The report of the Market Misconduct Tribunal into dealings in the shares of Yue Da Mining Holdings Limited on and between 3 December 2007 to 12 September 2008

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

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ANNEXURES

CHAPTER 9

ORDERS

374. On 8 May 2014, the Tribunal delivered Part 1 of its Report to the Financial Secretary. On the following day the Report was handed to the parties resident in Hong Kong through their legal representatives.

375. Concerning Mr Li and Mr Qian, as both were residents in the Mainland, copies of the Report were forwarded to the last known addresses under cover of explanatory letters. The letters informed them that, consequent upon its findings, the Tribunal would now move to consider the amount of any profit gained or loss avoided as a result of their established market misconduct. The documents posted to Mr Li and Mr Qian were not returned endorsed in any way to the effect that service had not been possible. It must be assumed therefore that they were received. As it was, neither Mr Li nor Mr Qian chose to make any representations either directly in writing or through legal representatives.

376. Initially, the Tribunal sought to reconvene on 17 June 2014 to deal with the issue of what orders should be imposed. A number of counsel, however, faced difficulties. The Senior Counsel of Yue Da Group (HK) Company Limted, having taken up a senior Government position, was no longer in private practice while his junior counsel was engaged in a very lengthy trial. Other logistical difficulties also arose. In the result, the Tribunal was only able to reconvene on 31 October 2014.

377. For the sake of completeness, it should be said that documents filed with the Tribunal by the Presenting Officer in respect of orders sought to be made were copied to both Mr Li and Mr Qian. No response was received.

Section 257(1)(d): disgorgement of any profit gained or loss avoided

378. Section 257(1)(d) of the Ordinance empowers the Tribunal to order that a person found culpable of market misconduct must pay to the Government "an amount not exceeding the amount of any profit gained or loss avoided… as a result of the market misconduct in question."

379. In Part 1 of this Report, the Tribunal identified four persons as having engaged in market misconduct; namely, Mr Li, Mr Qian, Yue Da Mining and Yue Da Group. The market misconduct in question consisted of false trading and stock market manipulation.

380. To assist the Tribunal in determining whether any of the four persons had gained a profit or avoided a loss as a result of their market misconduct, a report was submitted to the Tribunal by Mr Cheng Kai Sum. A copy of the report is attached as Annexure B. Mr Cheng had given evidence as an expert witness in the earlier proceedings and no objection was taken to his expertise in respect of this consequential issue.

381. In his report, Mr Cheng identified the core finding of the Tribunal in respect of culpability, namely, that Mr Li, in association with Yue Da Mining and/or Yue Da Group, and with the connivance of Mr Qian, had dealt in the shares of Yue Da Mining for the primary purpose of increasing, or at least

maintaining, the price of those shares at a time when Yue Da Mining was under heavy financial pressure as it sought to transform itself into a major player in the Mainland mining sector by means of various acquisitions.

382. In respect of Mr Li and Mr Qian, Mr Cheng recognised that no evidence had been placed before the Tribunal to suggest that either man had made any private gain or avoided any private loss as a result of their market misconduct. There was therefore no basis for making any disgorgement order against either man in his personal capacities.

383. In considering whether it had been demonstrated that Yue Da Mining and/or Yue Da Group had made a profit or avoided a loss as a result of the market misconduct of which they had been found culpable, Mr Cheng took into account a number of factors including the following:

i. On a consideration of the evidence found to be proved by the Tribunal, the primary purpose of the market misconduct had not been to secure a profit or avoid a loss but instead had been to improve, or at least maintain, the price of Yue Da Mining shares during a period of transformation by that company. The dealing in the shares being on-going and dominated by buying with only limited sales, it was not possible to extract evidence of any specific gain or loss avoided.

ii. Nor, taking into account the dominant nature of the purchases and the generally weak market tone at the time, was there any basis for establishing any form of notional profit.

iii. Equally, while the share placement exercise conducted by Yue Da Mining did provide a theoretical framework for calculating profit gained or loss avoided, due to the dynamic and complex price-fixing mechanisms employed in such placement exercises, it had not been possible in this particular case to come to any clear objective assessment.

384. Accordingly, it was Mr Cheng's conclusion that, on the evidence found proved by the Tribunal, it was not possible to establish whether either company had realised any profit or avoided any loss. The Presenting Officer accepted the correctness of Mr Cheng's report. The Tribunal itself considered it to be persuasive. In the result, the Tribunal makes no order for disgorgement against any of the four parties.

Section 257(1)(a): an order that a person shall not act as a director or take part in the management of a listed corporation or any other specified corporation

385. An order pursuant to section 257(1)(a) is not penal in nature. It seeks to protect the integrity of the governance of listed companies and any other companies identified by the Tribunal as being at risk.

386. Mr Li's positions of formal authority and his positions of decision-making power in the Jiangsu Group of companies (of which both Yue Da Mining and Yue Da Group were members) have been described in paragraphs 35 – 38 of Part 1 of this Report. More specifically, the Tribunal said of Mr Li:

> "On any objective view, therefore, Mr Li was strategically positioned not to partake in the day-to-day management of Yue Da Mining, that being the responsibility of Mr Dong Liyong, but to devise and execute financial plans that may affect Yue Da Mining and/or other companies in the Jiangsu Group."

Elsewhere, by way of shorthand, the Tribunal described Mr Li as "the power behind the throne".

387. Mr Qian's positions of authority and/or influence in the Jiangsu Group have been described in paragraphs 31 and 32 of Part 1 of this Report. While, on the evidence, the Tribunal accepted that Mr Li appeared perhaps to have taken the greater initiative in the joint conduct constituting the market misconduct, the Tribunal found that both men worked closely together. In this regard, for example, the Tribunal observed in respect of Mr Qian:

> "On the evidence, the probabilities clearly indicate that he worked closely with Mr Li Libin, both being veterans of the Jiangsu Group transferred to Hong Kong. Whatever the true extent of Mr Qian's authority, whether he worked shoulder to shoulder with Mr Li Libin or perhaps as his subordinate, he was no mere cipher, blindly carrying out instructions."

388. As the Tribunal has said in Part 1 of the Report, neither Mr Li nor Mr Qian testified before the Tribunal. Nor did either man seek to make representations in respect of any orders consequential upon the findings of their culpability. In the result, it has not been possible to ascertain with any degree of certainty whether either man continues to play a role in the management of

any company in the Jiangsu Group (with the Group's reach into Hong Kong) or indeed any other group of companies having business interests in Hong Kong.

389. If both men have retired from corporate life, any order that the Tribunal may make will not prejudice them. However, even though there was evidence that Mr Li was in poor health, there is no evidence, certainly no convincing evidence, that either man has retired from corporate life with the clear intention of remaining retired. In the circumstances, the Tribunal is of the view that, having regard to the calculation and cynicism of their proven actions, the Tribunal must consider whether protective orders are required under the section.

390. In considering this issue, which, if an order is to be imposed, includes the question of its duration, the Tribunal has taken into account, among other matters, the following:

i. that, on the evidence, both Mr Li and Mr Qian were of previous good character;

ii. that in the six years between the acts of market misconduct and the Tribunal's report, neither man has been charged with any further form of corporate misconduct. In this regard, the delay in the investigation has been of assistance to them; and

iii. that, on the evidence, neither Mr Li nor Mr Qian appeared to have acted for personal gain. That being said, an order under section 257(1)(a) looks to protecting the integrity of corporate governance and therefore to the role that the two men played in *that* context and not in their personal capacities.

391. The Tribunal is satisfied that, having regard to the calculated manner of the market misconduct perpetrated by both Mr Li and Mr Qian coupled with its surreptitious nature, and also having regard to its strategic nature, the Hong Kong market must be protected from any possibility that either man will repeat such conduct. An order pursuant to section 257(1)(a) must therefore be imposed on both men.

392. When considering the duration of the order, while the Tribunal must consider the threat posed by each man separately, in the present matter it has not been possible to separate the nature and extent of their culpability and the threat that they both pose. Mr Qian may have acted under the instructions of Mr Li, thereby playing a more secondary role, but frankly, having regard to the limited and uncertain nature of the evidence, it is difficult to be satisfied that that was in fact the case. What is to be remembered is that Mr Qian was himself clearly a trusted, long-term employee, a man of seniority in the Group. It is also to be remembered that Mr Qian refused at any time to co-operate with the enquiry, refusing therefore to explain the true nature and extent of his involvement. In the circumstances, the Tribunal must do the best it can.

393. Accordingly, the Tribunal has determined –

i. That Mr Li and Mr Qian should both be prohibited from acting as a director or taking part in the management of any listed company for a period of three years.

ii. That, in addition, Mr Li and Mr Qian be prohibited from acting as a director or taking part in the management of any company in which a listed corporation, directly or indirectly, has a shareholding, such prohibition also to be for a period of three years.

iii. That, in order to enable Mr Li and Mr Qian to be advised of the order before it comes into effect, the order shall only commence on 1 May 2015.

Section 257(1)(b): an order that a person shall not deal in any securities.

394. Section 257(1)(b) gives the discretion to the Tribunal to impose an order commonly called a 'cold shoulder' order. It is an order that a person identified as having engaged in market misconduct –

> "… 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 five years) specified in the orders."

Unless the leave of the Court of First Instance is first obtained, a cold shoulder order has the effect of prohibiting a person who is the subject of the order from any dealings, direct or indirect, in the Hong Kong financial market for the length of the order. Clearly, for a person whose profession is based on the ability to have access to the market it is potentially a ruinous prohibition. That being said, while, on the evidence, Mr Li and Mr Qian were prepared to deal in shares,

they were essentially – and if they still work, no doubt remain – corporate managers.

395. A cold shoulder order looks to protecting the integrity of our financial markets. It is a protective order and as such should not be imposed simply as a form of penalty. It should only be imposed when the Tribunal is satisfied that the person upon whom it is imposed poses a threat to the integrity of our financial markets.

396. In the judgment of the Tribunal, without in any way appearing to reduce the seriousness of the market misconduct perpetrated by Mr Li and Mr Qian, it does not consider that either man presents the sort of threat to our financial markets that requires the imposition upon them of cold shoulder orders.

397. This is not to say that no form of order need be imposed to prevent either man from perpetrating further market misconduct in our financial markets. There remains a further order which the Tribunal has power to impose, namely, an order that a person shall not again perpetrate market misconduct. It is that order, imposed in conjunction with the order under section 257(1)(a), which the Tribunal considers to be appropriate.

398. For the avoidance of ambiguity, the Tribunal recognises that a cold shoulder order is not limited to a person who is a professional investor or financier or in some other way is a full-time professional in our financial

markets. It is instead simply a matter of deciding each case according to its own particular circumstances. There will therefore be no order under section 257(1)(b).

Section 257(1)(c): an order that a person shall not again perpetrate market misconduct

399. Section 257(1)(c) provides that the Tribunal may order that a person identified as having engaged in market misconduct –

> "… 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),"

'Cease and desist' orders, as they are commonly called, do not shut out the person who is the subject of the order from our financial markets. Instead, on pain of criminal punishment, they seek to ensure that all future dealings by that person avoid the market misconduct detailed in the order. Cease and desist orders may be made without a time limit.

400. In the opinion of the Tribunal, taking into account all relevant factors, cease and desist orders should properly be imposed on Mr Li and Mr Qian, both orders to specify conduct which constitutes insider trading, false trading, price rigging and stock market manipulation. Neither order is to be limited in time.

401. In imposing this order, the Tribunal has taken into account that, on the evidence, neither Mr Li nor Mr Qian – both of whom have spent the last few years on the Mainland – have committed any further acts of market misconduct. That is, of course, a factor to be taken into account. But that must be balanced

by the nature of their culpable conduct identified in Part 1 of this Report and the threat that the Tribunal is satisfied both men still present to the integrity of our markets.

Section 257(1)(e) and (f): payment of costs incurred by the Government and by the SFC

402. In light of its findings in Part 1 of this Report, the Tribunal is satisfied that Mr Li and Mr Qian should pay the costs of the Government and the SFC. Counsel for Yue Da Mining and Yue Da Group have accepted that both companies should also be responsible for the costs of the Government and the SFC. Counsel have argued, however, that the quantum of such costs should be subject to certain limitations which the Tribunal now considers.

A. Unwarranted delay

403. The issue of unwarranted delay has been raised consistently over the years. In the present case, the SFC commenced its investigations in late 2008 but it was not until late 2011 that the Notice of the Financial Secretary was issued, a lapse of some three years. There was a further delay of some 18 months before the matter was brought before the Tribunal, this being occasioned by a number of factors, more particularly, the illness of Mr Li, a change in the chairmanship of the Tribunal itself and the requirement for the expert report of Mr Cheng Kai Sum to be revisited.

404. However, while the problems of delay are recognised, it has not been suggested in the present case that it has had any direct prejudicial impact on the issue of costs.

405. Moreover, in the present case the SFC was burdened by the fact that its officers had to conduct much of their investigations in the Mainland. In addition, it has to be recognised that one of the material reasons for delay related to the illness of Mr Li, fairness dictating that he should be given an opportunity to recover sufficiently to represent himself in the enquiry, whether through legal representation or otherwise.

406. In the circumstances, other than any wasted costs that may reasonably have been incurred on account of the fact that the expert report of Mr Cheng had to be reworked, the Tribunal does not intend to amend any of its costs orders by reason of delay.

B. <u>The need to compute costs on a purely compensatory basis, excluding any profit factor</u>

407. It was submitted by Mr Brewer, counsel for Yue Da Mining and Mr Dong, that the adoption of any approach to the question of costs which permitted Government to recover amounts over and above what was required to indemnify it against costs and expenses actually incurred risked infringing the strictly compensatory nature of market misconduct proceedings. As Mr Brewer expressed it, if costs orders contained any profit factor favouring Government it

would amount in practice to a penalty imposed on the party ordered to pay those costs and would not therefore be a strictly contained indemnity order.

408. As the Tribunal has understood it, Mr Brewer's submissions have focused solely on costs sought to be recovered for the employment of counsel in Government service, that is, counsel who are paid a salary. It is accepted that the employment of counsel in private practice permits Government, when it pays the bills of such counsel, to pay for any profit factor that is charged.

409. Mr Brewer founded his argument on a short paragraph in the judgment of the Court of First instance in Chau Chin Hung v Market Misconduct Tribunal[66], a judgment which considered the nature of market misconduct proceedings, more particularly whether they are penal in nature. The paragraph in question (paragraph 52) reads:

> "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."

410. The same broad and general observation is to be found in an earlier decision, that of Building Authority v Business Rights Limited[67] in which Burrell J encapsulated the nature of what is sometimes called 'the indemnity principle' –

> "The principle is that costs as between party and party are given by the law as an indemnity to the person entitled to them; they are not imposed

[66] Unreported, Constitutional and Administrative Law List 22/2008
[67] [199] 3 HKC 247 at 251G

> as a punishment to the party who pays them nor given as a bonus to the party who receives them. It is also usefully defined in Practice Note (Taxation: indemnity principle) 1998 1 WLR 1674D:
>
> The indemnity principle is as follows: an order for costs between parties allows the receiving party to claim from the paying party only an indemnity in respect of the costs covered by the order. Receiving parties cannot therefore recover a sum in excess of their liability to their own solicitors. On the taxation of a bill, the indemnity principle is to be applied on an item by item basis rather than on a global basis…"

411. It is interesting to note that in that case it was accepted that a Government lawyer's costs as the successful litigant may include a profit element provided the indemnity principle was not offended. In this regard, Burrell J said (255B):

> "It is recognised that a successful party to litigation is entitled to a profit element in its costs. This applies equally to a Government Department. Anyone who goes to court risks losing and paying the other side's costs. If the Government were not entitled to some profit in their costs, the risk element would be less when the opposing party was a Government Department."

412. However, to reflect the true profit element and to avoid offending the indemnity principle, Burrell J determined that the hourly rate method of calculating the costs of Government Legal Officers was more appropriate.

413. It appears to the Tribunal, therefore, that, on the authorities cited above, the compensatory nature of an award of costs made in favour of a Government Department employing salaried Legal Officers may not be offended if some element of profit was included provided it did not offend the indemnity principle.

414. Mr Brewer has attempted to meet this by arguing that it may be permissible in adversarial litigation of the classic kind but it is not permissible in regulatory proceedings such as market misconduct proceedings. It is his submission that in such proceedings any award of costs in favour of the Government must be stripped of any profit element no matter how modest. For that reason, Mr Brewer submitted, when seeking costs in regulatory proceedings, Government Departments must be able to demonstrate by way of a detailed breakdown of the cost structure of such Departments that there is no profit element at all in the costs claimed.

415. The issue raised by Mr Brewer is not entirely novel. In *In re Eastwood* [1975] 1 Ch 112, the English Court of Appeal was faced with the question of the correct approach to the problem of taxation of costs awarded to the Crown, having regard to the fact that the Crown was represented not by an independent solicitor but by the Treasury Solicitor and his department. It was contended that there was an onus upon any party which had its own legal department to produce figures to demonstrate that the operations and expenses of that department, analysed and broken down and apportioned, would throw up a figure properly attributable to the litigation in question which would not be more than the figure of reasonable indemnity. The Court of Appeal, expressing

itself to be horrified with the complications that such an approach would entail, held that it was a proper method of taxation of a bill of costs in cases of this kind to deal with it as though it was the bill of an independent solicitor, there being no reason to suppose that the figure arrived at would infringe the principle that taxed costs should not be more than an indemnity to the party seeking the costs. The court of Appeal recognised that there may be occasions in which it would be reasonably plain that the principle will be infringed if the bill is applied without modification but commented that it would be impracticable in all cases of an employed solicitor to require a detailed breakdown of the activities and expenses of the department with a view to ensuring that the principle is not infringed.

416. While Mr Brewer recognised that the principle set down in *In re Eastwood* has not been specifically disapproved, it was his submission that the principle was set in "the days of pencils and slide rules and well prior to the advent of sophisticated computer systems now found throughout Government Departments".

417. While the Tribunal accepts that there have been considerable advances in computer technology since the mid-1970s no evidence has been put before it to suggest that the sort of breakdown that he seeks in respect of salaried Legal Officers does not still present in the majority of cases its own difficulties, not least in time spent and resultant expense.

418. *In re Eastwood* is particularly persuasive in its recognition of a practical matter, one that remains valid. As all solicitors versed in matters of

litigation know, courts and tribunals have open to them a hierarchy of costs orders, 'party and party' costs being the usual order made. As those solicitors also know, in practice 'party and party' costs rarely cover every dollar spent to bring litigation to fruition and even more rarely result in a profit. A standard order that a party found culpable in regulatory proceedings should pay the 'party and party' costs incurred by counsel employed by Government will not therefore in the ordinary run of events result in any form of profit being earned by Government or by a statutory body. Indeed, it is likely to result in some form of loss.

419. There may of course be occasions when the ordinary run of events does not apply. But, as the Court of Appeal recognised in *In re Eastwood*, such occasions can be adequately dealt with, if agreement between the parties is not reached, by the taxing master.

420. In its Report in *Mobicon Group Limited* dated 23 March 2009, this Tribunal was faced with similar arguments concerning three Government counsel employed to assist an independent counsel in the presentation of proceedings. Having considered the relevant legislation which provided that, when providing for fees and costs, Legal Officers are deemed to have the status of barristers or solicitors, the Chairman of the Tribunal directed that the Tribunal may, if it so wishes, make an order for 'party and party' costs in favour of the three Government counsel who did not themselves orally argue matters arising in the proceedings but assisted the independent counsel to do so[68].

[68] In this regard, see paragraph 395 of the *Mobicon* report.

421. Having considered Mr Brewer's submissions, the Tribunal has determined that it may award party and party costs in favour of the Government without first being shown a detailed breakdown of operating costs as evidence that it contains, in respect of the costs occasioned by Legal Officers, no element whatsoever of profit. As to the award of costs, the Tribunal is not persuaded that costs in regulatory proceedings must be differentiated from costs in civil and criminal proceedings. The indemnity principle is well understood by those given the responsibility of taxing contested bills of costs and, in the opinion of the Tribunal, that principle provides adequate protection to persons found culpable in regulatory proceedings and ordered to pay the costs occasioned by Government.

Apportioning the costs payable

422. The Presenting Officer submitted that, as five specified persons were nominated in the notice of the Financial Secretary, fairness required that costs should be apportioned accordingly. That being the case, Mr Li, Mr Qian, Yue Da Mining and Yue Da Group should each be ordered to pay 20% of the costs and expenses incurred by the Government and by the SFC. Mr Dong, the fifth specified person, was exonerated of any culpability.

423. The apportionment of costs is not an accounting exercise based upon an audit of the time taken up in considering the case of each person found culpable of misconduct. All four of the parties found culpable were, in their own way, equally central to the enquiry. None were purely peripheral. The Tribunal has considered the various submissions made as to apportionment of costs but has determined that the submission of the Presenting Officer should be followed

and that accordingly each of the four persons found culpable of market misconduct should be ordered to pay 20% of the costs and expenses incurred by the Government and by the SFC.

Section 260: the claim by Mr Dong for costs and expenses incurred

424. The Financial Secretary's Notice of 16 December 2011 listed Mr Dong, an Executive Director, Vice-Chairman and Chief Executive Officer of Yue Da Mining, as a specified person. In Part 1 of this Report, while the Tribunal found Yue Da Mining itself to be culpable of market misconduct, it did not find Mr Dong to be culpable. In the result, Mr Dong has sought an award to him of such sum as the Tribunal considers appropriate in respect of the costs reasonably incurred by him in conducting his defence.

425. Section 260(1)(b) gives power to the Tribunal to award Mr Dong what it considers to be an appropriate amount in respect of the costs reasonably incurred by him. That power, however, is subject to the provisions of subsection (4)(b) and (c) which provides that the power vested in the Tribunal shall not apply to –

> "(b) a person whose conduct the Tribunal considers has caused, whether wholly or in part, the Tribunal to investigate or consider his conduct during the course of the proceedings in question;
>
> (c) a person whom the Tribunal considers has by his conduct caused, whether wholly or in part, the institution of the proceedings."

426. These provisions are to be contrasted with section 5 of the Costs in Criminal Cases Ordinance, Cap 492, which provides that –

> "Where after trial in the District Court or the Court of First Instance a defendant is acquitted, the District Court or the Court of First Instance may order that costs be awarded to the defendant."

427. In criminal cases, the principle that has arisen from this general provision may broadly be summarised in the following terms; namely, that a costs order should normally follow an acquittal unless a defendant's own conduct has brought suspicion on himself and misled the prosecution into thinking the case against him was stronger than it proved to be.

428. In the judgment of the Tribunal, the provisions of section 260 referred to above should also, on a proper construction, be read to mean that if a specified person is found not to be culpable of market misconduct then a costs order should normally be made in favour of that specified person.

429. The issue in respect of Mr Dong, however, on a proper construction of subsection 4(b) and (c), is whether his conduct has displaced the normal consequence to the extent that, whether wholly or in part, the Tribunal should deny him costs.

430. In this regard, there is only one aspect of his conduct which falls for consideration and that is his admitted failure to be kept fully advised of the nature and purpose of the flow of funds into and out of Yue Da Mining, funds which, in part, the Tribunal has found constituted the fuel driving the market misconduct of Mr Li and/or Mr Qian and, through them, of Yue Da Mining and Yue Da Group. Put succinctly, the question to be asked is whether, as an

Executive Director, Vice-Chairman and CEO of Yue Da Mining, Mr Dong fell so short in the discharge of his responsibilities in ensuring that he was kept fully advised of the nature and purpose of the very substantial flow of funds into and out of Yue Da Mining, that in respect of these regulatory proceedings he has been the author of his own misfortune.

431. In Part 1 of this Report, the Tribunal observed that "at first blush, it seems strange that Mr Dong would permit the outflow of funds from Yue Da Mining without query or apparent concern".[69] This observation was made in the context of an earlier observation that "Mr Dong described himself as an expert manager, a person appointed from Hong Kong to protect the interests of shareholders generally not just the interests of the Jiangsu Group".[70] This gives rise to the question: surely, as CEO of Yue Da Mining, a publicly listed company in Hong Kong, being aware of his responsibility to protect the interests of shareholders generally, even if he was not an authorised signatory of the company's bank accounts, and even if he was not primarily responsible for determining what funds came into Yue Da Mining and what funds went out, he would have been at pains to ensure that he was kept fully informed of the nature and purpose of that flow of funds if only to ensure that the interests of Yue Da Mining were not being sacrificed on the altar of the overriding interests of the Jiangsu Group. Instead, so the proposition may be made, he abandoned his responsibility of ensuring scrupulous oversight and allowed the flow of funds to take place with minimal, if any, oversight and enquiry on his part. In the circumstances of this particular case, so the proposition may further be put, that

[69] See paragraph 359.
[70] See paragraph 354.

failure on his part, a material failure for the CEO of a listed company, resulted inevitably in his conduct being made the subject of the investigation and indeed, if only in part, brought about the institution of the proceedings.

432. How was it then that Mr Dong explained his lack of oversight? As the Tribunal understood his evidence, Mr Dong said that Mr Li and Mr Qian, as trusted veterans of the Jiangsu Group, were posted to Hong Kong to ensure the broader interests of the Group. He was well aware, he said, that Yue Da Mining had received substantial sums through Yue Da Group from the Jiangsu Group to assist in the transformation of the company and that any flow of funds back from the company was therefore legitimate repayment and "how that repayment, once made, was then deployed was not a matter of concern for him".[71] His concern, he said, was to ensure that the account balances remained viable and he would ask Mr Qian to confirm that. In addition, he said, the half yearly management reports assured him of the position.

433. Although Mr Dong, at the material time, did not have signing powers on the bank accounts of Yue Da Mining, he was given the authority to sign accounting vouchers. He said, however, that, as he travelled frequently, cheques would be signed and funds transferred without any reference to him and he would be left to sign the relevant vouchers – which themselves lacked detail – after the event.

[71] See paragraph 359.

434. In the unanimous judgment of the Tribunal, Mr Dong, as CEO of Yue Da Mining, failed significantly in discharging his responsibility, first, to assure himself that he understood the nature and purpose of significant fund flows moving into and out of his company and, second, to ensure that he had an authoritative voice, if only by way of consultation, in controlling such fund flows. Instead, Mr Dong appears to have distanced himself; indeed, it may be said that he effectively 'washed his hands' of the matter. This, it is to be remembered, was at the time of transformation of the company. It is further to be remembered that we are not talking about relatively small sums, we are talking about substantial flows of capital.

435. Whatever the prevailing corporate culture within the Jiangsu Group, Mr Dong had been appointed, as he himself accepted, to protect the interests of Yue Da Mining and its shareholders. Yet, as he accepted, payments out of the company would often be made without any reference to him and he would be left to sign poorly detailed vouchers after the event.

436. The argument may be put: but Mr Dong knew that the purse strings were held by the Jiangsu Group, acting through Mr Li and Mr Qian, and he was effectively powerless to interfere in decision-making in that regard. But was he? He gave no evidence to the effect that he attempted to ensure that he was consulted and given the ability to conduct detailed oversight of the flow of funds. If he had insisted, if due process had been followed, even if he may not have discovered (or become suspicious of) any form of market misconduct, it would have been clear to the Tribunal that he had discharged his responsibilities as CEO. As it was, by reason of his failing, the Tribunal was obliged to consider

the circumstantial evidence in considerable detail. Expressed another way, considered in the context of all the relevant facts, Mr Dong's passive compliance with whatever Mr Li and Mr Qian chose to do with the cash assets of Yue Da Mining, bearing in mind that he knew that they were there primarily to protect the interests of the Jiangsu Group, gave rise to the suspicion that he was working in conjunction with them or, at the least, turning a blind eye, and was therefore conniving in their misconduct.

437. The Tribunal is therefore satisfied, it being a unanimous decision, that Mr Dong should be denied his costs subject to the exceptions set out below.

438. During the course of submissions, it was submitted on behalf of Yue Da Mining and Mr Dong that they were successful in seeking disclosure of seven documents in respect of which the SFC claimed legal professional privilege and should be awarded their costs in this regard. Counsel for the SFC disagreed.

439. By way of background, it appears that in May 2012 the Presenting Officer sought a ruling on the disclosure of these documents. The Tribunal directed that the SFC give explanations in writing setting out the basis upon which legal professional privilege was claimed in respect of each of the documents. This was done. However, as Yue Da Mining and Mr Dong still sought disclosure, the matter was set down for argument before the Tribunal on 9 August 2012. At the hearing, the SFC voluntarily disclosed four documents, but only by way of a limited waiver, and asked the Tribunal to determine whether the remaining three contained materials relevant to the Tribunal's

mandate. The Tribunal was of the view that they were not relevant. In the result, Yue Da Mining and Mr Dong did not press for disclosure of these three documents.

440. Arising out of this, all parties have sought their costs. In the view of the Tribunal, it would be wrong to penalise the SFC with costs when, on a limited waiver basis only and in order to save time and costs, they voluntarily disclosed a portion of the documents in issue, the Tribunal (without a full written ruling) indicating that it considered the remaining documents to be irrelevant. Equally, Yue Da Mining and Mr Dong, having obtained sight of four of the seven documents, the Tribunal is of the view that it would be wrong to penalise either of them in costs. Adopting a broad approach, one that seeks overall fairness, the Tribunal is of the view that there should therefore be no order as to costs in respect of the proceedings to obtain disclosure. This means that neither the SFC nor Yue Da Mining and Mr Dong are entitled to their costs in respect of the proceedings.

441. In the result, Mr Dong is to be awarded only –

i. his costs wasted by reason solely of the need for the expert witness, Mr Cheng, to revise his expert report; and

ii. his costs, if any, incurred in obtaining the expert evidence of Mr Pascutto in respect of the legitimacy of the share repurchase scheme.

Should there be summary orders as to the quantum of costs?

442. While it may have become customary for the Tribunal to make summary assessments of costs, the Tribunal does not consider it to be appropriate in the present case. In this regard, it is to be remembered that Mr Brewer has challenged the costs presented by the Government: at least as to the assertion that they have breached the indemnity principle. That being the case, the Tribunal orders that all costs and expenses be taxed unless agreed between the parties.

443. Subject to paragraph 442, the costs and expenses of the Government and the SFC have been assessed at $4,522,821.00 and $491,608.00, the details being set in Annexures C and D.

Summary of the orders made

444.

A. In respect of Mr Li Libin

(i) Pursuant to section 257(1)(a), he shall not, without the leave of the Court of First Instance, be or continue to be a director or take part in the management of a listed company or any company in which a listed company, directly or indirectly, has a shareholding, this prohibition to last for 3 years calculated from 1 May 2015.

(ii) Pursuant to section 257(1)(c), he shall not again perpetrate any conduct which constitutes the market misconduct of insider trading, false trade, price rigging and stock market manipulation.

(iii) Pursuant to section 257(1)(e), that he shall pay the Government 20% of its costs and expenses assessed at $904,564.20.

(iv) Pursuant to section 257(1)(f), that he shall pay the SFC 20% of its costs and expenses assessed at $98,321.60.

B. In respect of Mr Qian Jinbiao

(i) Pursuant to section 257(1)(a), he shall not, without the leave of the Court of First Instance, be or continue to be a director or take part in the management of a listed company or any company in which a listed company, directly or indirectly, has a shareholding, this prohibition to last for 3 years calculated from 1 May 2015.

(ii) Pursuant to section 257(1)(c), he shall not again perpetrate any conduct which constitutes the market misconduct of insider trading, false trade, price rigging and stock market manipulation.

(iii) Pursuant to section 257(1)(e), that he shall pay the Government 20% of its costs and expenses assessed at $904,564.20.

(iv) Pursuant to section 257(1)(f), that he shall pay the SFC 20% of its costs and expenses assessed at $98,321.60.

C. Yue Da Mining Holdings Limited

(i) Pursuant to section 257(1)(e), that it shall pay the Government 20% of its costs and expenses assessed at $904,564.20.

(ii) Pursuant to section 257(1)(f), that it shall pay the SFC 20% of its costs and expenses assessed at $98,321.60.

D. Yue Da Group (HK) Company Limited

(i) Pursuant to section 257(1)(e), that it shall pay the Government 20% of its costs and expenses assessed at $904,564.20.

(ii) Pursuant to section 257(1)(f), that it shall pay the SFC 20% of its costs and expenses assessed at $98,321.60.

E. In respect of Mr Dong Liyong

(i) Pursuant to section 260(1)(b) as read with section 260(4)(b) and (c), Mr Dong Liyong is denied his costs with the exception only of those costs detailed in paragraph 441.

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

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

The Hon Justice Hartmann NPJ
(Chairman)

Dr Norman W Y Ngai
(Member)

Dr Cynthia K L Lam
(Member)

Dated 20th April 2015