satisfy the balance of probability test is obviously less than would otherwise be required. Evidence of propensity must go into the balance…… Evidence to a very high standard of cogency indeed is necessary before the court can be justified in finding either to be dishonestly involved in a conspiracy to promote a forged will.".

24. The Tribunal approached the drawing of inferences adverse to the Specified Persons with those considerations in mind. Mindful of the fact that the conduct alleged against all of the Specified Persons is of a nature that could have resulted in the bringing of serious criminal charges the Tribunal did not draw inferences from proved primary facts that any one of the Specified Persons was culpable of the alleged misconduct unless to do so was very compelling and the evidence was of a very high standard of cogency indeed.

Good character.

25. The Tribunal bore in mind that a person of good character is less likely than otherwise might be the case to have committed the alleged misconduct and that good character supports his/her credibility in respect of both his/her evidence in the Tribunal and outwith the Tribunal in his/her records of interview, statements made on his/her behalf, for example in letters by solicitors to the SFC.

Separate consideration

26. The Tribunal has considered the case against and for each of the Specified Persons separately.

Delay.

27. The Tribunal has borne in mind in favour of the Specified Persons that the events the subject of these proceedings occurred more than five years prior to the commencement of the substantive hearing. Nevertheless, it acknowledges

that more than one year of that delay was in direct consequence of the ultimately unsuccessful applications for judicial review mounted by all the Specified Persons. Inevitably, with the passage of time memories dim or fade and relevant documents may be lost or destroyed. As an illustration of the former, the Tribunal notes that on the recall of Mr Chiu and Mr Lin to deal, respectively, with trading orders and a telephone conversation said to have occurred with the former on 5 May 2003 and the latter on 26 May 2003, not surprisingly, both expressed great difficulty in assisting the Tribunal with their recollection. On the other hand, the Tribunal bore in mind of that the Specified Persons were alerted to the fact of enquiries being made by the SFC into these events at a much earlier stage :

(i) SHKIS were alerted to enquiries into their trading in QPL shares on 27 May 2003, by the SFC letter dated 6 June 2003, of which enquiries Ms Connie Cheung testified she knew soon after, when her colleagues came to her to seek verification of the persons involved in the trading, adding that she had raised that matter in conversation with Mr Edmund Chau;

(ii) Mr Edmund Chau was interviewed first by an officer of the SFC as a person under investigation on 10 September 2003 and subsequently re-interviewed twice;

(iii) Ms Connie Cheung was interviewed by an officer of the SFC on 3 October 2003.

Attribution of liability to the corporate Specified Persons.

28. The Tribunal has been directed by the Chairman as to its approach to the issue of the attribution of liability to Cheeroll and SHKIS. Whilst a company has a separate legal personality it has no ability to think or act itself. In order to enter into any transaction or to be held liable for its conduct in both the common law and statutory law it is necessary to determine which actions of its directors,

employees and other agents may be attributed to it. Of that issue, in *Lennard's Carrying Company v Asiatic Petroleum Ltd* [1915] AC 705 Viscount Haldane observed famously, at 715 :

> *"... a corporation is an abstraction. It has no mind of its own any more than a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation."*.

29. In *Meridian Global Funds Management Asia Limited and Securities Commission* [1995] 2 AC 500, in the judgment of the Privy Council, Lord Hoffmann observed (page 506 B-G) :

> "Any proposition about a company necessarily involves a reference to a set of rules. A company exists because there is a rule (usually in a statute) which says that a persona ficta shall be deemed to exist and to have certain of the powers, rights and duties of a natural person. But there would be little sense in deeming such a persona ficta to exist unless there were also rules to tell one what acts were to count as acts of the company. It is therefore a necessary part of corporate personality that there should be rules by which acts are attributed to the company. These may be called 'the rules of attribution'.
>
> The company's primary rules of attribution will generally be found in its constitution, typically the articles of association, and will say things such as 'for the purpose of appointing members of the board, a majority vote of the shareholders shall be a decision of the company' or 'the decisions of the board in managing the company's business shall be the decisions of the company'. There are also primary rules of attribution which are not expressly stated in the articles but implied by company law, such as :
>
> > *'the unanimous decision of all the shareholders in a solvent company about anything which the company under its memorandum of association has power to do shall be the decision of the company:'* see *Multinational Gas and Petrochemical Co. v. Multinational Gas and Petrochemical Services Ltd. [1983] Ch. 258*.
>
> These primary rules of attribution are obviously not enough to enable a company to go out into the world and do business. Not every act on behalf of the company could be expected to be the subject of a resolution of the board or a unanimous decision of the shareholders. The company therefore builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency. It will appoint servants and agents whose acts, by a combination of the general principles of agency and the company's primary rules of attribution, count as the acts of the company, and having done so, it will also make itself subject to the general rules by which liability for the acts of others can be attributed to natural persons, such as estoppel or ostensible authority in contract and vicarious liability in tort.".

30. Later in his judgment Lord Hoffmann went on to note : (page 507 B-F)

> "The company's primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations. In exceptional cases, however, they will not provide an answer. This will be the case when a rule of law, either expressly or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability. For example, a rule may be stated in language primarily applicable to a natural person and require some act or state of mind on the part of that person 'himself', as opposed to his servants or agents. This is generally true of rules of the criminal law, which ordinarily impose liability only for the actus reus and mens rea of the defendant himself. How is such a rule to be applied to a company?
>
> One possibility is that the court may come to the conclusion that the rule was not intended to apply to companies at all; for example, a law which created an offence for which the only penalty was community service. Another possibility is that the court might interpret the law as meaning that it could apply to a company only on the basis of its primary rules of attribution, i.e. if the act giving rise to liability was specifically authorised by a resolution of the board or an unanimous agreement of the shareholders. But there will be many cases in which neither of these solutions is satisfactory; in which the court considers that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation : given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.".

<u>Vicarious liability.</u>

31. Of the ambit of vicarious liability an employer for the conduct of his employee Lord Nicholls said in his speech in *Dubai Aluminium Co v Salaam* [2003]1 BCLC 32 (page 21 F-G; paragraph 23) :

> "Perhaps the best general answer is that the wrongful conduct must be so closely connected with acts the partner or employee was authorised to do that, for the purpose of the liability of the firm or the employer to third parties, the wrongful conduct *may fairly and properly be regarded* as done by the partner while acting in the ordinary course of the firm's business or the employee's employment. Lord Millett said as much in *Lister v Hesley Hall Ltd* [2002] 1 AC 215, 245. So did Lord Steyn, at pp 223-224 and 230.".

32. Lord Nicholls went on to consider liability of an employer for his employee's misconduct in circumstances where the employee was motivated to benefit, not himself, but the employer : (page 43 A-B; paragraph 30)

> "Take a case where an employee does an act of a type for which he is employed but, perhaps through a misplaced excess of zeal, he does so dishonestly. He seeks to promote his employer's interests, in the sphere in which he is employed, but using dishonest means. Not surprisingly, the courts have held that in such a case the employer may be liable to the injured third party just as much as in a case where the employee acted negligently. Whether done negligently or dishonestly the wrongful act comprised a wrongful and unauthorised mode of doing an act authorised by the employer, in the oft repeated language of the 'Salmond' formulation : see *Salmond on Torts*, 1st ed, (1907), p 83.".

33. Of the limits of the application of this broad principle Lord Nicholls noted that the employer was not liable if the employee had embarked upon a "frolic of his own" and was engaged only in furthering his own interests (page 44 B-E; paragraph 33) :

> "*In Kooragang Investments Pty Ltd v Richardson & Wrench Ltd [*1982] AC 462, 473-475, Lord Wilberforce drew this distinction with his accustomed lucidity and authority. He rejected the broad proposition that so long as the employee is doing acts of the same kind as those it is within his authority to do, the employer is liable and he is not entitled to show the employee had no authority to do them. Lord Wilberforce said :
>
> > '…the underlying principle remains that a servant, even while performing acts of the class which he was authorised, or employed, to do, may so clearly depart from the scope of his employment that his master will not be liable for his wrongful acts.'
>
> *In* the *Kooragang* case the employee, authorised to carry out valuations, negligently carried out a valuation without authority from his employers and not on their behalf. In doing so he was not acting as an employee of the defendant company. The company was not liable for his wrongful acts. That was a case of negligence, but a similar approach is no less applicable in cases of dishonesty.".

34. In *Lister and Others v Hesley Hall Ltd* [2002] 1 AC 215, a case in which the warden of a school boarding house had sexually abused boys in his care, Lord Millett considered the ambit of the vicarious liability of the warden's employers and observed that the Sir John Salmond's formulation of liability in the first edition of his book on *Torts*, namely "a master is not responsible for a

wrongful act done by servant and less it is down in the course of his employment. It is deemed to be so done if it is either (a) a wrongful act authorised by the master or (b) a wrongful and unauthorised mode of doing some act authorised by the master", had been qualified by a subsequent passage in the text (paragraph 69) :

> " 'But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised, that they may rightly be regarded as modes - although improper modes - of doing them'.
>
> This could, I think, usefully be elided to impose vicarious liability where the unauthorised acts of the employee are so connected with acts which the employer has authorised that they may properly be regarded as being within the scope of his employment.".

35. *In The Ming An Insurance Co (HK) Ltd v The Ritz-Carlton Limited* [2002] HKCFAR all of the judges in the Court of Final Appeal approved of the "close connection" test articulated in *Lister*. In his judgment, Mr Justice Bokhary PJ noted that the test was not limited to particular classes of cases (paragraphs 21-23) and concluded (paragraph 25) :

> "For all the foregoing reasons, I regard close connection as the basic criterion for vicarious liability for all torts committed by an employee during an unauthorised course of conduct, whether intentional wrongdoing or mere inadvertence is involved. This is not to say that this criterion is to be treated like a statutory formula. Its application is always to be undertaken in context.".

<u>The nature of these proceedings.</u>

36. In the joint judgment of Hartmann and Lam JJs in *Chau Chin Hung and Market Misconduct Tribunal* HCAL 123/2007, 124/2007 and 22/2008 (unreported 22 September 2008) it was determined that (paragraph 78) :

> "Tribunal proceedings are not criminal proceedings. Rather the primary purpose of such proceedings is regulatory in order to maintain the integrity of the financial market in Hong Kong.".

37. Of the powers of sanction of the Tribunal they observed (paragraph 53) :

> "We are satisfied, however, that the statutory sanctions given to the Tribunal are intended to be civil in nature and, having regard to the relevant criteria and the manner in which their significance should be assessed, are correctly to be judged as being civil.".

The judgment concluded (paragraph 84) :

> "As such, although proceedings before the Tribunal are civil, it does not follow that they are to be equated in all respects with private civil law proceedings.".

38. In his judgment, with which Hartmann JA agreed, in *Luk Ka Cheung and the Market Misconduct Tribunal* HCAL 49/2008 (unreported 18 November 2008) A Cheung J noted that the Tribunal did not determine civil liability (see paragraph 48). Of the nature of its powers of sanction, he noted (paragraph 51) :

> "…they are all designed to protect financial institutions and the investing public, or, in the case of costs orders, to serve a compensatory purpose.".

CHAPTER 4

THE MATERIAL RECEIVED BY THE TRIBUNAL

Agreed Facts.

39. At the invitation of the parties to the proceedings the Tribunal received "Agreed Facts" dated 17 November 2008.

Oral Witnesses.

Mr Ma Yu Lung.

40. Mr Ma said he was a dealer in securities licensed by the SFC accredited to SHKIS, having been first employed by the company in 1987. He confirmed that he had signed a transcript of record of interview conducted of him on 8 December 2003. His signature appears beneath a declaration at the end of the transcript that it was an accurate record of what he had said in the interview and that the answers were true to the best of his knowledge and belief.

41. He confirmed as accurate the description he had made of his duties at work, in particular in 2003, namely inputting buying and selling instructions from dealers in the Dealing Room into the Automatic Order Matching and Execution System ("AMS") of the SEHK. Those instructions were given by "Outcry" either by Ms Connie Cheung or Mr Edmund Chau. From his description of objects within the Tribunal the room was 7.35 metres by 3.80 metres. He sat at a desk/table in a line of four people, he being on the left end of the table. In sequence to his right, were Ms Anita Fung, Ms Connie Cheung and Mr Edmund Chau. He confirmed as true his description to the SFC that he could not always hear clearly the "Outcry" orders of Mr Edmund Chau and that

on every occasion he confirmed them with Ms Connie Cheung. In cross-examination, he accepted that that had not been necessary on every occasion.

42. In cross-examination, he explained that when he told the SFC that Mr Edmund Chau was in his seat in the Dealing Room less than 50% of the time he had meant about 45%. By contrast, he testified that Ms Connie Cheung was in the Dealing Room about 90% of the time. For his part, he worked from 09:00 to 18:00. Mr Edmund Chau did not arrive in the Dealing Room until after 10:00. Prior to Mr Chau's arrival he had a lot to do, inputting pre-market orders, which could be cancelled up to 09:45. However, even when cancelled nevertheless they would appear on the teletext after the market opened at 10:00. In his evidence, Mr Shek, a director of the Enforcement Division of the SFC, said that once such orders were cancelled thereafter they no longer appeared in the teletext.

43. Mr Ma said that the orders he inputted into the stock market AMS bore his code number, namely 5538, the fact of whether the order was a "Buy" or "Sell" and the price. Also, it would show at which place in the queue of "Buy" and "Sell" the particular order was positioned. There were three other licensed dealers in the Dealing Room and he agreed with the suggestion that sometimes it was very noisy in the room.

44. Mr Ma said that he had never raised with either Mr Edmund Chau or Ms Connie Cheung the fact that she was placing "Sell" orders with him on behalf of Chinacal and Honest Opportunity during times when Mr Edmund Chau was placing "Buy" orders with him on behalf of Cheeroll.

Mr Lin Xu Ming.

45. Mr Lin testified that at all material times he was a director of Chinacal, a company which he had acquired in November 2001 for the purpose of investment. He had signed the transcript of a record of interview conducted of him by an officer of the SFC on 24 October 2003.

46. Mr Lin said that he had known Mr Edmund Chau since the 1990s, from the time at which he had begun and maintained an account at SHKIS. He described him as an "investment friend". In October 2002, at the invitation of Mr Edmund Chau, he had agreed to Chinacal subscribing for some 9 million QPL shares in a placement made by that company. He told Mr Edmund Chau to sell the shares if a profit could be made. Mr Edmund Chau did so at a profit. In March 2003, as a result of another invitation from Mr Edmund Chau to subscribe for a placement of QPL shares, he agreed to Chinacal subscribing for over 20 million QPL shares. Once again, he simply told Mr Edmund Chau to sell the shares if he could make a profit. In cross-examination, he confirmed that Ms Connie Cheung had been dealing with Chinacal's account with SHKIS since 2001. He had given the instructions to sell the shares acquired in the second placement if a profit could be made to both Mr Edmund Chau and Ms Connie Cheung. On his instructions a member of the staff of Chinacal, Mr Mok Ying Sang ("Mr Mok"), liaised with Ms Connie Cheung in respect of her dealings in shares in the Chinacal account. For her part, Ms Connie Cheung faxed confirmation slips of transactions in Chinacal's securities account to Mr Mok, which information was conveyed by Mr Mok to Mr Lin. Later, he saw and inspected the monthly statements of Chinacal's account.

47. In cross-examination, Mr Lin confirmed that in May and June 2003 he had no idea that Mr Edmund Chau was placing "Buy" orders for QPL shares

through a different account. He agreed that he was probably in the Mainland at that time.

Mr Chiu Sau Leung.

48. Mr Chiu Sau Leung said that he had signed a transcript of a record of interview conducted of him by an officer of the SFC dated 14 November 2003.

49. In 2001 he had become an executive director of a fund manager called RIMC Advisers Hong Kong Ltd. One of their clients was Honest Opportunity, a subsidiary of China Online. Through trading in Honest Opportunity's account with SHKIS he had come to know Mr Edmund Chau, who worked at the company. In October 2002 and February 2003, on the recommendation of Mr Edmund Chau, he had caused Honest Opportunity to subscribe for placement shares issued by QPL. At the beginning of May 2003, he had given Ms Connie Cheung instructions to sell the QPL shares held in Honest Opportunity's account with SHKIS. Depending on the market price of QPL shares those instructions had been given on a daily basis, a minimum price level having been set for Ms Connie Cheung. As he recalled, the instructions had been given to Ms Connie Cheung before 09:00 so that she could make opening orders.

50. Mr Chiu said that he had never heard of company called Cheeroll, nor did he know that Mr Edmund Chau was placing "Buy" orders for QPL shares in May and June 2003 through any account.

Mr David Hui Yip Wing.

51. Mr David Hui testified that he was now the Group General Manager and a director of Chinachem. In 2003, he was the Deputy-Chairman and Chief Executive Officer of SHK&Co and a director of its wholly owned subsidiary, Cheeroll. He accepted that the annual returns of SHKIS stated that he was not a

director of the company in the period 2002 to 2004. In so doing, he accepted that he was incorrect in stating in a record of interview conducted of him by an officer of the SFC that he was a director of the company. He identified the transcript of that record of interview dated 27 January 2005 as bearing his signatures.

52. Mr David Hui accepted that he had explained in the record of interview that long before he had joined SHK&Co, a committee of that company, Exco, had authorised Mr Edmund Chau to be responsible for dealing in securities. By that he meant in its House or Proprietary account. He accepted that by a memorandum of SHK&Co, dated 7 June 2000, he had been designated by the board of that company to authorise any propriety trading of the Group. Furthermore, he accepted that the minutes of a meeting of the board of directors of Cheeroll, dated 16 July 1997, at which Mr Edmund Chau was described as being present and which minutes he had signed, Mr Edmund Chau was appointed as an Authorised Person to give oral trading instructions singly on two margin accounts held by the company to a limit of $1.5 trillion.

53. Mr David Hui agreed that a document in the name of SHK&Co and entitled "Proprietary Trading Policy and Manual" governed and regulated proprietary trading by SHK&Co. He agreed that the Policy and Manual stated that it was structured to identify the basis of a House or Proprietary trading activity and that proprietary trading was a business activity of the company conducted as a separate profit centre. Paragraph 3.5 provided that an account would be regarded as an House Account where the ultimate beneficiary of the profits and losses of the trading activity was SHK&Co. He agreed that it had to be kept separate from activities carried out by SHK&Co on behalf of its clients as fiduciaries or agents. Provision was made that those persons authorised as responsible employees to act on a House Account were not also involved in

dealing on a client or agency basis in equities. Paragraph 5.8 of the Policy and Manual provided that such authorised persons were to be physically separated from persons involved in agency business and from persons involved in dealing.

54. Of his role in Cheeroll, Mr David Hui said that Mr Edmund Chau sent him an e-mail at the end of each trading day containing the trades conducted. If the authorised trading limit was to be exceeded his permission was needed. However, that had never occurred.

55. Of SHKIS's activities, Mr David Hui confirmed that it was an important company within the Group dealing with its agency business, in particular licenced to deal and advise in securities. Mr Edmund Chau was both a "Responsible Officer" and director of that company, whom he knew worked in the Dealing Room of SHKIS in which agency business was conducted by other dealers of the company. Mr David Hui accepted that in those circumstances when Mr Edmund Chau was dealing with proprietary trading on behalf of Cheeroll he was not kept physically separate from the agency trading of other dealers. Although the Policy and Manual made provision for such physical separation there had never been any discussion about that matter.

56. Mr David Hui accepted that paragraph 8.2 of the Policy and Manual provided that the House Account must not be traded so as to support or to "…artificially raise the price of securities through a process commonly known as 'ramping'." However, he said that he was not aware of anything that was done to ensure compliance with the provision. For his part, he did not then possess long experience in securities and relied heavily on the Chief Operating Officer for operation matters and the Credit Officer in approving credits. In cross-examination, he confirmed that in 2003 that experience was the 3½ years, namely the period that he had been at SHK&Co. Mr David Hui resigned as an

executive director and became a non-executive director of SHK&Co in September or October 2003, leaving the Group altogether in the first half of 2004. However, at either of those dates he was not aware of any discussion or remediable measures taken to address the problem of separating propriety trading from agency trading.

57. Mr David Hui agreed that the account statements of Cheeroll with SHKIS in the months of February to June 2003 inclusive showed a very low level of activity and with the suggestion that if Cheeroll had employed a person, physically separate from the agency dealing SHKIS, to conduct propriety dealing that person would have been largely inactive.

58. Of the issue of his involvement in dealings in QPL shares, Mr David Hui confirmed as true his denial in his record of interview that in the first half of 2003 he had instructed any member of staff of the group to invest in QPL shares. However, he confirmed as true his description of Mr Edmund Chau having informed him that he wanted to invest in QPL shares and his denial that Mr Edmund Chau had sought either his advice or approval on that matter. Mr David Hui confirmed that evidence in the context of his response to the suggestion in the record of interview that Mr Edmund Chau had sought his approval and had been given his agreement to buy $20 million worth of QPL shares, in which answer he had added that he could not recall if Mr Edmund Chau had mentioned the monetary amount but, provided that it was within his authorised limit, he had full authority to do the trading. He accepted that $20 million was well within the $1.5 trillion authorised limit afforded to Mr Edmund Chau in proprietary trading for Cheeroll. Of his ability to offer advice in respect of QPL shares, Mr David Hui said that whilst he was aware that the Group had been involved in a placement of QPL shares he did not know what QPL was and

knew no one on its board of directors. As a result, it was a difficult for him to advise on the sale or purchase of QPL shares.

59. In cross-examination, Mr David Hui agreed that in proprietary trading Mr Edmund Chau had full discretion as to when and what stock to buy or sell within his monetary authorization. He confirmed the description that he had given in his record of interview, namely that Mr Edmund Chau had decades of experience in the stock market and was given a free rein to invest. He confirmed the answers he had given in his record of interview and that Mr Edmund Chau had never given him any reason for investing in QPL shares nor had he informed him in any way that it was intended to use the Cheeroll account to assist in the disposal of QPL shares by a client of SHKIS.

Mr Shek Kam Por.

60. Mr Shek was permitted to give evidence as an expert in the area of market misconduct. He is a director of the Enforcement Division of the SFC, by whom he has been employed since 1997. Also, he is a certified public accountant of the Hong Kong Institute of Certified Public Accountants and has been since 1996. Since 2002, he has been a fellow of the Association of Chartered Certified Accountants. His testimony had been received as that of an expert in both criminal trials, in the District Court and in the Magistrates Court, and by the Insider Dealing Tribunal. In the District Court, he testified on two occasions in respect of allegations of false trading by the creation of the false appearance of active trading and in the Magistrates court in respect of "scaffolding".

61. In his statement he described QPL as being principally engaged in the manufacture and sales of integrated circuit lead frames, heatsinks and stiffeners. From a table he compiled depicting data of activity in the stock market of the

shares of QPL, in contrast to that of the Hang Seng Index ("HSI"), he noted of the share price of QPL that :

(i) in the period 3 to 31 March 2003 it dropped from $1.50 to $1.34, a loss of 10.67%, whilst the HSI lost 6.84%;

(ii) on 30 April 2003, on an average daily turnover in the month of just over 2 million shares, it had eased to $1.33, a loss of 0.75% over the months, whilst the HSI gained 0.96%;

(iii) in the period 2 to 30 May 2003, on an average daily turnover of 14.45 million shares, it rose from its close of $1.33 on 30 April 2003 to $1.63 on 30 May 2003, a gain of 22.56% whilst the HSI gained 8.83%;

(iv) on 30 June 2003 it had eased to $1.52 having closed at $1.70 on 17 June 2003.

"Scaffolding".

62. Mr Shek said that the term "scaffolding" was unique to Hong Kong, elsewhere it being described in phrases such as : "the creation of a false appearance of a strong demand". It is a type of market manipulation in which the perpetrator's attempt to distort the picture of supply and demand of a stock by inputting a large number of orders of a big size without the intention of executing those orders. The orders are usually cancelled before they are matched. He explained that if the market manipulator wishes to sell shares, a large number of large orders on the "Buy" side would create the appearance of a strong demand for the stock. That information was available to the market through stock market terminals provided by information vendors, for example displaying five price queues on the "Buy" side, namely the highest bid price and the next four price queues separated by one spread between each queue together with the total amount of shares and number of orders in each of the "Buy" and "Sell" queues. The quantity of shares in the respective queues provides a good

indication of existing market demand/supply and the possible direction of the share price. By inputting large orders on the "Buy" side, the manipulator can create a false and misleading impression that there is strong demand for the shares, so that potential buyers of the shares may consider raising their bid prices. In consequence, "scaffolding" on the "Buy" side has the effect of supporting, or even pushing up the price of a stock.

The pattern of the placing of orders by Cheeroll for QPL shares.

63. Mr Shek noted that in the months of April to June 2003, inclusive, Cheeroll held no QPL shares. From 1 April to 5 May 2003, no "Buy" orders for QPL shares were placed by Cheeroll. However, beginning on 6 May 2003, the day after selling of QPL shares began in the account of Honest Opportunity, and ending on 10 June 2003 a total of 565 orders, of which 314 were "Buy" orders, were placed by Cheeroll with SHKIS for QPL shares. In particular, in the eight day trading period on and between 26 May and 5 June 2003 ("the Analysed Period") the following orders were placed by Cheeroll with SHKIS :

(i) 157 "Buy" orders at an average order of 457,000 shares;

(ii) 41 "Reduce" orders of previously placed "Buy" orders; and

(iii) 110 "Cancel" orders.

Not a single share was acquired in the course of those orders.

64. It was Mr Shek's opinion that during the "Analysed Period" the pattern of placing orders by Cheeroll was consistent with the modus operandi of "scaffolding" in particular, having regard to :

(i) the large number of large "Buy" orders that were not filled;

(ii) the large number of cancel/reduction orders.

As to (i).

65. He noted that the average size of the 157 "Buy" orders by Cheeroll was 457,000 shares, of which 86 of the orders were for 600,000 shares, the maximum quantity allowed for an order, whilst 27 were in the range of 400,000 to 500,000 shares. By comparison the average size of "Buy" orders inputted by others in the period was only about 49,000 shares. Of the fact that none of the "Buy" orders was executed, Mr Shek noted that when selling pressure resulted in driving down the highest "Buy" price down, Cheeroll reacted by cancelling its high bids and replacing them with "Buy" orders at a lower price or it queued up at the back of the same price queue.

As to (ii).

66. Mr Shek noted that the cancellation of 110 orders represented 70% of the "Buy" orders that had been placed by Cheeroll, in addition to which 41 orders were reduced in size. That conduct was consistent with a strategy of avoiding "Buy" orders being hit.

Cheeroll's orders on 26 May 2003.

67. One of the illustrations of the pattern of ordering made by Cheeroll for QPL shares selected by Mr Shek was in respect of 26 May 2003. On that day Cheeroll placed 26 "Buy" orders for a total of 13.7 million QPL shares, all but one of which orders was of 400,000 or more to the maximum of 600,000 shares, and 12 cancellation orders to a total of 5.2 million QPL shares. At 10:21 the nominal price of QPL shares was $1.66 per share, at which time Cheeroll placed 2 "Buy" orders for a total of one million shares at $1.61. At 10:27:44 the nominal price had already dropped one spread to $1.65, with the quantity of shares in the primary "Buy" queue at that price decreased to 263,000 shares, which implied that the market was dominated by sellers and any further selling orders would likely send the price of QPL lower. At 10:27:45 Cheeroll

cancelled its "Buy" order for 500,000 shares at $1.64 and replaced it with two "Buy" orders for 900,000 shares at $1.60. After Cheeroll's activities, the nominal price rose from $1.65 to $1.69, but fell back to $1.66 at 15:54. However, between 15:54:52 and 15:55:01 five "Buy" orders by Cheeroll, each of which was for 600,000 shares, were placed, to be followed in the last two minutes before the market closed at 16:00 by five further "Buy" for 600,000 shares at the same price.

68. Of that conduct, Mr Shek observed that prior to the five "Buy" orders placed in the last two minutes of trading by Cheeroll there were 53 "Buy" orders to a total of 1.4 million shares in front of the first bid of Cheeroll in the primary bid queue at $1.65. Given the fact that Cheeroll had withdrawn a "Buy" at $1.64 in the morning, the placing of 10 "Buy" orders for a total of 6 million QPL shares at $1.65 implied an eagerness to acquire QPL shares. In those circumstances, Mr Shek said he could find no sensible reason why Cheeroll did not simply take the orders from the "Sell" side rather than queuing up at the back of the primary bid queue, particularly near the close of the market. However, he noted that the placing of the orders for the 6 million shares gave the market the impression that there was strong demand for QPL shares, a demand that the stock market terminals would reflect as having increased by 154%.

<u>The pattern of the placing of orders by Chinacal for QPL shares.</u>

69. Mr Shek observed, from the statements of account of Chinacal with SHKIS that, from the commencement of sales of QPL shares in that account on 26 May up and until 17 June 2003, 6,376,000 QPL shares were sold. In the eight trading days of the "Analysed Period" 4,876,000 QPL shares were sold by Chinacal in the price range of $1.64 to $1.68. In his opinion, the pattern of the

placing of orders was normal and the disposal of those shares was made in an orderly manner.

The pattern of the placing of orders by Honest Opportunity for QPL shares.

70. Mr Shek observed, from the statements of account of Honest Opportunity with SHKIS, that from 5 May to 17 June 2003 Honest Opportunity sold a total of 22 million QPL shares. In that period, all the executed trades in QPL shares were sales, save for the purchase of 300,000 QPL shares on 29 May 2003. In Mr Shek's opinion the prices at which those shares were sold was within a normal range and the disposal effected in an orderly manner.

Orders of Cheeroll placed within five minutes of orders of Chinacal and Honest Opportunity. [**Annexure IV**]

71. Mr Shek noted that in the period 6 May to 9 June 2003 there were 48 occasions on which orders placed on behalf of Cheeroll were placed within five minutes of orders placed by Chinacal or Honest Opportunity. In particular, it is to be noted that in the "Analysed Period" there were 13 such "Buy" orders made by Cheeroll within five minutes of "Sell" orders by Chinacal or Honest Opportunity. Of the fact of the making of orders by Cheeroll within a five-minute period of the making of orders by Honest Opportunity and Chinacal, Mr Shek was of the opinion that the effect of the "scaffolding" was to facilitate the selling of other parties, namely Honest Opportunity and Chinacal.

72. In cross-examination, Mr Shek produced for the first time a chart which tracked the relative position of the price of QPL shares in contrast to that of the HSI with 3 March 2003 being taken as the starting point of 100% for both. For most of the period prior to early May 2003, the relative movement of the share price of QPL in contrast to the HSI was negative. However, in the period thereafter until about mid June 2003 it outperformed the HSI relatively.

Subsequently, Mr Shek identified QPL as having been a constituent stock of the "Hang Seng Small Cap Index", in respect of which he produced a similar chart and tabular information. That chart was broadly similar to the first chart in his depiction of the relative movements of QPL shares and the HSI.

73. In cross-examination by Mr Bell, Mr Shek agreed that in his statement he had said of "scaffolding" on the "Buy" side that it "… has the effect of supporting, or even pushing up the price of a stock". However, he agreed that it could, but did not necessarily, have that effect. Nevertheless, when it was suggested to him that there was no evidence that the price of QPL shares had in fact been pushed up during the "Analysed Period" Mr Shek said that in that period the price of QPL shares was relatively strong adding : "... its share price is at a relatively high level when compared to its own trading because it was trading above the 1.6 level at the relevant time". However, he went on to agree that the closing price of QPL shares on 26 May and 5 June 2003 had been the same, namely $1.66. By contrast, the Hang Seng Small Cap Index had risen in the same period from 1078 to 1091, an increase of 1.20%. Nevertheless, in his opinion the relative movement of the price of QPL shares was quite in line with the Hang Seng Small Cap Index.

<u>Mr Edmund Chau Chin Hung.</u>

74. Mr Edmund Chau, one of the Specified Persons, testified that he is and was at all material times a director of SHKIS. Also, at the material time he was licensed to deal in securities under the Ordinance and approved as a "Responsible Officer" of that company by the SFC. He had been interviewed as a "person under investigation" by an officer of the SFC on three separate occasions, namely 10 September and 20 November 2003 and 19 April 2004. He identified his signatures on various places on the transcripts of those records of interview. In answer to questions from his counsel, Mr Bell, he testified that

answers he had given to selected questions to which his attention was drawn were true and accurate. He said that he had never been convicted of any criminal offence, nor had he received an adverse finding from a Tribunal or faced any disciplinary hearings relating to his profession.

75. Mr Edmund Chau testified that he had been born and educated to High School level in Hong Kong, after which he had taken his O-level and A-level examinations in England before obtaining a BSC degree in applied mathematics from Queen Mary College of the University of London. In 1974, he returned to Hong Kong and took up employment, involving finance and banking, with Sun Hung Kai Finance Company Limited, a subsidiary of Sun Hung Kai Securities Co Ltd. Having left that employment in 1983 in the remainder of the decade he worked, first at Citibank and then at China Everbright Co Ltd. From 1989 to 1991, he was employed by stockbroking company, Mok Ying Kee. From 1991 to 1993, he worked for Crusader Holdings Limited and then for the stockbroker Goodwill Group until 1997. He was a licensed dealer in securities for various subsidiary companies of the Goodwill Group in that period.

Mr Edmund Chau's positions at SHK&Co and SHKIS.

76. In July 1997, he was employed by SHK&Co in the capacity of an executive director of SHKIS, a wholly owned subsidiary, and Sun Hung Kai Commodities Ltd. In 2002 and 2003, he was one of seven and eight directors respectively of SHKIS. There was no chairman of the board of directors. In addition to being an executive director and "Responsible Officer" of the company he was also one of the "Group A" signatories. He was head of the Dealing Department, which department dealt in securities and other products on an agency basis on behalf of clients. In that capacity he was in charge of executions of trades and of a staff of more than 40 people employed in different places. He was responsible for overall supervision of the dealing staff. Ms

Connie Cheung, his direct subordinate, was one of two persons in charge of the actual dealing.

Mr Edmund Chau's position at Cheeroll.

77. Mr Edmund Chau said that since 1997 he had been an "Authorised Person", granted authority by SHK&Co to operate the "House" account, Cheeroll to a permitted exposure of $1.5 trillion. Cheeroll was a wholly owned subsidiary of SHK&Co. He was permitted to give oral trading instructions to SHKIS. He was never a director or officer of Cheeroll. Mr Edmund Chau acknowledged that as "Authorised Person" of Cheeroll his conduct was subject to SHK&Co's "Proprietary Trading Policy and Manual". It is to be noted that paragraph 5 describes the responsibilities of "Authorised Persons" in "…managing the House Account for which they are responsible" and provides :

> "5.4 Subject to the PTC* the authorized person shall be responsible for the management of the House Account to which they have been allocated responsibility, and also of ensuring compliance with the guidelines and with the reporting requirements.".

Of those managing House Accounts it states :

> "5.8 Those persons shall be physically separated from persons involved in agency business and from persons involved in dealing, research and corporate finance.".

78. Mr Edmund Chau explained that in his current position with SHK&Co he remained in charge of proprietary trading, but was no longer in charge of dealing. His office was separate from the places at which agency dealing was done.

The two placements of QPL shares : October 2002 and February 2003.

79. Mr Edmund Chau said that he had been involved in two placements of QPL shares in October 2002 and February 2003. His role had been in finding

* Proprietary Trading Committee (PTC), see 3.3.

two of the placees for the placement, namely Chinacal and Honest Opportunity. On each occasion the placing agent had been Sun Hung Kai International Limited. In October 2002, 29 million QPL shares had been placed at $1.50 per share, that representing a discount of 16.20% to the closing price of the shares prior to suspension and a discount of 2.66% to the average closing price for the previous 10 trading days. As placing agent, Sun Hung Kai International Limited was to receive a placing commission of 4.80% on the gross proceeds of the placing. Those details were confirmed by an announcement of QPL dated 24 October 2002. Mr Edmund Chau calculated that the commission came to $2,088,000.00.

80. In February 2003, 77 million QPL shares had been placed at $1.52 per share, that representing a discount of 11.63% to the closing price of the shares on the day before the suspension of the shares and at 9.52% to the average closing price in the last 10 trading days. As placing agent Sun Hung Kai International Limited was to receive a commission of 5.00% of the gross proceeds of the placing. Mr Chau calculated that to be $5,852,000.00. Although the commission was received by Sun Hung Kai International Limited, some of it was distributed to SHKIS : $112,500.00 in respect of the October 2002 placement and $334,000.00 in respect of the February 2003 placement. 45% of those monies were distributed to salesmen in SHKIS and the rest retained by the company. He received none of that money.

81. Mr Edmund Chau said that on the occasion of both placements he had spoken to both Mr Lin, whom he knew to be the beneficial owner of Chinacal, and Mr Chiu, whom he knew to be authorised to act on behalf of Honest Opportunity, and recommended that they subscribe to the placements. He had pointed out that the shares were being placed at a discount to the then market price, that QPL was a rather liquid stock and that the shares could be acquired

for short-term trading purposes. He had known Mr Lin since 1997, as a client of SHKIS, and knew him to be an important client in light of his turnover with the company. He knew Mr Chiu to be a fund manager, who was normally in contact with Ms Connie Cheung, and that Honest Opportunity was a wholly owned subsidiary of China Online, a listed company. On both occasions his recommendation was accepted and in October 2002 11 million and 10 million QPL shares were place respectively with Honest Opportunity and Chinacal. In February 2003, 22 and 21 million shares were placed with them, respectively.

82. Mr Edmund Chau said that after the placement of the shares to Chinacal in both October 2002 and February 2003 Mr Lin had told him to sell the shares if a profit could be made. Mr Chiu had given him no such instructions, rather he dealt directly with Ms Connie Cheung. He agreed that the Transaction records of SHKIS for the account of Chinacal and Honest Opportunity stated that all of the shares acquired in the October placement had been sold by early and mid-November 2002 respectively. Mr Edmund Chau said that he had passed on to Ms Connie Cheung Mr Lin's instructions in February 2003 to sell the QPL shares in Chinacal's account, if a profit could be made, telling her to watch the price and contact the client and sell when a profit could be made. Thereafter, he left the matter to Ms Connie Cheung. He had no conversation with her in respect of the disposal of QPL shares in the account of Honest Opportunity.

<u>The sale of QPL shares in the accounts of Chinacal and Honest Opportunity.</u>

83. The Transaction records, which Ms Connie Cheung testified she retrieved from her computer from records that she had made contemporaneously with the trading, state that apart from sales of a relatively small number of QPL shares in both the accounts of Chinacal and Honest Opportunity on 14 March 2003 at $1.50 per-share no QPL shares were sold in either account until May 2003. On 5 May 2003, 1.3 million shares in the account of Honest Opportunity

with SHKIS were sold at $1.50 per share, namely at a loss compared with the placement price.

Orders in respect of QPL shares placed in the account of Cheeroll.

84. Mr Edmund Chau said that he was responsible for all orders in respect of QPL shares made by Cheeroll with SHKIS. The first of such orders was a "Buy" order made on 6 May 2003. On and between that date and 10 June 2003 he made numerous "Buy", "Cancel" and "Reduce" orders for Cheeroll in its account with SHKIS. He explained that the main reason he had placed such "Buy" orders was "scaffolding". He hoped that Chinacal and Honest Opportunity could sell more actively and did so because he had been the one who had recommended that they subscribe for these QPL shares. After the placement in February 2003, Hong Kong had suffered from "SARS" and the QPL share price was less than that subscribed for at the placement. Also, he wanted the two companies to be able to sell their QPL shares more quickly and he thought that "scaffolding" would help.

85. When asked why it was that he had begun "scaffolding" on 6 May 2003 Mr Edmund Chau explained that on 5 May 2003 Honest Opportunity had begun selling QPL shares in its account with SHKIS. He had heard Ms Connie Cheung giving orders by "Outcry" in the Dealing Room. He agreed that those sales of 1.3 million shares were at $1.50 per share, a loss in relation to the placement price of $1.52 per share.

86. Mr Edmund Chau denied that he had had any conversation with Ms Connie Cheung or anyone else about the deployment of this tactic of "scaffolding". Moreover, he did not consult anyone else. He denied that in employing the technique of "scaffolding" he intended to influence the price of QPL shares.

87. Mr Edmund Chau said that both he and Ms Connie Cheung placed their orders with Mr Ma in the Dealing Room by "Outcry". He agreed with Mr Ma's description of the size of the room and the positions in which he, Mr Ma, Ms Anita Fung and Ms Connie Cheung sat in line at a table, with Ms Connie Cheung between him and Mr Ma. He said that he talked loudly. Nevertheless, apparently it was necessary on about 30% of the occasions that he gave "Outcry" orders to Mr Ma for the latter to confirm with Ms Connie Cheung the orders that he had given. For his part, he heard Ms Connie Cheung placing orders and expected that, if she was listening, she would be able to hear the orders he gave to Mr Ma.

88. In giving "Buy" orders on behalf of Cheeroll for QPL shares he agreed that he intended that an impression be created of increased demand and that would make potential buyers more ready to buy QPL shares. He intended to achieve that objective in order that Chinacal and Honest Opportunity could sell their holdings of QPL shares more easily and more quickly. He agreed that, with his experience as a licensed dealer in securities, he understood that the price of shares was dictated by supply and demand for that share. Prices rose with rising demand, or at least prices could be maintained with rising demand. He accepted that when he placed those orders he knew that in creating an impression of greater demand than really existed the price of the shares could be increased or maintained.

89. Mr Edmund Chau said that he had continued "scaffolding", by making orders for QPL shares on Cheeroll's account with SHKIS until 10 June 2003. He discontinued that activity on that day, having come to know of the fact of the receipt of the letter of the SFC dated 6 June 2003 in which SHKIS had been asked to provide information of its trading orders in respect of the shares of QPL

on 27 May 2003. He agreed that the effect of "scaffolding" in creating an illusion of apparent demand for QPL shares was a temporary effect in that Ms Connie Cheung had a limited window of opportunity to take advantage of the effect of that conduct. However, he was adamant and that he never had any discussion with Ms Connie Cheung about the "scaffolding" that he was causing in QPL shares. In particular, there never was an agreement between them.

90. At the conclusion of his testimony the Chairman drew Mr Chau's attention to several passages in his second and third records of interview in which he had denied allegations put to him by the SFC interviewing officer that his trading through Cheeroll in QPL shares was "scaffolding". He accepted that those denials were not true.

Ms Connie Cheung Sau Lin.

91. Ms Connie Cheung testified that she was now employed as a senior manager of SHKIS. She was first employed by SHK&Co in August 1997 as a licensed dealer in securities. Having been educated in Hong Kong to Form V level she had lived in Toronto from 1989 until 1994, when she became employed in Hong Kong as a settlement assistant with Standard and Chartered Securities. From 1995 to 1997, she was employed by Lippo Securities, first in the Settlement Department and then from 1996 as a licensed dealer in securities.

92. In October 2003 she had been interviewed by an officer of the SFC and identified a transcript of the interview which she had signed. In 2003, she was the person in charge of the seven people in Dealing Team II operating in the Dealing Room of SHKIS. Prior to 2001, she had been employed by the company as a terminal operator inputting trades in the same way as Mr Ma. In 2001, her duties changed and she was assigned as a dealer to look after VIP clients, of whom 40 to 50 were active. Two of those clients were Chinacal and

Honest Opportunity. When she assumed those duties she had met Mr Lin of Chinacal when he came to visit her in her office. Similarly, she came to know Mr Chiu, who was an authorised person who gave her instructions to trade in shares on behalf of Honest Opportunity. He contacted her by telephone on days when he wished to trade. Also, for her part she would contact him to offer her services if they were needed.

93. Ms Connie Cheung said that she was aware of the fact of the placement of QPL shares to Chinacal and Honest Opportunity in October 2002 and February 2003 and that Mr Edmund Chau had been involved in their subscribing for those placements. In February 2003, Mr Edmund Chau had told her in respect of the shares placed with Chinacal that month that it was Mr Lin's instructions to SHKIS that if money could be made by selling the shares, the shares should be sold. She said that she had confirmed those instructions with Mr Lin :

> "Around or before May 2003. Sometime before May 2003 Mr Lin instructed me : 'If the price goes above 1.60, sell for me.' ".

94. The "Transaction records" that Ms Connie Cheung printed out from her own contemporaneous computer records of trading in the accounts of Chinacal and Honest Opportunity with SHKIS state that, following the placement of QPL shares in February 2003, 124,000 and 300,000 QPL shares respectively were sold at $1.50 on 14 March 2003. Thereafter, none were sold in either account until 1.3 million QPL shares were sold in the account of Honest Opportunity on 5 May 2003 at $1.50 per share. The first sales of QPL shares in the account of Chinacal were made on 26 May 2003.

<u>The sale of QPL shares in the account of Honest Opportunity from 5 May 2003.</u>

95. Of the circumstances in which the sales were made in the account of Honest Opportunity in May 2003, she said that Mr Chiu of Honest Opportunity

had told her to keep an eye on the price of QPL shares and that if they came back to $1.50 per share he was willing to sell. She began to do so on 5 May 2003. Of the two "Buy" orders for a total of one million QPL shares at $1.46 per share placed after 15:55 shortly before the end of the trading day on 5 May 2003, she said that Mr Chiu had telephoned her and told her to place those orders so that he could see if he was able to buy shares, so that he could do "day-trading". She denied that she had placed those orders on her own initiative and that she had begun "scaffolding".

96. Mr Chiu was recalled to give evidence on this issue. However, he said that he found it very difficult to remember the instructions given for an individual day five years previously. Generally, he gave Ms Connie Cheung a standing instruction by telephone in the morning of the day on which he traded. He agreed that on 5 May 2003 the standing instruction he had given was to sell QPL shares at $1.50 or above. He could not recall whether or not he had given her instructions to place the "Buy" orders placed after 15:55.

Ms Connie Cheung's knowledge of the fact of "Buy" orders placed by Mr Edmund Chau for QPL shares.

97. Ms Connie Cheung agreed that the trading records, attached to Mr Shek's statement, state that on 6 May 2003 a series of large "Buy" orders were placed by Cheeroll, which orders were cancelled or reduced so that not one order was executed. However, she said that on that day she did not know that the orders were made by Cheeroll. She had heard Mr Edmund Chau making orders by "Outcry", but she did not know on which account he was trading. She could not remember if this was a day on which she had reconfirmed Mr Edmund Chau's instructions for the benefit of Mr Ma. Having been reminded by her counsel that Mr Edmund Chau had testified in her presence earlier that he had begun in "scaffolding" in the shares of QPL through orders placed by Cheeroll

on 6 May 2003, Ms Connie Cheung said that it was only after five or six trading days that she had noticed this pattern of conduct by Mr Edmund Chau. She thought that Mr Edmund Chau's conduct was explicable on the basis that he was trying to make it easier for her to sell QPL shares. However, that was not necessary. There was a liquid market for QPL shares and she could have sold the shares she wished to sell in any event.

98. When asked repeatedly by her own counsel if the fact of her awareness of Mr Edmund Chau's conduct through Cheeroll had any effect on the timing of the orders she made on behalf of Chinacal or Honest Opportunity she finally accepted that possibly about 4 to 5% of the sales orders that she made of QPL shares were made earlier than would otherwise have been the case in light of Mr Edmund Chau's "Buy" orders. For most of them, there was no effect at all.

99. Of the nature of Mr Edmund Chau's conduct, she said that she knew it to be "scaffolding" and that was a type of market misconduct. She said that she felt that the conduct was "odd" and not something a licenced person ought to be doing. However, he was her superior and it was not for her to "coach" him as to what he should do. She did not know to whom she might otherwise make a report of the conduct. She agreed that in her record of interview she had been shown the records of all orders placed in the period on between 26 May and 5 June 2003 and, in answer to the question of whether or not she thought that Mr Edmund Chau was manipulating the market in the orders placed through Cheeroll, she said :

> "I don't know because I only focused on my own work. I did not dare to ask about Edmund's orders. So I don't know. I dare not say whether it was a false market.".

100. In her oral testimony, Ms Connie Cheung went on to assert that at the time of the interview she did not think it was manipulation of the market.

101. Of Mr Edmund Chau's orders placed on 6 May 2003 through Cheeroll, this Ms Connie Cheung agreed that there were 20 "Cancellations" of orders and that was "pretty unusual". Of the trading by Mr Edmund Chau "five or six days" thereafter, namely from 16 May 2003 onwards when she came to think of the trading as "odd", she agreed that there were multiple orders and whilst not all of them would have involved individual and separate "Outcry" orders by Mr Edmund Chau the number of occasions on which he would have done so was in double figures on each day. She accepted Mr Shek's calculation that in the period 26 May to 5 June 2003 Mr Edmund Chau placed 157 "Buy", 41 "Reduce" and 110 "Cancel" orders for QPL shares through Cheeroll.

102. Having been shown Mr Shek's table detailing the orders of Cheeroll made within five minutes of orders placed by Honest Opportunity and Chinacal in the period 5 May to 10 June 2003 Ms Connie Cheung accepted that there were occasions when she had taken advantage of Mr Edmund Chau's "scaffolding" to assist her in selling QPL shares, but they had begun only five or six days after 6 May 2003, but she was unable to identify which ones fell into that category.

<u>The sale of QPL shares in the account of Chinacal from 26 May 2003.</u>

103. Of the circumstances in which sales of QPL shares in the account of Chinacal began on 26 May 2003 and continued thereafter, Ms Connie Cheung said that, after she had noticed the price of QPL shares had reached $1.60 she telephoned Mr Lin and asked him if he was willing to sell some of the shares. Mr Lin had said :

> "Conditional upon it's $1.60 or above, you sell some for me gradually.".

104. Mr Lin was recalled to testify in respect of this issue. He said that he had not given specific instructions to Ms Connie Cheung, repeating that his

instructions had been general : “If you can make money, sell”. He said it was difficult for him to recall whether or not he had received a telephone call in May 2003 from Ms Connie Cheung in respect of QPL shares. Of the issue of whether he had given specific instructions, namely that she should sell if the price was $1.60 or above, he said that he had not given such specific instructions. However, in cross-examination by Mr Mak he agreed that if he had received an enquiry from Ms Connie Cheung as to whether or not she should sell at $1.60, to which he might have responded by repeating his general instructions, he would not recall such a short conversation.

105. Ms Connie Cheung said that previously she had not seen the letter dated 6 June 2003 from the SFC to SHKIS, in which information was requested of all orders placed in respect of QPL shares for 27 May 2003. However, she was involved in the verification of the accuracy of the data gathered within SHKIS as a result of the request. She thought she had mentioned to Mr Edmund Chau that the SFC had approached the company for that information.

106. Of the effects of Mr Edmund Chau’s “scaffolding” this Ms Connie Cheung agreed that it inflated apparent demand, as a result of which potential buyers might become more willing to buy QPL shares. She agreed it acted as an inducement to buyers to buy more readily and that a consequence of inflated apparent demand was that the price of QPL shares might increase.

CHAPTER 5

A CONSIDERATION OF THE EVIDENCE

A. SUBMISSIONS.

107. Whilst the Presenting Officer assisted the Tribunal with a most helpful written submission, expanded upon in oral submissions, we find no need to deal with those submissions separately from the written and oral submissions made on behalf of the Specified Persons.

Submissions on behalf of Mr Edmund Chau.

Admitted false trading "with respect of the market for" QPL shares [section 274(1)(b)].

108. In his closing speech on behalf of Mr Edmund Chau, Mr Bell accepted that, on his own admission in his oral testimony, Mr Edmund Chau was culpable of false trading, contrary to section 274(1)(b) of the Ordinance, it being accepted that he was at least reckless as to whether his activities were likely to have the effect of creating a false or misleading appearance with respect to the market for securities traded on a relevant recognized market. It was accepted on Mr Edmund Chau's behalf that in placing multiple "Buy" orders for QPL shares which, as he intended, were not executed as a result of his cancelling, reducing or allowing the orders to lapse he was culpable of "scaffolding". Furthermore, again on his own admission in his oral testimony, it was accepted that he was culpable of that market misconduct over the period on and between 6 May and 10 June 2003, namely the period specified in the FS's Notice.

Denial of false trading in respect of "the price for dealings" in QPL shares [section 274(1)(b)] and of "active trading" [section 274(1)(a)].

109. However, Mr Bell submitted that in performing those acts Mr Edmund Chau did not have the intention, nor was he reckless as to whether it did or was

likely to have the effect, of creating a false or misleading appearance with respect to :

(i) the price for dealings in QPL shares on the SEHK, contrary to section 274(1)(b); or

(ii) of "active trading" in those shares, contrary to section 274(1)(a) of the Ordinance.

110. Of the phrase "active trading", Mr Bell reminded the Tribunal that it was not defined in either section 245 or Schedule 1 of the Ordinance. He submitted that given its natural and ordinary meaning "trading" meant a concluded bargain in which it was agreed between the parties to exchange one item of property for another, including money. He pointed out that there was no dispute that the mechanics of the admitted "scaffolding" by Mr Edmund Chau involved ensuring that he avoided his "Buy" orders being "hit". In the result, it was submitted that Mr Edmund Chau neither intended to nor was he reckless as to whether his conduct did or was likely to have the effect of creating a false or misleading appearance of active trading.

Denial of "price rigging" [section 275] and "stock market manipulation" [section 278].

111. Furthermore, it was submitted that Mr Edmund Chau did not have the intention, nor was he reckless as to whether his "scaffolding" had the effect, of influencing the price of QPL shares ("price rigging", section 275 of the Ordinance). Also, it was contended that there was no evidence that the "scaffolding", by itself or in conjunction with any other transaction, increased or was likely to increase the price of QPL shares ("stock market manipulation", section 278 of the Ordinance). Finally, it was submitted that the "Buy" orders for QPL shares placed by Mr Edmund Chau in the course of his "scaffolding"

did not amount to "transactions" under section 278(3)(a) of the Ordinance because Mr Edmund Chau did not intend that they be executed.

Submissions on behalf of Ms Connie Cheung.

Denial of "…assisting another person to engage in…" market misconduct [section 245].

112. Mr Bernard Mak submitted on behalf of Ms Connie Cheung that, notwithstanding her own admission that she had regularly confirmed orders shouted by "Outcry" by Mr Edmund Chau to Mr Ma thereby confirming the evidence of Mr Ma and Mr Edmund Chau to the same effect and had continued to do so after she had come to realise that Mr Edmund Chau was or might be "scaffolding" in placing "Buy" orders for QPL shares, her conduct did not fall within the definition of market misconduct in section 245 of the Ordinance, in particular the stipulation that market misconduct includes "… assisting another person to engage in..." market misconduct.

The ambit of culpability of market misconduct, arising from section 252(4)(c)(ii).

113. In respect of the ambit of culpability of market misconduct, arising from section 252(4)(c)(ii) in a person who "assisted or connived with" another person "… in the perpetration of any conduct which constitutes the market misconduct, with the knowledge that such conduct constitutes or might constitute market misconduct", Mr Bernard Mak submitted that a person could only connive with another if the person had a duty to control the behaviour of the other person. Further, he submitted that Ms Connie Cheung was under no such duty and had no power to control the behaviour of Mr Edmund Chau. As noted in paragraph 8, the Chairman directed the Tribunal that there was no such limitation in law.

114. In the result, Mr Bernard Mak submitted that Ms Connie Cheung was not culpable of market misconduct under either the provisions of section 245 or section 252(4)(c)(ii) of the Ordinance. He suggested that the appropriate way to deal with Ms Connie Cheung was by way of disciplinary action, pursuant to section 194 of the Ordinance.

"False trading", contrary to section 274(1)(b).

115. Mr Bernard Mak submitted, in the alternative, that if Ms Connie Cheung was culpable of market misconduct it was in respect of false trading only, contrary to section 274(1)(b). He supported Mr Bell's submissions in respect of the construction of the phrase "active trading".

116. Of the period over which she had committed such market misconduct, Mr Bernard Mak submitted that there was no reason or basis to reject Ms Connie Cheung's evidence that she had not come to realise that, in placing his "Buy" orders for QPL shares, Mr Edmund Chau was "scaffolding" and until five or six trading days after he began that conduct on 6 May 2003. He suggested that an examination of Mr Shek's table, in which orders of Cheeroll made within five minutes of orders of Chinacal and Honest Opportunity, indicates that, apart from 6 May 2003, there were no such orders until 16 May 2003. In any event, he submitted that the Tribunal disregard, as irrelevant in this context, orders that were either cancellations or reductions.

Submissions on behalf of Cheeroll and SHKIS.

117. Mr Brewer submitted that given the fact that much of the focus of Mr Shek's statement and accompanying tables was on the period 26 May to 5 June 2003, the "Analysed Period", the Tribunal was unable to make findings of market misconduct prior to or after that date.

Attribution of liability to Cheeroll for the conduct of Mr Edmund Chau.

118. Mr Brewer accepted that, notwithstanding the fact that he was never appointed a director or officer of Cheeroll, the authority given to Mr Edmund Chau to place orders on behalf of Cheeroll, evidenced by a board resolution to that effect, such acts, knowledge or state of mind as may be determined properly by the Tribunal in Mr Edmund Chau are attributable to Cheeroll.

No attribution of liability to SHKIS for the conduct of Mr Edmund Chau.

119. Of SHKIS, Mr Brewer acknowledged that Mr Edmund Chau was a director, "Responsible Officer" and head of the Dealing Department. Nevertheless, he submitted that that in placing "Buy" orders with Mr Ma, Mr Edmund Chau acted exclusively as an authorised person of Cheeroll and not in any way in his positions and capacities in SHKIS. Accordingly, he submitted no liability for Mr Edmund Chau's conduct was attributable to SHKIS.

The ambit of section 252(4)(c)(ii).

120. Mr Brewer supported Mr Bernard Mak's submission in respect of the construction of the phrase "connived with" in section 252(4)(c)(ii) of the Ordinance, namely that it was necessary to prove that such a person was under a duty and in a position to control the other person whose conduct was market misconduct.

Attribution of liability to SHKIS for the conduct of Ms Connie Cheung.

121. Of Ms Connie Cheung's position in SHKIS, Mr Brewer acknowledged that whilst she was never a director or officer of the company, her authority derived from the fact that she was a registered "Representative" with the SFC of SHKIS permitted to do deal in securities on behalf of its clients. He conceded that in those circumstances acts, knowledge and state of mind determined by the Tribunal to have existed in Ms Connie Cheung were capable of being attributed

to SHKIS. However, in light of the evidence, received by the Tribunal from Mr Brewer in course of his closing speech, that in 2008 there were 523 such "Representatives" accredited to SHKIS and, even in the absence of evidence relating to 2003, he submitted that the extent of her authority was insufficient to permit attribution of her conduct to the company.

122. However, having been reminded of the evidence that she was head of one of the two teams in the Dealing Room and enjoyed discretionary power to sell Chinacal's QPL shares, if she could do so at a profit from the placement price of $1.52, and that in respect of Honest Opportunity she enjoyed a discretionary power to sell QPL shares as to volume, timing and price, above a minimum price Mr Brewer conceded that SHKIS was vicariously liable for her conduct.

Addendum.

123. By written submissions, dated 29 December 2008, 7 and 9 January 2009, Mr Brewer responded to an open invitation made by the Tribunal on the last day of oral submissions for assistance in respect of any judicial consideration of the term "active trading" in the context of legislative provisions dealing with a similar subject matter. At the outset, he accepted that he been unable to find a judgment in which the phrase had been construed directly. However, he drew attention to the fact that the phrase was used in section 135 of the former Securities Ordinance, which has its origins in section 998 of the Corporations Law in Australia, itself based on section 9(a) of the Securities Exchange Act 1934 of the United States of America.

124. In those circumstances, Mr Brewer said that as a matter of statutory construction regard was to be had to the juxtaposition of subsections 274(5) and 274(8) as relevant to the impugned conduct described in section 274(1) and (2).

Section 274(5) provides, in effect, for a deeming provision in respect of intention or recklessness in relation to conduct that has or is likely to have the effect of creating a false or misleading appearance :

> "Without limiting the general nature of the conduct which constitutes false trading under subsection (1) or (2), where a person -
>
> (a) enters into or carries out, directly or indirectly, any transaction of sale or purchase…. of securities that does not involve a change in the beneficial ownership of them;
>
> (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,".

125. Section 274(8) provides, inter-alia, that any "transaction of sale or purchase" includes an offer to sell or purchase securities.

126. In the result, he submitted that unless an offer to purchase or sell a share happens to fall within the particular deeming provisions of section 274(5) of the Ordinance, it cannot otherwise constitute a species of false trading.

B. FINDINGS.

Mr Edmund Chau.

Character.

127. Whilst the Tribunal is mindful of the direction of the law given by the Chairman in respect of good character, having regard to Mr Edmund Chau's admissions of false trading and, in particular, his admission that his denials to the SFC in two of his records of interview of such misconduct, which denials were clearly lies, the Tribunal has determined that in all the circumstances it would be absurd to give any effect to a direction of good character in favour of Mr Edmund Chau. It does not do so.

"False trading", contrary to section 274(1)(b).

128. The Tribunal has no hesitation whatsoever in finding that Mr Edmund Chau is culpable of market misconduct by false trading, contrary to section 274(1)(b) of the Ordinance, namely with respect to the market for QPL shares. However, the Tribunal does not accept that his conduct was simply "reckless" in that regard. We determine that in placing "Buy" orders for QPL shares on and between 6 May and 10 June 2003 he intended that conduct have the effect of creating a false or misleading appearance in respect of the market for QPL shares. We accept his evidence that he did so in order that Chinacal and Honest Opportunity could sell their holdings of QPL shares more actively and quickly. His explanation for his motive in so acting is highly telling :

> "Because I recommended the shares to them.".

He went on to say :

> "Because after the second placement, that was 2003, and Hong Kong suffers from the SARS disease therefore, you can see the share price was below the placement price in March and April. Therefore, when there is a chance to sell with a profit, of course I want them to sell more quickly.".

129. Of course, his involvement with the two placements of the QPL shares to Chinacal and Honest Opportunity in October 2002 and February 2003 was in his capacity as a director and "Responsible officer" of SHKIS. In securing those two companies as placees in October 2002, Mr Edmund Chau was able to place 21 million of the 29 million QPL placement shares and, in February 2003, he was able to place 43 million of the total placement of 77 million QPL shares. Sun Hung Kai International had earned a little under $8 million as fees in those two placements. SHKIS itself had received a little under $450,000.00 of those fees. Clearly, both companies were important clients of SHKIS. We determine that in his sustained pattern of "scaffolding" in QPL shares on behalf of those two customers, over a period of five weeks, Mr Edmund Chau was mindful not

only of the desirability of retaining them as customers but also that they remain satisfied with the various services rendered to them, including earlier advice on investments in securities.

"False trading", contrary to section 274(1)(a) : "active trading".

130. On the other hand, we are not satisfied that by his conduct Mr Edmund Chau intended or was reckless as to whether it has or is likely to have the effect of creating a false or misleading appearance of active trading, contrary to section 274(1)(a) of the Ordinance. Whilst a legion of unexecuted "Buy" orders has or is likely to have the effect of creating a false or misleading appearance of the market for QPL shares, of itself it created no actual turnover in QPL shares, an important if not essential element in an appearance of "active trading" in the shares.

The effect on the price of the shares.

131. Of the effect of "scaffolding" in QPL shares, by the inputting of "Buy" orders, on the price of those shares Mr Shek said in his statement that it has the effect of supporting, or even pushing up the price of a stock.

> "21. Under normal circumstances, an investor will try to predict the short-term price movement of a stock by looking at the buying and selling forces. Therefore, the quantity of shares in the bid and ask queues provide a good indication of existing market demand/supply and possible direction of the share price. Hence, by putting up large orders on the bid side, a manipulator can create a false and misleading impression that there is strong demand for the shares. Given this impression, potential sellers who want to sell the shares at the prevailing market price may hold back and wait to see if they can sell at a higher price, and potential buyers who want to buy the shares at the prevailing market price may consider raising the bid prices so as to queue at the top or to take shares from the ask queue out right. As a result, scaffolding on the buy side has the effect of supporting, or even pushing up the price of a stock." [emphasis added].

132. However, in his oral testimony, in answer to a question from a member of the Tribunal, Mr Shek said :

"In scaffolding, usually they are relatively liquid stocks so there are sufficient in the market and you cannot raise the price easily without actually taking the shares from the outside.

If you really want to induce people to feel that there is a strong demand in the stock, the easiest way and cheap way is to input a large number of orders to create the illusion that there is a strong demand. Scaffolding is talking about creating a kind of false impression to the investor. It is different from what we normally see in price rigging or ramping, which directly has an impact immediately on the share price, but scaffolding affects the perceptions or impressions of the investor in order to induce them to buy the shares so as to provide a support or to raise the share price.".

133. In cross-examination by Mr Bell, Mr Shek responded to the suggestion that whilst "scaffolding" could have the effect of supporting or raising the price of a share it did not necessarily do so, by saying that it depended on the market situation at the relevant time. We accept that evidence as stating the obvious : for example, the outbreak of the Gulf War or the collapse of Lehman Brothers would be relevant to the market situation.

134. In re-examination, Mr Shek said of "scaffolding" :

"I think the intention of the manipulator is to support or at best raise up the price. This is the intention of this kind of manipulative technique, to support or raise the price.

Q. Which intention would be more consistent with scaffolding?
A. Yes.
Q. Which? Supporting the market or increasing the price?
A. Both will do, because by creating an impression of strong demand you can shift the price a bit and so it will raise up the price and at the same time you provide a support for the price. So it will serve both purposes.".

135. In cross-examination, Mr Edmund Chau agreed that in 2003 he had appreciated that the price of the stock is primarily dictated by supply and demand and that prices rise with rising demand or, at least, prices can be maintained with rising demand. Of significance, was the following interchange :

"Q. You knew that by creating an impression of a bigger demand, which was the effect of the orders you placed, as you agreed earlier, the price of QPL could be increased or maintained, even by a small fraction?
A. Yes.
Q. And, with that knowledge, you placed those orders nonetheless?
A. Yes."

Section 275(1)(b).

136. We are satisfied that in "scaffolding" in the shares of QPL, namely by placing "Buy" orders which he then reduced, cancelled or allowed to lapse, in the period 6 May to 10 June 2003 Mr Edmund Chau's conduct falls within the ambit of "enters into or carries out, directly or indirectly, a fictitious or artificial transaction or device..", as set out in section 275(1)(b) of the Ordinance. As Mr Edmund Chau admitted, it was an overriding part of his overall stratagem that his "Buy" orders not be "hit". None of the 314 "Buy" orders placed by Mr Edmund Chau on behalf of Cheeroll in the period on and between 6 May and 10 June 2003 resulted in the acquisition of a single QPL share. In large part, that was achieved by Mr Edmund Chau's carefully calculated "Reduction" and "Cancellation" orders. Furthermore, we find that Mr Edmund Chau intended or was reckless as to whether it had the effect of "…maintaining the price..." of QPL shares traded on the SEHK. Accordingly, on that basis we find him to be culpable of "price rigging", contrary to section 275(1)(b) of the Ordinance.

Section 278 : stock market manipulation.

137. There is no evidence that Mr Edmund Chau's "scaffolding" increased the price of QPL shares nor are we satisfied to the requisite standard that it was "likely to increase" the price of QPL shares.

Ms Connie Cheung.

Character.

138. At the time of her oral testimony before the Tribunal Ms Connie Cheung had been employed in the Securities industry for 14 years. At the time of her records of interview conducted by the SFC, she had been so employed for about 10 years. We approach a consideration of all the evidence relevant to her case

on the basis that she is of good character and entitled to the benefit of the Chairman's directions in law in that respect.

139. There is no dispute that, following the commencement of sales of QPL shares by Ms Connie Cheung in the account of Honest Opportunity on 5 May 2003, on the next trading day, 6 May 2003, Mr Edmund Chau began his "scaffolding" exercise through the account of Cheeroll. At issue, is when it was that Ms Connie Cheung became aware that his "Buy" orders were made in order to make it easier for her to sell QPL shares and when it was and to what extent that she took advantage of his activities in her sale of those shares. Both Ms Connie Cheung and Mr Edmund Chau deny that they had any conversations, let alone reached an agreement, about Mr Edmund Chau's "scaffolding" and the use to which Ms Connie Cheung was to make of that activity. Whether or not there was any discussion between them, we have no doubt whatsoever that from the very outset of Mr Edmund Chau's "scaffolding" on 6 May 2003 not only was that obvious and known to Ms Connie Cheung contemporaneously but also she took advantage of it in placing "Sell" orders on behalf of Honest Opportunity. Clearly, there was at the very least a tacit agreement between the two of them as to the purpose of and use to be made by Ms Connie Cheung of Mr Edmund Chau's "scaffolding". Furthermore, in those circumstances, in repeating Mr Edmund Chau's orders made on behalf of Cheeroll in respect of QPL shares to Mr Ma, Ms Connie Cheung was "assisting…another person to engage in" (section 245; "market misconduct") market misconduct.

<u>The period over which market misconduct was committed.</u>

140. On 6 May 2003 Mr Edmund Chau placed "Buy" orders on behalf of Cheeroll for more than 7 million QPL shares. Even allowing for the fact that "Buy" orders for different quantities and different prices made within a short period of time nevertheless were undoubtedly made in the same "Outcry", it is

clear that there were more than 10 such separate occasions of "Outcry". Similarly, the cancellation of "Buy" orders for a total of more than 7 million QPL shares were made on multiple occasions.

141. It is to be noted that Mr Shek's table of "Order details of Cheeroll Limited (Placed within five minutes of the Orders of Chinacal Limited and Honest Opportunity Limited) Period : 5 May-10 June 2003." [**Annexure IV**] describes five such matches between orders of Cheeroll and Honest Opportunity on 6 May 2003. More particularly, 4 of the "Sell" orders of Honest Opportunity were made within that time period of "Buy" orders placed by Cheeroll, three of which "Buy" orders were placed before the "Sell" orders of Honest Opportunity. Similarly, on each of 7, 9 and 12 May 2003 the table describes "Buy" orders placed by Cheeroll within that time period of "Sell" orders placed by Honest Opportunity. That pattern of behaviour is described as having continued in respect of Honest Opportunity and Cheeroll up and until 23 May, together with 9 June 2003. In respect of orders placed by Chinacal and Cheeroll, a similar pattern commenced on 26 May and continued until 6 June 2003.

142. In the record of interview, conducted by an officer of the SFC on 3 October 2003, Ms Connie Cheung said that she "…did not know" when it was suggested to her that she had thought Mr Edmund Chau's conduct amounted to manipulating the market and creating a false market. In her oral testimony, as noted earlier, she said that she had thought that conduct to be "odd" and agreed with the suggestion that the effect was that the orders could create an impression that there was a bigger demand for QPL shares than there was in reality. However, she resiled from that admission, contending that at the time she did not know that to be the case. We reject those assertions, and find that she knew on 6 May 2003 and thereafter Mr Edmund Chau's conduct to be market misconduct.

Section 252(4) : "assisted or connived with".

143. The Tribunal determines that in so conducting herself, Ms Connie Cheung "assisted or connived with" Mr Edmund Chau in the perpetration of his market misconduct, namely as described hitherto being "false trading" with respect to the market for QPL shares, contrary to section 274(1)(b), and "price rigging" in respect of those shares, contrary to section 275(1)(b) of the Ordinance "..with the knowledge that such conduct constitutes or might constitute market misconduct". Accordingly, pursuant to section 252(4) of the Ordinance we identify Ms Connie Cheung as having engaged in that market misconduct.

The issue of the attribution of liability to Cheeroll and SHKIS for the market misconduct of Mr Edmund Chau and of Ms Connie Cheung.

(1) The liability of Cheeroll.

144. The Tribunal is satisfied that Mr Brewer's concession that Cheeroll was liable for the market misconduct of Mr Edmund Chau, namely his "false trading" and "price-rigging" as determined earlier by the Tribunal is well made. Although Mr Edmund Chau was never a director of Cheeroll it is clear that he had long been entrusted and clothed with significant and important authority to act on its behalf, namely to operate its trading account with SHKIS to a permitted exposure of $1.5 trillion. Clearly, his conduct in placing orders in respect of QPL shares in that account with SHKIS was squarely within his authorization. Cheeroll and SHKIS were both wholly-owned subsidiaries of SHK& Co, by whom he was employed as an executive director of SHKIS.

(2) The liability of SHKIS.

(A) In respect of Mr Edmund Chau.

145. Although Mr Edmund Chau's orders in respect of QPL shares placed on behalf of Cheeroll on and between 6 May and 10 June 2003 were made by him

under his authority to trade in Cheeroll's account with SHKIS we are satisfied that in the attribution of corporate liability it is necessary to have regard to the overall reality established by the evidence. Clearly, no benefit did or could have accrued to Cheeroll for the multiple orders made in that account by Mr Edmund Chau. The purpose of the making of those orders on behalf of Cheeroll was to assist the sale of QPL shares in the accounts of Honest Opportunity and Chinacal with SHKIS. As Mr Edmund Chau admitted in his testimony, he was responsible for suggesting to those two companies that they take substantial tranches of QPL shares in the placement made in February 2003 and he was motivated to make the orders in the account of Cheeroll in order to enable them to sell those shares more easily and quickly. There is no doubt that he was so motivated on behalf of SHKIS, in particular that SHKIS continued to be well regarded by those two clients, whose purchases of shares in the two placements had generated about $8 million in fees to Sun Hung Kai International, some of which had reached SHKIS. It is to be noted that Mr Edmund Chau's ability to "scaffold" in the account of Cheeroll by placing orders in the Dealing Room of SHKIS was in clear breach of SHK&Co's "Proprietary Trading Policy & Manual" which required separation of agency and proprietary trading. It is to be remembered that he was an executive director, Responsible Officer and head of the Dealing Department of SHKIS. Clearly, not only was he in breach of his duty, under section 279 of the Ordinance, to ensure that SHKIS take all reasonable measures to ensure that proper safeguards existed to prevent SHKIS from acting in a way which would result in SHKIS perpetrating any conduct which constitutes market misconduct but also it was his own conduct that was market misconduct. In reality, Mr Edmund Chau simply took advantage of his position in Cheeroll to act for what he intended to be the benefit of SHKIS's clients and SHKIS.

146. In the result, we are satisfied that liability for Mr Edmund Chau's conduct is attributable not only to Cheeroll but also SHKIS, the two clients of which company were intended to be beneficiaries of his market misconduct.

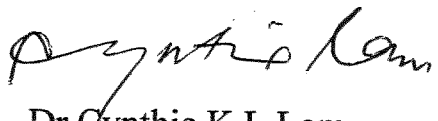
(B) In respect of Ms Connie Cheung.

147. Earlier, the Tribunal determined that Ms Connie Cheung was culpable of market misconduct, she having "assisted or connived with" Mr Edmund Chau in his perpetration of market misconduct, namely "false trading" and "price-rigging". Whilst Ms Connie Cheung was never a director of SHKIS, she was a representative accredited to SHKIS and head of its Dealing Team II. Moreover, she was authorised to deal in the accounts of Chinacal and Honest Opportunity. In respect of the former, on an open authorisation as to the volume and time of sale and, in respect of price, restricted only on the basis of an overall profit be made on the sale of QPL shares. In respect of the latter, on a daily authorisation by the client in respect of price only.

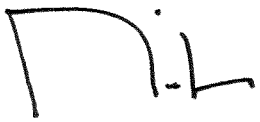
148. Clearly, Ms Connie Cheung's sales of QPL shares in the accounts of Honest Opportunity and Chinacal in the period on and between 6 May and 10 June 2003 was well within her authority as an employee of SHKIS. The Tribunal finds that she was motivated to assist or connive with Mr Edmund Chau in his "false trading" and "price rigging" in respect of QPL shares in order to benefit those two clients of SHKIS. In so doing, she was assisting or conniving with a person who was an executive director, "Responsible Officer" and head of the Dealing Department of SHKIS in market misconduct. It is to be noted that the impugned conduct with which the Tribunal is concerned is of a civil and essentially regulatory nature. In all the circumstances, the Tribunal is satisfied that SHKIS is vicariously liable for the market misconduct of Ms Connie Cheung as set out earlier.

149. In alternative, the Tribunal is satisfied, having regard to the nature and ambit of Part XIII of the Ordinance, that in all the circumstances in order to give effect to the obvious legislative intent it is appropriate to determine that there is a special rule of attribution of liability to SHKIS in respect of the aforesaid conduct of Ms Connie Cheung.

The Hon Mr Justice Lunn
(Chairman)



Dr Cynthia K L Lam
(Member)



Mr Michael T P Sze
(Member)

Dated 22 January 2009

CHAPTER 6

THE LAW : A DETERMINATION OF THE AMOUNT OF ANY PROFIT GAINED OR LOSS AVOIDED IN THE SALE OF QPL SHARES

The Tribunal's determination of the identity of persons engaged in market misconduct.

150. In Part I of our Report dated 22 January 2009 the Tribunal determined that :

(i) Mr Edmund Chau was culpable of market misconduct by false trading, contrary to section 274(1)(b) of the Ordinance in that he intended by his conduct to create a false or misleading appearance in respect of the market for QPL shares traded on the SEHK and by the same conduct that he was culpable of price rigging, contrary to section 275(1)(b) of the Ordinance in that he intended or was reckless as to whether that conduct had the effect of maintaining the price of QPL shares traded on the SEHK;

(ii) Ms Connie Cheung, having assisted or connived with Mr Edmund Chau in the perpetration of that conduct with the knowledge that such conduct constitutes or might constitute market misconduct, was culpable of market misconduct by false trading, contrary to section 274(1)(b) and price rigging, contrary to section 275(1)(b) of the Ordinance;

(iii) Cheeroll was culpable of market misconduct by false trading, contrary to section 274(1)(b), and price rigging, contrary to section 275(1)(b) of the Ordinance; and

(iv) SHKIS was culpable of market misconduct by false trading, contrary to section 274(1)(b), and price rigging, contrary to section 275(1)(b) of the Ordinance.

151. In those circumstances, section 252(3)(c) of the Ordinance requires the Tribunal to determine -

> "the amount of any profit gained or loss avoided, if any, as a result of the market misconduct.".

152. The Ordinance gives no guidance as to how that calculation is to be made. However, the proper construction and ambit of the terms "… profit gained or loss avoided" in the context of their use in section 23(1)(b) of the Securities (Insider Dealing) Ordinance, Cap 395, namely "...as a result of the insider dealing" was considered by the Court of Final Appeal in the *Insider Dealing Tribunal v Shek Mei Ling* [1999] 2 HKCFAR 205. Of those phrases, Lord Nicholls of Birkenhead noted (page 210 B-D) :

> "To be within the scope of a financial order there must be a 'profit' that is 'gained' by the person in question, whether the insider dealer or someone else, and it must have been gained 'as a result of the insider dealing'. A comparable limitation applies to 'loss avoided'.".

153. Section 257(1)(d) of the Ordinance empowers the Tribunal to make an order, in respect of a person identified as having engaged in market misconduct pursuant to section 252(3)(b), namely :

> "…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.".

CHAPTER 7

A DETERMINATION OF THE AMOUNT OF ANY PROFIT GAINED OR LOSS AVOIDED

Submissions.

154. The Presenting Officer and counsel for the Specified Persons were unanimous in their submissions to the Tribunal that there is no evidence that there was any "…profit gained or loss avoided as a result of the market misconduct." In particular, the Tribunal's attention was drawn to its findings at paragraph 137 of Part I of the Report :

> "There is no evidence that Mr Edmund Chau's 'scaffolding' increased the price of QPL shares nor are we satisfied to the requisite standard that it was 'likely to increase' the price of QPL shares.".

155. For his part, Mr Bell, on behalf of Mr Edmund Chau, submits that although there is undisputed evidence that both Chinacal and Honest Opportunity made an overall profit on the disposal of their QPL shares there is no evidence that this was achieved as a result of the market misconduct, there being no evidence that the shares would have been sold at a lower price if the market misconduct had not occurred. In any event, Mr Bell reminds the Tribunal that, even if there was evidence that those companies had gained a profit as a result of the market misconduct, the Tribunal could make no "disgorgement" order, pursuant to section 257(1)(d) of the Ordinance against either or both of the companies, they not having been identified as Specified Persons in the FS's Notice and, in consequence, not the subject of a determination by the Tribunal pursuant to section 252(3)(b) of the Ordinance.

156. Of Mr Edmund Chau's position, Mr Bell points out that there is no evidence that Mr Edmund Chau gained any profit in the form of commission,

bonus or otherwise or avoided any loss as a result of his market misconduct. He reminded the Tribunal of the undisputed evidence of Mr Edmund Chau, confirming his answers in his record of interview with the SFC, that as a full-time member of staff of SHKIS he was not entitled to any commission nor would he get any bonus, nor would he be fired if he failed to sell at a good price.

157. On behalf of Cheeroll, now renamed Sun Hung Kai Strategic Capital Limited, Mr Brewer submits that there is no evidence that it benefited in any way in consequence of the market misconduct. None of the "buy" orders for QPL shares placed by Mr Edmund Chau was executed.

The Tribunal's Determination.

158. The Tribunal has no hesitation in accepting the unanimous submissions of counsel and determining, as required by section 252(3)(c) of the Ordinance, that no profit was gained or loss avoided as a result of the market misconduct it has identified as having occurred in Part I of the Report.

CHAPTER 8

ORDERS

(I) Submissions.

The Presenting Officer.

Costs orders - section 257(1)(e) and (f).

159. The Presenting Officer invited the Tribunal to make orders of costs in favour of the Government and the SFC, pursuant to section 257(1)(e) and (f) respectively. As to the Government, he sought an order in respect of payments made to the Presenting Officer as a barrister and in respect of the Assistant to the Presenting Officer on an hourly rate, being costs reasonably incurred by the Government in relation or incidental to the proceedings, in total being $1,083,447.00 [**Annexure V**]. As to the SFC, he sought an order of $63,013.00, [**Annexure VI**] being costs reasonably incurred by the Commission in relation or incidental to the investigation of the market misconduct before the matter was referred to the Tribunal by the FS and in relation or incidental to the proceedings themselves.

Costs orders - section 260(1)(a).

160. On the direction of the Tribunal the Presenting Officer made enquiries of witnesses whose attendance had been required at the proceedings if they sought any order of costs for that attendance. In the event, only one witness sought such an order, which was granted by the Tribunal.

Mr Edmund Chau.

161. On behalf of Mr Edmund Chau, Mr Bell submits that in determining the appropriate orders to impose the Tribunal is to have regard to the following factors :

(i) that his market misconduct did not cause loss to any investor, in that the Tribunal determined that there was no evidence that it caused the price of QPL shares to increase;

(ii) that Mr Edmund Chau was motivated to misconduct himself, not for personal financial motive, but in order to retain customers for his employer;

(iii) that from the outset of the proceedings Mr Edmund Chau had accepted that he was culpable of market misconduct and that he had attempted to "settle" the case;

(iv) that hitherto Mr Edmund Chau had enjoyed a long and successful career in the securities industry;

(v) that Mr Edmund Chau had been subjected to an inordinate period of delay for which he was in no way responsible, between the time of his interviews by the SFC as "a person under investigation" in September 2003 and the FS's Notice of 6 June, 2007, during which time he was subjected to the stress of not knowing whether and not he might face criminal proceedings.

162. It is the burden of Mr Bell's submission that Mr Edmund Chau's market misconduct "… falls at the lower end of a scale of seriousness". He submits that the imposition of a "cold shoulder" order, pursuant to section 257(1)(b) of the Ordinance would be inappropriately Draconian depriving him, as it would, of the means of earning his livelihood. He suggests that the aim of protecting the public can be achieved by the supervision of his employers, enhanced by the fact that he is employed now in proprietary trading only, physically separated from the trading conducted on behalf of clients of SHKIS. Mr Bell submits that a disqualification order would be inappropriate, given that Mr Edmund Chau did not perpetrate the market misconduct in his capacity as a director or manager but in his capacity as a dealer. By contrast he submits that a "cease and desist

order" pursuant to section 257(1)(c), for breach of which there are criminal sanctions and punishment as contempt of court, would be most appropriate. He asks that any order for costs be apportioned between the parties rather than being made joint and several. Finally, Mr Bell submits that it would be unnecessary for the Tribunal to make a recommendation to the SFC that disciplinary action be taken, pursuant to section 257(1)(g), they being in a position to take such initiative themselves, if they so determine, following their receipt of the Tribunal's report.

Ms Connie Cheung.

163. On behalf of Ms Connie Cheung, Mr Bernard Mak reminded the Tribunal of its finding that her culpability lay in having "assisted or connived with" Mr Edmund Chau in his conduct of "scaffolding", namely by false trading and price rigging. He suggested that the initiative for that conduct lay with Mr Edmund Chau. However, he accepted that her culpability lay in having acted on Mr Edmund Chau's conduct in continuing to sell QPL shares, thereby encouraging his activities. He reminded the Tribunal that Ms Connie Cheung made no gain. In all the circumstances, it was his submission that her culpability lay at the "lowest end of the spectrum of persons engaged in market misconduct of false trading and/or price rigging".

Ms Connie Cheung's current circumstances.

164. Mr Bernard Mak informed the Tribunal that in July 2008 Ms Connie Cheung had been appointed as a senior manager in corporate sales within the Sun Hung Kai Financial. Whilst she continued to receive orders from clients she no longer worked in the Dealing Room. Now, her duties were to relay the orders of clients to dealers in the Dealing Room.

Section 257(1)(a) - disqualification.

165. Mr Bernard Mak submitted that in light of the circumstances leading to the finding of culpability against Ms Connie Cheung there was no need to disqualify her from acting as a director.

Section 257(1)(b) - "cold shoulder" order.

166. Mr Bernard Mak submitted that the prohibition contained in section 257(1)(b), namely that without the leave of the Court of First Instance the person shall not :

> "… directly or indirectly, in any way acquire, dispose of or otherwise deal in any securities…"

is confined to personal dealings of the person and does not extend to acting as a licensed representative of a brokerage house to take or place orders for clients.

167. In support of the submission, he drew the Tribunal's attention to the definition of "dealing" set out in Schedule 1 of the Ordinance :

> " 'dealing' -
>
> (a) in relation to securities, means, whether as principal or agent, making or offering to make an agreement with another person, or inducing are attempting to induce another person to enter into or to offer to enter into an agreement -
>
> (i) for or with a view to acquiring, disposing of, subscribing for or underwriting securities; or…".

168. Mr Bernard Mak submitted that the phrase "... whether as principal or agent" is to be construed as referring to a transaction "entered into on one's own account irrespective of whether or not the person was beneficially entitled to the transaction. By contrast, he submitted that in placing orders for clients a licensed representative was carrying on the business of dealing in securities for his/her principal in which circumstances a brokerage house acted as agent for the account of their clients. In the result, it was his submission that the ambit of the order does not extend to a prohibition on "… a person from carrying on the

169. In the event, that the Tribunal did not accept that submission as to the ambit of the sub-section Mr Bernard Mak submitted that it would be wrong of the Tribunal to impose such an order since to do so would "… usurp the supervisory jurisdiction of the intermediaries of the SFC and SFAT.".

Section 257(1)(g) - referral to a disciplinary body.

170. Mr Bernard Mak accepted that it would be appropriate for the Tribunal to refer Ms Connie Cheung's case to the SFC pursuant to section 257(1)(g) of the Ordinance in light of their disciplinary jurisdiction over Ms Connie Cheung.

Cheeroll.

171. On behalf of Cheeroll, Mr Brewer reminded the Tribunal that whilst Cheeroll was and is a vehicle that undertakes investment and proprietary trading on behalf of the Sun Hung Kai Financial it is not a licensed entity. He pointed out that, whilst its maximum permitted exposure was set at a limit of $1.5 billion, in May and June 2003 there was a very low level of trading activity its trading activity, such that a single trader dedicated to proprietary trading would have been inactive for much of the time. For its part, Cheeroll had relied upon Mr Edmund Chau's integrity as a long serving senior employee of SHK&Co.

SHKIS.

172. On behalf of SHKIS Mr Brewer informed the Tribunal that having been founded in 1972 it had grown to the extent that it now had more than 50,000 client accounts and was probably Hong Kong's biggest local brokerage. As a wholly-owned subsidiary it made a major contribution to the turnover and profits of SHK&Co.

SFC registration.

173. SHKIS is registered with the SFC to deal and advise on securities (Type 1 and 4), advise on corporate finance (Type 6) and provide automated trading services and asset management services (Types 7 and 9). It has 11 Responsible Officers and over 500 Representatives licensed with the SFC.

The market misconduct.

174. Mr Brewer accepted that the market misconduct, namely the "scaffolding", was committed in breach of SHK&Co's Proprietary Trading Policy in that proprietary trading was not segregated from trading conducted on behalf of clients. He submitted that by contrast, the April 2003 edition of the SFC's "*Management, Supervision and Internal Control Guidelines For Persons Licensed By or Registered with the Securities and Futures Commission*" merely suggested, but did not mandate, segregation of those functions (Appendix) :

> "*Chinese Wall*
>
> 8. The firm avoids apparent and potential conflicts of interest by establishing and maintaining adequate 'Chinese Walls', such as the separation of dealers handling client funds or discretionary orders from those handling proprietary or staff accounts.".

175. It is to be noted that the Appendix states :

> " **SUGGESTED CONTROL TECHNIQUES AND PROCEDURES**
>
> In this Appendix, details of various internal control techniques and procedures commonly implemented by licensed or registered persons in the financial industry are provided. These techniques and procedures neither constitute nor should be construed as an exhaustive or comprehensive list of applicable or relevant internal control techniques and procedures. *They represent suggested approaches*, which when employed effectively, can serve to assist licensed or registered persons in establishing sound internal control systems and enhance their ability to comply with the relevant legal and regulatory requirements.". (italics added.)

176. In that context, Mr Brewer invited the Tribunal to note that in the "Introduction" to the Guidelines it is stated :

> "A pragmatic approach will however be adopted taking into account all relevant circumstances, e.g. the inability of a small firm to segregate duties.".

177. Mr Brewer suggested that the very low level of trading activity in the proprietary account was a "relevant circumstance" in applying a pragmatic approach to the guidelines, it making it uneconomic to employ a dedicated proprietary trader segregated from trading on behalf of clients.

178. Mr Brewer submitted that there was nothing in the conduct of Mr Edmund Chau, as a Responsible Officer, or Ms Connie Cheung, as a Dealer, that gave cause for SHKIS to doubt their integrity.

179. Finally, Mr Brewer suggested that in having regard to the circumstances of the commission of the market misconduct there was no evidence of other officers of SHKIS "... failing to take reasonable measures to ensure proper safeguards to prevent misconduct.".

Remedial action.

180. Mr Brewer drew the Tribunal's attention to correspondence in November 2007 between Sun Hung Kai Financial and the SFC as evidencing remedial measures taken by SHK&Co to strengthen and restructure its Internal Audit Department, Risk Control Department and Compliance Department. Subsequently, both the "Front Office" and "Back Office" Manuals had been revised in April 2008, the former specifically in light of the experience of SHKIS arising from these proceedings. He submitted that SHKIS was now pro-active in addressing compliance with those Manuals by way of in-house surveillance and departmental meetings intended to pre-empt misconduct. Also, he pointed to the fact that there was now physical separation between the places at which proprietary trading and trading on behalf of clients was conducted.

Ambit of the Orders that may be made under section 257 of the Ordinance.

"Costs and expenses" section 257(1)(e) and (f).

181. Of the orders that may be made by the Tribunal, pursuant to its powers under section 257 of the Ordinance, Mr Brewer invited the Tribunal to note that section 257(1)(e) and (f) provides that the Tribunal may make a money order in favour of the Government and the SFC respectively, in respect of monies that the Tribunal "considers appropriate for the costs and expenses reasonably incurred" by those bodies. He submitted that it was wrong in principle for the Department of Justice ("DoJ") to claim costs beyond the direct costs of employed Government counsel and that the appropriate method of calculation was simply to calculate an hourly rate of remuneration by a division of the monthly salary and to multiply the hours of work in respect of which a claim for costs was made by the hourly rate.

Mitigating Factors.

(i) Delay.

182. Whilst inviting the Tribunal to have regard to the delay prior to the issue of the FS's Notice on 6 June 2007 Mr Brewer acknowledged that the various applications made to the Tribunal and the subsequent and related applications for judicial review on behalf of Cheeroll and SHKIS of the Tribunal's rulings contributed towards additional delay before the substantive hearings were begun. However, he submitted that those applications were inevitable given that these were the first proceedings before the Market Misconduct Tribunal. Also, he invited the Tribunal to note that the challenge mounted by Cheeroll and SHKIS was not as to the Tribunal's jurisdiction but only as to its procedures, in particular the issue of whether the proceedings were adversarial or inquisitorial in nature.

(ii) Attempts at settlement.

183. Mr Brewer invited the Tribunal to have regard to the attempts that were made to settle these proceedings when determining the appropriate orders to be made under section 257 of the Ordinance. He pointed to contact made with the Civil Division of the DoJ in May 2008, in particular to a letter from Messrs Haldanes, acting on behalf of all Specified Persons, dated 23 May 2008 in which it was asserted :

> "It is the wishes of all above-named clients' to try and reach a settlement in respect of the matters in both the MMT as well as the applications for judicial review.".

The letter went on to state :

> "While Edmond Chau maintains the truthfulness of his statements and his good intents at the time, for the sake of resolving these matters, he would be prepared to accept that his activity constituted inappropriate conduct, and that it amounted to market misconduct.".

In that event, it was proposed that :

> "This settlement would be on a global basis and that upon accepting Edmond Chau's position, no further proceedings will be taken against Connie Cheung, Cheeroll Ltd or SHKIS.".

Of the issue of costs, it was proposed :

> "Edmond Chau will be responsible to pay any reasonable costs of the Presenting Officer at the MMT, and of the Department of Justice in the judicial review, to be taxed, if not agreed.".

184. It is apparent from the correspondence that Mr Brewer has placed before the Tribunal that by way of response in a letter dated 27 May 2008 the DoJ informed Haldane's that they had passed a copy of the letter of 23 May 2008 to the Senior Government counsel assisting the Presenting Officer and suggested :

> "You may wish to consider putting forward a proposal to the MMT direct as you see fit.".

185. Having been informed by Haldanes that they had passed their letter of 23 May 2008 to the Presenting Officer, the DoJ responded by letter of 28 May 2008 observing of the Haldanes letter dated 23 May 2008 :

> "We note the various issues and matters which the letter attempts to deal with. However, given that the role of the Presenting Officer is confined to the Market Misconduct Tribunal proceedings under the Securities and Futures Ordinance Cap 571 ('Ordinance'), we could only facilitate any 'settlement' proposed by the specified parties in the proceedings before the Tribunal.
>
> As a next step towards such proposed 'settlement', you may wish to invoke the procedure provided by sections 30-35 of Schedule 9 to the Ordinance. A written application to the Chairman setting out your proposals and requesting a conference to be attended by all parties may be made. You may also wish to provide a draft of the orders and/or directions which you wish the Chairman to make at the conference if you deem fit.".

186. By letter of 30 May 2008 Haldanes provided more details of the proposed settlement to the Assisting Presenting Officer, namely :

> " 1. That Mr Edmond Chau would admit to the allegation market misconduct;
> 2. On the basis that the Presenting Officer and the Market Misconduct Tribunal accept the above plea by Mr Edmond Chau, the Financial Secretary through the Presenting Officer would withdraw the terms of reference against Ms Connie Cheung and the two companies, namely Sun Hung Kai Investment Services Limited and Cheeroll Limited;
> 3. Mr Edmond Chau would pro-offer to suspend his dealing licence for a period of say, 12 months or such order as may be determined by Market Misconduct Tribunal;
> 4. Mr Edmond Chau will be responsible to pay the reasonable costs of the Presenting Officer. Such sum to be taxed, if not agreed;".

The letter concluded with Haldanes indicating that they wished to reach an agreement "in principle" with the Presenting Officer before approaching the Tribunal.

187. By letter of 2 June 2008 the Assisting Presenting Officer wrote to Haldanes stating :

> "It is our view that under the statutory regime of Cap 571, we will not be in a position to reach any agreement-in-principle with your clients. The duties of a Presenting Officer is to present to the Tribunal all such available evidence

> (including any admission or proposed admission) for the purposes of securing the just, expeditious and economical conduct of the proceedings. However, it must be emphasised a further conduct of the proceedings in the light of the said evidence will be subject to the direction of the Tribunal/Chairman.".

The letter concluded with a suggestion that it might be more appropriate for Haldanes to approach the FS, DoJ and/or the SFC directly.

188. As suggested, Haldanes wrote to the Financial Services and Treasury Bureau ("FSTB") by letter dated 3 June 2008, copying all earlier correspondence in relation to the matter, and inviting the FS to consider the offer of the proposed settlement. In response, by letter of 4 June 2008, the FSTB noted that the proceedings before the Market Misconduct Tribunal ("MMT") had been instituted by a notice of the FS, observing :

> "This is now in the hands of MMT. We are not aware of any facts or circumstances which throw doubt on the basis on which those matters were originally referred to the MMT. Accordingly, we do not consider that there is any basis for FS to withdraw his notice to the MMT in respect of all or any persons specified in that notice.".

In passing, the FSTB noted the suggestion of the Assistant Presenting Officer that Haldanes invoke the procedures provided in sections 30 - 35 of Schedule 9 of the Ordinance to make a formal application to the Chairman of the MMT.

189. By a letter, dated 5 June 2008, to the DoJ, Haldanes stated :

> "We are of the view that the matter should go back to the Market Misconduct Tribunal under sections 30 to 35 of the Schedule 9 of the Securities and Futures Ordinance for further directions.".

However, the request articulated in that letter that the DoJ agree to an adjournment of the judicial review proceedings, fixed to be heard on 17 and 18 June 2008, was immediately refused by a letter of the same date.

190. By letter of 6 June 2008 the DoJ set out in more detail its reasons for refusing the requested agreement to an application for an adjournment of the judicial review proceedings. Of the issues raised in the judicial review proceedings, it was asserted that they :

> "… raise important issues going to the root of the nature and propriety of the statutory regime of MMT proceedings under the Securities and Futures Ordinance (Cap 571). An adjournment will invariably (sic) result in undue delay in resolution of these issues and prolonging the period of legal uncertainty over the regime which will be inimical to the proper functioning of the MMT in dealing with market misconduct in general and is against the interests of the public.".

191. The DoJ went on to note that at the request of Haldanes' clients the proceedings before the MMT had been stayed, pending disposal of the judicial reviews and observed :

> "The current hearing dates were fixed as early as December 2007 in consultation with respective parties' counsel's diaries. Your clients have seen fit to wait until now to seek an adjournment with a view to pursuing your intended action with the MMT which could have been done long ago.".

192. By letter, dated 6 June 2008, Haldanes wrote to the clerk to Mr Justice Hartmann indicating that it was proposed to seek the directions of the Tribunal as soon as possible and asking that the court adjourn the judicial review proceedings notwithstanding the opposition of the DoJ. Mr Brewer informed the Tribunal in the course of his oral submissions that no response had been made by the court to that request and that at the hearing itself the application was not renewed.

193. By a letter, dated 11 June 2008, the FSTB declined further suggestions from Haldanes that they participate in a meeting to seek to agree terms before the matter was remitted to the Tribunal for directions under Schedule 9, noting :

> "Although FS has the statutory function of referring cases to the MMT, he is not a party to the proceedings. Accordingly, where there does not appear to be any basis for withdrawal of the original notice, it seems also that FS should not be a party to any negotiations to try to compromise those proceedings.

> Similarly we do not consider that in such circumstances a withdrawal of the notice should form any part of a settlement proposal.".

194. By letter, dated 22 September 2008, Haldanes wrote to Mr Richard Fawls of the DoJ, raising with him the possibility of a proposal to the Tribunal, pursuant to section 33 of Schedule 9 of the Ordinance, in order to resolve the proceedings. Section 33 of Schedule 9 provides :

> "… the Tribunal or the chairman may make any order which it or he is entitled to make under any provision of this Ordinance, whether or not the requirements otherwise applicable to the making of the order have been complied with, if -
>
> (a) the parties to the proceedings request, and agree to, the making of the order under the section by the Tribunal or the chairman (as the case may be); and
> (b) the parties consent to all of the terms of the order.".

195. Haldanes asserted that it was clear that the Presenting Officer was necessarily a "party" to the proceedings and indicated that they intended raising proposals with him aimed at obtaining the consent of all the parties to the proceedings to an order being made.

196. By reply, dated 23 October 2008, Mr Fawls indicated that the DoJ "... tend to agree with you that the Presenting Officer is a party for these purposes.". However, he indicated that in light of correspondence with the Presenting Officer it was his view that the Presenting Officer was unlikely to accept that position or be prepared to engage in settlement discussions.

<u>The Submissions of the Presenting Officer in Reply.</u>

(i) <u>The ambit of a "cold shoulder order" - section 257(1)(b) of the Ordinance.</u>

197. Of the nature of a "cold shoulder" made pursuant to section 257(1)(b) of the Ordinance Mr Yeung drew the Tribunal's attention to the joint judgment of Hartmann and the Lam JJs in *Chau Chin Hung and Cheung Sau Lin v The*

Market Misconduct Tribunal and The Financial Secretary HCAL 123/2007, 124/2007 and 22/2008 (unreported), but set out at Annexure II of Part I of the Report (paragraphs 34 and 35) :

> "… 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 market 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 consequences of a cold shoulder order may be damaging to the identified person but that does not a detract from the primary purpose and essential character of the order. In this regard, it is important to note that the Court of First Instance is given the power to alleviate any burden created by a cold shoulder order which, whilst detrimental to the interests of the identified person, may not serve to advance the protective purpose of the order.".

198. Mr Keith Yeung submitted that the issue is one of statutory interpretation and that it was clear from the plain meaning of section 257(1)(b) and the purpose of such an order described above that the order is not confined to a prohibition against "personal dealings" of the person subject to the order. He submitted that the Tribunal had no power to qualify the effect of an order under the sub-section and that the alleviation of any undue hardship arising from such an order lay with the power of the Court of First Instance to qualify the order.

(ii) <u>The ambit of a money order in favour of the Government in respect of its "… costs and expenses reasonably incurred" - section 257(1)(e).</u>

199. Mr Keith Yeung submitted that it is well established for the purposes of taxation bills of costs in civil cases pursuant to Order 62 that :

> "(a) the fair costs payable in respect of those of a government lawyer must include a profit element; and
> (b) the rates for an independent solicitor could be charged when the work had been done by a salaried 'in-house' government solicitor.".

200. In support of his submissions, Mr Keith Yeung relies on the judgment of the Court of Appeal of England and Wales in *In re Eastwood*, DECD *Lloyds Bank Ltd V Eastwood and Others* [1975] 1 CH 112. There, the court was concerned with the issue of the apposite principle to be applied, where, in litigation relating to the construction of a will involving charitable gifts, the work had been done by a solicitor in the Treasury Solicitor's office rather than an independent solicitor. In the judgment of the Court of Appeal Russell LJ said :

> "Now, except no doubt for purposes of internal accounting, the employed solicitor or legal department renders no bill to the employer or organization : he or it makes no professional charges. It is however quite clear on authority that it is not permissible to say that consequently the party is limited to disbursements specifically referable to the particular litigation on the ground that the salaries of employees or other general expenses of the department would have been incurred by the party in any event.".

In conclusion, Russell LJ said :

> "It is the proper method of taxation of a bill in the case of this sort to deal with it as though it were the bill of an independent solicitor...".

201. Also, Mr Keith Yeung drew the attention of the Tribunal to the judgment of Burrell J. of 28 April 1999 in *The Building Authority v Business Rights Limited* CACV 212A/1993 (unreported). There, the judge was concerned with a summons to review a taxation from litigation conducted in the District Court. As the judge observed in his judgment :

> "10. Fundamental to the resolution of this matter is the indemnity principle. Both sides of this argument agree that the indemnity principle must apply. Both sides also agreed that the fair costs payable to a Government lawyer in court must include a profit element …".

202. At issue, and not relevant to the matter in hand, was whether or not it was appropriate to include in a bill of costs items relating to conduct at some stages of the proceedings as a solicitor and at other stages of the proceedings as a barrister all performed by the same person.

(iii) The Chairman's directions in law.

A "cold shoulder" order - section 257(1)(b).

203. The Chairman has directed the Tribunal that, having regard to the clear language of the sub-section "… directly or indirectly, in any way acquire, dispose of or otherwise deal in any securities..." the ambit of the prohibition in an order made under section 257(1)(b) encompasses such conduct, whether personal or done in the course of employment on the instructions of a client of the employer.

"Costs and expenses reasonably incurred by the Government" - section 257(1)(e)†.

204. At issue, is the validity of a claim made on behalf the Government for the costs of the Assistant to the Presenting Officer, Ms Winnie Ho, in relation to or incidental to the these proceedings, which claim is calculated on a basis described as :

> "Fee earner :
> Mrs Winnie Ho admitted in 1997, rate charged out $4,000/hr".

205. Ms Winnie Ho was appointed as Assistant to the Presenting Officer on 27 August 2007 on the delegated authority of the Secretary for Justice ("SforJ"), in exercise of the powers conferred by section 254(1) of the Ordinance.

206. The rate at which the claim is made for Ms Winnie Ho's work, namely $4,000.00 per hour, is at the upper level of the band of $3,200.00 - $4,000.00 allowed since 1997 on party and party taxation in the High Court for the work of a solicitor of 10 years and more experience.

† See Corrigenda at page 99.

207. The Chairman has directed the Tribunal that the Legal Officers Ordinance, Cap 87 provides that :

> "3(1) Any legal officer shall in respect of any of the matters mentioned in section 4(1) have all the rights of barristers and solicitors duly admitted under the provisions of the Legal Practitioner's Ordinance (Cap 159).".

Further, that section 4(1) provides :

> "(1) The matters referred to in section 3(1) are -
>
> (a) any matter which by virtue of any enactment in force in Hong Kong or under any law applicable to Hong Kong is entrusted to, or is within the discretion or control of or requires to be discharged by, the Secretary for Justice;
>
> (b) any matter which the Government is interested;".

208. Section 2 of the Legal Officers (Fees and Costs) Rules, made pursuant to section 10 of the Legal Officers Ordinance provides that :

> "(1) In any proceedings before any court or tribunal with regard to the matters referred to in section 4(1) of the Ordinance of the fees and costs of and incidental to the conduct of such proceedings and the appearance of any legal officer shall be governed by Order 62 of the Rules of the High Court.".

209. Section 257(6) of the Ordinance provides that, where the Tribunal makes an order under section 257(1)(e), Order 62 of the Rules of the High Court applies to the taxation of costs.

210. The Chairman has directed the Tribunal that the judgment of the Court of Appeal of England and Wales delivered by Russell LJ in *Eastwood* is directly relevant to the issue at hand. In particular, that the apposite principle to be utilised in addressing a bill of costs in respect of work performed by an employee of a government department, rather than an independent solicitor, is as described by Russell LJ at page 132 C-D of his judgment :

> "It is the proper method of taxation of a bill in the case of this sort to deal with it as though it were the bill of an independent solicitor, assessing accordingly the reasonable and fair amount of a discretionary items such as this, having regard to all the circumstances of the case.".

That approach is, as Russell LJ pointed out in his judgment, subject to the indemnity principle.

(II) A consideration of the submissions.

Costs and expenses payable to government, pursuant to section 257(1)(e).

211. Mindful of the Chairman's directions in law and, having regard to the nature and complexity of these proceedings, the Tribunal has determined that the basis of the claim made in respect of the work performed by the Assistant to the Presenting Officer, namely an hourly rate of $4,000.00, is appropriate in respect of work in relation or incidental to the proceedings. Whilst there was a challenge to the rate at which claim was made for the work done it was not suggested that costs were unreasonably incurred in consequence of that work.

212. We are satisfied that the costs claimed on behalf of the Government and the SFC are in respect of costs reasonably incurred in relation or incidental to the proceedings, in the case of the Government, and reasonably incurred in relation or incidental to the investigation of the market misconduct and in relational incidental to the proceedings in the case of the SFC and that it is appropriate that the Tribunal make orders in those terms.

213. In addition to those costs, are the costs and expenses of the Tribunal itself. Calculations in respect of the costs and expenses of the Chairman and the Tribunal staff are based on their respective annual staff costs as described in the "Staff Cost Ready Reckoner" prepared by the Director of Accounting Services. A schedule of those costs attached at [**Annexure VII**].

Apportionment of costs.

214. There was no dispute that the appropriate apportionment of costs was that each Specified Person there one quarter of the cost sought. In all

circumstances, the Tribunal is satisfied that is an appropriate apportionment of costs.

Mitigating factors.

Motive.

215. The Tribunal takes into account in determining the appropriate orders the fact that neither Mr Edmund Chau nor Ms Connie Cheung were motivated by the hope or expectation of personal monetary benefit from their market misconduct. In Part I of our Report we determined in respect of Mr Edmund Chau's conduct in relation to Honest Opportunity and Chinacal that he "… was mindful not only the desirability of retaining them as customers but also that they remain satisfied with the various services rendered to them, including earlier advice on investment in securities.".

Previous conduct.

216. We take into account the fact that both Mr Edmund Chau and Ms Connie Cheung had been involved in the financial services business for a lengthy period of time prior to their market misconduct, during which time there is no suggestion of any impropriety at all. Similarly, we note that SHKIS and Cheeroll were companies that operated in the same financial services business without impropriety for many years prior to their market misconduct.

Subsequent conduct.

217. We accept that in the five years subsequent to the market misconduct, namely 6 May - 10 June 2003, there is no suggestion of any impropriety by any of Mr Edmund Chau, Ms Connie Cheung or Cheeroll. By contrast, we note as Mr Brewer drew to our attention that in January 2009 SHKIS (described as Sun Hung Kai) was subjected to a public reprimand by the SFC :

> "… in respect of internal systems and controls relating to its sale since 2002 of Lehman Brothers Minibonds to its clients, following an investigation by the SFC.".

However, we note that it was stated :

> "Sun Hung Kai does not admit any liability wrongdoing arising from these matters but acknowledges seriousness of these concerns.".

Nevertheless, amongst the matters agreed between the SFC and Sun Hung Kai it was agreed that the latter :

> "(b) …engage an independent audit firm to conduct a review of Sun Hung Kai's internal control and compliance systems;
> (c) if, within 18 months from the completion of Sun Hung Kai's current enhancement exercise (which shall be completed within six months from the date of this agreement) the SFC finds the same concerns of a materially serious nature as those identified by it in this investigation, Sun Hung Kai's licence will be partially suspended for a period of three years to the extent that Sun Hung Kai will not be allowed to sell or distribute unlisted or structured products to clients and provide advice to clients in relation to these products;".

218. The SFC stated that it had taken into account a number of matters, including :

> "Sun Hung Kai has already made enhancements and will continue to engage an external professional consultant for the further enhancement of its systems and controls;".

<u>Delay.</u>

219. As we stated in Part I of the Report, the Tribunal has found that in the period from the commencement of the enquiries by the SFC's letter of 6 June 2003 to the issue of the FS's Notice on 6 June 2007 there was unnecessary delay, for which the Specified Persons were in no way accountable. In particular, we found of the two-year period during which legal advice was sought and was forthcoming (paragraph 93 and 94 of Annexure I of Part I of the Report) :

> "93. On any view that period of time expended on the obtaining of legal advice, on the one hand by the SFC internally and on the other hand by the Financial Secretary from the Department of Justice, is extraordinary.".

220. Of the detailed explanations that were proffered for that element of delay we regret that we found it necessary to find :

> "94. Notwithstanding the various explanations proffered on behalf on the SFC in the Department of Justice, the facts stated above merely to be stated for it to be obvious that there was unjustifiable delay.".

Significance of the delay.

221. From the evidence adduced in the proceedings, it is clear that Ms Connie Cheung and Mr Edmund Chau came to learn of the fact of SFC's enquiries into their conduct soon after the receipt by SHKIS of the SFC letter dated 6 June 2003. We accept that from the time that he was first interviewed on 10 September 2003, as a "person under investigation", inevitably Mr Edmund Chau would have been concerned about the possibility of being subjected to criminal proceedings in respect of his conduct. Ms Connie Cheung was first interviewed in October 2003. The stress of the uncertainty of what might lie ahead for each of them was not resolved until they were informed of the fact of the issue of the FS's Notice by the Presenting Officer's letter of 29 August 2007.

222. Obviously, the conduct the subject of investigation, which resulted in these proceedings, necessitated enquiries and the taking of expert and legal advice that, even if processed with expedition, would have occupied many months. Of that, there is no dispute. It would be inappropriate to take into account that period of time in favour of Mr Edmund Chau and Ms Connie Cheung. However, we do take into account in their favour in determining the appropriate orders to be made by the Tribunal the substantial period of unjustified delay described above. It was not suggested that factor is relevant to the corporate Specified Persons nor do we take it into account in their cases.

Irrelevant delay.

223. From the first hearing of the Tribunal on 3 September 2007 counsel acting on behalf of the Specified Persons embarked upon a series of challenges to the jurisdiction and procedures of the Tribunal both before the Tribunal itself and, having failed in those applications, in respect of some of those rulings in judicial review proceedings in the Court of First Instance. Counsel on behalf all four Specified Persons supported all the applications before the Tribunal, save for counsel for Mr Edmund Chau in respect of the challenge to the Tribunal's power to compel a specified person to give testimony and to receive records of compelled interviews made outwith the Tribunal. In the result, commencement of the substantive hearing was delayed until 10 November 2008. There is no dispute that the period is not relevant as a factor to be considered in favour of Mr Edmund Chau and Ms Connie Cheung.

Attempts to "settle" the proceedings.

224. Although Mr Bell has asserted that Mr Edmund Chau was prepared to admit his culpability of market misconduct from the outset of these proceedings, he accepts that intention or desire was not communicated in any way to the Tribunal until November 2008.

225. Of the attempts made at what has been described as "settlement" of these proceedings and of the judicial review proceedings, it is immediately apparent from the correspondence put before the Tribunal by Mr Brewer that prior to November 2008 the offer of "settlement" was both limited and circumscribed. It is to be noted that in the letter to the DoJ from Haldanes dated 23 May 2008 it was contended that, whilst Mr Edmund Chau was prepared to accept that his activity constituted market misconduct, he maintained :

> "… the truthfulness of his statements and his good intents at the time…".

226. In those circumstances, it is difficult to comprehend on what basis he was prepared to accept that he was culpable of market misconduct. If the reference to "his statements" is a reference to his records of interview, and the Tribunal is aware of no other relevant statements of Mr Edmund Chau, it is to be noted that throughout those records of interview with the SFC he maintained stoutly his position that he was not culpable of "scaffolding". In face of the allegation, made in the record of interview of 20 November 2003, of "false trading", in respect of his orders in relation to QPL shares placed in the period 26 May to 5 June 2003 Mr Edmund Chau responded :

> "... It would be very risky for me. I would not do that. Nor would the company allow me to do that. I absolutely did not have the intention you said. My intuition tells me that it would be foolish to do that.".

227. In respect of a similar allegation, made in his record of interview of 19 April 2004, in relation to his orders on 16, 19 and 20 May 2003 Mr Edmund Chau responded :

> "I do not agree with what you said. All the orders were placed by me according to my intuition. I never harboured any intention or thought of creating a false market.".

228. Of the limited and circumscribed nature of the offer of the proposed settlement, it is to be noted that in the letter of Haldanes, dated 23 May 2008, it was proposed :

> "This settlement would be on a global basis and that upon accepting Edmond Chau's position, no further proceedings would be taken against Connie Cheung, Cheeroll Ltd, or SHKIS.".

229. That position was maintained and it was suggested in the letter of Haldanes dated 30 May 2008 to the Presenting Officer that on the latter and the Tribunal accepting what was described as Mr Edmund Chau's "plea" that the FS would withdraw the Tribunal's terms of reference against the other Specified Persons.

230. Also, it is to be noted that the obvious and logical suggestion made by the DoJ in their letter to Haldanes dated 27 May 2008 that the matter be remitted to the MMT was not pursued until November 2008 at the commencement of the substantive hearing.

231. On 10 November 2008, the Tribunal acceded to a request from the Presenting Officer and counsel appearing for all the Specified Persons that the proceedings be adjourned, specifically so that discussions could ensue in respect of an application being made by all parties to the proceedings to the Tribunal for an order by consent pursuant to section 33 of Schedule 9 of the Ordinance. However, on 13 November 2008 the substantive hearing commenced, the parties then not being in a position to make such an application. On that day, 14 and 17 November 2008 the Tribunal received all the factual evidence put before it by the Presenting Officer together with the expert testimony of Mr Shek.

232. At the end of proceedings on 17 November 2008, the parties to the proceedings put before the Tribunal an application for an order to be made by consent pursuant to section 33 of Schedule 9 of the Ordinance (**Annexure III** of Part I of the Report). In short, it was proposed that with the consent of all parties to the proceedings the Tribunal make an order determining that Mr Edmund Chau, Ms Connie Cheung, Cheeroll and SHKIS were all culpable of false trading, contrary to section 274(1)(b) of the Ordinance in consequence of Mr Edmund Chau's "scaffolding" in placing orders through Cheeroll to buy QPL shares, in which conduct Ms Connie Cheung "connived" and for which, through Mr Edmund Chau, Cheeroll accepted its culpability and, through Ms Connie Cheung, SHKIS its accepted culpability. Specifically, it was accepted that Mr Edmund Chau by that conduct intended to create a false or misleading appearance of demand for QPL shares. However, all the Specified Persons

denied culpability for “price rigging”, contrary to section 275(1), and “stock market manipulation” contrary to section 278(1) of the Ordinance.

233. In the event, on 18 November 2008 the Tribunal ruled that it declined to exercise its discretion to make the order sought (**Annexure III** of Part I of the Report). Almost immediately thereafter Mr Edmund Chau and then Ms Connie Cheung gave evidence. Ultimately, the Tribunal determined that all the Specified Persons were culpable of not only false trading, contrary to section 274(1)(b) but also price rigging, contrary to section 275(1)(b) of the Ordinance.

234. Notwithstanding the very late stage in the substantive hearing at which the Specified Persons admitted to the Tribunal their culpability for false trading, they are entitled to and the Tribunal affords them a measure of credit for those admissions. The Tribunal takes that factor into account in their favour in determining the appropriate orders to make.

Factors of aggravation in respect of culpability.

235. It is a factor in aggravation of the culpability of the Specified Persons that the market misconduct of which they are culpable was conducted on a sustained basis over a prolonged period of time, from 6 May to 10 June 2003. Furthermore, as we noted in Part I of our Report (paragraph 89) it was only brought to an end by the intervention of the SFC on 6 June 2003 by their enquiry of SHKIS in respect of dealings in QPL shares.

(III) ORDERS.

236. The Tribunal makes the following orders :

(a) in respect of Mr Edmund Chau Chin Hung :

(i) pursuant to section 257(1)(a), that he 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 subsidiary company of Sun Hung Kai & Co including Sun Hung Kai Investment Services Limited or in any way, whether directly or indirectly, be concerned or take part in the management of a listed corporation or any subsidiary company of Sun Hung Kai & Co, including Sun Hung Kai Investment Services Limited for 18 months;

(ii) pursuant to section 257(1)(c), that he shall not again perpetrate any conduct which constitutes market misconduct;

(iii) pursuant to section 257(1)(e), and that he shall pay the Government $796,076.41;

(iv) pursuant to section 257(1)(f) that he shall pay the Commission $15,753.25; and

(v) pursuant to section 257(1)(g) that the SFC be recommended to take disciplinary action against him.

(b) in respect of Ms Connie Cheung Sau Lin :

(i) pursuant to section 257(1)(a), that she 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 subsidiary company of Sun Hung Kai & Co including Sun Hung Kai Investment Services Limited, whether directly or indirectly, be concerned or take part in the management of a listed company or any subsidiary company of Sun Hung Kai & Co, including Sun Hung Kai Investment Services Limited for 6 months;

(ii) pursuant to section 257(1)(c), that she shall not again perpetrate any conduct which constitutes market misconduct;

(iii) pursuant to section 257(1)(e), that she shall pay the Government $796,076.41;

(iv) pursuant to section 257(1)(f), that she shall pay the Commission $15,753.25; and

(v) pursuant to section 257(1)(g), that the SFC be recommended to take disciplinary action against her.

(c) <u>In respect of Cheeroll Limited, now known as Sun Hung Kai Strategic Capital Limited :</u>

(i) pursuant to section 257(1)(c), that it shall not again perpetrate any conduct which constitutes market misconduct;

(ii) pursuant to section 257(1)(e), that it shall pay the Government $796,076.41; and

(iii) pursuant to section 257(1)(f), that it shall pay the Commission $15,753.25.

(d) In respect of Sun Hung Kai Investment Services Limited :

(i) pursuant to section 257(1)(c), that it shall not again perpetrate any conduct which constitutes market misconduct;

(ii) pursuant to section 257(1)(e), that it shall pay the Government $796,076.41;

(iii) pursuant to section 257(1)(f) that it shall pay the Commission $15,753.25; and

(iv) pursuant to section 257(1)(g), that the SFC be recommended to take disciplinary action against it.

237. Pursuant to section 264(2) of the Ordinance the Tribunal directs the Secretary to file the orders made under section 257(1)(a) with the registrar of Companies forthwith.

238. Pursuant to section 264(1) of the Ordinance the Tribunal directs the Secretary to give notice to the Court of First Instance to register its orders made pursuant to section 257(1)(a), (c) (e) and (f).

CHAPTER 9

MISCELLANEOUS MATTERS

Representation.

239. Throughout the hearings the Presenting Officer was Mr Keith Yeung and the Assistant to the Presenting Officer was Ms Winnie Ho.

240. Messrs Haldanes were instructing solicitors of all counsel appearing for all the Specified Persons throughout the hearings. Mr Adrian Bell appeared behalf of Mr Edmund Chau. Mr Kevin Patterson appeared for Ms Connie Cheung until 10 November 2008 and thereafter, when she was represented by Mr Bernard Mak. Cheeroll and SHKIS were represented by Mr John Brewer.

Corrigenda

241. As to Chapter 2 of Part I of the Report : "Chronology" at page 6, in addition to the dates there stated, namely 14 and 15 November 2007, the Tribunal received submissions in respect of the same matter on 16 and 22 November 2007.

Addendum (3 March 2009) : in Chapter 7 of Part II of the Report the heading to paragraph 204 should state section 257(1)(e) and not section 257(1)(f).

Acknowledgment

242. The Tribunal acknowledges with thanks the assistance of all counsel and those assisting them in the hearings in respect of the substantive issues.

The Hon Mr Justice Lunn
(Chairman)

Dr Cynthia K L Lam
(Member)

Mr Michael T P Sze
(Member)

Dated 25 February 2009