Annexure I

MARKET MISCONDUCT TRIBUNAL

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

SPECIFIED PERSONS :

Sun Hung Kai Investment Services Limited

Cheeroll Limited

Mr Chau Chin Hung, Edmund

Ms Cheung Sau Lin, Connie

Date of Delivery of Ruling : 27 December 2007.

RULING

1. Following delivery of the ruling in respect of submissions as to the jurisdiction of the Tribunal to conduct this hearing and the nature of the proceedings before the Tribunal Mr Patterson, as he had foreshadowed in his earlier written submissions, made an application that these proceedings be stayed permanently in respect of Ms Cheung. He did so on the basis of unreasonable and inordinate delay in prosecuting the allegations set out in the Financial Secretary's ("FS") notice on the basis that :

(a) delay had resulted in prejudice to Ms Cheung such that she cannot be assured of the fair hearing guaranteed to her by section 252(6) of the Securities and Futures Ordinance, Cap. 571 ("the Ordinance"), Articles 10 and 11 of the Hong Kong Bill of Rights Ordinance ("HKBOR") and Article 14 of the

International Covenant on Civil and Political Rights ("ICCPR") as imported into the law of Hong Kong by Article 39 of the Basic Law; alternatively

(b) even if a fair hearing is possible, it would constitute an abuse of process to continue with the proceedings.

THE DELAY

2. Mr Patterson submitted, as his argument was refined, that the appropriate period of delay was from 6 June 2003, when the Securities and Futures Commission ("SFC") commenced initial enquiries of Sun Hung Kai Investment Services Ltd in respect of dealings by them in the shares of QPL on 27 May 2003 to 29 August 2007 when Ms Cheung received notice from the Presenting Officer to the Tribunal of the fact of the issue of the notice by the Financial Secretary, dated 6 June 2007, and was informed that the initial hearing of the Tribunal was to take place on 3 September 2007.

<u>The submissions of Mr Patterson as to the relevant law.</u>

3. Mr Patterson submitted that in determining whether or not to exercise its power under section 253(1)(i) of the Ordinance to stay proceedings the Tribunal is to approach the matter on the basis that although these proceedings are not criminal in nature they are "quasi criminal" and guidance is to be found in the judgment of Ribeiro PJ, with whom all the other judges agreed, in the Court of Final Appeal in *HKSAR v Lee Ming Tee* [2001] 4 HKCFAR 133 at 148 F-151 J. In that case the Court of Final Appeal was concerned with an appeal from an order of stay by a trial judge in criminal proceedings in the Court of First Instance. Mr Patterson relied on passages in the judgment of Ribeiro PJ in support of his contentions that a stay of proceedings ought to be ordered :

firstly, if it be the case that notwithstanding the available remedial measures Ms Connie Cheung can no longer be afforded a fair hearing by this Tribunal (page 148 J) and secondly, that even if the Tribunal was to determine that a fair hearing is possible the conduct of the SFC and the FS involves an abuse of power such that the Tribunal's sense of justice and propriety is so offended that these proceedings ought to be stayed (pages 149 J-150 B).

4. Mr Patterson accepted that it is for Ms Connie Cheung to show on the balance of probabilities and that she will suffer serious prejudice to the extent that no fair hearing can be held (page 149 E).

Applications for stay of proceedings on behalf of Mr Edmund Chau, Sun Hung Kai Investment Services Limited and Cheeroll Limited.

5. At the conclusion of the oral evidence Mr Bell, on behalf of Mr Edmund Chau, as he had foreshadowed he might in his written submissions of 20 September 2007, informed the Tribunal that he too had an application for permanent stay of these proceedings. Mr Brewer made a similar application in respect of Sun Hung Kai Investment Services Ltd and Cheeroll Ltd adopting the submissions made by both Mr Patterson and Mr Bell.

The submissions of Mr Bell.

The Law.

6. Mr Bell submitted that in light of the fact that the Tribunal had ruled on 12 October 2007 that these proceedings are not criminal proceedings and, notwithstanding that the Tribunal had not ruled that they were civil proceedings, nevertheless the appropriate approach to be adopted by the Tribunal was that which had been developed in respect of

the power of the High Court to dismiss an action for want of prosecution. Of relevance, he submitted, is the jurisprudence that has developed in respect of the exercise of that power as summarised in Hong Kong Civil Procedure, 2008 in respect of order 25 at 25/L/2 :

> "There are two distinct, though related, circumstances in which an action may be dismissed for want of prosecution, namely (a) when a party has been guilty of intentional and contumelious default, and (b) when there has been inordinate and inexcusable delay in the prosecution of the action.".

Mr Bell did not pray-in-aid limb (a), but he does rely upon limb (b).

7. In construing the term "inordinate and inexcusable delay" he relied upon the commentary of the authors of Hong Kong Civil Procedure 2008 and in particular at 25/L/4 :

> "The requirements: (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third-party.".

8. Mr Bell invited the Tribunal to have regard to the authors' discussions of the terms "inordinate" and "inexcusable delay" but drew particular attention to their discussion of the term "prejudice to the defendant" at 25/L/7 :

> "The effect of the lapse of time on the memory of witnesses or, in the course of such time of their death or disappearance are the most usual factors..... In a case of prolonged culpable delay following long delays in serving of proceedings, the court may readily infer that

memories and reliability of witnesses has further deteriorated in the period of culpable delay.".

9. However, Mr Bell took issue with the assertion that then follows :

"There has to be some indication of prejudice, e.g. that no witness statement was taken at the time so that a particular witness who would have been called on a particular issue has no means of refreshing his memory or that a particular witness was of advanced age and no longer wish to give evidence or has become infirm or unavailable in the period of inordinate and inexcusable delay (Hornagold v Fairclough Building Ltd [1993] P.I.Q.R 400.".

10. In support of his submission that in fact there was no requirement that there be some indication of prejudice, Mr Bell cited the speech of Lord Browne-Wilkinson in the House of Lords, with whom all the other judges agreed in *Roebuck v Mungovin* [1994] 2 AC 224 at page 234 D-G. The case concerned an action in respect of personal injuries in a road accident. The plaintiff was guilty of inordinate and inexcusable delay for a period of nearly 4 years. Then, there followed a period in which the defendant's solicitors took various steps to seek to progress the action. Thereafter, nothing happened in the action until the defendant sought to strike out the plaintiff's claim. At issue, was whether or not it was required of the defendant to show that prejudice was caused by the later period of delay rather than the totality of the delay. Lord Browne-Wilkinson said :

"In the ordinary case the prejudice suffered by defendant caused by the plaintiff's delay is dimming of witnesses memories. Where there are two periods of delay, how can it be shown that a witness has forgotten during the later, rather than the earlier period? We were referred to an unreported decision of the Court of Appeal, Hornagold v Fairclough Building Ltd (unreported) 27 May 1993; Court of Appeal (Civil

Division) Transcript number 634-1993, where there was a difference of opinion as to whether in such a case it was necessary to adduce specific evidence that the prejudice flowed from a loss of memory in the later period. I have no doubt that such evidence is not necessary and that a judge can infer that any substantial delay in whatever period leads to a further loss of recollection.".

11. In further support of his submission that there is no requirement that Mr Edmund Chau point to any specific prejudice suffered in consequence of delay, Mr Bell relied on passages in the judgment of Peter Gibson LJ in the Court of Appeal of England and Wales in *Shtun v Zalejsksa* [1996] 1 WLR270 at 1285 C-D :

> "It is not, in my judgment, essential in every case that there should be evidence of particular respects in which potential witnesses memories have faded, still less that it need be shown that such fading memories occurred in a particular period. That would be to approve of the classically inept question in cross-examination, 'When did you first forget?' Every court in the land is accustomed to drawing inferences from primary facts. So long as there are primary facts from which inferences can properly be drawn, there is nothing wrong with doing so.".

12. It is to be noted in passing that in the judgment of Hobhouse LJ (as he was then) the consequences of what he said was the unnecessary intrusion of judicial authority is addressed (page 1286) :

> "In my judgment this case vividly illustrates the excessive intrusion of authority into the decision of factual questions.".

Later, he went on to note :

> "In this court we have been referred to some 20 authorities again on what is a question of fact and the drawing of inferences in each case turned on its own facts on whether or not, in any given case, it is

appropriate to draw the inference depends upon the circumstances of that case.".

The submissions of Mr Yeung as to the relevant law.

13. Mr Yeung acknowledged that by virtue of section 253(1)(i) this Tribunal has a statutory power to order a stay of proceedings, namely the power to :

> "*stay any of the proceedings on such grounds and on such terms and conditions as it considers appropriate having regard to the interests of justice;*".

14. In the context of criminal proceedings, Mr Yeung accepted that the passages in the judgment of Ribeiro PJ in *Lee Ming Tee* cited by Mr Patterson support the primary proposition that in criminal proceedings no stay should be imposed on the ground of delay unless the defendant shows on the balance of probability that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held. Furthermore, on the authority of the advice of the Privy Council in *A-G v Cheung Wai Bun* [1993] 1 HKCLR 249 he submitted that there is no "presumption of prejudice" because of the length of delay.

15. In the context of civil proceedings, Mr Yeung accepted that the observations of the authors of the Hong Kong White Book at 25/L/1-25/L/22 cited earlier are apposite.

16. Outwith the context of the issue of delay in proceedings of a criminal or "classic" civil nature, Mr Yeung drew the Tribunal's attention to the judgments of the Supreme Court of Canada in *Blencoe v British Columbia* 190 DLR (4^{th}) 513. There, the court was called upon to

consider the issue of delay in the investigation and referral to a Tribunal of allegations of sexual harassment and sexual discrimination by several complainants. In March 1995, the respondent's assistant made public allegations of sexual harassment by the respondent between March 1993 and March 1995. In July and August 1995, two sexual harassment complaints were filed with the British Columbia Council of Human Rights. Whilst there was much intervening communication between the Council and the respondent it was not until 3 July 1997 that the respondent was informed by the Council that the matter was to be referred to the Tribunal for a hearing. On 10 September 1997 the respondent was advised that the two matters would be heard by the Tribunal in mid-March 1998.

17. The respondent's application for judicial review, in which it was contended that the Council had lost jurisdiction in consequence of delay, was rejected by the judge at first instance. However, by a majority of the Court of Appeal of British Columbia held that the delay constituted a breach of the respondent's rights under section 7 of the Charter of Rights and ordered the proceeding stayed. In the result, the Supreme Court ordered the stay lifted and ordered that an expedited hearing be held. Whilst the majority and the minority expressed different views about the need to determine the issue of the respondent's rights under section 7 of the Charter of Rights they were agreed that the matter could be resolved under principles of administrative law. The majority held that the determination of whether or not delay was inordinate had to be resolved against contextual factors. In the judgment of Bastarache J, with whom the majority agreed, the issue was described thus (paragraphs 121-2) :

"121. To constitute a breach of the duty of fairness, the delay must have been unreasonable or inordinate (Brown and Evans, *supra*, at p. 9-68). There is no abuse of process by delay *per se*. The respondent must demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings. While I am prepared to accept that the stress and stigma resulting from an inordinate delay may contribute to an abuse of process, I am not convinced that the delay in this case was 'inordinate'.

122. The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.".

18. Finally, Mr Yeung submitted that in its analysis of all the available evidence relevant to the issue of delay the Tribunal was to have regard to the practical realities of litigation. In particular, he referred to passages in the judgment of Lord Bingham in the House of Lords in *Dyer v Watson* [2002] 3 WLR 1488 at 1408, which passages were cited with approval in the judgment of Tang J (as he was then) in *HKSAR v Lee Ming Tee* (unreported) HCCC 191/1999. At paragraph 53 Lord Bingham said :

"53. It is recognized, realistically enough, that the more complex a case, the greater the number of witnesses, the heavier the burden of documentation, the longer the time which must necessarily be taken to prepare it adequately for trial and for any appellate hearing. But with

any case, however complex, there comes a time when the passage of time becomes excessive and unacceptable.".

Later, at paragraph 55 he added :

"It is plain that contracting states cannot blame unacceptable delays on a general want of prosecutors or judges or courthouses or on chronic underfunding of the legal system. It is, generally speaking, incumbent on contracting states to organise their legal systems so as to ensure that the reasonable time requirement is honoured. But nothing in the Convention jurisprudence requires courts to shut their eyes to the practical realities of litigious life even in a reasonably well-organised legal system. Thus it is not objectionable for a prosecutor to deal with cases according to what he reasonably regards as their priority so as to achieve an orderly dispatch of business. It must be accepted that a prosecutor cannot ordinarily devote his whole time and attention to a single case.".

The evidence adduced by the Presenting Officer.

19. At the outset Mr Yeung placed before the Tribunal material by which it was sought to explain the passage of time from the commencement of the enquiries by the SFC to the commencement of the hearings of the Tribunal. He did so in documentary form, counsel for the Specified Parties indicating in terms that they did not seek to cross-examine the makers of the documents in question. The material comprised :

(a) a letter dated 19 September 2007 by Mr Geoffrey F Harris, Senior Director of Enforcement of the SFC;

(b) a letter dated 21 September 2007 by Ms Jennifer Kwong for the Secretary for Financial Services and the Treasury;

(c) a witness statement dated 10 October 2007 from Mr Mark Robert Steward, an Executive Director of Enforcement of the SFC; and

(d) a witness statement dated 10 October 2007 of Mr Richard Granville Fawls, a Senior Assistant Law Officer (Civil Law) of the Department of Justice.

Ambit of the material available to the Tribunal.

20. In addition to the material specifically addressing the issue of delay there is available to the Tribunal records of interview conducted by officers of the SFC of six witnesses, together with an expert report of Mr Shek Kam Por and various documentary exhibits relating to the dealing in issue.

21. The six witnesses and the compiler of the expert report are :

(i) Mr Edmund Chau Chin Hung, a Specified Person in the Financial Secretary's notice and an executive director and responsible officer of Sun Hung Kai Investment Services Ltd, a director of Sun Hung Kai Securities Ltd, an authorised person of Cheeroll Ltd and a Specified Person in the Financial Secretary's notice. Records of interview of Mr Chau were conducted on 10 September, 20 November 2003 and 19 April 2004.

(ii) Ms Connie Cheung Sau Lin, a Specified Person in the Financial Secretary's notice and a senior dealer of Sun Hung Kai Securities Ltd, an account executive for Chinacal Ltd and a Specified Person in the Financial Secretary's notice. A record of interview of Ms Cheung was conducted on 3 October 2003.

(iii) Mr Lin Xu Ming, a director of Chinacal Ltd and through Delcore Dynamics Corporation a shareholder of Chinacal Limited. A record of interview was conducted of Mr Lin on 24 October 2003.

(iv) Mr Chiu Sau Leung a person authorised to place orders for Honest Opportunity Ltd and an executive director of RIMC Advisors. A record of interview of Mr Chiu was conducted on 14 November 2003.

(v) Mr Ma Yu Lung, a supervisor of dealing and a terminal operator of Sun Hung Kai Securities Ltd. A record of interview of Mr Ma was conducted on 8 December 2003.

(vi) Mr David Hui Yip Wing, the chief executive officer of the Sun Hung Kai Group, a supervisor of Mr Edmund Chau Chin Hung and a director of Cheeroll Limited. A record of interview of Mr Hui was conducted on 27 January 2005.

(vii) Mr Shek Kam Por, the Director of the Enforcement Division (Surveillance) of the SFC, whose expert report is dated 27 February 2006.

A brief chronology of the sequence of events.

22. By a letter dated 6 June 2003, pursuant to section 181(1) the Ordinance, the SFC demanded that Sun Hung Kai Investment Services Ltd :

> *"... provide information about orders input by you in the shares of QPL International Holdings Limited on 27 May 2003.".*

By a notice dated 20 August 2003, pursuant to section 182(1) of the Ordinance, Mr Stephen Suen, Director of Enforcement of the SFC,

directed stipulated persons to investigate and report to the Commission in respect of matters that he declared he had reasonable cause to believe had occurred during round the period from 26 May to 5 June 2003, namely :

> *"(a) offences of false trading and/or price rigging and/or stock market manipulation may have been committed in respect of dealing in the shares of QPL International Holdings Ltd, contrary to section 295 and/or section 296 and/or section 299 of the Securities and Futures Ordinance (Chapter 571); and /or*
>
> *(b) persons may have engaged in false trading and/or price rigging and/or stock market manipulation in respect of dealings in the shares of QPL International Holdings Ltd, contrary to section 274 and/or section 275 and/or section 278 of the Securities and Futures Ordinance (Chapter 571).".*

23. By 8 December 2003 five of the six factual witnesses had been interviewed by officers of the SFC. In fact, Mr Chau had been interviewed twice. Mr David Hui was not interviewed until 27 January 2005. However, it was not until 25 April 2006 that matters were referred by the SFC to the FS, through the Financial Services and the Treasury Bureau ("FSTB") by transmission of three box files containing the eight witness statements of the six witnesses of fact and the expert report.

24. The Department of Justice received that material together with an investigation report on 27 April 2006. On 30 January 2007 the Department of Justice delivered its advice to the Financial Secretary. Having been asked on 2 March 2007 by the FSTB to clarify that advice

and to draft a notice the Department of Justice gave an advice on 4 April 2007 and a draft notice on 5 May 2007. The FS's notice to the Tribunal is dated 6 June 2007.

The explanations offered for delay.

(1). As to the SFC.

25. There is no issue that the relevant period of time in question is from 6 June 2003, when the SFC first made enquiries into the activities that are the subject of these proceedings, and 25 April 2006 when the SFC referred the case to the FS through the FSTB, namely a period of two years and ten and a half months.

(a) The investigation.

26. In his letter to the Tribunal Mr Harris said that whilst *"... most of the evidence contained in the current referral was gathered by 2 March 2004, the investigation was not complete at that point."* Of the additional investigation, Mr Harris referred to suspicion having fallen on past or present directors of Sun Hung Kai, without specifying which company or companies, as being beneficiaries of the trades in question. Of the ambit of those enquiries, Mr Harris said that it *"... involved tracing through four layers of bank accounts and was subject to significant bank delays in obtaining requested information."* Mr Harris said of those enquiries that they *"...failed to establish any evidence that suggested any more than is alleged in the current referral to the Market Misconduct Tribunal."*.

27. In his witness statement Mr Steward said that this line of enquiry stopped in about August or September 2004 and that the extension of the time of the enquiry was approximately six to seven months of the time of the investigation. However, notwithstanding his specific reference to the

letter of Mr Harris and the attached chronology and his related assertion *"I agree with his comments and observations as well as the attached chronology of major milestones."* Mr Steward resiled from Mr Harris's statement that there was an element of delay caused by banks by stating : *"There is no evidence any bank or third-party contributed to the length of time in responding to the information requests."*.

(b) Obtaining an expert opinion.

28. Both Mr Harris and Mr Steward attributed some of the delay in these proceedings to various difficulties relating to obtaining an expert opinion in respect of the alleged conduct. Of that, Mr Harris contended that there is a notorious difficulty for the SFC to obtain independent expert assistance from members of the securities industry. He did not elaborate as to why that was the case. He said that the three experts available within the SFC have many demands upon their time.

29. Mr Steward said that in about September 2004 the SFC expert, Mr Shek, had asked for additional information about the orders that were the subject of his opinion. As a result, four further notices demanding information were served upon Sun Hung Kai Investment Services Ltd in the month from mid-September to mid-October 2004. He acknowledged that the replies of Sun Hung Kai Investment Services Ltd were timely and the last of that information supplied on 25 October 2004. Mr Harris said that in December 2004 an expert report was received in respect of the period 26 May to 5 June 2003. A fifth notice was served upon Sun Hung Kai Investment Services Ltd in February 2005, to which they responded on 1 March 2005. In the result, Mr Steward said :

> *"The time taken to complete the expert opinion added approximately 5 - 6 months to the length of the investigation.*

Some of this time was taken up by the need for additional information. The workload of the expert was also a factor however some of this time was quite simply the time it took for Mr Shek to analyse the relevant materials and to prepare his written opinion.".

(c) Obtaining legal advice.

30. Finally, Mr Steward referred to the time that had been taken in obtaining an internal SFC legal advice. That advice had been sought in May 2005, but was not delivered until December 2005. He explained that, in part, that delay was accounted for by the need to have the transcript of the records of interview translated. Translations had been made available to the person giving that legal advice on and between 2 September and 24 November 2005. He acknowledged that it was difficult to estimate the length of time that had been expended on obtaining translations of those interviews but nevertheless estimated that was between four and six months.

(d) Miscellaneous matters.

31. Of the period between the receipt of the legal advice in December 2006 and the referral of the case to the FS on 25 April 2007 Mr Harris said that in January 2006 a paper had been prepared for reference in an SFC board meeting recommending referral to the FS, which meeting took place in March 2006 and at which a decision was made to refer the case to the FS. In February 2006 Mr Shek had signed off his expert's report.

(2). As to the Department of Justice.

32. Mr Fawls said that on receipt of the case papers from the FSTB on 27 April 2006 he had determined to give the requested advice himself.

However, as a result of pressure of work in August 2006 he had requested another counsel within the Department of Justice, but not one familiar with the related workload of the Insider Dealing Tribunal cases, to produce a draft advice. That advice was produced in mid-September 2006. At that stage, Mr Fawls determined to have all of the documents contained in the materials sent from FSTB translated from Chinese into English. That was completed in mid-October 2006. Given that a year earlier the need to translate the records of interview had caused a similar delay in the giving of legal advice within the SFC, it is difficult to understand why the need arose on a second occasion. Thereafter, Mr Fawls prepared the advice in its final form. That advice was sent to the FSTB on 30 January 2007.

33. Mr Fawls described at some length the pressures of work at that time within the section of the Civil Division of the Department of Justice seized with dealing with insider dealing and market misconduct cases of which he was in charge. It consisted of a team of six other counsel whose remit encompassed not only those two Tribunals but also appellate work on behalf of government in the areas of revenue, telecommunications and commercial litigation. He observed that proceedings in the Insider Dealing Tribunal were brought to a halt in the period from September 2005 until 24 March 2006, as a result of judicial review proceedings and an appeal therefrom arising out of inquiries by the Tribunal into dealing in the shares of Vanda Systems and Communications Holdings Ltd on the one hand and Asia Orient Holdings Ltd on the other. He noted that in consequence of the backlog of inquiries to be conducted and in an attempt to expedite matters no fewer than four inquiries were underway at different times before the Insider Dealing Tribunal in the nine-month period beginning April 2006. In addition, preparatory work was

performed in respect of two other inquiries. In each of the inquiries one of the counsel assisting Mr Fawls had duties either as one of the counsel assisting the Tribunal or as an instructing solicitor. Furthermore, as a result of observations by both Chairmen of the Insider Dealing Tribunal, in respect of the undesirability of counsel who had advised the FS in respect of a matter subsequently appearing as counsel assisting the Tribunal in the same matter, steps were taken to ensure that did not occur. Inevitably, duplication of work ensued. As a result, Mr Fawls contended that he and his team were hard pressed in their work commitments, it appears in particular in the second half of 2006.

34. Mr Fawls drew attention to the fact that the legislation in respect of market misconduct is relatively new and untested by the Tribunal. He says that the first case referred to the Department of Justice for advice for possible referral to this Tribunal was received in August 2005. The proceedings now before the Tribunal was the second case referred by FSTB to the Department of Justice. No doubt, arising out of the element of novelty of proceedings before this Tribunal Mr Fawls said that two cases referred for advice were found to be wholly unsuitable for referral to the Tribunal and in other cases it was necessary to ask that the SFC gather considerable amounts of additional evidence before any advice could be given. As a result, he said that from mid-October 2006 until the advice was rendered on 30 January 2007 there was an ongoing discussion within his section concerning advice in cases that might be referred to this Tribunal. One concern was that a consistent approach be adopted, another that errors be avoided.

<u>The oral evidence called in respect of the issue of delay/abuse of process.</u>

(i) Ms Connie Cheung.

35. Having placed Ms Connie Cheung's witness statement, dated 12 October 2007, before the Tribunal Mr Patterson indicated that the objection was taken to the fact that a notice pursuant to section 253(1) of the Ordinance had been issued on 23 October 2007 requiring her to give testimony. The nub of the objection was the element of compulsion in a person said to be "accused" of market misconduct. In result, the Tribunal having rescinded that notice, Mr Patterson indicated that Ms Connie Cheung wished to give evidence on the issue of delay/abuse of process and she was called to do so. In her evidence in chief, she adopted as true the contents of her witness statement.

36. In paragraph 4 of her witness statement Ms Connie Cheung stated that on 29 September 2003 she had received a letter from the SFC dated 26 September 2003 requesting her attendance for an interview at the SFC to take place on 3 October 2003. In consequence, she attended that interview. She was unaccompanied and answered the questions put to her by Mr Kenneth Ip on behalf of the SFC. The nub of her evidence is her assertion, at paragraph 5 of her witness statement :

> *"At no stage during this interview was I informed by any member of the SFC that I was a suspect or a "persons specified" in relation to the investigation. In fact, I was told by SFC Investigator Kenneth Ip that I was only 'assisting' him in his investigation. At all times, I understood that I was being interviewed as a witness. This was the very strong impression given by the SFC documents which were delivered to me and by the questions of SFC investigator Mr Kenneth Ip.".*

37. In cross-examination by Mr Yeung, Ms Connie Cheung accepted that nowhere in the SFC letter to her of 26 September 2003 was she told her that her status was that of a witness, nor did it state that she was a "person under investigation". She readily agreed that at that time she was unaware of any practice of the SFC to inform persons of the latter status, if that be the way in which those persons were viewed by the SFC. On receipt of that letter she did not consult a lawyer. Similarly, on receipt of a letter from the SFC dated 10 May 2006 in which she was advised in respect of QPL that the *"findings of the above inquiry had been referred to the Financial Secretary for consideration"* she did not consult a lawyer. She said that she did not know the effect that would have upon her.

38. Of the reference in her witness statement to the effect that Mr Kenneth Ip had told her that she was "assisting" him in his investigation Ms Connie Cheung readily agreed that was a reference to what she had been told and what was written in Chinese characters on a document that she signed in the course of the record of interview (bundle B 1 at page 454 in its original and page 349 in the English translation.) There it was stated :

> *"In conducting this investigative interview, I am performing a function under the Ordinance. In attending this investigative interview,* ***you are assisting me*** *in the performance of that function. Section 378 of the Ordinance imposes on you and obligation of secrecy."* **[Emphasis added]**.

39. In the context of her assertion that had she been aware at the time of the fact that she was *"the subject of the SFC investigation and a 'person specified'.."* she would, amongst other things, *"have taken all*

steps necessary to prepare myself for any future response to the specific SFC relegation, including but not limited to receiving legal advice and contacting potential witnesses on my behalf", Ms Connie Cheung accepted that she had not tried to contact any such witnesses after she had become aware of these proceedings in late August 2007. However, she said that she had contacted her solicitors, Haldanes, and the issue of contacting potential witnesses was left to them.

(ii) Mr Kenneth Ip.

40. The Presenting Officer called Mr Kenneth Ip to give oral testimony. He testified that he had worked for the SFC as a manager in the Enforcement Division from September 2002 to September 2005. However, at the latter date he resigned that position, having been convicted after trial in the Magistracy of an offence of assault occasioning actual bodily harm for which he was fined $5,000 and sentenced to serve a term of imprisonment of three months suspended for two years. In cross-examination, he accepted that his appeal to the Court of First Instance had been unsuccessful as had his application for leave to appeal to the Court of Final Appeal.

41. Mr Ip conducted all of the eight records of interview of the six witnesses that are before the Tribunal. Not surprisingly, he described himself as being the principal investigator. Mr Edmund Chau was the first of those persons interviewed by Mr Ip. That interview of 10 September 2003 was preceded by a letter from Mr Ip to Mr Chau dated 28 August 2003 in which he was told that: he was a "person under investigation"; that he was required to attend an interview and that he was entitled to have a lawyer present at the interview. An accompanying Notice of the same date detailed the impugned conduct and reasserted,

this time in bold letters, that he was a "person under investigation". Mr Ip said that in general terms the classification of a person as a person "under investigation" was not a decision that he made but was passed on to him at the time he was given the case papers. He agreed that in the two subsequent interviews of Mr Edmund Chau the information contained in the similar letters and notices sent to him in advance of those interviews were to the same effect as on the first occasion.

42. Mr Ip accepted that in the letter of 26 September 2003, sent to Ms Connie Cheung in advance of her record of interview on 3 October 2003, she was not informed that she was "a person under investigation" nor that she had the right to have a lawyer present at the interview. He explained that she was not a "person under investigation", she was a witness.

Submissions on the evidence of delay, explanations thereof, prejudice and the remedy of stay of proceedings.

A. SUBMISSIONS ON BEHALF OF THE SPECIFIED PARTIES

(i) The length of the investigation.

43. In his analysis of the various activities said to have been under way at particular times from the commencement of the initial inquiries of the SFC of Sun Hung Kai Investment Services Ltd, by their letter of 6 June 2003, followed by the investigation commenced on 20 August 2003 concluding with the issue of the Financial Secretary's notice on 6 June 2007 Mr Bell noted that Mr Harris said that "*while most of the evidence in the current referral was gathered by 2 March 2004 the investigation was not complete at that point*", adding that inquiries into a suspected connection between the impugned traders and "Sun Hung Kai" had been performed that had not resulted in any material being referred to the

Tribunal. Mr Bell pointed out that Mr Harris indicated that those inquiries had continued until December 2004, but Mr Steward had put those inquiries as coming to an end in August/September 2004. Mr Bell said that he took no issue in respect of delay until August/September 2004 as a result of the ultimately fruitless extension of the extended enquiry. However, Mr Patterson contended that the investigation should not have taken as long as it did. He contended that by the conclusion of the interviews by the SFC of Mr Edmund Chau and Ms Connie Cheung on 3 October 2003 the SFC investigations into those persons was effectively over. Alternatively, he said that position had been reached by early December by which time five of the six proposed witnesses in the hearing had been interviewed. He contended that the decision of the SFC to expand the inquiry to determine whether or not there was a link between past and present directors of Sun Hung Kai companies with the conduct of Mr Edmund Chau and Ms Connie Cheung is not a "legitimate reason for the delay incurred".

(ii) The time taken to prepare the expert's report.

44. Mr Bell did take issue with the length of time it took the expert, Mr Shek, to prepare his report for the SFC. Mr Patterson supported that objection. Mr Bell pointed out that Mr Harris said that a version of the expert report, dealing with the period 26 May to 5 June 2003, was received in December 2004 but that then additional broker records were obtained to assist the expert. Mr Steward said that the SFC made a request of SHK to provide "order and client information" in February 2005, which material was supplied on 1 March 2005 and that in May 2005 the case was referred for internal legal advice at the SFC. Mr Bell asked rhetorically: why was there that overall delay?

(iii) The time taken by the SFC to obtain legal advice.

45. Mr Bell pointed out that Mr Steward said that internal legal advice was obtained by the SFC for the case in the period May to December 2005. Of the explanation that translations of the interview transcripts had been necessary, the first of which had not become available until September 2005 and the last on 24 November 2005, Mr Bell contended that in light of the staleness of the case it was appropriate that either the matter be advised upon by counsel able to read the original Chinese transcripts or translations should have been obtained earlier.

(iv) Miscellaneous delay by the SFC.

46. Finally, Mr Bell invited the Tribunal to have regard to the fact that even after legal advice was obtained in December 2005 the file was not referred to the Financial Secretary until 25 April 2006.

(v) Delay in obtaining the advice of the Department of Justice.

47. Mr Bell reminded the Tribunal that Mr Harris said that the material passed on to the FS comprised only three box files containing eight witness statements plus an expert statement. That, it appears, is the same material that has been made available to the Tribunal by the Presenting Officer. That material reached the Department of Justice on 27 April 2006, although it did not render its advice to the FS until 30 January 2007. Of that delay, Mr Bell said that it spoke for itself. For his part, Mr Patterson said that the delay was far too long and that the explanation for the delay offered by Mr Fawls was not reasonable, in particular in respect of a reliance by Mr Fawls on resource limitations and pressure on the specialist unit advising on these matters as "a complete answer to the delay".

(vi) Delay between receipt of the legal advice of the DOJ (30 January 2007) and issue of the FS's notice (6 June 2007) and the Presenting Officer's letter to the Specified Parties (29 August 2007).

48. Mr Bell submitted that this was a period of further unnecessary delay.

49. When asked by the Chairman to identify the actual prejudice caused to Ms Connie Cheung by delay Mr Patterson responded initially by saying "...it would be a natural consequence flowing from the delay that has occurred." However, later he acknowledged "...we have limited actual prejudice in the terms of those items relied upon", that being a reference to Ms Connie Cheung and her husband determining to have a second child and of her not having contacted a lawyer earlier.

50. Mr Bell accepted in the course of his submissions that he was not in a position to identify any evidence of specific prejudice to Mr Edmund Chau caused by delay. Instead, he said that he relied on "inferred prejudice" arising from that delay. He accepted that the fact of the making, the timing and juxtaposition of the orders to buy and sell by the respective parties was established by documentary records. Similarly, no doubt, he would have said that even the erroneous assertions in the returns of Sun Hung Kai Investment Services Ltd to the SFC, as to whom it was who had placed orders on behalf of Chinacal Ltd, had been resolved in the oral interview of Ms Connie Cheung by the SFC of 3 October 2003. The records indicated, as Mr Edmund Chau had accepted in his interview by the SFC of 10 September 2003, that he had placed the orders on behalf of Cheeroll Limited. Mr Bell submitted that the crucial issue in the case of his client was Mr Edmund Chau's explanation for

inputting orders to buy and then cancelling them in the manner that he did. That, Mr Bell said, was not documented. That, was a matter upon which Mr Edmund Chau had to rely upon his memory and, given the passage of time, it was to be inferred that he was prejudiced in his ability to present his account of events.

51. Mr Bell accepted that in the three records of interview conducted of Mr Edmund Chau he had been asked to explain in respect of specific orders and cancellations the purpose or intention of his trading. However, he said that Mr Edmund Chau's explanations were restricted to the transactions in which he was questioned and that was determined by his interrogator Mr Kenneth Ip.

52. Mr Patterson invited the Tribunal to note that on the occasion of the only interview conducted of Ms Cheung by the SFC on 3 October 2003 she was not informed that she was a *"person under investigation"*. By contrast, he pointed to the fact that in all three records of interview conducted of Mr Edmund Chau Chin Hung, also a Person Specified in the FS's notice, he was advised that he was *"...under investigation"*. Furthermore, Mr Patterson submitted that the impression left with Ms Cheung was that she was no more than a witness assisting the SFC with their enquiries. Also, he reminded this Tribunal that Ms Cheung was told in terms at the conclusion of the record of interview that she was subject to the statutory provisions relating to secrecy, prescribed in section 378 of the Ordinance. Finally, he submitted that the letter of 10 May 2006 from the SFC to Ms Cheung advising her that the case had been submitted to the FS in no way alerted her to the fact that consideration was being given as to whether or not the FS should exercise his discretion to initiate proceedings by this Tribunal as to whether or not she ought to be named

as a Stipulated Person in his notice. In the result, Mr Patterson submitted that three years and 11 months has elapsed from the time that Ms Cheung was advised by letter from the SFC dated 28 September 2003 that she was required to attend an interview by the SFC and her being informed, by the Presenting Officer's letter of 29 August 2007, that she was a Specified Person in these proceedings before this Tribunal.

53. Mr Patterson submitted that the consequence of the length of the delay is such that a presumption arises that Ms Cheung has suffered prejudice. Alternatively, he relied upon Ms Cheung's oral evidence and the witness statement she adopted in which she says that, given that she had not been told that she was a person under investigation and in light of the secrecy provisions of section 378 of the Ordinance, she had not discussed the matter with anybody else nor had she sought legal advice from a solicitor. She understood that she was a witness merely assisting the SFC in their enquiries. Had she been told that she was a person under investigation she would have contacted a lawyer sooner and tried to contact witnesses. She says that she has simply gone on working and progressing in her profession. Now, she is a senior manager of Sun Hung Kai and she holds a licence, granted by the SFC in December 2004, to deal in securities and commodities, Type 1 and Type 2 regulated activities.

54. Of what he contends is personal prejudice to Ms Connie Cheung, Mr Patterson pointed to her evidence in her witness statement that on 1 November 2005 she gave birth to a son, an addition to her family then consisting of her daughter born in April 2001. She says that had she known of the ongoing nature of the enquiries which have resulted in her being designated a specified person she and her husband would not have

planned to have the addition of a son to their family at that time. Rather, she says that she would have taken steps to prepare herself to deal with the allegation she now faces, including seeking legal advice and contacting potential witnesses.

B. THE SUBMISSIONS OF THE PRESENTING OFFICER

55. Mr Yeung submitted that the material before the Tribunal for the substantive hearing revealed a simple case in which documentary records would serve to prove the making of the various orders in respect of QPL shares. He acknowledged that the identity of the person's inputting those orders had been established in the initial interview of Mr Edmund Chau and the only interview of Ms Connie Cheung. Mr Yeung was not called upon by the Chairman to address the Tribunal on the issue of the delay resulting from the decision of the SFC to extend the ambit of their enquiries. Of the delays in the various stages of that then followed, Mr Yeung invited the Tribunal to have regard to the explanations proffered by the SFC and the Department of Justice. That was his response in respect of the delay in obtaining the draft report of Mr Shek, which was available in May 2005. Of the delay from May 2005 to 2 December 2005, in the SFC obtaining its internal legal advice, Mr Yeung said that viewed objectively "things can be improved", but he declined to take it upon himself to suggest those improvements. Similarly, in respect of the delay in obtaining the legal advice of the Department of Justice, from 27 April 2006 to 30 January 2007, Mr Yeung pointed to the explanations that had been proffered, but when pressed by the Chairman, given his familiarity now with the same three box files and expert's report it appears that were sent to the Department of Justice, to give an estimate of the time required for counsel to give advice he said that it would take "longer than a couple

of weeks", adding that on the face of it the matter could have been expedited.

A CONSIDERATION OF THE SUBMISSIONS

The Law.

56. As required by the Ordinance the Chairman has directed the Tribunal in respect of the relevant issues of law. The starting point of a consideration of this application of the provisions of section 253(1)(i) of the Ordinance, which provides that the Tribunal may :

> "stay any of the proceedings on such grounds and on such terms and conditions as it considers appropriate having regard to the interests of justice;".

The question that arises is : on what principles and considerations is that power to be exercised properly?

57. The principles and considerations relevant to the issue of whether or not to stay criminal proceedings have received considerable attention in recent years in Hong Kong and in many other common-law jurisdictions. The matter was considered in some detail in the judgment of Ribeiro PJ, with whose judgment all the other judges agreed, in *Lee Ming Tee*.

58. However, on 12 October 2007 the Chairman ruled that these are not criminal proceedings. It follows that Article 11 of the HKBOR and Article 14(2) and (3) of the ICCPR are not directly relevant to the issues raised. Article 10 of the HKBOR and the rights that arise at common law require that the proceedings be fair, in particular that the Specified Persons have a fair hearing. In the earlier ruling, the Chairman noted that

section 252(7) of the 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. Section 252(3) of the Ordinance provides that the objective of the proceedings instituted by the FS, pursuant to section 252(1), is to determine the matters there adumbrated. Sections 253 and 254 stipulate the powers of the Tribunal and include the power in section 253(1)(a) to receive and consider material even if that material would not be admissible in evidence in civil or criminal proceedings in a court of law. It follows that proceedings in this Tribunal are manifestly not "classic" civil proceedings.

59. There is no dispute that, the matters that the Tribunal is required to determine pursuant to section 253(3) of the Ordinance involve the determination of the "... rights and obligations in a suit of law" of the Specified Persons. In consequence, the provisions of Article 10 of the HKBOR are engaged and the Specified Persons are "...entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.". Undoubtedly, the principles of natural justice and the duty of fairness also give rise to the right to a fair hearing.

60. In the context of criminal proceedings, Ribeiro PJ, in his judgment in *Lee Ming Tee,* noted of the use of the power of the court to stay proceedings (page 148 J) :

> "In most such cases, the court only grants the stay because, notwithstanding the range of remedial measures available at the trial, a fair trial for the accused is found to be impossible and continuing the prosecution would amount to an abuse of process.".

He went on to quote from the judgment of Mason CJ in the High Court of Australia in *Jago v District Court of New South Wales* (1989) 168 CLR 23 at page 28 in respect of the question that arises in an application to stay (page 149 B-C) :

> "The question is not whether the prosecution should have been brought, but whether the court, whose function is to dispense justice with impartiality and fairness both of the parties and to the community which serves, should permit its processes to be employed in a manner which gives rise to unfairness.".

61. Ribeiro PJ went on to endorse the statement of Lord Lane C J in the Court of Appeal of England and Wales in *A-G's Reference (No. 1 of 1990)* [1992] QB 630 at 644 of the limited circumstances in which a stay of criminal proceedings should be imposed :

> "...no stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held: in other words, that the continuance of the prosecution amounts to a misuse of the process of the court.".

62. In the context of a consideration of the necessity for proof of prejudice arising from delay in the context of a hearing before a Tribunal Bastararche J in the judgment of the majority in the Supreme Court of Canada in *Blencoe* said (paragraph 101 at page 559) :

> "...delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period....In the administrative Law context, there must be proof of significant prejudice which results from an unacceptable delay.".

63. The issue of whether or not prejudice is to be presumed from delay in the context of criminal proceedings was addressed in the Advice of the Privy Council articulated in the judgment of Lord Mustill in *Tan v Judge Cameron* [1992] 3 WLR 249 at 264 :

> "Naturally, the longer the delay the more likely it will be that the prosecution is at fault, and that the delay has caused prejudice to the defendant; and the less that the prosecution has to offer by explanation, the more easily can fault be inferred. But the establishment of these facts is only one step on the way to a consideration of whether, in all the circumstances, the situation created by the delay is such as to make it an unfair employment of the powers of the court any longer to hold the defendant to account. This is a question to be considered in the round, and nothing is to be gained by the introduction of shifting burdens of proof, which serves only to break down into formal steps what is in reality a single appreciation of what is or is not an unfair.".

64. That statement of Lord Mustill is entirely consistent with the observations of Lord Browne-Wilkinson in *Roebuck*, in addressing the issue of whether or not a party was estopped from praying-in-aid prejudice that had arisen during a period of his acquiescence in the delay, (page 234 G) :

> ".... a judge can infer that any substantial delay at whatever period leads to a further loss of recollection.".

65. In his judgment in *Shtun* Neil LJ (as he was then) endorsed that statement of Lord Browne-Wilkinson (page 1290 E) :

> "The judge's task is to assess the *likely* effect on the trial and on the defendant's ability to put his case forward. The judge must therefore draw inferences based on all the material before him. These inferences will include inferences as to the effect of delay on the recollection of witnesses.".

66. It follows from an acceptance of the accuracy of those judicial observation and their applicability to the proceedings before this Tribunal that while, on the one hand, prejudice is not to be presumed by delay "per se" nevertheless, on the other hand, the Tribunal is entitled to draw inferences based on all the material before it as to the effect of delay on the Specified Parties and the fairness of these proceedings.

67. In his judgment in *Lee Ming Tee* Ribeiro PJ went on to endorse a second line of cases, in particular the judgment of the House of Lords *R v Horseferry Road Magistrates Court, ex p Bennett* [1994] 1 AC 42], upon which the stay of criminal proceedings was ordered (page 150 A-B) :

> "...where, although the fairness of the trial was not in question, the Court granted a stay because the circumstances involved an abuse of process which so offended the Court's sense of justice and propriety that the entire prosecution was tainted as an abuse of process.".

68. Ribeiro PJ went on to note in his judgment (page 150 B-C) that in criminal proceedings, although the jurisdiction existed on that dual basis, it was only most sparingly exercised and observed that in practice such stays were highly exceptional.

69. In his judgment, on behalf of the majority in *Blencoe*, Bastarache J stated that he accepted the findings of the judge at first instance, that the respondent's right to a fair hearing had not been jeopardised and that proof of prejudice had not been demonstrated to be of a sufficient magnitude to impact on the fairness of the hearing, but then went on to pose the question (page 560 paragraph 104) :

> "...whether the delay in this case could amount to a denial of natural justice or an abuse of process even where the respondent has not been prejudiced in an evidentiary sense.".

70. Later in his judgment, Bastarache J answered that rhetorical question by citing with approval passages in the judgment of L'Heureux-Dubé, J in *Rv Power* [1990] 1 SCR 601 (page 566 paragraph 120) :

> "For there to be an abuse of process, the proceedings must, in the words of L'Heureux-Dubé, J be "unfair to the point that they are contrary to the interests of justice" (page 616). "Cases of this nature will be extremely rare" (*Power, supra* at p 616). In the administrative context, there may be abuse of process where conduct is equally oppressive.".

In the result, the majority in *Blencoe* determined that the delay in that case was not so inordinate as to amount to an abuse of process.

71. The Chairman has directed the Tribunal that, it is for a Specified Person to establish on the balance of probabilities that a "fair hearing" is not possible but that even if the Tribunal is satisfied that the Specified Persons can be afforded a fair hearing in these proceedings, nevertheless it can and should grant a stay of proceedings if the circumstances involved an abuse of process which so offended the Tribunal's sense of justice and propriety that these proceedings were tainted as an abuse of process.

<u>An analysis of the facts established by the evidence.</u>

72. The determinations of fact, in accordance with the Chairman's directions as to the law, have been reached by the Tribunal as a whole. There is no doubt that at the outset of the investigation the SFC moved with commendable speed in making enquiries of Sun Hung Kai Investment Services Ltd in respect of dealings in the shares of QPL. Equally, the company responded to requests to be furnished with

documents timeously. As a result, on 17 June 2003 it responded to the request of the SFC of 6 June 2003 by providing detailed information of their dealings in the shares of QPL on 27 May 2003. Similarly, on 8 August 2003 it provided the SFC with similar detailed information in respect of 26 and 28 May and 2 and 5 June 2003. A direction having been issued to officers of the SFC, pursuant to section 182(1) of the Ordinance, on 20 August 2003 to investigate and report on dealings in the shares of QPL in the period 26 May to 5 June 2003 Mr Edmund Chau and Ms Connie Cheung were interviewed by Mr Kenneth Ip on 10 September and 3 October 2003 respectively. "MSS Stock Activities" record for dealings in the shares of QPL for various relevant dates in the period including 26 May to 5 June 2003 were available and put to the interviewees.

The records of interview.

73. The progress of the SFC investigation is best evidenced by a brief examination of the various records of interview that were conducted. In the interview of 10 September 2003 Mr Edmund Chau confirmed that he was an Executive Director of Sun Hung Kai Securities Ltd responsible for proprietary trading and supervision of the staff including Ms Connie Cheung in the "Hong Kong dealing" department. He acknowledged that he was the "authorised person" for Cheeroll Ltd able to place orders on its behalf and that he had enjoyed that status since 1997. The Directors of Cheeroll Ltd were his colleagues Mr David Hui Yip Wing and Mr Kwok Chee Chung, respectively the "CEO" and Finance Director of the Sun Hung Kai Group. Mr Chau went on to confirm that he had placed all the orders by "outcry" to one or other of two terminal operators on behalf of Cheeroll Ltd, reflected in the records provided by Sun Hung Kai

Investment Services Ltd to the SFC, for 26 and 28 May and 2 and 5 June 2003.

74. Mr Chau explained that in October 2002 and February 2003 QPL had placed shares through Sun Hung Kai International Ltd at $1.50 and $1.52 respectively. He was involved in the arrangements whereby Chinacal Ltd, a client of his employer, subscribed for QPL shares in each of the two placements. He said that Honest Opportunity, a client of his company had also obtained shares in each of the two placements. Mr Lin Xu Ming, known to him as a shareholder and director of Chinacal Ltd, instructed him to sell the QPL shares if the occasion arose. He instructed Ms Connie Cheung to make those sales. In his second interview of 20 November 2003, Mr Chau explained that those instructions had been received on the telephone at the time of the second placement when he was told to sell if there was a profit to be made and that is what he had told Ms Connie Cheung.

75. Mr Edmund Chau said that on 23 May 2003 the volume of QPL shares traded exceeded 30 million and the price had risen to the range of $1.50-$1.60 on an upward trend. Mr David Hui agreed with his proposal to buy up to $20 million worth of QPL shares as proprietary trading. As a result, he began to make bids to buy those shares on 26 May 2003. He decided when and at what price to bid to buy shares. Thereafter, Mr Chau was asked to explain his pattern of bidding to buy QPL shares in the period 26 May to 2 June 2003 only to cancel the bid in due course and to replace it with another bid to buy QPL shares, often at the same price as the earlier cancelled bid. It was suggested to him that the pattern was evident: that his "buy" bids were made in conjunction with offers to sell QPL shares by Chinacal and Honest Opportunity Ltd. In response to a

question, as to why it was that at 11:56 a.m. on to June 2003 he had cancelled a bid to buy 200,000 QPL shares at $1.62 per share shortly after the bid was made and then made a bid to buy 300,000 QPL shares at the same price shortly thereafter, Mr Chau said :

> *"At that time, I did not want to have too many buy orders at $1.62 in the market. Thus, I cancelled them and then input a larger order at $1.62. The reason why I did not want to have too many buy orders in the market was that I did not want to leave the market with the impression that I was* scaffolding.*"* **(Emphasis added).**

76. In her interview of 3 October 2003, Ms Connie Cheung confirmed that she was a senior dealer of Sun Hung Kai Securities Ltd and had been since 1995. She placed her orders to deal in shares by "outcry" to Mr Ma Yu Lung, who sat next to her. Her supervisor was Mr Edmund Chau. She said that in February 2003 after Chinacal Ltd had subscribed for QPL shares in a placement she had been instructed by Mr Edmund Chau to sell those shares if the price was good. That happened immediately after a telephone call that Mr Edmund Chau had with a person at the other end she believed to be Mr Lin Xu Ming. Thereafter, she made the decision when to sell those shares and at what price. She confirmed that she placed all the orders to sell QPL shares on behalf of Chinacal Ltd on 26 and 28 May and 2 and 5 June 2003.

77. Ms Connie Cheung said that she knew that Cheeroll was a "house account" of her employer in the charge of Edmund Chau and Honest Opportunity a "direct dealing" client from whom she received either specific or general instructions from Mr Terry Chiu.

78. When invited to note that, from the records, on days when Chinacal placed orders to sell QPL shares Cheeroll Ltd placed large orders to buy those shares Ms Connie Cheung confirmed that she was aware that those buy orders were "... input by SHK", in particular by Mr Edmund Chau. They sat close to each other and she could hear him place the orders. However, given that Cheeroll Ltd was a house account, she did not ask him any questions at all about those orders.

79. In his second interview of 20 November 2003 Mr Edmund Chau said that he made his "buy" orders by "outcry" to Mr Ma Yu Lung as did Ms Connie Cheung. He denied the suggestion put to him that when he input "buy" orders of QPL shares in the relevant period on behalf of Cheeroll Ltd he was aware of "sell" orders of those shares input by Ms Connie Cheung, although he accepted that it was probable that he became aware of her orders after he had placed his "buy" order. He denied that the aim of his inputting "buy" orders for QPL shares on behalf of Cheeroll Ltd during the relevant period was not in fact to buy QPL shares but with the intention of creating an apparently active buying market for those shares, in order to make it easier for Ms Connie Cheung to sell those shares on behalf of Chinacal Ltd and Honest Opportunity.

80. In an interview with the SFC on 8 December 2003, Mr Ma Yu Lung said that from 1987 he had been employed by Sun Hung Kai Investment Services Ltd to input instructions from dealers to buy and sell shares. He was performing those duties in the period 26 May to 5 June 2003. Orders were placed by outcry. Initially, he said that he received instructions in that period from only Ms Connie Cheung and not Mr Edmund Chau. However, when taken to the records submitted by Sun Hung Kai Investment Services Ltd to the SFC on 8 August 2003 of their

dealing in the shares of QPL in that period, which records detailed Mr Edmund Chau as having given instructions in respect of orders to buy QPL shares on behalf of Cheeroll Ltd, and having been told that that is what Mr Edmund Chau had said himself had happened, Mr Ma explained his initial answer by saying that although Mr Edmund Chau had initiated the order they had been confirmed to him by Ms Connie Cheung. He said that there were seats for four persons at a desk in the dealing room opposite each of whom there was a teletext terminal. He and Mr Edmund Chau sat at the far end of the line of four seats and Ms Connie Cheung had a seat between them.

81. In an interview with the SFC on 24 October 2003, Mr Lin Xu Ming explained that Chinacal was a company that he had acquired in 2001. He was a director. In October 2002 and February 2003 at the suggestion Mr Edmund Chau of Sun Hung Kai International Chinacal Ltd had acquired placement shares of QPL. The QPL shares first acquired were sold at a profit. Following the acquisition of the shares in February 2003 he instructed Mr Edmund Chau to sell those QPL shares when there was a profit to be made. He was not involved subsequently.

82. In an interview with the SFC on 14 November 2003, Mr Terry Chiu Sau Leung said that in May and June 2003 he was an executive director of RIMC Advisors [Hong Kong] whose duties included discretionary management of asset portfolios of clients, one of which was Honest Opportunity Ltd. It had an account with Sun Hung Kai Investment Services Ltd. He was authorised to place orders in that account on behalf of Honest Opportunity Ltd. On the recommendation of Mr Edmund Chau Honest Opportunity Ltd had acquired 21.7 million QPL shares through that account in the placement of QPL shares in

February 2003. In May 2003 he had instructed Ms Connie Cheung to sell the QPL shares held by Honest Opportunity Ltd if a price greater than the acquisition price of $1.50-$1.52 could be obtained. He said that he was unaware of unfulfilled bids made by Cheeroll Ltd for QPL shares made at the time of the disposal of QPL shares held by Honest Opportunity Ltd.

83. In a record of interview conducted of Mr Edmund Chau on 19 April 2004, he accepted that he had begun bidding to buy shares in QPL through Cheeroll as early as 6 May 2003. He accepted that there was prior to the conversation that he had said, in his first interview, that he had with Mr David Hui and was without his authority or approval. He said he did not need his authority or approval because that trading was within his own authority. He had only spoken to Mr David Hui out of courtesy. Thereafter, Mr Edmund Chau was confronted with records in respect of trading by Sun Hung Kai Investment Services Ltd in the shares of QPL in the period 5 to 23 May 2003, which records had been obtained from that company by their letter of 12 March 2004 to the SFC. His attention was drawn to the pattern of trading by Cheeroll Ltd and to the related orders to sell by Honest Opportunity in that period. He denied that the pattern of his trading through Cheeroll Ltd was intended to create a false market and, in particular, that he received instructions so to trade from Honest Opportunity Ltd.

84. Finally, Mr David Hui was interviewed by the SFC on 27 January 2005. In the material period he was Deputy-Chairman and CEO of Sun Hung Kai Co Ltd and a director of Sun Hung Kai Investment Services Ltd. Mr Edmund Chau was one of his subordinates and had authorisation from the board of directors of Sun Hung Kai Co Ltd to deal in securities. Mr David Hui acknowledged that a memorandum of Sun Hung Kai Co

Ltd dated 7 June 2000 designated him to authorise any proprietary trading of the Group and that the minutes of a board meeting of Cheeroll Ltd dated 16 July 1997 authorised Edmund Chau to give oral trading instructions on behalf of that company. He said that during the period between January and June 2003 Mr Edmund Chau had told him that he wanted to invest in the shares of QPL, although he did not specify an amount of the investment. For his part, he said that he did not give him any advice and nor did Mr Edmund Chau need his approval because he was authorised to make a purchase of that nature so long as it was within the monetary limits of his authorization.

85. It is clear, at least in retrospect, that by 8 December 2003 just over six months after the initial inquiry of SHK by the SFC on 6 June 2003 the SFC had gathered almost all of the relevant factual evidence that is now laid before the Tribunal for its consideration in determining the issues posed by the Financial Secretary's notice. The only witness of fact interviewed after 8 December 2003 whose interview is put before us is that of Mr David Hui. There is no explanation for why it was that he was not interviewed until January 2005. As Deputy-Chairman and CEO of Sun Hung Kai Co Ltd and a Director of Sun Hung Kai Investment Services Ltd his whereabouts would appear to have been known.

<u>The length of the investigation.</u>

86. Given that Cheeroll was a company closely associated with senior management of Sun Hung Kai Co Ltd and Sun Hung Kai Investment Services Ltd it is readily understandable and entirely justifiable that the SFC should have determined to broaden the ambit of their enquiries to determine whether or not there was evidence establishing the connection of past and present directors of those companies with the impugned

trading conduct of Cheeroll Ltd. On the material available to the Tribunal there is no reason to doubt that the six to seven months of additional, but as it turned out fruitless, investigation that Mr Steward says was expended in that respect was justifiable.

Delay in obtaining the draft of the expert's report.

87. It appears that a draft of Mr Shek's report was available in about May 2005 and in that month the case was sent for internal SFC legal advice. There is no dispute about Mr Steward's statement in his witness statement that in about September 2004 Mr Shek had asked for additional information about the orders that were the subject of his opinion and as a result four requests had been made of Sun Hung Kai Investment Services Ltd for that information in the month from mid-September to mid-October 2004. Also, he noted that a fifth request had been made in February, to which a response and received on about 1 March 2005. He said that obtaining the expert's report added five to six months to the length of the investigation, the additional line of enquiry having stopped in about August/September 2004. However, there is a dispute, at least on the part of Mr Patterson, as to whether or not that length of time was justified.

Mr Shek's report.

88. A short analysis of Mr Shek's report is of assistance in addressing the complaint made by Mr Patterson. It is to be noted that at the outset of the substantive part of his report (paragraph 7) Mr Shek designates the period 26 May to 5 June 2003 as the "Analysed period". He said that in the period Cheeroll placed 157 buy orders of QPL shares, 110 of which were cancelled, 41 of which buy orders were reduced in size and that the upshot was that Cheeroll bought not one single QPL share. By contrast,

the relevant period stipulated in the FS's notice to the Tribunal under the heading "Statement for Institution of Proceedings" refers to the period between "6 May 2003 and 10 June 2003 (both dates inclusive)".

89. The main structure of the report may be broken down into the following areas :

Order placing patterns in respect of QPL shares of -

(a) Cheeroll (paragraphs 24-52);

(b) Chinacal (paragraphs 53-55); and

(c) Honest Opportunity (paragraphs 56-58).

It is to be noted that there is repeated reference in the analysis to the limited time frame of the "Analysed period", although in the case of each company in addition there is reference to the broader timeframe of April-June 2003.

90. Furthermore, it is to be noted that in the latter part of the report under the title "Additional Comments" (paragraphs 59-72), in which Mr Shek was asked to address the issue of whether : *"the order placing patterns of Cheeroll during the analysed period were consistent with facilitating the offloading of QPL shares by Chinacal and/or Honest"* that there is a more detailed analysis of the trading patterns of those three companies outside the "Analysed period", even intruding into April 2003. In that context Mr Shek makes a number of pertinent observations relevant to the overall time period prescribed in the Financial Secretary's notice. For example, at paragraph 68 he observes :

> *"From 1 April to 5 May 2003, no-bid orders for shares of QPL had been placed by Cheeroll. However, on the trading day immediately after Honest started offloading its shares,*

i.e. 5 May 2003, Cheeroll began to place large quantity bid orders, which lasted for a period of almost 6 weeks. From 6 May to 10 June 2003, a total of 314 buy orders were placed by Cheeroll, but not a single share of QPL had been acquired by it.".

91. The relevance of Mr Shek opinions in respect of the three-month April to June 2003 period, is the fact that, on the information placed before the Tribunal, it was not until the request of the 18 February 2005 followed by the reply of Sun Hung Kai of 1 March 2005 that the SFC asked for and was provided with details of the orders input by Sun Hung Kai in respect of QPL shares for the periods 1 to 30 April, 2 to 5 May and 6 to 30 June 2003. The three replies of the four requests made by the SFC of Sun Hung Kai in mid-September to mid-October 2003 that are available to the Tribunal, namely the replies of 23 September, 4 October and 25 October 2004 all deal with information sought in relation to the "Analysed period". The latter reply corrects mis-information provided to the SFC in the two earlier replies.

92. It is not apparent to the Tribunal why the information relating to the entire three-month period was not sought from Sun Hung Kai at an earlier stage. No doubt, the SFC had available to it some information for that three month period from the MSS Stock Activities Reports. We agree with Mr Steward when he says in his witness statement that it would have been better and preferable for the expert opinion to have been provided more quickly. Also, we agree with his statement that it is appropriate for an expert to request information to be confirmed and for other information to be gathered and with his assertion that a *"...cogent, well organised and thought-out expert opinion will save time for*

prosecution decision-makers and courts and Tribunal's.". Nevertheless, we judge there to have been an element of unexplained and unjustified delay in the production of the draft expert report.

Delay in obtaining legal advice and acting upon it.

93. On any view the period of time expended in 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. The investigation having been completed, the draft expert report was available by May 2005 and yet it was not until 6 June 2007, about 25 months later, that the FS issued his notice. The SFC spent from May to December 2005 obtaining legal advice internally. Even after that length of delay it was not until four months later, on 25 April 2006, that the matter was referred to the FS. The Department of Justice was asked to advise on three box files of material and spent from 27 April 2006 to 30 January 2007 before delivering their advice to the Financial Secretary. Even then, a clarification of that advice and the drafting of the notice consumed several more months before the notice was issued.

94. Notwithstanding the various explanations proffered on behalf of the SFC and the Department of Justice, the facts stated above have merely to be stated for it to be obvious that there was unjustifiable delay. A delay of months by the SFC in obtaining translations of records of interview that had been made 18 months earlier was unacceptable. Whilst of course we accept that the section of the Civil section of the Department of Justice dealing with advice to the FS in respect of matters that might be referred by him to the Market Misconduct Tribunal was under pressure of work a delay of no less than nine months in rendering such advice was wholly unjustifiable.

95. It is not for this Tribunal to proffer suggestions to the SFC or the Department of Justice as to how the lamentable state of affairs described above is to be addressed to avoid its re-occurrence. However, we express the hope that these findings of the Tribunal will result in appropriate remedial measures so that such delays do not occur in future.

96. The issue of delay in proceedings being brought before the Insider Dealing Tribunal ("IDT"), they also being proceedings in which the SFC and the Department of Justice play significant roles prior to the matters reaching the IDT, has received adverse comment by the IDT on a number of occasions. In the Report of the IDT in respect of *"whether insider dealing took place in relation to the listed securities of Vanda Systems and Communications Holdings Ltd between 14 and 17 February 2000 (inclusive)"* the Tribunal considered, but rejected, an application for the stay of proceedings on the basis of delay. The FS's notice constituting the Tribunal was dated 28 October 2003, but the "Salmon letters" were not served until 11 April 2005 and the first preliminary hearing was held on 17 May 2005. In its Ruling on 9 August 2005 on the issue (annexure D of the Report) the Tribunal noted :

> "Mr Patterson is right there has been delay. The events the section 16(2) notice requires us to inquire into occurred in February 2000. That is now five years six months ago (though the last two months have been taken up with various arguments on matters of disclosure relating to these applications). That, in the view of this Tribunal, is a most undesirable period of delay between events and any inquiry into them. And unfortunately the present inquiry is not an exception to the rule. For some time past a delay of about five years and sometimes more has elapsed between events the subject of a section 16(2) notice

and the issue of Salmon letters in enquiries conducted by the Divisions of the Insider Dealing Tribunal.".

A consideration of Prejudice arising from delay.

(i) Mr Edmund Chau.

97. As indicated earlier Mr Bell conceded that he is unable to point to any specific prejudice enuring to Mr Edmund Chau's detriment arising from delay, rather he relies on "inferred prejudice". In particular, he pointed to the single issue of the ability of Mr Edmund Chau to account and give explanation now for the pattern of his trading through Cheeroll in the material period. With respect to Mr Bell, we do not accept that there is any such prejudice arising to Mr Edmund Chau. He was put on notice by the SFC letter of 28 August 2003, about three months after the impugned events, of the nature of the SFC enquiry of the fact that he was a "person under investigation". Moreover, in the first record of interview of 10 September 2003 he was challenged specifically to account for the intention or purpose of his trading in relation to particular trades that were said to evidence an overall pattern. The fact that he was not taken to every single trade is neither here nor there. Clearly, he was alerted to what allegations were being made against him. The fact that Mr Edmund Chau was acutely aware of exactly the nature of the investigation into his conduct and the related allegations is evidenced by his own explanation in respect of his cancellation of a bid shortly after it had been made, which cancellation was soon followed by a new bid at the same price. Mr Edmund Chau explained that he did not want to have too many bids in the market lest he be accused of "scaffolding", the very conduct that the SFC was investigating.

98. Furthermore, in the second and third interviews of Mr Chau by the SFC, namely 20 November 2003 and 19 April 2004 the focus of the SFC's attention on the intention and purpose of his trading through Cheeroll Ltd was re-iterated and emphasised in respect of the trading of Chinacal Ltd and expanded in ambit by reference to the trading of Honest Opportunity Ltd.

99. Having been alerted to the nature of the SFC's enquiries, in particular the fact that he was a person under investigation within three months of the impugned conduct and having been interviewed no less than three times in the ensuing months we are satisfied that Mr Edmund Chau was very well placed to marshal and preserve his memory of the issues in question, so that the subsequent passage of more than four years causes him no or very little prejudice in his participation in these proceedings. Certainly, such minor element of prejudice enuring to his detriment is signally short of the prejudice required to justify the extraordinary remedy of stay of the proceedings.

(ii) Ms Connie Cheung.

100. Ms Connie Cheung was alerted to the ambit of the SFC's enquiries into these matters by their letter to her of 26 September 2003. There is no dispute that she was not informed that she was "a person under investigation". Equally, we accept Mr Kenneth Ip's evidence and are satisfied that she was not such a person at the time of her interview. Whilst there is no requirement in the Ordinance that such a person be informed that he/she falls into that category the apparent practice of the SFC to inform an interviewee of that fact, as evidenced by the interview of Mr Edmund Chau, is clearly the fair and appropriate practice. Furthermore, an appropriate extension of that fair practice would be to

inform a person such as Ms Connie Cheung, when that determination was made, that she had become a "person under investigation". If that stage had been reached by the time of the letter to her from the SFC dated 10 May 2006, in which she was informed that the matter had been referred to the FS for his consideration, that was an ideal opportunity for the information to be imparted.

101. The requirements of the Ordinance governing the interviewing of a person suspected to be possessed of information that might assist the SFC's enquiries were met in full in the case of Ms Connie Cheung. There was no requirement to advise her of the right that she enjoyed in common with all citizens to seek legal advice or, for that matter, to be accompanied by a lawyer to her interview. Ms Connie Cheung was informed of the need to make it known that she asserted her right to self-incrimination, albeit that she was advised that she must nevertheless answer the questions truthfully, and the restrictions on the subsequent use of reponses. She chose to make no such claim. Finally, when informed of the restrictions imposed by operation of the "secrecy" provisions pursuant to section 378 of the Ordinance Ms Connie Cheung was advised of her right nevertheless to consult and inform a lawyer of her circumstances and to obtain advice. On her evidence she chose not to do so.

102. Whilst, on the one hand Ms Connie Cheung has testified that had she been alerted earlier to the fact that she had become a person under investigation or that consideration was being given to her being named a Specified Person in the proceedings that have resulted she would have sought legal advice and sought to locate relevant witnesses on the other hand she has given no testimony of the fact that there are dead or missing

witnesses or even witnesses whose memories have faded through the passage of time. Similarly, she has given no testimony of the fact that documentation is now missing which would otherwise have been available at an earlier stage had she been so alerted. Having been alerted to the fact of the SFC investigations into the impugned transactions within four months of those events and having been questioned closely about her conduct relevant to those matters and, in particular, her knowledge of Mr Edmund Chau's conduct in trading through Cheeroll we are satisfied that not only was Ms Connie Cheung's attention drawn to the very matters that are the focus of the proceedings before this Tribunal but also that she gave detailed answers in respect of those enquiries. Not once did she claim that she had no memory of those events. As a result, we are satisfied she too was well placed to marshal and preserve her memory of relevant events at an early stage.

103. Since Ms Connie Cheung has raised the issue of prejudice arising in her personal life by the decision that she and her husband made, in ignorance of the prospect that she might be named as a Specified Person in these proceedings, to have a second child the Tribunal must address the issue if only to traverse it, as we do. Overcoming, as we do, an initial reluctance to accept that the birth of a child to a family in the circumstances of Ms Connie Cheung could be considered a prejudice to her, nevertheless we are satisfied that very little or no significance is to be attached to this issue in the context of determining whether or not to stay these proceedings.

104. Whilst the passage of time inevitably has an effect in dimming memories and mindful of the fact that more than four years have passed since the impugned events we are satisfied that Ms Connie Cheung has

suffered no or little prejudice as a result. Certainly, as in the case of Mr Edmund Chau, such prejudice falls signally short of that required to justify a stay of these proceedings.

(iii) Cheeroll Ltd and Sun Hung Kai Investment Services Ltd.

105. Although Mr Brewer has joined in the submissions made by both Mr Patterson and Mr Bell that these proceedings be stayed he has not advanced any arguments whatsoever nor has he articulated any reasoning that is said to apply separately to the two companies. Furthermore, although invited to do so by the Chairman he has not provided any authorities evidencing applications for stay being made or granted in respect of companies. Assuming, that in principle such a right exists, and there seems no reason why it should not, we are satisfied that there is no evidence whatsoever of prejudice arising from delay that would justify the stay of proceedings against these two companies.

CONCLUSION

106. We are satisfied that there is no prejudice arising from delay enuring to the detriment of Mr Edmund Chau, Ms Connie Cheung, Cheeroll Ltd or Sun Hung Kai Investment Services Ltd such that it would be appropriate to stay the proceedings against any or all of those persons.

107. Furthermore, having regard to the alternative basis upon which it is appropriate to impose a stay of proceedings, namely that the circumstances involved an abuse of process which so offended the Tribunal's sense of justice and propriety that these proceedings were tainted as abuse of process, we are satisfied that there is no such basis whatsoever for stay of the proceedings against any or all of those persons.

108. In the result, all the applications for stay are refused.

The Hon Mr Justice Lunn
(Chairman)

Dr Cynthia K L Lam
(Member)

Mr Michael T P Sze
(Member)

Annexure II

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HCAL 123/2007,
124/2007 and 22/2008

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 123 OF 2007

BETWEEN

CHAU CHIN HUNG	1st Applicant
CHEUNG SAU LIN	2nd Applicant

and

MARKET MISCONDUCT TRIBUNAL	1st Respondent
FINANCIAL SECRETARY	2nd Respondent

AND

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 124 OF 2007

BETWEEN

CHEEROLL LIMITED	1st Applicant
SUN HUNG KAI INVESTMENT SERVICES LIMITED	2nd Applicant

and

MARKET MISCONDUCT TRIBUNAL	1st Respondent
FINANCIAL SECRETARY	2nd Respondent

AND

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 22 OF 2008

BETWEEN

CHEUNG SAU LIN	1st Applicant
CHAU CHIN HUNG	2nd Applicant

and

MARKET MISCONDUCT TRIBUNAL	1st Respondent
FINANCIAL SECRETARY	2nd Respondent

Before : Hon Hartmann and Lam JJ in Court
Dates of Hearing : 17 and 18 June 2008
Date of Handing Down Judgment : 22 September 2008

JUDGMENT

Introduction

1. The Market Misconduct Tribunal is a body established under the Securities and Futures Ordinance, Cap. 571 ('the Ordinance'). Its statutory purpose is to 'hear and determine' whether, in respect of proceedings instituted by the Financial Secretary, any form of market misconduct has taken place and, if so, the identity of the perpetrators and the amount of money gained or loss avoided by reason of the misconduct.

2. As to the commencement of proceedings before the Tribunal, s.252 of the Ordinance directs that :

> " (1) If it appears to the Financial Secretary ...that market misconduct has or may have taken place, he may institute proceedings before the Tribunal concerning the matter.
>
> (2) The Financial Secretary shall institute proceedings before the Tribunal by giving the Tribunal a notice in writing which shall contain a statement specifying such matters as are prescribed in Schedule 9."

3. On 6 June 2007, the Financial Secretary issued a notice pursuant to s.252 of the Ordinance informing the Tribunal that it appeared to him that market misconduct may have taken place in respect of certain dealings in the securities of a publicly listed company, QPL International Holdings Limited. The Financial Secretary specified three forms of market misconduct which he believed may have occurred : false trading, price rigging and stock market manipulation.

4. Schedule 9 of the Ordinance directs that a notice issued under s.252 shall specify the identity of the person or persons believed to have committed the market misconduct. To this end, the notice issued by the Financial Secretary identified the following 'specified persons' : Mr Chau Chin Hung, Ms Cheung Sau Lin, Cheeroll Limited and Sun Hung Kai Investment Services Limited.

5. When the matter came before the Tribunal for hearing and determination, a number of fundamental challenges to its powers were raised by counsel representing the specified persons. In two written rulings, Mr Justice Lunn, Chairman of the Tribunal, dismissed all of the

challenges. It is in respect of those dismissals that the specified persons (the applicants) have now sought judicial review.

6. The most fundamental challenge made by counsel on behalf of all four specified persons went to the true nature of the proceedings before the Tribunal; that is, whether they were civil or criminal in nature. On behalf of the applicants, it was argued that the proceedings are criminal in nature and that matters going to the standard of proof, the compellability of testimony and such must be determined in accordance with that fact. The Tribunal, however, concluded that the proceedings were civil.

7. The second challenge, again made by counsel on behalf of all four specified persons, went to whether the notice dated 6 June 2007 issued by the Financial Secretary had complied with the requirements of the Ordinance. It was contended that the notice had not complied strictly with the requirements of the Ordinance and that accordingly the notice was invalid. That being the case, the Tribunal itself had no authority to hear and determine matters pursuant to the notice. The Tribunal, however, rejected any submission that the requirements of the Ordinance resulted in the notice being the equivalent of an indictment in criminal proceedings or pleadings in civil litigation. It found that —

> "... the information supplied in the Notice provides both the tribunal and the specified persons with the material which the Financial Secretary is required to provide by section 13 and which he has chosen to provide pursuant to section 14 of Schedule 9. In consequence, the notice is valid and this Tribunal has jurisdiction to proceed as directed by the Financial Secretary."

8. The third challenge was made by Mr Kevin Patterson, counsel representing Ms Cheung Sau Lin. Mr Patterson's arguments were supported by John Brewer, counsel for Cheeroll Limited and Sun Hung Kai Investment Services Limited. In was Mr Patterson's contention that the Tribunal did not, in law, have the power to compel Ms Cheung, a specified person, to give testimony. Nor did the Tribunal, in law, have the power to admit into evidence her record of interview obtained under compulsion by investigating officers on 3 October 2003. Mr Patterson submitted that this was so because any purported exercise of the two powers would deny Ms Cheung her constitutionally protected right to a 'fair hearing' under arts.10 and 11 of the Hong Kong Bill of Rights. The Tribunal, however, found that a fair balance had been struck between the general interest of the community in realising the legitimate aims of the Ordinance and protecting the fundamental rights of the individual and that, accordingly, there was no undermining of Ms Cheung's constitutionally protected right to a fair hearing.

The remedies sought

9. Before us, the applicants have sought orders of *certiorari* to bring up and quash the rulings of the Tribunal together with declarations that are in accordance with their original challenges.

Are proceedings before the Tribunal criminal or civil in nature?

10. Art.39 of the Basic Law directs that the International Covenant on Civil and Political Rights ('the ICCPR') is to be implemented into Hong Kong law. The implementation finds its expression in the

Hong Kong Bill of Rights Ordinance, Cap. 383. Through art.39, the Bill of Rights is itself given constitutional force.

11. Art.10 of the Bill of Rights, in so far as it is relevant, provides that :

> "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

12. Art.11, which concerns the determination of criminal proceedings, again in so far as relevant, provides that :

> "(1) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
>
> (2) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality-
>
> ...
>
> (g) not to be compelled to testify against himself or to confess guilt."

13. Since the judgment of the Court of Final Appeal in *Koon Wing Yee v. Insider Dealing Tribunal* (unreported, 18 March 2008, FACV 19 and 20 of 2007), it is now settled that, in determining whether, for the purposes of arts.10 and 11 of the Bill of Rights, a matter is civil or criminal in nature, three criteria must be considered :

(i) the classification of the offence under the domestic law of Hong Kong;

(ii) the nature of the offence;

(iii) the nature and severity of the potential sanction.

14. These three criteria are not to be treated as analytically distinct. They are to be weighed together. However, it is now settled that criteria (ii) and (iii) are to be considered more significant.

15. As to the concept of a 'criminal charge' contained within art.10 of the Bill of Rights, in giving the judgment of the court in *Koon Wing Yee* Sir Anthony Mason NPJ said that perhaps the best explanation of the concept was to be found in the words of Lord Hope in *R (Mc Cann) v. Manchester Crown Court* [2003] 1 AC at 819 :

> "The words 'criminal charge' themselves suggest that the proceedings which they have in mind are not just proceedings where a 'charge' is made. The question is whether they are proceedings which may result in the imposition of a penalty. This point emerges clearly from the French text of article 6(1), as Lord President Rodger pointed out in *S v Miller* 2001 SC 977, 988, para 21. It states that the matter which is to be determined must be either a dispute 'sur ses droits et obligations de caractère civil' or an "accusation en matière pénale'. The words 'en matière pénale' indicate it is envisaged that there will be a penal element. The court seems to have had this point in mind when, in *Engel v The Netherlands* (No 1), at p 678, para 82, it asked itself when it was setting out the first criterion 'whether the provision(s) defining the offence charged belong, according to the legal system of the respondent state, to criminal law, disciplinary law or both concurrently.' In other words, proceedings involving a charge which is merely disciplinary in character will not fall within the ambit of article 6."

16. As Sir Anthony Mason observed, it follows that —

> "... proceedings which may result in the imposition of a penalty for wrongful conduct will involve the determination of a criminal charge unless they have a character which is neither criminal nor penal. Disciplinary proceedings, which do not concern the

> public at large, usually have such a non-criminal, non-penal character. Proceedings under regulatory legislation whose purpose is essentially protective rather than punitive and deterrent may also have such a character … So also with proceedings that have a preventative rather than a punitive or deterrent purpose. Likewise, proceedings for a penalty which is compensatory in nature have a non-criminal and non-penal character."

17. Sir Anthony Mason further observed that a monetary penalty which is punitive and deterrent rather than compensatory may suggest that the matter is 'criminal' in nature if the penalty is sufficiently substantial. Generally speaking, therefore, proceedings which are not expressed to be criminal proceedings will not be classified as criminal for the purposes of the Bill of Rights unless the penalty for wrongful conduct, which may be imposed, is substantial.

18. Against this background, we turn now to consider the three criteria.

(i) Classification of the offences

19. In his notice, the Financial Secretary specified three forms of market misconduct which he believed may have occurred : false trading, contrary to s.274 of the Ordinance; price rigging, contrary to s.275 and stock market manipulation, contrary to s.228. Each alleged offence of market misconduct is serious.

20. But, that being said, in s.252 of the Ordinance – the same section which specifies the procedure to be adopted by the Financial Secretary in instituting proceedings before the Tribunal – the legislature

has seen fit to lay down the standard of proof required to determine all issues before the Tribunal. In this regard, s.252(7) states 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."

21. That being the case, the classification of proceedings before the Tribunal under the Ordinance, and therefore according to domestic law, is civil. A civil standard is set for one purpose; that is, to determine civil proceedings.

22. We accept, of course, that the Ordinance provides for a dual regime of both civil and criminal proceedings to determine allegations of market misconduct. But the Ordinance in this regard is not unique and nothing was placed before us during the course of the hearing to cause us any concern that this dual character, of itself, infringes the Bill of Rights. In this regard, we note the observation of Sir Anthony Mason, albeit *obiter,* in *Koon Wing Yee*, para 67 :

> "... it is desirable to refer to a suggestion made in the course of argument that legislation, which provides for a dual regime of civil and criminal sanctions to deal with insider dealing, may infringe the Bill of Rights. As at present advised, I would not regard that suggestion as soundly based."

(ii) The nature of the offences

23. As we have said, the three offences of market misconduct alleged against the applicants are serious. The Tribunal also accepted this. The offences, even at the lowest level of culpability, incorporate a course of conduct intended to undermine the orderly workings of our financial

markets; in short, to a greater or lesser degree, to distort those markets. A finding of false trading, price rigging or stock market manipulation brings with it a professional stigma. As such the offences cannot be equated, for example, with a failure to follow arcane procedural regulations, offences essentially of oversight or neglect.

24. The Ordinance incorporates a dual regime, one which seeks to proceed by way of civil enquiry, if necessary imposing civil sanctions, and one which proceeds by way of criminal prosecution.

25. As we perceive it, the civil regime seeks to deal with those persons who, in respect of market conduct regulated under the Ordinance, are believed to have acted inappropriately but nevertheless outside the ambit of the criminal law.

26. Nevertheless, the Ordinance, in the working of its dual regimes, does make the same offences subject to both civil and criminal proceedings. To that extent, even when civil misfeasance only is under consideration, it must be recognised that the conduct is therefore, even if only generically, to be considered serious or at least potentially so.

(iii) The nature and severity of the potential sanctions

27. The Court of Appeal, in its judgment in *Koon Wing Yee* (unreported, 30 May 2007) was of the view that this third criteria was the most important. Certainly, during the course of submissions before us, counsel for the applicants placed the greatest emphasis on it.

28. S.257 of the Ordinance gives to the Tribunal the power to visit a number of sanctions on a person who has been identified as having engaged in market misconduct.

29. S.257(1)(a) provides for orders of disqualification; namely, orders that disqualify an identified person from being concerned in the management of listed or other specified companies. The sub-section reads :

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

30. We have no difficulty with the nature of this order. It is not penal. It is designed to protect the investing public.

31. In *Koon Wing Yee*, Sir Anthony Mason was satisfied that an order of disqualification under s.23(1)(a) of the old Securities (Insider Dealing) Ordinance, Cap.395, was protective rather than punitive in character, the primary purpose of the power being to protect investors and the public. While obviously the power to make such an order has a deterrent effect, Sir Anthony Mason commented that the —

> "... effect is incidental and subservient to the purpose of protecting shareholders, investors and the public from corporate officers who are unfit to hold office."

32. In our judgment, the disqualification order in s.257(1)(a) of the Ordinance serves the same purpose and has the same character as the order in the old statute.

33. S.257(1)(b) of the Ordinance makes provision for what are commonly called 'cold shoulder' orders; that is, orders that – without the leave of the Court of First Instance – deny an identified person access to the financial markets. The sub-section reads :

> "... that the person shall not, without the leave of the Court of First Instance, in Hong Kong, directly or indirectly, in any way acquire, dispose of or otherwise deal in any securities, futures contract or leveraged foreign exchange contract, or an interest in any securities, futures contract, leveraged foreign exchange contract or collective investment scheme for the period (not exceeding 5 years) specified in the order."

34. In our judgment, a 'cold shoulder' order serves the same essential purpose as a disqualification order. It is not penal in character. It is protective. The integrity of the financial markets must be safeguarded and, if it has been demonstrated that a person cannot be trusted to operate in the markets in accordance with the requirements of the Ordinance, then he can be prevented from doing so for such period of time as the Tribunal considers appropriate. A cold shoulder order serves to protect financial institutions as well as the investing public.

35. Yes, of course, the consequence of a cold shoulder order may be damaging to the identified person but that does not detract from the primary purpose and essential character of the order. 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, while

detrimental to the interests of the identified person, may not serve to advance the protective purpose of the order. By way of example, the Court of First Instance may permit investment, certainly through a reputable broker or agent, that enables an identified person to save for retirement.

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

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

37. In plain language, as we see it, the Tribunal is given the power to demand that an identified person shall in future act professionally, avoiding what has been identified by the Tribunal – even if the person should contest it – to be a form, or forms, of market misconduct.

38. In our view, such demands, or warnings, are intended to do no more than look to the future protection of the financial markets. To that extent, such orders are preventative and not penal.

39. S.257(1)(d) of the Ordinance gives the power to the Tribunal to order disgorgement of any profits made by an identified person. The sub-section provides for an order —

> "... that the person pay to the Government an amount not exceeding the amount of any profit gained or loss avoided by the person as a result of the market misconduct in question."

40. This power is to be contrasted with the power given to the Insider Dealing Tribunal in the old statute to make an order imposing on an identified person a penalty "of an amount not exceeding three times the amount of any profit gained or loss avoided by any person as a result of the insider dealing." In his judgment in *Koon Wing Yee*, Sir Anthony Mason found that the penalty of up to three times the profit or loss avoided in the old statute was comparable to a fine, its purpose being punitive and deterrent. As he said :

> "The penalty provision seeks to deter insider dealing by leaving a person who engages in such dealing substantially out of pocket.
>
> ... That the amount of the penalty is limited by reference to the amount of profit gained does not, in my view, detract from its punitive and deterrent character and endow it with a compensatory character. The imposition of the penalty amounts to punishment for very serious misconduct."

41. However, in looking to the Ordinance (the statute which is the subject of this judgment), Sir Anthony Mason noted that the Tribunal has been given the power to impose "civil sanctions", including surrender of any profit made or increased by market misconduct, but "without power to impose a fine or penalty." As Sir Anthony Mason noted, the decision to leave the Tribunal —

> "... without power to impose a fine was influenced by legal advice received by the Government to the effect that the existence of such a power might lead to a breach of the Bill of Rights."

42. In our judgment, the intention of the legislature in providing for disgorgement orders is clear. It is to the effect that any person identified as being the perpetrator of any form of civil infraction of the market conduct provisions contained in the Ordinance should not be permitted – in the discretion of the Tribunal – to retain the fruits of their infraction. That, we believe, is not a punishment. It is no more than an application of the ancient principle – based on natural justice – that a wrongdoer should not be permitted to retain the proceeds of his wrongdoing. Effectively, in so far as it is possible, it seeks to restore the *status quo ante*.

43. It is true that the proceeds of a disgorgement order are made payable to the Government. But, in this regard, while market misconduct in its various forms – especially insider dealing – may no longer be considered a victimless crime, the legislature, we believe, was entitled to take into account that the location of 'victims' in respect of each and every identified act of market misconduct may not be possible. Hence, based, at least in part, on a practical imperative, comes the provision that the fruits of a civil wrong of market misconduct should be forfeit to the state.

44. On behalf of the applicants, however, it is emphasised that, if any person is able to show that he has sustained a loss as a result of market misconduct, he may seek compensation from an identified person even if that identified person has been ordered to make disgorgement to the state. In this regard, s.281(1) of the Ordinance provides that :

> "... a person who has committed a relevant act in relation to market misconduct shall, whether or not he also incurs any other liability ... be liable to pay compensation by way of damages to any other person for any pecuniary loss sustained by the other

> person as a result of the market misconduct, whether or not the loss arises from the other person having entered into a transaction or dealing at a price affected by the market misconduct."

45. S.281(1) is, however, to be read with s.281(2) :

> "No person shall be liable to pay compensation under subsection (1) unless it is fair, just and reasonable in the circumstances of the case that he should be so liable."

46. The argument is therefore made on behalf of the applicants that, if an identified person is made liable to pay compensation to one or more identified 'victims' under s.281 and, in addition is ordered to make disgorgement under s.257(1)(d), he will not merely be liable to make restitution of any wrongful gain that he has made but will have to pay compensation too, perhaps several times. In such circumstances, it is argued, the disgorgement order becomes a penalty. As Mr Bell puts it : "This demonstrates very clearly that although disgorgement is limited to an amount not exceeding the profit gained or loss avoided it is not compensatory in nature: it may result in an additional penalty over and above compensation paid to a 'victim'. In such circumstances it merely substitutes a 'two-times penalty' for the 'three-times penalty' that existed under [the old statute]. The fact that it is payable to the Government and not to the 'victim' reinforces its penal characteristics."

47. In our view, this is not a correct analysis of the statutory provisions. We agree with the submissions advanced by Mr Peter Duncan SC, leading counsel for the respondents, that the two sets of proceedings are distinct. A disgorgement order seeks to ensure that an

identified person does not benefit financially from his market misconduct. He is thereby placed in the financial position in which he would have been if not for his misconduct. By contrast, civil proceedings under s.281 seek to ensure that a person who can demonstrate that he has himself suffered loss as a result of the market misconduct is able to obtain compensation for that loss. The actual loss sustained by that person, of course, may bear no relationship whatsoever to the amount which the identified person has had to disgorge as a result of his market misfeasance. As it is put by Mr Duncan, whether a profit is made or a loss avoided by an identified person does not affect the existence of a liability to one or more third parties under s.281.

48. We are satisfied that it is incorrect to seek to join the two proceedings – disgorgement under s.257(1)(d) and a claim for compensation under s.281 – as if they are integral to each other. They are not. Civil law recognises that there may be more than one consequence to an act which constitutes an infraction of law. This is such a case.

49. The Tribunal is given a further power under s.257(1)(g) to refer an identified person to his own professional body for possible disciplinary proceedings. The provision states that the Tribunal may make an order —

> "... that any body which may take disciplinary action against the person as one of its member be recommended to take disciplinary action against him."

50. Of course, the true effect of this order, if it is made, is one of recommendation only. Whether disciplinary proceedings are undertaken

by a professional body remains a matter entirely for the exercise of its own discretion.

51. A manifest object of the Ordinance is the protection of Hong Kong's equity and financial markets. The power given to the Tribunal to refer an identified person to his professional body is, in our view, integral to the protective purpose of the Ordinance. As such, we do not see the power as being penal in nature.

52. S.257(1) further gives to the Tribunal the power to make costs awards, including setting interest rates. This power – which is vested in our civil courts – is compensatory.

53. Although we have examined each sanction separately, we have, of course, taken into account their combined measure in determining their true character. 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. In this regard, we can do no better than repeat the words of the Chairman of the Tribunal given at the conclusion of his ruling :

> "In my judgment it is clear that the powers given to the Tribunal to make orders pursuant to section 257(1) of the Ordinance are to protect the public and to deprive a person culpable of market misconduct of the benefits of that conduct. They are not to punish ..."

54. By way of a postscript, we record that, both before the Tribunal and before us, argument was advanced on behalf of the applicants

that the true nature of the proceedings before the Tribunal were adversarial; proceedings commenced of course by a public party not a private litigant and, by that fact, should be considered criminal.

55. In our judgment, while we see the relevance of the arguments advanced, we do not think that, in this case, they really take matters much further. As we see it, the proceedings are *sui generis*, their nature being dictated by the provisions of the Ordinance, those provisions themselves being created to meet a particular set of challenges thrown up in the modern market place. To this end, we believe that the Chairman was correct to describe the proceedings as —

> "... proceedings conducted by a Tribunal directed to apply the civil standard of proof to determine the matters set out in section 252(3) of the Ordinance and stipulated in the Financial Secretary's notice, in a regime in which material may be received and considered that may be inadmissible, even in civil proceedings, and where the procedure to be followed may be determined by the Tribunal itself."

56. However, in so far as it may be necessary to go further, we are satisfied that the true nature of the proceedings are not adversarial. They are, on an analysis of the relevant provisions of the Ordinance, more essentially inquisitorial.

The validity of the notice issued by the Financial Secretary

57. As we have said earlier, it was on 6 June 2007 that the Financial Secretary issued his notice pursuant to s.252(2) and Schedule 9 of the Ordinance. Counsel for the applicants contend that it is invalid. This is because the notice does not strictly satisfy the requirements of the Ordinance. In particular, Mr Bell submitted that in the notice, the

Financial Secretary failed to specify the following matters with sufficient particularity :

(i) The particular provision or provisions that each applicant is alleged to have breached; and

(ii) How each applicant's conduct allegedly breached the provision or provisions relied on.

58. The notice itself is in the following form :

"**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 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 for 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."

59. On behalf of the applicants, it is argued that the defects in the notice are not curable by amendment or by the supply of further and better particulars. The defects therefore destroy the validity of the notice and without a valid notice the Tribunal has no power to act.

60. The Chairman of the Tribunal rejected this submission. He said that the effect of the relevant provisions of the Ordinance was not —

> "... to import into the Market Misconduct Tribunal the rigours of indictments in criminal proceedings or pleadings in civil proceedings."

61. We agree with that conclusion.

62. The Tribunal is established under s.251 of the Ordinance. It is a standing institution as opposed to an *ad hoc* tribunal. More importantly, for present purposes, the Tribunal is not set up by a notice issued by the Financial Secretary under s.252(2). There cannot therefore be any suggestion that a particular panel of the Tribunal is not validly constituted due to a defect in such notice.

63. A notice issued under s.252(2) is a document by which the Financial Secretary institutes proceedings in the Tribunal. But, in our view, the notice is not equivalent to an indictment or a charge in criminal proceedings, requiring such persons to enter a plea of guilty or not guilty. Nor is it in the nature of originating pleadings requiring the persons alleged to have committed market misconducts to plead in response.

64. Further, the Financial Secretary is not a party to the proceedings in the Tribunal. The proceedings are conducted by a Presenting Officer appointed by the Secretary for Justice under s.251(4). Accordingly, while a copy of the report of the Tribunal will be given to the Financial Secretary under s.262(2)(a), he does not have any right of appeal under s.266 of the Ordinance.

65. The involvement of the Financial Secretary was explained at paras.107 and 108 of the report of the Legislative Council Bills Committee dated 5 March 2002. At para.108, it was said :

> "In brief, SFC will conduct an independent investigation and refer cases to the Financial Secretary if it is satisfied that there is 'reasonable suspicion'. The Secretary for Justice will tender independent legal advice to the Financial Secretary on 'chance to win'. The Financial Secretary will institute the Tribunal proceedings having regard to the legal advice and broader considerations in relation to the regulation of financial market in Hong Kong."

66. Upon receipt of a notice, the Tribunal is tasked to determine the three matters set out in s.252(3) :

(i) whether any market misconduct has taken place;

(ii) the identity of any person who has engaged in the market misconduct; and

(iii) the amount of any profit gained or loss avoided as a result of the market misconduct.

67. It is noteworthy, in our view, that s.252(3)(a) does not confine the market misconduct to the market misconduct set out in the Financial Secretary's notice. Further, the Tribunal is given power to hear and determine any question or issue arising out or in connection with the proceedings so long as it is done in accordance with Part XIII and Schedule 9 of the Ordinance : see s.251(1).

68. There are, of course, limits to the Tribunal's jurisdiction. For example, it is clearly spelt out that the Tribunal cannot identify any person as engaging in market misconduct or make any order against him

unless he has been specified in the Financial Secretary's notice : see s.17 of Schedule 9. It is also specifically provided that the Tribunal cannot exercise its power of amendment to amend the identity of the person specified in such notice : see s.15(9) of Schedule 9. Nor can the Tribunal amend a s.252(2) notice to turn the focus of the proceedings to another financial product : see s.15(b) of Schedule 9.

69. Subject to these limitations, however, the Tribunal is given wide powers to amend: 'in such manner as it considers appropriate'. The power can be exercised 'at any time during the course of any proceedings' : see s.15 of Schedule 9. We are prepared to accept that the power must be exercised in a manner fair to the parties to the proceedings. However, we see no justification for limiting the power of amendment to, say, confining the amended statement to market misconducts already identified in the existing notice or provisions of Part XIII already specified.

70. S.16 of Schedule 9 provides that, after an amendment to the notice, the Tribunal shall have jurisdiction exercisable by reference to the statement as amended.

71. In the result, even though it is right to say that the Tribunal proceedings are instituted by the Financial Secretary under a s.252(2) notice, in the sense that the notice is the first step in the proceedings and it defines the scope of those proceedings in terms of the identity of the persons alleged to have committed market misconduct and the financial product in question, the contents of the notice do not by any means serve as the last word on the precise parameters of the proceedings.

72. The Tribunal has the power to order amendments to the Financial Secretary's notice in order to refer to a market misconduct not set out in the original notice. This is, of course, provided that the person identified and the financial product remains the same. Whether the power would be exercised is, as usual, subject to the overriding requirement of fairness to the parties. We see this as an inquisitorial power.

73. The substantive requirements for a notice are set out in s.13 of Schedule 9. Though s.252(2) provides the manner in which proceedings are to be instituted by the Financial Secretary, it really adds nothing to those requirements.

74. S.13 of Schedule 9 requires the following to be specified in the notice :

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

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

75. The notice under consideration in this judgment does set out the provisions of Part XIII by reference to which the applicants are said to have perpetrated market misconduct : it refers to ss.274, 275 and 278.

76. The real complaint of the applicants, however, is that under those sections there can be many ways in which market misconduct may be committed and each section contains many permutations and

combinations of possible misconduct. This, it seems to us, is analogous to a complaint that a criminal indictment is bad for duplicity.

77. But, as we have indicated earlier, we are satisfied that a notice issued by the Financial Secretary pursuant to s.252(2) is not a criminal indictment nor a document which the Ordinance intends to be read as such and thereby subject to the same limitations. As we have said, we can find no basis for imposing on the notice the requirements of a criminal indictment or of civil pleadings.

78. We are of the view that s.13 falls to be interpreted in the context of the statutory scheme as a whole and in this regard we note that :

(i) 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.

(ii) In Tribunal proceedings, the Tribunal can exercise its power on its own motion in some circumstances, see ss.253(1), 254(1), 262(2)(v) and Schedule 9 ss.15, 18, 26(a). The legislature clearly envisages that the Tribunal may consider forms of market misconduct beyond those specifically put forward by the Presenting Officer. If fairness demands, the Tribunal may also order the notice to be amended;

(iii) Given that a person specified in s.252(2) notice is not required to plead to it and there is ample opportunity to clarify the precise nature of the allegations raised against him at a preliminary conference under s.30 before he deals with the matter substantively, the employment of general wording in

such a notice would not, and does not, cause any unfairness or prejudice the person in defending himself.

79. We would add that, even in criminal proceedings, a defect arising from duplicity can be cured by amendment : see *Archbold Hong Kong 2007* para.1-138.

80. In our view, the crux of the matter is whether the notice contains such brief particulars as are sufficient to disclose reasonable information concerning the nature and essential elements of the market misconduct. We fail to see how the information set out in the notice is inadequate. It is not suggested by counsel that there is any ambiguity in the factual allegations. We consider the allegations to be reasonably clear, as least sufficient as brief particulars of the nature and essential elements of the alleged market misconducts.

81. What counsel complains of is that there is no correlation of each factual allegation to each element of each alleged market misconduct in the notice. But there is no specific requirement to that effect in s.13 of Schedule 9. Nor do we regard that as necessary in order to provide reasonable information concerning the nature and essential elements of the alleged market misconduct.

82. In any event, even assuming there are defects in the notice, it does not necessarily follow that the proceedings have not been validly commenced. A defective notice may still be valid even though it may have to be amended. As Neuberger J said in *Bell v. Touhy* [2002] 3 All ER 975 at para.23 :

> "The question of whether the issue of a document in a manner or at a time which fails to comply with the requirement of a statute, a statutory instrument, or rules of court, renders the document void (in which case it is wholly ineffective) or irregular (in which case it can, but not necessarily will, none the less be valid) inevitably depends upon the language used and the purpose of the document and the requirement, and the provisions of which the relevant provisions form part."

83. In our view, therefore, even assuming, for the purposes of argument only, that counsel for the applicants were correct in criticising the notice as not complying with s.13 of Schedule 9, we do not think that such a defect would render the proceedings commenced by the notice null and void. At worst it is an irregularity that can be cured by amendment.

The issue of compellability

84. As we have found, the primary purpose of the statutory powers of sanction given to the Tribunal are not penal but protective. Nevertheless, it must be recognised that the exercise of one or more of the sanctions may have a severe effect on an identified person. Aside from any monetary loss, it may well restrict his freedom of access to the markets. In short, it may deprive him of his livelihood. 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. They have their own special character, regulatory in nature, where specified persons stand in jeopardy perhaps of their careers.

85. By way of analogy, it is now well settled, we understand, that disciplinary proceedings against a professional person, although not classified as criminal in nature, may still incorporate certain requirements

of a fair trial that are more normally identified as being integral to criminal proceedings : the presumption of innocence would be one example.

86. On behalf of the applicants, Mr Patterson submits that, having regard to the special nature of proceedings before the Tribunal, especially regarding the potential severity of the sanctions that may be imposed, a person accused of market misconduct would be denied a fair hearing (pursuant to his rights under art.10 of the Bill of Rights) if :

(i) he was compelled to give evidence when that evidence may incriminate him, or

(ii) a statement which he had been forced to give under statutory compulsion was admissible into evidence against him.

87. As it is, the Ordinance does compel all persons, including persons specified by the Financial Secretary, to give evidence if the Tribunal so requires. In this regard, s.253(1)(b) provides that the Tribunal may :

> "... require a person to attend before it at any sitting and to give evidence and produce any article, record or document in his possession relating to the subject matter of the proceedings."

88. In addition, there is the requirement that evidence must be truthful. S.253(1)(d) gives the power to the Tribunal to :

> "examine or cause to be examined on oath or otherwise a person attending before it and require the person to answer truthfully any question which the Tribunal considers appropriate for the purposes of the proceedings."

89. The possibility, of self-incrimination provides no grounds for refusing to testify. S.253(4) provides that :

> "A person is not excused from complying with an order, notice, prohibition or requirement of the Tribunal made or given under or pursuant to subsection (1) only on the ground that to do so might tend to incriminate that person."

90. S.253(2)(a) makes it a criminal offence if a person, without reasonable excuse —

> "fails to comply with an order, notice, prohibition or requirement of the Tribunal made or given under or pursuant to subsection (1)."

91. What must be underscored, however, is that, although evidence is compellable, even by a person believed by the Financial Secretary to have committed acts of market misconduct, such evidence is, with very limited exceptions, only admissible in those proceedings before the Tribunal. Such evidence is not admissible against the person who has given it in any other proceedings – civil or criminal – in any court of law. In this regard, s.255(1) of the Ordinance directs that :

> "Notwithstanding any other provisions of this Ordinance, evidence given by any person at or for the purposes of any proceedings instituted under section 252 (including any material, record or document received by the Tribunal from the person or produced to the Tribunal by the person under section 253, and any record or document or information given, provided, produced or disclosed to the Tribunal by the person under section 254) shall be admissible in evidence for all the purposes of this Part (including any proceedings (civil or criminal) instituted under or pursuant to this Part) but, *subject to subsection (2)*, shall not be admissible in evidence against that person for any other purposes in any proceedings (civil or criminal) in a court of law brought by or against him." [our emphasis]

92. The circumstances contemplated by sub-section (2) in which the evidence may be admissible in other proceedings are very limited and, in our view, do not undermine the purpose of s.255(1) itself.

93. As to the admission into evidence of any record of interview made by a specified person, s.253(1)(a) of the Ordinance provides that the Tribunal has the power to receive and consider —

> "... written statements or documents, even if the material would not be admissible in evidence in civil or criminal proceedings in a court of law;"

94. Under s.183(1) of the Ordinance, when a person is under investigation for possible market misconduct, he may be compelled to :

> "(a) produce to the investigator, within the time and at the place the investigator reasonably requires in writing, any record or document specified by the investigator which is, or may be, relevant to the investigation and which is in his possession;
>
> (b) if required by the investigator, give the investigator an explanation or further particulars in respect of any record or document produced under paragraph (a);
>
> (c) attend before the investigator at the time and place the investigator reasonably requires in writing, and answer any question relating to the matters under investigation that the investigator may raise with him; and
>
> (d) give the investigator all assistance in connection with the investigation which he is reasonably able to give, including responding to any written question raised by the investigator."

95. S.183(1), however, is to be read in conjunction with s.187(2) which provides that, if a person under investigation claims that an answer to any question "might tend to incriminate" him, then his answer shall not be admissible in evidence against him in any criminal proceedings.

96. It is therefore clear that, subject to certain important protections, a specified person may be compelled to give evidence before the Tribunal even though such evidence may tend to incriminate him. It is equally clear, again subject to important protections, that, if a specified person has made a statement pursuant to s.183 of the Ordinance, that statement may be admissible.

97. The issue is whether those provisions of the Ordinance, if exercised, deny a specified person a fair hearing.

98. In determining the issue, what must first be borne in mind is that, in our judgment, proceedings before the Tribunal *are* civil in nature and that, as a basic principle, there is no right to silence in civil actions. As Chu J put it in *Ming Hsing Development Ltd v. Ming Shiu Tong* (unreported, HCA 671/1995), citing Rouqier J in *Halford v. Brookes* [1992] PIQR 175 :

> "... there is no right to silence in civil actions, so that the court is entitled to have regard to a defendant's failure to give evidence, not by any means as being conclusive but as having a degree of probative value."

99. That being said, we accept that it goes too far to deny that the principles which, as 'common law rights', weigh against self-incrimination and compellability in criminal proceedings may not have their place in certain civil proceedings too.

100. In our judgment, the Chairman of the Tribunal correctly identified the essential route to a determination of the issue when he

concluded, citing Ribeiro PJ in *HKSAR v. Lee Ming Tee* (2001) 4 HKCFAR 133, at 176, that what has to be decided is whether —

> "... a fair balance has been struck between the general interest of the community in realizing the legislative aim and the protection of the fundamental rights of the individual."

101. The right to a fair hearing is a constitutionally protected right. But, as we have observed, the inroads in the Ordinance into the rights against self-incrimination and compellability are ringed with measures which ensure that such inroads are, for all material purposes, restricted to proceedings before the Tribunal.

102. In addition, what must be noted, as the Chairman noted in his ruling, is that the sanctions which the Tribunal may apply are protective in nature. Their purpose is not to punish. What then are they protective of? They are protective of the financial services industry in Hong Kong, an industry of inestimable importance to the Territory. In this regard, we can do no better than repeat the words of the Chairman :

> "The financial services industry in Hong Kong is of very considerable importance to the community. Accordingly, there is a directly proportionate interest in the community to ensure that the market in securities is not only well regulated but also that the public at large are protected from the misconduct of those that seek to obtain impermissible personal advantage to the disadvantage of the market generally. The widespread recognition in other jurisdictions, as well as the Hong Kong, of the difficulty of achieving this objective, given the complexity of the operations of the market, is a factor to be borne in mind in weighing the proportionality of the measures adopted in Hong Kong."

103. In our judgment, taking all matters into account, we are in agreement with the Chairman that a fair balance has been struck.

Accordingly, if a specified person is compelled to give evidence before the Tribunal which may tend to incriminate him, or if a statement taken from him pursuant to s.183 of the Ordinance is admitted into evidence, he is not thereby, on either count, denied a fair hearing.

Conclusion

104. For the reasons given, we are satisfied that these applications for judicial review must be dismissed.

105. We see no reason why costs should not be awarded to the second respondent and a final order is made. We understand that the first respondent, the Tribunal itself, has not been represented. However, if we are wrong in that regard, we are prepared to hear submissions as to costs.

(M.J. Hartmann)
Judge of the Court of First Instance,
High Court

(M.H. Lam)
Judge of the Court of First Instance,
High Court

Mr Adrian Bell, instructed by Messrs Haldanes,
for the 1st Applicant in HCAL 123/2007 and 2nd Applicant in HCAL 22/2008

Mr Kevin J Patterson, instructed by Messrs Haldanes,
for the 2nd Applicant in HCAL 123/2007 and 1st Applicant in HCAL 22/2008

Mr John Brewer, instructed by Messrs Haldanes,
for the Applicants in HCAL 124/2007

1st Respondent in HCAL 123, 124/2007 and 22/2008, absent

Mr Peter Duncan, SC & Mr Nicholas Cooney,
instructed by Department of Justice, for the 2nd Respondent in HCAL 123, 124/2007 and 22/2008

Annexure III

WITHOUT PREJUDICE

Market Misconduct Tribunal Proceedings (the **"Proceedings"**): Dealings in the Shares of QPL International Limited (the **"Company"**)

Application for Order of the Tribunal Pursuant to section 33, Schedule 9, Securities and Futures Ordinance

Mr Chau Chin Hung, Miss Cheung Sau Lin, Sun Hung Kai Strategic Capital Limited (formerly known as Cheeroll Limited) and Sun Hung Kai Investment Services Limited (the **"Specified Persons"**), together with Mr Keith Yeung, Presenting Officer (together, the **"Parties"**), having discussed and agreed the factual and evidential materials listed in Annexes "A", "B", and "C" attached, hereby make application to the Tribunal for the making of an Order in the terms set out below.

1st Specified Person - Chau Chin Hung

That the 1st Specified Person engaged in market misconduct contrary to section 274(1)(b) of the Securities and Futures Ordinance between 26 May 2003 and 5 June 2003 in relation to the placement of bid orders for shares in the Company and the cancellation or reduction of orders so placed.

2nd Specified Person - Cheung Sai Lin

That the 2nd Specified Person engaged in market misconduct contrary to the Securities and Futures Ordinance between 26 May 2003 and 5 June 2003 by reason of conniving with 1st Specified Person in the perpetration of his misconduct in relation to the placement of bid orders for shares in the Company and the cancellation or reduction of orders so placed, with the knowledge that his conduct might constitute market misconduct.

3rd Specified Person - Sun Hung Kai Strategic Capital Limited (formerly known as Cheeroll Limited)

That the 3rd Specified Person engaged in market misconduct contrary to section 274(1)(b) of the Securities and Futures Ordinance by reason of the acts and intentions of the 1st Specified Person between 26 May 2003 and 5 June 2003, namely the placement of bid orders for shares in the Company and the cancellation or reduction of orders so placed, being attributable to the 3rd Specified Person.

4th Specified Person - Sun Hung Kai Investment Services Limited

That the 4th Specified Person engaged in market misconduct contrary to the Securities and Futures Ordinance by reason of the acts and intentions of the 2nd Specified Person between 26 May 2003 and 5 June 2003, namely conniving with the 1st Specified Person in the perpetration of his misconduct in relation to the placement of bid orders for shares in the Company and the cancellation or reduction of orders so placed, with the knowledge that his conduct might constitute market misconduct, being attributable to the 4th Specified Person.

Chau Chin Hung (1st Specified Person)

Cheung Sau Lin (2nd Specified Person)

Sun Hung Kai Strategic Capital Limited, formerly known as Cheeroll Limited (3rd Specified Person)

Sun Hung Kai Investment Services Limited (4th Specified Person)

Keith Yeung (Presenting Officer)

Date: 17 November 2008

MARKET MISCONDUCT TRIBUNAL PROCEEDINGS

QPL INTERNATIONAL HOLDINGS LIMITED

FACTUAL AND EVIDENTIAL BACKGROUND TO THE PROPOSED CONSENT ORDER PURSUANT TO PARAGRAPH 33, SCHEDULE 9, CAP. 571

Introduction

1. During the "Analysed Period" namely 26th May 2003 to 5th June 2003, Chau Chin Hung ("Chau") was in breach of the provisions of Section 274(1)(b) of the Securities and Futures Ordinance, Cap. 274, ("the Ordinance".)

2. The breach consisted of Chau's placing a total of 157 bid orders for QPL shares through the account with Sun Hung Kai Investment Services Limited ("SHKIS") held by of Cheeroll Limited ("Cheeroll"); the cancellation of 110 of such orders; and 41 orders made to reduce the size of previously placed bid orders.

3. Chau placed, cancelled and reduced the orders with the intention of creating a false or misleading appearance with respect to the market for QPL shares during the Analysed Period, contrary to section 274(1) (b) of the Ordinance.

4. Chau at no stage held any intention that such false trading should have any effect upon the price of QPL shares traded in the market. His intention was limited to improving the appearance of the market for QPL shares at the material time.

5. Chau's motive for the false trading was that he was aware that during the Analysed Period his colleague, Cheung Sau Lin, Connie, was trying to sell QPL shares held by clients of SHKIS, namely Chinacal Limited ("Chinacal") and Honest Opportunity Limited ("Honest"). Chau had previously recommended to Lin Xu Ming of Chinacal that Chinacal subscribe for placements of QPL shares in October 2002 and February 2003, which Lin asked to be sold when there was a profit. Chau also recommended to Chiu Sau Leung of Honest that Honest subscribe for the placement of QPL shares in October 2002 and February 2003. The price of QPL shares had increased between the time of the placements and the Analysed Period and Chau wished to ensure that there was a good market in which to sell the shares to enable both Chinacal and Honest to dispose of their shares at a profit.

Evidential background

6. In 2002 and 2003 Chau was a director of Sun Hung Kai Securities Limited, a member of the same group of companies as SHKIS. He was responsible for proprietary trading and central dealing including supervision of central dealing staff. His duties included taking charge of equity capital markets, for example involvement in Initial Public Offerings, when he would liaise with SHKIS's sales department (**Chau Interview : B1/4**).

7. Cheeroll was used as a house account of the Sun Hung Kai Group. Chau was an authorized person of Cheeroll with authority to place orders for the buying or selling of shares through Cheeroll's account (**Chau interview: B1/5**).

8. Chau was delegated to trade on Cheeroll's account. The two directors of Cheeroll, Hui Yip Wing and Kwok Chi Chung were as Chief Executive Officer and Finance Director of the Sun Hung Kai Group, busy with other duties (**Chau interview: B1/5-6**).

9. In October 2002 and February 2003 QPL made placements of shares through Sun Hung Kai International Limited. The prices at which QPL shares were placed in October 2002 and February 2003 were HK$1.50 and HK$1.52 respectively (**Chau interview: B1/7**).

10. Chinacal subscribed through SHKIS's sales department for QPL shares in both October 2002 and February 2003. At the time of the placements Chau was in contact with Lin Xu Ming of Chinacal, and in around February or March 2003 Lin asked that Chinacal's QPL shares be sold if the opportunity arose. (**Chau interview: B1/8**).

11. At the time of both placements Chau suggested to Lin that Chinacal buy QPL shares. Lin asked Chau not to hold the shares but to sell them when there was a profit (**Lin statement: B2/655-6**).

12. Honest was also a client of SHKIS and acquired shares at the time of both the October 2002 and the February 2003 placements (**Chau interview: B1/12**). Honest subscribed for the QPL shares on the recommendation of Chau (**Chiu statement: B2/763**).

13. From 23/5/03 QPL shares were trading at prices in excess of HK$1.60 on the

SEHK, thus providing an opportunity to subscribers to the October 2002 and February 2003 placements to make a profit (**Shek report: C/431**).

14. At this time Cheung Sau Lin, Connie was handling the Chinacal account. She had previously been told by Chau, at the time of the QPL share placement of February 2003, to sell Chinacal's QPL shares if the price was good. During the Analysed Period she placed sell orders on the SEHK in respect of Chinacal's QPL shares in accordance with such prior instructions. In so doing the prices, numbers of shares and timing of the orders input on behalf of Chinacal were all decided by her. Chau gave her no advice or suggestion as to the handling of the sales orders. Nor did anyone from Chinacal give her any instructions (**Cheung interview: B1/353**).

15. With regard to the QPL shares held in the account of Honest, Chiu Sau Leung gave a general instruction in May 2003 to Cheung Sau Lin, Connie to sell the shares. The number of shares, time and price were decided by her (**Chiu statement: B2/763**).

16. In accordance with the instructions aforesaid, Cheung Sau Lin Connie placed sell orders in respect of the QPL shares held by Chinacal and Honest during the Analysed Period. Orders placed on behalf of Chinacal and Honest during the Analysed Period are set out at exhibits SKP-12 and SKP-13 to the Report of Shek Kam Por (**Shek Report: C/442-3**). The pattern of the orders placed on behalf of Chinacal and Honest were normal and disposal was made in an orderly manner (**Shek Report: C/15-16**).

17. During the Analysed Period Chau gave instructions on behalf of Cheeroll to SHKIS to issue purchase orders in respect of QPL shares. His purpose in doing so was to create a favourable market for the disposal of Chinacal's and Honest's QPL shares. Since he did not intend to purchase QPL shares, the bid orders that he placed were cancelled or reduced before they could be matched by corresponding sell orders. Chau placed a total of 157 bid orders with an average size of 457,000 shares. 110 of the orders were subsequently cancelled and 41 orders were made to reduce the size of the previously placed bid orders. Cheeroll did not purchase any QPL shares during the Analysed Period (**Shek Report: C/7, para.25**).

18. A table showing the orders for QPL shares placed by Cheeroll during the Analysed Period is at Exhibit SKP-10 to the Report of Shek Kam Por (**Shek Report: C/434-9**).

19. Neither Chau nor Cheung Sau Lin, Connie obtained or expected to obtain any bonus or commission as a result of their trading in QPL shares during the Analysed Period. Nor would they have been dismissed had they failed to obtain a good price on the sale of QPL shares (**Chau interview: B1/167**).

Dated this day of November 2008

MARKET MISCONDUCT TRIBUNAL

Proceedings instituted by the Financial Secretary by Notice dated 6th August 2007 concerning suspected market misconduct that may have taken place arising out of dealings in the securities of QPL International Holdings Limited ("**QPL**") (Stock Code 243) (the "**Proceedings**")

Statement by Sun Hung Kai Strategic Capital Limited ("**SHKSC**") (formerly known as Cheeroll Limited), 3rd Specified Person

We, **KWOK Chee Chung** (holder of HKID card A996067(0)) and **TONG Tang, Joseph** (holder of HKID card G068755(2)), being the directors of SHKSC, hereby state as follows in connection with the Proceedings which were instituted by the Financial Secretary of Hong Kong concerning suspected market misconduct that may have taken place in the shares of QPL contrary to certain provisions of the Securities and Futures Ordinance (the "SFO"), in particular from 6 May 2003 to 10 June 2003 (the "**Analysed Period**"). References "**A1**", "**B1**", "**B2**" and "**C**" in this our statement are references to paginated bundles of materials received by the Market Misconduct Tribunal (the "**Tribunal**") -

Sun Hung Kai Strategic Capital Limited (formerly Cheeroll Limited)

1. SHKSC is a private company incorporated in Hong Kong on 29 February 1980 and ultimately a wholly-owned subsidiary of Sun Hung Kai & Co. Limited ("**SHKC**"). Certain related entities of the SHKC group, including Sun Hung Kai Investment Services Limited ("**SHKIS**", also a wholly-owned subsidiary of SHKC and the 4th Specified Person in the Proceedings) are registered

institutions with the Securities and Futures Commission ("**SFC**"), but SHKSC maintains no such registration. A chart showing the relationship between SHKSC, SHKC and SHKIS is attached.

2. Although SHKSC's issued and paid-up capital is just 2 ordinary shares of HK$1.00 each **[A1/18]**, it is and was during the Analysed Period funded by SHKC to undertake trading of shares on behalf of the SHKC group ("**Proprietary Trading**").

Role of Chau Chin Hung

3. On 16 July 1997, and when SHKSC's board of directors previously included CHAU Chin Hung ("**Chau**", being the 1st Specified Person in the Proceedings), SHKSC authorized Chau to give oral trading instructions on behalf of SHKSC concerning Proprietary Trading in respect of accounts 05-396567 and 05-928801 then maintained by SHKSC with SHKIS **[A1/169]**.

4. Prior to 11 June 1998 authority to undertake Proprietary Trading was vested in SHKC's Proprietary Trading Committee, of which Chau was a member, and thereafter in SHKC's Executive Committee, of which Chau was not a member. Effective 1 June 2000 this authority was delegated to Mr David Hui Yip Wing ("**Hui**") and in turn advised to Chau by SHKC's Secretarial Department on 7 June 2000 **[A1/167 & A1/168]**.

5. Chau's limit of authority in respect of Proprietary Trading was set at HK$1,500,000,000 **[A1/161]**.

Proprietary Trading During the Analysed Period

6. During the Analysed Period Chau was authorized to undertake Proprietary Trading for SHKSC.

7. Proprietary Trading was undertaken by SHKSC in Hong Kong securities during the Analysed Period through the following stockbroking accounts (together, the "**Accounts**") maintained with SHKIS **[A1/90 to A1/135]** -

Account No.	Valuation at 30.4.03	Valuation at 31.5.03	Valuation at 30.6.03
05-39656-7	HK$36,366,450	HK$39,902,310	HK$38,632,565
05-92880-1	HK$3,265,712	HK$4,572,488	HK$4,391,917

8. In or around May 2003 Chau confirmed with Hui clearance to purchase shares in QPL in value up to HK$20 million pursuant to his Proprietary Trading authority **[B1/7 & B2/546]**.

9. SHKC's wholly-owned subsidiary Sun Hung Kai International Limited ("**SHKI**") had previously arranged the placing of 29 million shares in QPL on 24 October 2002 at $1.50 per share and 77 million shares in QPL on 12 February 2003 at HK$1.52 per share. Placees arranged by SHKI included Chinacal Limited ("**Chinacal**") and Honest Opportunity Limited ("**Honest**"), both of which were clients of SHKIS and had been recommended to participate in the placements by Chau **[B1/8, B2/655 & B2/763]**.

Chau's Misconduct

10. From 26 May 2003 to 5 June 2003 (the "**Analysed Period**") and pursuant to his authority to engage in Proprietary Trading Chau caused 157 bid orders for QPL shares, each of an average order size of 457,000 shares to be placed with

SHKIS for SHKSC's account, further caused 110 of such orders to be cancelled and caused 41 of such orders to be reduced in size (together, the "**Analysed Orders**") **[A2/59 - A2/64]**.

11. At no time did Chau indicate to SHKSC's directors either the fact, nature or extent of the orders he intended to place in respect of QPL shares, nor did he indicate to SHKSC's directors either the fact, nature of extent of the reductions and cancellations of such orders.

12. Although Chau had ceased to be a director by 23 March 1998, well before the Analysed Period we nevertheless accept that Chau's acts in the placing, cancellation and reduction of orders were attributable to, SHKSC by reason of Chau's standing authority to trade securities in SHKSC's accounts.

Admissions

13. Chau has admitted to us that these activities, known in the securities business as "scaffolding", amount to a breach of section 274(1)(b) of the SFO, in that they were intended to create a false or misleading appearance with respect to the market for QPL shares and he has informed us that he intends to make a similar admission to the Tribunal. Having taken legal advice as to the nature and extent of the authority Chau exercised at the material time on behalf of SHKSC we unreservedly accept that Chau's acts in respect of the Analysed Orders are attributable to SHKSC with the result that SHKSC hereby admits breaching section 274(1)(b) of the SFO.

14. Chau was employed and remunerated by SHKC's wholly-owned subsidiary and immediate holding company of SHKIS, Sun Hung Kai Securities Limited. Chau was not remunerated by SHKSC in respect of Proprietary Trading or at

all, nor did his activities in respect of the Analysed Orders entitle him to any benefit from SHKSC.

15. Chau's employment terms required him to comply with any compliance requirements of the Securities and Futures Commission and the Stock Exchange of Hong Kong Limited.

16. Chau was also required to comply with the terms of SHKC's Proprietary Trading Policy & Manual which governed SHKC's trading in QPL shares during the Analysed Period **[A1/148 to A1/160]**, paragraph 5.8 of which required physical separation of Chau from SHKC group employees involved in agency business, dealing, research and corporate finance. We accept that at all material times Chau was not physically separated from SHKC group employees whose function it was to handle business from other SHKIS clients, in particular one of Chau's colleague employees and immediate subordinates Cheung Sau Lin, Connie (**"Cheung"**) as 2nd Specified Person.

17. Cheung was responsible for dealing with orders placed by Chinacal and Honest, transacting sales of 4,876,000 QPL shares at prices ranging from $1.64 to $1.68 during the Analysed Period. The SFC's expert witness Shek Kam Por (**"Shek"**) has stated in his expert report **[C/15]** that the order placing patterns of Chinacal were "rather normal" and the Chinacal's disposal of QPL shares was made "in an orderly manner". Shek has further stated **[C/16]** that Honest's orders were filled at prices "within the normal range" and disposals were made "in an orderly manner". In such circumstances SHKSC does not accept that Chau's activities amount to price rigging as provided at section 275 of the SFO.

18. We are not aware of any consultation or agreement having been reached between Chau and Cheung, or anyone else in SHKSC or SHKIS or elsewhere within the SHKC group concerning the Analysed Orders or the Chinacal and Honest sales of QPL shares. We are aware that Chau has stated that no consultation took place with either Cheung or any representative of Chinacal or Honest and we note that although the Statement instituting the Proceedings alleges that Cheung was aware of the Analysed Orders, there is no allegation that she was consulted by Chau in connection with them, let alone that there was any agreement made between Chau and Cheung in connection with them. In such circumstances SHKSC does not accept that Chau's activities amount to market manipulation as provided at section 278 of the SFO.

19. We are aware, however, that Chau has admitted to the Tribunal that his motive for engaging in false trading, or scaffolding, was that he was aware that Cheung was trying to sell QPL shares on behalf of Chinacal and Honest. Although the market price had increased in the period since QPL shares had been placed with Chinacal and Honest, Chau wished to assist by creating an impression of there being a good market in which Chinacal and Honest could sell those QPL shares and accept that Chau's intention in this regard is attributable to SHKSC.

Remedial Action Taken

20. On 20 November 2007 and soon after the Tribunal commenced hearings concerning the Proceedings, the SHKC group informed the SFC of the establishment of a risk management committee and of efforts made and to be

made concerning compliance, internal audit and risk control frameworks, as is explained in the attached copy letter.

21. We are not aware of any other instance of market misconduct having been perpetrated by, or alleged against, Chau or any other person authorized to undertake Proprietary Trading on behalf of SHKSC, nor against Cheung.

This statement was tabled at a meeting of the board of directors of Sun Hung Kai Strategic Capital Limited on 14 November 2008 at which we, the directors named below, carefully considered and approved its contents and believing the same to be true to the best of our knowledge and belief, resolved that this statement be executed for and on behalf of SHKSC.

KWOK Chee Chung - Director, 14 November 2008

TONG Tang, Joseph - Director, 14 November 2008

MARKET MISCONDUCT TRIBUNAL

Proceedings instituted by the Financial Secretary by Notice dated 6th August 2007 concerning suspected market misconduct that may have taken place arising out of dealings in the securities of QPL International Holdings Limited ("**QPL**") (Stock Code 243) (the "**Proceedings**")

Statement by Sun Hung Kai Investment Services Limited ("**SHKIS**"), 4th Specified Person

We, **CHEN Wai Huen, Douglas** (holder of HKID card D412322(1)), **NG Yuk Ip, Ada** (holder of HKID card G625873(4)), **WONG Kwok Hing, Patrick** (holder of HKID card K238307 (1), **LO Chi Ho** (holder of HKID card D353814(2)), **FONG Tsun Kuen, Jimmy** (holder of HKID card D469571(3)), **HUNG Yat Chuen** (holder of HKID card D231911(0)), **LEE Oi Ping, Christina** (holder of HKID card D037267(7)) and **LEUNG King Yuen** (holder of HKID card A994836(0), being directors of SHKIS, hereby state as follows in connection with the Proceedings which were instituted by the Financial Secretary of Hong Kong concerning suspected market misconduct that may have taken place in the shares of QPL contrary to certain provisions of the Securities and Futures Ordinance (the "SFO"), in particular from 6 May 2003 to 10 June 2003 (the "**Analysed Period**"). References "**A1**", "**B1**", "**B2**" and "**C**" in this our statement are references to paginated bundles of materials received by the Market Misconduct Tribunal (the "**Tribunal**") -

1. SHKIS is a private company incorporated in Hong Kong on 4 August 1972 and ultimately a wholly-owned subsidiary of listed company Sun Hung Kai & Co. Limited ("**SHKC**") and within the same group of companies as Sun Hung Kai Strategic Capital Limited ("**SHKSC**", formerly known as Cheeroll Limited, the 3rd Specified Person). SHKIS is a registered

institution with the Securities and Futures Commission ("**SFC**") and an important part of Sun Hung Kai Financial, one of Hong Kong's largest integrated financial services businesses. A chart showing the relationship between SHKIS, SHKC and SHKSC is attached.

2. SHKIS's registrations with the SFC are to undertake dealing in securities (Type 1 activity), advising on securities (Type 4 activity), advising on corporate finance (Type 6 activity), providing automated trading services (Type 7 activity) and asset management (Type 9 activity).

3. SHKIS's issued and paid up capital is and was during the Analysed Period HK$290 million. SHKIS is a major contributor to the turnover and profits of the SHKC group and with more than 50,000 individual, corporate and VIP client accounts it would be one of, if not the, largest local securities brokerage in Hong Kong.

4. SHKSC is one of SHKIS's clients and has maintained accounts 05-39656-07 and 05-92880-01 with SHKIS for trading in Hong Kong securities since 15 May 1992. SHKIS is aware that SHKSC employs these accounts in order to undertake trading of shares ("**Proprietary Trading**"). SHKIS does not benefit in any way from Proprietary Trading other than generation of normal commissions from transactions actually executed.

Role of Chau Chin Hung

5. CHAU Chin Hung ("**Chau**"), holder of HKID card E250021(7), is one of 9 directors of SHKIS and registered with the SFC as one of 7 of SHKIS's Responsible Officers, having held industry accredited positions with financial services entities within the SHKC group from 1974 to 1983 and from 1997 to-date, or about 20 years in total. Chau's duties include central dealing and supervision of staff, along with involvement in initial public offerings and share placements. Prior to the Analysed Period, these

placements included placements of 29 million QPL shares at HK$1.50 per share on 24 October 2002 and 77 million QPL shares at HK$1.52 per share on 12 February 2003 arranged by another of SHKC's indirect wholly-owned subsidiaries, Sun Hung Kai International Limited. Certain of these shares were placed with Chinacal Limited (**"Chinacal"**) and Honest Opportunity Limited (**"Honest"**). During the Analysed Period Chau was responsible for SHKSC's Proprietary Trading **[A1/169]**.

6. Chau is, and was during the Analysed Period, the immediate superior of Cheung Sau Lin, Connie (**"Cheung"**, the 2nd Specified Person in the Proceedings), whose duties as dealer were to receive orders from VIP clients of SHKIS, including Chinacal and Honest.

7. Given the nature of the issues addressed by this statement and Chau's involvement in the issues, we considered it inappropriate for Chau to take part in the board meeting at which this statement has been considered and he has accordingly not participated in making it, nor does he share in our responsibility for it.

Role of Cheung Sau Lin

8. Cheung Sau Lin, Connie holds a Representative's licence with the SFC, accredited to SHKIS, and began her securities career as dealer in 1995. She is employed by Sun Hung Kai Securities Limited and acted as SHKIS's senior dealer and head of share dealing Team 2, responsible for orders from VIP clients **[B1/350]**. These included Chinacal, whose orders to sell QPL shares she dealt with after being instructed generally to do so by Chau, and reported the results to Chinacal's Mok Ying Sang **[B2/656]**. Cheung was also responsible for the VIP account of Honest, from whose Chiu Sau Leung, Terry she took discretionary orders to sell QPL shares **[B2/763]**.

Misconduct - Chau

9. From 26 May 2003 to 5 June 2003 (the **"Analysed Period"**) and pursuant to the authority granted to him by SHKC to engage in Proprietary Trading **[A1/161]** Chau caused 157 bid orders for QPL shares, each of an average order size of 457,000 shares to be placed with SHKIS for SHKSC's account. He further caused 110 of such orders to be cancelled and caused 41 of such orders to be reduced in size (together, the **"Analysed Orders"**) **[A2/59 - A2/64]**.

10. Chau has admitted to us that these activities, known in the securities business as "scaffolding", amount to a breach of section 274(1)(b) of the SFO, in that in addition to SHKSC being presented as a willing buyer of the orders he gave, such orders were intended to create a false or misleading appearance with respect to the market for QPL shares and he has informed us that he intends to make a similar admission to the Tribunal. Although Chau held the positions of director and Responsible Officer of SHKIS, it is plain to us that Chau's misconduct was perpetrated in his role as authorized person of our client company SHKSC but outside the authority granted to him by it. Having taken legal advice as to the nature and extent of the authority Chau exercised at the material time, we do not accept that Chau's intentions in respect of the Analysed Orders are attributable to SHKIS.

11. Chau was employed and remunerated by the immediate holding company of SHKIS, Sun Hung Kai Securities Limited. Chau was not remunerated by SHKIS in respect of Proprietary Trading or at all, nor did his activities in respect of the Analysed Orders entitle him to any benefit from SHKIS.

Misconduct - Cheung

12. Cheung was responsible for dealing with orders placed by Chinacal and Honest, transacting sales of 4,876,000 QPL shares at prices ranging from $1.64 to $1.68 during the Analysed Period. The SFC's expert witness Shek Kam Por ("**Shek**") has stated in his expert report **[C/15]** that the order placing patterns of Chinacal were "rather normal" and that Chinacal's disposal of QPL shares was made "in an orderly manner". Shek has further stated **[C/16]** that Honest's orders were filled at prices "within the normal range" and disposals were made "in an orderly manner".

13. We are not aware of any consultation or agreement having been reached between Chau and Cheung, or anyone else in SHKSC or SHKIS or elsewhere within the SHKC group concerning the Analysed Orders or the Chinacal and Honest sales of QPL shares. We are aware that Chau has stated that no consultation took place with either Cheung or any representative of Chinacal or Honest in relation to the Analysed Orders and we note that although the Statement instituting the Proceedings alleges that Cheung was aware of the Analysed Orders, there is no allegation that she was consulted by Chau in connection with them, let alone that there was any agreement made between Chau and Cheung in connection with them.

14. We are aware, however, that Chau will admit to the Tribunal that a purpose for giving the purchase instructions was for "scaffolding" as he was aware that Cheung was trying to sell QPL shares on behalf of Chinacal and Honest. Although the market price had increased in the period since QPL shares had been placed with Chinacal and Honest, Chau wished to assist Cheung by creating an impression of there being a good market in which Cheung could ensure Chinacal and Honest were able to sell those QPL shares.

15. We are also aware that Cheung will admit to the Tribunal knowledge of the Analysed Orders and that, while she regarded the opportunity to execute her VIP clients' orders against the background of an apparent increase in demand for QPL shares to be irresistible and not inconsistent with her and SHKIS's obligation to obtain "best execution" for clients, she knew that the Analysed Orders might constitute market misconduct and, in the sense that she did not prevent Chau's perpetration of such conduct, connived with Chau in the perpetration of that conduct, thus entitling the Tribunal to find that she engaged in market misconduct by virtue of the operation of section 252(4)(c) of the Securities and Futures Ordinance.

16. Having taken legal advice as to the nature and extent of the Cheung's position as a licensed person accredited to SHKIS at the material time we unreservedly accept that Cheung's connivance is attributable to SHKIS with the result that SHKIS hereby admits engaging in market misconduct.

Remedial Action Taken

17. On 20 November 2007 and soon after the Tribunal commenced hearings concerning the Proceedings, the SHKC group informed the SFC of the establishment of a risk management committee and of efforts made and to be made concerning compliance, internal audit and risk control frameworks, as is explained in the attached copy letter.

18. The SHKIS Front Office Manual, introduced in May 1998 and thereafter revised in January 2000 and February 2004 was further revised in April 2008 in the light of experience gained through the issues arising from Chau's misconduct. The SHKIS Back Office Manual was also revised in April 2008 and a new systems enhancement was introduced whereby certain dealing activity undertaken during the previous trading day is flagged and reported to Compliance Department for its review and if

deemed by it as potentially suspicious or unusual, investigated, and if necessary, escalated.

19. We are not aware of any other instance of market misconduct having been perpetrated by, or alleged against, Chau or any other person authorized to undertake Proprietary Trading on behalf of SHKSC, nor against Cheung.

This statement was tabled at a meeting of the board of directors of Sun Hung Kai Investment Services Limited on 14 November 2008 at which we, the directors named below (but not including CHAU Chin Hung, Edmond who was given notice of the meeting but was excused from attending) carefully considered and approved its contents and believing the same to be true to the best of our knowledge and belief, resolved that this statement be executed for and on behalf of SHKIS.

CHEN Wai Huen, Douglas - Director, 14 November 2008

NG Yuk Ip, Ada - Director, 14 November 2008

WONG Kwok Hing, Patrick - Director, 14 November 2008

LO Chi Ho - Director, 14 November 2008

FONG Tsun Kuen, Jimmy - Director, 14 November 2008

HUNG Yat Chuen - Director, 14 November 2008

LEE Oi Ping, Christina – Director, 14 November 2008

LEUNG King Yuen – Director, 14 November 2008

[CHINESE NAME FOR MMT] | HKSAR Coat of Arms | MARKET MISCONDUCT TRIBUNAL

Order pursuant to section 252(4) of the Securities and Futures Ordinance, Cap 571 (the "Ordinance") and section 33 of Schedule 9 of the Ordinance

By written notice given pursuant to section 252(2) and Schedule 9 of the Ordinance dated 6 June 2007, the Financial Secretary required the Market Misconduct Tribunal (the "Tribunal") to conduct proceedings (the "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*

arising out of dealings in the securities of QPL International Holdings Limited (Stock Code 243) (the "Company") during the period from 6 May 2003 to 10 June 2003.

The Proceedings commenced on 3 September 2007 and the substantive hearing commenced on 10 November 2008.

UPON application from counsel representing Mr CHAU Chin Hung, Ms CHEUNG Sau Lin, Sun Hung Kai Strategic Capital Limited (formerly known as Cheeroll Limited) and Sun Hung Kai Investment Services Limited (the "Specified Parties") together with Mr Keith Yeung (the "Presenting Officer"), collectively (the "Parties") that an order (the "Order") be made by the Tribunal pursuant to the provisions of section 33(a) of Schedule 9 of the Ordinance; and

UPON the Parties requesting that the Order be made in the terms appearing below and agreeing to the same pursuant to the provisions of section 33(a) of Schedule 9 of the Ordinance; and

UPON the Parties consenting to all of the terms of the Order pursuant to the provisions of section 33(b) of Schedule 9 of the Ordinance

The Tribunal now makes the Order pursuant to the provisions of section 252(4) of the Ordinance and Schedule 9 of the Ordinance upon and in the following terms -

1st Specified Person - Chau Chin Hung

That the 1st Specified Person engaged in market misconduct contrary to section 274(1)(b) of the Securities and Futures Ordinance between 26 May 2003 and 5 June 2003 in relation to the placement of bid orders for shares in the Company and the cancellation or reduction of orders so placed.

2nd Specified Person - Cheung Sau Lin

That the 2nd Specified Person engaged in market misconduct contrary to the Securities and Futures Ordinance between 26 May 2003 and 5 June 2003 by reason of conniving with 1st Specified Person in the perpetration of his misconduct in relation to the placement of bid orders for shares in the Company and the cancellation or reduction of orders so placed, with the knowledge that his conduct might constitute market misconduct.

3rd Specified Person - Sun Hung Kai Strategic Capital Limited (formerly known as Cheeroll Limited)

That the 3rd Specified Person engaged in market misconduct contrary to section 274(1)(b) of the Securities and Futures Ordinance by reason of the acts and intentions of the 1st Specified Person between 26 May 2003 and 5 June 2003, namely the placement of bid orders for shares in the Company and the cancellation or reduction of orders so placed, being attributable to the 3rd Specified Person.

4th Specified Person - Sun Hung Kai Investment Services Limited

That the 4th Specified Person engaged in market misconduct contrary to the Securities and Futures Ordinance by reason of the acts and intentions of the 2nd Specified Person between 26 May 2003 and 5 June 2003, namely conniving with the 1st Specified Person in the perpetration of his misconduct in relation to the placement of bid orders for shares in the Company and the cancellation or reduction of orders so placed with the knowledge that his conduct might constitute market misconduct, being attributable to the 4th Specified Person.

Given under the hands of the Chairman and Members of the Tribunal this day of November 2008

The Hon Mr Justice Lunn

(Chairman)

Mr Michael Sze Tsai Ping

(Member)

Miss Cynthia Lam Kit Lan

(Member)

MARKET MISCONDUCT TRIBUNAL

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

SPECIFIED PERSONS :

Sun Hung Kai Investment Services Limited

Cheeroll Limited

Mr Chau Chin Hung, Edmund

Ms Cheung Sau Lin, Connie

Date of Delivery of Ruling : 18 November 2008.

THE TRIBUNAL'S RULING

1. There is before the Tribunal an application made on 17 November 2008 by all the parties to the proceedings that the tribunal make an order pursuant to section 33 of schedule 9 of the Securities and Futures Ordinance, which I shall describe as the SFO, it being the case that:

> "(a) the parties to the proceedings request, and agree to, the making of the order, and
>
> (b) the parties consent to all of the terms of the order."

Section 35 of schedule 9 of the SFO provides that the term "order" as used in section 33 includes "any finding, determination and any other decision".

2. To put the application in context, it is relevant to recite what are now called "milestones" in the civil justice reform proceedings in the chronology of these proceedings.

CHRONOLOGY

* On ***21 June 2007***, the Financial Secretary issued his notice.

* On ***29 August 2007***, the parties were given notice of the fact of that notice and of these proceedings.

* The first hearing was held on ***3 September 2007***.

* In September, hearings as to the jurisdictional challenges to the Market Misconduct Tribunal were conducted and the Tribunal gave a ruling on ***12 October 2007***.

* That led to an application for leave to apply for judicial review, which was granted on ***29 October 2007*** by Mr Justice Hartmann, who also made orders of: (a) stay of these proceedings, and (b) an expedited hearing of the judicial review proceeding.

* In ***November 2007***, Mr Justice Hartmann ordered a partial lifting of the stay to permit the tribunal to receive further applications, including an application for stay of the proceedings for delay, on which latter matter a ruling was delivered, together with the other rulings, on ***27 December 2007***.

* The hearing of the application for judicial review was heard on ***17 and 18 June 2008***.

* On ***22 September 2008***, the joint judgment of Mr Justice of Appeal Hartmann, as he was then, and Mr Justice Lam was delivered in the judicial review proceedings.

* On ***23 September***, that is the following day, 2008, this Tribunal ordered that these proceedings resume on 10 November 2008.

* On ***10 November 2008***, the proceedings were adjourned until 13 November on the application of the parties, as the Tribunal understood it, to discuss the making or basis of an application under section 33 of schedule 9 of the SFO.

* On ***13, 14 and 17 November 2008***, the Tribunal received evidence from four witnesses of fact and from Mr Shek as an expert witness in respect of the alleged market misconduct, at the conclusion of which evidence this application was made.

3. The application is made at a time when the next order of business is the testimony of the Specified Persons, as required of Mr Chau and Ms Connie Cheung by order of the Tribunal pursuant to section 253(1)(b) of the ordinance, together with such other evidence as they or the corporate specified persons wish to put before the Tribunal.

4. In support of the application, the parties have put before the Tribunal the following documents:

4.1 An unsigned document dated 17 November 2008 in the name of the presenting officer and the four specified persons bearing the phrase in capital letters "WITHOUT PREJUDICE" and the title "Application for Order of the Tribunal Pursuant to section 33, Schedule 9, Securities and Futures Ordinance", in which it is asserted that the four specified persons and the Presenting Officer make the application in the terms thereinafter set out: "having discussed and

agreed the factual and evidential materials listed in annexes A, B and C attached", and make the application to the tribunal for the making of the order in the terms there set out.

4.2 Annexure A (or Appendix A as it is actually entitled) is undated and bears the title "Factual and evidential background to the proposed consent order pursuant to paragraph 33, schedule 9, Cap. 571". Amongst other matters, it makes assertions as to the intention, motives and purpose of Mr Chau in respect of his conduct in placing, cancelling and reducing bid orders on behalf of Cheeroll through its accounts with Sun Hung Kai Investment Services for QPL shares on and between 26 May and 5 June 2003.

4.3 Of Ms Connie Cheung, Annex A states that she placed sell orders of QPL shares on the Stock Exchange of Hong Kong on behalf of, firstly, Chinacal and, secondly, Honest Opportunity, and makes assertions as to the circumstances in which she came to so conduct herself.

4.4 Annex B is dated 14 November 2008 and is an unsigned "Statement by Sun Hung Kai Strategic Capital Limited (SHKSC) (formerly known as Cheeroll Limited) 3rd Specified Person", and is made by two named directors of the company, it being stated that the board of directors had "carefully considered and approved of its contents and believing the same to be true to the best of our knowledge and belief resolved that this statement be executed for and on behalf of SHKSC".

4.5 Amongst the factual matters addressed, is the assertion that Mr Chau admitted that his conduct was in breach of section 274(1)(b) of the SFO, in that "they were intended to create a false or misleading appearance with respect to the market for QPL shares".

4.6 Further, it is stated that the company accepts that in light of the "nature and extent of the authority Chau exercised at the material time on behalf of SHKSC, we unreservedly accept that Chau's acts in respect of the analysed orders are attributable to SHKSC, with the result that SHKSC hereby admits breaching section 274(1)(b) of the SFO".

4.7 However, of Mr Chau's conduct it is asserted further that the company, and this is in paragraph 17, "does not accept that Chau's activities amounted to price rigging as provided at section 275 of the SFO". Then at paragraph 18, the following is asserted on behalf of the company, that it "does not accept that Chau's activities amounted to market manipulation as provided at section 278 of the SFO".

4.8 Annexure C is dated 14 November 2008 and is an unsigned statement of eight directors of Sun Hung Kai Investment Services Limited, who stated that at a board meeting of the directors it was carefully considered, its contents approved, and a resolution passed that it be executed.

4.9 Amongst the matters addressed is the assertion that Mr Chau admitted that his conduct was in breach of section 274(1)(b) of the SFO, in that the orders he placed on behalf of Cheeroll were "intended to create a false or misleading appearance with respect to the market for QPL shares".

4.10 However, it is contended that Sun Hung Kai Investment Services "does not accept that Chau's intentions in respect of the analysed orders are attributable to SHKIS".

4.11 Of Ms Connie Cheung it is asserted, "while she regarded the opportunity

to execute her VIP client orders against the background of an apparent increase in demand for QPL shares to be irresistible and not inconsistent with her and SHKIS's obligation to obtain 'best execution' for clients, she knew that the analysed orders might constitute market misconduct and, in the sense that she did not prevent Chau's perpetration of such conduct, connived with Chau in the perpetration of that conduct, as entitling the tribunal to find that she engaged in market misconduct by virtue of the operation of section 252(4)(c) of the Securities and Futures Ordinance".

4.12 By way of conclusion, in paragraph 16, it is accepted by the company that: "Cheung's connivance is attributable to SHKIS, with the result that SHKIS hereby admits engaging in market misconduct".

5. Turning to the nature of the Tribunal's duty, section 252(3) of the SFO provides that the object of these proceedings is a three-fold determination of:

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

6. The proposed "order" is in fact an articulation of the Tribunal's determination of the first two issues.

7. The Tribunal notes that whereas the Financial Secretary's notice enjoins the Tribunal to consider whether or not market misconduct contrary to three stipulated sections of the ordinance occurred, namely, section 274 false trading, section 275 price rigging, and section 278 stock market manipulation, the draft order invites the tribunal to make determinations of market misconduct under section 274(1)(b) and section 274(1)(b) together with section 252(4)(c)(ii) only.

Also, it is noted that the attribution of corporate liability is prescribed on a limited stipulated basis.

8. Having regard to all matters, not least the stage which these proceedings have reached, but also the better to determine the nature and ambit of the sustained simultaneous conduct of Mr Chau and Ms Connie Cheung and to do so having regard to all three sections of the ordinance, namely, section 274, section 275, and section 278, the Tribunal has determined not to exercise its discretion to make an order under section 33 of schedule 9 of the SFO.

Annexure IV

Orders Details of Cheeroll Limited
(Placed within 5 Minutes of the Orders of Chinacal Limited and Honest Opportunity Limited)
Period: 5 May 2003 - 10 June 2003

Date	Time	Client	Order (B/S/C/R)	Price	Quantity
06/05/2003	10:33:53	Cheeroll	B	1.47	400,000
06/05/2003	10:35:08	Honest Opportunity	S	1.50	200,000
06/05/2003	10:39:57	Honest Opportunity	S	1.53	200,000
06/05/2003	10:40:25	Cheeroll	C	1.46	400,000
06/05/2003	11:16:57	Cheeroll	B	1.50	600,000
06/05/2003	11:20:42	Honest Opportunity	S	1.54	200,000
06/05/2003	11:20:48	Cheeroll	B	1.51	300,000
06/05/2003	11:21:27	Cheeroll	B	1.51	450,000
06/05/2003	11:22:38	Honest Opportunity	S	1.55	200,000
06/05/2003	11:23:31	Cheeroll	B	1.51	100,000
06/05/2003	12:22:08	Honest Opportunity	S	1.56	200,000
06/05/2003	12:22:56	Cheeroll	B	1.52	300,000
07/05/2003	10:22:53	Honest Opportunity	S	1.52	100,000
07/05/2003	10:23:29	Cheeroll	C	1.48	500,000
07/05/2003	10:55:50	Cheeroll	B	1.48	400,000
07/05/2003	10:56:03	Honest Opportunity	S	1.51	100,000
07/05/2003	12:27:52	Honest Opportunity	S	1.55	200,000
07/05/2003	12:29:46	Cheeroll	B	1.48	400,000
09/05/2003	14:53:36	Honest Opportunity	S	1.54	200,000
09/05/2003	14:55:09	Cheeroll	B	1.49	600,000
09/05/2003	15:53:44	Cheeroll	B	1.48	100,000
09/05/2003	15:54:11	Honest Opportunity	C	1.56	200,000
12/05/2003	9:37:32	Honest Opportunity	S	1.58	200,000
12/05/2003	9:37:59	Cheeroll	B	1.51	500,000
12/05/2003	11:59:24	Honest Opportunity	S	1.55	120,000
12/05/2003	12:02:29	Cheeroll	B	1.50	600,000
13/05/2003	9:38:33	Cheeroll	B	1.53	600,000
13/05/2003	9:41:35	Honest Opportunity	R	1.58	100,000
13/05/2003	11:53:57	Honest Opportunity	R	1.60	100,000
13/05/2003	11:56:03	Cheeroll	C	1.53	600,000
13/05/2003	11:56:04	Cheeroll	C	1.55	200,000
13/05/2003	11:57:06	Honest Opportunity	S	1.62	300,000
16/05/2003	10:09:10	Honest Opportunity	S	1.59	100,000
16/05/2003	10:10:28	Cheeroll	B	1.54	500,000
16/05/2003	11:41:41	Honest Opportunity	S	1.57	100,000
16/05/2003	11:42:14	Cheeroll	C	1.56	300,000

B: Buy S: Sell
C: Cancel R: Reduce

Date	Time	Client	Order (B/S/C/R)	Price	Quantity
16/05/2003	11:43:58	Cheeroll	B	1.52	600,000
16/05/2003	11:44:39	Honest Opportunity	S	1.58	100,000
16/05/2003	15:46:00	Cheeroll	C	1.54	600,000
16/05/2003	15:46:26	Honest Opportunity	S	1.55	87,000
19/05/2003	10:59:55	Honest Opportunity	S	1.64	200,000
19/05/2003	11:00:11	Cheeroll	B	1.56	600,000
19/05/2003	11:58:31	Cheeroll	B	1.54	600,000
19/05/2003	12:02:53	Honest Opportunity	S	1.59	100,000
19/05/2003	15:05:02	Honest Opportunity	S	1.62	200,000
19/05/2003	15:06:19	Cheeroll	B	1.56	200,000
23/05/2003	14:48:02	Cheeroll	B	1.57	300,000
23/05/2003	14:52:09	Honest Opportunity	S	1.63	300,000
23/05/2003	14:52:49	Honest Opportunity	S	1.64	300,000
23/05/2003	14:54:06	Cheeroll	B	1.57	300,000
23/05/2003	14:56:48	Cheeroll	B	1.59	600,000
23/05/2003	14:58:18	Honest Opportunity	S	1.61	200,000
23/05/2003	15:11:07	Honest Opportunity	S	1.61	300,000
23/05/2003	15:11:46	Cheeroll	C	1.58	300,000
26/05/2003	15:54:17	Chinacal	S	1.66	300,000
26/05/2003	15:54:52	Cheeroll	B	1.65	600,000
26/05/2003	15:55:01	Cheeroll	B	1.65	600,000
26/05/2003	15:57:38	Chinacal	S	1.66	500,000
26/05/2003	15:58:34	Cheeroll	B	1.65	600,000
26/05/2003	15:58:41	Cheeroll	B	1.65	600,000
26/05/2003	15:59:39	Chinacal	S	1.66	500,000
27/05/2003	10:11:44	Chinacal	S	1.65	200,000
27/05/2003	10:13:43	Cheeroll	C	1.63	600,000
27/05/2003	11:04:26	Cheeroll	C	1.60	600,000
27/05/2003	11:04:31	Chinacal	S	1.66	200,000
27/05/2003	11:04:32	Cheeroll	C	1.60	400,000
27/05/2003	11:05:30	Chinacal	S	1.65	300,000
27/05/2003	14:45:58	Chinacal	S	1.64	100,000
27/05/2003	14:50:49	Cheeroll	B	1.63	600,000
28/05/2003	10:20:02	Chinacal	S	1.65	300,000
28/05/2003	10:20:37	Cheeroll	B	1.62	600,000
28/05/2003	10:25:56	Chinacal	S	1.65	200,000
28/05/2003	10:27:27	Cheeroll	B	1.60	600,000
30/05/2003	10:02:10	Cheeroll	B	1.59	300,000
30/05/2003	10:03:33	Chinacal	S	1.65	300,000
30/05/2003	10:03:33	Cheeroll	B	1.59	200,000

B: Buy S: Sell
C: Cancel R: Reduce

Date	Time	Client	Order (B/S/C/R)	Price	Quantity
02/06/2003	10:54:56	Cheeroll	B	1.60	300,000
02/06/2003	10:55:16	Chinacal	S	1.65	200,000
02/06/2003	10:55:24	Cheeroll	B	1.61	500,000
05/06/2003	10:04:45	Chinacal	S	1.66	300,000
05/06/2003	10:08:22	Cheeroll	B	1.60	600,000
05/06/2003	10:12:53	Cheeroll	B	1.59	600,000
05/06/2003	10:17:30	Chinacal	C	1.68	300,000
05/06/2003	14:44:47	Chinacal	S	1.67	171,000
05/06/2003	14:45:39	Cheeroll	C	1.60	600,000
06/06/2003	10:15:28	Cheeroll	B	1.61	600,000
06/06/2003	10:18:02	Chinacal	S	1.68	300,000
09/06/2003	10:44:10	Honest Opportunity	S	1.68	300,000
09/06/2003	10:44:46	Cheeroll	B	1.62	600,000

B: Buy S: Sell
C: Cancel R: Reduce

Annexure V

Assessment of costs in MMTI 1/07C
QPL International Holdings Limited

		$
(1)	Correspondence : 169 e-mails/letters received 143 e-mails/letters written Time spent : 33 hrs	132,000.00
(2)	Perusing and considering papers : 26 hrs	104,000.00
(3)	Conference on 19.9.07 : 1 hr 30 mins	6,000.00
(4)	Preparation for hearings : 11 hrs	44,000.00
(5)	Attending tribunal hearings : 70 hrs 25 mins	281,667.00
(6)	Counsel fees : a) Keith Yeung $360,000 b) Graham Harris $12,000	372,000.00
(7)	Photocopying charges, 1,886 pages x 10 sets	56,580.00
(8)	Filing & serving fees	2,000.00
(9)	General conduct and care : 16 hrs 30 mins (including phone calls with parties and counsel)	66,000.00
(10)	Costs of this assessment : 12 hrs at $1,600/hr	19,200.00
	Total :	**1,083,447.00**

Fee earner :
Mrs Winnie Ho admitted in 1997, rate charged at $4,000/hr

Annexure VI

Annexure VI

File Reference: 508/EN/875

Statement of Investigation Costs

Staff Costs	$52,073
Overhead	$10,940
Total	**$63,013**

Annexure VII

Annexure VII

Market Misconduct Tribunal Proceedings
QPL International Holdings Limited

Summary of costs and expenses Incurred by the Tribunal

Item	Cost ($)
1. Tribunal Chairman	1,151,520.99
2. Tribunal Members	256,500.00
3. Tribunal Secretariat	561,420.13
4. Fees for Court Interpreters	30,600.00
5. Fees for Court Reporters	100,537.50
6. Witness expense to Mr Kenneth Ip	280.00
Total:	**2,100,858.62**