The report of the Market Misconduct Tribunal into dealings
in the shares of Asia Telemedia Limited
(now known as Yunfeng Financial Group Limited)
on and between 5 February 2007 and 6 June 2007

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CHAPTER 1

INTRODUCTION

1. The proceedings which have given rise to this report have a long and involved history. They relate to allegations of insider dealing in the shares of a company listed on the Hong Kong Stock Exchange in 1987 (stock code 376), it being asserted that the insider dealing took place between February and June 2007.

The Company and those said to be culpable of insider dealing by trading in the Company's shares.

2. The company in question was at the time material to this report called Asia Telemedia Limited ('the Company' or 'ATML' or 'Asia Telemedia'). Its principal business was trading in securities and bullion, fund management, brokerage and the like.

3. Between February and June 2007, the following four persons – described by the Securities and Futures Commission as the 'four Specified Persons' – were officers and/or employees of the Company; namely –

(a) Lu Ruifeng ('Lu'), the Chairman, CEO and Executive Director of the Company and a substantial shareholder in it;

(b) Charles Yiu Hoi Ying ('Charles Yiu'), the Director of Finance of the Company and also an Executive Director;

(c) Marian Wong Nam ('Marian Wong'), the Company Secretary, and

(d) Cecilia Ho King Lin ('Cecilia Ho').

A brief history.

4. In respect of the assertion of insider dealing, while far greater detail is given in the body of this report, the relevant background may be summed up briefly as follows –

(a) In March 2005, Lu, Charles Yiu, Marian Wong and Cecilia Ho were each granted options to purchase shares in the Company, those options remaining exercisable until early 2010.

(b) At the time when the options were granted, however, the Company was in a parlous financial state and it appears that little hope was held out of being able to profitably exercise those options. Mr. Clive Rigby, an expert who testified at the hearing before the Tribunal, spoke of the Company being on 'life support', that support (in the form of transfusions of cash) coming from the Chairman, Lu. In his report prepared for the Tribunal, Mr Rigby said that uncertainty as to the Company's

ability to continue as a going concern was hardly fresh news. It had been losing heavily and its accounts had been qualified for years.

(c) The Company's largest single debt was due to a woman by the name of Liu Lien Lien ('Madam Liu'), the amount of the debt being recorded in July 2002 as being in a sum of over HK$83 million together with interest. In February 2007, after the Company had failed in a number of undertakings to pay off the debt, Madam Liu assigned all her right, title and interest in the debt to a company called Goodpine Limited ('Goodpine'). Solicitors representing Goodpine informed the Company of the assignment and demanded payment of the full amount of the debt. To the knowledge of the four Specified Persons, the Company was not in a position to meet that demand.

(d) The demand for payment of the debt and the fact that, as matters stood, the Company was not in a position to pay that debt, while it was known to the four Specified Persons, was not known to the market. As such, it was asserted that knowledge of the demand constituted inside information.

(e) As it was, at about the time when Goodpine's demand was made, there was a surge in the price of the Company's shares. On 16 February 2007, after modest rises over the previous few days, the share price of the Company rose by over 42%,

closing the day at $0.320. The next trading day there was a further surge, the share price closing at $0.460. In May 2007, the shares peaked at $0.970. Although it was difficult to identify the exact causes of the surge in the share price, it appeared to market observers that the increasing integration of the Mainland and Hong Kong securities markets had particularly supported shares in securities and brokerage companies.

(f) In light of this unexpected surge, between about 26 February and 5 June 2007, having exercised their options to purchase shares in the Company, the four Specified Persons sold all (or the great majority) of those shares. Each of them made a substantial profit.

(g) Accordingly, so it was asserted, the four Specified Persons engaged in market misconduct by way of insider dealing contrary to section 270 of the Securities and Futures Ordinance, Chapter 571 ('the Ordinance').

Proceedings before the Market Misconduct Tribunal.

5. However, it was not until 16 January 2014 – almost seven years later – that the Securities and Futures Commission ('the SFC') issued a notice to this Tribunal pursuant to section 252(2) and Schedule 9 of the Ordinance requiring the Tribunal to conduct proceedings in order to determine whether market

misconduct had taken place and, if so, the identity of the persons who had engaged in that misconduct and the amount of any profit gained or loss avoided.

6. In terms of the notice, the persons suspected to have engaged in market misconduct by way of insider dealing were the four Specified Persons.

7. As to proceedings before the Tribunal, the following is a broad chronology –

(a) The first directions hearing took place on 1 April 2014. At that hearing, to enable the legal representatives of the Specified Persons to take instructions, and with due allowance being given for existing commitments on the part of the members of the Tribunal, it was directed that the hearing of the enquiry would commence on 17 November 2014.

(b) A second directions hearing took place on 19 September 2014. The purpose of the hearing was to consider delaying the commencement of the enquiry itself by two weeks. This delay was occasioned by the Chairman, Mr Hartmann, who was committed at the time to the completion of an independent expert panel report due to be presented to the Chief Executive of the HKSAR.[1]

[1] The Report of the Independent Expert Panel concerning the Hong Kong section of the Guangzhou-Shenzhen-Hong Kong Express Rail Link.

(c) In the result, the substantive hearing of the enquiry before the Tribunal commenced on 1 December 2014 running through until, and including, 24 December 2014. Thereafter, with certain evidence still being outstanding, the hearing was adjourned until the 27th and 30th January 2015.

(d) At the conclusion of the hearing, counsel were given time to prepare their final submissions which were presented to the Tribunal at the end of March 2015.

Findings of the Tribunal.

8. The report of the Tribunal (as to the substantive issues of liability) was issued on 26 November 2015. For the reasons given in the body of the report, the Tribunal came to the following unanimous determinations –

> "That in respect of the first Specified Person, Lu Ruifeng, it had not been possible to determine whether he was or was not culpable of market misconduct by way of insider dealing. This was because, due to evidence of acute illness, he had not been given a reasonable opportunity of being heard.
>
> That in respect of the second and third Specified Persons, Charles Yiu and Marian Wong, although found to be knowingly in possession of inside information at the time they dealt, were not identified as insider dealers on the basis that they had each independently established a defence of "innocent purpose" pursuant to section 271(3) of the Ordinance in that they had established that the purpose for which they dealt in the shares did not

> include the purpose of securing a profit *by using the inside information* [emphasis added].
>
> That in respect of the fourth Specified Person, Cecilia Ho, she was not identified as an insider dealer and therefore culpable of market misconduct on the basis that, although in possession of information which constituted relevant information at the time of certain of her later dealings, she did not know that such information constituted relevant information."

The process of appeal.

9. The SFC sought leave to appeal the determinations of the Tribunal in respect of all four Specified Persons. In its judgment dated 26 April 2017, the Court of Appeal dismissed the appeal, upholding the Tribunal's determinations.

10. The SFC then appealed to the Court of Final Appeal, its appeal being related to the Tribunal's determinations in respect of two of the Specified Persons only, namely, Charles Yiu and Marian Wong. Those determinations were to the effect that, while the elements of insider dealing had been established against both, neither of them were culpable of engaging in market misconduct on the basis that they had succeeded in establishing the defence of "innocent purpose" under section 271(3) of the Ordinance, that section being to the following effect –

> "A person shall not be regarded as having engaged in market misconduct by reason of an insider dealing taking place through his dealing in … listed securities … if he establishes that the purpose for which he dealt in … the

listed securities … was not, or, where there was more than one purpose, the purposes for which he dealt in … the listed securities … did not include, the purpose of securing or increasing a profit … *by using inside information*." [emphasis added]

11. Before the Court of Final Appeal, the core question to be determined was defined by the Court in the following terms:

> "Whether, on the findings of the Tribunal, upheld by the Court of Appeal, namely, the findings that the respondents' sales of ATML shares while they possessed price sensitive information, although *prima facie* constituting [market misconduct], were solely motivated by the unexpectedly high prices achievable taken together with the belief that the relevant information would remain behind closed doors, it was correct as a matter of law to hold that the respondents were entitled to rely on the defence provided by section 271 (3) of the Ordinance."[2]

12. In its judgment dated 12 October 2018, the Court (by a majority of 4 – 1) allowed the appeal, the matter being remitted to the Tribunal to deal with the question of appropriate sanctions on the basis that the Second and Third Specified Persons had been found culpable of market misconduct.

13. In respect of costs, an order was made that the second and third Specified Persons pay the costs of the SFC in respect of all three levels of determination, that is, before the Tribunal, the Court of Appeal and the Court of Final Appeal.

[2] The core question was set out in the judgment of the Court of Final Appeal in paragraph 17 of the joint judgments of Ribeiro PJ and Fok PJ.

The issue of sanctions.

14. The first hearing before the Tribunal relating to sanctions took place on 17 December 2019. During that hearing, the Tribunal was concerned as to a number of matters, particularly whether, if it was found that the law concerning "innocent purpose" had been uncertain at the time when the insider dealing took place, that uncertainty should be counted as a factor in mitigation. The hearing was therefore adjourned in order to allow counsel to prepare further submissions.

15. The second hearing relating to sanctions took place on 26 June 2020. Time, however, was insufficient for the SFC to be able to make its reply submissions. The Tribunal therefore directed that the reply submissions should be made in writing. Those submissions were filed with the Tribunal on 30 July 2020.

CHAPTER 2

PART ONE OF THE TRIBUNAL'S REPORT: THE ORIGINAL FINDINGS AS TO CULPABILITY

16. Part One of the Tribunal's report, dealing with culpability only, is set out as originally published in the chapters that follow, that is, chapters 3, 4, 5, 6, 7, 8, 9 and 10.

CHAPTER 3

THE NOTICE TO COMMENCE PROCEEDINGS

17. The Tribunal was constituted pursuant to the notice issued by the Securities and Futures Commission ("the SFC') dated 16 January 2014. The Notice was in the following terms.

IN THE MATTER OF THE LISTED SECURITIES OF
ASIA TELEMEDIA LIMITED
(NOW KNOWN AS REORIENT GROUP LIMITED)
(STOCK CODE 376)

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

Whereas it appears to the Commission that market misconduct within the meaning of section 270 ("**Insider Dealing**") of Part XIII of the Ordinance has or may have taken place arising out of the dealings in the securities of Asia Telemedia Limited (now known as Reorient Group Limited) (Stock Code 376) ("**ATML**"), the Market Misconduct Tribunal is hereby required to conduct proceedings and determine:

(a) Whether any market misconduct has taken place;

(b) the identity of any person who has engaged in the market misconduct found to have been perpetrated; and

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

Persons suspected to have engaged in market misconduct activities

Lu Ruifeng ("**Lu**")
Yiu Hoi Ying ("**Charles**")
Wong Nam, Marian ("**Marian**")
Ho King Lin, Cecilia ("**Cecilia**")

Statement for institution of proceedings

1. ATML was at all material times a listed company on the Stock Exchange of Hong Kong with stock code 376. Between 1st February 2007 and 6th June 2007, the following were officers and/or employees of ATML:

Lu	Chairman, CEO, Executive Director and substantial shareholder
Charles	Director of Finance and Executive Director
Marian	Company Secretary
Cecilia	Assistant Company Secretary

2. China United Telecom Ltd. ("**China United**") was a company in which Asia Telemedia Holdings Limited ("**ATMHL**") held 35% of the issued share capital. ATMHL was 100% owned by Lu who was the only person authorised to operate the securities account of China United.

3. Clear Excel Limited ("**Clear Excel**") was a BVI company owned and controlled by Lu.

4. Kayden Limited ("**Kayden**") was a BVI company owned by the Kayden Trust as an investment holding company. Lu in substance controlled the assets of the Kayden Trust with the power to revoke the trust in which case the assets of the trust would revert to Lu.

5. Yao Wen Pei ("**Yao**") is the father of Charles and an acquaintance of Lu. He held no office or employment with ATML, but was a director and sole shareholder of Telemedia Capital Inc. ("**TCI**").

6. At some time in or before 2002, Mansion House Group Limited (the

previous name of ATML) became indebted to one Liu Lien Lien. Between July 2002 and May 2006, there were negotiations and agreements between Liu Lien Lien and Mansion House Group Limited/ATML as to repayment of this debt. During the period of these negotiations and agreements, Lu Lien Lien served five statutory demands on Mansion House Group Limited/ATML at various different times. None of these statutory demands appear to have been followed up by any legal action and instead repayment arrangements were agreed between Liu Lien Lien and Mansion House Group Limited/ATML.

7. By a deed of assignment dated 1st February 2007 ("**the Assignment**"), Liu Lien Lien assigned the debt, comprising outstanding principal of HK$58,083,992.133, interest and legal costs, to Goodpine Limited ("**Goodpine**"). Goodpine agreed to pay HK$25,000,000 as consideration for the Assignment. On 5th February 2007, Goodpine, through its solicitors, Woo Kwan Lee and Lo ("**WKLL**"), sent a notice of the Assignment together with a demand for payment to ATML via its solicitors, Chiu & Partners. By an email dated 6th February 2007, Chiu & Partners advised ATML that it did not seem to have a real defence to the demand from Goodpine. On 2nd March 2007, WKLL provided Chiu & Partners with a copy of the Assignment.

8. On 20th April 2007, ATML published its final results for the year ended 31st December 2006. These revealed inter alia that ATML had a cash balance of HK$12,432,308. The final results also disclosed that ATML had consolidated total assets of HK$132,045,000 compared to consolidated total liabilities of HK$190,583,000. The auditors disclaimed their opinion in respect of a material uncertainty relating to the going concern basis of ATML noting that "[p]rovided that the repayment arrangement for the [Debt] can be agreed upon and provided that income generating investments are injected into the Group, the directors of [ATML] are satisfied that the Group will be able to meet in full its financial obligations as they fall due for the foreseeable future. The auditors were unable to obtain sufficient evidence to assess whether any impairment should be recognised in respect of an amount equivalent to HK$27,725,067. They also declined to express an opinion on the financial statements as to

whether they gave a true and fair view of the state of ATML's affairs.

9. On 26th April 2007, WKLL on behalf of Goodpine sent a statutory demand ("**the Statutory Demand**") to ATML demanding payment of HK$70,270,491.357 (comprising outstanding principal, interest up to and including 25th April 2007 and legal costs) within 21 days, failing which Goodpine would issue proceedings for the winding-up of ATML.

10. ATML, through Chiu & Partners, responded with letters dated 7th May 2007 and 22nd May 2007. The first of these offered to pay HK$8,000,000 by instalments in full and final settlement of Goodpine's claim. The second offered the same sum as a lump sum payment. There was no reply to either letter.

11. On 6th June 2007, Goodpine served a winding-up petition on ATML. ATML's shares were suspended from trading before market opening on 7th June 2007. The closing price on 6th June 2007 was HK$0.83. Thereafter on 15th June 2007, ATML announced that it had been served with a winding-up petition by Goodpine ("**the Announcement**"). Trading remained suspended until 18th October 2007 and on the resumption of trade the share price dropped 62% to HK$0.315.

Trading in ATML shares

12. On 23rd March 2005, Lu, Charles, Marian and Cecilia had been granted options in ATML's shares at an exercise price of HK$0.2 per share as follows:

Lu	1 million share options
Charles	8 million share options
Marian	8 million share options
Cecilia	3 million share options

These options were exercisable until 22nd March 2010.

13. On 7th May 2007, Marian and Cecilia were granted further options in ATML's shares at an exercise price of HK$0.4 per share as follows:

Marian 5 million share options
Cecilia 1 million share options

These options were exercisable until 6th May 2009.

14. Lu, Charles, Marian, Cecilia and Yao sold ATML shares on various dates between 26th February 2007 and 5th June 2007 as set out below:

Date	No. of shares	Price per share (HK$)
Lu (through China United account)		
4 – 25/4/07	5.5 million	0.39 – 0.4923
26/4 – 30/5/07	50.75 million	0.4 – 0.8965
Lu (through his personal account)		
14/5/07	0.5 million	0.65
23/5/07	0.5 million	0.66
(These shares were obtained by Lu as a result of exercising share options at $0.20 for 1 million ATML shares on 14th and 23rd May 2007 respectively.)		
Charles		
28 – 31/5/07	6 million	0.85 – 0.91
(These shares were obtained by Charles as a result of exercising share options at $0.20 for 6 million shares between 28th and 31st May 2007.)		
Marian		
28/2 – 26/4/07	6.2 million	0.37 – 0.494
27/4 – 5/6/07	3.8 million	0.395 – 0.98
(These shares were obtained by Marian as a result of exercising share options for 8 million shares at $0.20 and for 2 million shares at $0.40.)		
Cecilia		
26/2 – 19/4/07	2.7 million	0.2938 – 0.495
11 – 31/5/07	0.9 million	0.5017 – 0.96
(These shares were obtained by Cecilia as a result of exercising		

share options at $0.20 for 3 million shares and at $0.40 for a further 1 million shares.)		
Yao (through TCI account on behalf of Lu)		
21/3 – 20/4/07	9 million	$0.385 – 0.509
14 – 25/5/07	48.6 million	0.63 – 0.903

15. The Commission contends that Yao was acting as a nominee for Lu in conducting the trades through the TCI account. Yao was a friend of Lu, and of the sale proceeds of the trades by Yao through the TCI account, HK$1.25 million was paid to Clear Excel (Lu's company) and the balance of HK$37.7 million was paid to Yao's wife, from whose account HK$32.4 million was transferred to Kayden (Lu's trust company).

16. Each of the above persons sold ATML shares after notice of the Assignment had been sent to ATML, but before the existence of the Assignment had become public knowledge; and also each of them sold ATML shares after service of the Statutory Demand on ATML but before the existence of the Statutory Demand had become public knowledge.

17. The Commission relies on the Assignment and notice thereof on 1st and 5th February 2007 respectively, and the Statutory Demand from Goodpine on 26th April 2007, as being relevant information within the meaning of section 245 of the Ordinance. It was specific information about ATML "*which [was] not generally known to the persons who are accustomed or would be likely to deal in the listed securities of [ATML] but which would if it were generally known to them be likely to materially affect the price of the listed securities*". The information did not become generally known until the Announcement of 15th June 2007.

18. All 4 persons suspected of insider dealing were connected with ATML within the definition of section 247 of the Ordinance, by virtue of their positions as set out in paragraph 1 above. The evidence will show that at the time that they sold the ATML shares they had the relevant information, and must have known it to be relevant information.

19. Accordingly, by reason of the matters set out above, Lu, Charles, Marian and Cecilia engaged or may have engaged in market misconduct, namely insider dealing contrary to section 270 of the Ordinance.

Dated this 16th day of January 2014.

Securities and Futures Commission

18. Shortly after the issue of the Notice, the SFC served a synopsis dated 29 January 2014, giving a summary of what it considered to be the relevant factual background together with details of the trading in the shares of ATML said to constitute the market misconduct by way of insider dealing.

19. As stated in Chapter 1, after a number of directions hearings, the substantive hearing of the enquiry commenced before Mr Hartmann and two Tribunal members on 1 December 2014, running through until and including 24 December 2014. Thereafter, as certain evidence was still outstanding, the hearing was adjourned until the 27th and 30th of January 2015. Counsel presented their final submissions to the Tribunal on 23 March 2015.

CHAPTER 4

A PRELIMINARY MATTER: WAS LU RUIFENG GIVEN A REASONABLE OPPORTUNITY OF BEING HEARD?

20. Fairly early in the course of the SFC investigation, Lu Ruifeng, the Chairman and Chief Executive Officer of Asia Telemedia, complained that his ill health prevented him from co-operating fully. His ill-health, the nature of which was not directly disputed, was that of chronic liver dysfunction.

21. In the months before the hearing of the enquiry, if the evidence concerning the matter is to be believed, Lu Ruifeng's chronic condition worsened to such a catastrophic degree that, by the time of the hearing – and during it – his cognitive skills had been so reduced that he was in a state of confusion and clearly unable to deal rationally with issues as complex as those arising in the enquiry.

22. It was on this basis, at the conclusion of the enquiry hearing, that Lu Ruifeng's counsel submitted to the Tribunal that his client had not been given a reasonable opportunity of being heard and that, in such circumstances, the Tribunal was not permitted to come to any findings in respect of his culpability.

23. Section 252(6) of the Ordinance directs that a tribunal constituted under the Ordinance "shall not identify a person as having engaged in market misconduct without first giving that person a reasonable opportunity of being heard."

24. The issue that falls for consideration, therefore, as a preliminary issue, is whether Lu Ruifeng, looking to all relevant circumstances, was given a reasonable opportunity of putting his case, that is, of being heard in his own cause.

25. Mr. Laurence Li, leading counsel for Lu Ruifeng, did not seriously contest the fact that Lu Ruifeng was given ample opportunity to prepare his defence. It was instead, the principal focus of Mr. Li's submissions that, by reason of involuntary illness of the most serious kind, his client had been unable to give instructions as to matters arising during the course of the hearing, matters that were not well trodden along the pathway of the investigation but, in part or in whole, were issues that arose for the first time during the course of the hearing itself. In the main, said Mr. Li, these matters were not merely incidental but were of sufficient substance that they may play a role in influencing the Tribunal's final determination. It was on this basis, Mr. Li argued, that his client had been deprived of the opportunity of being heard.

26. As to the nature of Lu Ruifeng's involuntary illness, evidence by way of hospital certificates and the like was placed before the Tribunal. That evidence shows that Lu Ruifeng was born with hepatitis B and has suffered for much of his life from liver dysfunction, culminating in cirrhosis.

27. The available evidence further indicated that on or about 6 October 2014, just under two months before the commencement of the enquiry hearing on 1 December 2014, Lu Ruifeng suffered a relapse, apparently brought on by "overwork and exhaustion" and was admitted to the Beijing Junhai Liver

Disease Recovery Hospital. If the evidence is accepted, it appears that Lu Ruifeng remained in that hospital throughout the period of the enquiry hearing and was still a patient at the end of January 2015 when the Tribunal completed hearing evidence.

28. More than that, if the evidence is accepted, it appears that, once in hospital, instead of undergoing an unremarkable recovery, Lu Ruifeng's condition underwent a profound deterioration to the extent that he was at one time classified as being critically ill.

29. As to Lu Ruifeng's ability to participate in the enquiry hearing even though hospitalised, Dr Bai Jie, seemingly the Chief of the Department of Hepatology at the Beijing Junhai Liver Disease Recovery Hospital, reported that Lu Ruifeng's worsening condition had been marked by symptoms of hepatic encephalopathy which describes a spectrum of neuropsychiatric abnormalities in patients with liver dysfunction. At the more serious end of the spectrum, the abnormalities are characterised by personality changes, intellectual impairment and a depressed level of consciousness. In short, if the evidence is believed, Lu Ruifeng was unable during the course of the enquiry hearing to assist in his own defence.

30. Turning to the legal principles, it is well-established that a disciplinary and/or regulatory tribunal has a discretion to commence and/or continue the hearing of an enquiry into the conduct of an individual even though that individual may be absent. The discretion, however, is one that must be exercised with "utmost care and caution", the overriding concern being to ensure that the

hearing of the enquiry is as fair as circumstances permit and leads to a just outcome.[3]

31. Citing the observations of Rogers VP in *Wong Sun v Insider Dealing Tribunal*[4], Mr. Li said that a man who stands in the position of an accused in a disciplinary hearing – in that that his reputation (and perhaps livelihood) stand at risk – is entitled to see how the case against him is made out and how it develops before answering the allegations made against him. Lu Ruifeng, it was submitted, was (on the unchallenged medical evidence) in no fit state to be informed of how the case against him was developing during the hearing itself and certainly in no fit state to give rational, balanced instructions thereby enabling his counsel to answer the allegations made against him in the course of the hearing.

32. It would appear that, despite his unchallenged chronic liver dysfunction, when the first directions hearing took place before the Tribunal at the beginning of April 2014, Lu Ruifeng was running his day-to-day business interests, even though under considerable pressure of work.[5] At that first hearing, Lu Ruifeng was represented by senior counsel, Mr. Peter Duncan, who made no mention of Lu Ruifeng's ill-health but simply requested time to take instructions and prepare the defence. On this basis, it was agreed that the hearing of the enquiry would not take place until 17 November 2014, that date later

[3] The need for "utmost care and caution" was set out by Lord Bingham in *R v Jones (Anthony)* [2002] 2 WLR 524, a criminal case. However, as a guiding principle it has been followed generally in disciplinary and/or regulatory proceedings. In this latter regard, see (for example) *Raheem v Nursing and Midwifery Council* [2010] EWHC 2549 (Admin), paragraphs 30 and 31.

[4] Unreported, CACV 153 of 2000, dated 3 November 2000.

[5] As stated earlier, it was in October 2014 – according to his medical evidence – that Mr. Lu was admitted to the Beijing Junhai Liver Disease Recovery Hospital, the relapse in his condition, having been brought about by "overwork and exhaustion".

being moved back to 1 December 2014.

33. Nor does it appear that, until September 2014 at least, Lu Ruifeng was prevented from working with his legal team by way of ill-health. Certainly, in respect of commercial matters, he was able to have a business meeting with Charles Yiu, the second specified person in Shenzhen in September 2014.[6]

34. On 19 September 2014, however, when a second directions hearing took place, the Tribunal was informed that Lu Ruifeng was now scheduled to undergo a three-month course of treatment at a hospital in Beijing, that treatment to commence in December 2014 – at or about the same time that the hearing of the enquiry was scheduled to take place.

35. By the date of that second directions hearing, Lu Ruifeng had instructed new solicitors[7] and it was a solicitor from that new firm, who appeared. Regrettably, no doubt because of a lack of time to take full instructions, the solicitor's grasp of the relevant medical facts was markedly inadequate. Lu Ruifeng's solicitor asked for an adjournment of the hearing of the enquiry until about March 2015. As to the reason, the solicitor was able to say that Lu Ruifeng suffered from cirrhosis of the liver which was at a 'late stage' and that the three-month period of treatment was necessary to stabilise his condition. The treatment, it was said, would require Lu Ruifeng to be on a drip for three hours a day.

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6 This was the evidence of the second specified person.
7 Messrs. C.L. Chow & Macksion Chan

36. The question of timing – the obvious question – was raised by the Chairman. If Lu Ruifeng's condition required a three-month period of treatment, why was he not able to go to hospital immediately in order to commence that treatment? If he was able to commence the treatment immediately, he would be two thirds of the way through that treatment by the time the hearing of the enquiry commenced and would no doubt by then, even if still in hospital, be much improved. Lu Ruifeng's solicitor answered to the effect that Lu Ruifeng was undergoing some form of preliminary treatment in the form of an injection that was given to him every two weeks; that treatment had to be completed apparently before Lu Ruifeng was admitted to hospital. Why such preliminary treatment was necessary before hospitalisation was not explained nor were any details given of the nature of the injections, for example, whether they were part of standard Westernised medical procedure or part of traditional Chinese medicine. A further obvious question was asked. It was in no way suggested that Lu Ruifeng's condition was critical. Otherwise (surely) he would be admitted to hospital without delay. If his treatment, once he was in hospital, consisted of being on a drip for three hours a day, would he not still be able to give relevant instructions and, if he wished, would he not be able to participate in the hearing by way of video link? Lu Ruifeng's solicitor confessed that, as matters stood, he was in no position to answer these questions.

37. In the result, on the basis of the sketchy assertions before it, the Tribunal was not prepared to grant an adjournment through until March 2015. A decision would be made later when more comprehensive evidence was put before the Tribunal. In this regard, the Tribunal directed that two reports were to be supplied:

(i) a detailed report from Lu Ruifeng's doctor or chief of his medical team in Beijing setting out the nature of his condition and why the in-hospital treatment could not be brought forward so that, if not completely finished by the commencement of the hearing of the enquiry, it would at least be substantially finished and hopefully by then Lu Ruifeng would be in a more robust physical condition;

(ii) a further report from a specialist in liver dysfunction in Hong Kong explaining and, for the assistance of the Tribunal, commenting on the Beijing medical report. For example, whether the injection given every fortnight prior to the in-hospital treatment was a standard treatment or perhaps, in accordance with standard Western procedures, an 'alternative' form of treatment.

38. It is to be emphasised that the Tribunal did not direct that a Hong Kong specialist in liver dysfunction must go to Beijing to personally examine Lu Ruifeng nor that Lu Ruifeng must come to Hong Kong to be examined by a Hong Kong specialist. All that was required was a document that explained and commented on the Beijing document in order to assist the Tribunal.

39. Presumably, in order to comply with the first direction, in a letter dated 30 October 2014, Lu Ruifeng's solicitors provided a report dated 10 October 2014 prepared by Dr Bai Jie who identified himself as being the Chief of the Department of Hepatology at the Beijing Junhai Disease Recovery Hospital. In the report, Dr Bai Jie gave a brief history of Lu Ruifeng's hepatitis,

explaining why he had to be admitted to the hospital in October 2014, this being earlier than December 2014, the original suggested starting date of Lu Ruifeng's treatment.

40. As to Lu Ruifeng's current condition and prognosis, Dr Bai Jie wrote (this being the English translation of the Chinese characters):

> "According to the patient's current situation (hepatic encephalopathy is a symptom at this time), it is expected that the patient would be hospitalised for no less than three months. Another six months to one year of rest is necessary after he is released. He should avoid overworking and maintain an anger-free composure; he should eat mildly flavoured food, and his condition should be closely monitored. He should pay regular consultation visits to the hospital such that he could be hospitalised and observed as soon as any abnormality is identified. This will help prevent the occurrence of liver failure and complications which could lead to a reduced opportunity of survival."

41. On this basis, what was apparently being sought was an adjournment of a year or more.

42. Although the Tribunal had asked for specific details of the treatment being given to Lu Ruifeng – that being one way in which a Hong Kong specialist could assess the seriousness of Lu Ruifeng's condition and the adequacy of his treatment – no specific details of Lu Ruifeng's treatment were given.

43. Nor (perhaps understandably, given the very general nature of what was reported) was any form of report submitted by a Hong Kong specialist. Instead, in an explanatory letter, Lu Ruifeng's solicitors appeared to suggest that Lu Ruifeng had not been well enough to come to Hong Kong to be examined and that no Hong Kong specialist had been able to go to Beijing, issues of insurance and the like constituting a barrier to such a course. To re-emphasise the point, the Tribunal had not insisted that Lu Ruifeng come to Hong Kong, nor that a specialist from Hong Kong go to Lu Ruifeng.

44. It should be said that in a further letter dated 10 November 2014 Lu Ruifeng's solicitors provided further evidence in the form of a certificate of diagnosis stating that Lu Ruifeng was suffering from "hepatitis B in decompensated liver cirrhosis (active phase)". Unhelpful photographs purporting to show Lu Ruifeng lying in his hospital bed were also supplied.

45. In light of this evidence, Lu Ruifeng's solicitors wrote to the Chairman seeking an adjournment of the hearing of the enquiry to an unspecified date in 2015 when, at best, a further update of Lu Ruifeng's speed of recovery could be given to the Tribunal. The SFC opposed any such indefinite adjournment.

46. In a written ruling dated 12 November 2014, the Chairman declined to grant an adjournment. The reasoning behind the ruling was based substantially on the uncertainty of the material put before the Tribunal and the fact that, by the commencement of the hearing itself, if Lu Ruifeng's condition was treatable – and there was nothing to say that it was not – Lu Ruifeng would have been

under treatment for some two months. What was anticipated by Lu Ruifeng's own medical team was a three-month period of treatment which would mean, on the probabilities, that Lu Ruifeng would be much improved by the time the hearing commenced and able therefore to both receive information as to the progress of the hearing and to give instructions concerning his own defence.

47. The Chairman accepted that he had to rely on the general probabilities rather than on the details of a medical prognosis as no such prognosis had been supplied. The Chairman went on to say that if the probabilities, as he saw them, did not in fact meet the realities of the situation then he was prepared to reconsider the ruling. However, as things stood, bearing in mind that there were three other implicated persons who had no doubt already gone a long way in the preparation of their defences, the Chairman was of the view that the enquiry must continue as scheduled.

48. Some two weeks after the Chairman had given his ruling saying that, all being well, Lu Ruifeng's treatment would have advanced sufficiently by the commencement of the hearing to enable him to participate in it, a further letter was received from Dr Bai Jie saying that suddenly all was not well.

49. Far from experiencing a steady recovery, Lu Ruifeng's condition had now deteriorated substantially. He was delirious and had "low computation ability", presumably this being a very reduced ability to rationally understand what was said to him and to compute a coherent answer. Dr Bai Jie further said that Lu Ruifeng was "blunted in responsiveness and sensibility". It was said that his family had been informed of his changed condition.

50. On the evidence, Lu Ruifeng's condition got even worse. During the course of the hearing itself a further notice was received from Beijing stating that Lu Ruifeng was now categorised as being critically ill.

51. When the Tribunal convened at the end of January 2015 in order to hear the final two days of evidence, it received further documentation concerning Lu Ruifeng's state of health. This included a further certificate of diagnosis (dated 28 January 2015) which read:

> "The patient's psycho-mentation condition is extremely poor. Appears [to be] chronic hepatic failure symptoms, aurigo level rapidly increases. Ascites start to appear, distended abdomen appears. Have informed his family that the patient is in danger of hemorrhage. Keep watch."

52. This was accompanied by a note from a family member stating that Lu Ruifeng was in a confused state of mind most of the time and it appeared that his memory was failing.

53. If the evidence is accepted, it appeared that Lu Ruifeng had been in a critical, or near critical, state for a period of some two months.

54. But is the medical evidence to be accepted? It is for the Tribunal to weigh the evidence received and to determine what weight, if any, can be given to it. The history of the matter – from Lu Ruifeng's unwillingness in 2008 to co-operate with the SFC, right through to the sudden worsening of his condition when it was suggested that Lu Ruifeng may still be able to partake in the hearing of the enquiry from hospital – obviously raised concerns. Despite popular

myth, judicial bodies are required to be in touch with the realities of life, not divorced from them. The question, therefore, had to be asked: was this all just too convenient? If there had been some contradictory evidence to which weight should properly have been given, then the Tribunal may well have replied to the effect that, yes, it was all just too convenient. But there was no contradictory evidence. The evidence of Lu Ruifeng's dire circumstances was unchallenged.

55. It is correct that, seemingly on the basis of some misunderstanding, the solicitors representing Lu Ruifeng had not initially obtained the assistance of a Hong Kong expert in matters of liver dysfunction and the appropriate treatment for it. But by the time of the hearing, and the receipt of evidence that Lu Ruifeng's condition had deteriorated, matters had moved on and it is very doubtful that any Hong Kong expert – from a distance – would have been in any position to dismiss the diagnosis of rapid degeneration made by Dr Bai Jie.

56. In cases where the person claiming involuntary illness is in a hospital in the same jurisdiction, if the tribunal has doubts as to whether the evidence supporting an illness is genuine or sufficient, there are relatively straightforward practical ways of determining the issue. One possibility is to direct that further evidence be provided promptly. Another is that the party seeking the adjournment should be invited to allow an independent medical expert to examine him.[8] In the present case, however, Lu Ruifeng was receiving treatment in a hospital in another jurisdiction, one in which the doctors, being

[8] In this regard see *Teinaz v London Borough of Wandsworth* [2002] EWCA Civ 1040, paragraph, 22 per Gibson LJ.

subject to very considerable pressures of work and operating in a different cultural and legal environment, are understandably not attuned to supplying the type of detailed evidence that the common law finds to be ideal.

57. Certainly, no suggestion was made by the SFC investigators or the Presenting Officer that there were grounds for doubting the essential accuracy of Dr Bai Jie's reports.

58. In the circumstances, the Tribunal must accept, and does accept, the essential accuracy of the reports penned by Dr Bai Jie and the other material supplied by the Beijing hospital.

59. On the basis of that evidence, the unavoidable inference to be drawn is that during the course of the hearing Lu Ruifeng was in no fit state to fully and rationally comprehend reports given to him as to the progress of the hearing and in no fit state therefore to give instructions as to how best to conduct his defence in respect of matters arising.

60. Mr. Adrian Bell, S.C., the Presenting Officer, submitted that, in the circumstances of this case, it did not follow that Lu Ruifeng had been denied the opportunity to be heard. In this regard he advanced the following submissions:

(i) Lu Ruifeng had been given ample time to fully instruct his legal representatives as to his defence and such instructions would surely have sought to answer the case against him. In addition, if

he chose, Lu Ruifeng could have made a written statement or affirmation to support his case.

(ii) As it was, in support of his case Lu Ruifeng was able to call one factual witness.

(iii) In addition, of course, an expert witness was called to support Lu Ruifeng and the other specified persons in respect of their contention that what was known to them did not constitute 'relevant information' and their subsequent actions could not therefore have constituted market misconduct.

(iv) The central issue in the case, that is, whether the information constituted 'relevant information' and was known to each of the specified parties, was dealt with in the evidence of other specified persons and comprehensively covered in submissions made by Lu Ruifeng's counsel and counsel for all the other specified persons.

61. In answer, Mr. Li, on behalf of Lu Ruifeng, raised a number of matters which he said could not necessarily have been anticipated in the preparatory work for the hearing. These were, or perhaps more accurately, became, matters of direct relevance during the course of the hearing. However, because of Lu Ruifeng's involuntary medical condition, it was not possible to take even the most basic instructions from him. In this regard, Mr. Li made mention, among other matters, of the following:

(i) During the course of the hearing, much was made of Lu Ruifeng's attitude to the debt that was assigned, as to whether he did or did not maintain doubts that it was legitimate.

(ii) An issue arose (or in its fully fledged form arose) during the course of the hearing as to why it was that, after the assignment of the debt, Lu Ruifeng did not take more vigorous steps to discover the purpose of the assignment and the true identity of the company to which it was assigned. More especially in this regard why it was that he made an offer of only $8 million in full settlement of the debt, an offer that was described during the course of the hearing as "derisory".

(iii) An allied issue arose during the course of the hearing as to why it was that Lu Ruifeng was seemingly prepared to let his company go into liquidation when, if only as a listing shell, the company had considerable value. This issue in turn gave rise to the question of how much, and in what manner, Lu Ruifeng had profited financially since his takeover of the company. Was it a case, for example, that having made his profit (including perhaps by means of insider dealing) he was prepared to let the company be liquidated?

(iv) The issue arose as to the extensive share options granted to staff, especially Mainland staff, and the asserted assistance granted to his employees by Lu Ruifeng to enable them to exercise those

options, both financial assistance and assistance by way of banking facilities (assistance that did not appear to have been formally reported). Had these constituted genuine options genuinely exercised or devices to enable Lu Ruifeng to personally profit?

(v) They were a number of issues which were sought to be proved by way of circumstantial evidence, for example, the share dealings by Telemedia Capital Inc. which it was suggested could only have been orchestrated by and for the benefit of Lu Ruifeng.

62. Mr. Li also emphasised that, even if the Tribunal concluded that originally Lu Ruifeng had been evading his obligation to participate in the enquiry, certainly by April 2014 the evidence suggested that he understood that his interests could best be protected by participating in the enquiry. Why else, it was asked, would he have briefed senior counsel in early 2014, and indeed briefed senior counsel for the course of the hearing itself?

63. Determining whether Lu Ruifeng has been given a reasonable opportunity of being heard has not been the easiest matter. What cannot be avoided however is a basic principle of fairness spelt out by Rogers VP in *Wong Sun v Insider Dealing Tribunal* (cited earlier), namely, that a trial, enquiry or inquisitorial hearing in which live evidence is given is so central to the common law process of determining culpability that the presence of an implicated party at such trial, enquiry or inquisitorial hearing – so that he may understand the case against him as it develops through the course of the hearing and be in a position

to answer it – is itself considered to be integral to the process and understood as being a basic tenent of fairness. If an implicated party chooses not to be present then there can be no complaint. But if an implicated party is deprived of the right to put his case (either directly by giving evidence or indirectly by giving instructions to his counsel) by reason of unchallenged involuntary illness then, only in exceptional cases, will fairness permit the tribunal or court to proceed to a final determination in the absence of that implicated party. Hence the direction that, when faced with these difficult questions, tribunals and courts must proceed with utmost care and caution.

64. In the present case, the determination of the Tribunal would have been different if the evidence demonstrated that, by a series of manoeuvres, Lu Ruifeng had distanced himself from the hearing. But, whatever its latent concerns, as the Tribunal has stated, there was never any challenge to the fact that the nature of Lu Ruifeng's illness and the degree of its seriousness was genuine.

65. Of course, the fact of hospitalisation itself does not mean that an implicated party may not participate in a trial, enquiry or inquisitorial hearing. The use of video link-ups is becoming more common. It enables a person to participate in a hearing from the hospital bed. As it is, however, the evidence put before the Tribunal by Lu Ruifeng, notwithstanding its shortcomings, makes plain that throughout the period of the hearing Lu Ruifeng was in such a critical state of physical health – with his cognitive and emotional abilities so overborne – that he was deprived of any meaningful opportunity of participating in the proceedings.

66. Nor can it be said that the hearing itself was an uncontentious affair in which for all practical purposes the oral evidence did no more than support what had already been recorded in written statements. Unsurprisingly, with two members of the Tribunal being qualified and experienced professionals in the area of corporate finance, there was lively questioning 'from the bench', much of it canvassing areas that would not necessarily have been included in Lu Ruifeng's preparation of his defence. There were also lengthy examinations by counsel of the witnesses, raising new issues and casting old issues in a new light.

67. That being the case, the Tribunal is drawn to the conclusion that, by reason of his worsening medical condition, Lu Ruifeng was not given a reasonable opportunity of being heard. Accordingly, the Tribunal is not permitted to identify him as a person who engaged in market misconduct.

68. In discharging its mandate in respect of the other specified persons, the Tribunal has, of course, had to make mention of various actions of Lu Ruifeng which are relevant to the enquiry. To exclude any reference, bearing in mind his central role, would have been entirely artificial. Not all of those references to him have been entirely neutral. However, in so far as those references have been coloured by the opinion of the Tribunal, those opinions have been reached in knowledge of the fact Lu Ruifeng has not been able to assist the Tribunal in order fully to give his own side of the story. Nor are those opinions in any way whatsoever to be taken as indirectly identifying him as a person who has engaged in market misconduct. Such opinions have been expressed for the single purpose of giving context to the findings of the enquiry

in respect of the other specified persons.

CHAPTER 5

A MORE DETAILED OVERVIEW OF THE FACTUAL BACKGROUND AND BASIS FOR THE ENQUIRY

Initial background.

69. The Company was incorporated in August 1982. As stated in Chapter 1 of this report, it secured its listing on the Hong Kong Stock Exchange in July 1987. In the course of its history, it has had a number of names. Originally, it was called Mansion House Group Limited and, as such, was part of a group of companies involved in securities trading, bullion trading, fund management and the like. Among its subsidiaries were Mansion House Securities Limited and Mansion House Capital Limited, both these subsidiaries being engaged in securities trading.

70. By early 2002, with its brokerage business in decline, the Group found itself in a precarious financial position. It was at this time, acting through a BVI company, China United Telecom Limited, that Lu Ruifeng, a Mainland businessman whose main focus at that time was on commercial exploitation of internet opportunities, was able to acquire a controlling interest in the Company, doing so through a number of connected transactions including a subscription agreement and a loan agreement, the latter providing for a sum of $20 million to be advanced to the Company to assist it in meeting its financial commitments.

71. In the Company's annual report for the financial year ended

31 December 2003, it was reported that the reconstituted Board would seek to employ the experience of the shareholders of China United Telecom Limited, a corporation controlled by Lu Ruifeng, to diversify into the media and telecommunications sectors. To this end, in August 2004, the Company changed its name to Asia Telemedia Limited.

Early events in respect of the debt due to Madam Liu.

72. On 29 July 2002, the Company entered into an agreement with a woman by the name of Liu Lien Lien ('Madam Liu'). The agreement stated that the Company was indebted to Madam Liu in a sum in excess of $40 million being the principal loan and accrued interest. In addition, the agreement stated that the Company had borrowed certain shares from Madam Liu which had not yet been returned or paid for. In consideration of Madam Liu refraining from instituting legal proceedings, it was agreed that the two sums combined, totaling $83,388,308 were due to Madam Liu and that interest would be payable on the capital at the rate of 7% per annum. It was agreed that the total amount would be paid by way of instalments, the last instalment to be paid on or before 31 March 2003. The agreement was signed on behalf of the Company by Eric Lowe and So Wai Yin, Irene (both of them at that time directors of the Company).

73. As it was, at the end of September 2002, the Company defaulted in payment of the second instalment. This default resulted in Madam Liu[9]

[9] Madam Liu at all times within the parameters of this report acted through solicitors.

serving a statutory demand under s.178 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap. 32, on the Company. The demand was dated 11 October 2002. It gave the Company 21 days within which to make payment in full failing which a petition for the winding up of the Company may be filed.

74. Section 178 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap 32, provides that a company may be wound up by the court in a number of stated circumstances, one such circumstance being its inability to pay its debts. Section 178 (1)(a) of the Ordinance provides that a company shall be deemed to be unable to pay its debts –

> "if a creditor, by assignment or otherwise, to whom the company is indebted in a sum then due equal to or exceeding the specified amount [$10,000], has served on the company, by leaving it at the registered office of the company, a demand… requiring the company to pay the sum so due, and the company has for 3 weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor."

In short, a 'statutory demand', as it is called, is a simple method of proving that a company is unable to pay its debts and that inability leaves the company open to being wound up. The power of a statutory demand lies in its latent threat of an imminent wind up.

75. There were to be later statutory demands. In respect of this first statutory demand, however, it is apparent that the existential threat it posed to the Company's continuance in business was fully recognised. Trading in the

shares of the Company was suspended on 15 October 2002 at the Company's request pending the publication of an announcement.

76. The announcement was published on 22 October 2002. It gave details of the acknowledgement of debt dated 29 July 2002, confirming that there had been default in repayment. It went on to record that, subsequent to the change of the controlling shareholder and the appointment of a new Board in early August 2002, the Company had undertaken a review of the circumstances allegedly giving rise to the debt so that it could either be rejected or verified. Should the debt be found to be due and owing, the new Board would "take steps as soon as practicable to raise further funds, including but not limited to further issues of equity or equity linked capital" or would "seek other financing, such as bank loans, to satisfy the claimed amount" rather than drawing on the internal resources of the Company. The announcement further said that, if the debt was found to be due and owing, then the new controlling shareholder of the Company, China United Telecom Limited, would "consider providing or advancing funds to support the repayment of the claimed amount by subscribing additional equity or convertible securities".[10]

77. The announcement concluded by stating that the Company would keep the public informed of further developments in respect of the matter.

[10] The relevant portion of the announcement read: "In the event that the Claimed Amount is satisfactorily verified as properly incurred and due to the Creditor as alleged, the New Board will take steps as soon as practicable to raise further funds including but not limited to further issues of equity or equity linked capital or to seek other financing, such as bank loan to satisfy the Claimed Amount instead of drawing on the internal resources so to avoid material adverse impact on the working capital position of the Group. China United Telecom Limited, the controlling shareholder of the Company has expressed that subject the Claimed Amount being satisfactorily verified, it will consider providing or advancing funds to support the repayment of the Claimed Amount by subscribing additional equity or convertible securities."

78. Trading in the shares of the Company was resumed on the following day, that is, on 23 October 2002.

Liability (apparently) accepted.

79. Despite the undertaking to keep the public informed of developments in respect of the debt due to Madam Liu, no further announcements were made by Asia Telemedia giving information as to any internal review. But that said, on 18 December 2002, just short of two months later, a second agreement was entered into with Madam Liu in terms of which Asia Telemedia acknowledged that it was indebted to her in the amount claimed.

80. While this agreement was not made public (nor were later amended agreements), the Company's indebtedness to Madam Liu was disclosed in the audited accounts for 2004, 2005 and 2006. In addition, mention was made of the debt in a number of Chairman's Reports.

81. On the evidence, it is therefore apparent that those persons who were accustomed to dealing in the shares of the Company, or were likely to deal in them, would have become aware of the fact that – to all appearances, at least – the Company, after due investigation, had accepted its liability and was seeking a way to discharge that debt. Such persons will also have become aware of the fact that the debt due to Madam Liu was the Company's largest single debt.

The Company's precarious financial position.

82. Equally, on the evidence, it is apparent that those persons who were accustomed to dealing in the shares of the Company, or were likely to deal in them, would have become aware of the fact that the Company was in a precarious financial position, indeed, in an insolvent position.

83. Mr. Clive Rigby, an expert who testified at the hearing, spoke in his report of Asia Telemedia being on "life support" for an extended period of time, that support coming from Lu Ruifeng.

84. What is to be noted in this regard, however, is that at no time was the public informed that the Company was in such a parlous state that it had no ability left to raise funds. Indeed, even after the institution of winding up proceedings in 2007 which were opposed by the Company, it was said in a public announcement (dated 17 October 2007) that if the court ruled against the Company, it was the Company's intention to seek to settle the outstanding debt through a fund raising exercise.

85. As to the state of the Company's finances, Mr. Rigby said the following in his report –

> "Uncertainty as to Asia Telemedia's ability to continue as a going concern was hardly fresh news. The Company had been losing millions of dollars every year since 2001. It had had a negative net worth for 6 years. Its accounts had been qualified for years."

86. Mr. Charles Li, another expert who testified, agreed. In his report, he said:

> "Asia Telemedia was… in a negative net asset situation since 2001 and was also insolvent in those years. The debt [due to Madam Liu] and the uncertainty relating to the Company's going concern had also been qualified by the auditors of the Company for the years ended 31 December 2004, 2005 and 2006 respectively."

87. In the Company's 2006 audited accounts it was admitted that: "the daily operation of the Group is mainly funded by the Chairman of the Board [Lu Ruifeng]."

88. Mr. Clive Rigby was of the opinion that the real value of Asia Telemedia lay in the fact that it had a stock market listing. As Mr. Rigby put it in his report:

> "Asia Telemedia was a holding company with a stockbroking subsidiary known as Mansion House. It had had a string of annual losses, very small income and was a company with a negative net worth. It had been kept on "life support" for several years. It most definitely was not a thriving business but it had the potential to become a "shell" via which another business could achieve a "back door listing". Such shells' values fluctuate according to how "hot" the stock market might be at any given time along with other variables. Loosely speaking such "shells" have values that can easily vary between about HK$100 million and HK$300 million. The Company at the time in question was regarded not as a thriving brokerage but as a shell awaiting the injection of new and hopefully exciting assets."

89. Mr. Charles Li was of a similar view:

> "A company that is in negative net assets means that its total liabilities exceed its total assets. If such company is liquidated, technically the shareholders of the company would receive no residual value. However, as listing status…commands a good price in the Hong Kong market, listed companies sustaining negative net assets could therefore still be trading at a positive share price, especially when the Shell Premium is more than the amount of negative net assets."

90. However, Mr. Karl Lung, who was asked by the SFC to give evidence as an expert, was of the view that in respect of Asia Telemedia its status as a 'listed shell' would not have afforded the comfort to shareholders suggested by the other two experts. He pointed out that in reality there were more shell companies on the market to be sold than buyers who could afford to be selective. Mr. Lung also pointed out that (on his calculations) the market capitalization of the Company exceeded "the $300 million upper end value of a shell" indicated by Mr. Rigby.[11]

Returning to Madam Liu's debt.

91. On 16 October 2003, some four months after the publication of the 2002 annual report, a third agreement was entered into with Madam Liu rescheduling payment of the debt due to her. The stated reason for this new

[11] In paragraph 22 of his principal report, Mr. Karl Lung wrote: "During the period from April 2, 2007 up to the date of the Announcement, share price of ATML traded within a range of $0.355 to $0.990. Based on the 1,457.5 million issued shares of ATML as at December 31, 2006, market capitalization of ATML ranged between about $517 million and $1,443 million within that period."

agreement was seemingly because the Company was "undertaking an exercise of capital injection": see Clause (4) of the agreement. On this occasion, it was agreed that the principal debt then outstanding together with interest thereon would be paid by way of 15 instalments.

92. On 22 October 2003, just a matter of days after concluding the third agreement, the Company defaulted in the payment of its first instalment due under this agreement. This resulted in Madam Liu serving a second statutory demand.

93. Six months later, in terms of an agreement dated 27 April 2004 – this being the fourth agreement acknowledging indebtedness to Madam Liu – there was a further rescheduling of the debt repayments. On this occasion, repayment was to be by three instalments, the final repayment to be made by 31 October 2005. Again, however, there was a default in payment and again this resulted in Madam Liu serving a statutory demand on the Company (dated 19 October 2004) claiming the full balance of the capital outstanding together with interest.

94. There does not appear to have been much haste on the part of Asia Telemedia in responding to the statutory demand. Some six months later, in April 2005, a draft response was subject to internal consideration, part of that draft reading:

> "Our client instructs us that it is now planning for another asset injection exercise and most of the documentations are already in place. However,

> the investors are not prepared to complete the injection exercise with your client's loan still in place.
>
> Based on its financial restraint, our client instructs us to propose a convertible note with one payment of the capital payment of entire debt plus interest at the agreed rate on a day 18 months after the issue of the convertible note."

The draft continued with an attempt at pointing out the essential futility of Madam Liu instituting wind up proceedings:

> "In any event, if the Company is in liquidation, your client being an unsecured creditor will be ranked alongside all other unsecured creditors and our client estimates that its unsecured creditors will receive only a very small percentage of the debt owed. As the Company has several SFC regulated subsidiaries, the liquidation may take a long time to complete and there may be complications due to previous SFC investigations."

95. As to the repayment of the debt due to Madam Liu, it appears that, even if the matter was considered internally, no proposals were communicated to her legal representatives. This led to the service of a further statutory demand dated 30 April 2005 being served on the Company: the fourth statutory demand.

The granting of share options.

96. Shortly before this, on 23 March 2005, Lu Ruifeng, Charles Yiu, Marian Wong and Cecilia Ho, the four specified persons, were each granted

options in Asia Telemedia shares exercisable until 22 March 2010 at the price of $0.2 per share, the options being in the following numbers: Lu Ruifeng, 1 million; Charles Yiu, 8 million; Marian Wong, 8 million; Cecilia Ho, 3 million.

Returning to events in respect of Madam Liu's debt.

97. In respect of the debt due to Madam Liu, on 6 October 2005 the Company's solicitors sent a draft agreement to Madam Liu's solicitors for her consideration, setting out a further rescheduling of the debt. This draft suggested repayment by way of five instalments over a period of five years with Madam Liu being asked to waive much of the interest due. Requested terms of repayment were becoming more extended.

98. The response by Madam Liu's solicitors was contained in two letters, both dated 25 November 2005. The response made it plain that Madam Liu would not entertain any further advance to make repayment by way of instalments until and unless Asia Telemedia paid (by way of a cashier's order) the sum of $10 million. One of the two letters constituting the response concluded by warning that –

> "If your confirmation on the above matter does not reach us by 5:00 p.m. on 2nd December 2005, our client will treat your client as having no intention to repay the subject debt any further; and may proceed with any action (including lodging the winding up petition) as she sees appropriate."

99. Asia Telemedia's solicitors responded by saying that the Company needed more time to consider the demand for payment of the $10 million. The

solicitors also asked Madam Liu set out her proposals for payment of the balance of the debt.

100. As it was, Asia Telemedia never paid the $10 million.

101. In the result, on 10 April 2006, the $10 million not having been paid and there being no resulting negotiations concerning liquidation of the debt, a further statutory demand – the fifth – was served on the Company.

102. A few days later, on 25 April 2006, the Company's annual report for 2005 was published. The Company remained in a position of insolvency. In his Chairman's statement, Lu Ruifeng looked principally to the issue of the uncertainty surrounding repayment of the debt to Madam Liu, she being the Company's biggest creditor. He said:

> "In terms of debt repayment, the Group repaid more than half of the debt during the last three years and as of December 2005; the Group had indebtedness in the principal amount of around $58 million due to one individual creditor [Madam Liu]. *Although discussions and negotiations have been going on, no formal conclusion for the settlement of the indebtedness has been reached with the creditor thus far."* [emphasis added]

103. The sentence to which emphasis has been added, while in its blandness perhaps accurate enough, in fact is essentially disingenuous. No mention is made of the repeated defaults in payment by Asia Telemedia; no mention is made of the fact that, patently frustrated at the lack of progress in discharging the debt, Madam Liu had demanded a $10 million good faith

payment as a prerequisite to negotiating further terms of repayment, a demand that had not been met. To say that "no formal conclusion for the settlement of the indebtedness has been reached" suggests some orderly progress towards a solution when in fact Asia Telemedia had been patently employing tactics of delay.

104. During the course of the hearing, evidence was given that, under the direction of Lu Ruifeng, Charles Yiu (together with one of Lu Ruifeng's associates) had been given the task of contacting Madam Liu direct in order to discuss terms of settlement. Neither man, however, had been successful in getting to speak to her. How it was exactly that they had been frustrated was not fully explained.

105. On the evidence, what became plain was that there was never any concerted, substantive move on the part of Lu Ruifeng and his senior managers (including two of the specified persons, Charles Yiu and Marian Wong) to agree terms of payment and to ensure there were sufficient funds to make good those terms; no evidence, for example, of any actual injection of capital by Lu Ruifeng specifically set aside to reduce Madam Liu's debt. In the early days relatively small amounts may have been paid to reduce the debt but for the final three years or so nothing was paid. As indicated earlier, while in his Chairman's Report in the 2005 annual report, Lu Ruifeng may have given the impression that rational and concerted negotiations were in progress, the true picture was far less edifying.

106. By May 2006, Charles Yiu, was effectively throwing the Company on

the mercy of Madam Liu, accepting for all intents and purposes that the Company had no way of repaying the debt due to her. In a letter written in Chinese characters and addressed to Madam Liu's solicitors dated 15 May 2006, Charles Yiu attempted to convince Madam Liu to accept a five-year repayment plan by saying –

> "Annex One is the 2005 annual results announcement of our company. We believe you can see that the company is insolvent. It has all along been unable to get rid of the problem in relation to its negative equity and the situation is seriously deteriorating further year by year. The company is not capable at all of repaying its debt of approximately $58 million owed to Madam Liu…
>
> All along, our efforts have not been able to change the financial situation of the company. In view of the current status of the company, the company has lost the capability to obtain loans. It is difficult for the company to reach a financing agreement with any financial institution in order to settle the outstanding debt issue. Without a proper solution, it will be difficult for the company to go on. If the company goes into liquidation, this will be of no benefit to the creditors."

107. In both Asia Telemedia's 2005 annual report published in April 2006 and in the letter of Charles Yiu sent a month later to Madam Liu's solicitors, it was, without equivocation, recognized, first, that the debt was due to Madam Liu and second, that it was of such a magnitude that, without a "proper solution," the Company would have difficulty in continuing in business. Put another way, the senior management of the Company recognized that Madam

Liu's debt posed a threat to its continued existence.

The assignment of the debt by Madam Liu.

108. On 1 February 2007, pursuant to a deed of assignment, Madam Liu assigned all her right, title and interest in the debt owed to her by the Company to a BVI company, Goodpine Limited ('Goodpine') for a consideration of $25 million. The deed recorded that this sum of $25 million had already been paid. The deed further recorded that, as at the date of signing, the outstanding balance of the debt stood in the sum of $58,083,992 together with accrued interest at the rate of 7% per annum and legal costs.

109. On the date of the assignment, that is, on 1 February 2007, Asia Telemedia shares closed the day at $0.200 on a volume of 1,540,000 shares.

110. By letter dated 5 February 2007, Woo, Kwan, Lee & Lo, Madam Liu's solicitors – but acting on this occasion for Goodpine Limited – informed the Company of the assignment and demanded payment of the full amount of the debt.

111. This letter was passed by Marian Wong, in her capacity as the Company Secretary, to the Company's solicitors, Chiu & Partners, for advice. In an email of the following day, the solicitors said the following:

> "The letter dated 5 February 2007 from Woo, Kwan, Lee & Lo gave you notice of the assignment of the debt, together with interest and costs by Liu

Lien Lien [Madam Liu] to Goodpine Limited. We can request Woo, Kwan, Lee & Lo for a copy of the assignment of debt. *However, it does not seem to us that you have a real defence to the demand from Goodpine Limited. Please let us have your instructions as to whether you would like to put forward a settlement proposal to Goodpine Limited for consideration on a without prejudice basis.*" [emphasis added]

112. Marian Wong clearly appreciated the potential seriousness to the viability of the Company of this change of circumstance. She replied:

"Yes, we would like a copy of the assignment. Is the assignment effective without our endorsement and can we also request disclosure of Goodpine's owner since we have a responsibility to public investors and the loan is quite significant? As for settlement proposal, our management may wish to get in touch or meet with the new owner first if it no longer relates to Madam Liu."

113. Marian Wong then went on to ask the following:

"Please let us know your view on one further question. This loan with Madam Liu was claimed to be created since 1997 – 1998, under a series of transactions, there has been no loan agreement or evidence of payment. If the loan is now assigned to another party, would it be sufficient for the assignee to institute legal proceedings for recovery of the loan *(or petition for winding up)* without providing other proof of granting of the loan?" [emphasis added]

114. Chiu & Partners obtained a copy of the deed of assignment from Woo,

Kwan, Lee & Lo which was sent to them under cover of a letter demanding payment of the outstanding principal, interest and legal costs in full by the close of business on 9 March 2007, failing which legal proceedings would be commenced without further notice.

115. A copy of this letter together with a copy of the deed of assignment were sent to Marian Wong, who was advised as follows:

> "The repayment agreement dated 27 April 2004, does not prohibit Madam Liu from assigning the benefit of the repayment agreement. Therefore, she is entitled to assign her interest in the agreement to a third party."

116. Goodpine was in fact a company controlled by Madam Liu not by independent parities. However, whether the assignment was part of a scheme involving third parties is not known.[12]

117. During the course of the hearing the specified persons said that they believed that Goodpine was simply Madam Liu under a new guise and that accordingly the Company was not independent of her in the sense of being controlled by independent third parties. That surmise – for it was no more than that – was seemingly based on the single known fact that the same lawyers who had advised Madam Liu for a number of years also represented Goodpine.

*The sudden rise in the share price of Asia Telemedi*a.

118. On 16 February 2007, after modest rises over the previous few days,

[12] Madam Liu did not testify nor provide a statement.

the share price of Asia Telemedia rose by over 42%, closing the day at $0.320.

119. The next trading day, on a turnover of 133,975,815 shares, it rose by over 43%, closing at $0.460.

120. Thereafter the shares fell back slightly but for April 2007 they stayed above 40 cents, hitting a closing day high of $0.510 on 17 April 2007.

121. In May 2007, there was a further surge in the share price, rising during the course of the month to over 90 cents. On 29 May 2007, on a turnover in excess of 156 million shares, Asia Telemedia peaked at $0.970.

122. Although difficult to identify the exact courses, it appears that the increasing integration of the Mainland and Hong Kong securities markets buoyed stocks in companies such as Asia Telemedia which were in the securities business. The Hong Kong Daily News, in an article dated 8 May 2007, said the following:

> "The Hong Kong stock market has hit a record high in the past few days with market turnover increasing continuously. Securities companies definitely benefit most significantly.
>
> Asia Telemedia (376), which is engaged in activities including securities brokerage and investment holding in Hong Kong, has entered into a cooperation agreement on securities business with a financial institution in the PRC earlier. Its share price surged to $0.57 in February. Its adjustment seems to be close to an end. Having moved sideways for

> 7 days, with its turnover decreasing significantly and profit-taking positions almost fully unwound, the stock is now positioned for another surge."

The author of the article concluded by saying:

> "I believe Asia Telemedia will be the next hot stock. It is advisable to buy at the present low price, with the previous high of HK$0.57 as the short-term target."

123. It would appear that, as the month of May progressed, market attention was drawn to the short term profits to be gained from 'small cap' stocks. In an article published in the Sing Tao Daily on 14 May 2007 it was said:

> "Craze for small caps continues despite a decline in the market. Asia Telemedia (376), a target of day trading, surged by nearly 21% last Friday. Adventurous traders must have reaped considerable profit."

124. Late in the month, in its edition of 29 May 2007, the Hong Kong Economic Journal wrote – "Hot Money targets firework stocks" – citing Asia Telemedia as one of the stars that had arisen in the "frenzy" of "short-term speculation".

125. That shares such as Asia Telemedia were essentially speculation stocks was identified by the Oriental Daily News in an article dated 30 May 2007:

> "Yesterday the market did not look good, yet investors made a lot of money from small cap stocks. When it comes to small caps, you certainly buy

> those on the rise, but make sure you avoid surging stocks without any support of turnover or you may suffer."

The article recorded the views of an experienced market trader:

> "Few investors held stocks overnight yesterday as it was much safer for them to trade intra-day. "Asia Telemedia (0376), Frasers PPT (0535), Asian Union (0419) were among the hits, but few of them were held overnight. They would not be held overnight unless the buyers are not able to sell before the market close."

126. These observations support what was said during the course of the hearing; namely, that Asia Telemedia was a speculators' stock, certainly in May and June 2007. The price of such stocks are not resilient.

Marian Wong and Cecilia Ho begin to sell their shares.

127. With the unexpected rise in the price of Asia Telemedia shares, both Marian Wong and Cecilia Ho began to exercise their options and to sell their shares.

128. Between 28 February and 26 April 2007, Marian Wong sold 6.2 million shares at prices varying between $0.37 and $0.494.[13]

129. Between 26 February and 19 April 2007, Cecilia Ho sold 2.7 million

[13] Marian Wong had been granted an option to acquire 8 million shares at $0.20 and granted a further option to acquire 2 million shares at $0.40.

shares at prices varying between $0.2938 and $0.495.[14]

Dealing with the deed of assignment.

130. On 20 April 2007, more than two months after the Company had received the notice of assignment of Madam Liu's debt to Goodpine, the Company's 2006 annual report was published. In the report, in his Chairman's Statement, Lu Ruifeng said the following in respect of Madam Liu's debt:

> "During the year, notwithstanding the management's continuous effort in compromising practical terms of settlement with the Group's single major creditor [Madam Liu] in connection with indebtedness in the principal amount of $58 million, key progress is yet to be reached and hence relevant discussions and negotiations have been going on."

131. It was not seen fit however to make any announcement, either in the 2006 annual report or in any collateral document, of the assignment of the debt (a debt which had now been outstanding for just short of five years and which still stood in excess of $70 million) or, of greater moment still, that the assignment had been followed by a letter of demand for full payment issued on behalf of the new creditor, that new creditor, not yet at least, having indicated any desire to enter into negotiations as to the manner of repayment. A development of this nature, in order to be considered in context, had to be considered in light of the auditor's report that there was "material uncertainty relating to the going concern basis" of Asia Telemedia.

[14] Cecilia Ho had been granted an option to acquire 3 million shares at $0.20 and granted a further option to acquire 1 million shares at $0.40.

132. On 26 April 2007, presumably as part of the "relevant discussions and negotiations" mentioned in the annual report, Marian Wong instructed the Company's solicitors as follows: "Our directors propose to offer a one-off settlement to the creditor for HK$10 million. Could you please draft a letter for our directors' review and confirmation?"

133. What is to be noted is that, on the face of the deed of assignment, in taking assignment of the debt, Goodpine had paid a consideration of HK$25 million. Yet this offer was less than half of that consideration.

134. A telephone conversation followed that same day between Marian Wong and the Company's solicitors in which it was agreed that – as a negotiating tactic – Goodpine would be offered a lesser sum of just HK$8 million payable in five instalments.

135. That same day, however, that is, 26 April 2007, the Company received a statutory demand from Woo, Kwan, Lee & Lo issued on behalf of Goodpine Limited. In that statutory demand, payment of a total sum of HK$70,270,491 (inclusive of the outstanding principal, interest up to and including 25 April 2007 and legal costs) was demanded together with interest accruing from 26 April 2007. The statutory demand said that if within 21 days the Company failed to pay the full amount due or to secure it to the reasonable satisfaction of Goodpine a petition for winding-up would be made.

136. At that moment in timed, therefore, what was known to the specified

persons, but not to the market, was the following:

(i) that, having failed to secure any reduction of the debt due to her in several years and having received no positive response for a $10 million good faith payment as a prerequisite to further negotiations, there still being in excess of $70 million due, Madam Liu had now assigned the debt to a corporate third party;

(ii) that, on its face – the assignment being a formal deed – the third party had already paid a sum of $25 million to acquire all rights in the debt;

(iii) that, while it may have been surmised that the new creditor, Goodpine, was controlled by Madam Liu, the true identity of those behind the company was not known; nor was the purpose of the assignment known. However, after some five years of default and delay, the probabilities suggested something more than an exercise in passive internal administration. On any informed reckoning the assignment had to hold out the inevitability of some new, more aggressive set of moves to recover the debt; and

(iv) that this corporate third party, Goodpine, had now served a statutory demand seeking full payment within 21 days, failing which proceedings for the winding up of Asia Telemedia would be instituted.

Further options granted.

137. A few days later, on 7 May 2007, Asia Telemedia went through a further exercise of granting share options to its employees. On this occasion the evidence indicates that 37.5 million share options were granted with an exercise price of 40 cents per share. Marian Wong was granted 5 million share options and Cecilia Ho was granted 1 million, exercisable immediately.

Dealing with the statutory demand.

138. On 7 May 2007, Marian Wong referred the statutory demand served on behalf of Goodpine to the Company's solicitors. She instructed the solicitors that, if the statutory demand did not affect the ability to make an offer of settlement, then the offer of $8 million payable in five instalments should be put forward.

139. In acknowledging receipt of the instructions, the solicitors gave the following warning:

> "Please note that if the statutory demand is not complied with within 21 days from the date thereof, the creditor may present a winding-up petition against Asia Telemedia Limited. Once a winding up petition is filed, all bank accounts of Asia Telemedia Limited will be frozen."

140. The Company had therefore been formally warned by its own solicitors of the dangers of a winding up petition.

141. Despite the change of circumstances brought about by knowledge of the deed of assignment and the following statutory demand, no consideration was given to any suspension of trading in the shares of the Company pending the public being informed of the changed circumstances. The possibility was not raised with either the Company's solicitors or accountants.

142. In accordance with instructions, however, Chiu & Partners sent a without prejudice letter to Woo, Kwan, Lee & Lo dated 7 May 2007, offering $8 million in final settlement payable in five instalments.

143. There was no response and on 15 May 2007 Chiu & Partners asked the Company if an improved offer should be put forward. Marian Wong responded on 21 May 2007, saying that the Company was prepared to improve its offer by making payment of the $8 million in one payment. The offer was made by letter dated 22 May 2007. There was no response.

Charles Yiu sells his shares.

144. Charles Yiu did not exercise his option to buy 8 million Asia Telemedia shares in the last days of April even though, if he had done so, he would have been able to effectively double his money, exercising his option at 20 cents a share and selling at about 40 cents.

145. Instead, Charles Yiu waited approximately one further month. It was only on 28 May 2007, when Asia Telemedia shares rose above 90 cents, that he

chose to sell, doing so over a four day period between 28 and 31 May 2007.[15]

146. Even then, however, he did not exercise the option to purchase his full 8 million shares. He exercised his option to buy 6 million, leaving 2 million.

147. Why did he sell at that time? In the course of his testimony, Charles Yiu said that the share price rose "…as much as four times from 20 cents to one dollar, so the temptation was simply too great. I couldn't even dream of that, you know. And that's why it was at that point in time I started selling off my shares."

148. Mr. Clive Rigby, a stockbroker who testified as an expert before the Tribunal, observed that in his experience, share price rises of far less magnitude would have prompted profit taking.

149. As it was, Charles Yiu made his final sale of shares just six days before winding up proceedings commenced. From the sale of his shares, Charles Yiu made a net profit of some $5.3 million.

Marian Wong and Cecilia Ho sell the balance of their shares.

150. Looking at matters purely chronologically, both Marian Wong and Cecilia Ho sold shares in Asia Telemedia after receiving notice of the assignment of Madam Liu's debt to Goodpine and the consequent statutory

[15] On 28 May 2007, the share price closed at $0.910, on 29 May 2007 it closed higher at $0.970; on 30 and 31 May 2007, it closed at $0.860 and $0.900 respectively.

demand.

151. Between 27 April and 5 June 2007 Marian Wong sold the balance of 3.8 million shares at prices varying between $0.395 and $0.98. From the sale of all her shares obtained by way of her options, Marian Wong made a net profit of some $5.1 million.

152. Between 11 May and 31 May 2007, Cecilia Ho sold the balance of 0.9 million shares at prices varying between $0.5017 and $0.96. From the sale of the shares that she had obtained by way of her options, Cecilia Ho made a net profit of some $1.8 million.

Trading by Lu Ruifeng.

153. In March 2005, Lu Ruifeng had been granted an option to purchase one million shares in Asia Telemedia. Having exercised these options he sold 500,000 shares on 14 May and the balance of 500,000 on 23 May 2007, making a net profit in the sum of $653,617.

Trading through the accounts of China United Telecom Limited and Telemedia Capital Incorporated.

154. Between 4 April and 30 May 2007 a total of 56,250,000 shares in Asia Telemedia were sold through the account of China United Telecom Limited, Lu Ruifeng being the only person authorized to operate the securities account of that company. The net proceeds exceeded $40 million.

155. During the hearing it was submitted that these trades by Lu Ruifeng had been for his own benefit. This, however, was disputed by Lu Ruifeng's counsel who argued that the trades had been made to enable a number of Mainland employees to exercise the options that they too had been granted, these employees having technical difficulties in processing their options in Hong Kong.

156. In the view of the Tribunal, there was evidence tending to show that Lu Ruifeng had used the names of several Mainland employees as a front in order to move funds to himself. By way of one isolated example, if the evidence of the one Mainland employee who testified was to be believed, his share option equaled something like 37 years' salary. Equally, however, there was evidence supporting the assertion that the movements of funds had been intended solely to pay the Mainland employees the profits from the exercise of their share options. In the result, the Tribunal has come to no findings in respect of this matter on the basis that Lu Ruifeng himself was not given a reasonable opportunity of being heard.

157. Equally, the evidence showed that between 21 March and 29 May 2007 a total of 57,610,192 Asia Telemedia shares were traded through Telemedia Capital Incorporated, securing a net profit in excess of $43 million. The person who had traded the shares was a Mainland citizen, a director of Telemedia Capital, Mr. Yao Wen Pei.

158. Mr. Yao is the father of the second specified person, Charles Yiu, and it was submitted that the trades had been made by Mr. Yao acting as a nominee

of Lu Ruifeng. This too was denied. There was again some evidence supporting the submission that the funds were intended for Lu Ruifeng. By way of an isolated example, it appeared that Mr. Yao's wife (Charles Yiu's mother) transferred $37.7 million of the funds obtained from the trades to Kayden Limited, Kayden being a BVI company owned by Kayden Trust, the assets of the trust being controlled by Lu Ruifeng. Again, however, there was evidence supporting the contention that Mr. Yao had not acted as a nominee and, in the result, the Tribunal has come to no findings in respect of this matter on the basis that Lu Ruifeng himself was not given a reasonable opportunity of being heard.

Goodpine issues a petition for winding up.

159. On 6 June 2007 – with share price closing the day at $0.830 – a winding up petition issued by Goodpine was served on the Company. The following day trading in the shares of the Company was suspended.

160. It is significant that between 5 February 2007 (when Asia Telemedia was informed of the deed of assignment, also receiving a letter of demand served on behalf of the new creditor) and 6 June 2007 (when the winding up petition was served) there was not one communication from the new creditor, direct or through its solicitors, touching upon the issue of negotiating new terms of repayment. In that extended period – one of four months – Asia Telemedia, acting through its solicitors had made a couple of desultory offers but there had been no response to those offers. If the creditor had remained Madam Liu, a continuation of the tactic of utter passivity – on both sides – may have been

explicable. But this was a new creditor, an unknown quantity. Surely, on the part of Lu Ruifeng and his senior managers, that had to raise the question: why no approach to negotiate? The statutory demand was served on 26 April 2007 but was followed by silence. As was to be proved by the serving of the winding up petition on 6 June 2007, the new creditor, Goodpine, had no interest in further negotiations. Absent payment in full it was proceeding directly to winding up. The possibility of such a tactic was either something that Lu Ruifeng and his senior managers never contemplated or else, with the share price of Asia Telemedia riding a sudden and unexpected wave, their focus was on short term personal gain and not on securing the viability of the Company.

161. It was only the service of the winding up petition itself that appeared to bring Lu Ruifeng and his senior managers out of their slumber of misconceived security. On 17 June 2007, Lu Ruifeng, in his capacity as Chairman of the Company, announced that the winding up petition would be "strenuously opposed" if the directors considered it appropriate to do so in the light of legal advice being received.

162. As it was, having taken legal advice, the Company did resist the winding up petition. An announcement dated 17 October 2007 said that evidence in opposition had been filed.[16]

163. The following day – 18 October 2007 – trading in Asia Telemedia

[16] It is interesting to note that in the announcement of 17 October 2007, the following was said: "…in the event that the court rules against the Company in the proceedings, the Company's intention is to settle the outstanding debt through fund raising exercise. According to the estimation of the legal advisors of the Company on the length of the winding up process, the Company considers that it has sufficient time to conduct the necessary fund raising exercise before the winding up process concludes."

resumed. The share price fell by 62%.

164. The litigation in respect of the winding up petition finally came to trial in February 2008 before Barma J (as he then was), his judgment being handed down in 18 March 2008[17].

165. Barma J found no basis for impeaching the validity of the debt due to Madam Liu. He was satisfied that there was no basis on which the Company could resist the petition and therefore made the usual winding up order with costs against the Company[18].

166. In his judgment, Barma J – a jurist with many years of experience in the fields of corporate law and insolvency law – had reason to comment on Lu Ruifeng's evidence that it was only on receipt of the winding up petition that he became concerned. His comments were to the following effect:

> "Further, it is, to my mind, extraordinary that it should have been suggested by Lu Ruifeng that it was only on receipt of the petition that he became concerned about Madam Liu's claims. The claims were advanced many years ago. A statutory demand was served in 2002, and again in 2005 by

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[17] *Re Asia Telemedia Limited* (unreported) HCCW 242/2007 dated 18 March 2008

[18] Barma J found that there was ample evidence to show that Asia Telemedia had repeatedly recognized the validity of Madam Liu's claims against it, citing – among other matters – the following (at para 47):

" (1) The settlement agreements themselves, which were executed on behalf of the Company pursuant to apparently regular board resolutions, themselves contain admissions of indebtedness on the part of the Company to Madam Liu.

(2) The Company's Annual Reports and audited financial statements for the period between 2001 and 2006 clearly record the original debt, and later the debt as constituted by the various settlement agreements. The recording of the original debt in the 2001 accounts would appear to suggest that the Company's auditors were satisfied of its existence.

(3) There are numerous audit confirmations which were sent by the Company to Liu seeking her confirmation of the amounts owed to her. These extend up until 16 April 2007, just two months prior to the presentation of the petition."

> Madam Liu, and a further statutory demand was served, as a precursor to petition, in April 2007. There is, quite simply, no excuse for the failure to treat the claims with the seriousness they deserve, having regard to the consequences that might otherwise befall the Company…"

167. The relevance of this observation by Barma J – although in no way binding on this Tribunal but nevertheless worthy of note – lies in the fact that during the course of the hearing, it was the shared evidence of the three specified persons who testified (i.e. Charles Yiu, Marian Wong and Cecilia Ho) that they too had seen no reason for concern until the winding up petition itself was served on the Company. They were seemingly fortified in this lack of concern by three principal beliefs. First, there had been so many previous statutory demands, five in all, without winding up proceedings being instituted that the service of another on the Company was by now seen as an empty threat, another instance of Madam Liu 'crying wolf'. Second, there was little purpose in winding up the Company as the pay-out to unsecured creditors would be minimal. Third, *in extremis*, Lu Ruifeng would somehow find the resources to pay sufficient of the debt to stall winding up proceedings.

168. Although in the public announcement of 17 October 2007 it had been said that, if the Company lost the court proceedings, it would seek to raise sufficient funds to discharge the debt to Goodpine, it does not appear that it did so. Instead it appears that before a final winding up order was made, a scheme of arrangement was agreed with a third party. In the result, the Company continues to operate today as a listed corporation, doing so under the name of Yunfeng Financial Group Limited. Even if it was at the 'eleventh hour', it

appears that the Company's value as a 'listed shell' prevailed.

169. Although a winding up order was made, it appears that during the course of the liquidation, a third party made an offer under a scheme of arrangement which was duly sanctioned. Hence the fact that the Company continues to operate under the name of Reorient Group Limited.

CHAPTER 6

LOOKING TO THE LAW AND CONSIDERING THE SCOPE OF THE ENQUIRY

170. Before setting out the Tribunal's analysis of the evidence, it is necessary to look to the legal framework within which that analysis has been conducted. In this regard, the following directions as to law were given by the Chairman to the members pursuant to s.24(c) of Schedule 9 of the Ordinance.

171. The SFC Notice has requested the Tribunal to determine whether market misconduct in the nature of insider dealing took place between 26 February 2007 and 5 June 2007. Whether insider dealing took place on or between those dates is therefore to be determined in accordance with the provisions of the Ordinance as those provisions were at *that* time.

The essential elements of insider dealing.

172. At the relevant time, s.270(1) of the Ordinance provided that –

> "Insider dealing in relation to a listed corporation takes place –
>
> (a) when a person connected with the corporation and having information which he knows is relevant information in relation to the corporation –
>
> (i) deals in the listed securities of the corporation or their derivatives, or in the listed securities of a related corporation of the corporation or their derivatives; or

(ii) counsels or procures another person to deal in such listed securities or derivatives, knowing or having reasonable cause to believe that the other person will deal in them."

173. In the context of this enquiry, the constituent elements of insider dealing therefore comprise the following:

(A) the person must be 'connected' to the listed corporation;

(B) the person must have information which is 'relevant information in relation to the corporation';

(C) the person must know that it is 'relevant information in relation to the corporation'; and

(D) the person, having that information and knowing it to be relevant information, must deal in the listed securities of the corporation.

(A) The person dealing in the securities must be 'connected' to a listed corporation

174. At the relevant time, s.247(1)(a) of the Ordinance provided that, in respect of insider dealing, a person shall be regarded as connected with a corporation if, being an individual –

"he is a director or employee of the corporation …"

175. In the present case –

(i) the second specified person, Charles Yiu was at all material times the Director of Finance and an Executive Director of Asia Telemedia;

(ii) the third specified person, Marian Wong, was employed by the Company as Company Secretary; and

(iii) the fourth specified person, Cecilia Ho, was employed by the Company as Assistant Company Secretary.

176. It is not disputed therefore that, in terms of the Ordinance, each of the specified persons are to be regarded as being 'connected' to Asia Telemedia.

177. Nor is it disputed that Asia Telemedia was at the time a corporation listed on the Hong Kong Stock Exchange.

(B) The information that is possessed, must be 'relevant information' (often referred to as 'price sensitive information')

178. At the relevant time, s.245 of the Ordinance defined 'relevant information' in relation to a corporation as –

"….specific information about –

(a) the corporation;

(b) a shareholder or officer of the corporation; or

(c) the listed securities of the corporation or their derivatives, which is not generally known to the persons who are accustomed or would be

> likely to deal in the listed securities of the corporation but which would if it were generally known to them be likely to materially affect the price of the listed securities."

(i) What is meant by 'specific'?

179. Specific information was information which possesses sufficient particularity to be capable of being identified, defined and unequivocally expressed. In this sense, it is to be contrasted with information which fails to achieve the required degree of specificity because it is too vague, inchoate or speculative.

180. In the present case, the information was not vague. It was made up of a number of clearly defined matters, namely, the deed of assignment itself; an accompanying letter of demand and, finally, a statutory demand.

181. However, while the deed of assignment spoke of what had occurred and in that sense was historic, the statutory demand spoke of contemplated action: what would or may occur if payment of the sums demanded was not made.

182. This raises the question whether contemplated action, for example, the issue of a statutory demand (which warns of winding up proceedings in the event of a failure to make full payment) is capable of constituting 'specific' information.

183. In the Firstone International Holdings Limited report (dated 2 April 2004) Mr. Justice McMahon found that, contemplated action was capable of constituting 'specific information'. He said (at page 59 of the report):

> "…the fact that a transaction is only contemplated or under negotiation and has not yet been subjected to any formal or informal final agreement does not necessarily cause the information concerning that contemplated course of action or negotiation to be non-specific.

184. Mr. Justice McMahon went on to cite with approval the observations of Brenda Hannigan, the author of the oft-cited text 'Insider Dealing' (Kluwer Law 1988), who said (at page 54):

> '…the whole point of insider dealing frequently is to deal while the transaction is only contemplated, for once it has actually occurred the market is likely to be aware of it and will move to reflect that fact in the price, thereby preventing any profiting by insiders'.".

185. The Tribunal is satisfied that contemplated or preliminary action is capable of constituting specific information. If that was not the case then only completed action would be capable of meeting the criteria. Whether contemplated action does or does not constitute specific information will depend on the relevant circumstances. What may start out as a vague set of indications may grow in particularity until, although the indications still speak only of contemplated action, they have assumed such solidity of detail that they are now capable of being identified, defined and unequivocally expressed.

186. It was submitted that the statutory demand that followed the deed of

assignment went no further than suggesting that the new creditor, Goodpine, may be more prepared to petition for the winding up of Asia Telemedia than had previously been the case. But that remained "too loose a description of the prospect of the winding up petition" to amount to specific information. The Tribunal does not accept that submission.

187. As stated earlier in this report, the power of a statutory demand lies in its underlying threat of an imminent wind up of the debtor corporation. In that respect, it is far more potent – far more specific in its purpose – than an ordinary letter of demand. What the market may make of it is another matter.

188. The Tribunal has had no difficulty in concluding that the deed of assignment, the letter of demand and the consequent statutory demand, when considered in context, constituted specific information.

(ii) Information likely to materially affect the price of the shares

189. In the report of the Insider Dealing Tribunal in *Public International Investments Limited*, dated 5 August 1995, in addressing the issue of whether or not information was 'likely to affect the price' of the shares of a company (if known to those accustomed or likely to deal in those shares) the nature of the test was described as being (paragraph 19.4.2):

> "…hypothetical in that on the date that the insider acts on inside information, he acts when the investing public, not in possession of the inside information, either does not act, or acts in response to other information or advice. The exercise in determining how the general investor would have

behaved on that day, had he been in possession of that information, has necessarily to be an assessment. It is true that an examination of how those investors react once the information is stripped of its confidentiality and becomes public knowledge, will often provide the answer, although care must be taken to ascertain whether the investors' response is indeed attributable to the information released, or whether it is wholly or in part attributable to other events, or considerations.".

190. Of the term 'materially' the report concluded (paragraph 19.4.5):

"We think that the word 'materially' speaks for itself – it is to be contrasted with 'slight', insignificant' and 'immaterial'.".

191. In the report of the Insider Dealing Tribunal in *The International City Holdings Limited*, dated 27 March 1986, the Tribunal observed of the requirement of materiality that the information (paragraph 2.6):

"…be likely to bring about a material change in the price of those securities. Thus information that would be likely to cause a mere fluctuation or a slight change in price would not be sufficient; there must be the likelihood of change of sufficient degree in any given circumstances to amount to a material change.".

(C) The essential element of knowledge

192. A person is not be found culpable of market misconduct by way of insider dealing simply because he possesses information which, determined objectively, is found to constitute price sensitive information. That person may

only be found culpable if the Tribunal is satisfied that he possesses the requisite knowledge, that is, that at the time he dealt in the shares he knew that the information in his possession was price sensitive.

193. Whether a person possesses the necessary knowledge is a matter of fact that may be proved directly, for example, by way of an admission against interest, or inferred from the relevant facts and/or circumstances.

194. The Tribunal has further directed itself that knowledge includes the state of mind of a person who wilfully shuts his eyes to the obvious; such a person denies what, in truth, he knows to be the case by contriving a façade of ignorance.

(D) The person must 'deal'

195. The three specified persons accept that, having exercised their options, each of them dealt in the shares of the Company by selling them.

The defence under s.271.

196. At the relevant time (that is, in 2007) s.271(3) of the Ordinance stated as follows:

> "A person shall not be regarded as having engaged in market misconduct by reason of an insider dealing taking place through his dealing in or counselling or procuring another person to deal in listed securities or derivatives or his disclosure of information if he establishes that the purpose

> for which he dealt in or counselled or procured the other person to deal in the listed securities or derivatives in question or disclosed the information in question (as the case may be) was not, or, where there was more that one purpose, the purposes for which he dealt in or counselled or procured the other person to deal in the listed securities or derivatives in question or disclosed the information in question (as the case may be) did not include, the purpose of securing or increasing a profit or avoiding or reducing a loss, whether for himself or another, by using relevant information."

197. It is therefore open to a person to establish on a balance of probabilities that, although at the time of dealing he was knowingly in possession of price sensitive information, that was not a factor inducing him to deal. If he is able to establish that fact then he is not to be identified as being an insider dealer.

198. What needs to be emphasised is that it is not obligatory for a specified person to point to evidence of his actual purpose in order to invoke the defence. Any evidence arising in the course of the hearing (from whatever source) that can support an inference that he did not have the proscribed purpose may go towards establishing the defence.[19]

199. What must be understood, of course, is that it is no defence to establish that the price sensitive information, while a factor was only a

[19] Supporting authority is to be found in the judgment of the High Court of Australia in Braysich v R (2011) 276 ALR 451, at 465.

subsidiary one. What must be established is that the price sensitive information was not in any way a motivating factor.[20]

The standard of proof.

200. The provisions of the Ordinance applicable in 2007, and indeed today, provide that the standard of proof for determining any question or issue before the Tribunal is "the standard of proof applicable to civil proceedings in a court of law". This means proof on a balance of probabilities.

201 In A Solicitor v. The Law Society,[21] Bohkhary PJ explained (at 145G-H) that –

> "only two standards of proof are known to our law. One is proof beyond reasonable doubt and the other proof on a preponderance of probability."

202. Before making any finding of culpability against any of the specified persons, therefore, the Tribunal must be satisfied of that culpability on the preponderance of the probabilities.

Circumstantial evidence and inferences.

203. In his judgment in *HKSAR v Lee Ming Tee*[22], Sir Anthony Mason NPJ addressed the proper approach to the drawing of inferences in circumstances of

[20] In Henry Tai Hon Leung v. Insider Dealing Tribunal CACV 333/2004, para 28, the Court of Appeal said: "What has to be determined is whether there was any desire or intention to make a profit or avoid a loss by use of the relevant information."
[21] (2008) 11 HKCFAR 117
[22] (2003) 6 HKCFAR 336

allegations of gross misconduct. Sir Anthony said:

> "…that conclusion was not to be reached by conjecture nor, as the respondent submitted, on a mere balance of probabilities. It was to be plainly established as a matter of inference from proved facts. It is not possible to state in definitive terms the nature of the evidence which the court will require in order to be satisfied, in a civil proceeding that a serious allegation of this kind, is made out. It would not be right to say that the requisite standard prescribes that the inference of wrongdoing is the only inference that can be drawn (cf *Sweeney v Coote* [1907] AC221 at 222, per Lord Loreburn) for that is the standard which applies according to the criminal standard of proof. In the particular circumstances, it was for the respondent to establish as a compelling inference that very senior officers of the SFC had deliberately and improperly terminated the investigation into Meocre Li's conduct for the ulterior purpose alleged, sufficient to overcome the inherent improbability that they would have done so (see *Aktieselskabet Dansk Skibsfinansiering v Brothers & Others* (2000) 3 HKCFAR 70 at pp. 91H, 96 G-I, per Lord Hoffmann).".

Lies.

204. The Chairman has directed the Tribunal that a lie in itself does not prove the maker of the lie is culpable of the misconduct alleged against that person. People innocent of wrongdoing sometimes tell lies: perhaps, as a misguided reaction to a problem, or to postpone facing up to it or to attempt to deflect ill-founded suspicion, or to fortify their defence. Nevertheless, it may be a matter relevant to credibility.

Good character.

205. The Chairman has directed the Tribunal that a specified person of good character is less likely than otherwise might be the case to have committed the alleged misconduct and that good character supports his credibility in respect of both his evidence in the Tribunal and in his records of interview.

Separate consideration.

206. The Tribunal has considered the case against and for each of the specified persons separately.

Expert Evidence.

207. The Tribunal has received evidence from three persons accepted as expert witnesses.

208. The Tribunal received their evidence, containing both factual information and expression of opinions, because it was likely to be outside the knowledge and experience of the Tribunal. That being said, the Tribunal has been directed that it is not bound to accept the evidence of an expert witness in so far as it forms an expression of opinion. The Tribunal is entitled to accept or reject all or part of that evidence, coming to its own conclusions on such matters based on a consideration of all the evidence.

Looking to the scope of the enquiry.

209. Mr. Samuel Wong, counsel for Charles Yiu, set out the scope of the enquiry to be undertaken by the Tribunal in respect of his client by reference to three questions. In the opinion of the Tribunal, these three questions act also as an appropriate structure in defining the scope of the enquiry in respect of the other two specified persons, Marian Wong and Cecilia Ho.

210. The three questions may be phrased as follows:

(i) Whether the assignment by Madam Liu to Goodpine and Goodpine's statutory demand, taken separately or together, constituted relevant information?

(ii) Whether the three specified persons knew that the assignment and statutory demand, taken separately or together, was relevant information?

(iii) Whether, if the information is found to be relevant information, that fact was in any way a motivating factor when each of the three specified persons dealt in the shares of Asia Telemedia?

CHAPTER 7

WHETHER THE ASSIGNMENT AND STATUTORY DEMAND CONSTITUTED RELEVANT INFORMATION?

211. During the course of the hearing the first issue of contention that fell for consideration was whether, considered in the context of the circumstances as they existed at the time, the deed of assignment linked with the statutory demand constituted relevant information.

212. The Tribunal is satisfied that the deed of assignment on its own would not have constituted price sensitive information. What must be considered therefore is the hypothetical question of whether, if knowledge of the deed of assignment *and* the statutory demand had been in the public domain it would have been likely to have materially depressed the price of Asia Telemedia shares. The phrase 'public domain' has been used as a form of shorthand. The Legislation requires that the test be related to "the persons who are accustomed or would be likely to deal in the listed securities" of a company. During the course of the hearing, Mr. Clive Rigby, an expert witness – an experienced stockbroker – said that, in his opinion, a "small cap, speculative fund" might have dealt in the shares of Asia Telemedia but he would not have expected "regular fund managers" to be dealing. Mr. Rigby agreed that, by and large, dealing in the shares would have been a "speculators' play". This accords with contemporary press commentaries concerning the Company's shares.

213. What is the relevance of the finding that Asia Telemedia would in the main attract speculators? During the course of the hearing it was suggested that such speculators would primarily have been interested in the possibility of the Company undergoing a metamorphosis as a listing shell. At the time that is what would have underscored their reason to buy. There is, however, a less sophisticated explanation, one that accords with events, and that is the desire to achieve short term profits. In this regard, mention has been made of the fact that in May 2007 Asia Telemedia, as a securities stock, was the subject of intense buying interest. By way of further illustration in an Oriental Daily News article dated 4 June 2007, an experienced market trader commented:

> "Everyone bought on the uptrend. HK Health Check (0397), CNT Group (0701) and Asia Telemedia (0376) were the most profitable ones. *Some traders even took a big gamble to hold stocks overnight…*" [emphasis added]

214. As the Tribunal commented earlier in this report, a speculative stock such as Asia Telemedia with its share price soaring[23] would not have been marked by its resilience; to the contrary it would have been recognised by the great majority as a share to be held for a very limited period, perhaps a few hours, perhaps a day, while the market generally, and the stock in particular, was riding a wave of enthusiasm.

215. Against that background, the question is to be asked whether, if knowledge of the deed of assignment coupled with the statutory demand, had

[23] In its article of 4 June 2007, the Oriental Daily News recorded that "since the beginning of this year, prices of the third and fourth liner stocks have soared to an astonishing level."

leaked into the public domain, it would have constituted price sensitive information?

216. In this regard, the Tribunal was assisted by three expert witnesses. Mr. Charles Li, who was given his mandate by Lu Ruifeng, was of the opinion that this knowledge would not have constituted price sensitive information. Mr. Clive Rigby, who was given his mandate by Charles Yiu, was of the same opinion. However, Mr. Karl Lung, who was asked by the SFC to provide an expert report, was of the opinion that the two taken together, in the circumstances as they prevailed at the time, would have constituted price sensitive information. All three experts, however, were agreed that an actual winding up petition would have constituted price sensitive information.

217. At this point, the Tribunal believes it is appropriate to answer two observations made by Mr. Rigby in his report –

(i) Mr. Rigby commented that he had not been shown any evidence that the consideration of $25 million due by Goodpine to Madam Liu under the deed of assignment had in fact been paid. That, however, ignores the fact that the document of assignment – a 'deed' – records that the sum was not merely due but had been paid. What the market would have learnt therefore was that Goodpine had already paid $25 million for the assignment.

(ii) Mr. Rigby further commented that, as the SFC knew, Goodpine

> was in fact beneficially owned by Madam Liu. There was therefore "no real change in creditor". That, however, fails to take into account that – at the relevant time – nobody in Asia Telemedia knew who was the beneficial owner of Goodpine. At that time, therefore, if news of Goodpine had become known to the market, Goodpine would have been seen as a new actor on the stage. Its beneficial ownership would have been unknown and – critically – its intentions would have been unknown too.[24]

218. In looking to whether the statutory demand (subsequent to the deed of assignment) would have constituted price sensitive information, Mr. Charles Li said that the SFC 'Guidelines on Disclosure of Inside Information' should be a "good point of reference on the then prevailing disclosure practice". Mr. Clive Rigby supported him in this view. Mr. Li emphasised that the Guidelines listed 34 examples but did not include either a deed of assignment of debt or a statutory demand. Mr. Li sought to add weight to this observation by pointing to the fact that there are precedents of a number of listed companies declining to announce statutory demands, waiting rather for the service of a winding up petition before doing so.

219. The Tribunal notes, however, that the 2012 SFC Guidelines do not seek to set out an exhaustive list of what will or will not constitute price sensitive information. Examples are given, no more than that. Importantly,

[24] The specified persons testified that they believed that Goodpine was controlled by Madam Liu simply because the same lawyers represented Madam Liu and the corporation. But that was no more than a surmise and not a compelling one. When there are shared intentions – and no conflict of interest – it is common for one set of solicitors to represent all parties involved.

the preamble to the examples reads:

> "There are many events and circumstances which may affect the price of the listed securities of a corporation. It is vital for the corporation to make a prompt assessment of the likely impact of these events and circumstances on its share price and decide consciously whether the event or the set of circumstances constitutes inside information that needs to be disclosed. The following are common examples…"

220. Mr. Li further advanced the opinion that the deed of assignment did not amount to 'relevant information' in terms of the legislation, because it was not information about Asia Telemedia, its officers or its listed securities. The Tribunal, under the directions of the Chairman, rejects that opinion.[25] The subject of the deed of assignment was Asia Telemedia's largest debt, a debt that the Company had either declined to pay or not been able to pay in six years. It was a debt which could destroy the Company, rendering its shares worthless. The deed of assignment recorded that this debt had been transferred to a third party for a sum of $25 million. That information was very much 'concerned' with the Company; it was information in all respects 'touching' the interests of the Company and was therefore information 'about' the Company.

221. Mr. Li was also of the opinion that, because the debt owed by Asia Telemedia remained the same, and because that debt had already been fully disclosed, the fact that there was now a new creditor – Goodpine – would not constitute price sensitive information. As Mr. Li put it in his report, there would have been no perceived material increase in the risk of Asia Telemedia

[25] Which in any event is an opinion as to law and not therefore in Mr. Li's field of expertise.

being made subject to winding up.

222. That assessment, however, in the judgment of the Tribunal, omits consideration of two material matters. First, Madam Liu was a 'known quantity' in the sense that over a period of some five years, despite the debt due to her remaining largely undiminished, she had taken no dramatic steps. If she had issued a further statutory demand the market may well have dismissed it as simply more of the same. But now, however, she had assigned her debt to a third party, a totally unknown quantity. Second, and importantly, the deed of assignment recorded that the new creditor had paid $25 million to secure the rights in the debt, a sum that – on any common sense assessment – it would surely be seeking to recover together with a measure of profit. These two matters together promised a dramatic change in environment.

223. Mr. Li did accept that those persons accustomed to dealing in the shares of Asia Telemedia, or likely to deal in them, would perhaps have anticipated a change in tactics from the new creditor but would have had no reason to apprehend winding up proceedings and the destruction of all their value in the shares of the Company. As it was, of course, with shares in Asia Telemedia booming and its listing status becoming increasingly more valuable, Goodpine went directly for the throat. That was its change in tactics and it appears, with the benefit of hindsight, to have been successful. But why, in the opinion of Mr. Li, would those likely to deal in the shares – speculators in the main – have had no reason to apprehend winding up proceedings? According to Mr. Li, it was because there was simply no sense in instituting winding up proceedings. Asia Telemedia was insolvent, its assets were minimal and could

take an extended period of time to realise. That being the case, whatever the bluster, Goodpine would have to negotiate just as Madam Liu had been forced to do. In simple terms, the fact that Asia Telemedia was insolvent and barely a going concern somehow made it bomb proof. To institute winding up proceedings in such circumstances, said Mr. Li, would have been irrational.

224. Returning to look through the lens of hindsight, the fact is, of course, that Goodpine did institute winding up proceedings. More than that, Asia Telemedia, with Lu Ruifeng in the vanguard, resisted those proceedings, doing so right through until there was a trial of the issues. In Mr. Li's opinion, both the resistance by Asia Telemedia and the persistence of Goodpine would also have been considered irrational.[26]

225. Are all instances of winding up proceedings in respect of companies with negative net asset values to be dismissed therefore as exercises in futility? If so, it is understandable that shareholders – working on the basis that in the market exercises in futility are rarely the chosen option – would be unperturbed by any formal threat of winding up.

226. But the fact is – leaving aside what happened in the present case – that petitions to wind up companies with negative net asset values are not unknown and are not always exercises in absolute futility. A creditor may act on the basis that ten cents on the dollar is better than nothing. A creditor may

[26] During the course of Mr. Li's testimony, the Chairman asked Mr. Li to comment on the fact that Asia Telemedia resisted the winding up proceedings and that, in face of such resistance, Goodpine nevertheless pressed ahead, doing so right through to trial. The question therefore arose: why? Mr. Li's answer was: "…it sounds bizarre, irrational."

believe that brinkmanship will perhaps achieve results which earlier negotiations had failed to achieve.[27] A creditor may be working towards some form of take-over.[28] And creditors (in the final analysis) put their interests above those of shareholders.

227. Mr. Rigby, in the course of his evidence, accepted that there may be circumstances in which it would be in the interests of a creditor to commence winding up proceedings even in respect of a company in a parlous financial state akin to that of Asia Telemedia.

228. Mr. Li himself, when questioned by the presenting officer, accepted that the service of a statutory demand may – in certain circumstances – constitute price sensitive information. Whether it did or not, to use Mr. Li's expression, would be "about judgment".

229. In short, at the end of the day, it was accepted that a deed of assignment coupled with a statutory demand may constitute price sensitive information. Whether it did or not depended on the circumstances of each case.

230. The Tribunal accepts, of course, that Asia Telemedia, an insolvent company, had only one asset of real value, that is, its listing. It was, to employ

[27] In this regard, it is relevant to note that in Asia Telemedia's announcement of 17 October 2007, it was said that should the Company be unable to resist the winding up, it would seek to settle the outstanding debt through a fund raising exercise.

[28] Although it is not suggested that this took place in respect of Asia Telemedia, it remains a fact of the Company's history that, after a winding up order had been made, a third party made an offer under a scheme of arrangement to take over the Company. In terms of that scheme a healthy sum was paid to Goodpine. Hence the result that the Company, now named Yunfeng Financial Group Limited, remains a listed corporation, its principal business being in the fields of finance and brokerage.

Mr. Rigby's description, "not regarded as a thriving brokerage but as a shell awaiting the injection of new and hopefully exciting assets". But that said, there was more than one way to acquire the shell. One such way – even if fraught with risk – was by way of brinkmanship, pushing winding up proceedings almost to the limit in the hope of squeezing a profitable payment out of the Company and/or its principal shareholders, the other was to proceed fully to winding up.

231. It is apparent to the Tribunal that in the days following the service of the statutory demand the buoyancy of Asia Telemedia's share price was being driven in the main by speculators whose investment horizons (at that time) were measured largely in hours or days not months. In this regard, consider that on 2 February 2007 Asia Telemedia shares closed at $0.197 while on 27 April 2007 (the day after the Company received Goopine's statutory demand) the share price closed at $0.410 and, with no dampening news, was to rise within a single month to more than double that sum. To put it into context, a company that was insolvent was riding a 'small cap' wave. It was, however, a speculative wave and, as such, quixotic.

232. In light of this, what then – at that time – would have been the likely reaction of those accustomed to trading in Asia Telemedia shares, or likely to do so, if the details of the deed of assignment and the statutory demand had spilled out into the market? The Tribunal is satisfied on the probabilities of the following scenario emerging:

(i) First, in looking to what was known in the market, it was accepted that the debt due to Madam Liu had remained largely undiminished for over five years. While insiders knew that there had been several defaults in repayment and, as time progressed, tactics of delay had dominated – an example being an avoidance of the demand made by Madam Liu for $10 million as a good faith payment as a prerequisite to further negotiations – what was known to the public was more bland. It was that Asia Telemedia's single largest debt remained a matter of negotiation. There was, therefore, in respect of a company that was struggling to remain a going concern, no undue cause for concern in respect of that debt. Put another way, the debt was being managed.

(ii) Against that relatively innocuous (but wrongly portrayed) background what would have become known at a time of very considerable speculation in Asia Telemedia's shares – with no warning – were three things. First, that the debt due to Madam Liu, a debt in excess still of $70 million, had been assigned to a corporate third party, a party about which nothing was known – including its intentions. Second, a strong indicator, however, of this third party's intentions was the fact that it had already paid $25 million to acquire the rights in the debt, an amount that surely it would seek to recover together with a profit. Third, that this corporate third party, Goodpine, had served a letter of demand for the full amount due and thereafter had served a statutory demand, such a demand being a precursor to instituting winding up

proceedings. Could the statutory demand be met? Seemingly not, not without an outside injection of capital that may well result in a dilution of the share price. If winding up proceedings were instituted, could they be successfully resisted? On the basis of the information put out by the Company, it appeared that it had investigated the validity of the debt back in October/November 2002 and accepted that it was properly due and owing. There was therefore nothing in the public domain to suggest that winding up proceedings, if they took place, could be resisted. In short, there was suddenly an existential threat to Asia Telemedia, a small cap share enjoying a speculation bubble, one that was not supported by any realistic fundamentals.

(iii) In such circumstances, what was the surest way of avoiding the general risk that was now posed? With a share of greater resilience, a 'wait and see' attitude may have prevailed. But Asia Telemedia shares, being traded largely, as a short-term speculative stock, had no such resilience. The obvious answer to avoid the general risk would surely have been to sell. Certainly sell if you are only holding the shares looking for a short term gain before selling anyway.

233. In the judgment of the Tribunal, context is critical and in this regard it must be recognised that at the material time (between about 6 February and 27 April 2007) Asia Telemedia shares were being swept up in a speculative wave of buying, one which the market itself recognised was not based on any real

form of solid fundamentals. As such, in the alchemy of short-term speculation, what was gold in the hand could equally turn to base metal if there was news to puncture the exuberance. The Tribunal is satisfied that Asia Telemedia, having received notice of the deed of assignment and the statutory demand – more especially in circumstances in which the new creditor was giving no indication of a desire to negotiate terms of repayment – was under an obligation to make an announcement to the public. That it did not do so was a palpable failing. The Tribunal is further satisfied that if such a notice had been published it would certainly have acted to put pressure on any further upward pressure and in all likelihood would have resulted in a material decrease in the share price. In summary, the Tribunal is satisfied that, taken together, the deed of assignment and the consequent statutory demand constituted price sensitive information.

CHAPTER 8

WHETHER THE SPECIFIED PERSONS KNEW THAT THE ASSIGNMENT AND STATUTORY DEMAND WERE RELEVANT INFORMATION?

234. Having found that the deed of assignment and consequent statutory demand constituted price sensitive information, the Tribunal now turns to consider whether each of the specified persons, their cases being considered separately, knew that this was the case. The question may be put this way: at the time they dealt, did each of them know that they were privy to price sensitive information?

235. In approaching its task, the Tribunal has been assisted by the following observations of Mr Justice Burrell, Chairman of the Insider Dealing Tribunal in the Hong Kong Parkview Limited enquiry[29]:

> "The test of "knowledge" is a subjective test. It is usually determined by inference. If it is part of a man's case that he did not know something there is unlikely to be any direct evidence of what he did actually know. One has to examine the surrounding circumstances and consider what events occurred before and after the material time to see if they throw any light on what he truly knew. Our attention has been drawn to authorities in criminal law on the meaning of "knowledge". We accept that as the Ordinance uses the word "knows" on its own and does not, as it could have done, add words such as "or believed", then only actual knowledge will

[29] The report was published on 5 March 1997, the observations being on page 43.

suffice. Thus the evidence must satisfy us that… he knew the information in his possession was relevant. [information]."

A. The second specified person: Charles Yiu.

236. Charles Yiu joined Asia Telemedia in July 2004. He admitted that his father, Yao Wen Pei, a Mainland businessman, was acquainted with Lu Ruifeng but would put their relationship on no closer basis. At the time when he joined the Company, Charles Yiu had enviable academic credentials, holding an MBA, and held himself out has having practical experience in business operations. When he was appointed, he was given the responsibility of reporting directly to Lu Ruifeng. In the same year as his recruitment he was appointed an Executive Director and in the following year he was made Financial Director. On the evidence, it appears that, although Charles Yiu worked mainly in the Mainland, he spent two days or so a week at the office of Asia Telemedia in Hong Kong and, when away from the office, was, of course, kept up to date by way of email and the like.

237. Concerning Asia Telemedia's indebtedness to Madam Liu (and thereafter Goodpine), leaving aside that, as an Executive Director and the Financial Director, he would have been expected to have firm knowledge of the history of the debt and issues relating to its repayment, the evidence given during the enquiry revealed that he also played a role in attempting to negotiate with Madam Liu. He signed correspondence concerning the issue of the debt and accepted that, under Lu Ruifeng's instructions, he and another associate of Lu Ruifeng, had been instructed to meet personally with Madam Liu to

attempt – face to face – to agree repayment terms with her. As it was, the attempt failed.

238. It was never disputed that Charles Yiu knew of the deed of assignment and its terms, knew that a letter of demand had been served and was informed of the receipt of the statutory demand. Communications (essentially by way of email) were copied to him. On a consideration of all the evidence, the Tribunal is satisfied that, as the Financial Director and person responsible for reporting directly to Lu Ruifeng, Charles Yiu did discuss these new developments with Lu Ruifeng which must have included – and did include – the seriousness of the threat now presented and, having regard to Asia Telemedia's position of insolvency, how best to keep the threat at bay. In this latter regard, the Tribunal is satisfied that Charles Yiu would have played some role in determining the structure of the offer made to attempt to settle matters with this new entity, Goodpine.

239. In summary, it is clear that Charles Yiu was at the very centre of this new debt issue and, if only by way of advice given to Lu Ruifeng, would have played a guiding role in what amounted to a supine attempt to deal with it. As such, it follows that Charles Yiu would have had a firm grasp of the potential seriousness of the new environment brought about by the assignment and the consequent statutory demand and would also have understood only too well the vulnerability of the Company to the threat that was now posed.

240. Yet, if he is to be believed, Charles Yiu played no such guiding role and had little idea of the potential seriousness of the change of events. Charles

Yiu testified at length and during his testimony did his best to emphasise that, despite his trappings of authority, he was very largely kept at the periphery of matters. To use an expression employed by him in the course of his testimony, he did little more than run "errands" for Lu Ruifeng.

241. Was he, however, as peripheral – as essentially ignorant of the dynamics of Asia Telemedia's frailty – as he sought to portray? A closer examination of his history assists in answering the question.

242. Charles Yiu was raised in the People's Republic of China 'the PRC' but went to university in the United State of America in the early 1990s where he obtained a first degree followed by a Master of Business Administration (an MBA) at Utah State University. He remained in the United States for a further two years or so, working in marketing, he said, before returning to the PRC.

243. Charles Yiu joined Asia Telemedia in July 2004. In his statement of 29 October 2014, he said that prior to joining Asia Telemedia, he had "extensive experience in business operation and management gained through previous posts". His letter of appointment said that he would report directly to the Chairman, Lu Ruifeng, to assist him in a range of matters including projects co-ordination, marketing and finance promotions and business development.

244. As mentioned, in 2005 Charles Yiu was appointed Financial Director. Whether he was appointed to fill a vacancy – as he emphasized – was not really the point. The fact that he was trusted by Lu Ruifeng to take up the post and held it for a relatively extended period of times indicates that in truth he held at

least a modicum of skills in matters of accountancy and corporate finance.

245. It was emphasised on behalf of Charles Yiu that his remuneration was modest, his basic salary being $380,000 a year (including $20,000 for his directorship). This was to be contrasted with Marian Wong's salary, it was said, she was receiving $650,000 a year as Company Secretary and Assistant to the CEO[30]. It was said that Charles Yiu received no bonuses[31], the only incentive that came to him being his share options in 2005.

246. Charles Yiu used his modest income as one of the indicators of his low level position in the Company. In a statement dated 16 December 2014, he said:

> "… save for the Independent Non-Executive Directors, Mr. Lu and I were the only two Executive Directors of Asia Telemedia. Mr. Lu was the Chairman, he was rarely in Hong Kong. As I was the only Executive Director of Asia Telemedia, who was occasionally in Hong Kong, I was asked by Mr. Lu to sign some documents prepared by others on behalf of Asia Telemedia. Hence, my name was referred to in some emails and letters issued by Asia Telemedia. I confirm I was never directly involved in any negotiation in relation to the Debt. On all matters related to Asia Telemedia, even though I was a director, I only acted upon the instructions of Mr Lu. *In fact, I was a director in name only*." [emphasis added].

[30] Charles Yiu was recruited in the Mainland and worked the majority of the time in the Mainland. By contrast, Marian Wong was recruited in Hong Kong from a Hong Kong company and remained Hong Kong based.

[31] It is noted that Charles Yiu's letter of appointment said that, at the discretion of Asia Telemedia, he would receive a year-end bonus and would also be considered for performance bonuses. This is not to say, of course, that he actually received any bonuses.

247. As earlier indicated, in the course of his testimony Charles Yiu laid particular emphasis on his true lack of authority and his general ignorance of corporate matters in Hong Kong. Some isolated examples serve to illustrate the point:

(i) As to his position in the Company, he said:

"So, in sum, I was only in name a director of Asia Telemedia; I got only 30,000 a month, you know. After I became a director, all I got was another 20,000 per year only. My monthly salary remained unchanged. So, because I was only a wage earner, a worker, and what I did was to scout around in mainland China, *doing errands*." [emphasis added]

(ii) As to the fact that, as an Executive Director (and the Finance Director) he would have had responsibilities; for example, to liaise with the Company's accountants in respect of significant financial developments or indeed make a public announcement in respect of them, the following exchange with Chairman took place:

"Chairman: Did it ever occur to you that, perhaps, as a director of a publicly-listed company, you might have certain responsibilities?

Yiu: No, I didn't know."

(iii) An important issue was Charles Yiu's reaction to his discovery that Madam Liu's debt had been assigned to Goodpine. In this regard, the following exchange took place with the Chairman:

"Chairman: Did you think it was important to try to find out the

identity, that is, the true controlling identity, of Goodpine?

Yiu: That's right, *it would have been important* because, if we know the identity of who is behind the Goodpine, then we can negotiate with the person.

Chairman: Exactly. And did it enter your mind, at all, that there are companies in the market which make profits out of pursuing debt that they have acquired?

Yiu: I don't know. I have no experience in this at all. I know nothing about and it never occurred to me that why this debt could be transferred. I had no knowledge in this at all.

Chairman: So you never wondered why the debt had been assigned?

Yiu: I have wondered at it but that I couldn't figure it out.

Chairman: Did you think of asking your lawyers to deal with this matter, that is, to try and find out the true identity of the assignee and, insofar as it was feasible, to report back to you as to why the debt had been assigned?

Yiu: I probably did not think of that."

248. In seeking to demonstrate that he was a director of Asia Telemedia "in name only", Charles Yiu sought to show that in reality the Company Secretary, Marian Wong, was the one with professional knowledge of Hong Kong corporate matters and the one who liaised directly with Lu Ruifeng. She was the person with true authority. The Tribunal accepts that Marian Wong, the

third specified person, was professionally qualified and experienced. But that does not take away from Charles Yiu's own professional knowledge and corporate experience.

249. The Tribunal has no hesitation in rejecting Charles Yiu's protestations that he was essentially a simpleton in respect of commercial matters with no real understanding of the threat facing Asia Telemedia. The Tribunal is satisfied that his evidence in such regard was purely tactical.

250. Charles Yiu said that there were a number of reasons why he saw no existential threat to Asia Telemedia in the deed of assignment and subsequent statutory demand issued by Goodpine.

251. He said that there had been many previous statutory demands, five in all, without any winding up proceedings being issued. That, however, ignores the fact that, after several years of prevarication and a failure to reduce the debt, Madam Liu had 'sold' her rights in the debt for a sum of $25 million to a third party, Goodpine, and it was *that* party, not Madam Liu, which had issued the statutory demand. In the course of his evidence, Charles Yiu accepted that it would have been important to try to find out the identity of who controlled Goodpine but could only say lamely that he "probably" did not think of giving instructions to his solicitors in that regard.[32]

252. He believed, he said, that, if matters came to a crisis point, Lu Ruifeng

[32] During the course of submissions, much was made of the allegation that it had been surmised that Goodpine was in truth under the control of Madam Liu because she and the company shared the same solicitors. But at the time that was no more than a surmise, one that nobody saw fit to follow up or attempt to confirm.

would somehow find the resources to pay off the debt or sufficient of it at least to stall winding up proceedings. Yet Lu Ruifeng had taken no steps over an extended period of time to either inject funds from his own resources or to raise funds in order – in a rational, concerted manner – to settle the debt issue. More than that, when winding up proceedings were commenced, there was no evidence of Lu Ruifeng coming up with any offer of sufficient substance to satisfy Goodpine's claim. Instead Lu Ruifeng defended the proceedings on the basis that the debt had no validity, a matter in respect of which he (and Asia Telemedia) had, by way of numerous earlier announcements, admitted liability.

253. It was his belief, he said, that there was no purpose in Goodpine proceeding with winding up proceedings as the pay-out to unsecured creditors would be minimal. In short, to use a description used earlier in this report, he somehow believed that Asia Telemedia was 'bomb proof'. Charles Yiu did his best to deny any nimbleness of mind as to corporate matters despite the fact that he had been hired (among other things) to advise Lu Ruifeng on matters of finance promotions and business development. For example, as cited earlier, he denied any knowledge of companies that took assignment of debts at a discount in order to make a profit by way of their recovery.

254. In any event, what needs to be understood is that whether Charles Yiu believed that somehow or the other Asia Telemedia would not be condemned to being wound up is not strictly to the point. The point is whether he knew that if the information found its way into the public domain – to people who did not possess his insider knowledge – the combination of the deed of assignment (revealing that Madam Liu had disposed of her debt for $25 million) and the

statutory demand (issued by the new creditor) would to a material degree blunt the speculative rise in the share price and/or reduce it.

255. The Tribunal is satisfied that Charles Yiu knew that, if, as it should have been, a public announcement was made by Asia Telemedia concerning the deed of assignment (involving a 'purchase price' of $25 million by a corporate third party) and the consequent statutory demand, such an announcement would in all likelihood not only have cancel out the continuing rise in the value of the Company's shares but, having regard to the company's known frailty, would have brought about a material reduction in their price.

256. The fact that, as an insider with insider's knowledge, Charles Yiu (along with Lu Ruifeng and other senior managers in Asia Telemedia) may have grown used to keeping Madam Liu at bay in the past, may explain a certain initial lethargy in reacting to, and properly understanding, the true import of the sudden change in circumstances brought about by the deed of assignment and the consequent statutory demand. The Tribunal is satisfied, however, that after receipt of the statutory demand from Goodpine, any discussion at the senior level of the Company concerning the matter must have – and did – alert Charles Yiu and the other senior managers to the potential threat that was now posed, a threat that, if publicly known, would in all likelihood stop the continuing boom in the share price and reverse it. The fact that Charles Yiu chose to turn a blind eye to the threat that was now posed does not detract from the fact that, in truth, he understood full well the nature of the threat and, in the course of the hearing before the Tribunal, contrived to put on a façade of ignorance.

257. Finally, the Tribunal observes that, in exercising his share options, Charles Yiu may have held back, watching the share price rise, seeking to catch the market at its peak. But that does not mean that he was ignorant of the fact that he was in possession of information that, if known, would be likely to materially influence the share price. In that respect, the probabilities have revealed that Charles Yiu did not believe that the price sensitive information would find its way into the public domain. He may have believed – if so, wrongly – that, no matter how ominous the threat presented by Goodpine, some form of negotiation would emerge that would (behind closed doors) at the very least draw out matters. He may have believed – if so, wrongly – that, if pushed to the limit, Lu Ruifeng would (again, behind closed doors) find some capital, the matter only being made public at a much later stage.

B. The third specified person: Marian Wong.

258. Marian Wong is a university graduate. After obtaining a degree in accountancy, she specialised in company secretarial work, working in that field from 1991 and becoming an associate member of the Hong Kong Institute of Company Secretaries. She joined Asia Telemedia in September 2002 in the role of the Company Secretary. In a statement dated 19 December 2014, Marian Wong said that her duties with the Company –

> "… included administrative duties such as preparing corporate governance reports (since 2006), annual returns and monthly returns, co-ordinating the printing of corporate documents such as announcements, circulars and annual reports, and organising shareholders' meetings. [She said that she] also acted an intermediary between the Company's board of directors and

> the Company's external adviser as such as lawyers by relaying the instructions from the directors to the external advisers and relaying information and advice supplied by such external advisers to the board of directors."

Marian Wong qualified this, however, by saying that as the Company Secretary –

> "I had no power, nor was it my duty to decide how to respond to statutory demands or how to deal with the Company's debts."

259. In the judgment of the Tribunal, this last statement by Marian Wong may be accurate on the surface but is in reality a reduced (and thereby artificial) description of the true nature and extent of her duties and responsibilities as Company Secretary of Asia Telemedia. While Marian Wong may have had no ultimate power to make decisions concerning the operations of the Company, that power being reserved to the Chairman – Lu Ruifeng – and the Board of Directors, nevertheless she was a member of senior management with a duty to advise Lu Ruifeng and the Board on all matters of good governance including compliance with statutory and regulatory rules applying to Hong Kong listed corporations.

260. In this regard, the Tribunal was referred to a publication of the Hong Kong Institute of Chartered Secretaries dated October 2013 entitled The Essential Company Secretary. Although published after Marian Wong's time with Asia Telemedia, the Tribunal has no reason to doubt that the broad duties outlined in the publication marked the essential role of company secretaries well

before the date of publication. By way of an overview, the publication states that a Company Secretary –

> "… is regarded as both an officer and part of the senior management team, and at the centre of the Board's decision making process. [The Company Secretary] is expected to use his or her influence to promote good corporate governance.
>
> Specifically, [the Company Secretary] should assist directors in their legitimate pursuit of profit and growth with integrity and independence, and also seek to protect the interests of the company, its shareholders and its employees, to the best of his or her ability.
>
> [The Company Secretary] is required to play an active role in promoting good governance…"

261. Accepting that publications of this nature tend to set parameters of perfection, the broad fact remains that, while Marian Wong's powers to make operational decisions may have been limited, clearly her ability (and obligation) to give advice to Lu Ruifeng and the Board to ensure that the Company complied with all the rules of good corporate governance was central to her responsibilities. Those, like Marian Wong, who advise on the correct course to be taken may not exercise full decision making power but they guide it. In Marian Wong's case her responsibility to advise on matters of good governance would have been all the more important because Lu Ruifeng was a Mainland businessman who could not be expected to be as proficient in the dynamics of Hong Kong rules of good governance as a businessman with long experience of

working in Hong Kong. Asia Telemedia being a listed company, advising on matters of good governance would also have included advising on all matters relevant to the Listing Rules and this in turn would have encompassed advising Lu Ruifeng and the Board on matters that should from time to time be reported to the market: such as matters that may constitute price sensitive information.

262. In summary, when it was learnt that the debt due to Madam Liu – being Asia Telemedia's single largest debt and one that could not be repaid without a major injection of capital – had been assigned to a corporate third party that had now issued a statutory demand, that became squarely a matter that required Marian Wong's consideration and advice to the Chairman and the Board.

263. As the Company Secretary, it was Marian Wong's responsibility to advise Lu Ruifeng and the Board whether this new threat to the Company, one that clearly she must have understood carried with it a threat of winding up proceedings, should be announced to the market. However, no evidence was put before the Tribunal to indicate that she gave advice one way or the other – certainly not in writing – to Lu Ruifeng or the Board. Nor was any evidence put before the Tribunal to indicate that she sought the advice of the Company's solicitors or accountants on this particular issue. Looked at objectively, despite the fact that, on any close examination, there was now a new threat presented to the Company, there does not appear to have been any change to the tactic that had previously enabled the Company to stall Madam Liu's persistent claims.

264. Marian Wong asserted in her evidence that she was never of the view

that the deed of assignment (showing that Goodpine had acquired Madam Liu's debt at the heavily discounted sum of $25 million) taken together with the statutory demand constituted a set of circumstances that, in meeting the dictates of good governance, should properly have been disclosed to the public. This is despite the fact that, as the Company Secretary, she was the one who directly wrote to the Company's solicitors concerning the Company's offers of settlement and, being directly at the helm, must have appreciated that the new creditor, Goodpine, was declining in any way whatsoever, to respond.

265. Marian Wong asserted that she was always of the belief that the Company may have a good defence in law to Goodpine's claim and that this was one of the matters that made her think that the Company's future was not in jeopardy. The Tribunal rejects that assertion. When she first joined the Company, Marian Wong knew that Madam Liu's claim was being investigated. Whether she knew the details of that investigation or not is irrelevant. What she did know is that the Company thereafter entered into a series of agreements (albeit abortive) in terms of which it admitted its indebtedness. In respect of the assignment itself, advice was received by her from the Company's solicitors which made it plain that there was no defence. That issue was not pursued.

266. In the view of the Tribunal, to cite the words of Barma J[33], there was, quite simply, no excuse for the failure to treat the claim by Goodpine with the seriousness it deserved, having regard to the consequences that might otherwise befall the Company.

[33] In Re Asia Telemedia Limited, cited earlier in this report in paragraph 152.

267. The issue of course is not whether Marian Wong was negligent in the performance of her duties as Company Secretary, the issue is whether, when she dealt in the shares of Asia Telemedia, she appreciated that news of the deed of assignment to Goodpine followed by Goodpine's statutory demand, if it spilt into the public domain, would be likely – to a material degree – to effect the price of Asia Telemedia shares by immediately stopping the speculative rise and forcing the price down.

268. The Tribunal has no hesitation in rejecting Marian Wong's assertion that she never believed the information was price sensitive. Perhaps to some degree the history of the successful stalling of Madam Liu's demands for payment may have numbed Marian Wong. But that said, even though she did her best in the course of her testimony to reduce the scope of her responsibilities, the Tribunal is satisfied that she was a capable woman, a woman who knew what her true responsibilities encompassed. The Tribunal is satisfied that Marian Wong did quickly come to understand the true nature of the threat that presented itself; she understood that, in order to meet the dictates of good governance, advice at least should be taken as to whether a public announcement should be made. No such advice was taken. Knowing what she did, why, as a competent Company Secretary, did she not act?

269. In the context of all the evidence, the Tribunal is satisfied that, as with Charles Yiu, while she knew that, if news of the deed of assignment and subsequent statutory demand fell into the public domain, it would be likely to have a material effect on the price of the Company's shares, she believed that – as it had been in the past with Madam Liu – the matter would somehow,

however slow and muddled the process, be dealt with behind closed doors. She therefore turned a blind eye to the issue of whether the market should be informed although in truth she knew the answer.

C. The fourth specified person: Cecilia Ho.

270. At all material times, Cecilia Ho was employed as Asia Telemedia's Assistant Company Secretary. She had joined the Company at the same time as Marian Wong and was responsible for reporting to her. The evidence shows that for most of the time the two of them constituted the Secretarial Department. As to her duties, Cecilia Ho said that they were to assist Marian Wong in corporate secretarial works and to carry out general administrative functions on behalf of the Company. Cecilia Ho had a degree in business and was an Associate Member of the Hong Kong Institute of Company Secretaries.

271. Cecilia Ho knew of Madam Liu's demands for payment and of her service of statutory demands. As she put it: "I became somewhat numbed to the effect of statutory demands and was labouring under the belief that the Company's management would be able to stave off legal proceedings against the company as and when necessary."

272. Even though the Company's Secretarial Department consisted of just the two of them, the evidence revealed that it was Marian Wong who would deal directly with matters when statutory demands were received and who, more particularly, having taken instructions from Lu Ruifeng and/or Charles Yiu, would herself consult the Company's solicitors, instructing them as to the best

way forward. In the course of her evidence, Cecilia Ho explained matters in the following terms:

> "Marian deals with contacting the lawyers and I help to prepare the documents. That's how we separate out work. And, when I need to prepare the documents, then I'll know the situation. If Marian makes her communications by telephone and email, however, then I won't know about it. But I may have a kind of general concept of what overall is happening."

273. The evidence shows that, after receipt of the deed of assignment and the demand for payment by the new creditor, Goodpine, it was Marian Wong – and Marian Wong alone – who dealt directly with the solicitors. In this regard, Cecilia Ho said that she was not made privy to the details of the communications with the solicitors. Accordingly, she did not know the nature of any advice being received. She said that, although Marian Wong told her that offers were being made through the solicitors in an attempt to settle matters, she was given no details of those offers. In this regard, in the course of her testimony, when answering if she was worried that the new creditor (Goodpine) might take steps to issue a winding up petition, she answered:

> "Well, no, I did not because Marian told me that an offer was made and that they are going to negotiate about the settlement and Marian also gave me a signal that Mr. Lu would like to reach a settlement on this matter."

274. On the evidence, therefore, the probabilities suggest that Cecilia Ho had no idea, certainly no firm idea, of whether, on this occasion, it was simply 'more of the same', that is, further prevarication, or whether some more earnest and rational attempt was being made to settle the matter of the debt. Put simply,

unlike Charles Yiu and Marian Wong, both of whom, in their separate ways, were directly involved in dealing with the new threat posed by the deed of assignment to Goodpine and Goodpine's subsequent statutory demand, Cecilia Ho stood essentially as an outsider.

275. During the course of her testimony, Cecilia Ho said that she was not concerned that the company was in any real danger of being wound up or of some other action being taken that might undermine the buoyant share price. If she had been concerned, she said, she would have rushed to sell her shares and would have done so in one lot. As it is, the records show that, after service of the statutory demand by Goodpine, Cecilia Ho sold shares on three occasions, the first occasion being on 11 May 2007, the second and third occasions being at the very end of the month on the 28th and 29th of May 2007.

276. Determining whether it has been demonstrated on the balance of probabilities that Cecilia Ho knew at the time when she dealt in her shares that she was in possession of price sensitive information has not been the easiest matter. Unlike Charles Yiu and Marian Wong, however, Cecilia Ho impressed the Tribunal as a witness who did not attempt to colour her evidence for tactical purposes. She impressed the Tribunal as being direct and truthful even when her answers may not have stood to her advantage.

277. As stated earlier, the test of 'knowledge' is a subjective test. Whether perhaps she should have known may assist the Tribunal in determining whether Cecilia Ho did in fact know. But it is not the test. The test is whether it is demonstrated that at the time she dealt Cecilia Ho had actual knowledge.

Having regard to all the circumstances, the Tribunal has been drawn to the unanimous conclusion that, when Cecilia Ho testified that she did not know that the deed of assignment taken together with the statutory demand constituted price sensitive information she should be believed in that regard. The surrounding circumstances do not undermine her assertion; indeed, in many respects they support it.[34]

[34] Although Cecilia Ho has been exonerated of market misconduct for the reasons given in this chapter, for the sake of completeness, the Tribunal wishes to record that, if it had been necessary, it would have found that Cecilia Ho should not be identified as being culpable of market misconduct on the basis that she has established (pursuant to s.271(3) of the Ordinance) that, when she dealt, she had no desire to make a profit or avoid a loss by use of the price sensitive information in her possession.

CHAPTER 9

THE S.271(3) DEFENCE

278. As defined earlier in this report, pursuant to s.271(3) of the Ordinance, even though it is found that a connected person has dealt in the shares of a listed company when knowingly in possession of price sensitive information, he will not be identified as an insider dealer if he is able to establish on a balance of probabilities that, when he dealt, he had no desire to make a profit or avoid a loss by the use of that price sensitive information. It is not sufficient to establish that the price sensitive information was only a subsidiary motivating factor, it must be established that it was not in any way a causative factor.

279. Charles Yiu, Marian Wong and Cecilia Ho each sought to establish a defence under s.271(3).

280. Fundamental to the defence put forward by each of them was the fact that they had only one motivation in selling their shares. Having been granted options to purchase shares in Asia Telemedia[35], a company that for several years had been a laggard in the market, they had the very great fortune to witness an unexpected surge in the share price, a surge that put the price beyond anything that rationally they could have expected other perhaps than in the very long term if the Company was able (problematically) to fully establish itself as a debt free, profitable enterprise. Bearing in mind their relatively modest salaries, the exercise of the share options was for all three of them quite literally the chance

[35] The terms of the options enabled the specified persons to exercise their rights and sell immediately thereafter.

of a lifetime and all three chose to exercise their options and sell their shares to seize that chance of a lifetime. That was, therefore, their sole motivation: to seize a sudden and unexpected speculative surge in the price of Asia Telemedia shares and, like others employed by Asia Telemedia in Hong Kong and the Mainland, to profit from the windfall.

A. The defence put forward by Charles Yiu.

281. Central to Charles Yiu's defence was that, if he had been in any way motivated by a desire to exercise his options and sell his shares before Goodpine instituted winding up proceedings, he would surely have done so before the 21 day deadline set out in Goodpine's statutory demand had expired. Within that 21 day period, knowing that no public announcement was being made by Asia Telemedia as to Goodpine and the statutory demand, he would have been comparatively safe and would have had the ability to pick the best dates to sell. But after that 21 day deadline he would have appreciated that he was increasingly at risk of the winding up petition being issued and trading in Asia Telemedia shares being suspended. The statutory demand was received by Asia Telemedia on 26 April 2007, its 21 day deadline expiring on or about 17 May 2007. The only reasonable inference to be drawn therefore was that, if motivated in any way by the price sensitive information of the statutory demand following the deed of assignment, he would surely have exercised his options and sold his shares before 17 May 2007.

282. As it was, however, Charles Yiu only commenced to sell the shares he had obtained by exercising his options on 28 May 2007, ten days after that

deadline. He chose to sell his shares, not in one or two days, but over a four day period between 28 and 30 May 2007. More than that, even though granted an option to acquire, 8 million shares, he chose to exercise his options in respect of 6 million only, leaving 2 million to be dealt with at a later stage.

283. From his sale of the 6 million shares, Charles Yiu made a net sum of $5.303 million, certainly giving him the ability to exercise his options in respect of the balance of 2 million shares if he wished.

284. It is to be noted that the share price between 27 April and 28 May 2007 would still have given Charles Yiu a handsome return. On the 27 April 2007 the share price stood at over 40 cents, rising steadily during May to well over 60 cents.

285. As to why he sold when he did, as cited earlier in the report[36], Charles Yiu said that when the share price rose close to four times from 20 cents to close to one dollar the temptation to sell was simply too great. As he put it: “I couldn’t even dream of that, you know. And that’s why it was at that point in time I started selling off my shares.”

286. The Presenting Officer, Mr. Bell, countered these submissions by referring to the expert evidence that, while selling quickly may be typical, it is not always the case that insider dealers will trade in haste after gaining inside information. That must be correct but again matters must be considered in context. In the present case, Charles Yiu had a 21 day window of opportunity

[36] See paragraph 133.

at the end of which, if winding up proceedings were instituted, trading in Asia Telemedia shares could be suspended and, in the longer term, the share price rendered worthless. He therefore had time to consider his options, stark as they were, and to act. Nevertheless he still did not deal within the 21 day period.

287. The Presenting Officer further submitted that, unless the Tribunal accepted that Charles Yiu did not appreciate he was in possession of price sensitive information, it would be wholly unrealistic to find that, when he sold his shares, he had no intention somehow to use that price sensitive information to his advantage. The Tribunal does not accept that this must always be the case.

288. As the Tribunal has attempted to make clear, an insider may know that information in his possession is price sensitive (in the sense that, if passed into the public domain, it will likely have a materially adverse impact on the share price) but, for his own reasons, whether sound or suspect, believe that the information will not pass into the public domain; put another way, that whatever threatens the share price will be resolved behind closed doors.

289. Speaking as an insider, Charles Yiu said that there had been previous statutory demands, five in all, albeit issued by Madam Liu, and none of them had come to anything. All had resulted in some form of negotiation to set out new terms of repayment, those negotiations being held behind closed doors and not being announced to shareholders. He therefore believed that, as it had been before, so it would be again. There was no purpose in winding up proceedings. There had to be negotiations. As to the form and outcome of those

negotiations, Charles Yiu said that he believed that, if necessary to save the Company, Lu Ruifeng would inject capital, again a matter that would be dealt with behind closed doors, being announced at some later stage.

290. Objectively, there are a number of grounds for criticising the validity of such beliefs. But the Tribunal is given the task here of considering a subjective issue, namely, whether, when he exercised his options and sold Asia Telemedia shares, Charles Yiu was motivated in any way by the fact that he knew he was at the time in possession of price sensitive information. Yes, he knew he was in possession of information which, if it became known to the market, would in all likelihood materially depress the share price. However, on balance, the Tribunal is satisfied that Charles Yiu believed that what was known to him would, by one means or another, be sorted out behind closed doors (as it had been in the past with Madam Liu) and would not therefore become a matter to influence the market. In the judgment of the Tribunal, on balance, that must explain why Charles Yiu paid no heed to the 21 day deadline imposed by the statutory demand. It was not because he lacked any appreciation of the events unfolding (although he tried his best to suggest such was the case) or because he was reckless. As he said, he sold because the share price, which clearly he was watching carefully, had gone so high that it was time to take his profit. In that sense, it was an undeniably sensible decision and, in the judgment of the Tribunal, not a decision that in any way indicates a conscious intent to misuse the price sensitive information in his possession. That, it must be accepted on balance, was his sole motivating factor – to take his share of manna found on the desert floor, that is, to profit from an unexpected speculative boom in the share price – and, at the time he dealt, was unconnected with any desire to avoid a loss

by reason of the price sensitive information in his possession.

291. As such, the Tribunal is drawn to the conclusion that Charles Yiu must succeed in his defence under s.271(3) of the Ordinance.

292. There is a moral dimension to this which some may find unappealing. How can it be that an Executive Director of a listed company can know of damaging matters that, if known to the market, would materially depress the share price and still be able to deal in the shares of the company without being found culpable of insider dealing simply because he believes that the damaging information will remain confidential and further believes, whether his belief is soundly based or not, that whatever problems face the company will be successfully resolved? This may go to explain why some academic commentators were of the view that the defence under s.271(3) should be limited to occasions when a person was compelled to deal or had no choice but to do so, a limitation that has been disapproved in Hong Kong.

293. The answer perhaps, in so far as one may be required, is twofold. First, the mischief to be avoided is the use of confidential information to 'steal a march' on ordinary investors. If, however, the confidential information has not been used in any way in that manner then there has been no mischief. Second, there is no risk of the floodgates being opened because the circumstances will be rare when a person who deals in the shares of a listed company while in possession of price sensitive information will be able to demonstrate that his dealing was totally unconnected with any desire to avoid a loss or make a profit by reason of the price sensitive information.

B. Marian Wong.

294. Marian Wong testified that, when she joined Asia Telemedia in September 2002, both she and Cecilia Ho were informed by Lu Ruifeng that, although they would not be entitled to bonus payments or any guaranteed double pay, he would endeavor to ensure that they were nevertheless compensated by the receipt of substantial share options.

295. As it was, said Marian Wong, with the Company struggling financially, during her time with the Company, other than share options, she received her salary and no more.

296. It was only in March 2005, said Marian Wong, that she and Cecilia Ho received their first share options when the Company went through a share option exercise, issuing in excess of 19 million shares with an exercise price of 20 cents to three directors (including Lu Ruifeng himself and Charles Yiu) and 16 employees in Hong Kong. On this occasion, she said, she received 8 million share options: 4 million were able to be exercised almost immediately (after 23 March 2005) and the balance in two years' time (after 23 March 2007).

297. At that time, however, the options were at best aspirational. In May 2005 the share price was trading well below 20 cents and was to fall as low as 5 cents in November 2005. Although the shares rebounded, over the next 22-23 months they rarely reached 20 cents and when they did it was for a day or two only.

298. It was in February 2007 that the share price began its surge, rising from below 20 cents to 32 cents on 16 February 2007. According to Marian Wong, the first Company employee to exercise her options was a woman by the name of Rita Chan who was leaving the Company and wished to take the windfall of the profit now available to her.

299. Other employees followed. On 21 February 2007 eight employees submitted applications to exercise their share options. On the following day four more employees submitted applications.

300. In her statement of 3 November 2014, Marian Wong said this sudden surge in the price Asia Telemedia shares caused considerable excitement among the Company's employees. As she put it: "Given that for years the Company's employees had been forced to sit on the options, the materialization of the opportunity to exercise our share options and sell the shares [at a profit] got everyone excited and eager".

301. Marian Wong said that by the end of February 2007 all the employees in the Hong Kong office had exercised their options.

302. As mentioned earlier, Marian Wong's original option 'package' of 8 million shares was boosted in a further options exercise in early May 2007, giving her a total of 13 million shares.

303. In respect of her own selling, the records show that Marian Wong began selling her shares (obtained by way of exercising her options) on

28 February 2007. Thereafter she sold regularly (on some 27 occasions), her final sale (of 500,000 shares) being on 5 June 2007. Marian Wong sold 10 million shares, it being calculated that her total net proceeds came to some $5.1 million.

304. After receipt of the statutory demand, Marian Wong dealt on nine occasions, making a net profit of some $2.56 million.

305. It was emphasized on behalf of Marian Wong that only some 9% or three million shares allocated in the option exercises were not exercised and they all belonged to her. In this regard, as with Charles Yiu, the submission was made – with effect – that surely, if Marian Wong was concerned that the information in her possession may lead to the winding up of Asia Telemedia, she would have sought to make the largest profit within the shortest time, that is, before the threat became reality. However, she did not do so.

306. It was the central assertion of Marian Wong's evidence that all the Asia Telemedia employees, both in Hong Kong and the Mainland, exercised their options – including herself – for one very obvious reason, a reason that had nothing to do with their faith in the longer term viability of the Company or indeed their fear that it had no viable future. That reason was the desire – at last – to exercise their options at a time when, unexpectedly, the share price was surging. Put simply, it was to seize upon an unexpected opportunity to make a profit when independent of any matter they knew of or could control, a profit presented itself; as the Tribunal has described it earlier – to pick up the gift of manna from the desert floor.

307. Even taking into account Marian Wong's less than impressive evidence, her evasiveness in answering questions being very evident, nothing of substance arose during the course of the hearing to give the Tribunal reason to question her assertion that she had exercised her options for the single reason given above, a reason that was not in any way coloured by the price sensitive information in her possession.

308. As to how it could be that her possession of price sensitive information played no role, the Tribunal reiterates what has been said in respect of Charles Yiu. The Tribunal is satisfied that, while Marian Wong was in possession of information which she knew should properly form the basis for a public announcement by the Company, she nevertheless believed that somehow, in some way, any threat presented by Goodpine would be dealt with behind closed doors. On balance, therefore, the Tribunal is satisfied that Marian Wong demonstrated that her sales were motivated by the single reason amplified above.

309. As such, as with Charles Yiu, the Tribunal is drawn to the conclusion that Marian Wong must succeed in her defence under s.271(3) of the Ordinance.

CHAPTER 10

THE CONCLUSIONS OF THE TRIBUNAL AS TO CULPABILITY

310. At first instance, the unanimous determinations of the Tribunal as to culpability were as follows –

(i) That in respect of the first specified person, Lu Ruifeng, it has not been possible, pursuant to s.252(6) of the Ordinance, to come to a conclusion as to whether he was or was not culpable of market misconduct by reason of the fact that, due to evidence of acute illness, he was not given a reasonable opportunity of being heard.

(ii) That in respect of the second specified person, Yiu Hoi Ying (Charles Yiu), although found to be knowingly in possession of relevant information at the time he dealt, he was not identified as an insider dealer on the basis that he established pursuant to s.271(3) of the Ordinance that his possession of the relevant information was not a factor inducing him to deal.

(iii) That in respect of the third specified person, Wong Nam (Marian Wong), although found to be knowingly in possession of relevant information at the time of certain of her later dealings, she was not identified as an insider dealer on the basis that she established pursuant to s.271(3) of the Ordinance that her possession of the relevant information was not a factor inducing her to deal.

(iv) That in respect of the fourth specified person, Ho King Lin (Cecilia Ho), she was not identified as an insider dealer and therefore culpable of market misconduct on the basis that, although in possession of information which constituted relevant information at the time of certain of her later dealings, pursuant to the provisions of s.270(1) of the Ordinance she did not know that such information constituted relevant information.

311. No market misconduct having been identified, the Tribunal will hear from the parties as to the question of costs.

CHAPTER 11

PART TWO OF THE TRIBUNAL'S REPORT: THE OUTCOME OF THE APPEAL PROCESS

312. As outlined in Chapter 1 – the introduction to this report – the determinations of the Tribunal as to the culpability of all four Specified Persons were appealed by the SFC.

313. In its judgment of 26 April 2017, the Court of Appeal upheld the determinations of the Tribunal, dismissing the appeal.[37]

314. The SFC then appealed to the Court of Final Appeal in respect of what was essentially a single determination of fact and law by the Tribunal, namely, that, while the elements of insider dealing had been established against Charles Yiu and Marian Wong (the second and third Specified Persons), neither of them were held to be culpable of engaging in market misconduct on the basis that they had succeeded in establishing the "innocent purpose" defence provided by section 271(3) of the Ordinance.

Looking to the judgment of the Court of Final Appeal.

315. The Court of Final Appeal upheld the SFC appeal. In their joint judgment, Ribeiro and Fok PJ held as follows:[38]

[37] The citation of the judgment of the Court of Appeal is CACV No. 154 of 2016
[38] Para 49 of the judgment.

"Construing the provision purposefully and in context, as one must, "using relevant information" in section 271(3) simply means making one's decision to buy or sell the listed securities because of the quoted market price, knowing that price to be either artificially high or artificially low because the relevant information is not generally known to those accustomed or likely to deal in the securities. By doing so, one is employing the price sensitive information to one's own advantage in order to steal a march on the rest of the market since, were that information generally known, it "would… be likely to materially affect the price of the listed securities" and therefore would have negated the insider dealer's advantage."

316. In his concurring judgment, Lord Neuberger said that he was satisfied that:

"… section 271(3) is intended only to apply where the purpose of the insider dealer's purchase or sale of the shares concerned can be shown to be unconnected with the market price of the shares. In other words, in the case of a normal transaction – i.e. one motivated (at least in part) by the quoted price of the shares – the insider dealer will not be able to invoke section 271(3) where he has been objectively advantaged as against the market by having the information. It would be inappropriate and unnecessary (and indeed impossible) to provide an exhaustive list of circumstances in which section 271(3) could avail an insider dealer, but they would include a sale or purchase pursuant to a specific contractual obligation or a court order …"

Looking to the dissenting judgment.

317. In considering the submissions as to mitigation put forward by counsel for Charles Yiu and Marian Wong, the Tribunal considers certain findings of Tang PJ in his dissenting judgment to be relevant.

318. In his dissenting judgment, Tang PJ made reference to the finding of the Court of Appeal in a much earlier matter, that of *Henry Tai Hong Leung v Insider Dealing Tribunal*, concerning the "innocent purpose" defence when Rogers VP said that it was for insider dealers to establish that the sales … were not in any way *influenced* by their knowledge of the [relevant information].[39]

319. Tang PJ further made reference to the 1976 judgment of the Ontario Court of Appeal in Canada in *Green v Charterhouse Group Canada Ltd* in respect of similar legislation, the decision being cited and adopted in Hong Kong in a 1986 decision of the then Insider Dealing Tribunal. In respect of the Canadian judgment, Tang PJ said –

> "The judgement of the Ontario Court of Appeal was delivered by Arnup JA who said that a burden of proof was upon the insider "to show that in fact he did not make use of the information in the transaction, that is, that the information was not a factor in what he did". And that: "In my view it is a question of fact in each case, and with respect to each individual in a case, whether the individual made use of specific confidential information."[40]

[39] Paras 111 – 113 of the judgment.
[40] Paras 117 -119 of the judgment.

320. The Hong Kong Insider Dealing Tribunal, in a 1986 decision in which *Green v Charterhouse Group Canada Ltd* was cited, said that *making use of relevant information* in dealing in securities (as distinct from merely dealing in securities when in possession of relevant information) was the touchstone of culpability.[41]

321. The Tribunal has referred to the dissenting judgment of Tang PJ for a single reason, that is, to illustrate that in or about 2007 the interpretation of section 271(3) – containing the elements of the defence of 'innocent purpose' – was not as unequivocally defined as it is now.

[41] See Para 120 – 123 of the judgment.

CHAPTER 12

PART THREE OF THE TRIBUNAL'S REPORT: DETERMINING APPROPRIATE SANCTIONS AND COSTS.

A summary of the SFC submissions as to sanctions.

322. Leaving aside (for the moment) the issue of costs, counsel for the SFC submitted that the imposition of the following sanctions on Charles Yiu and Marian Wong pursuant to section 257(1) of the Ordinance would, in the light of all relevant factors, meet the ends of justice –

A. In respect of Charles Yiu.

323. First, pursuant to subsection (a) of section 257(1), it was submitted that Charles Yiu – at all relevant times the Director of Finance of the Company – should be disqualified from being a director of a listed corporation or in any way, directly or indirectly, from being concerned in the management of a listed corporation, for a period of three years and six months. Second, pursuant to subsection (b), that he should be the subject of a 'cold shoulder' order barring him from dealing in financial markets in Hong Kong for a period of three years. Third, pursuant to subsection (c), that he should be the subject of a 'cease and desist' order, warning him against any future market misconduct. Fourth, pursuant to subsection (d), he should be the subject of an order of 'disgorgement' in terms of which he would pay to the Government a sum of HK$3,123,392.02, this being the amount of the financial loss he had avoided by

reason of his market misconduct.

B. In respect of Marian Wong.

324. First, pursuant to subsection (a), it was submitted that Marian Wong – at all relevant times the Company Secretary – should be disqualified from being a director of a listed corporation or in any way, directly or indirectly, from being concerned in the management of a listed corporation, for a period of three years (six months less than Charles Yiu). Second, pursuant to subsection (b), that she should be the subject of a 'cold shoulder' order barring her from dealing in financial markets in Hong Kong for a period of three years. Third, pursuant to subsection (c), that she should be the subject of a 'cease and desist' order, warning her against any future market misconduct. Fourth, pursuant to subsection (d), she should be the subject of an order of 'disgorgement' in terms of which she would pay to the Government a sum of HK$1,076,937.97. Fifth, pursuant to subsection (g), that, as a member of the Hong Kong Institute of Chartered Secretaries ('HKICS'), the Tribunal should recommend to that body that *further* disciplinary action be taken against her, the HKICS having already conducted one set of disciplinary proceedings arising out of her sale of Asia Telemedia shares in 2007 albeit before the judgment of the Court of Final Appeal.

The nature of the sanctions sought.

325. In the circumstances of this particular matter, the Tribunal considers it necessary to emphasise that the proceedings before it have been civil not

criminal in nature. In the result, the sanctions that have been sought are civil sanctions and are not penal. The essential purpose of civil sanctions (in the present context) is to protect the integrity of Hong Kong's securities market against those who, by reason of their culpable actions, have been shown to pose a threat to the market. The purpose is not to simply impose punishment upon such persons even though the effect of such protective sanctions may be punitive. Deterrence, of course, is essentially (in the present context) protective in nature. By way of example, by stripping from those found culpable of market misconduct any financial advantage that they may have gained by reason of their culpable actions, both the culpable individuals and the market as a whole is shown that there is no profit to be made from such conduct.

326. The Tribunal has thought it necessary to emphasise this fundamental point, namely, that any sanctions to be imposed are civil in nature and essentially therefore protective, because of the special circumstances of this particular case. Those special circumstances are focused essentially on two areas of contention. First, the issue of delay and, second, the issue of what may be described as ‘moral culpability’.

The issue of delay.

327. It was between late February and early June 2007 that Charles Yiu and Marian Wong, having exercised their options to purchase shares in the Company, then sold all (or the great majority) of those shares, each of them making a substantial profit. Although both of them were apparently notified by the SFC that their share dealing was subject to investigation, it was not until January

2014 that formal proceedings were commenced against them by way of a notice given to this Tribunal. The delay in instituting formal proceedings was therefore one of about six years and six months. It is true that for part of this time the SFC was engaged in interlocutory proceedings with potential parties to the inquiry but that does not detract from the fact that a period of more than six years – waiting in a state of uncertainty – was very substantial indeed.

328. However, once the matter was brought before this Tribunal, no application for a stay of proceedings was sought on the basis that, because of the long delay, a fair hearing was no longer possible. Nor, in hearing evidence, did the Tribunal itself conclude that it was handicapped in ensuring a fair determination. The issue of delay has therefore been put before the Tribunal at the conclusion of proceedings as a matter of mitigation, that is, as an issue which Charles Yiu and Marian Wong, through their counsel, argue should lessen the severity of any civil sanctions that are to be imposed upon them.

329. This Tribunal has observed on a number of occasions, but more particularly in its *Sunny Global*[42] report, that, absent exceptional circumstances, delay would *not* be relevant to civil sanctions under section 257(1) sounding in money –

> "… we do not accept that in the matters before us the delay in bringing these proceedings before this Tribunal is relevant to the issue of orders of disgorgement and orders of costs and expenses incurred by the Government and the SFC. Why should an order of disgorgement, of the benefit gained by a malefactor culpable of market misconduct, be reduced in circumstances of

[42] The references are to paragraph 373 of the *Sunny Gobal* Report dated 29 August 2008.

> delay in bringing the proceedings where the malefactor has been able to retain his ill-gotten gains longer? Why should orders of costs and expenses in favour of the Government and the SFC incurred in bringing that malefactor to justice be reduced because of delay in achieving justice?"

330. However, in respect of other forms of sanction, especially sanctions which disqualify persons from holding positions of authority in corporations or bar such persons from the securities market, this Tribunal has noted that delay may well constitute a mitigating factor. In this regard, in its *Sunny Global* report, the Tribunal has commented –

> "By contrast, we accept that the passage of five years since the market misconduct, during which time the Specified Persons have carried on their careers and have not been culpable of [further] misconduct, is relevant to the making of other orders by the Tribunal."

331. In the present case, in the period of about six years and six months that separated their actions of insider dealing and the formal institution of proceedings against them, neither Charles Yiu nor Marian Wong were found culpable of any other form of market misconduct. Indeed, without pointing any finger of blame, because of the long and arduous road that these market misconduct proceedings have taken, the Tribunal notes that a period of nearly 14 years has now passed since the insider dealing took place and in that extended period of time no further allegation of market misconduct has been made against either of them. In the opinion of the Tribunal, this is a fact of material relevance in determining the degree of the threat, if any, still posed to the integrity of the market by Charles Yiu and Marian Wong.

The issue of 'moral culpability'.

332. By dealing in the shares at a time when they were in possession of the inside information constituted by the Goodpine statutory demand, both Charles Yiu and Marian Wong were doing so at a time when they were objectively advantaged as against the market. At the time when they sold the shares, that inside information, if it had been known to the market, would in all likelihood materially have affected the share price. There is now no equivocating as to their culpability in law.

333. Sir Anthony Mason NPJ, in his judgment in *Koon Wing Yee v Insider Dealing Tribunal*[43], said:

> "That insider dealing amounts to a very serious misconduct admits of no doubt. It is a species of dishonest conduct".

334. That said, it is self-evident that not all conduct that falls under the generic heading of 'dishonest conduct' carries the same moral culpability. Clearly, the securities market in Hong Kong demands greater protection from those who on a premeditated basis, often by means of a sophisticated scheme, seek to use inside information to their own advantage, knowing that it will have a corresponding disadvantage to the market. Such persons present a greater risk than those who, for example, like Charles Yiu and Marian Wong, were not influenced by the negative inside information in their possession but rather, in ignorance of their responsibilities to the market, sought to take advantage of an unexpected but general upsurge in the share price of essentially all listed

[43] (2008) 11 HKCFAR 170

companies in the same sector as their company, Asia Telemedia.

335. That being the case, the Tribunal is of the view that, on its own factual findings (which were not criticised by the Court of Final Appeal) it is obliged to take into account the finding that, when they set about selling their shares, neither Charles Yiu nor Marian Wong had deliberately taken steps to keep the statutory demand by Goodpine out of the public arena and therefore away from the market. They believed that the issue would be dealt with behind closed doors as it had been in the past. Their single, albeit blinkered motive, was to profit from a speculative bubble in the share price, a bubble that was benefiting essentially all listed companies in the same line of business at that moment in time. When they did so, while they were in an objective position of advantage to the market, knowing that they held information that was likely to materially affect the share price, they had no calculated intention to withhold that information in order to obtain a trading advantage. On a purely factual basis, therefore, neither deliberately flouted the law as to insider dealing. Indeed, taking into account that the law as to the 'innocent purpose' defence was not at the time unequivocally defined, it may be said that they acted in ignorance of the law, that is, the law as declared by the Court of Final Appeal in its judgment in this matter.

336. In *R v Chan Woon Chung*[44], O'Connor J reiterated a well understood principle that, while ignorance of the law is not exculpatory, it may be mitigatory. In this regard, he said –

> "It seems to me that, while ignorance of the law can never be a defence to a

[44] HCMA 96/1988, para 22.

> criminal prosecution, there is every reason why it should be regarded as a mitigating circumstance. When a person is punished for a crime, one of the most important factors in assessing the punishment is the moral guilt of that person. That is such a truism today that it is perhaps hardly necessary to refer to it …"

The judge continued –

> "Where a crime is committed through ignorance of the law, whether such ignorance is or is not induced by wrong legal advice, moral guilt is absent and the punishment must obviously be more lenient than in the case of a person who knowingly transgresses the law…"

337. The judge was here setting the principle in the context of the criminal law in which punishment is laid down. The Tribunal is satisfied, however, that, insofar as it allows, the principle must apply also in respect of matters of market misconduct that come before this Tribunal, that is, in respect of orders which are not penal in nature but are essentially protective of the market.

338. Mr Horace Wong SC, leading counsel for the SFC, argued for a different approach. Protective orders, he submitted, were forward-looking in that they were looking, not to punishment for past actions but to the future protection of the market and, as such, left little room for weighing issues of moral culpability. That, however, in the view of the Tribunal, misses an important point. Protective measures are put in place in large measure to meet a perceived threat. If the threat, on the basis of the evidence available, is significant then the protective order must itself be of significant proportion. If, however, on the basis

of the evidence available, the threat is of a lesser order then the protective order itself may be of a lesser order. Diminished moral culpability is a pointer to the level of threat posed by a person found culpable of market misconduct, especially if it is linked – as in the present case – to evidence of the fact that the person had not been found culpable of any earlier or, despite the passing of many years, any subsequent infringement.

Looking to the individual sanctions sought by the SFC.

Section 257(1)(a): disqualification orders.

339. This section gives the power to the Tribunal to order that a person who is culpable of market misconduct shall not, without the leave of the Court of First Instance, be involved in any way (as a director, liquidator, receiver or manager) of a listed corporation, public or private, this for a period not exceeding five years. The purpose is to ensure the integrity of the market. In fulfilling that purpose, the Tribunal must take into account not only the danger of future misconduct on the part of the person found culpable but also the important deterrent character of such an order, that is, the need to deter others from breaching the trust which a corporate management position, especially a senior management position, carries with it.

340. On behalf of the SFC, weight was placed on the observations of the Tribunal in a 2005 report in the matter of *Gilbert Holdings*[45] in which it had commented that –

[45] The report is dated 15 December 2005, the paragraph cited is para. 309.

> "Insider dealing is of its nature serious and is an attack on the credibility of the open market system. Those who indulge in insider dealing, by that indulgence, demonstrate to the world at large that they are unfit to hold the office of a director, particularly of a publicly listed company. Having regard to these factors, it is our view that it would only be in exceptional circumstances that the Tribunal, having found a person to be an insider dealer, would not make a disqualification order."

341. Concerning Charles Yiu, it was emphasised that he had held the position of Director of Finance at all material times as well as being an Executive Director. As such, working with the CEO and major shareholder, Lu Ruifeng, he would have been at the very centre of the decision-making related to how best to deal with the existential threat posed by the statutory demand. Whether he was highly trained in matters of finance or not, he could not have been ignorant of the dynamics of the threat faced by the Company. During the course of his testimony, however, Charles Yiu sought to persuade the Tribunal that, despite his high-sounding titles, he really knew nothing about financial management. That suggestion was rejected as being entirely tactical.

342. On behalf of the SFC it was pointed out that, by exercising his share options and then selling the shares, Charles Yiu had netted a profit of over HK$5,300,000: a substantial sum.

343. On behalf of the SFC, it was further pointed out that, in respect of his personal circumstances, Charles Yiu did not appear to hold any current position in the management of a listed company and that, accordingly, on the face of

things, a disqualification order, while necessary for its deterrent effect, would not have any immediate adverse impact upon him.

344. On behalf of the SFC, counsel therefore sought an order that Charles Yiu be disqualified from being a director of a listed corporation or in any way, whether directly or indirectly, from being concerned or taking part in the management of a listed corporation for a period of three years and six months.

345. On behalf of Charles Yiu, it was submitted by his counsel, Samuel Wong, that any period of disqualification should be materially less than three years and six months. It was emphasised that, on the evidence, there had been no premeditation on his part. He had clearly not implemented a sophisticated scheme. The incident had been a 'one off'. In the many years since that incident had occurred he had not been found culpable of any form of market misconduct nor indeed investigated in that regard.

346. As to his personal circumstances, it was emphasised that, once the proceedings had commenced, their length and complexity had been a tremendous burden to him, both financially and emotionally. Any money that he may have made by means of his market misconduct had been exhausted in the proceedings. In total, from the time of the insider dealing until the end of these proceedings, a period of time approaching 14 years had passed. The events had been life-changing.

347. The Tribunal accepts that, in respect of both Charles Yiu and Marian Wong, the manner in which these proceedings have unfolded has created an

exceptional set of circumstances for them both personally, a factor which must, by way of mitigation, be given due weight. While the sanctions that are under consideration are vital for the protection of the securities industry in Hong Kong, their application must be tailored to the unique circumstances of each and every case and to the circumstances of each and every individual found culpable of market misconduct. If not, the manner of applying sanctions runs the risk of crossing that boundary between legitimate protection and illegitimate punishment.

348. The Tribunal bears in mind that Charles Yiu is not at this time employed by a listed corporation in Hong Kong and that any order of disqualification will not therefore have an immediate impact but will instead bar him from the gates of any entry back into that world.

349. That said, the Tribunal is satisfied that, when the insider dealing took place, Charles Yiu was very much at the helm of Asia Telemedia's finances and, as between himself and Marian Wong, the Company Secretary, he must bear principal responsibility. He was the one, together with Lu Ruifeng, who was at the centre of decision-making.

350. In all the circumstances, bearing in mind the matters of general mitigation referred to earlier, the Tribunal is satisfied that, if only for purposes of its deterrent effect, Charles Yiu should be subject to a period of disqualification, that period being one of three years.

351. In respect of Marian Wong, it has been submitted on behalf of the SFC that an appropriate period of disqualification, even bearing in mind the heavy personal toll that may be visited upon her, would be one of three years.

352. Marian Wong, by reason of her insider dealing, made a net profit in excess of HK$2.5 million, avoiding losses in sum in excess of HK$1.25 million.

353. Concerning Marian Wong, the Tribunal has found the matter of disqualification to be one of difficulty. At the time when her culpable share trading took place well over a decade ago, she held the position of Company Secretary in Asia Telemedia. It was, of course, a senior position one of responsibility related to ensuring that the Company's operations were compliant with all statutory laws and regulations. However, unlike Charles Yiu, she was not at the centre of decision-making as to how the threat posed by the statutory demand was to be countered. In a period of close to 14 years since her insider dealing, it appears that she has continued to pursue her profession without any further blemish to her name and indeed is presently employed in the capacity of a Company Secretary by a listed corporation in Hong Kong.

354. Nor can it be said that Marian Wong has, up to this moment, avoided any form of sanction. As a result of the Tribunal's report on the matter of culpability, even though that report exonerated her in respect of insider dealing, she was nevertheless referred to her professional body, the HKICS, where she was subject to public censure and other sanctions. In addition, because that professional body reserved its right to reconsider her position should she be found culpable of insider dealing in the appeal to the Court of Final Appeal, and

this Tribunal, as one of its sanctions, has agreed to refer the matter back to that body, she still faces the prospect of further professional discipline.

355. In respect of Charles Yiu, therefore, the order of disqualification bars him from a door which in all probability he has no desire whatsoever to enter. In respect of Marian Wong, however, the impact of an order of disqualification will be direct and immediate. She will inevitably lose her job. As a member of a respected profession, although already disciplined, she may well face further discipline. And to that – for an incident of market misconduct that took place well over a decade ago – she may well face an extended period of unemployment. If not, almost certainly, she will face a material reduction in her career standing and prospects.

356. Of course, those who are members of a profession and who betray their standing in that profession, must expect a material fall from grace. But that said, every case must be judged according to its own particular circumstances. As the Tribunal has earlier indicated, no finger of blame has been pointed concerning the fact that a period of almost 14 years has passed since the incident of insider dealing to the resolution of these proceedings. An important issue of law has fallen for determination. In the broader interests of the market, delays occasioned in seeking that determination have been necessary and are justified. That, however, looks to the broader interests of the market. It does not look to the individual hardship visited upon Marian Wong (and indeed Charles Yiu). In light of all the mitigatory factors that have been mentioned, both general and personal to Marian Wong, the Tribunal has been drawn to the conclusion that there are more appropriate sanctions to be applied, ones that will have a

deterrent effect and will thereby protect the market. Exceptionally in this case, therefore, the Tribunal will not impose an order of disqualification on Marian Wong.

357. In determining exceptionally not to impose a disqualification order on Marian Wong, the Tribunal has of course taken into account that it has treated Charles Yiu differently. But, in respect of his personal circumstances at this time, Charles Yiu stands in a very different position and, while consistency in the application of sanctions is a principle to be borne in mind, the circumstances of the individual must be the predominant consideration.

Section 257(1)(b): 'cold shoulder' orders.

358. This section gives the power to the Tribunal to impose what are commonly called 'cold shoulder' 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 life of the order. Failure to comply with such an order constitutes a criminal offence. If a person aids or abets the avoidance of a 'cold shoulder' order that person commits an offence. Even though such an order may result in financial loss, it is well settled that this effect is incidental and subservient to the primary intention of protecting the market. The Ordinance provides that a 'cold shoulder' order shall not be imposed for a period of time exceeding five years.

359. On behalf of the SFC, it was proposed that a cold shoulder order of three years duration should be imposed on both Charles Yiu and Marian Wong.

360. In the written submissions, counsel for the SFC sought to convince the Tribunal that, in light of the judgement of the Court of Final Appeal, the Tribunal should now find that both Charles Yiu and Marian Wong had knowingly misused price sensitive information. With respect to counsel, the Tribunal can find nothing in the judgment to suggest that its findings of fact at first instance should be set aside. In light of the judgment, the findings of fact (which remain undisturbed) were to the effect that both parties knew that they were in possession of inside information, and both were therefore objectively in a position of advantage vis-à-vis the market. As such, even though neither gave a considered thought to that fact in their rush to benefit from the upsurge in the market, the fact that they did trade while being in that objective position of advantage rendered each of them culpable of misconduct. In the judgment of the Tribunal, that conduct, while constituting a serious breach of their obligations to the market, is not to be judged as seriously as insider dealing which results from a premeditated, and therefore planned, misuse of inside information.

361. Neither Charles Yiu nor Marian Wong may have been regular share traders in 2007 when they committed the acts of insider dealing. Both, however, so it appears, continue to make their living in the way of business and temptations may well arise from time to time. ‘Cold shoulder’ orders are preventative in nature and in the circumstances the Tribunal is satisfied that the orders do need to be imposed. In respect of both parties, the Tribunal is satisfied that the orders should each be for a period of three years.

Section 257(1)(c): 'cease and desist' orders.

362. This section gives the power to the Tribunal to 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. Such orders, known commonly as 'cease and desist' orders, permit trading but, on pain of criminal punishment, seek to ensure that all future dealings by that person will not constitute market misconduct. Such orders are made in perpetuity. Our courts have held that 'cease and desist' orders are preventative, that is, protective and not of a penal nature.

363. Neither Charles Yiu nor Marian Wong objected to such orders being made in respect of them.

364. In respect of Charles Yiu, the Tribunal is of the view that the cease and desist order should be limited to any conduct which constitutes insider dealing.

365. In respect of Marian Wong, however, the Tribunal is of the view the cease and desist order should be of wider ambit. Cease and desist orders do not shut out the person who is the subject of the order from the market. Instead, on pain of criminal punishment, such orders seek to ensure that all future dealings by that person comply with market regulations. Concerning Marian Wong, it is to be remembered that she has not been disqualified for any period of time from being involved in the management of listed corporations. She remains apparently a Company Secretary employed in just such an organisation. Having

– exceptionally – been freed from that restraint, the Tribunal considers it imperative that she be made constantly aware of the fact that any form of market misconduct will have the most serious consequences. Accordingly, in regard to her, the Tribunal will order that she will not again perpetrate any conduct which constitutes market misconduct under section 270 of the Ordinance (insider dealing), section 274 (false trading), section 275 (price rigging), section 276 (disclosure of information about prohibited transactions), section 277 (disclosure of false or misleading information inducing transactions) and section 278 (stock market manipulation).

Section 257(1)(d): orders for disgorgement.

366. Pursuant to this subsection, the Tribunal may order a person who has been found culpable of market misconduct to pay to the Government an amount not exceeding the amount of any profit made or loss avoided by that person as a result of the misconduct in question.

367. At the outset what is to be emphasised is that disgorgement orders are a specific form of protective order. They are designed to ensure that persons found culpable of market misconduct are not able to retain the value of any profit made or loss avoided. If it was otherwise, persons found culpable would be able to profit financially from their misconduct. That they are specifically targeted sanctions is illustrated by the fact that – unlike fines that are imposed in criminal cases – they are calculated by means of a specific methodology (set down in *The Insider Dealing Tribunal v Shek Mei Ling*, a judgment of the Court

of Final Appeal[46]).

368. In the present case, Karl Lung Hak Kau, who was called as an expert witness by the SFC, undertook a detailed calculation of the losses avoided by both Charles Yiu and Marian Wong, adopting the methodology set down by the Court of Final Appeal. His original calculations were, during the course of the inquiry, made subject to certain amendments. This resulted in the SFC, in the final result, submitting that the following payments should be made to the Government:

(a) Charles Yiu should be ordered to pay a sum of $3,123,329.02;

(b) Marian Wong should be ordered to pay a sum of $1,076,937.97.

369. Fines levied in criminal cases are invariably calculated on a broader, equitable basis, weighing up competing aggravating and mitigating factors, the final sum being in the discretion of the court and invariably expressed in round figures. The Tribunal emphasises this distinction because, in its opinion, when counsel made their submissions that, in respect of Charles Yiu, there should be no disgorgement order made and, in respect of Marian Wong, that any such order should be materially reduced, the distinction between the nature and purpose of disgorgement orders and fines was not sufficiently integrated into those submissions.

[46] (1999) 2 HKCFAR 205.

370. Because of the specifically targeted nature of orders of disgorgement, it is accepted that, in the absence of exceptional circumstances, this Tribunal will order that there be a disgorgement of the full profit gained or loss avoided by a person as a result of market misconduct: see the report in *China Huiyan Juice Group Limited*[47].

371. However, on behalf of both Charles Yiu and Marian Wong, it was submitted that there were exceptional circumstances enabling the Tribunal to exercise its discretion in this matter to order either that there be no disgorgement orders or that they be materially reduced in value.

(a) Grave financial loss by way of legal costs

372. In this respect, counsel submitted that Charles Yiu had not secured any financial advantage by his market misconduct. To the contrary, having been put to "enormous legal costs" to defend himself, and now being required to pay very large sums as and for costs to the Government and to the SFC, he had not in any way profited from his market misconduct. To the contrary, he had suffered grave financial loss and that loss should be reflected in the calculation of the amount of the disgorgement order. That submission, in the view of the Tribunal, is founded on the erroneous basis that a disgorgement order is the same as a general penalty in the nature of a fine which at the conclusion of proceedings can be calculated by looking to a range of matters said to be mitigatory.

373. As the Tribunal understands the correct approach, it having been

[47] See paragraphs 286 – 288 of the Report dated 10 May 2013.

established that Charles Yiu obtained a financial advantage from his insider dealing, it is to strip *that* financial advantage (and no more) from him. The issue of the burden of legal costs, even though they may be grave, is a separate issue entirely and, except in the rarest of cases – this not being such a case – falls to be separately considered.

374. It appears to the Tribunal that Charles Yiu's true complaint as to the burden of legal costs may go to an issue of overall fairness. In the present case, the proceedings have run the full appellate gamut. Having been successful at first instance and successful also before the Court of Appeal, Charles Yiu was unsuccessful before the Court of Final Appeal. Costs have followed that final event and that has resulted in serious financial loss to Charles Yiu. That may be the case. But, as this Tribunal has noted, compensation for the reasonable expenditure of legal costs, is a separate matter from the assessment of sanctions.

375. In any event, in respect of legal costs, it appears to the Tribunal that the issue (in principle) has already been determined. In the judgment of the Court of Final Appeal, the Chief Justice said:

> "As to costs, we would make an order *nisi* that the 1st and 2nd Respondents pay the costs of the Appellant in this appeal, in the Court of Appeal and before the Market Misconduct Tribunal, such costs to be taxed if not agreed. Should any party seek a different order as to costs, written submissions should be lodged with the Registrar (and served on the other parties) within 14 days of the handing down of this judgement…"

376. As the Tribunal understands it, there was no challenge to the order *nisi*

and accordingly the order for costs – an order to compensate the successful litigant for its expenses – was made final. It is not an order which this Tribunal has any power to alter.

(b) Unfair that no financial burden placed on Lu Ruifeng

377. In seeking to convince the Tribunal that general fairness required that no disgorgement order be made or, if made, that it be materially reduced, counsel for Charles Yiu argued that it was inherently unfair to "fry the minnows" – Charles Yiu presumably being a minnow – while Lu Ruifeng, the CEO and major shareholder, presumably a much bigger fish, remained free of any such financial burden. The Tribunal is satisfied that these submissions are misplaced. No sanctions were imposed on Lu Ruifeng because he was *not* identified as an insider dealer.

(c) Shifting grounds of argument during the appeal process

378. On behalf of Charles Yiu, a submission was made to the effect that during the appellate process the SFC, in the course of its arguments, 'moved the goalposts', shifting the substance of its arguments and thereby undermining procedural fairness. Again, the Tribunal finds nothing in this point. The true interpretation of the 'innocent purpose' defence – the core issue on appeal – was declared by the Court of Final Appeal. As arguments proceeded to that final declaration, it was almost invariable that there be some shift in emphasis. In that respect, in light of the final interpretation, the only complaint can be that counsel for Charles Yiu were put to extra time and work in order best to deal with any shift

in emphasis on the part of the SFC. If so, the correct process to resolution would have been to seek an appropriate award of costs. But no such award of costs was sought.

(d) Salaries tax already paid on the financial advantages

379. In substance, this submission was made on behalf of Marian Wong and was adopted by Charles Yiu.

380. It was not disputed that both Charles Yiu and Marian Wong paid salaries tax in respect of the financial advantage that they obtained by exercising their share options and then selling the shares[48].

381. The matter in issue, as the Tribunal understood it, was to the effect that, salaries tax having been assessed for the 2007/2008 tax year, and that salary having been paid, there was now no way – so many years later – of seeking repayment from the Inland Revenue Department. That being the case, should the Tribunal make an order that the full disgorgement amounts calculated by the SFC should be paid to the Government, it would mean that the Government would receive into its general coffers a greater sum than that contemplated by section 257(1)(d) in that it would receive the capital sum clawed back and an extra amount equivalent to the salaries tax levied on that sum.

382. It was therefore submitted on behalf of Charles Yiu and Marian Wong that this was an exceptional instance in which the Tribunal should order that any

[48] Tax was chargeable under section 9(1)(d) of the Inland Revenue Ordinance, Chapter 112.

sum payable by way of disgorgement should be *less* the tax already paid.

383. The Tribunal does not accept that, because Charles Yiu and Marian Wong had to pay salaries tax on the exercise of their options, as would have been the inevitable consequence of their actions, that this Tribunal must now order that all amounts to be disgorged pursuant to section 257(1)(d) should be net of salaries tax – or indeed any other tax or levy that may have fallen to be paid in the ordinary course of events. There is nothing in the wording of section 257 to suggest this should be the case. To the contrary, section 257(1)(d) gives the power to the Tribunal to order that a culpable 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". The provision, therefore, requires the Tribunal, to look to any illicit financial advantage gained as a direct result of the illicit conduct and to cancel *that* advantage. In the opinion of the Tribunal, the fact that both parties had to pay tax on their substantial gains is an incidental to their illicit conduct, it does not constitute an exceptional circumstance.

384. The Tribunal accepts that it may now not be possible for Charles Yiu or Marian Wong to seek a refund from the tax authorities. Again, however, it sees this as an incidental to their illicit conduct.

(e) The calculation of the amounts to be disgorged is incorrect

385. As the Tribunal has noted above, the specific amounts that fell to be disgorged by Charles Yiu and Marian Wong were calculated by the SFC's expert

witness, Karl Lung Hak Kau, who made his calculations in accordance with the methodology laid down by the Court of Final Appeal. The other expert witnesses, (representing the specified persons at the Tribunal's inquiry hearing) did not put forward an alternative set of calculations. It must be accepted, therefore, that the methodology accepted by the SFC's expert was not in contention.

386. As to the figures making up the calculations, during the course of submissions as to appropriate sanctions it was suggested that other figures should have been used, figures more favourable to Charles Yiu or Marian Wong. However, nothing has been put before the Tribunal to indicate on balance that the figures employed by the SFC's expert witness were wrong in that they did not accord with the methodology laid down by the Court of Final Appeal or were clearly wrong for any other reason.

387. In the circumstances, for the reasons given, the Tribunal is satisfied that orders should be made pursuant to section 257(1)(d) as follows –

(a) Charles Yiu should be ordered to pay a sum of $3,123,329.02;

(b) Marian Wong should be ordered to pay a sum of $1,076,937.97.

Section 257(1)(g): recommendation that the HKICS take disciplinary action.

388. An order under this subsection enables the Tribunal, if it considers it appropriate, to deliver a copy of its report to a professional body which has the

power to discipline its members, recommending that it take disciplinary action against a person found culpable of market misconduct. At all material times, Marian Wong has been a member of the HKICS, a professional body which has the power to discipline its members.

389. On behalf of Marian Wong, her counsel has submitted that, as she has already been disciplined by the HKICS for the very same matter, it would be superfluous, and would constitute an undue hardship upon her, to force her through the same process again. It has been emphasised that Marian Wong has had to pay a disciplinary fine, has been subjected to censure and, perhaps most importantly as a protective measure for the market, has been forced to undergo relevant training.

390. However, the Tribunal has been made aware of the fact that in its report the disciplinary body of the HKICS specifically recorded that it had not proceeded on the basis that Marian Wong was culpable of market misconduct. However, if, in the appeal process, Marian Wong was to be found culpable of market misconduct by way of insider dealing then the disciplinary body stated that it reserved the right reconsider its position. The Tribunal has determined that it would be wrong not to respect that reservation by the disciplinary body.

391. It is important to emphasise that the Tribunal does not have the power to direct the HKICS to take disciplinary action. It has the power only to recommend it. Accordingly, in making its recommendation to the HKICS, the Tribunal is not in any way 'forcing the hand' of that professional body. It is doing no more than giving the HKICS the opportunity to consider whether the

findings of the Court of Final Appeal require any further disciplinary action or whether, in light of the disciplinary action that has already been taken, the interests of the profession (seen through the prism of fairness) do not require further steps to be taken.

Section 257(1)(e): costs and expenses incurred by the Government.

392. Pursuant to section 257(1)(e), an identified person may be ordered to pay the Government such sum as the Tribunal considers appropriate for the costs and expenses reasonably incurred by the Government in relation to, or incidental to the proceedings. These costs are essentially the Tribunal's own costs. In this regard, having considered the detailed schedules drawn up by its staff, the Tribunal is satisfied that –

(i) in respect of proceedings before the Tribunal as to culpability, an appropriate amount is $1,499,000.

(ii) in respect of proceedings before the Tribunal related to the issue of sanctions, an appropriate amount is $334,000.

Section 257(1)(f)(i), (ii) and (iii): costs and expenses incurred by the SFC.

393. Pursuant to subsection (f)(i), an identified person may be ordered to pay to the SFC such sum as the Tribunal considers appropriate for the costs and expenses reasonably incurred in relation to, or incidental to the proceedings. In this particular instance, as the costs related to the culpability proceedings before

the Tribunal have been the subject of the order of the Court of Final Appeal, the costs now determined relate only to the sanctions hearings conducted before the Tribunal. In this regard, having considered the detailed schedules presented by the SFC, the Tribunal is satisfied that a sum of $1,250,000 is appropriate to reflect the overall costs and expenses reasonably incurred in respect of the issue of sanctions.

394. Pursuant to subsection (f)(ii) and (iii), an identified person may be ordered to pay to the SFC such sum as the Tribunal considers appropriate for the costs and expenses reasonably incurred by the SFC arising out of the investigation into the person's conduct prior to the institution of proceedings and for the purposes of the proceedings. In this regard, having considered the detailed schedules presented by the SFC, the Tribunal is satisfied that a sum of $750,000 is appropriate to reflect the overall costs and expenses reasonably incurred.

395. In the present case, given that there were four Specified Persons, it has been accepted by the SFC – following the apportionment approach adopted by this Tribunal in the *Yue Da Mining Holdings Ltd* report,[49] that, in respect of the investigations prior to the institution of proceedings and for the purpose of the proceedings themselves, insofar as they related to culpability before this Tribunal, Charles Yiu and Marian Wong should each be ordered to pay 25% of the costs and expenses incurred by the SFC.

396. The Tribunal is satisfied that the same apportionment approach should

[49] See paragraphs 422 and 423 of Part II of the Report dated 20 April 2015.

be adopted in respect of costs and expenses incurred by the Government, that is, essentially the Tribunal, in respect of all proceedings before it in respect of culpability. Namely, that Charles Yiu and Marian Wong should each be ordered to pay 25% of those costs and expenses.

397. While this approach has been accepted by counsel representing Marian Wong, in addition the Tribunal has been urged to take into account the fact that Marian Wong was not a director of Asia Telemedia and was not therefore at the centre of critical decision-making. It has therefore been argued that her liability should be reduced to just 15% of the costs and expenses incurred by the Government and the SFC. The Tribunal does not accept this submission. While Marian Wong may not have been at the centre of decision-making in Asia Telemedia, she held a senior position in the company. In addition, of course, she was proved to be culpable of insider dealing, market misconduct which she chose to challenge in the course of proceedings before the Tribunal. She was unsuccessful in that challenge.

398. Accordingly, Charles Yiu and Marian Wong are each ordered to pay 25% of the costs and expenses incurred by the Government and by the SFC.

399. In respect of the sanctions hearings, that is, the costs referred to in paragraph 393 above, it has been submitted by the SFC that the costs should be borne as to 50% by Charles Yiu and 50% by Marian Wong on the basis that, for all practical purposes, the sanctions hearings were concerned only with them, any question of costs related to Lu Ruifeng and Cecilia Ho being minimal.

400. It may be that, considered in the context of the proceedings as a whole, the question of costs related to Lu Ruifeng and Cecilia Ho have been essentially minimal. But it is doubtful that it is viewed that way by Charles Yiu and Marian Wong who have to pay those costs. Accordingly, the Tribunal will order that, in respect of the sanctions hearings, the costs of the SFC are to be paid as to 45% by Charles Yiu and 45% by Marian Wong, this being assessed as $562,000 each.

401. The Tribunal is satisfied that the same apportionment approach should be adopted in respect of costs and expenses incurred by the Government, that is, essentially the Tribunal, in respect of the sanctions proceedings, this being assessed as $150,000 each.

Costs claimed by the two Specified Persons found not culpable.

402. Two of the four persons specified in the SFC's notice dated 16 January 2014 constituting the inquiry were found not culpable of market misconduct. Those two persons – whose conduct was, in part at least, the subject of the Tribunal's inquiries – were Lu Ruifeng and Cecilia Ho.

403. At the conclusion of proceedings, each of them sought payment of their legal costs pursuant to section 260 of the Ordinance. The section gives the power to the Tribunal to award such sum as it considers appropriate in respect of costs reasonably incurred in relation to the proceedings by "any person whose conduct is the subject, whether wholly or in part, of the proceedings".

404. The SFC accepted that the costs of *both* Lu Ruifeng and Cecilia Ho

that had been reasonably incurred should be paid.

405. However, in respect of Lu Ruifeng, it was submitted that his costs reasonably incurred, when determined, should be subject to a reduction of 13%. This submission was founded on the following argument –

(a) In the course of the inquiry, it was Lu Ruifeng's principle position that his condition of chronic liver dysfunction had, in the months leading up to the commencement of the inquiry, worsened to such a catastrophic degree that, by the time of the hearing (and during it) his cognitive skills had been so reduced that he was unable to deal rationally with the issues and thereby to give instructions to his counsel. Lu Ruifeng was successful in these submissions. The Tribunal, in its report, found that, due to his worsening condition, he had not been given a reasonable opportunity of being heard and that accordingly the Tribunal was not permitted to identify him as a person who had engaged in market misconduct.

(b) In addition to this argument, however, during the course of the inquiry before the Tribunal, his counsel argued other matters in the interests of Lu Ruifeng, for example, whether what was known to Lu Ruifeng at the relevant time constituted inside information. These arguments did not find favour with the Tribunal. Counsel for the SFC submitted that these arguments which had failed to persuade the Tribunal had taken up a

material amount of time; indeed, it was calculated that they had expended just over 13% of the hearing which lasted some 14 days.

406. The general rule is that an unsuccessful party in civil proceedings is liable to pay the costs of the successful party. That principle applies in matters determined before this Tribunal. However, the Tribunal has a discretion to make a different order where it would be unjust to follow the normal rule. It is no longer necessary to establish that a successful party has acted unreasonably or improperly in submitting unsuccessful arguments or raising unsuccessful issues for that successful party to be deprived of any of its costs. There is no doubt that in the present case, in addition to the successful issue of Lu Ruifeng's worsening health, his counsel advanced a number of distinct arguments going to the substance of the issues before the Tribunal. There is no criticism of this; it was no doubt the prudent approach. But the fact remains that in respect of these issues Lu Ruifeng was not successful. In advancing those unsuccessful issues, a significant increase in the length of the proceedings had been occasioned. In the exercise of its discretion, therefore, the Tribunal orders that, while Lu Ruifeng is entitled to his costs, that entitlement shall be subject to a reduction of 13%.

407. In respect of Cecilia Ho, a detailed schedule of her costs were submitted. The Tribunal has assessed her reasonable costs at $860,000.

Summary of the orders made as to sanctions and as to costs and expenses.

In respect of Charles Yiu:

(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 of, or, whether directly or indirectly, take part in the management of a listed company, this prohibition to last for three years calculated from 15 April 2021.

(ii) Pursuant to section 257(1)(b), he 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 such instrument or collective investment scheme for a period of three years calculated from 15 April 2021.

(iii) Pursuant to section 257(1)(c), he shall not again perpetrate any conduct which constitutes the market misconduct of insider dealing.

(iv) Pursuant to section 257(1)(d), he shall, by way of disgorgement of his loss avoided, pay to the Government the sum of $3,123,329.02.

(v) Pursuant to section 257(1)(e), in respect of proceedings before the Tribunal as to culpability, that is, all proceedings before the Tribunal

not related to the issue of sanctions, he shall pay the Government 25% of its costs and expenses assessed at the sum of $374,000.

(vi) Pursuant to section 257(1)(e), in respect of proceedings before the Tribunal related to the issue of sanctions, he shall pay the Government 45% of its costs and expenses assessed at the sum of $150,000.

(vii) Pursuant to section 257(1)(f)(ii) and (iii), in respect of proceedings before the Tribunal as to culpability, that is, all proceedings before the Tribunal not related to the issue of sanctions, he shall pay the Commission 25% of its costs and expenses assessed at the sum of $187,000.

(viii) Pursuant to section 257(1)(f)(i), in respect of proceedings before the Tribunal related to the issue of sanctions, he shall pay the Commission 45% of its costs and expenses assessed at the sum of $562,000.

In respect of Marian Wong:

(i) Pursuant to section 257(1)(b), she 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

such instrument or collective investment scheme for a period of three years calculated from 15 April 2021.

(ii) Pursuant to section 257(1)(c), she shall not again perpetrate any conduct which constitutes market misconduct under section 270 of the Ordinance (insider dealing), section 274 (false trading), section 275 (price rigging), section 276 (disclosure of information about prohibited transactions), section 277 (disclosure of false or misleading information inducing transactions) and section 278 (stock market manipulation).

(iii) Pursuant to section 257(1)(d), she shall, by way of disgorgement of her loss avoided, pay to the Government the sum of $1,076,937.97.

(iv) Pursuant to section 257(1)(e), in respect of proceedings before the Tribunal as to culpability, that is, all proceedings before the Tribunal not related to the issue of sanctions, she shall pay the Government 25% of its costs and expenses assessed at the sum of $374,000.

(v) Pursuant to section 257(1)(e), in respect of proceedings before the Tribunal related to the issue of sanctions, she shall pay the Government 45% of its costs and expenses assessed at the sum of $150,000.

(vi) Pursuant to section 257(1)(f)(ii) and (iii), in respect of proceedings before the Tribunal as to culpability, that is, all proceedings before

the Tribunal not related to the issue of sanctions, she shall pay the Commission 25% of its costs and expenses assessed at the sum of $187,000.

(vii) Pursuant to section 257(1)(f)(i), in respect of proceedings before the Tribunal related to the issue of sanctions, she shall pay the Commission 45% of its costs and expenses assessed at the sum of $562,000.

(viii) Pursuant to section 257(1)(g), this report shall be referred to the Hong Kong Institute of Chartered Secretaries (the HKICS) with a recommendation that it take disciplinary action against Marian Wong.

In respect of Lu Ruifeng:

Pursuant to section 260(1)(b), he be awarded his costs reasonably incurred in relation to the proceedings before the Tribunal, to be taxed if not agreed, subject to the condition that such sum shall be subject to a reduction of 13%.

In respect of Cecilia Ho:

Pursuant to section 260(1)(b), she be awarded her costs reasonably incurred in relation to the proceedings before the Tribunal, assessed in the sum of $860,000.

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

409. Pursuant to section 264(1) of the Ordinance, the Tribunal directs that notice be given to the Court of First Instance to register its orders.

Mr. Michael Hartmann, GBS
(Chairman)

Dr. Chiu Keung Wah
(Member)

Mr. Chan Sai Hung
(Member)

Dated 31 March 2021.